Quality Broadcasting Corp. of San Juan d/b/a WQBS-AM Radio Station "La Gran Cadena" *and* Union de Periodistas, Artes Graficas y Ramas Anexas afiliada a The Newspaper Guild, AFL-CIO. Case 24-CA 3916

March 21, 1979

DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS JENKINS AND MURPHY

On November 17, 1978, Administrative Law Judge Charles W. Schneider 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,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified herein.

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 the Respondent, Quality Broadcasting Corp. of San Juan d/b/a WQBS-AM Radio Station "La Gran Cadena," Santurce, Puerto Rico, 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 2(a):

"(a) Offer Peter John Porrata 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 or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings or other benefits as prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest thereon as prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977). (See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962))."

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

[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.

Respondent contends that the Administrative Law Judge erred in stating that Porrata's testimony concerning his November 3, 1977, meeting with Ruiz was uncontroverted. Inasmuch as the Administrative Law Judge ultimately credited Porrata's version and discredited Ruiz' version of that meeting, whether Porrata's testimony as to the particular statement involved was contradicted is immaterial.

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 an opportunity to present evidence, the National Labor Relations Board has found that we violated the National Labor Relations Act, as amended, and has ordered us to post this notice. We intend to abide by the following:

WE WILL NOT discharge or otherwise punish any employee for exercising rights under the National Labor Relations Act.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed by Section 7 of the Act.

WE WILL offer Peter John Porrata 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 or other rights or privileges previously enjoyed, and make him whole, with interest, for any loss of pay, earnings, or benefits that he may have suffered by reason of his discharge.

QUALITY BROADCASTING CORP. OF SAN JUAN D/B/A WQBS-AM RADIO STATION "LA GRAN CADENA"

DECISION

STATEMENT OF THE CASE

CHARLES W. SCHNEIDER, Administrative Law Judge: On November 8, 1977,[1] Union de Periodistas, Artes Graficas y Ramas Anexas afiliada a The Newspaper Guild, AFL-CIO (the Union), filed an unfair labor practice charge and filed on December 1 a first and on December 28 a second amended charge against Quality Broadcasting Corp. of San Juan d/b/a WQBS-AM Radio Station "La Gran Cadena," the Respondent, pursuant to the National Labor Relations Act, as amended, 29 U.S.C. §151, *et seq.* On January 12, 1978, the Acting Regional Director for Region 24 (Hato Rey, Puerto Rico) issued a complaint and notice of hearing on the charge. Service of the charge, the amendments, and the complaint were made on the Respondent. On January

[1] All dates are 1977 unless otherwise specified.

19, 1978, the Respondent filed an answer denying the commission of unfair labor practices.

Pursuant to notice, a hearing was held before me in Hato Rey, Puerto Rico, on February 23 and 24, 1978. All parties appeared at the hearing and were afforded full opportunity to participate, to introduce and meet material evidence, and to engage in oral argument. On April 10, 1978, the General Counsel and the Respondent filed briefs, which have been considered.

On the entire record in the case, including my observation of the witnesses and their demeanor, and after due consideration of the briefs, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

Quality Broadcasting Corp. of San Juan d/b/a WQBS-AM Radio Station "La Gran Cadena" is, and has been at all times material herein, a corporation duly organized under, and existing by virtue of, the laws of the Commonwealth of Puerto Rico. At all times material herein, Respondent has maintained an office and place of business at First Federal Building, Suite 1512, in the City of Santurce, Commonwealth of Puerto Rico, where it is, and has been at all times material herein, continuously engaged in the operation of a radio broadcasting station.

During the past year, which period is representative of its annual operations generally, Respondent in the course and conduct of its operations derived gross revenues therefrom in excess of $100,000. Respondent in the course and conduct of its operations advertised national brand products and was a member of the Associated Press and United Press International, utilizing their wire services. Respondent is and has been at all times material herein an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE UNFAIR LABOR PRACTICES

The Issue

On November 3, the Respondent discharged Peter John Porrata, according to the General Counsel because of his protected concerted activity in connection with claims on the Respondent for overtime pay, and according to the Respondent because of deficiencies in performance by Porrata. The General Counsel asserts that the discharge violated Section 8(a)(1) of the Act.

The Facts

Porrata was hired by the Respondent on July 16 as an operator-announcer, or disc jockey, for the Respondent's AM radio station in San Juan, Puerto Rico.

At the time he was hired, Porrata was a full-time law student, carrying 13 credit hours. His working schedule for the Respondent, 30 hours per week, was as follows: Monday through Thursday—7 to 12 p.m.; Friday—7 to 2 a.m.; and Saturday—10 to 1 a.m.

About a month after being hired, Porrata presented a claim to Ismael Nieves, the Respondent's controller, for overtime under a Puerto Rican law requiring time and a half for hours worked in excess of 8 over a 24-hour period. Nieves agreed with Porrata's claim, and as a result a check was issued to Porrata to correct the deficiency.

Toward the end of August, Samuel Pena, a technician employed by the Respondent, approached Porrata and inquired as to the correctness of his pay under the Puerto Rican law. Porrata explained the law to Pena.

Around September 12, the Respondent presented Porrata with a document which "confirmed" Porrata's appointment at a compensation of $125 weekly and which also stated other terms and conditions of employment, including certain fringe benefits, with the request that Porrata indicate agreement by signing the document. Porrata objected on the ground that the document did not contain all the benefits promised upon his hiring, but ultimately, at the insistence of Program Director Pedro Ruiz, Porrata signed the document.

In the latter part of October, Samuel Pena and another disc jockey named Joaquin Ross asked Porrata, in the station, for further explanation of the law as to overtime pay. In the presence of employees Porrata repeated the requirements of the law. Shortly thereafter, Pena made a claim on the Respondent for overtime pay for work performed in excess of 8 hours during a 24-hour period. A week after this claim, Pena received a check from the Respondent for the amount of the claimed differential.

At the end of 90 days of employment with the Respondent, Porrata became a permanent employee under Puerto Rican law, and thus entitled to 1 month's pay and other benefits in the event of unjustified termination.

The October 31 Conversation Between Porrata and Ruiz

On October 31, prior to the beginning of Porrata's shift, Program Director Ruiz and Porrata had a conversation, the terms of which are disputed, in the newsroom of the station. Porrata's version is as follows.

Ruiz and Porrata whether he and Porrata had not agreed as to Porrata's salary and hours at the time Porrata was hired. Porrata replied that that was correct. Ruiz asked why Porrata had then claimed overtime, Porrata replying that the overtime compensation was required by law. Ruiz stated that the problem was that Samuel Pena, apparently on Porrata's advice, had now claimed overtime, which Porrata acknowledged to be true. Ruiz then declared that Porrata was setting a precedent for the Respondent which Ruiz was "not going to let . . . happen." During the conversation, Pena, who had operated the previous shift, and who was waiting for Porrata to relieve him, came into the newsroom twice to advise Porrata of the time and heard part of the conversation. Pena corroborated Porrata's testimony in substantial part.

Ruiz' version of the conversation is that it consisted wholly of comment by Ruiz on Porrata's deficiences as an announcer, in an effort to improve his performance. The conflict is resolved *infra.*

Three days later, on November 3, as Porrata was preparing to begin his shift on that evening, Program Director Ruiz called Porrata to his office and discharged him. When Porrata asked the reason, Ruiz stated that the Respondent was not satisfied with Porrata's services, at which Porrata

expressed disbelief. Ruiz told Porrata that he would give Porrata a good recommendation if inquiries were made about him, and he advised Porrata not to "claim . . . rights" for other people. Porrata asked Ruiz for a month's salary, in accordance with Puerto Rican law in the case of unjustified discharge of a permanent employee. Ruiz replied that the discharge was justified and that Porrata was therefore not entitled to severance pay. Several days later, Porrata received a letter from the Respondent dated November 3, 1977, confirming his termination and stating as grounds that the Respondent was "not satisfied with [his services]."[2]

The Respondent's Asserted Reasons for the Discharge

As Program Director Ruiz testified, the Respondent's stated grounds for the discharge were Ruiz' dissatisfaction with Porrata's services. Ruiz' testimony is that from the outset of Porrata's employment his performance was characterized by the following deficiencies, as outlined in the Respondent's brief:

1. Not following the written rules for disc jockeys.
2. Announcing in a shouting manner, making it hard to understand him.
3. Altering the established musical format.
4. Not properly announcing the time, or giving the station's slogan.
5. Encouraging listeners to call, contrary to station policy.
6. Having prolonged telephone conversations.
7. Abandoning his work area and going into other areas of the station, such as the newsroom, to attend to personal matters.
8. Not paying attention while on the air, thus causing frequent "batches" or periods of air silence.

Ruiz' testimony in those respects is as follows: He monitored Porrata's performance, principally from Ruiz' home at night, in the course of which he noted Porrata's deficiencies. After a period of some weeks of this—a forbearance designed to give Porrata reasonable opportunity to adapt himself to the Respondent's format—Ruiz began to speak to Porrata about his improper performance, but without success. From then on, Ruiz testified, he spoke to Porrata critically on "innumerable occasions" and "continuously," both by phone and at the station, with no improvement in Porrata's performance. Finally, becoming convinced in mid-October that Porrata was "not interested," Ruiz decided to discharge him. However, Ruiz was unable to secure a replacement until November 3, the day of the discharge. Ruiz did not warn Porrata of adverse consequences, such as discipline or discharge, which might result from Porrata's malperformance.

Ruiz' testimony as to Porrata's deficiencies in performance and his conversations with Porrata about them was largely in general terms and provided few identifiable incidents or instances which could be refuted by other than equally general denial. However, it is established that Porrata often did his homework during free intervals at the controls, and on occasion used the typewriter in the newsroom in connection with his studies. Porrata likewise admitted that there were sometimes "batches" during his shift—one or two of them due to his inattention. However, the remainder of the batches Porrata attributed to malfunctions in recordings or tapes, and to failure of the news announcer to respond to his cues, occurrences which the news announcer, a witness for the Respondent, admitted. The evidence indicates that technical malfunctions and missed cues, with resultant batches, occur from time to time, sometimes as a result of personal and physical demand. Porrata's undenied testimony is that he often reported technical malfunctions on the "trouble" sheet, or log, kept for each shift. These were presumably in the possession of the Respondent and thus available to test the credibility of Porrata's testimony in such respect. Concerning changes in format, Porrata admitted changing the order of musical numbers at times, but only when a malfunctioning tape or other emergency required substitution of a different tape. The testimony of both Program Director Ruiz and employee Joaquin Ross establishes that Ruiz did speak to Porrata concerning his delivery. Porrata's testimony, seemingly confirmed by that of Ross, is that Porrata made a number of changes in his method of presentation and delivery to conform to the wishes of Ruiz and the Respondent.

On balance, I conclude from the testimony that Ruiz' testimony as to the degree and volume of his dissatisfaction with Porrata was exaggerated. Ruiz spoke to all announcers from time to time concerning their performance and conformance to rules, a number of which seem not to have been rigorously enforced. As we have seen, personal physical demand sometimes required an announcer to leave his place. When work permitted, announcers sometimes left their positions and visited with others in the station. Night jockeys, such as Porrata, were required sometimes at inopportune moments, to answer the phone, which is located in the AM control room. Ruiz admitted that he did not know whether Porrata's phone conversations were work related or personal—merely that they were prolonged. Since Ruiz was not ordinarily present in the station during Porrata's shift, it is not apparent how he could know that Porrata, rather than others on the staff, were using the phone, nor how long individual conversations took. With respect to visitors, though visitors were forbidden in the station, employees, including Ruiz, sometimes had them, and there is no indication that Porrata was a greater offender in this respect than anyone else. Concerning asserted improprieties in Porrata's delivery, Ruiz' testimony is disputed by Porrata

[2] The findings as to the discharge interview are based on Porrata's uncontradicted and credited testimony. Porrata testified that, after Ruiz told him tht he was fired because the Respondent was not satisfied with his services, Porrata responded that that was "impossible" and pressed Ruiz for particulars. Porrata's testimony from that point, in part, is as follows:

> Ruiz said, "Well, the reasons are the ones I'm giving you. The company is not satisfied with your job or your services within the company, and my obligation is to fire you." And I say "Mr. Pedro Ruiz, you know those aren't the reasons for firing me. Discharging me from this job." And he said, "no, the reasons I'm discharging you you might know them, but those are the reasons."
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> And he started in a manner of philosophy, he said, "Let me give you my advice. Try to work on your own. Don't work for nobody. Don't claim no rights for nobody. I'm going to give you advice. You're a nice person. You're a young person. You have a nice life ahead of you and I believe in giving persons second chances and second opportunities. If you happen to look for a job at another station and they happen to call here I'll give you a good recommendation of your job. But you got a nice life ahead of you and you're going to be a lawyer. I know that you're going to be a lawyer. But you're not a lawyer yet and since you're not a lawyer yet you can't claim nobody's rights."

and Ross, the latter still in the Respondent's employ and thus not likely to be influenced to give false testimony contradicting that of his superior.[3]

Conclusions

The issue is whether the Respondent's dominant and controlling motive for Porrata's discharge was his activity in connection with the overtime matter, one protected under Section 7 of the Act (*Synadyne Corp.*, 228 NLRB 664 (1977)), or was instead Porrata's deficient performance as an employee (*N.L.R.B.* v. *Fibers International Corporation*, 439 F.2d 1311 (1st Cir. 1971); *N.L.R.B.* v. *Circle Bindery, Inc.*, 536 F.2d 447 (1st Cir. 1976); *N.L.R.B.* v. *South Shore Hospital*, 571 F.2d 677 (1st Cir. 1978)).

If the testimony of Porrata and Pena is accepted as to the conversation between Porrata and Program Director Ruiz on October 31, the evidence warrants the inference that it was Porrata's advice and activity concerning the overtime pay which was the operative factor in producing Porrata's discharge without notice 3 days later. Thus, when Porrata told Ruiz that dissatisfaction with Porrata's services was not the reason for his discharge, Ruiz' answer was, in effect, that it was not, but that it was the reason the Respondent was giving. In addition, Ruiz warned Porrata not to be giving advice to individuals about their rights until he became a lawyer, a statement interpretable as a reference to Ruiz' assertion that Pena's claim was a result of Porrata's advice. The sequence between the October 31 conversation and the November 3 discharge, if the testimony of Porrata and Pena is substantially correct, seems too marked to be ascribed to coincidence. Other factors contributing to that conclusion are adverted to *infra*. The question then is, who is to be credited as to the October 31 conversation?

After consideration of the circumstances and the demeanor of the witnesses, I have concluded that the testimony of Porrata and Pena as to the October 31 conversation is to be credited and that of Ruiz rejected. According to Ruiz, he decided about mid-October to discharge Porrata as soon as he could find a suitable replacement, and at some time prior to the October 31 conversation with Porrata he had found and hired one, but he was not available until November 3. I consider it implausible that, if Ruiz' testimony as to Porrata's asserted persistent deficiencies and stubborn incorrigibility were correct, Ruiz would have spoken to Porrata on October 31 for the purpose of improving his performance over the next 3 days. Moreover, if Ruiz' version of the October 31 conversation is correct, the conclusion would follow that Porrata and Pena had deliberately perjured themselves by concocting a wholly fictitious story. While the testimony of Porrata and Pena was not always consistent, such defects as it may have in those respects can be ascribed, in my opinion, to confusion or failure of recollection. Their testimony as to what Program Director Ruiz said in the October 31 conversation, however, falls into an entirely different category: it cannot have been mistaken; it was either true or it was deliberately false. On the basis of my observation, I conclude that Porrata and Pena would not have so boldly and jointly concocted an outright lie. Porrata and Ruiz, of course, have partisan interests in the outcome of the litigation. But no reason is apparent for Pena to have joined in a knowing fabrication.[4] Thus, perjury on Pena's part seems a more remote probability. On the other hand, Ruiz' testimony, though incorrect, may not have been a conscious falsehood. The capacity of the human mind unconsciously to color, to modify, even to obliterate completely, recollections damaging to self-interest, make it possible for Ruiz' testimony to be honestly incorrect as to what he told Porrata on October 31.[5] Thus, actual instances of lapses by Porrata, and conversations between him and Ruiz concerning Porrata's delivery and presentation, of no more than routine significance at the time they occurred, may have been unconsciously magnified and distorted in Ruiz's recollection aa to volume, importance, and occasion, and telescoped and transferred to the October 31 conversation, while actual statements by Ruiz were expunged by psychological rejection. Whatever the reason, I find Ruiz' testimony as to what he told Porrata on October 31 to be incorrect.

I therefore conclude that Porrata and Pena's version of the October 31 conversation between Porrata and Program Director Ruiz is substantially correct. I further conclude that the Respondent's dominant and controlling motive in discharging Porrata was his giving advice to employees about overtime and his activities in connection with that problem, and not dissatisfaction with Porrata's performance as an employee.

Thus, it does not seem likely that if the Respondent had been dissatisfied with Porrata's work performance it would have permitted him to become a permanent employee, with its accompanying legal complications. Nor does it seem likely, in the light of the evidence, that the decision to discharge was made before October 31. The delay from about October 15, when Ruiz assertedly decided upon the discharge, to November 3, when he effectuated it, is not satisfactorily explained by asserted inability to find a replacement.

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[3] See *N.L.R.B.* v. *Sunshine Mining Company*, 110 F.2d 780, 790 (9th Cir. 1940); *Georgia Rug Mill*, 131 NLRB 1304, fn. 2 (1961); *Wirtz* v. *B. A. C. Steel Products, Inc.*, 312 F.2d 14, 16 (4th Cir. 1963); *N.L.R.B.* v. *National Survey Service, Inc.*, 361 F.2d 199, 206 (7th Cir. 1966); *N.L.R.B.* v. *Southbridge Sheet Metal Works, Inc.*, 380 F.2d 851, 855 (1st Cir. 1967); *Federal Stainless Sink Div. of Unarco Industries*, 197 NLRB 489, 491 (1972); *Florida Steel Corporation*, 214 NLRB 264 (1974); *Gold Standard Enterprises, Inc., et al.*, 234 NLRB 618 (1978).

[4] Pena was discharged on the same day as Porrata, and the original unfair labor practice charge alleged his termination to be discriminatory. However, no complaint seems to have issued on that allegation. While the possibility of bias on Pena's part therefore exists, he has no pecuniary or proprietary interest in the litigation as do Porrata and Ruiz.

[5] See Stryker, "The Art of Advocacy," 94 (1954):

> [A]ll [a witness'] recollections ofttimes are the product of an association of ideas, commingled and confused with rationalization, and all his memory may be tinctured by a bias, sometimes subconscious, or colored by suggestion.

And see Marshall, "Evidence, Psychology, and The Trial: Some Challenges To Law," 63 Columbia L. Rev. 197, 211, 215 (1963):

> Memory too is selective. . . .
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> False testimony may be intentional and conscious; on the other hand, it may involve *psychological denial* by the witness that he is testifying falsely, that is, he may be blocking out the truth from his consciousness and not recognize that he is doing so.

If Porrata's performance was as bad as portrayed by Ruiz, no reason appears why his shift (and particularly the last 3 days, involving a total of 15 hours), could not have been handled by the Respondent's five other announcers, who are subject to emergency call, once his discharge had been decided upon and a replacement secured. In addition, Santiago, the replacement, worked for the Respondent, apparently on a call-in basis, during Porrata's employment, according to Porrata's credited testimony. The fact that Santiago held a full-time job with his brother, which he changed to part-time at some undisclosed date after replacing Porrata, does not seem a satisfactory explanation for delaying his induction until November 3. Porrata's work was also part-time, and all of it at night. It also seems significant that Porrata was discharged not at the end of his shift on November 2 but at the beginning of it on November 3. Ruiz' explanation for this—that it was a "personal decision" on Ruiz' part—is hardly enlightening. The fact that the Respondent made settlement on overtime claims other than those of Porrata and Pena does not negate the Respondent's motivation in Porrata's case, which is established from Ruiz' statements in the October conversation. The apparent objection to Porrata was that he was a catalyst, not that he was a claimant.

Those factors, in my judgment, require the conclusion that Porrata's discharge was not decided on until shortly before it was effected and that its cause was not his work performance but his protected concerted activity. It is so found. The Respondent thus violated Section 8(a)(1) of the Act.

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

ORDER[6]

The Respondent, Quality Broadcasting Corp. of San Juan d/b/a WQBS-AM Radio Station "La Gran Cadena," Santurce, Puerto Rico, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging or otherwise punishing employees because they engage in protected concerted activity for the purpose of collective bargaining or mutual aid and protection.

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

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

(a) Offer to Peter John Porrata immediate and full reinstatement to his former position or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole, with interest, for any loss of pay, earnings, or benefits he may have suffered by reason of his discharge by the Respondent.

(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 under the terms of this Order.

(c) Post at its premises copies, in English and in Spanish, of the attached notice marked "Appendix."[7] Copies of said notice, on forms provided by the Regional Director for Region 24, after being duly signed by an authorized representative of the Respondent, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, inconspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 24, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

[6] 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.

[7] 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."