

AMC Air Conditioning Co. and North Central Texas Laborers' District Council Local Union No. 1324 and International Association of Machinists and Aerospace Workers, AFL-CIO. Cases 16-CA-6581 and 16-CA-6710

September 23, 1977

DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS
PENELLO AND MURPHY

On March 29, 1977, Administrative Law Judge Ralph Winkler issued the attached Decision in this proceeding. Thereafter, the General Counsel 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 briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge¹ only to the extent consistent herewith.

The General Counsel contends that Respondent violated Section 8(a)(1) by preventing employee Threadgill on nonworktime and in a nonwork area—that is, in the lunchroom during his lunchbreak—from reading to other employees material concerning the rights of employees, management, and labor under the Act, and violated Section 8(a)(3) by discharging Threadgill for engaging in union or protected activity. The Administrative Law Judge found, however, that Threadgill had no protected right to make an unauthorized speech in the lunchroom and that he was properly discharged, essentially for insubordination. We disagree.

I. THE 8(a)(1) VIOLATIONS

North Central Texas Laborers' District Council Local Union No. 1324 began organizing Respondent's plant in April 1976. Gregory Threadgill was,

¹ The complaint alleged, *inter alia*, that Paul W. Josey was unlawfully discharged on July 22, 1976. The Administrative Law Judge concluded, however, that the record failed to establish that Josey was discharged for unlawful reasons rather than for insubordination as asserted by Respondent. In reaching this result he found it unnecessary to pass on Respondent's contention that Josey was at all times relevant a supervisor. Neither the General Counsel nor the Charging Party in Case 16-CA-6710 filed exceptions to the recommended dismissal of the complaint with respect to Josey's discharge. However, Josey filed papers with the Board in which he alleged that he had never been a supervisor and that his case was not adequately tried, with the consequence that the record evidence does not justify dismissing the complaint with respect to him. He thus requests that the record be reopened for the purpose of taking additional evidence bearing on the legality of his discharge. We find below that Respondent did engage in certain unlawful conduct prior to the date of Josey's discharge with the consequence that the circumstances surrounding that discharge do

as Respondent knew, active on behalf of the Union. On May 7 during his lunch period, he stood up in the lunchroom and in a loud voice asked for attention, stated his name, and informed the approximately 75 employees there in the room that he was a member of the union committee trying to organize the plant. After making another comment or two, he began to read from a book material concerning the rights of employees, management, and labor under the Act.² At the time, Foreman Davenport was eating in the lunchroom. He checked with Plant Manager Palmer to see if Threadgill had permission to give a lunchroom speech, learned he did not, and then, with two other supervisors supporting him, three or four times ordered Threadgill to stop his unauthorized speech. Threadgill refused on the ground he had a right to continue. Finally, one of the supervisors involved, Jackson, closed the book Threadgill was reading from and with that the latter gave up his attempt to finish his "speech."

There can be no question but that an employee's making a union-related speech as here on his own time and in a nonwork area is a type of concerted activity protected by the Act. Indeed, it is not contended otherwise. Rather, the issue as presented is whether or not in the particular circumstances Respondent had an overriding right legally justifying its forcing Threadgill to discontinue his speech; i.e., reading from a book on rights under the Act. The Administrative Law Judge held that it did, relying in this regard on what he found to be Respondent's rule proscribing, *inter alia*, lunchtime speeches or meetings in the lunchroom without prior approval from management, a rule which he concluded reflected a legitimate concern of management to insure employees "their undisturbed tranquility" during their 30-minute lunch period.

It may well be that in certain limited circumstances an employer can lawfully prohibit the use of a lunchroom during mealtimes for various loud or otherwise disrupting activities including certain normally protected concerted activities.³ But contrary to the conclusions of the Administrative Law

indeed appear suspicious. Nevertheless, we find that the Administrative Law Judge's result is supported by largely uncontradicted and substantial evidence and that insufficient grounds have been advanced for either reversing that result or for remanding the case for taking additional evidence. Furthermore, Josey's record testimony supports, we find, the conclusion that he was at the time of his discharge a supervisor as defined in the Act. In view of all the foregoing, Josey's request that the case be remanded for the taking of additional evidence with respect to his discharge is denied.

² Threadgill stated that he was not acting as a member of the union committee in addressing the employees but rather as a citizen of the United States. Such comment does not subtract at all from the fact that Threadgill was concerned with encouraging employees to engage in union activities by reading to them what their rights with regard to such matters were.

³ See, e.g., *Farah Manufacturing Company, Inc.*, 202 NLRB 666, 707 (1973), where the Board adopted the Administrative Law Judge's conclusion

Judge we are not faced with that type of situation here, for there is no evidence that the silencing of Threadgill was a consequence of any established management policy or rule prohibiting speechmaking or similar mealtime conduct in the lunchroom for any reason, much less for the specific purpose of insuring employees "their undisturbed tranquility" during their lunch period.⁴ Certainly there was no announced rule—oral or written—to that effect. Furthermore, Foreman Davenport's and Manufacturing Manager Palmer's handling of the situation belies the conclusion that any such rule existed. Thus, when Threadgill commenced his talk Davenport did not stop him on the ground it was prohibited by a rule. Rather he checked with Palmer to see if Threadgill was authorized to give a speech in the lunchroom. As for Palmer, he made no reference to any rule forbidding mealtime speeches, but rather just replied he had given no authorization and directed that Threadgill be stopped. Consequently, it is apparent that Threadgill's error was, at least ostensibly, lack of authorization for his lunchroom speech, not the violation of any established rule or policy proscribing speeches during mealtimes in order to assure "tranquility" in the lunchroom.⁵ However, Respondent cannot lawfully require an employee to secure permission as a precondition to engage, without fear of management interference or retaliation, in protected concerted activities on company property in nonwork areas on the employees' free time.⁶

Consequently, we find in view of all the foregoing that Threadgill's refusal to accede to Davenport's initial demands to stop talking to the lunchroom employees was not, as the Administrative Law Judge found, insubordination, but rather that Davenport's attempt to stop Threadgill's speech and his ultimate success in doing so constituted illegal interference

that a company prohibition against speeches and demonstrations in the company cafeteria was reasonable and proper where the cafeteria was used not only by employees but also by visitors and customers and where speechmaking was permitted in a central hallway frequented by employees the union sought to reach. There is in the present case no evidence of visitor or customer use of the lunchroom, and no claim Threadgill's speech had undesirable business-related consequences. Also there is no evidence that Respondent had provided, or that there existed, any other location where Threadgill could reach the audience he was seeking to reach. Clearly, Foreman Davenport's invitation to Threadgill to take his group outside did not provide him with a satisfactory alternative to make his views public, as Threadgill was seeking obviously to reach employees reluctant to engage in union activities and who therefore would be unlikely to follow him outside.

⁴ In support of his conclusion that there was such a rule, the Administrative Law Judge relied at least in part on evidence that in the past persons seeking to use the lunchroom for meetings of various kinds first asked and were then given permission to do so. But we have here only evidence of a practice, and one which seems singularly unrelated to the problem before us; for there is no showing at all that anyone had ever sought permission for mealtime use of the lunchroom for a meeting or speech, much less that a request of that kind had been denied on grounds of a rule against such use.

⁵ Davenport did testify he told Threadgill he could not give a speech "while the—you know, the employees are having lunch." But he almost

with Threadgill's rights to engage in protected union-related concerted activities.⁷ Accordingly, we further find that in attempting to stop and in finally stopping Threadgill's speech Respondent violated Section 8(a)(1) of the Act.

II. THE DISCHARGE VIOLATION

Precisely what transpired following the suppression of Threadgill's speech is a matter for the most part of disputed testimony, the conflicts having been left unresolved by the Administrative Law Judge. But it does appear that Threadgill had been led to believe he was going to be discharged; that a fellow union in-plant committeeman told him that he should take some witnesses and go to the timeclock; that Threadgill did select a couple of union committeemen as witnesses, left the lunchroom, and headed toward the timeclock; and that some 30 employees followed of their own accord, as there is no evidence that Threadgill requested or otherwise encouraged them to accompany him and his "witnesses." On the way to the timeclock the group was met by Respondent's president, Paschal, who testified that it appeared to him that Threadgill was trying to give a speech and that he asked Threadgill to go to the office with him, but that Threadgill disregarded the request. At that point Manufacturing Superintendent Palmer put in an appearance and Paschal told him to take Threadgill to the office and find out what the problem was. With that Paschal disassociated himself from the situation and according to his own testimony played no part in the subsequent decision to discharge Threadgill.

Palmer did direct Threadgill several times to come to his office. Threadgill initially refused, apparently

immediately followed this testimony with the statement he told Threadgill "he was not authorized to give a speech in the lunchroom." His testimony is thus obviously inconclusive with respect to the existence of any rule. Davenport also testified in response to a leading question that he had told Threadgill "he was disturbing everyone." However, that statement clearly is no support for a conclusion that there was any rule against lunchtime speeches. It is also irrelevant with respect to the protected nature of Threadgill's speech. *Wayne Graphics, Inc.*, 207 NLRB 658, 664 (1973). Finally, it can also be noted that on the record here there is no support for Davenport's statement that employees were disturbed. All we have on this point is Davenport's testimony that when Threadgill started his speech some employees asked him what was going on. In fact, Davenport appears to have been the only person in the lunchroom disturbed by Threadgill's conduct.

⁶ See, e.g., *Fasco Industries, Inc.*, 173 NLRB 522 (1968), and *Campbell Soup Company*, 159 NLRB 74 (1966). Assuming what the facts fail to show that there was a rule which was realized through a fixed policy or intent never to grant permission for mealtime use of the lunchroom for speeches or other disturbing "activities," such a rule would be unlawful if for no other reason than that in not defining the area of permissible union activity in a manner clear to employees it would tend to cause employees to refrain from engaging in protected activities in areas where, and at times when, they have a right to do so under the Act. See *Fasco Industries, supra*.

⁷ *Farah Manufacturing Company, Inc.*, *supra*.

because he believed Palmer should first punch in his timecard.⁸ However, when threatened with physical removal from the plant, he did go to the office. There, according to Palmer's version of the events, he asked Threadgill what his problem was and Threadgill replied that he was "in his rights or within his constitutional rights or something to that effect in giving a speech." Next, Palmer inquired—still according to his testimony—what was the disturbance out on the line, but to this question Threadgill assertedly refused to give any answer or explanation. With that Palmer testified "I terminated him," later explaining that he had fired Threadgill "for refusing a reasonable request on my part, on the part of management and creating a disturbance on the production line during working hours." As stated above, the discharge is alleged to have violated the Act.

Palmer's explanation of the discharge is patently disingenuous, especially in the manner in which it necessarily seeks to separate the incident in the lunchroom concerning the unlawful suppression of Threadgill's speech from subsequent related events. Clearly, Threadgill's conduct while walking through the plant and his alleged recalcitrance at the timeclock were directly caused by Respondent's unlawful conduct in the lunchroom and were an immediate part of Threadgill's response to Respondent's illegal interference. Consequently, even accepting Palmer's explanation that Threadgill was discharged for his behavior in the plant, Threadgill's conduct was both a reasonable and foreseeable consequence of Respondent's interference with his statutory rights and thus was itself, we find, conduct protected by the Act. Furthermore, the record shows, and we find, that Palmer knew that Threadgill's activities for which he was discharged were not some isolated incidents of alleged misbehavior but were immediately related to and in fact had grown out of the lunchtime suppression of his speech. Thus, it was Palmer himself who had ordered the speech stopped as unauthorized; and in the office before his discharge Threadgill told Palmer that his "problem" was that he had a protected right to give the speech.

⁸ Threadgill had punched out for lunch. According to his testimony he was concerned that if he did not punch back in it would appear he had simply left at lunchtime and never returned. A record such as that would, he feared, be detrimental to his own interests. Consequently, it appears—and this irrespective of the substance of Threadgill's fears—that Threadgill's conduct at the timeclock was based on a reasonable and legitimate concern for his own interests and was not simply some mindless or defiant resistance to management.

⁹ Thus the Administrative Law Judge found "that Threadgill was guilty of serious insubordination by insistently ignoring Respondent's repeated requests to discontinue his speech in compliance with the rule, by causing a disturbance in the lunchroom and on the plant floor and by refusing Respondent's requests to discuss the matter away from the working area." He thus concluded "that Respondent did not violate the Act in discharging Threadgill." The Administrative Law Judge's position here necessarily

Further, we believe, and so find, that the foregoing supports the conclusion—also reached by the Administrative Law Judge—that Threadgill was discharged not only for the reasons given by Palmer but also for delivering his protected union-related speech in the lunchroom and for resisting attempts to silence him.⁹

Consequently, whether Threadgill was discharged for his conduct in the plant and at the timeclock, or for his conduct in giving his lunchroom speech and resisting its suppression, or for both reasons, it appears, and we find, that he was discharged for engaging in protected concerted activity. Therefore, his discharge would clearly seem to have violated Section 8(a)(1) of the Act. However, we are faced here with what seems to us to be a rather anomalous situation in that the complaint alleges specifically only an 8(a)(3) violation with respect to the discharge and fails to allege that the discharge constituted either an independent or derivative violation of Section 8(a)(1). Nevertheless, in the circumstances, we believe that the record before us, including the formal papers, justifies a finding that Threadgill's discharge did violate Section 8(a)(1). First, the complaint does allege, *inter alia*, that Threadgill was discharged for engaging in "concerted activities for the purpose of . . . mutual aid or protection," in other words for engaging in protected concerted activities. Thus, the elements of an 8(a)(1) violation were alleged and in consequence Respondent was put on notice that such an issue was present in the case. Second, Respondent's defense was predicated on the claim that Threadgill was discharged for creating a commotion in the plant, and it introduced considerable testimony—part of which we have alluded to above—that Threadgill's discharge was for such reason and for his refusing to comply with a proper order of management, and that that discharge was unrelated to his lunchroom speech and its suppression.¹⁰ Consequently, the Respondent's defense was directed at least in effect toward the 8(a)(1) type allegations of the complaint. It is thus clear that the 8(a)(1) aspects of the discharge were fully litigated. In view of all the foregoing we believe, as

implies a finding with which we obviously agree that Threadgill was discharged for his lunchroom as well as plant conduct. We, of course, have found that conduct not to have been insubordination but rather to have been protected concerted activity.

¹⁰ Respondent filed no brief with the Board, but in its brief to the Administrative Law Judge it took the position that the discharge of Threadgill was not motivated by any antiunion considerations. Nevertheless, Respondent's counsel stated at the beginning of the hearing that Respondent took the position Threadgill was discharged for creating a commotion in the plant and Manufacturing Manager Palmer testified as indicated that he fired Threadgill for such reason and for refusing to obey a proper order of management to go to the company office. Consequently, it is clear that Respondent's initial position and primary testimony were not narrowly related to the 8(a)(3) allegation of the complaint but also covered the 8(a)(1) type allegation.

stated above, that the record fully warrants and supports a finding that Threadgill's discharge violated Section 8(a)(1) of the Act¹¹ and we so find.

Furthermore, as we have noted, the record shows that Threadgill was active in support of the Union; he introduced himself in the lunchroom as a member of the union committee, and the speech related, among other things, to employee rights to engage in union activities. In view of these considerations, we also find that Threadgill's discharge for his union activities in delivering the speech and for resisting attempts to silence him necessarily had the inherent effect of discouraging Threadgill and other employees from engaging in union-related activities and thus constituted unlawful discrimination under Section 8(a)(3) of the Act.¹²

CONCLUSIONS OF LAW

1. AMC Air Conditioning Co. is, and at all times material herein has been, an employer engaged in commerce and a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Association of Machinists and Aerospace Workers, AFL-CIO, is, and at all times material herein has been, a labor organization within the meaning of Section 2(5) of the Act.

3. By prohibiting an employee from giving a union-related speech in a nonwork area on the employee's free time, Respondent violated Section 8(a)(1) of the Act.

4. By discharging Gregory Threadgill for engaging in concerted and union-related conduct protected by Section 8(a)(1) of the Act, Respondent violated Section 8(a)(1) and (3) of the Act.

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

THE REMEDY

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

As we found that Respondent unlawfully discharged Gregory Threadgill, we shall order that it offer him 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 and privileges. We shall also order that Respondent make him whole for any loss of earnings suffered as a consequence of his illegal discharge in the manner provided in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest as prescribed in *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962), and *Florida Steel Corporation*, 231 NLRB 651 (1977).¹³

Finally, in view of the serious nature of Respondent's unfair labor practices, we find that a broad cease-and-desist order is necessary and appropriate.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, AMC Air Conditioning Co., Fort Worth, Texas, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Preventing employees from presenting union-related speeches or speeches concerning protected concerted activities in nonwork areas on the employees' free time.

(b) Discharging employees for engaging in concerted or union-related activities protected by Section 7 of the Act.

(c) In any other manner interfering with, restraining, or coercing employees in the exercise of their rights protected by Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Offer Gregory Threadgill immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent job, without prejudice to his seniority or other rights and privileges or working conditions, and make him whole for any loss of earnings he may have suffered as a result of the discrimination against him, such backpay to be determined in the manner set forth in the section of the Decision entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all

Owens-Corning Fibreglas Corporation v. N.L.R.B., 407 F.2d 1357 (C.A. 4, 1969).

¹² *Radio Officers' Union of the Commercial Telegraphers Union [A. H. Bull Steamship Co.] v. N.L.R.B.*, 347 U.S. 17 (1954).

¹¹ *Independent Metal Workers Union Local No. 1 (Hughes Tool Company)*, 147 NLRB 1573, 1576-77 (1964), in which the Board held in effect that where a complaint describes a violation of a certain section of the Act and where the facts constituting such violation are alleged and fully litigated, the Board is not precluded from finding a violation of the relevant section of the Act merely because the General Counsel has not alleged as a legal conclusion that the pleaded and litigated facts violated such section of the Act. See also *America Newspaper Publishers Association v. N.L.R.B.*, 193 F.2d 782, 799-800 (C.A. 7, 1951), cert. denied 344 U.S. 812 (1952), and *REA Trucking Company, Inc. v. N.L.R.B.*, 439 F.2d 1065 (C.A. 9, 1974), and

¹³ In accordance with our decision in *Florida Steel Corporation*, 231 NLRB 651 (1977), we shall apply the current 7-percent rate for periods prior to August 25, 1977, in which the "adjusted prime interest rate" as used by the Internal Revenue Service in calculating interest on tax payments was at least 7 percent.

other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its Fort Worth, Texas, plant copies of the attached notice marked "Appendix."¹⁴ Copies of said notice, on forms provided by the Regional Director for Region 16, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 16, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

¹⁴ 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 prohibit our employees from giving union-related speeches or other speeches concerning protected concerted activities in non-work areas including the lunchroom on their free time.

WE WILL NOT discharge employees for engaging in protected concerted or union-related activities, including giving speeches in the lunchroom on their free time concerning protected concerted or union activities.

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

WE WILL offer Gregory Threadgill immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent job, without prejudice to his seniority or other rights and privileges or working conditions, and we shall pay him for any loss of earnings he may have suffered as a result of his unlawful discharge.

AMC AIR CONDITIONING
Co.

DECISION

STATEMENT OF THE CASE

RALPH WINKLER, Administrative Law Judge: Upon charges filed on May 10 and July 26, 1976, a consolidated complaint issued by the General Counsel on August 18, 1976, and an answer filed by Respondent, a hearing was held in Fort Worth, Texas, on November 11 and December 7, 1976.

Upon the entire record in the case, including my observation of the demeanor of the witnesses and upon consideration of briefs, I make the following:

FINDINGS OF FACT

I. BUSINESS OF RESPONDENT

Respondent AMC Air Conditioning Company, a Texas corporation, manufactures air conditioner component parts at a plant in Fort Worth, Texas. It is an employer within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATIONS INVOLVED

North Central Texas Laborers' District Council Local Union No. 1324 (herein called Union) and International Association of Machinists and Aerospace Workers, AFL-CIO (herein called Machinists), are labor organizations within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

All dates herein are in 1976.

The complaint alleges that on May 3, Respondent "by order and by physical restraint, prohibited an employee [Gregory Threadgill] on non-work time and in a non-work area from reading to other employees their rights under Section 7 of the Act, and distributing to them pamphlets or literature regarding their rights" thereby violating Section 8(a)(1) of the Act, and that Respondent discharged Threadgill on May 7 and Paul Josey on July 22 in violation of Section 8(a)(1) and (3) of the Act. Respondent denies all alleged violations and claims that it discharged Threadgill for causing a disturbance in the plant and Josey for insubordination, and it further asserts that Josey was in any event a statutory supervisor and therefore outside the Act's protection.

The Union (Laborers) began organizing Respondent's employees in or about April, and on May 10 some 28 employees sent a letter to Respondent, signed by each of them including Threadgill and Josey, advising that they were actively engaged in the organizational effort. Except as described above, the complaint does not allege, and the record does not establish, that Respondent has engaged in any other violations of the Act, that Respondent is opposed to the unionization of its employees, or that Respondent has ever expressed such animus to its employees.

Threadgill's Discharge

Threadgill was in Respondent's employ about 2 months when he was discharged. He had attended union meetings and had openly handed out union cards in the plant

lunchroom and solicited employees to sign them. Threadgill's supervisors saw him engaging in this activity and they said nothing to him about it.

During his lunch period on May 7, Threadgill stood up in the lunchroom where approximately 75 employees were eating at the time. (The lunchroom was estimated to be somewhat larger than 25 feet by 75 feet.) In a loud voice Threadgill announced his name to the employees and stated that he wanted their attention and he told them he was on the organizing committee which was trying to form a union at the plant. Threadgill then proceeded to read from a high school textbook concerning the respective rights under the Act of employees, employers, and unions. Foreman Jimmy Davenport was having lunch with some 14 of his employees and they apparently did not want to listen to Threadgill's speech. Davenport checked with Winston Palmer, the plant manager, to determine whether Threadgill had been given permission to make a speech in the lunchroom during that period and Palmer advised him that Threadgill had no such authorization and that Davenport should stop Threadgill's speech. Davenport returned to the lunchroom and either he or another supervisor informed Threadgill that unauthorized speeches in the lunchroom during lunch period were against company policy and that Threadgill would have to stop. Threadgill argued with Davenport about his right to make the speech, and he continued addressing the employees. Davenport repeated the instruction to Threadgill, and Threadgill again failed to comply. Meanwhile some 10 or 15 employees in the lunchroom began cheering Threadgill, and Davenport told Threadgill he could go outside the plant and make his speech to those employees who wanted to hear him but that he should stop disturbing the other employees in the lunchroom. Threadgill continued with his speech. Davenport a third time told Threadgill to stop, and Threadgill once more ignored Davenport's request. Another supervisor thereupon reached over and forcibly closed the book from which Threadgill was reading to the employees. Threadgill then sat down, but not before arguing heatedly with Davenport in "nose to nose" fashion. Threadgill testified that during this incident an unidentified supervisor also told him he could not distribute union literature in the lunchroom.

There is some conflict in the record at this point. Threadgill testified, without corroboration, as follows: That before sitting down he mentioned he would find out about his right to make a speech and that when he did sit down an unidentified supervisor told him to leave the premises; that he then sought to make a telephone call in the lunchroom to a union organizer to inquire about his rights and that, after dialing the number and while waiting for the organizer to answer the call, Respondent President A. J. Paschal entered the lunchroom and disconnected the telephone receiver and told Threadgill to go with him; that Paschal "got mad" when Threadgill refused to accompany him, whereupon Paschal directed Palmer to "take this man's name down" and that he (Paschal) wanted Threadgill "out of here right now" and would call the police if necessary; that Threadgill replied that they knew where his

timecard was if they wanted to terminate him; that Paschal and Palmer thereupon left the lunchroom and that Threadgill, taking some "witnesses" with him and followed by half the people in the lunchroom, also left the lunchroom and headed for the timeclock which was located in or adjacent to an area where employees were at work; that on the way to the timeclock, Paschal asked Threadgill what his "problem" was and that Threadgill replied that he wanted to make a speech; that Paschal told Threadgill he wanted Threadgill off the premises and would call the police;¹ and that Threadgill and Palmer had another exchange at the timeclock and that Palmer told Threadgill that he (Palmer) didn't have to fire Threadgill and would just take Threadgill to the personnel office.

Paschal and Palmer denied having been in the lunchroom at all on the occasion to which Threadgill testified, and they testified in effect that they first observed Threadgill addressing some 30 employees in a production area near the timeclock; that Paschal asked Threadgill to come to his office and, upon Threadgill's refusal, Paschal instructed Palmer to inquire about the cause of the disturbance and that Palmer should get Threadgill out of the production area and have the other employees return to work; that Palmer asked Threadgill to accompany him to the office, and Threadgill refused; that Palmer then removed Threadgill's timecard and several times repeated his request that Threadgill go with him to the office; and that Threadgill did go to the office after Palmer told Threadgill he would be forcibly removed from the plant unless Threadgill would "sit down and talk."

All parties agree that Threadgill finally went to Palmer's office and Palmer testified that he then asked Threadgill what the disturbance was about and that he fired Threadgill when Threadgill refused to answer or explain the situation. Palmer testified that he discharged Threadgill for creating a disturbance in a production area and for refusing to come to his office to discuss the matter. Threadgill testified that Palmer told him he was being terminated "for holding an unlawful union meeting and causing a disturbance in a work area."

The record establishes that speeches may not be made or meetings held in the lunchroom without prior approval from either the front office or Plant Manager Palmer and that, upon such authorization, the procedure is to post notices of the meeting on the plant bulletin board. Palmer testified that the only speeches he has attended in the lunchroom were after work, not during the lunch period. Threadgill had not sought or obtained permission to make his speech. It is recalled that Threadgill had solicited and handed out union cards in the lunchroom with company knowledge and without criticism or other interference of any sort, and the record does not establish that there was any restriction on such personal distributions or solicitations. (I do not credit Threadgill's testimony that an unidentified supervisor told him he could not distribute union literature in the lunchroom). Foreman Davenport testified that he stopped Threadgill from making the speech, not because of the union content of the speech but because Threadgill had not been authorized to make one

¹ As indicated above, Threadgill first placed this particular conversation with Paschal in the lunchroom.

and because Threadgill was disturbing him and other employees by making the speech during the lunch period.

Discussion

After the parties had rested and in an effort to understand the theory of the General Counsel's case, I inquired whether the General Counsel was contending that Threadgill had a protected right to make a union speech notwithstanding the company rule described above, and I also inquired whether Respondent would violate the Act by discharging Threadgill for persisting in making a speech despite repeated requests and instructions that he stop. The General Counsel replied that on those facts alone Respondent would not have violated the Act. The General Counsel then stated that his theory of the case was that Respondent had discharged Threadgill for antiunion reasons. When I then inquired what showing there was of union animus, the General Counsel mentioned that Paschal had purportedly interfered with Threadgill's telephone call to the union organizer and that Respondent did discharge Threadgill, and in his brief the General Counsel also relies in this connection on the purported statement by an unidentified supervisor (which statement I have not credited) concerning the distribution of union literature. There was neither claim nor showing of disparate use of the lunchroom as to union speeches and, whether or not Paschal did interfere with Threadgill's call, there was no credible showing of union animus. Accordingly, I find that the record does not establish that the union nature of the speech — as distinguished from the fact of making a speech at all — had anything to do with Respondent's motivation in discharging Threadgill.

In his brief the General Counsel contends for the first time that Threadgill did in fact have a protected right to make the speech, and as predicate for this contention he relies on established law concerning the statutory protection afforded union solicitation and distribution in nonwork areas during nonworktime. The General Counsel thereupon asserts that the company rule was "overly broad" and therefore illegal in prohibiting speeches in such circumstances. The General Counsel also now contends that even assuming the validity of the company rule, Threadgill's conduct was not so unreasonable as to deprive him of the protections he would otherwise enjoy while engaging in union activities in a nonwork area during nonworktime. The General Counsel states in connection with these various theories that "No one was forced to stay [in the lunchroom during their own lunch period], and there is no evidence Threadgill demanded that anyone pay attention to him."

Respondent does not question the right of its employees to solicit in behalf of the Union or to distribute union literature in the lunchroom, which would be in a nonwork area during nonworking hours. *Republic Aviation Corporation v. N.L.R.B.*, 324 U.S. 793, 803 (1945); *N.L.R.B. v. Magnavox Company of Tennessee*, 415 U.S. 322, 324 (1974); *Samsonite Corporation*, 206 NLRB 343, 346 (1973). And it is to be presumed that any restraint on such activities is "discriminatory in the absence of evidence that special circumstances make the rule necessary in order to maintain production or discipline." *Peyton Packing Company, Inc.*,

49 NLRB 828, 843-844 (1943), quoted with approval *N.L.R.B. v. Magnavox, supra*; *East Bay Newspapers, Inc., d/b/a Contra Costa Times*, 225 NLRB 1148, 1149 (1976); *Hoerner Waldorf Corporation*, 227 NLRB 612, 613 (1976).

Speeches in behalf of unions are a form of organizational activity, but as in the present case that technique is vastly different from personal solicitation or other private conversations. Employees were in the lunchroom to have lunch and relax, and it is a legitimate concern of their employer to insure their undisturbed tranquility during that 30-minute period. It is not enough to prevail here that Threadgill had a right to solicit individual employees in the lunchroom or to attempt to speak with them privately concerning the Union. In these situations, plainly protected under the Act, the individuals are free to rebuff or ignore him and to continue their luncheon period without disturbance. Nor is it appropriate to say, as the General Counsel suggests, that employees who did not want to hear Threadgill were free to leave the lunchroom. Indeed, when I inquired at the hearing whether Respondent would have violated the Act by refusing to allow an employee organizer to make a speech in the lunchroom during the luncheon period, the General Counsel said Respondent would not have. The General Counsel nonetheless does further argue that the facts of this case "are substantially similar, if not identical to," the facts in *Farah Manufacturing Company, Inc.*, 202 NLRB 666 (1973). I respectfully disagree with the General Counsel's analysis of that case, which I find to be plainly distinguishable from this case in important respects which need not be explicated here.

In balancing the conflicting legitimate interests of all parties herein, I find that Respondent's rule is lawful under the Act. And I find that Threadgill was guilty of serious insubordination by insistently ignoring Respondent's repeated requests to discontinue his speech in compliance with the rule, by causing a disturbance in the lunchroom and on the plant floor, and by refusing Respondent's repeated requests to discuss the matter away from the working area. I accordingly conclude that Respondent did not violate the Act in discharging Threadgill. Upon consideration of all attendant circumstances, including Threadgill's provoking conduct in particular, I also find no violation in the alleged telephone call episode even on the basis of Threadgill's testimony.

Josey's discharge

Josey was hired as a truckdriver in July 1974, and he eventually became a "vacuum machine supervisor" in the production department, the position he held at the time of his discharge on July 22, 1976. Although Respondent raises a supervisory defense as to this discharge, I find it unnecessary to discuss and resolve that issue as I shall recommend dismissing his case on its merits.

It is recalled that Josey was 1 of 28 employees who by letter of May 10, 1976, advised Respondent that they were "actively engaged" in organizing a union at Respondent's plant. Josey passed out cards and distributed union literature in the lunchroom before and after work and during the lunch period. There is no evidence that Respondent interfered with his activities in any respect or spoke to him about his organizational efforts and, as stated

above, this record contains no showing that Respondent expressed any union opposition or that it even has such animus.

Gary Swinney is manager of the plastics department. Swinney testified that he fired Josey for insubordination in that Josey failed on July 19 to follow instructions as to unloading and checking of merchandise. Swinney testified without contradiction and I find that he instructed Foreman Ron Tritton to have Josey check in a large load of material so that the whereabouts and availability of the merchandise could be controlled; and that Josey was given a packing slip for this purpose but that he failed to check in all the material as directed with the result that Josey "had about half of it checked in, and the rest of the material was just stacked around. We didn't know what had been delivered or what happened."

The General Counsel asserts that Respondent's insubordination defense is merely a pretext and that it really fired Josey for union reasons. The General Counsel thus refers to the fact that Josey had been in Respondent's employ for 2 years and that Respondent had issued a written reprimand to Josey on May 12, 2 days after being advised of Josey's organizational effort, and then issued another

reprimand to him on June 11. The General Counsel contends that neither reprimand was justified although he has not alleged that their issuance was discriminatory.

The General Counsel's argument might be said to raise a suspicion, at most, about Josey's discharge. But suspicion will not carry the day. Upon consideration of the entire record, including a complete lack of showing of animus, I conclude that the record does not preponderantly establish that Respondent discharged Josey for union reasons and not for the "insubordination" incident. I shall recommend dismissal of his case.

CONCLUSIONS OF LAW

1. Respondent is an employer within the meaning of Section 2(6) and (7) of the Act.
2. Laborers and Machinists are labor organizations within the meaning of Section 2(5) of the Act.
3. The record does not preponderantly establish that Respondent has violated the Act in any respects alleged in the complaint.
[Recommended Order for dismissal omitted from publication.]