

**Joseph West, d/b/a West Meat Company and Local
545 United Food and Commercial Workers Interna-
tional Union, AFL-CIO.¹ Case 14-CA-11776**

September 5, 1979

DECISION AND ORDER

BY MEMBERS PENELLO, MURPHY, AND TRUESDALE

On May 25, 1979, Administrative Law Judge Marvin Roth issued the attached Decision in this proceeding. 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 in light of the exceptions and brief and has decided to affirm the rulings, findings,² and conclusions³ of the Administrative Law Judge and to adopt his recommended Order, as modified herein.⁴

¹The name of the Charging Party, formerly Local 545, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, is amended to reflect the change resulting from the merging of Retail Clerks International Union and Amalgamated Meatcutters and Butcher Workmen of North America on June 7, 1979.

²Respondent 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), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings. We have further considered Respondent's contention that the Administrative Law Judge displayed bias and prejudice against Respondent in this proceeding. We have carefully considered the record and the attached Decision and reject these charges of bias alleged by Respondent as unsupported.

In sec. III of his Decision, the Administrative Law Judge found that, after being discharged, John Messerly returned to Respondent's plant to ask for his job back. The record does not support this finding, and we have not relied upon it in reaching our determination that Respondent unlawfully discharged Messerly.

³The Administrative Law Judge concluded that Respondent's reliance on Messerly's alleged tardiness as a reason for discharging him was pretextual. In so doing, the Administrative Law Judge observed that, although he was sometimes late during slack periods, Messerly's attendance was good during peak periods. The record supports the Administrative Law Judge's finding that Messerly's attendance was good during peak periods. With regard to the Administrative Law Judge's finding concerning Messerly's attendance during slack periods, the record establishes that, although on occasion Messerly worked less than 8 hours a day during these periods, he requested and received permission to go home early on such occasions. Consequently, we find that Messerly had a good attendance record during both peak and slack periods. We also agree with the Administrative Law Judge's finding that although Messerly was late three times during his final week of work, those tardy dates were irrelevant because the decision to discharge Messerly was purportedly made 2 to 3 months before the actual discharge. Accordingly, we find, in agreement with the Administrative Law Judge, that Messerly's good attendance record evidences that Messerly's alleged tardiness was a pretextual reason for his discharge.

⁴In par. 1(b) of the recommended Order, the Administrative Law Judge provided that Respondent shall cease and desist from "in any other manner" interfering with, restraining, or coercing employees in the exercise of their protected Sec. 7 rights. However, in light of our recent Decision in *Hickmott*

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, as modified below, and hereby orders that Respondent, Joseph West, d/b/a West Meat Company, Rock Hill, Missouri, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 1(b):

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

2. Substitute the attached notice for that of the Administrative Law Judge.

Foods, Inc., 242 NLRB 1357 (1979), the Order and notice should be narrowed to read "in any like or related manner," because the broad injunctive language is warranted only when a respondent is shown to have a proclivity to violate the Act or has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for employees' fundamental statutory rights. No such showing has been made herein.

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 parties had an 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 to carry out its provisions.

WE WILL NOT discourage membership in Local 545, United Food and Commercial Workers International Union, AFL-CIO, or any other labor organization, by discriminatorily terminating employees or in any other manner discriminating against them with regard to their hire or tenure of employment or any term or condition of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights to organize; to form, join, or assist labor organizations, including the above-named Union; to bargain collectively through representatives of their own choosing; to

engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection; or to refrain from any and all such activities.

WE WILL offer John W. Messerly, Jr., immediate and full reinstatement to his former job or, if such job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and WE WILL make him whole for losses he suffered by reason of the discrimination against him, with interest thereon.

All our employees are free to become, remain, or refuse to become or remain, members of said Local 545, United Food and Commercial Workers International Union, AFL-CIO, or any other labor organization.

JOSEPH WEST, D/B/A WEST MEAT COMPANY

DECISION

STATEMENT OF THE CASE

MARVIN ROTH, Administrative Law Judge: This case was heard before me at St. Louis, Missouri, on February 5, 1979. The charge was filed on August 29, 1978, by Local 545, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO (herein called the Union). The complaint, which issued on January 17, 1979, and was amended on January 22, 1979, alleges that Joseph West, d/b/a West Meat Company (herein called the Company or Respondent), violated Section 8(a)(1) and (3) of the National Labor Relations Act, as amended. The gravamen of the complaint is that the Company allegedly discharged John W. Messerly, Jr., in order to discourage union membership or activities. The Company's answer, as amended, denies the commission of the alleged unfair labor practices.¹ All parties were afforded full opportunity to participate, to present relevant evidence, to argue orally and to file briefs. General Counsel and Respondent each filed a brief.

Upon the entire record in this case² and from my obser-

¹ The Board's Regional Director initially refused to issue a complaint in this case. However, the Union appealed that action to the General Counsel of the Board, who sustained the appeal after retroactively allowing an extension of time in which the appeal could be filed. In its amended answer to the complaint, the Company asserts that it was never informed of any request for an extension of time, i.e., that it did not receive a copy of a timely request for such extension. The Company did not elaborate on this assertion, either in the answer or at the hearing or in its post-hearing brief. Company counsel did receive a copy of the Union's letter to General Counsel of November 6, 1978, in which the Union asserted that it did file a timely request for extension (which was not received by the Office of Appeals) and requested that the General Counsel rescind its previous rejection of the appeal as untimely and consider the merits of the appeal. The Company did not oppose their request, and the request was granted. Sec. 102.19 of the Board's Rules and Regulations provides, in pertinent part, that consideration of an appeal untimely filed is within the discretion of the General Counsel upon good cause shown. I find that the General Counsel did not abuse its discretion in acknowledging the appeal as timely received and therefore that the complaint is properly before the Board for consideration on its merits. See also *N.L.R.B. v. Monsanto Chemical Company*, 205 F.2d 763 (8th Cir. 1953).

² [Errors in the transcript have been noted and corrected.]

vation of the demeanor of the witnesses, and having considered the arguments of counsel and the briefs submitted by General Counsel and Respondent, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

The Company is an individual proprietorship doing business under the trade name and style of West Meat Company. The Company maintains its principal office and plant at Rock Hill, Missouri, where it is engaged in the processing and distribution of meat and meat products. It is undisputed that during the 12-month period from January 1, 1978, to December 31, 1978, which period is representative of the Company's operation within the State of Missouri, the Company had sales of meat products totaling \$1,780,991.52, of which \$143,361.59 represented retail sales and the balance was wholesale sales, and that the Company purchased meat products and supplies directly from outside the State of Missouri valued at \$3,000. Therefore, the Company's operation meets the Board's self-imposed retail standard for asserting its jurisdiction. *Indiana Bottled Gas Company*, 128 NLRB 1441 (1960); *Demarco Concrete Block Company*, 231 NLRB 341 (1975). As the Company has an annual inflow of products and supplies across state lines which is more than *de minimis*, the Company is engaged in commerce within the meaning of the Act. *Inglewood Park Cemetery Association*, 355 F.2d 448, 450-451 (9th Cir. 1966), cert. denied, 384 U.S. 951 (1966); *N.L.R.B. v. Aurora City Lines, Inc.*, 299 F.2d 229, 231 (7th Cir. 1962). See, generally, *N.L.R.B. v. Reliance Fuel Oil Corp.*, 371 U.S. 224 (1963). I find that the Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that it would effectuate the purposes of the Act for the Board to assert its jurisdiction in this case.

II. THE LABOR ORGANIZATION INVOLVED

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES: THE DISCHARGE OF JOHN MESSERLY

John Messerly began working for the Company in August 1976. In accordance with the Company's usual progression for new employees, Messerly began working as a general laborer and gradually was trained on different facets of the Company's operation. He stuffed hams for about 6 months and was then assigned to pumping hams, which is more difficult than stuffing. In early 1978 he was regularly assigned to boning hams, which is the most difficult job in the production operation, and boning remained his regular job until his discharge on August 25, 1978. Throughout his employment with the Company Messerly received individual wage increases. He began working for \$4 per hour, received a 50-cent-per-hour increase on January 7, 1977, 25-cent-per-hour increases in March and May 1977, and 25-cent-per-hour increases about May 19 and June 16, 1978,

respectively; so that at the time of his discharge he was earning \$5.50 per hour. As will be discussed, I find that his job assignment and wage increases in 1978, as well as those in 1977, were made in recognition of his increasing ability and performance on the job and not, as contended by the Company with respect to the 1978 increases, as an unsuccessful effort to cajole better performance from an erratic worker.

In the late spring of 1978³ Messerly talked to some of his fellow employees about the possibility of bringing a union into the plant. In late June Messerly contacted Union President James Pettigrew. Messerly arranged for a meeting which was conducted at the home of employee Bill Martin on July 27. The meeting was attended by two union officials and four employees, including Messerly. As the Company had only 8 or 9 employees in July 1978 (the usual complement ranging in number from 6 to 12), the employees at the meeting composed almost half of the Company's work force. The employees signed union authorization cards, and Messerly took extra cards for other employees to sign. The employees, including Messerly, continued to discuss the Union both at and away from their work stations. It is evident from the uncontroverted testimony of Messerly, corroborated in part by that of employees Bill Martin and Edward Akers (the latter a company witness), that Messerly was the principal employee figure in the organizational campaign.

Messerly was personally discharged by Company Owner Joseph West on August 25. Messerly was not given any advance warning that he would or even might be discharged. West testified as to the alleged reasons for Messerly's termination, but he did not testify concerning the discharge interview, either as an adverse witness for General Counsel or as a company witness. Messerly's testimony concerning the discharge interview and a subsequent conversation with West is uncontroverted. I credit Messerly concerning these conversations. Messerly was summoned to West's office. West said: "John, we're going to be making some changes around here and one of them is that I am terminating your employment effective now." Messerly asked why, and West answered that it was because Messerly's production was off, because of his tardiness, and because of a conversation between them in December 1977. West said nothing about a dispute between Messerly and John "Nubs" Mecey on August 10, which will be discussed *infra*. Messerly asked West to elaborate, but West said only: "It's my company and I'm going to do with it the way I please." Messerly left. Messerly subsequently returned to ask for his job back, but West indicated that he did not want Messerly anywhere near the plant.

In neither of the above conversations was there any mention of the Union or of union activity. There is no direct evidence that West had any knowledge of Messerly's union activity prior to Messerly's discharge. However, it is difficult to see why, if he were simply discharging an employee because of a poor or indifferent work record, West would explain his action by insisting that he was going to run the Company the way he pleased. It is also difficult to see why

West would be so vehement in not wanting Messerly around the plant. Messerly was not allegedly terminated for theft, mayhem, or some other heinous offense, but simply because of allegedly poor performance and attitude. West testified, in sum, that he had nothing against unions. He pointed out that he employed a truckdriver who was represented by a union and that as the owner of a previous business (which he dissolved upon taking over the present company) he was party to a collective-bargaining contract with the Union. However, the present Company is *the* West family business, which West took over from his father, and having one union driver does not equate with a fully unionized plant. John Messerly testified that in conversations after work, West sometimes said that he disliked unions and had no use for them. West, in his testimony, did not expressly deny making such statements. John Mecey testified that although there were conversations in the plant about unions over the past 1-1/2 years, he could not recall West saying that he hated unions or that they were bad, but he did not indicate what West did say about unions. I credit Messerly. Moreover, what is also significant with regard to West's attitude (in addition to his parting remark on August 25) is the December 1977 incident to which West alluded in Messerly's discharge interview.

In December 1977 Messerly was primarily working as a pumper. As West frequently did during this busy time of year, West worked alongside the pumper for periods of time, making the pickle solution for insertion into the hams. Messerly testified that West said he wanted Messerly's production rate to go up, but that it did not. After Christmas Messerly noticed that West seemed to avoid talking to him. Messerly asked West if there was anything wrong. According to Messerly, West asked why Messerly slowed down. Messerly answered, in sum, that he was tired because he had been pushing hard every day to put out as many hams as possible. West responded that he was disappointed. Thereafter Messerly was assigned to boning, which he had started to learn during the latter part of 1977. Messerly testified that West did not thereafter criticize his work, but in fact complimented Messerly's performance. Messerly testified that as of December 29, 1977, he was pumping 40 to 45 hams per hour, which, according to West, was acceptable, although below average, production. West testified that going into the Christmas 1977 season, Messerly was pumping 50 to 55 hams per hour (average production), but that during the season his production inexplicably dropped below 40 hams per hour. West summoned Messerly to his office and complained about the drop. According to West, Messerly indicated that he got discouraged and dissatisfied when other people helped him. West testified that he discussed the matter with "the foreman," and they decided to move Messerly to boning, which was "an individual type of job." In fact, the Company had no foreman as such until August 10, 1978, when West designated John Mecey as foreman. In fact, also, boning involved two boners working as a team (two boners preparing hams for one stuffer).

I find that the evidence adduced in this case, both testimonial and documentary, tends to support Messerly's version of the December, 1977 matter, and I credit Messerly in this regard. The Company's business is very much a seasonal one. The busiest time is the Christmas season, which

³ All dates herein are in 1978 unless otherwise indicated.

in fact begins in mid-September and continues until the Christmas holiday. The next busiest time is the Easter season. The third busiest period is in the summer, which constitutes a time of average production. The balance of the year, e.g., January and February, consists of relatively slow periods, when less time is devoted to straight production and more to maintenance and training of new employees. Notwithstanding the extreme fluctuations in production demand, the Company's records (specifically, Messerly's hour and wage sheet) and West's testimony indicate that the Company operates almost constantly on a 40-hour week. There is little or no overtime, even during the Christmas season. From Monday through Friday, the employees are never assigned to work more than 8 hours per day. Occasionally there is Saturday work, but this is nearly all during the Christmas season, and then usually for not more than 4 hours on any such day. It is evident that in order to maintain this schedule, and thereby avoid substantial overtime pay, the Company must have pushed its workers to the utmost during the peak seasons. Indeed, uncontroverted testimony so indicates. Messerly testified, without contradiction, that John Mecey advised him not to produce as much as he possibly could, because West would then expect him to meet such a standard all of the time. Significantly, employee Edward Akers, a company witness who worked together with Messerly on boning, testified as follows:

Joe—I mean John, he boned, I don't recall the exact figure, but several hams over 20 hams an hour, and then he told me, he said that was it, "I just want to prove to him that I could do it, and I'm never going to do it again."

Then we were put on the table together. He was qualified to make his 20 hams an hour. We were put on the table—any time there is a new boner on the table, whether I've worked with him or broke him in or he's just a new boner, I make sure that I know how many hams I'm doing, *just for the record, I just do it*. I average about 22 hams on hour all the time. I bone a ham every two and one-half minutes. *This is my speed. I just work at that speed.* . . . [Emphasis supplied.]

In sum, Messerly shared with his fellow employees their resentment that West was pushing them to the utmost of their physical ability instead of allowing them more working time to meet increased production demands. Messerly was outspoken in voicing their common grievance, and West, for his part, resented that anyone should tell him how to run his operation. If West resented the fact that one employee spoke out in protest against working conditions at the plant, then it may fairly be inferred that West would be even more antagonistic at the idea of the employees declaring their position through a collective-bargaining representative and thereby interfering with West's self-asserted right "to do with [my company] the way I please."

Moreover, the foregoing evidence, when compared with West's asserted reasons for terminating Messerly, indicates (1) that West, in discharging Messerly, dealt with Messerly in a discriminatory manner, or for a pretextual reason, and (2) that West, by his own admission, discharged Messerly at least in part because he voiced grievances or problems

which were shared by his fellow employees. West testified that he discharged Messerly: (1) because of lack of production and poor working habits, (2) because he was late a great deal, and (3) because of a rebellious attitude which he demonstrated over the last 1-1/2 years of his employment, including refusal to cooperate with his foreman and specifically including the confrontation with "foreman" John Mecey on August 10. As indicated, West made no mention of August 10 incident when he discharged Messerly.

As for Messerly's alleged lack of production and poor working habits, the thrust of West's testimony was that Messerly's production was erratic in that he failed to maintain a consistently high level of production. However, as indicated, this is exactly what John Mecey advised Messerly to do and what Edward Akers, a longtime employee, also did. None were willing to work themselves to the point of exhaustion simply to make Joseph West happy. Instead, they tried to maintain their average level of production. The difference was that Messerly expressed his opinions on the matter to West. Messerly testified that as a boner, once he learned the job, he maintained a level of 20 hams per hour until his discharge and that at the time of his discharge he was substantially exceeding that level. West in his testimony admitted that 20 hams per hour is an acceptable level of production for a boner. West further admitted that the Company keeps no production records for individual employees, but rather relies on the employee's own figures. Therefore, Messerly would be the best authority on his production. Moreover, Messerly's testimony was corroborated by Akers, who worked alongside Messerly as a boner and was therefore the next best witness as to Messerly's production. Akers testified that Messerly maintained 20 hams per hour and that, to his knowledge, there were no problems with Messerly's production after Christmas of 1977. I find it unlikely that West would have assigned Messerly to the most difficult production job in the plant if Messerly was not a good worker. I also find it unlikely that West would have given him two raises in order to induce him to improve poor production and then, without any warning, taken a diametrically opposite approach and summarily discharged Messerly without even the benefit of a full explanation. I credit the testimony of Messerly that he was assigned to work as a boner because he had progressed to that level of work and that West gave him raises in May and June of 1978 because he steadily progressed to a satisfactory level of production. Indeed, West's proffered explanations are rendered completely implausible by his testimony that he decided to terminate Messerly some 2 or 3 months before the actual termination, i.e., in May or June, when West was giving him raises.

As for Messerly's alleged tardiness, I have previously indicated that West avoided substantial overtime work for his employees by pushing them to the extreme limits of their physical ability during busy seasons. The *quid pro quo* was that West endeavored to provide 40 hours a week of employment for his employees all year around, even during slack periods. Messerly's hour and wage sheets indicate that his attendance was good at those times when all hands were needed, i.e., during busy times. Messerly tended to sometimes be late or absent during slack periods. In so doing, Messerly may well have been doing the Company a favor.

as the employees were not paid for times and days not worked. Messerly lost only 1 hour from work (excluding a 1-week vacation in June) during the entire period from May 8 through August 21. During and even after the Christmas season of 1977, Messerly worked continuously, including overtime, for September 12 (when he returned from sick leave) through January 6, 1978, except for 1 day's absence and 2 days on which he was not more than 15 minutes late in beginning work. Messerly was late three times during his last week of work. However, this was the beginning of the slack period between the summer and Christmas seasons. Moreover, as indicated, this tardiness would be irrelevant to the issues in this case, because West testified that he decided to terminate Messerly some 2 or 3 months before the actual termination. Messerly testified that he was never reprimanded for being late. His testimony was not contradicted. West never claimed to have reprimanded Messerly about tardiness, and John Mecey, the alleged "foreman" testified that when Messerly came in late, he (Mecey) would just kid him about it. I find that the alleged tardiness was simply a pretext.

The third professed reason for Messerly's discharge, i.e., his alleged "rebellious attitude," is particularly significant. As indicated, the incident involving Messerly and Mecey took place on August 10, allegedly after West had already decided to terminate Messerly. The dispute involved a question concerning Mecey's authority as a "foreman." In fact, Mecey himself was not sure of his status until August 10. He testified that he officially became foreman as a result of the incident and that prior thereto he was "more or less sort of leadman" who passed along instructions from West to the employees. Mecey initially testified that Messerly refused to verify Mecey's authority by checking with West, but followed this testimony by admitting that both of them may have put the question to West. I credit Messerly's testimony that this in fact took place. West's actions further corroborate Messerly's version of the incident. West did not reprimand Messerly. Instead, he called a meeting of all the employees and informed them, including Mecey, for the first time, that he was making Mecey foreman and that Mecey would be in charge in the plant during West's absence. West, by his action, thereby acknowledged that there was a genuine question concerning Mecey's authority and that Messerly was not the only person who was unsure of Mecey's authority. West testified that thereafter there was no problem involving disobedience to Mecey. It is evident that if anything at all bothered West about the incident, it was not insubordination, but rather the fact that, as in December 1977, Messerly took the initiative in voicing grievances or problems which were common to all of the employees, i.e., that Messerly had a "rebellious attitude."

West's remarks to the employees on August 10 are significant in another respect. According to Messerly, West said that "as long as everybody keeps doing their work, you'll all have a job here," adding that there were two people in new jobs and that they were working out very well. Mecey corroborated Messerly, testifying that West praised "two or three of the fellows that had been promoted," who "were coming along." As employee Bill Martin was the only other individual to whom such description could apply, the remarks must have encompassed Messerly. All this was said

at a time when West had allegedly already decided to terminate Messerly because he was a hopelessly poor performer. Mecey also expressly contradicted West in another respect. West testified, in sum, that after consulting with Mecey, he decided in May or June that he would terminate Messerly. However, Mecey testified that West told him some 2 or 3 weeks before the discharge, i.e., after Messerly had become extensively involved in the union activity, and about the time that Mecey became foreman, that Messerly would be discharged. Mecey testified that they decided to hold off until the vacation season was over and the Company had a good inventory of hams (which may well be true).

Mecey's own ambiguous position may well have been the key to West's ultimate knowledge of Messerly's union activity. Messerly testified that sometime in August Mecey told several of the employees that they had better watch what they say, because West was listening in on the intercom. The system connects between West's office and locations in the plant, including the boning table where Messerly and Akers worked. Mecey, in his testimony, admitted that he may have said that Messerly should be careful in his conversations because he might be heard from the front office over the intercom. On the basis of Mecey's testimony, the inference is warranted that it is possible for someone in the front office to overhear conversations in the plant through the intercom. Mecey did not indicate that would have prompted him to make such a remark. There is no evidence that Messerly and his fellow employees had anything to conceal from West in or about August 1978 other than the fact of their union activity. The inference is warranted, and I so find, that Mecey knew or learned of the union activity and was giving the employees a warning. Mecey worked alongside the other employees, and prior to August 10 they had no reason to believe that he was a part of management. It is probable that Mecey learned of the union campaign from talk in the shop and learned that Messerly was the key figure in the campaign. However, on August 10 Mecey became a foreman, and part of management. He then probably passed along the information to West, who decided to terminate Messerly. In fact, there were various ways in which West could have learned of the union campaign. I find in all the circumstances, including the small complement of employees, the fact that most of them knew that Messerly was the principal activist, the fact that they talked about the Union in the plant, the fact that both West and Mecey worked alongside of the employees, the fact that shop conversations could be overheard on the intercom, the timing of the discharge, the pretextual reasons given for the discharge, Mecey's warning to the employees about the intercom, his promotion to foreman, and West's final remarks to Messerly, all as discussed above, that West learned that Messerly was the principal union activist.⁴ I further find, in light of all of these factors and

⁴ It is a settled principle of law that knowledge of union activity, like other elements of an unfair labor practice case, may be found from circumstantial evidence if the circumstances are such as to support a reasonable inference. *N.L.R.B. v. Radcliff*, 211 F.2d 309, 315 (9th Cir. 1954), cert. denied 348 U.S. 833 (1954); *Weeco Bodies, Inc. d/b/a Weeco Pacific Inc., v. N.L.R.B.*, 595 F.2d 451 (8th Cir. 1979); see also *Walker v. City of Birmingham*, 388 U.S. 307, 312, fn. 4 (1967).

West's hostility to the concept of collective bargaining, that West fired Messerly because of his union activity. Therefore, the Company violated Section 8(a)(1) and (3) of the Act.⁵

CONCLUSIONS OF LAW

1. The Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By discriminating in regard to the tenure of employment of John W. Messerly, Jr., thereby discouraging membership in the Union, the Company has engaged, and is engaging, in unfair labor practices within the meaning of Section 8(a)(3) of the Act.

4. By interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed them in Section 7 of the Act, the Company has engaged, and is engaging, in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

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

THE REMEDY

Having found that the Company has committed violations of Section 8(a)(1) and (3) of the Act, I shall recommend that it be required to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Company discriminatorily terminated John W. Messerly, Jr., it will be recommended that the Company be ordered to offer him immediate and full reinstatement to his former job or, if it no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of earnings that he may have suffered from the time of his discharge to the date of the Company's offer of reinstatement. The backpay for said employee shall be computed in accordance with the formula approved in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest computed in the manner and amount prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977).⁶

The General Counsel's request for interest at 9 percent is, as the General Counsel frankly concedes in its supplemental brief, a request that the Board reconsider its decision in *Florida Steel* regarding the interest rate. So long as *Florida Steel* remains Board policy, I am obligated to follow that policy. It will also be recommended that the Company be

⁵ If I did not so find, I would be compelled to find on the basis of West's own admission, and the pretextual nature of other reasons advanced for the discharge, that West discharged Messerly because in December 1977 and again in August 1978, Messerly was outspoken about grievances or problems which he shared with his fellow employees. Such discharge would be violative of Sec. 8(a)(1) of the Act. *Century Telephone Enterprises, Inc.*, 220 NLRB 1378, 1384 (1975).

⁶ See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716, 717-721 (1962).

required to preserve and make available to the Board or its agents, on request, payroll and other records to facilitate the computation of backpay due.

As the unfair labor practices committed by the Company are of a character striking at the root of employees' rights safeguarded by the Act, the inference is warranted that the Company maintains an attitude of opposition to the purposes of the Act with respect to the protection of employee rights in general. Accordingly, I shall recommend that the Company be ordered to cease and desist from infringing in any manner upon the rights guaranteed in Section 7 of the Act. See *N.L.R.B. v. Entwistle Mfg. Co.*, 120 F.2d 532, 536 (4th Cir. 1941).

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:

ORDER⁷

The Respondent, Joseph West, d/b/a West Meat Company, Rock Hill, Missouri, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in Local 545, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, or any other labor organization, by discriminatorily terminating employees or in any other manner discriminating against them with regard to their hire or tenure of employment or any term or condition of employment.

(b) In any other manner interfering with, restraining, or coercing employees in the exercise of their rights to organize; to form, join, or assist labor organizations, including the above-named labor organization; to bargain collectively through representatives of their own choosing; to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection; or to refrain from any and all such activities.

2. Take the following affirmative action, which is found necessary to effectuate the policies of the Act:

(a) Offer John W. Messerly, Jr., immediate and full reinstatement to his former job or, if such job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights, and make him whole for losses he suffered by reason of the discrimination against him as set forth in the section of this Decision entitled "The Remedy."

(b) 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.

(c) Post at its Rock Hill, Missouri, office and place of business copies of the attached notice marked "Appendix."⁸

⁷ 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.

⁸ 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

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Copies of said notice, on forms provided by the Regional Director for Region 14, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained

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."

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.

(d) Notify the Regional Director for Region 14, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.