Endicott Interconnect Technologies, Inc. *and* Alliance @IBM/Communications Workers of America, Local 1701, AFL–CIO. Case 3–CA–24105

August 27, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On August 7, 2003, Administrative Law Judge Joel P. Biblowitz issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief answering the Respondent's exceptions.[1]

The National Labor Relations Board has considered the decision and the record in light of the exceptions, cross-exceptions, and briefs and has decided to affirm the judge's rulings, findings, and conclusions as clarified below, and to adopt the recommended Order.[2]

The issue in this case is whether public statements made by employee Richard White on two occasions constituted activity protected by the Act, or rather were disloyal conduct warranting his discharge for cause. The judge found White's conduct protected, and concluded that the Respondent violated the Act by retaliating against him. Consistent with our discussion below, we find that the judge's decision is in accord with *NLRB v. Electrical Workers Local 1229 (Jefferson Standard),* 346 U.S. 464 (1953), and its progeny.

I. THE RELEVANT FACTS

The Respondent produces printed circuit boards for the computer industry at its facility in the Binghamton area of upstate New York. The Respondent's owners had negotiated and completed the purchase of the business from IBM between March and November 2002.[3] Their motivation in acquiring the business was, in part, to protect the local economy from massive layoffs being contemplated by IBM, and in part to take advantage of a potentially profitable business investment. In exchange for their commitment to maintain jobs at the facility, the Respondent's owners received financial assistance from the State of New York in completing the transaction. After the purchase, IBM became a customer of the Respondent, accounting for about 60 percent of the Company's sales.

The Union had been organizing at the facility for about 3 years prior to the purchase, although it had not succeeded in becoming the IBM employees' bargaining representative. The Union continued its organizing activities with the employees of the Respondent who were carried over from IBM after the purchase.

On November 15, 2 weeks after the purchase was completed, the Respondent permanently laid off 10 percent of its work force of 2000 employees. Because IBM had been one of the area's larger employers, and because of the investment of public funds in the enterprise to preserve local jobs, the layoffs attracted significant attention in the local media. The Union requested that employee and union member White, who was not laid off, provide comments about the layoff for an article in a local newspaper. The article appeared on November 16. In relevant part, it stated:

> The firing of 200 people at the fledgling Endicott Interconnect Technologies two weeks after its birth was a "pragmatic" decision by James J. McNamara, Jr., president and chief executive officer.
>
> "I have a fiduciary responsibility to make this business profitable," McNamara said, just hours after notifying scores of mid-level managers, engineers and support people on Friday morning that they no longer had jobs.
>
> Those affected by Friday's action are not in a forgiving mood. They are unwilling to accept that the cutbacks are in the best interest of the company. Many feel a sense of betrayal in their enthusiasm for a new start with this IBM successor company. Other workers believe that they were fed a line of false promises when the deal to sell the IBM-Endicott site to local investors was announced in July.
>
> "This is greed with a capital G," said Mike McKercher, who spent 26 years with IBM and two weeks with Endicott Interconnect. "I walked by Thomas Watson's picture and you could see tears running down his (face)."
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> Endicott Interconnect executives said they had no choice in the matter. Depressed production volumes don't support the infrastructure the 15-day-old company inherited from IBM Corp. As an independent company without the corporate bureaucracy of the entrenched computer maker, Endicott Interconnect

[1] In addition, the General Counsel filed cross-exceptions and a supporting brief; the Charging Party filed cross-exceptions and a brief both supporting its cross-exceptions and in opposition to the Respondent's exceptions; the Respondent filed a reply brief in further support of its exceptions and in opposition to the General Counsel's and the Charging Party's cross-exceptions; and the Charging Party filed a reply brief in further support of its cross-exceptions.

[2] In its exceptions, the Charging Party requested that, in addition to the usual remedial notice posting, the Board's notice should be posted electronically by means of the Respondent's e-mail and intranet systems. There is no evidence in the record concerning the Respondent's customary means of providing information to its employees. Member Liebman would leave this matter to the compliance stage. Member Schaumber would deny the Union's request. In the absence of a majority in favor of requiring electronic posting, the Union's request is denied.

[3] All subsequent dates are in 2002.

> Technologies could slice off a layer of management without an effect on the customer, McNamara said.
>
> Some employees disagree, saying the decision made Friday will hurt the company over the long term.
>
> *"There's gaping holes in this business," said Rick White, an employee with 28 years at the Endicott plant who, with nearly 2,000 other people, recently transferred from IBM to Endicott Interconnect.*
>
> *White, who kept his job, said development and support people with specific knowledge of unique processes were let go, leaving voids in the critical knowledge base for the highly technical business.*
>
> McNamara, for his part, doesn't dispute that Friday's action will produce more work and more responsibilities for others in the plant. Managers with one area of responsibility may be asked to oversee one or two other areas, he said. Cutting a management layer, however, will give the remaining workers a larger role in the business, he said. [Emphasis added.]

Soon after the article was published, William Maines, one of the Respondent's co-owners, received a telephone call from an IBM official who called on behalf of IBM as a customer. In response to questions about White's "gaping holes" comment in the article, Maines assured the official that the layoff would not affect the Company's performance.

On November 19, White was called into a meeting with Maines. Maines testified that he warned White that his comments in the article had disparaged the Company in violation of the company handbook and would not be tolerated further. He threatened to terminate White if it happened again.

Because of the significance of the business to the local economy, the newspaper that had published the November 16 article maintained a public-forum website where people could read and/or submit opinions about the purchase of the business by the Respondent. On December 1, White responded to an antiunion message that an individual named House had contributed to the forum:

> To Mr. House: Why do you continue to try to bundle reasons why a union is suspect and not so desirable for EIT employees? Why do you site [sic] all the bad things about Unions, and ignore all the bad things that IBM and EIT have done to the employees and their families and the community at large? Isn't it about time you seriously thought about the fact that no one else will help to stop the job losses, and root for the workers of the community instead of defending the likes of Bill Maines, George Pataki, and Tom Libous? Hasn't there been enough divisiveness among the people working in this area? Isn't it about time we stood up for our jobs, our homes, our families and our way of life here? Do you want to sit by and watch this area go to hell and dissolve into a welfare town for people over 70? This business is being tanked by a group of people that have no good ability to manage it. They will put it into the dirt just like the companies of the past that were "saved" by Tom Libous and George Pataki, i.e., "Telespectrum", "IFT (Flex)". When are you going to get it??? A union is not just a protection for the employees. It's an organization that collectively fights for improvements and benefits for working people in communities like ours. Forget Jimmy Hoffa and the mob. Those people and situations are stereotypes of fools who chose to undermine the very system they vowed to protect. They are the minority and always have been. Look around. Do you think the government will help you when you lose your job and your house? Think again. A union is the beginning of a community standing up for itself. It's time is now.

On December 19, Maines and White met in Maines' office to discuss the internet-forum message. Maines testified that he told White he had disparaged the Company again, especially his reference to the Company "being tanked" by Maines and others. White was then discharged, consistent with Maines' warning of November 19.

The General Counsel's complaint alleged that the Respondent violated the Act by warning and discharging White. The Respondent contended that White's conduct was unprotected, and that he was lawfully warned and then discharged for disloyalty to the Company.

The judge analyzed both the newspaper comments and the internet-forum remarks under *Jefferson Standard,* supra, and relevant Board precedent. He found that the November 15 layoff constituted a labor dispute between the Respondent and the Union, and that White's comments in the newspaper article were part of the context of the dispute. The judge rejected the Respondent's argument that White's conduct was not protected because the article did not refer to the Union; he found it sufficient that the Union had in fact authorized White to speak. He also found that the content of White's remarks did not exceed the boundary of conduct protected by the Act.

Similarly, the judge found that White's December 1 internet-forum message referred to, and was part of, the labor dispute arising from the November 15 layoff, as well as the Union's efforts to organize Respondent's employees. Again, the judge found that the content of

White's message was within the area of protected speech covered by the Act. Accordingly, he concluded that the Respondent had violated the Act by threatening and warning White on November 19, and by discharging him on December 19.

II. DISCUSSION

A. The Relevant Case Law

Employee appeals concerning employment conditions made to parties outside the immediate employer-employee relationship may be protected by the Act.[4] However, that protection may be forfeited, as explained by the Supreme Court in *Jefferson Standard,* supra, and more recently by the Board in *Mountain Shadows Golf Resort,* 330 NLRB 1238 (2000) (*Mountain Shadows I*):[5]

> In *Jefferson Standard,* the Supreme Court held that a television station was justified in discharging certain of its technician employees who had prepared and distributed to the public some 5000 copies of a handbill strongly disparaging the quality of the station's broadcasting and suggesting that the community was being treated as "second-class." Although the technicians' union was involved in a collective-bargaining dispute with the employer, the employees were not on strike, the handbill made no reference to the union or to any dispute or issue relating to the technicians' employment, and the handbill did not purport to solicit support or sympathy for the technicians. The Court agreed with the employer that the handbill demonstrated such "detrimental disloyalty" as to provide cause for discharge.
>
> In cases decided since *Jefferson Standard,* the Board has held that employee communications to third parties in an effort to obtain their support are protected where the communication indicated it is related to an ongoing dispute between the employees and the employers and the communication is not so disloyal, reckless or maliciously untrue as to lose the Act's protection.[6]

The Board evaluates the protected character of an assertedly disloyal communication "in its entirety and in context."[7] Moreover, in applying the *Jefferson Standard* doctrine, the Board relies on the definition of a "labor dispute" in Section 2(9) of the Act.[8] That section states:

> The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

In short, this definition comprehends disputes concerning either employment conditions or representation for collective bargaining. The presence of an organizing union or a collective-bargaining relationship is not required.[9] There need not be an ongoing strike or picketing.[10] All that is required is a controversy that relates to terms or conditions of employment.

A permanent layoff of hundreds of employees is, by definition, a change in employment conditions, both for the employees who are terminated and for those who remain working. If the layoff sparks disagreement between management and the employees affected—whether a union is involved or not—it is a "labor dispute" under Section 2(9).

B. The Present Case

Viewed in context, the November 16 newspaper article and the December 1 internet posting each provide more than enough information for an ordinary reader to understand that a controversy involving employment is at issue. Moreover, the requisite nexus between White's statements and these labor controversies is apparent. Finally, his comments were not so egregious in the circumstances that the Act's protection should be withdrawn. Accordingly, his conduct was protected in each instance.

1. The November 16 article

The November 16 article sets forth two views of the widely-publicized layoff of 200 employees, an issue of significant import to the local community and the taxpayers whose funds had been invested in the enterprise to preserve local jobs. The Respondent's CEO, James

[4] *Eastex, Inc. v. NLRB,* 437 U.S. 556, 565 (1978).

[5] See also *Mountain Shadows Golf Resort,* 338 NLRB 581 (2002) (*Mountain Shadows II*). Both *Mountain Shadows* cases were affirmed by the Ninth Circuit Court of Appeals, sub nom. *Jensen v. NLRB,* 86 Fed.Appx. 305, 2004 WL 78160 (2004). In *Mountain Shadows I,* the Board found that an employee's handbill was unprotected because it made no reference whatsoever to a labor dispute. As the analysis below makes clear, the present case is distinguishable: White's two public communications referred explicitly to labor disputes involving the Respondent and its employees and the Union.

[6] 330 NLRB at 1240 (fn. citations omitted).

[7] *Sierra Publishing Co. v. NLRB,* 889 F.2d. 210, 217 (9th Cir. 1989).

[8] See *Emarco,Inc.,* 284 NLRB 832, 833 (1987).

[9] See, e.g., *NLRB v. Washington Aluminum Co.,* 370 U.S. 9, 15–16 (1962) (unrepresented employees' disagreement with their employer over work conditions was a "labor dispute" under Sec. 2(9); *Compuware Corp. v. NLRB,* 134 F.3d 1285, 1290 (6th Cir. 1998), cert. denied 523 U.S. 1123 (1998) (same); *Hacienda de Salud-Espanola,* 317 NLRB 962, 966 (1995) (same).

[10] See, e.g., *Emarco,* supra, 284 NLRB at 833–834. (comments to a third party by former strikers awaiting recall were related to a labor dispute under Sec. 2(9) that predated the strike).

McNamara, speaks for management. White, as well as Mike McKercher, a laid-off employee, speak for the affected employees. White, who kept his job, is portrayed as representing employees who oppose the layoff because they believe that it "will hurt the company over the long term." He describes "gaping holes" in the Company's "critical knowledge base," due to the loss of employees "with specific knowledge of unique processes." It is apparent that White's interest is in the layoff's impact on employment conditions for workers continuing at the plant.

The judge found that the Union, although not mentioned in the article, was part of the layoff dispute because it had asked White to participate in the article. In its exceptions, the Respondent contends that the absence of any reference to the Union in the article itself leaves White's comments unrelated to any labor dispute and therefore unprotected.

We neither rely on the judge's view, nor find merit in the Respondent's exceptions. As we explained above, the presence of a union is not required to establish that a labor dispute exists. The most casual reader of the article would recognize that the layoff involved a controversy between management and employees concerning employment conditions. Thus, there was an identifiable labor dispute. With CEO McNamara's comments on one side of the dispute, and White's on the other, a reader can "filter the information critically,"[11] i.e., identify the interests of the parties to the dispute. Accordingly, the fact that the article presents White's statements in clear relation to a labor dispute provides him with protection under the Act, consistent with the *Jefferson Standard* doctrine.[12]

2. The December 1 internet posting

White's December 1 internet posting was a response to an antiunion message left by another individual. It is both a broad statement in favor of union representation for the Respondent's employees, and a criticism of recent management of the Company. His initial statement signals his point of view: "Why do you continue to try to bundle reasons why a union is suspect and not so desirable for EIT employees?" He then characterizes "the bad things" IBM and the Respondent had done "to the employees and their families and the community at large," and specifically refers to "the job losses." He also offers his view of the current state of the Company: "This business is being tanked" and "put into the dirt" by the current ownership.

White's posting identifies *two* employment controversies involving the Respondent and its employees. White's statement regarding "job losses" clearly refers to the layoff of the 200 employees that had occurred only 2 weeks earlier, and had been widely publicized in the local media. In addition, White's message clearly referred to the ongoing dispute over union representation at the Company; the Union's 3-year effort to organize the Company's employees was common knowledge. And it is evident from the tenor of White's message that the Union's campaign was controversial. Thus, given the context of the posting, the requisite nexus between White's comments and a labor dispute is apparent. Moreover, White's message was a manifestly partisan expression of opinion, and it would certainly be read accordingly. Therefore, his internet message met the *Jefferson Standard* "dispute" requirement, and it is entitled to protection under the Act.

3. Respondent's exceptions

In its exceptions, the Respondent acknowledges that White's prounion comments in the posting "were clearly protected," and argues solely that the egregious nature of his remarks, not their lack of connection to a labor dispute, caused him to lose the Act's protection. However, the Act permits certain criticism in connection with a labor dispute, if readers or listeners can grasp the connection. Once this nexus is established, such statements are not inherently unprotected.[13] White's references to the Respondent "being tanked" and "put into the dirt" in the posting, and to "gaping holes" and "voids in the critical knowledge base" in the newspaper article, were "not so misleading, inaccurate, or reckless, or otherwise outside the bounds of permissible speech, to cause [him] to lose the Act's protection."[14] The Board has permitted far more offensive comments to retain their protected character in similar circumstances.[15] In context, White's

[11] *Sierra Publishing Co. v. NLRB,* 889 F.2d. 210, 217 (9th Cir. 1989).

[12] We note that White obviously could not control what portion of his interview would be quoted or the precise context in which his statements might be framed.

[13] Our dissenting colleague would find, in effect, that there was no connection between White's comments and the labor disputes in this case, as set forth in the newspaper article and the internet posting. We disagree. As discussed above, the context of the article and of the posting—and not simply an evaluation of White's statements in isolation—makes the required nexus clear. Moreover, as we have said, a layoff affects those who remain working, not just those laid off. The remaining employees, White for example, have a legitimate employment interest in the continuing viability of the Company after the layoff which may be expressed through protected speech.

[14] *Titanium Metals Corp.,* 340 NLRB 766, 766 fn. 3, (2003), enf. denied on other grounds 392 F.3d 439 (D.C. Cir. 2004).

[15] See *Titanium Metals,* supra at 770, 774 (employee's newsletter that referred to the respondent's supervisors as "Public Enemy Number One," as "secret police" that "might kick down your door," as the "Dynamic Duo," and as "Howdy Doody and Buffalo Bob," and described

statements evince no more than the kind of bias and hyperbole that the Board has found within the acceptable limits of Section 7 in *Jefferson Standard* situations.[16]

The Respondent also argues that White's comments came at a fragile moment in the Company's development, i.e., as it was beginning to establish itself competitively. We acknowledge the Respondent's situation. But its sensitivity to the possible impact of White's comments cannot serve to limit his statutory right to appeal to the public. See, e.g., *Allied Aviation Service Co.,* supra, 248 NLRB at 231.

Accordingly, we conclude, in agreement with the judge, that White's statements were not so disloyal, reckless, or maliciously untrue as to lose the Act's protection, and that the Respondent violated Section 8(a)(1) by warning, threatening, and then discharging him because of them.[17]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Endicott Interconnect Technologies, Inc., Endicott, New York, its officer, agents, successors, and assigns, shall take the action set forth in the Order.

CHAIRMAN BATTISTA, dissenting.

The issue in this case is whether public statements made by employee Richard White on two occasions are protected under the Act or, as argued by the Respondent, constitute disloyal misconduct warranting his discharge for cause. Contrary to my colleagues, I would reverse the judge and find that White's November 15 and December 1, 2002 statements did not speak of a "labor dispute" within the meaning set forth in *NLRB v. Electrical Workers Local 1229 (Jefferson Standard),* 346 U.S. 464 (1953), and its progeny. In addition, I would find that White was discharged for cause because of his disloyal and disparaging statements against the Respondent.

Under *Jefferson Standard,* supra, employee appeals concerning employment can be protected if the employee's message makes clear that a labor controversy is involved. In *Jefferson Standard,* the Supreme Court held that a television station lawfully discharged a group of technicians for creating and distributing handbills disparaging the quality of the station's broadcasting. In finding the technicians' conduct outside the protection of the Act, the Court noted that although there was an ongoing labor dispute in which the employees had the protected purpose of gaining a collective-bargaining concession from the employer, "'[t]hat purpose . . . was undisclosed.'"[1] In other words, readers of the handbill were not made aware that a labor controversy was involved, thus, preventing a fair evaluation of the nature of the appeal and the reliability of the information. Accordingly, the public's reasonable perception of the technicians' handbill was critical to the determination of whether the employees' communication was a lawful, albeit partisan, exercise of Section 7 rights, or a misleading, disloyal attack on the economic well being of the employer who paid their wages. In cases of this kind, therefore, to avoid an unwarranted threat to a company's business based on a misapprehension of the nature of the communication, the employees' message must make clear that a labor controversy is involved. At that point, "third parties who receive appeals for support in a labor dispute will filter the information critically so long as they are aware it is generated out of that context."[2]

Thus, under *Jefferson Standard* and its progeny, statements to third parties are protected only "where the communication indicates that it is related to an ongoing labor dispute between the employees and the employers and the communication is not so disloyal, reckless or maliciously untrue as to lose the Act's protection." *Mountain Shadows Golf Resort,* 330 NLRB 1238, 1241 (2000) (*Mountain Shadows I*).

In the instant case, White's comments reported in the November 16 newspaper article did not refer to a labor dispute.[3] While I agree with my colleagues' assertion that the layoff precipitating White's comments was a term or condition of employment, it does not follow that *White's comments* were protected. The labor dispute here was about the plight of the employees who were being laid off, and about the Union's opposition to that

one of them as "trying to sink his canoe and ours too," found protected); *Emarco, Inc.,* 284 NLRB 832, 833–834 (1987) (two employees' comments to a client of the respondent that the respondent "can't finish the job," and that the respondent's president was "no damn good" and a "son of a bitch," found not to exceed the protection of the Act). See also *Allied Aviation Service Co. of New Jersey,* 248 NLRB 229, 231 (1980), enfd. mem. 636 F.2d 1210 (3d Cir. 1980); *Community Hospital of Roanoke Valley,* 220 NLRB 217, 220, 223 (1975), enfd. 538 F.2d 607 (4th Cir. 1976).

[16] See, e.g., *El San Juan Hotel,* 289 NLRB 1453, 1455 (1988); *Emarco,* supra at 834.

[17] The complaint alleged that the Respondent's disciplinary actions against White violated Sec. 8(a)(3) as well as Sec. 8(a)(1). The judge dismissed the 8(a)(3) allegations, finding insufficient proof of antiunion animus. The General Counsel excepted. We find it unnecessary to consider the 8(a)(3) allegations in light of our finding that the Respondent's conduct violated Sec. 8(a)(1). See *Emarco,* supra at 835 fn. 18, citing *NLRB v. Burnup & Sims,* 379 U.S. 21 (1964). See also *Richboro Community Mental Health Council,* 242 NLRB 1267, 1268 fn. 12 (1979).

[1] 346 U.S. at 472, quoting the Board's underlying decision, 94 NLRB 1507, 1511 (1951).

[2] *Sierra Publishing Co. v. NLRB,* 889 F.3d 210, 217 (9th Cir 1989).

[3] The article is set forth in the majority opinion.

layoff. However, White's remarks in the article made the different point that the layoff would be detrimental to the quality of the Respondent's product. Indeed, as the article says, White was not even among the laid-off employees.

Concededly, as my colleagues point out, other passages in the article refer to the laid-off employee's chagrin as to the effect that the layoff would have on them. *However, White was not disciplined for what the article said. He was disciplined for his views, as reported in the article. And those views concerned his opinion about the condition of the Company.* Nor was he accused of "feeding" these passages to the writer of the article. Rather, White was discharged for *his* disparaging remarks about the Company, as they were reported in the article.[4]

I would therefore examine White's comments in this context. He is quoted as saying that there were "'gaping holes in this business'" as a result of the layoff. Further, he explained that the loss of certain personnel left "voids in the critical knowledge base for the highly technical business." White's comments lack any reference to a labor controversy. They were also harmful, disparaging, and disloyal to the Respondent. The comments suggested that the Respondent, a manufacturer of highly technical computer circuit boards, no longer had the skilled and knowledgeable personnel to continue producing that product. Such a statement, made by an insider, would foreseeably have a devastating impact on the reputation of an employer. Indeed, the potential damage done to the Company's reputation is evidenced by the fact that the Respondent's principal customer, IBM, called immediately to inquire about the truth of White's assertions. Thus, the Respondent was justified in warning White that he would be discharged if he disparaged the Company again in the future.

White's internet posting also lacked a clear nexus to the labor dispute concerning the layoffs.[5] Although there is a reference to a potential loss of jobs, the major thrust of the posting is an attack on a third-party posting and on others who were perceived as being antiunion. The one clear reference to the Respondent's layoff is *not about the plight of those laid off, but rather about the Respondent's business.* The reference is a disparaging one ("This business is being tanked by a group of people that have no good ability to manage it."). In addition, White's comments were also insubordinate, in light of the Respondent's explicit warnings to White to cease from making such disloyal statement to the public.

Accordingly, I would find that both of White's communications were unprotected by the Act because they failed to reference an ongoing labor dispute and because they were disloyal to the Respondent. Divested of Section 7 protection, the statements constituted simply "a sharp, public, disparaging attack upon the quality of the Company's product and its business policies, in a manner reasonably calculated to harm the Company's reputation and reduce its income."[6] The Respondent was, therefore, fully within its rights to discipline White because of the November 16 article, and to discharge him for cause because of the December 1 posting.[7]

Alfred Norek, Esq., for the General Counsel.
Raymond Pascucci, Esq. (Bond, Schoeneck & King, PLLC), for the Respondent.
Carolyn Zapanta, Esq. (Semel, Young & Norum), for the Charging Party.

DECISION

STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative Law Judge. This case was heard by me on June 10, 2003, in Binghamton, New York. The complaint herein, which issued on April 29, 2003, and was based upon an unfair labor practice charge and an amended charge filed on February 24 and April 25, 2003, by Alliance @IBM/Communications Workers of America, Local 1701, AFL–CIO (the Union), alleges that Endicott Interconnect Technologies, Inc. (the Respondent) violated Section 8(a)(1) and (3) of the Act by threatening employee Richard White with discharge on about November 19, 2002,[1] and December 19, by issuing him a verbal warning on November 19 and by discharging him on December 19, because of his Union and protected concerted activities.[2]

FINDINGS OF FACT

I. JURISDICTION

Respondent admits, and I find, that it has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

[4] My colleagues assert that White's comments must be analyzed in the context in which they are made, and note that the article itself references the ongoing labor dispute. In so doing, however, the majority misses the larger point. Regardless of whether the article itself addressed a labor dispute, White's statements made a different point. *Mountain Shadows I,* 330 NLRB at 1240. On the face of the reported comments, White's statements referenced neither an ongoing employer/employee dispute, nor his involvement in the Union. Thus, there was no way for the readers of his remarks, which remarks questioned the employer's abilities to continue operating, to read them with a grain of salt. Concededly, the article itself spoke of the layoff. However, that was the choice of the writer of the article. White was discharged for his remarks as related in the article, not for the other comments of the article-writer.

[5] The posting is set forth in the majority opinion.

[6] *Jefferson Standard,* 346 U.S. at 471.

[7] Id. at 477–478; see also *Mountain Shadows II,* 338 NLRB 581 (2002).

[1] Unless indicated otherwise, all dates referred to herein relate to the year 2002.

[2] The joint motion of counsel to correct the transcript is granted.

II. LABOR ORGANIZATION STATUS

The Union was established in 1999 in an effort to organize the employees of IBM employed in the Endicott/Binghamton, New York area. Lee Conrad, the Union's national coordinator and organizer, testified that the Union, a local union affiliated with the Communications Workers of America, exists to deal with employers concerning grievances, labor disputes, wages, hours of employment, and conditions of employment, and that employees of IBM/the Respondent participate as officers and chapter representatives. In fact, sometime in late November or early December, White was elected to the Union's governing council. I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE FACTS

A. The Sale of IBM in Endicott to the Respondent

William Maines, co-owner and chairman of the board of directors of the Respondent, testified about the sale of a portion of the IBM operation in Binghamton-Endicott to the Respondent. IBM was the largest employer in the area with about 4000 employees. He learned that IBM wanted to divest itself of the manufacturing part of its operation in the area which produced printed circuit boards, because of its high labor costs, and to concentrate on other more profitable portions of its business. Maines and a group of local businessmen and friends discussed the fact that IBM was actively marketing its Endicott operation and the importance "of maintaining those jobs to the community. Also, that there might be a nice business opportunity to have an ongoing profitable business." They contacted IBM as well as some New York State officials to facilitate some meetings. Maines and his group commenced negotiations with IBM in about March, and on June 30, they signed a contract with IBM with the closing of the agreement scheduled for about November. Because of their commitment to maintain the jobs in the area, the purchasers received assistance, incentives, and tax credits, based upon job retention, from New York State. Maines testified that the investors commitment was about $75 million and the State incentives were a few million dollars. The closing took place on about November 1. Since the closing, the Respondent's sales to IBM has comprised about 60 percent of its business and its sales to Sun Microsystems has comprised about 30 percent.

B. Events of July 8

On July 8, Maines conducted series of meetings with the IBM employees in the area; Conrad and Larry Davis, a retired IBM employee who was employed part time by the Union, distributed leaflets to employees entering the meetings. The leaflets were union authorization cards, stating: "IBM looked out for their interests The new owners are looking out for theirs ORGANIZE- TO LOOK OUT FOR YOURS!" At the meetings with the employees, Maines distributed a document with a summary of benefits stating that the employees' pay and benefits would remain comparable to what they were with IBM. Later that day, Maines came to the union office; Conrad testified that Maines said that Conrad was on Respondent's property when he was distributing the leaflets. Maines also said that he didn't like the tone of the leaflet that he was looking out for his interest and he gave Conrad the document he had given his employees that day saying that the employees' benefits would remain the same. Conrad said that his interest was to look out for the interest of the employees and Maines said, "If you escalate, we'll escalate." Maines told Conrad that his other business was nonunion, and he didn't want to try to build up the new business while worrying about a union organizing campaign. Maines testified that he went to the Union's office that day to respond to a leaflet the Union handed out to employees saying that they were waiting to see if the Respondent was being truthful with the employees. Maines gave Conrad a copy of the benefit summary that he gave to the employees showing that their new benefits would be comparable and Conrad said that he already had a copy of the document. Maines also told Conrad that he would be happy to answer any questions that he had: "Feel free to contact me directly." Shortly thereafter, Maines received an undated letter from Linda Guyer, the union president, which stated, inter alia:

> I hear you stopped by the Alliance @ IBM office in Endicott on Monday to express your concerns and to say hello. I also understand that your meeting with Lee Conrad and Rick Roscoe was very productive.
>
> We appreciate your approach of open dialogue and your listening to our concerns and efforts around the EIT employees' benefits and work environment.
>
> You are most welcome to visit our office again. Because of our need to protect the confidentiality of workers who come to our office, would you please make an appointment for any future visits.

C. Layoffs on about November 15

On about November 15, the Respondent announced a layoff of approximately 200 employees. White testified that between 30 and 40 percent of those who were laid off were managerial employees. The rest were production employees, administrative employees, and engineers. Maines testified that the layoffs were necessary because the overhead made it impossible for the Respondent to be profitable. It was decided where cost savings were most needed and a total of 200 employees, or about 10 percent of the work force, was laid off. About 60 percent of those who were laid off were managerial employees. In addition, maintenance and sanitation employees, secretarial employees, and engineers were also laid off.

D. November 16 Newspaper Article and Its Aftermath

On November 15, Conrad called White and told him that he had been called by a reporter for a local newspaper who wanted to speak to White about the layoff. Sometime that day, White called the reporter and answered the reporter's questions. On the following day, there was an article in the newspaper about the layoff, quoting White and others. The article states, inter alia:

> The firing of 200 people at the fledgling Endicott Interconnect Technologies two weeks after its birth was a "pragmatic" decision by James J. McNamara, Jr., president and chief executive officer.
>
> "I have a fiduciary responsibility to make this business profitable," McNamara said, just hours after notifying

scores of mid-level managers, engineers and support people on Friday morning that they no longer had jobs.

Those affected by Friday's action are not in a forgiving mood. They are unwilling to accept that the cutbacks are in the best interest of the company. Many feel a sense of betrayal in their enthusiasm for a new start with this IBM successor company. Other workers believe that they were fed a line of false promises when the deal to sell the IBM-Endicott site to local investors was announced in July.

This is greed with a capital G," said Mike McKercher, who spent 26 years with IBM and two weeks with Endicott Interconnect. "I walked by Thomas Watson's picture and you could see tears running down his (face)."

Endicott Interconnect executives said they had no choice in the matter. Depressed production volumes don't support the infrastructure the 15-day-old company inherited from IBM Corp. As an independent company without the corporate bureaucracy of the entrenched computer maker, Endicott Interconnect Technologies could slice off a layer of management without an effect on the customer, McNamara said.

Some employees disagree, saying the decision made Friday will hurt the company over the long term.

"There's gaping holes in this business," said Rick White, an employee with 28 years at the Endicott plant who, with nearly 2,000 other people, recently transferred from IBM to Endicott Interconnect.

White, who kept his job, said development and support people with specific knowledge of unique processes were let go, leaving voids in the critical knowledge base for the highly technical business.

McNamara, for his part, doesn't dispute that Friday's action will produce more work and more responsibilities for others in the plant. Managers with one area of responsibility may be asked to oversee one or two other areas, he said. Cutting a management layer, however, will give the remaining workers a larger role in the business, he said.

Maines testified that after reading this newspaper article, he had a number of concerns:

> I was very concerned that we would have an employee making the negative comments about our ability to be successful at a very fragile and delicate time . . . I was concerned about the community at large in terms of thinking that we weren't going to be successful. I was thinking about the retained employees that had their jobs there, thinking they would be much less secure. But most importantly I was concerned about customers.

He testified that shortly after the newspaper article appeared, he received a telephone call from an individual in charge of IBM's microelectronics division, who handles the purchasing from the Respondent. He asked if there were gaping holes at the company, and Maines assured him that there were no gaping holes, that the layoffs were well thought out, and "that we had all the core skills and competencies that we needed to perform for him."

On November 19 White was called to Maines' office. White testified that Maines said that he read the newspaper article where White said that there were gaping holes at the Company, and he asked White why he said that. White said that he was talking to the reporter as a union representative and was trying to convey the pain that the employees were experiencing. Maines told him that the deal with IBM was an expensive and difficult situation for him and he couldn't understand why White would say that. White said that he wasn't accusing him of being a bad businessman, but was trying to express the pain of the laid-off employees. Maines said that the layoff was difficult for him, as well, but it was the only option that the Respondent had. He also said that he made sure that no union members were involved in the layoff, but that he was surprised that White was still employed by the Respondent, "because he couldn't believe that somebody that would say that was still employed." White testified further:

> He told me that he didn't want somebody working for his company that had an attitude like mine, and he said if you don't have your heart in this job, 100% . . . I don't want you to work here. But, he said, that's not a threat. And I told him I had my heart 100% into that job and I, 100%, supported the company, I wanted it to succeed. I told him I felt that the lay-off of those 200 people, the experts, the people that knew what they were doing, was not a good thing.
>
> He asked me or he told me that he didn't want me to talk to the newspapers and he said, I don't want you to talk to the newspapers . . . and see the company's name in the newspapers. And I said, I'm on board with that and that won't happen.

Before leaving Maines' office, they shook hands and White said that he had a right to his opinion, and Maines said, "Yes, you do." He does not recall Maines saying that if White again criticized him or the Respondent, he would not be able to work with him further, and he would be terminated, nor does he recall Maines saying what would happen if White again spoke to the newspaper about the company.

Maines testified that he spoke to White in his office on November 19. He told White that he was disappointed that White would make comments that the Company's success was at risk and that it had gaping holes. The investors had a lot of money at risk and they were working hard to make it work. The layoff was unfortunate, but there was no alternative. He told White:

> I am not accustomed to working with an individual who is publicly trashing the owners of the company and questioning the ability of the company to survive in our management ability, and it was unacceptable, that it was in violation of the company handbook, and that if it were to happen again, that he would be terminated, that I would not be able to work with him.

White responded that he was entitled to his opinion, and Maines said that while he was entitled to his opinion, he was not entitled to make disparaging remarks about the Company and he wouldn't tolerate it. He never forbade White from speaking to the press. "But when he makes unfactual, unfounded, disparaging remarks that are read by customers, that literally could put us out of business overnight, when they are

incorrect, I told him that I would not tolerate that." White responded: "I'm on board, it won't happen again."

E. White's December 1 Web Site Message

Due to the large amount of interest in the IBM sale to the Respondent, the local newspaper that printed the November 16 article, maintained a public forum web site where people could contribute or read messages about the IBM-Respondent issue. In order to write letters to this forum, individuals had to obtain a user ID and a password, permitting them to contribute to this public forum. White did this, and he was a contributor to the forum. He testified that some antiunion messages appeared on this forum, "so I decided to post a message to rebut what he was talking about." The following message appeared on the forum on December 1 under White's name:

> To Mr. House:[3] Why do you continue to try to bundle reasons why a union is suspect and not so desirable for EIT employees? Why do you site all the bad things about Unions, and ignore all the bad things that IBM and EIT have done to the employees and their families and the community at large? Isn't it about time you seriously thought about the fact that no one else will help to stop the job losses, and root for the workers of the community instead of defending the likes of Bill Maines, George Pataki, and Tom Libous?[4] Hasn't there been enough divisiveness among the people working in this area? Isn't it about time we stood up for our jobs, our homes, our families and our way of life here? Do you want to sit by and watch this area go to hell and dissolve into a welfare town for people over 70? This business is being tanked by a group of people that have no good ability to manage it. They will put it into the dirt just like the companies of the past that were "saved" by Tom Libous and George Pataki, i.e., "Telespectrum," "IFT (Flex)."[5] When are you going to get it??? A union is not just a protection for the employees. It's an organization that collectively fights for improvements and benefits for working people in communities like ours. Forget Jimmy Hoffa and the mob. Those people and situations are stereotypes of fools who chose to undermine the very system they vowed to protect. They are the minority and always have been. Look around. Do you think the government will help you when you lose your job and your house? Think again. A union is the beginning of a community standing up for itself. It's time is now.

Maines testified that he first became aware of White's December 1 letter to the newspaper's chat room about 2 weeks later when it was downloaded by the Respondent's human resources department. After reading White's letter, Maines was concerned because he had previously given White the warning that he was not to publicly trash the Company again, and if he did it again he would be terminated. "And, lo and behold, there it is, after he promised me that he is on board. . . . And here it is, that he's done it again"

F. December 19 Termination

On December 19, at about 4 p.m., White was told to go to Maines' office. He testified that Maines began the conversation by saying, "I heard you made a comment." When White asked what comment, Maines gave me a copy of his statement that appeared in the forum on December 1 and told White to read it. White began reading it to himself and Maines told him to read it out loud. When White read the portion that said that the business was being tanked by the likes of Maines and others, Maines said, "Right there, right there. I told you not to say this. I told you not to talk to the press and I told you that you would be terminated if you said this. I'm tired of this fucking bullshit with you, I told you that you would be terminated." White interrupted Maines and said that he had not told him that he would be terminated; rather, he said that he didn't want him talking to the press, and that he had a right to his opinion. Maines said, "I told you that you would be terminated and you're terminated." Maines got up and walked out of his office. A vice president came into the office and said that White should wait, that he would get somebody to escort him back to his desk. White said that he knew where his desk was, and he walked back to his desk and took all of his belongings and left the facility. Maines testified that he had warned White on November 19 that his statements trashing the Respondent were not acceptable and were in violation of the Respondent's employee handbook, and if it happened again, he would be fired. After reading the December 1 article by White, especially the portion that refers to Maines and others tanking the business, he determined that White had done it again, and he fired him for that reason.

IV. ANALYSIS

The complaint herein alleges that the statements that White made in the November 16 newspaper article, and the December 1 chat room, "were an outgrowth of discussions White had with other employees and/or were taken in order to induce collective action on the part of his fellow employees." The complaint further alleges that the November 19 verbal warning and the December 19 termination were caused by White's statements in the newspaper and the chat room on November 16 and December 1 and in order to discourage other employees "from engaging in these and other protected concerted activities." In addition, the complaint alleges that White was warned on November 19 and was fired on December 19 because he joined and assisted the Union and engaged in protected concerted activities and to discourage other employees from doing so, in violation of Section 8(a)(1) and (3) of the Act.

Initially, I find that there was no "traditional" 8(a)(3) violation herein because there was a failure to establish any union animus. White testified that when he met with Maines on November 19, Maines told him that he made sure that no union members were included in the November 15 layoff. In addition, although Maines came to the union office on July 8 to dispute

[3] White testified that he doesn't know House, except to the extent that he was posting antiunion messages on this public forum.

[4] Libous, a State senator representing the area, and Governor Pataki, according to White's testimony, provided incentives and assistance to the Respondent in the sale from IBM.

[5] White testified that Telespectrum and IFT (Flex) are two companies that were located on the IBM property in the area that performed work for IBM. Telespectrum's work force has been reduced to a fraction of what it had previously been and IFT (Flex) is out of business.

the contents of the union leaflets distributed to the employees at the plant that day, the meeting ended in a nonadversarial way, as confirmed by Guyer's letter to Maines. The only indication of union animus is Conrad's testimony that at this meeting, Maines told Conrad, "If you'll escalate, we'll escalate." I find this insufficient proof of union animus, especially considering Guyer's letter that followed the meeting.

The Respondent defends that it discharged White for disloyalty to the Company and for disparaging the Company and its products. In addition, it defends that White was warned on November 19 not to repeat what he had done on November 16 and that by placing his letter on the newspaper's chat room on December 1, he violated this agreement with Maines. Finally, the Respondent states that Maines and the other individuals who purchased the operation from IBM have $75 million invested in the Respondent. This investment could be jeopardized by individuals reading that there were "gaping holes" in the Respondent's operation and the business was being "tanked" by Maines and the other investors.

In *NLRB v. Electrical Workers Local 1229*, 346 U.S. 464 (1953), more commonly referred to as *Jefferson Standard*, the television station and the union representing technicians had reached an impasse in negotiations and the union commenced picketing while its members continued working. When that did not succeed, the union changed tactics and "launched a vitriolic attack on the quality of the company's television broadcasts" with handbills inferring that the station was treating the city as a second-class city. The handbills made no mention of the labor dispute and the employees continued working during the leafleting. The station fired 10 of the technicians. The Board, at 94 NLRB 1507, 1511,1512 (1951), found that these leaflets were not protected: "In our judgment, these tactics, in the circumstances of this case, were hardly less 'indefensible' than acts of physical sabotage. . . . We . . . do not decide whether the disparagement of product involved here would have justified the employer in discharging the employees responsible for it, had it been uttered in the context of a conventional appeal for support of the union in the labor dispute." The Supreme Court agreed with the Board, stating: "There is no more elemental cause for discharge of an employee than disloyalty to his employer." The Court also stressed that the union never identified the handbill's message with its labor dispute with the company: "Their attack related itself to no labor practice of the company. It made no reference to wages, hours or working conditions. The policies attacked were those of finance and public relations for which management, not technicians, must be responsible. . . . It attacked public policies of the company which had no discernible relation to that controversy. . . . It was a concerted separable attack purporting to be made in the interest of the public rather than in that of the employees." 346 U.S. at 476–477.

In *Sierra Publishing Co. v. NLRB*, 889 F.2d 210 (9th Cir. 1989), because the employees were unhappy with the progress of bargaining, the union sent a letter to 50 of the newspaper's main retail advertisers stating, inter alia:

> Who wants a one-newspaper town? The readers don't. The politicians don't. As a business person and advertiser, you don't.
>
> And we, the employees of the Sacramento Union don't. Perhaps only the Bee [the other local newspaper] would like it.
>
> For nearly a year and a half we have been trying to get a fair contract with the Sacramento Union. We're not asking for more money. In fact, we expect to continue living with a pay cut—but not the 15% to 20% cut that was imposed on us a year ago.
>
> During these trying times of bargaining, the paper's circulation has plummeted, good employees have left for better jobs, advertising has suffered. The newspaper as a whole is speeding downhill.
>
> We, the employees, would like to get the newspaper back on track. . . . If something positive doesn't happen soon, we may all be facing the death of the Sacramento Union.
>
> We think we can turn the paper around, but it is time for you, as a member of the community to lend a hand. Talk it over with . . . the editor of the Union.
>
> SACRAMENTO UNION EMPLOYEES NEGOTIATING COMMITTEE

The employer took offense at this letter and fired the four-named members of this committee for disloyalty. The administrative law judge and the Board found that the letter to the advertisers constituted protected concerted activities, and that by firing the four employees the employer violated Section 8(a)(1) of the Act. The court agreed, distinguishing *Jefferson Standard,* saying, 889 F.2d at 216 :

> *Jefferson Standard* has been read to hold that if the appeal "disparages" the employer's product, as opposed to criticizing the employer's labor practices, it is so disloyal as to lose Section 7 protection. However, later cases confined the reach of this exclusion, and made clear that *Jefferson Standard* was not to be read to equate criticism with disloyal product disparagement. Instead, appeals to third parties forfeit Section 7 protection only if their connection to the employees' working conditions is too attenuated or if they are unrelated to any grievance which the workers may have. [Citations omitted.]

The employer defended that the letter amounted to product disparagement and was therefore unprotected. The court disagreed, supra at 217: "First and most important, there is no dispute that the letter was related to the labor dispute and to the employees' efforts to improve their working conditions. This feature was central to the Supreme Court's reasoning in *Jefferson Standard*, and has continued to be the focus of NLRB and judicial analysis." The Court, at footnote 9, referred to the fact that the letter was written on union letterhead, was signed by union members and referred to the failed negotiations. The Court stated further:

> If unions are not permitted to address matters that are of direct interest to third parties in addition to complaining about their own working conditions, it is unlikely that workers' undisputed right to make third party appeals in pursuit of better working conditions would be anything but an empty provision. Moreover, extending Section 7 protection in this direction does not pose an unreasonable threat to employers; third

> parties who receive appeals for support in a labor dispute will filter the information critically so long as they are aware it is generated out of that context.

In response to the employer's defense that the letter was disparaging because it referred to circulation plummeting and good employees leaving the paper, the court stated: "Once again, however, the effect of *Jefferson Standard* was not to equate every critical comment with unprotected disloyalty. The letter must be evaluated in its entirety and in context."

In *Allied Aviation Service Co. of New Jersey,* 248 NLRB 229 (1980), an employee was fired for writing two letters to the employer's customers questioning certain safety issues relating to the maintenance of their aircraft. The Board reversed the judge's finding that these letters were not protected, saying, "[T]he Board has found employee communications to third parties seeking assistance in an ongoing labor dispute to be protected where the communications emphasized and focused upon issues cognate to the ongoing labor dispute." The Board cited *Richboro Community Mental Health Council,* 242 NLRB 1267 (1979), and *Community Hospital of Roanoke Valley,* 220 NLRB 217 (1975), enfd. 538 F.2d 607 (4th Cir. 1976), where the communications to the third parties referred to a decrease in the quality and quantity of service to the clients and to the adequacy of patient care at the hospital. Both messages were found to be protected. The Board stated: "In both cases, therefore, the touchstone was not whether the communication constituted a virtual carbon copy of the specific arguments raised with the respondent, but was, rather, whether the communication was *a part of and related to* the ongoing labor dispute." The Board then addressed the employer's argument that the letters were a disparagement of its product or reputation:

> In determining whether an employee's communication to a third party constitutes disparagement of the employer or its product, great care must be taken to distinguish between disparagement and the airing of what may be highly sensitive issues. There is no question that the Respondent here would be sensitive to its employees raising safety matters with its airline customers. Yet, we have previously held that, "absent a malicious motive, [an employee's] right to appeal to the public is not dependent on the sensitivity of Respondent to his choice of forum."

In *Community Hospital of Roanoke,* supra, the Board and the court found that the hospital violated Section 8(a)(1) of the Act by issuing a warning to one employee and refusing to employ another because of a television interview where they stated that there were not enough nurses to cover a unit at the hospital and that the problem was directly related to the salaries and benefits provided by the hospital. The court said that these statements were admittedly true, and "they were directly related to protected concerted activities then in progress."

Emarco, Inc., 284 NLRB 832 (1987), involved an employer who was consistently in arrears in its payments to the union's welfare and pension plan. After being informed by the bank that, because the employer was 5 months late in its payments, the bank would no longer honor certain bills and benefits and that the employees would be ineligible for certain benefits, the employees wrote to the employer that unless the employer was current in its payments by a certain date, they would not report for work. Although the employer showed the employees that he was mailing the check prior to the specified date, the check was never received by the bank and the employees refused to work. The check was not received by the bank until about 17 days after the original deadline, at which time the strike concluded. However, because the employer alleged that it was having problems resuming its operations, two employees were not returned to work immediately. Before returning, however, they visited one of the employer's jobsites and told the general contractor that the employer was five to 6 months delinquent on payments to the union's health and welfare fund, that "these people never pay their bills . . . can't finish the job . . . is no damn good," and that 'this job is too big for them . . . . It will take a couple of years to finish the job." They also referred to their boss as "a son of a bitch." After the employer learned of these statements, he refused to recall these two employees. The Board found that this refusal to recall violated Section 8(a)(1) of the Act. As the statements that they made were made on the jobsite and in response to questions about the cause of the strike, the remarks "were made in the context of and were expressly linked to the labor dispute." Further the Board found that their remarks did not lose the protection of Section 7 of the Act: "[T]he remarks . . . name-calling aside, were not malicious falsehoods, but reflected to some extent the Respondent's actual inability to meet its financial obligations, which concern was at the heart of the employees' labor dispute with the Respondent." Finally, the majority of the Board responded to the dissenting opinion that there was no "labor dispute" other than the strike itself:

> [W]e believe our dissenting colleague's conclusion that there was no evidence of a labor dispute other than the strike itself, results from an overly restrictive view of what constitutes a "labor dispute." The definition of labor dispute under Section 2(9) of the Act includes "*any* controversy concerning terms, tenure or conditions of employment" [emphasis added]. Surely, the employees' actions, which included complaining individually and through union intervention, and which were taken in response to the Respondent's chronic failure to make contractually mandated timely payments to the welfare and pension plan, fall within the purview of that section.

In a more recent case, *Mountain Shadows Golf Resort*, 330 NLRB 1238 (2000), and a Supplemental Decision at 338 NLRB 581 (2002), the Board succinctly restated the rule that it has applied since *Jefferson Standard*. In order to have the protection of the Act, the statement must make reference to the organizational attempt, the labor controversy or to the collective-bargaining process and, in addition, the statement cannot be so disparaging of the company's product and business policies that it is reasonably calculated to harm the company's reputation and reduce its income. The Board, 330 NLRB at 1241, found that the alleged discriminatee therein lost on both counts and that therefore his March 5 handbill was unprotected: "the March 5 flyer did not mention the problems the employees' union was having negotiating with the Respondent, and bore no indication that it was written by or on behalf of any employee of the Respondent. Rather, the matters addressed in

the flyer related solely to the impact of the company's capital investment and other business practices on the quality of the service provided to customers." In addition, the flyer was not protected because it suggested that the city turn over the management of the company's facilities to one of its competitors. In distinguishing these facts from *Emarco*, supra, the Board stressed that in that matter the statements "were made in the context of and were expressly linked to the labor dispute." In *Mountain Shadows,* supra, they were not.

In *St. Luke's Episcopal-Presbyterian Hospitals, Inc.*, 331 NLRB 761 (2000), enf. denied 268 F.3d 575 (8th Cir. 2001), the hospital fired a nurse because of comments that she made about the hospital on a television newscast. Statements attributed to her accused the hospital of cutting nurses' shifts in order to replace them with less qualified employees, thereby jeopardizing the health of mothers and babies at the hospital. The newscast also noted that the nurses were fighting for collective-bargaining rights in order to insure adequate patient care and working conditions. The Board found that her statements were protected because it was made in the context of statements about the labor dispute, and nothing she said, "exceeds the bounds of the protection of the Act. Indeed, the statements made by Hollowood during the interview were neither disloyal, recklessly made, nor maliciously false."

White was threatened and was given a verbal warning on November 19 because of his statements that appeared in the newspaper on November 16, and he was fired on December 19 because of his December 1 statements contained on the newspaper's website devoted to the Respondent. I find that the threat, the warning and the discharge violate Section 8(a)(1) of the Act because both statements were protected under Section 7 of the Act.

Initially, I find that the situation in November and December involving the Union and the Respondent constitute a labor dispute within the meaning of Section 2(9) of the Act. The Union had been attempting to organize the employees of IBM since about 1999 and, since about July, had altered its aim to the Respondent. When the Respondent announced the layoff of 10 percent of its work force on November 15, the situation became a well-publicized dispute between the Respondent, those laid off, and the Union over the necessity and/or propriety of the layoff. The November 16 newspaper article clearly sets forth the facts of the dispute and the positions of the Respondent, a laid off employee, and White. McNamara referred to the layoff as a "pragmatic" decision that he had to make so that the Respondent would be profitable. White was certainly entitled to respond to this by saying that the layoffs would leave "gaping holes" in the business and that by laying off development and support employees, the Respondent was "leaving voids in the critical knowledge base" of the Company. In fact, according to the newspaper article, McNamara did not dispute the fact that the layoff would "produce more work and more responsibilities for others in the plant." Counsel for the Respondent, in his brief, stresses that because the November 16 article does not mention the Union, the statements made therein were unprotected. I disagree. Although the article does not refer to the Union, the subject of the article was what effect, if any, that the layoff off 10 percent of the work force would have upon the continuing viability of the Respondent, and, therefore, its employees. In addition, although the newspaper article does not refer to White's union affiliation, which White had no control over, White called the newspaper reporter at the request of Conrad, and was therefore speaking for the Union. I find that his response, in opposing the layoff of his fellow employees, constituted protected concerted activities, and that Maines could not lawfully inhibit him from making such statements. I further find that White's comments in the article did not constitute disparagement of the Respondent's business so as to deprive him of the protection of the Act. The "gaping holes" and "leaving voids" statements are certainly mild compared to the statements that were found protected in *Sierra Publishing,* supra, *Allied Aviation,* supra, *Community Hospital of Roanoke,* and *Emarco,* supra. As these comments related to the labor dispute between Respondent and the Union, I find that Maines' threat and verbal warning to White on November 19 violated Section 8(a)(1) of the Act.

On December 1, White wrote to the chat room on the newspaper's web site devoted to the Respondent. He testified that he wrote it in response to antiunion messages that appeared on the site. The alleged offensive portion of the message states:

> Isn't it about time you seriously thought about the fact that no one else will help to stop the job losses and root for the workers of the community instead of defending the likes of Bill Maines, George Pataki and Tom Libous? Hasn't there been enough divisiveness among the people working in this area? Isn't it about time we stood up for our jobs, our homes, our families and our way of life here? Do you want to sit by and watch this area go to hell and dissolve into a welfare town for people over 70? This business is being tanked by a group of people that have no good ability to manage it. They will put it into the dirt just like the companies of the past.

I find that this statement is protected as well. White was responding to some antiunion statements made to this web site and defends the Union's attempt to organize the Respondent's employees. Whether or not one agrees with his message that only the Union can save the operation from going under, he had the right to make it. Was his statement that the business was being tanked by Maines and his business associates appropriate? No. Was the statement true? Apparently, not. Was it protected? Yes. It did not lose the protection of the Act by disparaging the Respondent's owners. Saying that the business was being "tanked" by Maines and his associates "that have no good ability to manage it" was part of the continuing dispute that the Union had with the layoff and its attempt to organize the Respondent's employees and was not so disparaging as to lose the protection of the Act. *Emarco,* supra.

Maines and the Respondent cannot be too thin skinned. As was discussed in *Sierra Publishing,* supra, third parties who read these statements do not read it in a vacuum. The people in the Endicott/Binghamton area have been familiar with the IBM situation, which became the IBM-EIT situation, for a number of years. White's statement in the November 16 newspaper, and his statement on the chat room on December 1, could be evaluated by the people in the area, as well as by representatives of IBM and Sun Microsystems, for what it is—campaign propa-

ganda from one side of the dispute. By discharging White on December 19, the Respondent violated Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. The Respondent has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union has been a labor organization within the meaning of Section 2(5) of the Act.
3. The Respondent violated Section 8(a)(1) of the Act by threatening White with discharge because of his union and protected concerted activities on November 19 and December 19.
4. The Respondent violated Section 8(a)(1) of the Act by issuing a verbal warning to White on November 19, and by discharging him on December 19, in retaliation for his protected concerted activities of criticizing the Respondents and its management.

THE REMEDY

Having found that the Respondent unlawfully threatened, issued a verbal warning to White and fired him, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. It must rescind the verbal warning and the discharge given him on November 19 and December 19, and notify him in writing that this has been done, and it must offer him reinstatement to his former position, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed. In addition, I recommend that Respondent be ordered to make him whole for any loss that he suffered as a result of the discrimination against him, computed on a quarterly basis from the date of discharge to the date of an unconditional offer of reinstatement to his former position, less any interim earnings as set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact, conclusions of law and on the entire record, I issue the following recommended[6]

ORDER

The Respondent, Endicott Interconnect Technologies, Inc., Endicott, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging, warning, threatening, or otherwise discriminating against its employees for engaging in protected concerted activities.

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

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

(a) Within 14 days from the date of this Order, offer Richard White 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 previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth above in the remedy section of this decision.

(b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge and warning, and within 3 days thereafter notify White in writing that this has been done and that the discharge and warning will not be used against him in any way.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its facilities in Endicott, New York, copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 19, 2002.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

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

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[7] If 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."

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten, issue warnings to, discharge employees, or otherwise discriminate against them because they engaged in protected concerted activities under Section 7 of the Act.

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

WE WILL within 14 days from the date of this Order, offer Richard White 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 previously enjoyed, and WE WILL make him whole for any loss that he suffered as a result of our actions.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of and warning to Richard White, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge and warning will not be used against him in any way.

ENDICOTT INTERCONNECT TECHNOLOGIES, INC.