

McDonnell Douglas Corporation (Douglas Aircraft Company Division) and Charles E. Mosman. Case 31-CA-1744

March 19, 1971

DECISION AND ORDER

BY CHAIRMAN MILLER AND MEMBERS
FANNING, JENKINS, AND KENNEDY

On August 14, 1970, Trial Examiner Sidney Sherman issued his Decision in the above-entitled proceeding, finding that the Respondent had not engaged in certain alleged unfair labor practices and recommending dismissal of the complaint in its entirety, as set forth in the attached Trial Examiner's Decision. Thereafter, the General Counsel filed exceptions to the Trial Examiner's Decision and a supporting brief; and the Respondent filed a reply brief thereto.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and briefs, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order of the Trial Examiner and hereby orders that the complaint herein be dismissed in its entirety.

TRIAL EXAMINER'S DECISION

SIDNEY SHERMAN, Trial Examiner. The instant charge was served upon Respondent on February 27, 1970, the complaint issued on April 9, and the case was heard on June 2 and 3. The only issue litigated was whether the discharge of Mosman was unlawful. After the hearing, briefs were filed by Respondent and the General Counsel.

Upon the entire record,¹ including observation of the witnesses, the following findings and recommendations are adopted:

I. RESPONDENT'S BUSINESS

McDonnell Douglas Corporation,² herein called Respondent, is a Maryland corporation, with facilities in various States, including the one here involved, at Palmdale, California. It is conceded, and the record shows, that Respondent is engaged in commerce under the Act.

II. THE UNION

International Association of Machinists and Aerospace Workers, District Lodge 720, hereinafter called the Union, is a labor organization under the Act.

III. THE UNFAIR LABOR PRACTICES

The only issue raised by the pleadings is whether Mosman was discharged for engaging in union or concerted activities.

A. Sequence of Events

Respondent has a contract with the Union covering its Palmdale plant, which contains a grievance procedure culminating in arbitration. Mosman was hired in April 1966 and at the time of his discharge on January 14, 1970, was classified as a master painter. He was considered proficient in his work and admittedly made some valuable suggestions for improvement of operating procedures. He made frequent use of the grievance procedure under the Union's contract, having filed about 15 grievances. He was also a frequent target of disciplinary action, having received eight written reprimands for irregular attendance, straying from his work station, and taking unauthorized work breaks, and, although in June 1969 he was suspended for 3 days for an offense in the last category, he was guilty in December of 10 instances of absenteeism and tardiness. He was also given to expressing freely his rather unfavorable opinion of the qualifications of some of his fellow employees, as well as of his immediate supervisor, Christiansen. This tendency led to frequent complaints about him by the victims of his jibes and, finally, in November embroiled him in an altercation with one, Starkey, which came to the attention of the general foreman. This led to an oral reprimand and a warning of discharge. A few months later, on January 14, 1970, Mosman again became involved in a similar incident with the union "chairman" or shop steward, Tarin, which was triggered by an inquiry by Mosman of Tarin concerning a petition which he had undertaken to prepare for signature by the master painters and presentation to the Union and Respondent. Mosman was discharged for his part in this incident.

¹ Certain transcript corrections are duly noted.

² Respondent's name appears as amended at the hearing.

The Union presented a grievance over the discharge at the penultimate step of the grievance procedure, but, after the grievance was rejected by Respondent, the Union did not pursue the matter further.

B. Discussion

The General Counsel contends that the discharge of Mosman should be deemed unlawful because it was precipitated by a discussion between him and Tarin of a matter pertaining to employee concerted activities. That matter was the afore-described petition, which had already been drafted by Tarin on January 14, for signature by Respondent's master painters, including Mosman, and which requested the Union to secure the removal of one, Olenick, from the list of those eligible for assignment to work as a master painter on an overtime basis. This petition procedure was in accord with the Union's contract, or, at least, in accord with the parties' interpretation thereof.³

Respondent, on the other hand, contends that the controlling consideration in discharging Mosman was his entire employment record, particularly his difficult relations with his fellow employees and his immediate supervisor, culminating in his alleged abusiveness on January 14 toward Tarin, and that the fact that that incident was touched off by a reference to the employee petition was merely fortuitous and had no effect on the discharge decision.

A proper evaluation of these conflicting contentions would seem to require some understanding of the personalities involved. Mosman appeared to be a relatively young man. He had been employed by Respondent as a painter since April 1966, becoming a master painter early in 1969. Respondent conceded his technical competence and that he had made some valuable suggestions for improving the operating procedures in the paint shop. At the same time, the record establishes that his relations with his fellow employees and his supervisors left something to be desired. Mosman admitted that he had frequently expressed to management an unfavorable opinion of the qualifications of his fellow painters, including Tarin, and that word of this had got back to the other painters. In addition, Assistant Foreman Christiansen testified, without contradiction, that some of the other painters had complained to him that Mosman had expressed to them directly an unflattering opinion of their qualifications, and Tarin testified without contradiction that Mosman had frequently told him he was not qualified to be a master painter. Moreover, Mosman acknowledged that he had often criticized Christiansen's "policy" and differed with him as to how Mosman's job should be done; and, although he denied that he had in so

many words told Christiansen that he was not a competent supervisor, I credit Christiansen's testimony that Mosman frequently made that aspersions.⁴ Moreover, I credit Christiansen's uncontradicted testimony that when, as not infrequently happened, he found Mosman straying from his work station and admonished him to return to work Mosman would either make some flippant remark or proceed to argue with Christiansen.

In November, Mosman became involved in an incident which I deem significant, not only because of its influence on subsequent events, but also because it affords a revealing insight into Mosman's dealings with others. This incident began with an encounter between Mosman and Starkey, a painter leadman. Mosman's own version was that, upon seeing Starkey standing about idly at quitting time, Mosman, in an effort at railery, suggested he pick up a "pad" of the type used to prepare the exterior of aircraft for painting, the implication being that he should stop loitering and get to work, that Starkey took offense and complained to Christiansen that Mosman had "cut him down" in front of his crew, that, when Christiansen reported this to Mosman, he disclaimed any intention of disparaging Starkey and promised there would be no recurrence. The witness added that he then approached Starkey and remonstrated with him as follows:

I asked Jess [Starkey] . . . , "What's it all about. Why did you take offense? Why did you turn me in? There is something behind that is prompting you to jump on me," because we never had any fights or hassles to speak of personally. So I wondered why it prompted him . . . if there was some pressure on him to "nail me" . . . which later, has come out

This accusation that, in "turning in" Mosman, Starkey was merely acting as a tool of others had the predictable effect of rekindling Starkey's ire and causing him to carry another complaint to Christiansen, who haled Mosman before General Foreman Sharpnack. As to the subsequent events in Sharpnack's office, Mosman's account indicates that Sharpnack took Mosman to task for his antagonistic attitude toward Respondent, which Mosman attempted to justify by contending that Respondent was in his debt because of work he had done before being reclassified as master painter, for which he should have been paid at the higher rate,⁵ and because of suggestions he had made at Respondent's request "to upgrade the work of the plant and their procedure." According to Mosman, Sharpnack retorted that, if any misconduct by Mosman was ever reported to Sharpnack again, Mosman would be discharged.⁶

Christiansen's testimony was to the effect that the discussion in Sharpnack's office pertained to Mosman's attitude to Respondent, his fellow employees, and Chris-

objectivity of his testimony. Mosman's testimony was, on the other hand, marred by frequent, rambling efforts to give a favorable coloration to some incident or remark.

³ Mosman estimated that Respondent owed him \$900 in backpay on that account.

⁶ Mosman's version was corroborated by Tarin. Sharpnack had only a vague recollection of the incident and could recall only that it involved a "personal conflict" and that he warned Mosman against any recurrence.

³ Olenick was not a master painter but was classified as a sign painter. Under the Union's contract (Art. XIV, sec. 3) he was eligible to share overtime with the master painters only if they consented thereto. They had so consented in April 1969 but, because of alleged favoritism shown Olenick by management in the matter of overtime assignments, the master painters had decided to rescind their consent and this was effected through the petition prepared by Tarin.

⁴ I was favorably impressed by Christiansen's demeanor and by the

tiansen, himself; that Sharpnack warned that he did not want to see Mosman in his office again; but that, as he left the office, Mosman remarked that "this was not the end of it."

The composite effect of the foregoing testimony is, and I find, that in November Mosman became involved in an altercation with Starkey because of a jibe levelled at him by Mosman; that Christiansen attempted to settle the matter, extracting a promise from Mosman that he would cause no further trouble; that immediately thereafter he again made some provocative remarks to Starkey, which caused Mosman to be brought before Sharpnack; and that he taxed Mosman with a hostile attitude to his fellow employees and to management and warned him of discharge for any recurrence. I find further from Mosman's own testimony that he did not deny the charge made by Sharpnack about his hostile attitude but merely attempted to justify it by citing various circumstances which he believed placed Respondent in his debt. Finally, I find that, far from being chastened by the foregoing interview, Mosman parted from Sharpnack on a note of defiance.

Thus, the record shows that prior to the final episode of January 14, Mosman's relations with his fellow employees and with Christiansen were strained as a result of Mosman's frequent jibes at what he regarded as their incompetence, that the Union's "chairman," or steward, Tarin, received his fair share of these jibes, and that Mosman was on notice that any further clash with others would result in his discharge.

As already related, on January 14, Tarin had brought with him to work a petition, which he had just prepared, and which was to be signed by Mosman and the other master painters, relating to the termination of the existing overtime arrangement with regard to Olenick.⁷ According to Tarin, Mosman greeted him that morning with the remark, "Hey, mouth, where . . . is that petition you were supposed to bring today?" Tarin continued that he took umbrage at this and retorted, "If anybody here is a 'mouth,' you're the 'mouth,'" that the two then exchanged uncomplimentary remarks; that Tarin summoned Christiansen to the scene, that, as Christiansen approached, Mosman observed that Tarin must have "a wild hair" up his posterior; that Tarin demanded that Christiansen squelch Mosman; that the former proposed that the dispute be taken to the personnel office; and that, when Mosman turned his attention to Christiansen, casting aspersions on his supervisory ability, he announced that they were all going to the personnel office.

Christiansen testified that Tarin appealed to him to get Mosman off his back, explaining that he had just "hollered" at Tarin and called him "mouth"; that, when the witness then asked Mosman why he called Tarin "mouth," Mosman explained that he had merely wanted to discuss the petition with Tarin; that the latter returned to the scene at that point and exchanged some words with Mosman, in the course of which exchange Mosman referred to

Christiansen as a poor assistant foreman, that he directed the two men to desist, but they did not do so until he repeated his order; and that he then repaired with Tarin to the personnel office

Mosman's version was that he did not greet Tarin with the phrase, "Hey, mouth," but that he started the conversation with the inquiry, "What about the petition?" Mosman added that, when Tarin did not answer, Mosman said:

Are you all talk or is this all talk about the business, or is this going to materialize . . . are you all talk about getting this petition agreement made up or is it all mouth?

According to the witness, Tarin retorted in a loud voice, "Well, I'll tell you what's all talk and who's all mouth around here . . . You're the mouth . . . what in hell have you done for this shop materialistically, spiritually or morally?" Mosman added that he attempted to pacify Tarin, but the latter summoned Christiansen, who admonished Mosman to stay away from Tarin because he was upset, which Mosman agreed to do, that he then explained to Christiansen that he had merely inquired about the petition; and that Tarin returned at this point, declared he was tired of Mosman and his disparagement of Tarin as a painter and as a shop steward, and demanded that the matter be taken up with the personnel office.

Boudreau, a painter, who was present throughout the altercation, at first professed to be uncertain whether, in asking about the petition, Mosman addressed Tarin as "mouth," but almost in the next breath declared that he did not hear Mosman use that term, even though, as noted above, Mosman admitted he used it, albeit in a somewhat different context from that described by Tarin.⁸ Boudreau, moreover, attributed to Tarin an obscene epithet, but Mosman was unable to corroborate this. Finally, there was the testimony of Respondent's personnel director, Cochran, which was substantially corroborated by Union Business Agent Shaw, that at the hearing on Mosman's discharge grievance Boudreau testified that Mosman had shouted, "Hey, Mouth," to Tarin on the 14th. Absent any contradiction, I credit Cochran. It follows that little reliance can be placed on Boudreau's recollection.⁹

The next episode occurred in the office of Cochran, Respondent's personnel director, where Tarin and Christiansen gave their account of the incident. Mosman was then called in and related his version out of the presence of both the others. He admitted, according to the testimony of Cochran, that he had called out to Tarin, "Hey, big mouth, where is the paper you were bringing in," and had asked him whether he was "all talk or was actually going to do something about this"; that words were exchanged between them, that Mosman then proceeded to argue with Christiansen, asserting that he did not know how to run the paint shop and taxing him with favoritism toward Tarin in making job assignments and with "not treating people

⁷ See fn 3, above

⁸ Boudreau also denied, contrary to the testimony of both Mosman and Tarin, that the latter used the word "mouth" at any time during the incident

⁹ He had no apparent reason to favor Mosman in his testimony and seemed to be sincere. The only conclusion to be drawn is that his memory played tricks with him at the instant hearing

fairly and equally", and that Mosman disparaged Tarn's ability as a painter

In rebuttal, Mosman denied that he had admitted to Cochran that he had called Tarn a "big mouth," or that he had become involved in an argument with Christiansen. He denied further that he had made any derogatory reference to Christiansen in the course of the altercation on the 14th but did not deny specifically that he had admitted disparaging Tarn's workmanship

It appears from the foregoing that, while he denied he had greeted Tarn with the phrase, "Hey, mouth," Mosman acknowledged that he had roused Tarn's ire on the 14th by following up an inquiry about the petition with remarks implying that Tarn was "all talk" or "all mouth." Thus, even if Mosman be credited, it is clear that it was he who provoked Tarn by questioning his good faith in the matter of the petition. Moreover, I credit the mutually corroborative testimony of Tarn, Christiansen, and Cochran and find that Mosman did in fact greet Tarn that morning with the words, "Hey, mouth," and uttered the other remarks ascribed to him by Tarn and Christiansen.

As already related, at the conclusion of the foregoing interview on January 14, Mosman was notified by Cochran of his discharge. The official reason for the discharge, as stated on Respondent's personnel records, is, "Failure to meet requirements of employment. Unsatisfactory personal conduct." Christiansen, who appears to have played the major role in the decision to discharge Mosman,¹⁰ testified that, in recommending that discharge, he told Cochran that he was "getting tired of Mr. Mosman's attitude toward . . . the Company and myself and fellow employees" and that his recommendation was based on that attitude, as reflected in prior disciplinary actions taken against Mosman.¹¹

One is forced to conclude from the entire record that Respondent treated Mosman with unusual tolerance, and there is no reason to doubt Christiansen's explanation that this was out of deference to Mosman's technical proficiency. Due to this consideration, Respondent had long overlooked his idiosyncrasy for "needling" his fellow

employees and his immediate supervisor, as well as his generally insubordinate attitude. When, in November, an incident occurred that brought the problem to the attention of his general foreman, Sharpnack, Mosman was ordered in no uncertain terms to desist from such conduct and was warned, as he, himself, acknowledged at the hearing, that any recurrence would result in his summary discharge. Nevertheless, on January 14, there was a recurrence, when Mosman questioned Tarn about the petition relating to Olenick in a manner calculated to arouse Tarn's ire, insisted on bandying words with Tarn even after Christiansen ordered him to desist, and cast a slur on Christiansen's competence as a supervisor.¹²

The General Counsel contends in his brief that Mosman's discharge should be deemed unlawful because it was precipitated by his inquiry about action being taken to remedy the grievance of the master painters with regard to the assignment of overtime. The General Counsel's argument here seems to be twofold—namely, (1) that under the rule of *Burnup & Sims*¹³ Respondent's belief that Mosman's inquiry involved a violation of a plant rule is no defense, since there was in fact no such violation, and (2) even if Mosman's language to Tarn was objectionable, it was not so offensive as to deprive him of the Act's protection. As to (1), above, the General Counsel makes specific reference to plant rule 15, which was cited by Respondent's counsel at the hearing as among the rules breached by Mosman on the 14th, and which forbids the use of "profane, obscene, vile or abusive language to, or in the presence of, other employees." It having been found above that Mosman did vociferously greet Tarn with an appellation, which under the circumstances might well have been regarded as insulting, it is far from clear that such greeting, as well as Mosman's subsequent remarks, were not "abusive" within the meaning of the plant rule. Moreover, the conduct of Mosman would seem to fall even more clearly within the interdiction of plant rule 18, which forbids "distracting the attention of others from work . . . or causing confusion by such conduct as unnecessary shouting . . ."

¹⁰ He testified that he recommended the discharge to Cochran, who usually solicits Christiansen's recommendation regarding disciplinary action against his subordinates, and that he could not recall any instance where Cochran did not follow his recommendation. Cochran at first attempted to convey the impression that the discharge decision was in large measure, if not entirely, his, but finally conceded that the "initial decision" was made by Christiansen and Sharpnack and that Cochran's function was merely to review that decision in an advisory capacity for conformity with Respondent's over-all disciplinary policy. I conclude therefore that the moving spirit in the matter was Christiansen, who was most familiar with the facts and that Cochran played only a secondary role. (Sharpnack testified that he recommended Mosman's discharge, but Sharpnack was not examined as to the reason for his recommendation, and, absent anything to the contrary, it seems fair to infer that he either relied on Christiansen's recommendation or on the same considerations as prompted that recommendation.)

¹¹ Relatively little stress was placed by Christiansen on Mosman's record for "loitering" on the job, unauthorized departures from his work area, and absenteeism, which, as already related, had earned him eight written reprimands culminating in a 3-day disciplinary layoff in June. The record shows moreover, that, because of about 10 other instances of tardiness or absenteeism in December, Christiansen had on January 13, 1970, prepared a memorandum concerning disciplinary action to be taken against Mosman, which would however, have consisted only of a

"correction interview" (This interview was never held because of Mosman's discharge the next day.) In view of all these circumstances, I do not believe that Mosman's absenteeism played a significant role in the decision to discharge him and infer rather that Christiansen, at least, was disinclined to take any strong measures because of Mosman's irregular attendance alone, out of consideration for his proficiency as an employee.

¹² Christiansen professed at the hearing to have been unaffected by such slur. However, as noted above, he attributed his decision to discharge Mosman, in part, to his attitude toward Christiansen, and it would have been strange, indeed, if he could have dissociated the latest manifestation of such attitude from the prior ones.

Christiansen conceded that Tarn, like Mosman, was slow in complying with the order to break off the argument. The record shows also that Tarn was not discharged but merely reprimanded for the incident. The General Counsel does not, however, contend that such apparently disparate treatment of Tarn was, in itself, unlawful or somehow shows an improper motive in discharging Mosman. In any event, it would be a sufficient answer to such contention that Mosman was admittedly the aggressor on the 14th, that, although Tarn was involved in an insubordinate episode in December, this was, so far as the record shows, the only such incident in his employment history, and that in that respect his record was far superior to Mosman's.

¹³ *N.L.R.B. v. Burnup & Sims, Inc.*, 379 U.S. 21

As to the second branch of the General Counsel's argument, the leading case in this area is *Bettcher Manufacturing Corporation*,¹⁴ where the Board found unlawful the discharge of an employee for implying in the course of a bargaining session that his employer was deliberately misrepresenting his financial condition. The Board there stated:

We do not hold, of course, that an employee may never be lawfully discharged because of what he says or does in the course of a bargaining conference. A line exists beyond which an employee may not with impunity go, but that line must be drawn "between cases where employees engaged in concerted activities exceed the bounds of lawful conduct in a 'moment of animal exuberance' (*Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc.*, 312 U.S. 287, 293) or in a manner not activated by improper motives, and those flagrant cases in which the misconduct is so violent or of such serious character as to render the employee unfit for further service."¹⁵

Applying that rule here, I find that Mosman did not act "in a moment of animal exuberance," which phrase, construed in the context of the *Meadowmoor* case, I take to refer to the emotions engendered by confrontations between adversaries, whether on the picket line, at the bargaining table, or in a union meeting. For, Mosman's remark to Tarin was not immediately preceded by any drawing of lines or staking out of opposing positions or by any events that were calculated to generate tensions but was delivered "out of the blue," when Mosman happened to come upon Tarin in the paint shop. As for Mosman's motivation, the fact that, as Tarin testified without contradiction, only a few days earlier Mosman had asserted to Tarin that he had no interest in the petition militates against any inference that Mosman was inquiring about the petition because of any concern about its possible effect on his overtime assignments. The only reason suggested by the record for Mosman's action was his propensity for needling others with or without provocation, in which case, it could hardly be said that he was activated by proper motives.

As to whether Mosman's conduct was so flagrant as to render him unfit for further service, it is clear that, in discharging him, Respondent made the judgment that his value as an employee, however great, was nullified by his potential for disruption, as demonstrated by his record for creating disharmony and flouting discipline and by his persistence in such conduct on January 14, even after Christiansen had intervened and despite the strongly worded warning given him only a few months earlier. Under these circumstances, Respondent was warranted in believing that only by discharging Mosman could it insure harmony and discipline in the paint shop.¹⁶

Basically, the difference between a case like *Bettcher* and the instant one is that there is involved here not discipline

for a single, isolated incident but action taken on the basis of a series of incidents, of which only the last had any apparent relevance to concerted action. In such a case, it is easier to disentangle the strands of motivation and to find that it was the common denominator of all the incidents—namely, the quarrelsome disposition of the employee—rather than any unique aspect of the final incident that prompted the discharge.

That finding becomes inescapable here when one considers the total absence of union animus on the part of Respondent,¹⁷ its generally permissive attitude toward discussions of union matters on working time, and, more specifically, the undisputed fact that not only did Respondent's personnel director, Cochran, approve the petition procedure adopted by Tarin but Supervisor Christiansen even helped draft the petition. In view of this, it would be almost ludicrous to impute to Respondent any animus toward Mosman because of his reference to the petition in his encounter with Tarin.

Thus, here, the situation is more nearly like that which existed in *Continental Oil Company*, 161 NLRB 1059, 1061-1062, fn. 1, and *Borg-Warner Corporation*, 155 NLRB 1087, than that which existed in *Bettcher*. In *Continental Oil*, it was found that, although the dischargee's conduct was interspersed with some involvement in concerted activities, he was not terminated for that reason but because of his "continuous manifestations of personal dissatisfaction with numerous aspects of his job and constant complaining concerning management decisions as they affected him" And, in the *Borg-Warner* case, where it found no violation of the Act in the discharge of two employees for concertedly voicing to management repeated, unfounded complaints of maltreatment by a supervisor, the Board stated:

Were the employees terminated because they engaged in concerted activity? Or were they terminated for some other and legitimate reason that would have impelled the Respondent to take such action even independently of their concerted activity? On the particular facts of this case we are persuaded that the latter alone formed the motivating basis for the terminations. To begin with, there is nothing in the record to suggest that Respondent resented the fact that Shepherd and Strayers had acted together in presenting these complaints. . . . Nor is there anything in the record to show that the Respondent had a purpose to frustrate the presentation of complaints by other probationary employees. . . . In short here there is a complete absence of independent evidence on which to rest an inference that the Respondent acted either out of hostility toward or in reprisal for the concerted activity in which the employees engaged.

Here, too, there is a complete absence of evidence to support an inference that the Respondent acted either out

¹⁴ 76 NLRB 526.

¹⁵ *Accord: Socony Mobile Oil Co., Inc.*, 153 NLRB 1244; *enfd.* 357 F.2d 662 (C.A. 2); *Indiana Gear Works*, 156 NLRB 397; *Boaz Spinning Co.*, 165 NLRB 1019, enforcement denied, 395 F.2d 512 (C.A. 5).

¹⁶ See *Stuart F. Cooper Co.*, 136 NLRB 142, where two union adherents were disciplined for persisting in soliciting, and arguing with, the members

of an antiunion function, despite the employer's admonitions to desist. The Board found no violation because the employer's object was to restore harmony in the plant. See, also, *Hicks Ponder Co.*, 168 NLRB No. 103.

¹⁷ It had a long-term contract with the Union and there was nothing in the record to suggest that Respondent's relations with the Union were other than amicable.

of hostility toward, or in reprisal for, Mosman's ostensible interest in the petition drafted by Tarin.¹⁸

Accordingly, it is found that Mosman was discharged for the reasons assigned by Respondent and not for those alleged by the General Counsel,¹⁹ and it will be recommended that the complaint be dismissed.

¹⁸ Cf. *Falcon Plastics*, 164 NLRB 786, enfd. 397 F.2d 965, 966 (C.A. 9), where the Board refused to rely on the approach adopted by it in *Betcher* and held that the employee's insulting remark was merely seized on as a pretext for discharge, the real reason being his concerted activities. This rationale was an alternative basis for the decision in *Thor Power Tool Co.*, 148 NLRB 1379, enfd. 351 F.2d 584 (C.A. 7).

¹⁹ Although the complaint alleged only that Mosman's discharge was unlawful because it was in reprisal for his engaging in union or concerted activities and the case was in the main litigated on that theory, the General Counsel in his brief suggests as an alternative basis for a violation finding the theory that Mosman's remarks to Tarin were protected because they implied a criticism of Tarin's competence as an employee representative, and such criticism, like any other manifestation of disaffection from a union, is protected by the Act. However, even if one overlooks the variance between this violation theory and that alleged in the complaint, the result would be the same. To complete the General Counsel's syllogism, it would be necessary to find not only that Mosman's remarks were a protected

RECOMMENDED ORDER

It is hereby ordered that the instant complaint be dismissed in its entirety.

criticism of Tarin but also that he was discharged because of the "antiunion" aspect of the remarks. There is little more reason to find that Respondent was influenced by that aspect than that it was influenced by the "concerted activities" aspect of Mosman's remarks, for, most of the considerations cited above that militate against a finding of a discharge for concerted activities militate against a finding that Mosman was discharged because of apparent dissatisfaction with Tarin's handling of his union job. I find therefore that Respondent's concern was about Mosman's attitude toward Tarin, not as a union functionary, but as a fellow employee, and about the fact that the January 14 incident was further proof of Mosman's incompatibility with his fellow employees. Moreover, if one were to follow the General Counsel's thesis to its logical conclusion and hold that Tarin's union role made him fair game for any malcontent in the paint shop, what would there be to prevent such a one from keeping the shop in an uproar by continual verbal sniping at Tarin, so long as it was couched in terms of disparagement of his performance of his union functions? I do not believe that the Act should be so construed as to countenance such a result.