

Certified Ad Services, Inc. and San Francisco Web Pressmen and Platemakers' Union, Local No. 4, International Printing and Graphic Communications Union. Case 32-CA-409

October 31, 1978

DECISION AND ORDER

BY MEMBERS JENKINS, MURPHY, AND TRUESDALE

On July 20, 1978, Administrative Law Judge Roger B. Holmes issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and General Counsel filed a brief in support of the Administrative Law Judge's Decision.

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 and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Certified Ad Services, Inc., Fresno, California, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

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.

DECISION

STATEMENT OF THE CASE

ROGER B. HOLMES, Administrative Law Judge: The original unfair labor practice charge in this proceeding was filed on September 23, 1977, by San Francisco Web Pressmen and Platemakers' Union, Local No. 4, International Print-

ing and Graphic Communications Union, herein called the Union. The first amended unfair labor practice charge in this case was filed on November 25, 1977, by the Union.

The Regional Director of Region 32 of the National Labor Relations Board, herein called the Board, who was acting on behalf of the General Counsel of the Board, issued on December 21, 1977, a complaint and notice of hearing against Certified Ad Services, Inc., herein called Respondent.

The General Counsel's complaint alleges that Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the National Labor Relations Act, as amended, herein called the Act. Specifically, the General Counsel alleges that Respondent violated Section 8(a)(1) of the Act by Respondent's termination of Louie Vasquez on or about August 26, 1977, and by Respondent's failure and refusal to reinstate Vasquez since that date. Respondent filed an answer to the complaint and denied the commission of the alleged unfair labor practices.

The hearing was held before me on March 2, 1978, at Fresno, California. Both counsel for the General Counsel and the attorney for Respondent filed persuasive briefs by the due date of April 6, 1978. Thereafter, by letter dated April 10, 1978, the attorney for Respondent objected to the portion of counsel for the General Counsel's brief which went beyond the issue of whether Vasquez was discharged for protesting conditions which Vasquez believed to be dangerous to his fellow employees. In Respondent's view, such argument beyond that issue was improper in view of statements made at the hearing by the counsel for the General Counsel.

Upon the entire record in this proceeding and based upon my observation of the demeanor of the witnesses, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent has been at all times material herein a California corporation with an office and principal place of business located in Fresno, California, where it has been engaged in nonretail commercial printing.

During the 12-month period preceding the issuance of the complaint, Respondent, in the course and conduct of its business operations, sold and shipped goods or services valued in excess of \$50,000 directly to customers located outside the State of California.

Upon the foregoing facts admitted in the pleadings, and upon the entire record in this proceeding, I find that Respondent has been at all times material herein an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

It was admitted in the pleadings that the Union has been at all times material herein a labor organization within the meaning of Section 2(5) of the Act. Accordingly, I find that fact to be so.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Credibility Resolutions*

Many of the significant facts, which were related by the three witnesses who testified at the trial in this proceeding, are not in serious dispute. In addition, some of the findings of fact to be made herein are based upon documentary evidence which was introduced by the parties. However, there were some differences in the testimony given by the three witnesses, and those conflicts among the witnesses require that an evaluation be made of their credibility.

With regard to the witnesses, I shall primarily rely upon the credited testimony given by James Nelson. Nelson gave the impression of being a witness who was relating the facts at the trial to the best of his ability to do so. Nelson appeared to be testifying without regard as to whether his answers to questions, both on direct examination and cross-examination, would help or detract from the legal positions taken by the General Counsel, the Union, or Respondent. Of course, I have weighed the fact that Nelson is a member of the Union and the chapel chairman, but Nelson did not reveal on the witness stand any discernible bias or hostility against Respondent. Furthermore, I have not overlooked the fact that Nelson was still employed as an operator by Respondent at the time that he gave his testimony in this proceeding. See the Board's Decision in *Georgia Rug Mill*, 131 NLRB 1304 (1961); *Gold Standard Enterprises, Inc.*, 234 NLRB 618 (1978).

To the extent that their testimony is not in conflict with the credited testimony given by Nelson, I have also relied upon certain testimony given by Louie Vasquez, who is the alleged discriminatee in this proceeding, and Michael Walzberg, who is Respondent's plant manager. Where there are differences between the testimony of Vasquez and the testimony of Walzberg, I have found that Vasquez had the better recall of these events, and where it has been necessary to do so, I have relied upon his version. However, the testimony by Walzberg has been weighed and considered.

The basis for the findings of fact in each section will be specified herein.

B. *The Employment of Vasquez*

Louie Vasquez began working for Respondent about June 1969. He first worked in the mailroom for about a year, and then he advanced to the pressroom where he worked for 6 to 8 months as a flyman. Then he was an apprentice for about 2-1/2 years before becoming an operator. On the day of his termination by Respondent, August 26, 1977, Vasquez had the most seniority among any of the employees in the plant. Vasquez was a member of the Union.

Walzberg described the quality of Vasquez' work as being "good." Walzberg pointed out that Vasquez had been discharged by Respondent on two occasions prior to August 26, 1977. The first occasion was within the first 2 years of Vasquez' employment by Respondent. Vasquez was rehired after that occasion, but he was again terminated by Respondent a couple of months prior to August 26,

1977. Walzberg testified, "He didn't show up for work, and we fired him because he had a history of it." However, the termination was later settled for a suspension of Vasquez, and Vasquez returned to work for Respondent until his final termination on August 26, 1977.

Nelson gave his opinion of the quality of work performed by Vasquez as follows: "Louie was probably the best pressman in there. He was very competent."

The findings of fact in this section are based upon the testimony of Vasquez, Walzberg, and Nelson.

C. *Acting Foreman or "Working-Man-in-Charge"*

The parties stipulated that the last collective-bargaining agreement between Respondent and the Union expired on December 31, 1976. A copy of that agreement was introduced into evidence as Respondent's Exhibit 3.

Among the provisions of that collective-bargaining agreement was a section 4 entitled "foremen." It provides:

Section 4.

Foremen

(a) The foremen shall have charge of all men working and all work performed pursuant to the provisions of this Agreement. All orders for the pressroom shall emanate from the foremen. The foremen shall have full authority to carry out the instructions of the Employer or its representatives. The foremen shall post the starting time of all regularly scheduled shifts by Tuesday of each week or by not later than noon on Wednesday by mutual agreement, for the following week.

(b) In the absence of a foreman, a working-man-in-charge shall take the foreman's place and shall exercise his authority and his duties.

(c) There shall be a foreman or a working-man-in-charge on each shift. Such foremen and working-men-in-charge shall be journeyman pressmen in good standing as members of the Union.

Respondent's Exhibit 3 also provides in Section 9(b):

(4) Working-men-in-charge shall receive \$7.00 per shift in addition to the journeymen's rate.

* * * * *

(6) If a working-man-in-charge replaces a foreman during the vacation of the foreman or during illness of a foreman which exceeds one (1) week, the working-man-in-charge shall receive the foreman's scale. In this regard, the working-man-in-charge shall receive the foreman's scale effective the first day the working-man-in-charge replaces the foreman, when the foreman's illness exceeds one week.

When Vasquez reported for work on Thursday, August 25, 1977, Vasquez became aware at that time that he was going to be an acting foreman for a period of 1 week. Vasquez said that he saw this on his schedule on that date. He said nothing was said to him at that time, and that he was not aware until Thursday that he was going to be act-

ing foreman for that period of time.

Prior to August 26, 1977, Vasquez had been acting foreman on some other occasions. Walzberg explained that Chuck Previtiere was the regular foreman, but when Previtiere was absent from work, Vasquez would be acting foreman on a temporary basis because Vasquez was the most senior employee. Vasquez pointed out that he was never told that he was to be an acting foreman for any period of time longer than the time that the regular foreman was absent.

According to Vasquez, while he was acting foreman, Vasquez worked exclusively on the press. He said that when the regular foreman was present at work, the regular foreman did not work with Vasquez on the press, but instead, the regular foreman came by to see what was going on, talk to the employees, and see if they had any problems. Vasquez estimated that the regular foreman spent less than an hour a day at the press.

Vasquez said that Walzberg never told him that Vasquez had the authority to fire employees on those days that Vasquez served as the acting foreman. Vasquez said that he had never fired anyone. Vasquez acknowledged during cross-examination by the attorney for Respondent that the regular foreman could fire him, and that Vasquez was taking the foreman's place. However, Vasquez added, "But I didn't know I had the authority to hire and fire. Because that was never brought up to me about hiring and firing."

Vasquez said that he was not told what his authority was as an acting foreman. He stated that if a job had to be done by a certain time, and if something went wrong with the job, and if the production manager was not there, Vasquez had the authority to change a deadline. However, he said that he never did so.

Walzberg acknowledged at the hearing that the regular foreman, Chuck Previtiere, did not spend his working time exclusively on the press, whereas Vasquez did so even though he was the acting foreman on the date of his discharge. Walzberg said that Vasquez was the acting foreman or man-in-charge because Vasquez was the most senior employee at that time.

According to Walzberg, Vasquez did have the authority to hire and fire employees as an acting foreman. Walzberg testified during his examination by the counsel for the General Counsel as follows:

Q. On the day that he was discharged, Mr. Vasquez was acting foreman on that date, wasn't he?

A. Yes.

Q. Did he have authority that day to fire anybody?

A. Yes.

Q. Did he have authority to hire anybody?

A. He had authority to bring people in, yes, if needed.

Q. Did you tell him that he had that authority?

A. Not to his face, no.

Q. Did you tell him he had the authority to fire anybody?

A. No.

Q. Did he fire anybody?

A. No.

Q. Did he hire anybody?

A. No.

Walzberg also testified:

Q. Could Mr. Vasquez have fired anybody in the pressroom on his own without talking with anybody else about it before he did so?

A. Yes.

Q. But you didn't tell him that he could do that, did you?

A. It was already understood. I didn't have to tell him.

Q. You never told him that, did you?

A. Not personally, no.

Walzberg alluded to the fact that an acting foreman had fired a flyman over a year prior to the hearing, but Walzberg did not recall the identity of the acting foreman or the identity of the employee involved in that situation.

Walzberg also asserted that Vasquez had the authority as an acting foreman to grant overtime to employees, but Walzberg said that he personally did not tell Vasquez of this.

According to Walzberg, while he was attending the Deputy Labor Commissioner's hearing regarding Vasquez' postdischarge complaint, union representative Dave Ratto volunteered the statement during that hearing, ". . . that Louie was the man-in-charge, he represented management, was a supervisor."

The findings of fact in this section are based upon documentary evidence and the testimony of Vasquez whose version is credited over Walzberg's account, except as to the uncontradicted testimony regarding Ratto's statement at the hearing.

D. A Three-Unit, Four-Color Job

Normally, a three-person crew was utilized for running a three-unit, four-color job, according to Nelson. Nelson said that such a crew normally consisted of an operator, a journeyman or an apprentice, and a flyman.

Nelson said that at the time of Vasquez' discharge, it was a standard practice to run the presses with a two-man crew during the lunch hour. Some of those runs included three-unit, four-color jobs. Sometimes when a person was late, or when a person left early, there were also just two people in the crew, but he said that sometimes the foreman was there to help.

Nelson explained at the hearing that because of Respondent's financial problems, Respondent had earlier requested of the Union that there be some relief given with regard to manning; that the employees work through their lunch period and not shut down their presses; that the employees take staggered lunch periods so long as that practice did not displace someone, and that Mike Walzberg and Van Walzberg be permitted to work in the camera department. Nelson said, that as a result of Respondent's request, the employees had begun to work during the lunch period.

After testifying in specific detail regarding the operation of the presses at Respondent's premises, Nelson was asked the following questions during direct examination by counsel for the General Counsel:

Q. Based on your experience, do you consider it

potentially dangerous to start up a four-color, three-unit job with less than three men?

A. Yes.

Q. Other than August 26th, 1977, did you ever start up a four-color, three-unit job with less than three men?

A. I, myself, never did.

Although Nelson also testified that starting a three-unit, four-color job with just a flyman and himself would be dangerous, Nelson testified during cross-examination by the attorney for Respondent with regard to the job performed on August 26, 1977, in the afternoon: "On this particular job, I, myself, believed, with me running the press, that I conduct myself in such a manner that I don't think it would be unsafe to me, because I know what I'm doing. I'm the one that's taking the risk. If there are any risks, I'm the one that's doing it to myself. I don't think it would be unsafe."

Vasquez stated that he never operated a three-unit, four-color press with less than three men. He described the crew working on such a job as consisting of: (1) a flyman, (2) an apprentice, and (3) an operator.

While Vasquez testified that it was "potentially dangerous" to start up a three-unit, four-color job with less than three people in the crew and testified to certain specific reasons for that view, the following took place during the cross-examination of Vasquez by the attorney for Respondent:

Q. (By Mr. Frame) Mr. Vasquez, in response to some questions by Mr. Askin, I believe you pointed out some instances—some possibilities of an operator getting his hand, clothing caught in the moving press mechanism. Is that correct?

A. Right.

Q. Isn't it true, Mr. Vasquez, that all the things that you talked about could just as well happen, if there's a three-man crew, just as well with a three-man crew as with a two-man crew?

A. That's right.

During redirect examination of Vasquez by the counsel for the General Counsel, the following took place:

Q. (By Mr. Askin) You further testified that there would also be the same dangers present to employees, where three people were operating the press, two people plus the flyman.

A. Sure.

Q. Is one of those conditions, in your judgment, more dangerous than the other?

A. I think they're both the same, just on account of the machine just moving constantly all the time. And you just don't know what's going to happen just in that split second, even if you had somebody watching all the time. You just don't know what's going to happen, not in a job like that.

Walzberg acknowledged at the trial that three people normally comprised a regular crew operating a three-unit, four-color job. He described the three classifications as being, (1) an operator, (2) a second pressman or helper, (3) and a flyman.

According to Walzberg, the practice of Respondent, both before and after the termination of Vasquez, was to schedule three persons to handle a three-unit, four-color job. He said that the majority of the time three individuals did perform that work, but he said there were occasions where there were less than three people on such a job. Walzberg gave as examples of this being when the press was being run through the lunch period; when a man was late; when a man left work early; and when an employee was sick. He said that sometimes the foreman was present during the lunch period. Walzberg stated that Respondent began performing work during the lunch period in January 1977 after the Union agreed to this on an interim basis because of Respondent's financial difficulties. In Walzberg's opinion, it was safe to operate a three-unit, four-color job with a two-man crew.

Respondent's Exhibit 3 provides in section 16 as follows:

Section 16.

Manning Requirements

The present manning practices in the Employer's shop will be continued during the term of this Agreement. The parties will execute a separate Memorandum of Understanding, setting forth what the present practices are.

Walzberg said that it was after the termination of Vasquez that the Company made certain proposals to the Union to change from the prior practice. Walzberg said that a separate memorandum regarding manning was never executed by the parties and, in fact, the Union agreed to proceed without any manning requirements.

Counsel for the General Counsel introduced as General Counsel's Exhibit 3 a copy of a letter dated September 2, 1977, from Attorney Frame to the Union. In that letter, Attorney Frame presented certain proposals for a new collective-bargaining agreement on behalf of Respondent. Among those proposals was a proposal that, for manning purposes, foremen shall be considered as part of the crew. In addition, among the proposals for the manning of a three-unit job would be to have one operator and one flyman. (See item 7 on p. 2 of G.C. Exh. 3.)

The findings of fact in this section are based upon the testimony of Nelson and Vasquez, and, to the extent that it is not inconsistent with the testimony of Nelson and Vasquez, also certain of the testimony of Walzberg. In addition, the findings are also based on documentary evidence.

E. The Events on August 26, 1977

On August 26, 1977, Nelson was working on press "B." During the morning hours, at first a two-unit, one-color and black job was run. Then a three-unit, four-color job referred to as "Food Land" was run. Nelson said that he approached Walzberg that morning and asked Walzberg about that job. He said that Walzberg made Larry Flores available to him, and that Flores came over to help out from the warehouse.

Following the lunch period that day, neither press "A"

nor press "B" was running. That afternoon, press "B" was scheduled to run a three-unit, four-color job for "Save Mart's Country Store." At that time there was just Nelson and a flyman at the press. Nelson told Walzberg that they were short a man. Nelson also asked Jim Smith to see if he could get another person. Smith could not, so Nelson asked Walzberg if he could provide a flyman, but Walzberg could not do so. Walzberg asked Nelson if Nelson would run the job, and Nelson agreed to do so. During his direct examination by counsel for the General Counsel, Nelson described what took place thereafter as follows:

A. I started my press up, not full speed, just inching it; and I looked about, in between both presses, and I saw Mike and Louie talking. And I went down there and I overheard Louie saying to Mike that I shouldn't be running my press, because it was undermanned, there was only two guys on the press.

And Mike says: Well, I asked him to run the press.

And Louie says: Well, he shouldn't—he shouldn't be doing this, because he's short a man. And Louie said that he was going to refuse to operate his press, if I was going to run my press.

Mike says: Well, you know I'll have to fire you.

And Louie says: Yes, I don't care. Fire me.

And Mike says: Okay. You're fired.

Q. Did you subsequently have a conversation with Louie concerning this matter that same day?

A. Yeah. I—as soon as that happened Louie got a little hot. I tried to calm him down. I said: Hey, I'll go talk to Mike and try to get things patched up.

And I went and talked to Mike and said: Hey, don't fire him. We'll get the job off somehow, or something to that effect. And I wasn't able to calm Louie down too much, and he just went outside.

When Nelson was cross-examined by the attorney for Respondent as to what Vasquez had told Nelson with regard to running his press with a two-man crew, Nelson responded, "I don't think he told me in that certain word, 'don't run your press.' I think he more or less suggested that I shouldn't be running my press, because we were undermanned."

Nelson further confirmed that Vasquez said nothing to Walzberg regarding safety conditions, and, following Vasquez' termination that Vasquez told Nelson, ". . . that it was against our manning to run a four-color, three-unit job with two men."

There was some discussion among the employees about walking out of the plant after the termination of Vasquez, but Nelson said that he telephoned Union Representative Dave Ratto who advised the employees against walking out. During cross-examination by the attorney for Respondent, Nelson testified as follows with regard to his conversation with Ratto:

Q. You mentioned then that you had a conversation with Dave Ratto.

A. Yes.

Q. Okay.

And as a matter of fact, Mr. Nelson, isn't that the first time that the so-called safety claim came up in the

conversation with Dave Ratto?

A. Yes, it is.

Q. Isn't it further true that Dave Ratto suggested to you that that would be a good thing to put forward?

A. He told me to tell Mike that we were going to build our case, our defense, on the premise that, one, we were running the press undermanned and, two, the safety factor.

Q. That was Dave's idea, wasn't it?

A. Yes.

Nelson said that following his conversation with Ratto that Nelson spoke again with Walzberg. Nelson advised Walzberg that the Union intended to take action with regard to the firing of Vasquez and, ". . . one, they were asking us to run undermanned and, two, it was a hazardous condition to safety, what he had asked Louie to do or asked me to do."

Nelson's daily logsheet for August 26, 1977, was introduced into evidence as Respondent's Exhibit 6. After examining that log sheet at the hearing, Nelson said that the three-unit, four-color job which he ran that afternoon for "Save Mart's Country Store" consisted of 11,584 copies and that it took 45 minutes to an hour to run.

During the morning of August 26, 1977, Vasquez was working on the "A" press. There were three persons in his crew that morning, and they were doing a three-unit, four-color job known as "Brentwood." The other press, which was designated as the "B" press, started with a two-unit job and then went to a three-unit, four-color job.

According to Vasquez, the "B" press was scheduled for three persons, but they were short one man that morning when they began the three-unit, four-color job. He said press "B" did not begin that job with two employees, but instead, they got another employee from the warehouse, Larry Flores, who worked that morning as a flyman on the "B" press.

When Vasquez returned from lunch that afternoon, the presses were not running. There was still a three-man crew on "A" press, but there were only two people on the "B" press which was scheduled to start up with a three-unit, four-color job.

At that point in time, Vasquez spoke to Mike Walzberg. Vasquez testified during examination by the counsel for the General Counsel:

Q. Did you speak to anyone about the fact that there were only two employees down on press "B"?

A. Yes, sir.

Q. Who did you discuss this with?

A. I talked it over with Mike Walzberg.

Q. All right.

And what did he say in that conversation and what did you say?

A. Well, first, I approached him next to the camera room. And I told him that we're still a man short on—the "B" press, and that it just wasn't right, if Nelson wanted to start the four-color job with three units by himself, because there was just a lot of work for just one man.

Q. All right.

And what did Mike say about that?

A. That's when we started into that little argument that we had.

Q. All right.

Tell us what the argument was.

A. Well, the argument—Well, whatever—

Q. Say what was said in the conversation.

A. What was said. I just came out and told him that it was—it just wasn't right of Nelson having to run a four-color job, three units, by himself. And after that, we just started getting into it.

Q. All right.

A. Then it came up that I told Mike that if he didn't get another man to help out Nelson, that I wasn't just going to start my press up.

Q. Okay.

What did he say about that?

A. He just flat said if I didn't start my press up, he'd just go ahead and fire me. And I just went ahead and agreed with him. I said: Go ahead and fire me.

Q. Okay.

And did he fire you?

A. Yes, he did.

Q. Why did you tell him that you wouldn't start up your press, if Nelson was undermanned?

A. Because I thought—Well, at the time I didn't tell him, but I thought it was dangerous. Going back to the same thing, just anything can happen to a press, anything can happen to a unit, you know, just anything, you know. You might have a web break and the paper just might be just rolling up, rolling up in the rollers and nobody will know it, especially if a flyman's not looking.

Immediately following his termination by Walzberg, Vasquez said that he went directly to the sink, and while Vasquez was washing his hands, he told Walzberg that he wasn't going to take any of his "shit." Vasquez said that following his discharge, Walzberg did not talk with him about returning to work.

During his cross-examination by the attorney for Respondent, Vasquez acknowledged that he had given an affidavit to an agent from Region 32 of the Board, Mary E. McDonald, in which Vasquez had stated that he should have been fired from the foreman's job, but not from his job as an operator. He also was asked, "When you talked to Mary McDonald, did you believe that Mike should have fired you as foreman, because you didn't know what a foreman was supposed to do and you had not done the right thing?" Vasquez replied, "That's true."

Walzberg said that he had obtained a warehouseman, Flores, to come over to work on press "B" during the morning of August 26, 1977. However, Walzberg said that Flores had to go back to his job that afternoon. Walzberg said that he made an effort to find a third person for press "B," but neither he nor Nelson was successful.

Walzberg gave the following account of his conversation with Vasquez that afternoon:

Could you tell us what you said and what Louie said in that conversation?

A. All right.

I believe that Louie came to me and he was telling

me that they're not going to run the two-man crew.

And I told him we had to.

And he said: Well, you're not going to run a two-man crew. And if you do, I'm going to shut my press down. And if you don't like it, you can fire me.

Q. What did you say?

A. I explained to him the situation that we couldn't get anybody, myself or Nelson, and that we had to meet a deadline, we had to get the job in the post office; and I couldn't get anywhere with him.

And he said: Well, I don't care. I'm going to shut my press down. He said: If you don't like it, you can fire me.

Q. All right.

A. So after trying to explain to him some more, I just said: Okay. You're fired.

Walzberg said that it was after Vasquez was terminated that Vasquez directed some profanity towards Walzberg.

Walzberg said that Nelson asked Vasquez to return to work, and Walzberg overheard Vasquez reply to Nelson, ". . . no way, not if they're going to run a two-man crew."

Walzberg said that Nelson did ask him to hire Vasquez back on behalf of the Union, and that Walzberg made the offer for Vasquez to return to work for Respondent that day, but it was on the same conditions which had been in effect that afternoon; i.e., two persons would operate press "B" and three persons, including Vasquez, would operate press "A."

Walzberg said that Vasquez did not mention safety to him at the time of his termination, and Walzberg said Nelson did not mention safety on that occasion, but that Nelson did say the following week that the Union was going to fight the termination of Vasquez on the basis of a safety hazard.

The findings of fact in this section are based upon the testimony of Nelson and Vasquez, although I do not credit the portion of Vasquez' testimony that, at the time of his termination, he thought the situation was dangerous. As will be explained later, the evidence is convincing that it was the manning of the press, rather than the safety factor, which precipitated Vasquez' refusal to work. Although I have given consideration to Walzberg's version, I have credited the versions of Nelson and Vasquez for the reasons stated previously.

F. *The Decision of the Deputy Labor Commissioner*

Subsequent to his termination by Respondent, Vasquez filed a complaint with the Department of Industrial Relations, Division of Labor Standards Enforcement, of the State of California. An order to appear before labor commissioner dated September 13, 1977, was introduced into evidence as Respondent's Exhibit 4. The decision of the deputy labor commissioner, Richard L. Mitchell, was introduced into evidence as Respondent's Exhibit 5. The deputy labor commissioner's decision is dated September 21, 1977, and provides in part:

FINDINGS OF FACT

Louie Vasquez, plaintiff, alleges he was discharged in violation of Labor Code Section 6311. It is his testimony that failure to provide adequate personnel to staff the printing presses presented a real and apparent hazard.

Frank Warran, Cal/OSHA Region II, District 5 Manager, testified that:

I. There is no Safety Order regulating the manpower on printing presses.

II. Certified Ad Service, defendant, was inspected by his office of Cal/OSHA in 1976. During the course of their investigation no Special Safety Order was written.

III. Sometimes Special Safety Orders are written when there is an apparent safety hazard that is not otherwise covered.

IV. When Special Orders are written, they are limited to the situation at hand and cannot be projected to cover other employers.

V. Special Safety Orders are prospective and not retroactive. They may be for a limited time or for an indefinite period. They are in effect from the time they are issued forward.

VI. Since the 1976 Cal/OSHA inspection no other inspection has been made.

VII. The Fresno office of Cal/OSHA has not received a complaint from the plaintiff.

The plaintiff and his representatives were unable to specify a Safety Order Violation.

CONCLUSION

The question of whether or not a real and apparent hazard exists because of the staffing practices of Certified Ad Services is overshadowed by a lack of a Safety Order violation. In the absence of a Safety Order violation, there can be no violation of Labor Code Section 6311.

DECISION

I find for Certified Ad Service.

The findings of fact in this section are based upon the testimony of Vasquez and documentary evidence.

G. Conclusions

A threshold issue to consider is the objection raised by the attorney for Respondent concerning the portion of the brief filed by the counsel for the General Counsel which went beyond the contention that Louie Vasquez was discharged for protesting conditions which Vasquez believed to be dangerous to his fellow employees.

I have considered Respondent's objection to the General Counsel's brief in light of the fact that a substantial

amount of the testimony in this proceeding concerned the matter of whether or not it was safe to perform a three-unit, four-color job with less than three persons working in a crew. Certainly, the safety matter was explored in great detail at the trial. Arguments were advanced by the counsel for the General Counsel that Vasquez was terminated because he refused to work when Respondent told other employees to work under conditions which Vasquez had reason to believe were dangerous. However, counsel for the General Counsel made it clear at the trial that that theory was not the only theory on which the General Counsel was alleging a violation of Section 8(a)(1) of the Act.

For example, see transcript pages 92 through 97. At page 92, counsel for the General Counsel asked a question of Walzberg as follows, "And the majority of the counterproposals involved proposals by the employer to change the existing procedures, the status quo, at the employer's premises. Is that correct?" During a discussion of an objection made by the attorney for Respondent to that question, counsel for the General counsel argued, *inter alia*, the following at page 94:

The second page of that document reflects certain proposals by the employer with respect to the manning requirements of various units. And the law, I think, is clear in this area. It states that an employee who is discharged for attempting to maintain the status quo is engaging in protected concerted activities. And to the extent that the employee in this case was engaged and attempting to preserve the status quo, I'm attempting to show that he was engaged in protected concerted activities. I'm attempting to establish what the status quo was. And I think this ties it down.

Certainly, there's been testimony earlier on it. This ties it down in a little greater detail.

In addition, see transcript pages 150 through 164, and especially pages 158-159, where the counsel for the General Counsel makes the following argument:

The contract expired on December 31st. From December 31st till August 26th, when the employee was discharged, there was no collective bargaining agreement. We have introduced certain evidence as to what that practice was, during the period of time covered by the agreement and not covered by the agreement. He was discharged when there was no agreement.

Now, the document in which I was asking and making the representation that I was seeking evidence on whether Mr. Vasquez was attempting to preserve the status quo involved the document dated September 2nd, shortly after his discharge. And the question I was asking was not what was covered by the contract. I asked Mr. Walzberg: Do these proposals on September 2nd change the status quo of the working conditions at the premises, at that time, which was subsequent to the expiration of the contract.

So I think that's a distinction, Your Honor. I clearly am contending that Mr. Vasquez was attempting to preserve the status quo. That does not necessarily mean he was attempting to enforce the contract, because the contract had already expired.

Now, the practice subsequent to the expiration of the contract may, in fact, have been the same; but it makes a difference in terms of the application of which allegation the complaint must be addressed to.

If it were a contractual violation, then we would have an 8(a)(3) violation. But there was no contract violation here, because there was no contract. That's why it's an 8(1).

But nevertheless, if he makes an effort to preserve the status quo, be that a contractual situation or a noncontractual situation, it's immaterial. In that case, we have an 8(a)(1) violation of engaging in protected concerted activities, or so we contend.

After considering the foregoing, I conclude that the objection raised by the attorney for Respondent with regard to the brief filed by the counsel for the General Counsel is not meritorious since counsel for the General Counsel made it clear at the hearing that he was alleging a violation of Section 8(a)(1) of the Act based upon alternative theories—one of which was that Vasquez was terminated after refusing to work in an attempt to preserve the *status quo* with regard to the manning of a three-unit, four-color job.

We turn now to the question of whether or not Vasquez was a supervisor within the meaning of the Act at the time of his termination by Respondent on August 26, 1977.

I recognize that it is not necessary that a person possess all of the statutory authority set forth in Section 2(11) of the Act in order to be found to be a supervisor because Section 2(11) of the Act is to be read in the disjunctive. *Ohio Power Company v. N.L.R.B.*, 176 F.2d 385 (6th Cir. 1949), cert. denied 338 U.S. 899; *Arizona Public Service Co. v. N.L.R.B.*, 453 F.2d 228 (9th Cir. 1971).

It is also clear that possessing the title of "acting foreman" or "working-man-in-charge" is not determinative. As observed by Administrative Law Judge Arnold Ordman whose findings were adopted by the Board in *D. H. Overmyer Co., Inc.*, 196 NLRB 789, 791 (1972); "But it is familiar and sound doctrine that such a title is not determinative of supervisory status. Critical rather are the functions performed and the authorities possessed or exercised."

In *Commercial Fleet Wash, Inc.*, 190 NLRB 326 (1971), the Board stated: ". . . we do not consider these few isolated instances, in view of the record as a whole, to be sufficient to establish that they possess the supervisory authority contemplated by Section 2(11) of the Act." In *Meijer Supermarkets, Inc.*, 142 NLRB 513, 517, fn. 8 (1963), the Board said: "In accordance with established policy the Board will not exclude persons as supervisors who do not at present exercise supervisory authority or do so only on an irregular or sporadic basis," citing *Huntley Industrial Minerals, Inc.*, 131 NLRB 1227, 1228 (1961). See also *Highland Telephone Cooperative, Inc.*, 192 NLRB 1057 (1971); *Foote's Dixie Dandy, Inc.*, 223 NLRB 1363 (1976).

With the foregoing Board precedents in mind, I conclude that Vasquez was not a supervisor within the meaning of the Act at the time of his termination on August 26, 1977, although he was the acting foreman or "working-man-in-charge" at that time. It is clear that, by virtue of Vasquez having the most seniority, he was automatically

placed in the position of acting foreman or "working-man-in-charge" when the regular foreman was absent from work.

While the record does not disclose the exact number of times and exact number of days that Vasquez served in that capacity of acting foreman or "working-man-in-charge," I conclude from the testimony of Vasquez and Walzberg that it was not on a regular day-to-day basis, but instead it was on an irregular or sporadic basis when the foreman, Previtere, was absent due to illness, for example, or for vacation. Furthermore, based on the testimony of Vasquez, I conclude that Vasquez did not possess or exercise any of the indicia of supervisory authority set forth in Section 2(11) of the Act, and that he possessed limited discretion with regard to the performance of work in the event problems arose and Walzberg was not available. I do not credit the testimony offered by Walzberg that Vasquez possessed the authority to hire and fire employees as well as the authority to grant overtime to employees. While I have not overlooked the fact that union representative Ratto expressed the opinion to the Deputy Labor Commissioner that Vasquez was part of management and a supervisor at the time, I have given the facts as testified to by Vasquez regarding his duties and authority much more weight, than the mere opinion expressed by Ratto in another proceeding.

Having concluded that Vasquez was an employee within the meaning of the Act, rather than a supervisor, at the time of his termination, we turn now to a consideration of Respondent's motivation or reason for terminating Vasquez. The testimony by Nelson is, in my view, significant with regard to this issue. It should be recalled here that it was in a conversation between Nelson and Ratto which occurred after the termination of Vasquez that Ratto advised Nelson, "He told me to tell Mike that we were going to build our case, our defense, on the premise that, one, we were running the press undermanned and, two, the safety factor." Also, it should be remembered that Vasquez himself did not mention the lack of safety, or his belief that operating the three-unit, four-color job with two men was dangerous, to Walzberg either prior to or immediately after his termination. Furthermore, the testimony of Vasquez at the trial revealed that the potential dangers which he said he perceived from the operation of the press were present whether the press was being operated by two persons or three persons. As Vasquez testified, "I think they're both the same, just on account of the machine just moving constantly all the time."

I conclude that safety considerations did not precipitate Vasquez' refusal to work on August 26, 1977, and that safety considerations did not play a part in Respondent's decision to terminate him.

We turn now to a consideration of counsel for the General Counsel's other theory of a violation of Section 8(a)(1) of the Act. That theory is that Vasquez was terminated by Respondent for his refusal to perform work because Respondent altered the *status quo* with regard to the manning of a three-unit, four-color job.

With regard to that theory, I conclude initially that the evidence shows that the established practice, both prior to and even on the morning of August 26, 1977, was for Re-

spondent to assign three persons to perform a three-unit, four-color job. The testimony of Nelson and Vasquez establishes that fact, and Walzberg also said that was normally done. Of course, there were some past exceptions to the practice, but the evidence shows that the established practice and normal practice was to have three persons perform that type of work—just as Respondent had done during the morning of August 26, 1977.

After the lunch period, however, Respondent asked to have a three-unit, four-color job performed with only two persons, instead of three persons. It was that change which Vasquez specifically and expressly protested to Walzberg that afternoon by refusing to perform work on press "A" if Respondent altered the manning practice on press "B." Respondent fired Vasquez for doing so, and thereby violated Section 8(a)(1) of the Act. As the Board observed in *Bob Henry Dodge, Inc.*, 203 NLRB 78 (1973);

As we view it, Daley, in seeking to preserve the *status quo*, was doing no more than the Administrative Law Judge claims he should have done. Even were Daley's conduct to be construed as disobedience, the question would still remain as to the protected character of his conduct, it being well settled that, absent unusual circumstances not here present, the protections accorded employees under the Act are not dependent upon the merit, or lack of merit, of the concerted activity in which they engage, even though such activity embraces the disobedience of an order of management.²

² *Eastern Illinois Gas & Securities Co.*, 175 NLRB 639, 640; *Anaconda Aluminum Company*, 160 NLRB 35, 40.

I have considered the fact that Respondent had asked Nelson, who was the operator on press "B" and also the chapel chairman, to perform the three-unit, four-color job on press "B" the afternoon of August 26, 1977, with two men, and that Nelson agreed to do so. However, I conclude that Nelson's action in this regard did not amount to a clear and expressed waiver by the Union of the established practice since the evidence does not show that Nelson had such authority to do so, and further, immediately after Vasquez' discharge and Nelson's telephone conversation with union representative Ratto, Nelson told Walzberg that the Union was going to protest Respondent's termination of Vasquez on the basis of the manning of the job and the lack of safety. In these circumstances, I conclude that Nelson's acceding to Walzberg's request that afternoon did not remove Vasquez from the protection of the Act.

In view of the foregoing, I conclude that a preponderance of the evidence does establish that Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act when it terminated Vasquez on August 26, 1977.

Upon the basis of the foregoing findings of fact and upon the entire record in this proceeding, I 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. By terminating Louie Vasquez on August 26, 1977, for his refusal to perform work because Respondent altered the status quo with regard to the established manning practice concerning the number of employees to perform work on a three-unit, four-color job, Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. The unfair labor practices set forth above affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Since I have found that Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act, I shall recommend to the Board that Respondent be ordered to cease and desist from engaging in the unfair labor practices.

I shall also recommend to the Board that Respondent take certain affirmative action in order to effectuate the policies of the Act.

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

ORDER ¹

Respondent, Certified Ad Services, Inc., Fresno, California, its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Terminating an employee of Respondent for his refusal to perform work because Respondent alters the status quo with regard to the established manning practice concerning the number of employees to perform work on a three-unit, four-color job.

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

2. Take the following affirmative action which is deemed to be necessary in order to effectuate the policies of the Act:

(a) Offer Louie Vasquez immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position of employment, without prejudice to his seniority or other rights and privileges previously enjoyed.

(b) Make whole Louie Vasquez for his loss of earnings, with appropriate interest thereon, which has resulted from his termination by Respondent, with backpay and interest to be computed in accordance with the Board's decisions

¹ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

in *F. W. Woolworth Company*, 90 NLRB 289 (1950); *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962), and *Florida Steel Corporation*, 231 NLRB 651 (1977).

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

(d) Post at its Fresno, California, facility copies of the attached notice marked "Appendix."² Copies of said notice, on forms provided by the Regional Director for Region 32, after being duly signed by Respondent's authorized representative, shall be posted by it 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.

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

² In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

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

WE WILL NOT terminate an employee for his refusal to perform work because we alter the status quo with regard to the established manning practice concerning the number of employees to perform work on a three-unit, four-color job.

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

WE WILL offer Louie Vasquez immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position of employment, without the loss of his seniority or other rights and privileges previously enjoyed.

WE WILL pay to Louie Vasquez the amount of his loss of earnings, with appropriate interest thereon, which resulted from our termination of him.

CERTIFIED AD SERVICES, INC.