Melones Contractors, A Joint Venture *and* Jack J. Morris. Case 32-CA-372 (formerly 20-CA-13362)

March 15, 1979

DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS JENKINS AND MURPHY

On October 16, 1978, Administrative Law Judge Bernard J. Seff issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and General Counsel filed an answering 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 briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge, except as noted below, and to adopt his recommended Order.

Respondent has excepted, *inter alia,* to certain of the Administrative Law Judge's subsidiary findings which would indicate the existence of an underlying general atmosphere of ill will and contentiousness between Respondent and the Union, as well as the Charging Party himself. Respondent contends, in essence, that such findings are speculative and conjectural and not based on record facts. We have carefully reviewed the record and we agree with Respondent that some of the phraseology contained in the Decision characterizing the overall relationship between the parties is perhaps gratuitous and not supported in the record. Thus, in adopting the Administrative Law Judge's ultimate conclusion that Respondent unlawfully discharged Union Shop Steward Morris, we place no reliance on any such arguably unsupported findings of strong animosity between the parties. Rather, our agreement with the Administrative Law Judge on this ultimate issue is based on his well-supported finding of Morris' consistent union activism throughout the 15-month period immediately preceding his discharge, the clearly pretextual nature of the specifically asserted reason for his discharge, and the lack of substantiation for the additional reasons subsequently offered by Respondent as grounds for the discharge.

In agreeing with the Administrative Law Judge that deferral to the grievance proceedings in this case is not appropriate under the standards for such deferral long adhered to by the Board, and initially established in *Spielberg Manufacturing Company,* 112 NLRB 1080, 1082 (1955), we note that there was no final resolution of Morris' grievance under the contractual grievance resolution provisions, inasmuch as the grievance was never presented to the Council on Industrial Relations—the only body with final adjudicatory authority under the contract. Thus, "the full range of the mechanism for the determination of the dispute has not been utilized and there is no award that may be examined for its conformity with *Spielberg* requirements." *Whirlpool Corporation, Evansville Division,* 216 NLRB 183, 186 (1975).[2] Accordingly, we find it unnecessary to reach or pass on the other reasons given by the administrative Law Judge for not deferring to the parties' grievance procedure.

Finally, Respondent urges that if we decide, as we have, not to defer to the grievance proceedings conducted in this case, we should in the alternative refer this matter back to the Labor-Management Committee step of the contractual procedure for continued processing. However, inasmuch as this case involves allegations of employer interference with an employee's individual basic protected rights under Section 7 of the Act, we decline to so refer, for the reasons set out in the Board's Decision in *General American Transportation Corporation,* 228 NLRB 808 (1977).

In light of the above, we adopt the Administrative Law Judge's findings that Respondent discharged employee Jack Morris in violation of Section 8(a)(3) and (1) of the Act.

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, Melones Contractors, A Joint Venture, its officers, agents, successors, and assigns, at the site of the Melones Dam located near Jamestown, California, shall take the action set forth in the said recommended Order, except that the at-

[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 his findings.

The Administrative Law Judge's Decision contains several inadvertent errors: (1) In the third par. of sec. II,C, of the Decision, entitled "The Deferral Issue," "article 1, section 4(a)" should read "article 1, section 4(d)"; and (2) in this same par. the Administrative Law Judge erroneously states that the Council on Industrial Relations (CIR) accepted the recommendation of the Interim Committee, whereas the record establishes that the Labor-Management Committee, not the CIR, accepted this recommendation.

[2] See also *T & T Industries, Inc.,* 235 NLRB 517 (1978); *Super Valu Xenia, A Division of Super Valu Stores, Inc.,* 228 NLRB 1254, 1260 (1977); *Keller-Crescent Company, a Division of Mosler,* 217 NLRB 685, 686 (1975).

tached notice is substituted for that of the Administrative Law Judge.

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, it has been decided that we violated the law, and we have been ordered to post this notice. We intend to carry out the Order of the Board and abide by the following:

WE WILL NOT discharge or otherwise discriminate against employees for the purpose of discouraging employees from engaging in union or other protected concerted activity for their mutual aid or protection.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of their rights to self-organization, to form, join, or assist labor organizations, to bargain collectively through representative of their own choosing, and to engage in other 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 Jack Morris immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority and other rights and privileges previously enjoyed, including backpay with interest.

MELONES CONTRACTORS, A JOINT VENTURE

DECISION

STATEMENT OF THE CASE

BERNARD J. SEFF, Administrative Law Judge: This case came for hearing before me on April 25, 1978, in Stockton, California, based on a charge filed on September 6, 1977,[1] and a complaint issued on January 16, 1978. The complaint alleges that Melones Contractors, a Joint Venture, hereinafter called Respondent, in violation of Section 8(a)(3) and (1) of the National Labor Relations Act, hereinafter called the Act, discharged Jack J. Morris, an individual, on August 12, 1977, allegedly because he broke a piece of equipment on August 12. The General Counsel alleges that the reason for the discharge was the fact that Morris was a very militant activist in prosecuting alleged infractions of the contract in his capacity as a shop steward for the International Brotherhood of Electrical Workers, Local 591, AFL-CIO, hereinafter called the Union, and that therefore the discharge was because of his activities in processing grievances and was violative of Section 8(a)(3) and (1) of the Act. Respondent's answer denies the commission of any unfair labor practices.

At the hearing all parties were offered full opportunity to adduce relevant and material evidence, to examine and cross-examine witnesses, to argue orally on the record, and to submit briefs. Post-hearing briefs were submitted by General Counsel and Respondent which have been duly considered.[2]

Upon due consideration of the evidence, including my observation of the demeanor of the witnesses while testifying, and the entire record in the case, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE EMPLOYER

Respondent is involved in a joint venture as a participant engaged in the construction of a $150 million dam being built by the United States Army Corps of Engineers which has been in the process of contruction since 1974. During the conduct of its operations, Respondent purchased and received at the project goods, materials, and supplies valued in excess of $50,000 directly from suppliers located outside the State of California. Respondent's answer admits and I find that Respondent in an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

International Brotherhood of Electrical Workers, Local 591, AFL-CIO, is now, and at all times material herein has been, a labor organization within the meaning of Section 2(5) of the Act.

A. *Findings of Fact*

1. Background information

In its answer Respondent denies the supervisory status of two alleged supervisors, Loe Grooms, general electrical foreman, and Gene Armstrong, foreman. The Respondent's supervisory hierarchy consists of: Gene Reed, electrical superintendent; Barney Smith, labor relations manager; Fred M. Butler, project manager; Leo Grooms, general foreman; and Gene Armstrong, who is described as a foreman. Respondent denies the supervisory status of Grooms and Armstrong. Respondent in its answer denies that Grooms is a supervisor but this denial does not conform with the record information. Grooms was promoted to the position of general foreman on May 4, 1977; he testified that he appointed foremen under him, recommended layoffs and pro-

[1] All dates referred to in this Decision are in 1977 unless otherwise specified.

[2] The General Counsel served a *subpoena duces tecum* on Respondent requesting substantial information. Respondent filed a motion to revoke the *subpoena duces tecum*. Other documents were filed in connection with the request to produce books and records, all of which came to a head at the hearing, by which time the General Counsel filed an amended *subpoena duces tecum*. At the hearing the parties reached agreement on a stipulation regarding the subpenaed documents. The General Counsel stated on the record that Respondent substantially complied with the subpena.

motions, and disciplined employees. I find that Grooms is a supervisor within the meaning of the Act. As to Armstrong, he has appeared at various times during the course of his employment as a working foreman or an electrician—the job varies from time to time.

The construction project began approximately in 1974 and continues to date. The employee complement during the construction of the dam has fluctuated; there are currently about 500 employees on the site. Electricians for the project are supplied to the Employer from two IBEW locals, Local 591 in Stockton and Local 684 in Modesto.

Morris began work at the Melones site in 1975 for an electrical subcontractor, City Appliance, along with two or three other electricians. During that period Morris was supervised by Reed who was then Melones' electrical superintendent. Morris was laid off at the termination of the City Appliance subcontract but was rehired by Melones Contractors in April 1976. In May 1976, Morris was appointed job steward by his business agent, Mr. Ed James, who was replaced in the fall of 1976 as Local 591's business agent by Richard Boccoli. At Boccoli's instructions Morris began to keep a log of alleged contract violations which occurred at the Melones jobsite. During the time that he acted as a steward, Morris noted in his log approximately 50 violations, some of which became points of irritation between the Union and the electrical supervisors at Respondent.

2. Morris' shop steward activities

Among many issues about which Morris and Boccoli had conflicts with Respondent was its failure to pay electricians the required travel allowance. After a confrontation with Barney Smith, the personnel manager, and Respondent's failure to respond to the Union's request for additional mileage payment, in December, Morris, at Boccoli's instruction, caused a job stoppage 2 miles from the jobsite and went to the personnel office and demanded company transportation to the site. After a number of days of dispute, Respondent acceded to the Union's request and began to pay the disputed mileage although it refused to do so retroactively. On April 12 the Union took Melones through a labor-management grievance meeting over the issue of the unpaid mileage, and Morris appeared to present documentary evidence. The committee awarded the back mileage, and Respondent appealed that decision. On April 28 Boccoli went to the Melones jobsite and threatened a work stoppage if the payments were not received. On April 29 Morris instructed the employees that there would be a work stoppage until the payment was received. On May 2, after a 2-day work stoppage, Morris received a telegram threatening him with termination if he did not return to the job. Morris and his fellow electricians did return to the job as a result of this threat from Respondent.

The General Counsel calls attention to the fact that, early in January, Morris received a letter from the Union ordering him to appear at a union executive board meeting to testify about the problems at Melones Dam. The record shows that shortly after Morris received this letter Reed, apparently having learned of the letter, confronted Morris and warned him, "If there was any union troubles up here or anything else, that he (Reed) was going to run out material and have a layoff."

There was considerable friction between Morris and general electrician Foreman Grooms over matters that came up on the jobsite. For example, the violations included a prohibition against Grooms' working with his tools and working without an electrician on the job; the inequitable distribution of and notification concerning overtime assignments; the timing of coffeebreaks; and the problem of assigning foremen on the job. One of the matters which caused some difference of opinion between Grooms and Morris was the fact that Morris claimed Grooms was doing the work of the electricians on the job and as a general electrical foreman, he was not supposed to work with tools or work without another electrician on the job. There were other differences between Morris and Grooms, some consisting of a conflict concerning craft work assignments. Morris found Grooms assigning IBEW work to the wrong craft. Grooms protested it was easier for the other crafts to do the work, or contended that the electricians did not want the work. Morris, however, pressed his claim and went so far as to bring Boccoli up to the site where Boccoli notified Smith that the electricians were to be paid for the hours lost as a result of other crafts doing their work. Smith, the personnel director, agreed to pay electricians based on this claim.

Another problem, which ultimately led to a final work stoppage commenced by Morris on August 4, concerned the contractual provision regarding appointment of foremen. On three occasions when Grooms attempted to appoint a lineman, Jim Ballew, as a foreman, Morris insisted that such an appointment violated the inside wiremen's agreement which governed the Melones site. This problem first arose during the April 28 meeting between Smith, Boccoli, and Morris. At that meeting Smith attempted to secure Boccoli's consent to a waiver of the Union's right to protest the appointment of Ballew as a lineman. Morris convinced Boccoli not to sign such an agreement.

According to the General Counsel, the foreman issue, along with certain other recurring problems regarding Grooms' working with the tools, coffeebreaks, and the assignment of overtime, came to a head during a series of meetings and confrontations between July 26 and August 6. On the morning of July 26 Grooms told Morris that he was promoting Ballew and Dahlin to foremen. Morris protested that they had been over this problem a dozen times, and this would not be permitted. Grooms told Morris to get off the job or go to work, and Morris went back down to Oakdale to contact Sturgis, the Modesto business agent. Morris met with Sturgis, who sent a written directive telling Ballew and Dahlin to step down from the foreman job. On the following Monday Grooms reiterated his intention to switch foremen, and Morris again protested. This time Morris kept the men in the yard and refused to allow them on the jobsite until the matter was resolved. This work stoppage came to the attention of Reed, who went to the personnel office and had Smith contact Sturgis, who granted temporary permission to allow the switch pending a meeting on August 4. On August 4 there was a meeting in Smith's office, with Smith, Reed, Sturgis (a Modesto business agent), Neil Jennings (the Stockton business agent), and Morris attending.

After reciting the grievances the Union felt it had against

Respondent, Respondent replied that it too had complaints about the Union and one of them was that the electricians were leaving the jobs 15 to 20 minutes early. This accusation angered Morris who called Smith a "damn liar."

A certain amount of ill will was caused by the meeting, and this hostility continued on the j obsite during the next few days. On August 5 Morris held the electricians off the jobsite until exactly 8 a.m., contrary to prior practice. Grooms threatened to call Smith if Morris "did not stop this nonsense." At the end of the day's work on August 5, Grooms accused Morris of allowing the men to quit at 4:29 instead of 4:30 p.m., and there ensued an agrument about whose watch governed quitting time.

B. *Morris' Discharge*

On August 12 Morris was working with his foreman, Armstrong, on some wiring. It appears from the record that Armstrong, Morris, and Reed were the only electricians working on that Friday. There came a lull in the work, and Morris volunteered to begin the installation of three pipes which had to be connected to the back of a panel. The task which Morris attempted to perform required the bending of a 3-inch conduit to be bent 90 degrees which is a rather unusual problem. In order to accomplish this result, Morris took the pipe to the nearest shop and attempted to bend it in a Greenlea hydraulic bender.

A portion of the bender known as the shoe, which actually comes into contact with the pipe itself, broke as a result of the bending. After the shoe had broken and while Morris was still in the shop area, Reed came to the shop. Morris showed Reed the broken shoe and Reed responded, "My friend them things cost money." As a matter of record the cost of the shoe is $107. At this point Reed left Morris, went to the onsite personnel office, and prepared a termination slip for Morris.

During cross-examination of Grooms he was asked if Morris had an unusual problem concerning the bending of the conduit. Grooms replied, "I would say it was not a very common problem." Grooms was then asked, "and he just picked a solution that didn't work?" Grooms replied, "That is right. Over bending the 90 was not the wrong procedure; the method used was the wrong procedure."

Grooms also testified that there was another bender located in a van adjacent to the shed where the bender that was used was located. Both Morris and his working foreman, Armstrong, testified that they were not aware of the fact that there was another bender which might have been used and might have obviated the problem.

The termination slip given to Morris on August 12, the day he was discharged, states that the reason for the discharge was "misuse of hyd. bender resulting in broken 3-inch shoe," signed Superintendent Gene S. Reed. (This appears in the record as G.C. Exh. 10.) It should be noted that Reed, the man who signed this termination slip, testified that he never terminated an employee for breaking a piece of equipment. The record also shows that the General Counsel asked Reed. "Was this the first time anyone had ever been discharged for equipment breakage that you, that you had charged?" Reed answered "right."

It should be further noted that Fred Butler, the project manager, testified that as a matter of policy Respondent "does not discharge an employee for acts that cause damage . . . the only cause that we have for discharge on the site, is for not performing the work." At this point I showed Butler the Xerox copy of the termination slip which gives the reason for the discharge as "misuse of hydrolic [sic] bender resulting in broken, 3-inch shoe." I asked him to reconcile his testimony with the written reason for Morris' termination. He could not, but he said that there were other reasons which had been explained to him orally.

I then asked this question: In my mind what was the real reason for the discharge? Was it because he broke a tool, which was contrary to that which you testified to? Was it because he did not call in? Or was it because he was making a nuisance of himself by filing one grievance after the other?

The last comment is critical to me because under the interpretation of union activities, pursuit of a grievance has always been considered by the Board and the courts as a protected union activity.

When I finished with this series of questions counsel for Respondent stated that my statement calls for a response from him and not from Mr. Butler, and with my permission he would like to make that a little later on. Counsel for Respondent never did respond to these questions. Butler did say in relation to the question asked by me that the particular reason on the termination slip was not the entire reason which was later amplified by an explanation that was given to him orally.

There also was some testimony to the effect that Morris performed "sloppy work," and in this connection the record shows that he was not unique in that regard. Sloppy work was not unusual on the project.

Neither Reed, Grooms, nor Butler was able to give any specified instances of the sloppy work charged to Morris. There was one instance concerning miswiring a loader which occurred in May 1976. No action was taken against Morris for this miswiring at the time the incident occurred, and the instance took place more than a year before he was discharged. It is therefore so remote in point of time as to have no significance.

In rebuttal the General Counsel elicited from Morris the fact that he did not know the second bender was near the shop. Morris testified that it had always been at the old shop which was 1-1/2 or 2 miles from where he was bending the pipe. Foreman Armstrong, who worked with Morris on a day-to-day basis for a considerable period of time, also testified that he did not know there was a second bender machine near the shop.

Among other reasons given for the termination of Morris, Respondent states that he was absent two or three times without having called in, and that this standing alone is a sufficient basis for discharge. However, the record shows that an employee named Sauza Maes was absent about 16 days without phoning in during a relatively short period of time, and he is still working for Respondent. This was explained by the fact that Maes' wife had been seriously ill, and some of the absences took place in connection with her disability. However, the main reason why nothing was ever done to Maes was explained by Respondent as being due to the fact that Maes is a member of a minority.

Reed testified that Stewart Arvin, the Corps of Engineers' electrical inspector, told Reed *after* Morris was discharged

that Arvin would have requested his termination if Reed had not discharged him. I regard this testimony as irrelevant because it was given in relation to events that took place after Morris was discharged, and Arvin was not called as a witness by the Respondent.

For whatever it's worth the record also contains General Counsel's Exhibit 11, which is a letter sent from Melones by Fred M. Butler to Morris congratulating him on having over 2,500 hours without losing time as a result of a significant accident on the job.

It would also appear that Morris was never warned about any derelictions of duty on his part although he was spoken to about the miswiring of the panel in May 1976. He was never warned about being away without phoning in. No complaint was made that his work was not adequate. If these items come under the heading of "sloppy work," this is so vague as to be meaningless.

Respondent takes the position that Morris was never reprimanded or warned because he was a shop steward, and for this reason Respondent leaned over backward to avoid pointing a finger of accusation against him.

There is no doubt whatever that the zealous pursuit of grievances engaged in by Morris became a thorn in the side of Respondent. Some of the complaints registered by Morris were supported by the facts and rectified by Respondent. Some seem rather petty, and it is clear from the record that Morris in his zeal to perfect grievances against the Company caused at least two work stoppages.

C. *The Deferral Issue*

Respondent strongly argues that the Board should defer to the arbitration provision and dismiss the complaint. The parties to the instant proceeding are operating under a contract which contains provision for processing of grievances and ultimately for arbitration.

Respondent's brief points out that the agreement (in art. 1, sec. 4) provides that there shall be no strike or lockout because of any dispute over matters related to this agreement. It goes on to provide that such dispute "must be handled" in the first instance by a labor-management committee of three representing the Union and three representing the Employer. Disputes coming before it are decided by majority vote. If the committee fails to agree upon or adjust the matter in issue, it is further provided that the dispute may be "jointly or unilaterally by the parties . . . [referred] to the council of industrial relations of the electrical contracting industry for adjudication. The council's decision shall be final and binding on the parties hereto."

Morris was discharged August 12, and on August 26 a labor-management committee composed of three representatives of the Union and three representatives of management heard the Morris grievance. It is especially significant that the committee did not consider the issue of whether Morris was terminated because of his union activities as shop steward, but considered only the question of whether Morris was terminated for "cause." A particular complaint of Morris was that he had been discharged in violation of the following provision of the contract: "No steward shall be terminated except for cause, without notifying the Business Manager, in writing, 24 hours in advance." It is conceded that no notice as called for had been given. The committee deadlocked on the grievance and the Union, pursuant to article 1, section 4(a) of the basic contract (G.C. Exh. 14) notified the committee of industrial relations, the contractually mandated arbitration body, that the grievance would be appealed to that body[3] after the case had been referred to National Electrical Contractors Association and the International Brotherhood of Electrical Workers. Respondent points out that it is customary that, once a matter has been referred on appeal, an intermediate step takes place which consists of an appeal to an Interim Committee which is responsible for hearing the grievance and making recommendations. There is no provision in the contract that sets forth this step. The Interim Committee in this instance consisted of Mr. H. Zieman of the ninth district of the IBEW and Mr. Floyd Shipp, NECA's field representative in San Mateo. The committee convened in October 1977. It is to be noted that the Employer's interest was represented by Mr. Coleman and that of Mr. Morris by Neil Jennings, business agent of Local 591. It is impossible from the record to determine what evidence was presented to this Interim Committee. Suffice it to say that Morris was not present at this meeting, and the Interim Committee recommended that the Union withdraw the grievance. This step was taken by Jennings and the Union withdrew a request for a hearing by the CIR which, at a later stage, unanimously accepted the recommendation of the Interim Committee thereby concluding the matter. In its recommendation the Interim Committee stated "the Union may still take the matter to the CIR" and it also stated "Jack Morris may still pursue this matter with the NLRB." General Counsel points out that Morris did pursue the charge with the Board and the Region issued a complaint in the instant case.

It is well settled that the appropriateness of deferral to arbitration was initially established in the case of *Spielberg Manufacturing Company*, 112 NLRB 1080, 1082 (1955), which states the standards for deferral to arbitration are that (1) the proceedings have been fair and regular, (2) that all parties had agreed to be bound, and that (3) the decision of the arbitration panel is not clearly repugnant to the purposes and policies of the Act. There have been many cases decided involving both the *Spielberg* principle and the principle set forth in the *Collyer* case and some changes and additions have been added to the original criteria. For example, in the *Radio Television Technical School, Inc., t/a Ryder Technical Institute*, 199 NLRB 570-573 (1972), appears the following language:

> Where, as here, the arbitrator has not addressed himself to the unfair labor practice issue it does not encourage voluntary settlement of disputes, or effectuate policies of the Act, to give binding effect in an unfair labor practice proceeding to the arbitration award. [This principle was earlier set forth in the case of *Raytheon Co.*, 140 NLRB 883 (1963). More recently in the case of *Brewery Delivery Employees Local Union 46, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Port Distributing Corp.)*, 236 NLRB 1175 (1978), decided June 23,

[3] The contract provides that the decision of the committee of industrial relations, otherwise known as CIR, shall be final and binding and that either party may appeal a labor-management decision on a grievance to that body.

1978, it was held that deferral to arbitration is inappropriate when the arbitrator does not address himself to the unfair labor practice issue and the award is contrary to unfair labor practice decisions under the Act.]

A major obstacle to deferral in the instant case is that the grievance over Morris' discharge never got beyond an interim step in the grievance resolution procedure.

Of course it is clear, as alleged by the General Counsel, that the reason for Morris' termination was due to his proclivity to continuously file grievances. Thus the General Counsel concludes that Morris was terminated for engaging in protected concerted activities which, it has repeatedly been held by the courts and the Board, is a term that encompasses the processing of grievances under the collective-bargaining agreement.

In 1977, the Ninth Circuit Court of Appeals adopted the *Banyard* standards in *Stephenson* v. *N.L.R.B.*, 550 F.2d 535 (1977). Attempting to define more clearly the *Banyard* standards, the Ninth Circuit ruled that "the clearly decided requirement that the arbitrator's decision must specifically deal with statutory issues." While the court did not say a written award was necessary to satisfy the "clearly decided" prerequisite, the court held that there must be substantial and definite proof that the unfair labor practice "issue and evidence were expressly presented" and that the award "indisputably resolves that issue in a manner entirely consistent with the Act." In this connection it should be noted that the record is silent with respect to precisely what came up before the interim panel. Certainly it is clear that the panel had no final authority to make a binding decision, and there is no indication of what subject matters were discussed at the panel meeting. Morris was not himself present, and the unfair labor practice aspect of the case (which involves the fact that Morris was an indefatigable and militant advocate of whatever grievance he was dealing with at a given time) was not considered. None of this material was mentioned in the record nor does it appear that any attention was given to these elements of the case. As a consequence, without more, I find that the so-called arbitration hearing was not, in effect, an arbitration hearing at all. It did not accord finality to the testimony that was presented, whatever that may have been, with the result that the decision was merely to withdraw the complaint which was repugnant of the policies of the Act.

The General Counsel argues that it was the intent of *Spielberg* to limit alleged discriminatees to one forum but not to prevent them from reaching any. Since Morris has been left by the Union to pursue his remedy with the Board, Respondent may not now deny him that opportunity.

Where there is no indication that the unfair labor practice issue was considered by the arbitration tribunal, the Board will not defer. *International Association of Machinists and Aerospace Workers, District 15, AFL-CIO (Burroughs Corporation)*, 231 NLRB 602 (1977); *Alfred M. Lewis, Inc.*, 229 NLRB 757 (1977); *Versi Craft Corporation*, 227 NLRB 877 (1977); also see *United Parcel Service, Inc.*, 234 NLRB 483 (1978).

If the arbitration proceeding has been fair and regular and the other *Spielberg* standards are met, the Board will defer to the award. In 1977, the Board indicated some of the defects that will cause it to refuse deferral under this standard. In "*Division of Super Valu Stores, Inc.*, 228 NLRB 945, deferral to the result reached in step 4 of a bi-partite grievance procedure was denied when the employee grievants were not present at the meeting, no testimony was taken, and no transcript was available . . . ." There was no award which could be examined for its conformity with *Spielberg* requirements.[4]

Concluding Findings and Analysis

The explanations offered by Respondent to support its termination of Morris, overall, are not persuasive. He was absent two or three times in approximately 14 months of his employment. A fellow employee, Sauza Maes, was absent from work approximately 16 times on occasions when these absences were unreported or unexcused, and he is still employed by Respondent. No explanation of this disparate treatment was offered except that Maes is a minority employee.

Reed gave contradictory testimony concerning the Company's policy regarding an employee who broke a tool on the job and was not a convincing witness. I do not credit his testimony where it conflicts with that given by Morris. Overall, I was impressed with the demeanor of Morris, and I credit his testimony because he spoke with candor and directness.

Grooms was vague and uncertain in his answers and did not make a convincing witness.

In support of a generalized statement that Morris did sloppy work, which standing alone is meaningless, Reed could not recall specific instances except the May 1976 occurrence involving miswiring a load panel. According to Respondent's brief, this was a potentially serious mistake by Morris. It is to be noted that he was not warned about his error and nothing was done about this matter from the date of its occurrence May 1976, until approximately August 1977. This is the only specific instance offered by Respondent in support of its contention that Morris did sloppy work. Furthermore, it is not denied on the record that there was a good deal of "sloppy work" performed on the project by other employees, according to the uncontradicted testimony of Grooms. Grooms also testified that he complained to Morris' supervisor, Armstrong, about the way an employee, Wayne, as handling his tools, but Grooms did not complain about Morris.

By far the most impressive witness of Respondent was Project Manager Fred Butler. While I credit much of his testimony, attention is called to the fact that he corroborated Reed's testimony with respect to the fact that the Company has a policy not to terminate an employee for breaking a tool. Butler, too, was vague as to sloppy work performed by Morris.

It is to be noted that additional reasons for Morris' discharge were described by Respondent after Morris was terminated. At a later management meeting which took place on August 26, Reed brought up the "502" (drunk driving) charge against Morris. Morris denied this charge and the matter was dropped. Reed also said that Arvin, U. S. Corps

[4] Many cases were ably cited and summarized in the briefs filed herein, and they have all been considered.

of Engineers inspector, allegedly told Reed that Morris was an unsafe employee who should be fired. This allegation by Arvin is irrelevant because it was made after Morris was discharged, and Arvin was not offered as a witness at the hearing.

During the instant trial Reed recapitulated that he fired Morris because he did not use his head in handling the Greenlea bender, for miswiring a load panel in May 1976, for missing work "a couple of times" without calling in, and for generally "sloppy work."

It is well settled that when, as here, the asserted reasons for a discharge do not withstand examination, the Board can infer that there is another reason—an unlawful one which the employer seeks to conceal—for the discharge.[5] The facts and circumstances here provide substantial support for the inference, which I draw, that Morris was discharged for filing and processing too many grievances conduct which is a protected activity under the Act. The defenses advances by Respondent do not hold water. It is not the policy of Respondent to discharge an employee for breaking a tool; that was the asserted reason on his termination slip. He failed to report for work on "two or three" occasions in the 14 months he was employed; a fellow employee was absent without calling in on about 16 occasions over a short period of time and is still working for Respondent. This disparity of treatment is explained as being due to the fact that the employee is a member of a minority. Morris is accused of doing "sloppy work" and as proof of this deficiency in his job performance Respondent points to a single instance which occurred in May 1976. In order to bolster its case Respondent first leans on a charge of drunkenness (the so-called "502" offense) and then drops this charge when it is denied by Morris. Then, clutching at straws, Respondent states that *after* Morris was discharged an army inspector told Reed that he would have recommended Morris' discharge as an unsafe employee. Morris earned the hostility of Reed.

I conclude that Morris was discharged for too zealously pressing grievances in his role as shop steward. This is a protected activity under the Act. I find that by discharging Morris under the circumstances described *supra*, Respondent violated Section 8(a)(3) and (1) of the Act.

Upon the foregoing findings of fact and conclusions of law, and upon the entire record, I hereby make the following:

CONCLUSIONS OF LAW

1. Respondent 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. The Respondent, by and through its electrical superintendent, Gene Reed, on August 12, 1977, engaged in unfair labor practices within the meaning of Section 8(a)(1) and 8(a)(3) of the Act by discharging Jack Morris because he had engaged in the protected concerted activity of filing grievances.

4. The arbitration proceeding involving employee Morris in August 1977 and the circumstances leading thereto were unfair and prejudicial against Jack Morris, thus rendering the opinion repugnant to the purposes and policies of the Act.

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

6. The Respondent has not violated the Act in any respects other than those specifically found herein.

THE REMEDY

Having found that the Respondent engaged in certain unfair labor practices, it will be recommended that the Respondent cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

It further having been found that Respondent discriminatorily discharged Jack Morris in violation of Section 8(a)(1) and 8(a)(3) of the Act, the recommended Order will provide that the Respondent offer him full reinstatement with backpay and interest thereon to be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).[6]

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

ORDER[7]

The Respondent, Melones Contractors, its officers, agents, successors and assigns, at the site of the Melones Dam located near Jamestown, California, shall:

1. Cease and desist from:

(a) Discharging or otherwise discriminating against any employee for the purpose of discouraging employees from engaging in union or other protected concerted activity for their mutual aid or protection.

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

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

(a) Offer Jack Morris immediate and full reinstatement to his former position or, if such position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights or privileges, and make him whole for any loss of earnings in the manner set forth in "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all pay-

[5] *Shattuck Denn Mining Corporation (Iron King Branch)* v. *N.L.R.B.*, 362 F.2d 466, 470 (9th Cir. 1966).

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

[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.

roll records, social security payment records, timecards, personnel records, and all other records necessary to ascertain the amount of backpay, if any, due under the terms of this Order.

(c) Post at its facility at the Melones Dam in Jamestown, California, copies of the attached notice marked "Appendix."[8] Copies of the notice on forms provided by the Regional Director for Region 32, after being signed by an authorized representative of the Respondent, 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.

(d) Notify the Regional Director for Region 32, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

[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 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."