

**Joseph Nemeth d/b/a A-1 Janitorial Serv. Co. and
Retail Clerks International Association, Local No.
698, AFL-CIO. Case 8-CA-9036**

January 30, 1976

DECISION AND ORDER

BY CHAIRMAN MURPHY AND MEMBERS JENKINS
AND PENELLO

On October 9, 1975, Administrative Law Judge James V. Constantine issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings,¹ findings and conclusions of the Administrative Law Judge to the extent consistent herewith.

The Administrative Law Judge found that Respondent discriminatorily discharged and otherwise harassed and coerced Barbara Murphy in violation of Section 8(a)(1), (3), and (4) of the Act because she had given testimony in Case 8-CA-8669 and engaged in union activities. These findings of unlawful conduct rest on Respondent's harassment of Murphy to force her to quit, threats to discharge her, and an attempted transfer from her usual place of employment to a different work location with different conditions of employment. The Administrative Law Judge found that the transfer, and the harassment and coercion preceding it, forced Murphy to quit and thus constituted a constructive discharge.

Respondent excepts to these findings, contending that there is no evidence of unlawful motive on its part and that Murphy voluntarily quit Respondent's employ.

¹ Respondent complains of Administrative Law Judge Constantine's inconsistent rulings and his general conduct at the hearing. Our reading of the record bears out in some measure Respondent's complaints. The Administrative Law Judge cut off relevant lines of inquiry, constantly interrupted witnesses and counsel in the presentation of testimony, denied the General Counsel's counsel an opportunity to make an interim appeal, and stated that he would not accept his offer of proof but later did so, and at times displayed an attitude injudiciously critical of counsel. We admonish the Administrative Law Judge against unduly injecting himself in the presentation of a party's case and of conduct which can be interpreted as impatient or critical of the parties. Respondent, however, does not except to any specific ruling or point to any particular instance of misconduct or exclusion of evidence as prejudicial to it. Nor did its attorney at the hearing move to disqualify the Administrative Law Judge. While we observe that the Administrative Law Judge approached closely the limits of permissible conduct, we find no showing of prejudice to Respondent.

1. We adopt the Administrative Law Judge's 8(a)(1) and (4) findings insofar as they hold that Respondent coerced, harassed, and discharged Murphy because she gave testimony in an unfair labor practice proceeding. We do not adopt the 8(a)(3) finding which rests on a conclusion that Respondent's conduct was motivated by Murphy's union activities.

As found by the Administrative Law Judge, Murphy's cleaning work for Respondent, a janitorial service, at the Harrison Medical Building South was entirely satisfactory. Respondent's owner, Joseph Nemeth, described it as "100 percent." Nemeth knew that Murphy also worked at another job, at Westbrook Park Nursing Home (called Westbrook), during the same period she was working for Respondent. At Westbrook Murphy began to organize a union, and Westbrook discharged her for this activity on October 4, 1975. Thereafter, upon an unfair labor practice complaint, a hearing was held in Westbrook (Case 8-CA-8669) on January 28 and 29 and February 27, 1975. Murphy gave testimony at that hearing² and Respondent knew it.³

In late January Nemeth told his employees that "they were buggin' him about us working for him" and to avoid a tenant, Dr. Thomas. Mary Esber, the wife of an administrator at Westbrook, worked for Dr. Thomas. After the hearing ended Nemeth showed the employees a note, signed by Esber and another building tenant, complaining about the upkeep of the building and said, "trouble was starting already." At the same time he asked Murphy to quit, indicating that he feared loss of his service contract on the Harrison Building.

At the end of February Nemeth again asked Murphy to quit, asked her what she was doing to him, and said that he would fire her if she did not quit. About March 1 Nemeth repeated to Murphy that he was going to fire her but then proposed a job switch with another employee. Murphy agreed to the switch because, as she told Nemeth, it would not conflict with her daytime school patrol job. (Murphy's work for Respondent at the Harrison Building was at nighttime hours.)

Later in March, Nemeth told Murphy that the job switch was not acceptable to the other employee involved and offered her a transfer to another building which he serviced, but with daytime hours of work.

² The record in Case 8-CA-8669, of which we take official notice, shows that Murphy testified at the hearing on January 28, 1975.

³ We adopt the Administrative Law Judge's finding that Respondent was aware of Mrs. Murphy's testimony in the Westbrook case. Respondent had not excepted to this finding.

After the hearing in Case 8-CA-8669, the Administrative Law Judge issued a Decision finding that Westbrook had discriminatorily discharged Murphy in violation of Sec. 8(a)(3) and (1) of the Act. The Board adopted the Decision and recommended Order *Westbrook Park Nursing Home*, 219 NLRB No. 188 (1975).

About March 13 Nemeth directed Murphy to move to the other building. Murphy told Nemeth that she could not transfer because of the conflicting school patrol hours.

Murphy worked until March 17, 1975, when Nemeth told her that he had replaced her and that she would have to transfer. Murphy said that she could not do this and, on Nemeth's request, gave him the keys to the Harrison Building and left.

The facts demonstrate that Respondent's repeated pressure on Murphy to quit, threats to fire her, and finally the transfer under conditions that would have required Murphy to give up her daytime job violated Section 8(a)(1) and were actions taken on account of Murphy's participation in Case 8-CA-8669. Further, Respondent's proposed transfer, under the conditions described above, forced Murphy to leave Respondent's employ and constituted a constructive discharge in violation of Section 8(a)(4) of the Act.

2. We do not adopt the Administrative Law Judge's conclusion that the discharge violated Section 8(a)(3) because we cannot find that it was prompted by Murphy's union activities. To the extent that the Administrative Law Judge appears to be referring to Murphy's union organizing or other protected activity directed to Respondent's own employees, there is no evidence of such activity. Moreover, the evidence respecting Respondent's knowledge of Murphy's union activity at Westbrook, apart from Murphy's testimony in the *Westbrook* proceeding, is inconclusive. The Administrative Law Judge's finding rests entirely on Nemeth's testimony. On direct examination Nemeth testified that he had no knowledge of Murphy's union activities at Westbrook. On cross-examination he said that Murphy's husband "mentioned something [about union activity] . . . I just don't recall what." He did not recall any conversation with Murphy's husband before March 17, 1975 (when Murphy was discharged) about union activities at Westbrook. We conclude that the General Counsel has not proved, by a preponderance of the evidence, that Respondent discharged Murphy on account of her union activities. We shall therefore dismiss the 8(a)(3) allegation of the complaint.

CONCLUSIONS OF LAW

1. Joseph Nemeth d/b/a A-1 Janitorial Serv. Co. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. By harassing and coercing Barbara Murphy for the reason that she has given testimony under the Act in Case 8-CA-8669, Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

3. By discharging Barbara Murphy because she had given testimony under the Act in Case 8-CA-8669, Respondent engaged in unfair labor practices within the meaning of Section 8(a)(4) and (1) of the Act.

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

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Joseph Nemeth d/b/a A-1 Janitorial Serv. Co., Canton, Ohio, its agents, successors, and assigns shall:

1. Cease and desist from:

(a) Harassing or coercing employees because they gave testimony under the Act in a proceeding before the Board.

(b) Discriminating against employees by causing them to quit as a result of harassment or coercion because they gave testimony under the Act in a proceeding before the Board.

(c) In any other manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed to them by Section 7 of the Act.⁴

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

(a) Offer Barbara Murphy immediate and full reinstatement to her former job or, if that no longer exists, to a substantially equivalent position, the working hours of which do not interfere with her school patrol work, without prejudice to her seniority or other rights and privileges previously enjoyed by her, and make her whole for any loss of pay she may have suffered, in the manner set forth in the "Remedy" section of the Administrative Law Judge's Decision.

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

(c) Post at its place of business at Canton, Ohio, copies of the attached notice marked "Appendix."⁵ Copies of said notice, on forms provided by the Regional Director for Region 8, after being duly signed

⁴ *N.L.R.B. v. Entwistle Mfg. Co.*, 120 F.2d 532, 536 (C.A. 4, 1941). *Springfield Dodge, Inc.*, 218 NLRB No. 219, fn. 2 (1975).

⁵ In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

by Respondent or its duly authorized representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 8, in writing, within the 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the complaint be, and it hereby is, dismissed insofar as it alleges a violation of Section 8(a)(3) of the Act.

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

We hereby notify our employees that:

WE WILL NOT harass or coerce our employees because they give testimony in a proceeding before the National Labor Relations Board.

WE WILL NOT discriminate against our employees by causing them to quit our employment as a result of harassment or coercion by us because they give testimony in a proceeding before the National Labor Relations Board.

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

WE WILL offer Barbara Murphy immediate and full reinstatement to her former position or, if such position no longer exists, to a substantially equivalent position, the working hours of which do not interfere with her school patrol work, without prejudice to her seniority and other rights and privileges enjoyed by her, and we will make her whole for any loss of pay she may have suffered because of our discrimination against her, with interest thereon at the rate of 6 percent per annum.

JOSEPH NEMETH d/b/a A-1 JANITORIAL
SERV. CO.

DECISION

STATEMENT OF THE CASE

JAMES V. CONSTANTINE, Administrative Law Judge: This

is an unfair labor practice case litigated pursuant to the provisions of Section 10(b) of the National Labor Relations Act, as amended, herein called the Act. 29 U.S.C. 160(b). It was commenced by a complaint issued on May 9, 1975, by the General Counsel of the National Labor Relations Board, the latter herein called the Board, through the Regional Director for Region 8 (Cleveland, Ohio), naming Joseph Nemeth as the Respondent. Said complaint is based on a charge and an amended charge filed on March 21 and May 2, 1975, respectively, by Retail Clerks International Association, Local No. 698, AFL-CIO, herein called the Union.

In substance the complaint alleges that Respondent violated Section 8(a)(1), (3), and (4) and that such conduct affects commerce within the meaning of Section 2(6) and (7), of the Act. Respondent has answered admitting some allegations of the complaint but denying that he committed any unfair labor practices.

Pursuant to due notice this case came on to be heard, and was heard before me on July 18, 1975, at Canton, Ohio. Respondent and the General Counsel of the NLRB were represented at and participated in the trial and had full opportunity to offer evidence, examine and cross-examine witnesses, file a brief, and present oral argument. Respondent's motion to dismiss, taken under consideration at the hearing, is hereby denied. Respondent and the General Counsel argued orally and Respondent also submitted a brief.

This case presents the issues of whether Respondent (1) is engaged in commerce; (2) is an employer; (3) harassed and coerced employee Barbara Murphy for union membership or activities or for testifying in Case 8-CA-8669, or both; and (4) constructively discharged said Murphy because she gave testimony in Case 8-CA-8669, or engaged in protective activities, or both; and also, whether the Union is a labor organization is an issue.

Upon the entire record in this case, and from my observation of the witnesses, I make the following:

FINDINGS OF FACT

I. AS TO JURISDICTION

Respondent, an individual proprietor doing business under the trade name and style of A-1 Janitorial Service Co., is engaged at Canton, Ohio, in providing janitorial and cleaning services to office buildings. Annually he provides in excess of \$12,600 worth of services to Swallow Management Corp., an employer engaged in operating office buildings. Swallow annually receives rentals in excess of \$100,000, of which \$25,000 is derived from enterprises, such as Prudential Insurance and Metropolitan Life Insurance, meeting the Board's current jurisdictional standards other than indirect inflow or outflow.

Annually Respondent provides services valued in excess of \$29,600 to Home Savings and Loan Company, which in turn receives in excess of \$50,000 in income from "securities directly from points outside the State of Ohio." Also, Respondent provides \$3,900 and \$4,900 in services to Alco Standard Corporation and Standard Oil Company of Ohio, respectively, each of which annually ships goods valued in

excess of \$50,000 directly from Ohio to points outside Ohio.

I find that Respondent is an employer within the meaning of Section 2(2), and is engaged in commerce within the meaning of Section 2(6) and (7), of the Act, and that it will effectuate the purposes of the Act to assert jurisdiction over Respondent in this proceeding.

II. THE LABOR ORGANIZATION INVOLVED

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *General Counsel's Evidence*

Harold L. Murphy, a witness for the General Counsel, testified substantially as follows. He is the husband of Barbara Murphy. He was employed by Respondent from December 1973 to March 1975, at the Harrison Medical Building, South, to scrub and polish floors and to empty trash. He also worked for another employer, U.S. Ceramic Tile Company, during the same period. In late January 1975, Respondent spoke to Mr. Murphy "after the hearing started" in the Westbrook Park Nursing Home case, another complaint case numbered 8-CA-8669, about Barbara Murphy's employment at said Westbrook Park Nursing Home.

Barbara Murphy also gave testimony for the General Counsel. In substance she testified as follows: She commenced working for Respondent in September 1974, working in the Harrison Medical Building, South. She was a witness in the hearing of a complaint case in which Westbrook Park Nursing Home was the Respondent. Said hearing opened in late January, and ended on February 27, 1975. (See Case 8-CA-8669.) At the Harrison Medical Building her working hours were from 5:30 p.m. to 9:30 p.m. She also worked for the city of Canton on its school patrol from December 1974 to April 1975.

In late January 1975, Respondent told a group of his employees which included Mrs. Murphy "they were buggin' him about us working for him. . . . He asked us to come in a little bit later so we could stay off the second floor where their office is and to avoid the Thomas'." Then after the hearing in the Westbrook Park Nursing Home case ended Respondent asked Mrs. Murphy to quit her job because, he said, "he might lose the building"; i.e., the Harrison Medical Building, South. She replied that she "would let him know about quitting." Then he told his employees he had a note from Mary Esber and observed, "trouble was starting already." He also said he "had some complaints about our work," and added that Mary Esber's note complained that "the second floor in the medical lab, the floors were dirty . . . and that the rest room stunk . . . the toilets were dirty."

The above note was signed by "a girl that was working in the lab" and also Mary Esber. The latter "is the sister of Doctor and the wife of Edward Esber, Head Administrator of Westbrook Park Nursing Home."

In late February 1975, Respondent again asked Mrs.

Murphy "about quitting [her] job," but the latter replied that she could not afford to quit. Then he asked her "what [she] was doing to him," and said that if she did not quit the job he was going to fire her.

Then "around" March 1 Respondent told Mrs. Murphy he was going to fire her on March 1, but added that he thought he "was going to work something else out that maybe he could transfer me to another building with about the same hours. And then he said he was gonna try switching me with Jim Selby's wife." Mrs. Murphy responded that "it would be all right because it would not conflict with my other job." She informed him of said other job, i.e., "with the school patrol," and the hours during which she performed it, and further told him that she would "have to have a job with hours about the same as those at Harrison Medical." Said school patrol job had her occupied as a "guard at crossings" at various times between 8 a.m. and 3:45 p.m. on school days.

On the following Monday Respondent informed Mrs. Murphy that "Jim Selby's wife would not switch jobs with" Mrs. Murphy. However, Respondent offered her a job at another building, the Dartmouth Medical Building, at which he was under contract to clean the offices. But Mrs. Murphy rejected this offer as the hours at which she would work there conflicted with those required by the school patrol job.

About March 13, 1975, Respondent spoke to Mrs. Murphy in the presence of her husband. Respondent asserted that he was starting a "new company policy to exchange people from one building to another so they could learn all the jobs and [Mrs. Murphy] was going to have to move to the Dartmouth Building." She replied that she could not accept this "because of my other job"; i.e., her school patrol job. Thereupon Respondent retorted, "That was too bad." At this point Mr. Murphy quit his job with Respondent saying that he, Mr. Murphy, thought it was "pretty rotten" of Respondent.

Mrs. Murphy completed her work for Respondent on said March 13 and also worked on the next 2 days; i.e., Friday and Saturday. When she reported to work on Monday, March 17, she noticed that Respondent had assigned another woman to take Mrs. Murphy's place in cleaning the offices on Mrs. Murphy's floor. Respondent told Mrs. Murphy that he had "somebody else to replace" her, and that Mrs. Murphy would have to work for him at the Dartmouth Medical Center Building. But she made it known to Respondent that she could not do this and would not "show up" at the Dartmouth building. So he requested her to hand him the keys she had to the Harrison Medical Building. She did so and then left taking her "stuff" with her. She testified that she quit as an employee of Respondent by thus leaving.

Mrs. Murphy further testified that during the time she was employed by Respondent she never received any complaints pertaining to her work. Further, she insisted that the note from Mrs. Esber concerned work on the second floor whereas Mrs. Murphy worked on the third floor.

On cross Mrs. Murphy averred that Respondent explained to her that at the Dartmouth Medical Center Building she would work only on Tuesday, Friday, and Saturdays from noon or 1 p.m. to 5 p.m. And she replied to

him that she could not undertake this assignment because it conflicted with her other job as a school patrol officer. So she never reported to work at the Dartmouth Medical Center Building. Thus she quit. Continuing, she related on cross that previous to starting her employment at Harrison Medical Center she was employed by Westbrook Park Nursing Home. Also on cross she stated that Mrs. Esber works for Doctor Thomas, a tenant in the Harrison Medical Center Building, and that Respondent not only never complained about Mrs. Murphy's work but told her she was a good worker.

At this point the General Counsel rested.

B. Respondent's Defense

Joseph Nemeth, Jr., the Respondent in this case, testified in his defense. The essential import of his testimony follows. He is engaged in providing janitorial and cleaning services to office buildings and other commercial establishments in Canton, Ohio. He denies that he harassed and coerced employee Barbara Murphy because she gave testimony in the hearing of the Westbrook Park Nursing Home, identified as Case 8-CA-8669. And he insists he is ignorant "of what she did in reference to any union activities with regard to Westbrook Park Nursing Home" or even as to what work she did at said nursing home. However, he knows that for a period of time she worked at such nursing home while she also was employed by him, but is not cognizant as to when she started to work or ceased being employed at said nursing home.

Continuing, Nemeth asserted he had "no idea" whether Mrs. Murphy "joined, assisted, or favored the Union or engaged in other protected concerted activities of collective bargaining, mutually aided or protected reference to any work she did for" him. In fact, he has no knowledge whether any of his employees in general, and Mrs. Murphy in particular, "engaged in any union work or any union activities or labor disputes," or whether she "did anything in reference to any union activity of any kind with reference to [his] employment either with her or her employment with [him]," or whether she gave any testimony of any kind in any labor hearing. Nor did he "at any time discuss with her any of her activities or alleged activities with a union organization or union work." Further, he contends Mrs. Murphy quit working for him about March 15, 1975, but he did not directly, constructively, or indirectly discharge her.

On or about March 15, 1975, Nemeth had a conversation with Mr. and Mrs. Murphy in which he told them they would have to work in other buildings serviced by Nemeth rather than at the Harrison Medical Building. However, Mrs. Murphy insisted that "I am not going to be able to go to that other job because I have other employment." Since he "did not even know she was employed elsewhere" he asked her, "What other employment?" Then he reiterated that "this was a policy of the company that [he was] putting into effect." But she made no inquiry of him what the hours or nature of the work would be at Dartmouth Medical Center.

Nemeth further declared that he explained to Mrs. Murphy the working hours and type of work she would en-

counter while employed by him at Dartmouth Medical Center, telling her she would be engaged in performing the same kind of work she was then doing at Harrison Medical Center. "She took it for granted it [Dartmouth Medical Center] was like Harrison Medical Building," Nemeth claimed, and again in this conversation explained the policy he had adopted of having an employee work in different buildings serviced by him. He insisted while on the stand that he twice "talked to Barbara Murphy in reference to her transfer from Harrison Medical Center, South, to Dartmouth Medical Center," i.e., on March 1 or 2 and again on or about March 12 or 13, 1975, the day on which her husband quit. His purpose in doing so, which he conveyed to Mrs. Murphy was "to acquaint herself as well as all of the other employees, with the different work and the different buildings."

Continuing, Nemeth testified that, pursuant to the foregoing policy, he had planned to assign Mrs. Murphy to employee Margie Weingard's job at Dartmouth Medical Center and to transfer Ms. Weingard to Mrs. Murphy's job at Harrison Medical Center, South. And he not only spoke to Mrs. Murphy about taking Ms. Weingard's job, and the latter about assuming Mrs. Murphy's work, but also he "had talked to all our employees about our transfers." In fact Ms. Weingard did report to work at the Harrison Medical Building, South. Finally, on direct, Nemeth (a) attested to the fact that Mrs. Murphy's "work was 100 percent. I never did criticize her work," and (b) stated that he had completed the transfer of employees a week before July 18, 1975, the day of the hearing herein.

On cross Nemeth testified substantially as follows. Prior to requesting Mrs. Murphy to be transferred from working at Harrison Medical, South, to the Dartmouth Medical Building he had not transferred any other employee. And sometime before Mr. Murphy quit working for Nemeth the former told Nemeth that Mr. and Mrs. Murphy "were engaged in union activities."

C. Concluding Findings and Discussion

In arriving at the findings set out below I have observed and been guided by two principles of law which triers of facts are required to follow. The first is that the burden of proving the allegations of the complaint at all times is upon the General Counsel, and that no burden rests upon the Respondent to disprove any part of the General Counsel's Case. And the second is that discrediting or rejecting some or all of Respondent's evidence, "without more," does not constitute affirmative evidence, and, consequently, "does not mean that the [General Counsel] has fulfilled his burden of proving" his case. *N.L.R.B. v. Harry F. Berggren & Sons, Inc.*, 406 F.2d 239, 246 (C.A. 8, 1969), cert. denied 396 U.S. 823; *Ri-Del Tool Mfg. Co., Inc.*, 199 NLRB 969, 973 (1972). "The mere disbelief of testimony of itself establishes nothing." *N.L.R.B. v. Joseph Antell, Inc.*, 358 F.2d 880, 883 (C.A. 1, 1966), Cf. *N.L.R.B. v. Walton Manufacturing Company & Loganville Pants Co.*, 369 U.S. 404, 408 (1962).

1. As to harassing and coercing Barbara Murphy for engaging in union or other protected activity

An analysis of Nemeth's testimony convinces me, and I find, that he knew that Mrs. Murphy engaged in union activities. Thus I find that, on cross, he admitted that some time before Mrs. Murphy quit working for Respondent Mr. Murphy told Nemeth that both Mr. and Mrs. Murphy "were engaged in union activities." And I further find that Nemeth intentionally decided to transfer Mrs. Murphy to a job which interfered with her school patrol work because she was engaged in union activities. It follows, and I find, that by so transferring Mrs. Murphy Respondent harassed and coerced her for her union activities.

In finding harassment and coercion I have drawn inferences which point to said conclusion as Nemeth expressly denies that he so treated her. Said inferences have resulted from the facts, which I find, that

(a) Nemeth did not transfer any other employees at or before the time he told Mrs. Murphy he was transferring employees as a policy matter to indoctrinate them in all the buildings he serviced.

(b) Mrs. Murphy was transferred to a job with fewer working days than the one on which she was then employed. This probably would reduce her wages.

(c) Mrs. Murphy could not accept said job to which she was transferred as its hours of employment conflicted with her hours of work on the school patrol job, and Nemeth was aware of this.

(d) And although Nemeth at first told Mrs. Murphy he would "switch" her with employee Mrs. Selby, and Mrs. Murphy agreed to this as it would not interfere with her school patrol job, Nemeth failed to consummate said switch because Mrs. Selby would not consent to it. If Nemeth was switching all employees to familiarize them with all his buildings it can be inferred that he did not switch Mrs. Selby because such a move would benefit Mrs. Murphy. And, further, it is incongruous for him, as an employer, to allow an employee, i.e., Mrs. Selby, to refuse to obey his command that she was being transferred. Patently it can be inferred that an employer who overlooks such insubordination by Mrs. Selby does so with a motive of harassing or coercing the employee who was to be "switched" to Mrs. Selby's job. "The General Counsel can win by proving that other employees who committed similar acts but were not known to be engaged in union activities were not discharged, and he will normally lose if the employer can establish a record of discharges for similar conduct." See *N.L.R.B. v. Park Edge Sheridan Meats, Inc.*, 341 F.2d 725, 728 (C.A. 2, 1965).

2. As to harassing and coercing Barbara Murphy for giving testimony under the Act in Case 8-CA-8669

Initially, I find, crediting Mr. Murphy, and not crediting Respondent's evidence inconsistent therewith, that Nemeth in late January 1975, spoke to Mr. Murphy about Mrs. Murphy's employment at Westbrook Park Nursing Home. And Respondent testified that he knew Mrs. Murphy worked at said nursing home while she was also employed by him. Further, I find that Mrs. Murphy was a witness in

the hearing of the complaint case naming said nursing home as the Respondent, i.e., Case 8-CA-8669. Finally, I find that Nemeth harassed and coerced Mrs. Murphy for so testifying in said case by twice asking her to quit her job with him, once, i.e., around March 1, 1975, telling her he was going to fire her, and finally transferring her to another job, i.e., at the Dartmouth Medical Building, which prevented her from continuing to work on her school patrol job. Cf. *Globe Manufacturing Company*, 218 NLRB No. 51 (1975).

The foregoing finding that Mrs. Murphy was harassed and coerced has resulted from inferences which I have drawn. Such inferences have been made not only from the facts heretofore recited above in 1(a) through 1(d) in connection with Nemeth's harassing and coercing Mrs. Murphy for her union activity, but also the following facts, which I hereby find.

(a) Crediting Mrs. Murphy, I find that, after the hearing in the Westbrook Park Nursing Home case Nemeth asked her to quit her job with him as he might otherwise lose the work of servicing the Harrison Medical Building, South, where Mrs. Murphy worked for Nemeth.

(b) Although Nemeth testified that Mrs. Murphy's work was quite satisfactory he informed a group of employees which included Mrs. Murphy that he had a note from Mary Esber who works for Doctor Thomas, a tenant on the second floor of said Harrison Building, that "trouble was starting already." There is no reason why Mrs. Murphy should have been so warned since she worked only on the third floor of said building and her work, according to Nemeth, was admittedly "100%" satisfactory. It is significant that Mrs. Esber is the wife of Edward Esber, head administrator of Westbrook Park Nursing Home.

(c) As found above, Nemeth twice asked Mrs. Murphy to quit being employed by him notwithstanding that Nemeth testified that her work was satisfactory.

3. As to constructively discharging Mrs. Murphy for engaging in union and other activities protected by the Act

As found above Nemeth harassed and coerced his employee, Barbara Murphy, because she engaged in union and other protected activities under the Act, and also because she gave testimony under the Act in Case 8-CA-8669. Said harassment and coercion became more unbearable on about March 13, 1975, when Nemeth insisted that Mrs. Murphy "was going to move to the Dartmouth Building" and work there during hours which prevented her from performing her school patrol work. Although Mrs. Murphy responded that she was unable to accept the Dartmouth Building assignment because it precluded her from continuing to perform her school patrol job, Nemeth curtly replied, "that's too bad."

The foregoing conduct and attitude on Nemeth's part, and particularly his insistence that Mrs. Murphy work at the Dartmouth Building, convinces me, and I find, that it amounts to a constructive discharge of Mrs. Murphy. And I expressly further find that Nemeth by thereby constructively discharging Mrs. Murphy was out to get her to leave his employment as he had previously twice asked her to

quit her job and once told her he was going to fire her.

Then the question is whether said constructive discharge of Mrs. Murphy occurred at least in part because she was engaged in union activities. Upon the basis of the entire record I find that said question must be answered in the affirmative. Said finding results from an inference based on the entire record inasmuch as Nemeth denies that he constructively discharged Mrs. Murphy and his brief so contends.

Cases cited by Respondent indicating that Mrs. Murphy was not constructively discharged are distinguishable. For example, *N.L.R.B. v. Kopman-Woracek Shoe Manufacturing Company*, 158 F.2d 103, 108 (C.A. 8, 1946), contains this language: "The employer has the undoubted right to direct the employee as to the task to be performed. . . . It was not up to her [the employee] to determine what to do." This is true. But if two employees are insubordinate in the same respect but only one is penalized or disciplined therefore by their employer it may be found that the employer is illegally discriminating for the one not disciplined for disobeying the identical command. That is the situation here, and I so find. In other words, although Nemeth directed Mrs. Murphy to swap jobs with Mrs. Selby the latter refused to do so. Yet Mrs. Selby was not disciplined for such insubordination. Then when Mrs. Murphy refused to be transferred to another job she was not permitted to refuse to take it notwithstanding she gave a sound reason therefore. Hence I draw the inference that Nemeth's insisting that Mrs. Murphy be transferred to the Dartmouth Building was discriminatory since he took no action against Mrs. Selby for refusing to obey his order transferring Mrs. Selby to another similar job.

And *Montgomery Ward & Co. Incorporated (Wards Southtown Retail Store)*, 160 NLRB 1729, 1742, upon which Respondent relies, expressly recognized the rule of law that "An employer 'constructively' discharges an employee in violation of the Act where, for discriminatory reasons, he makes the employee's conditions of work so intolerable or undesirable that he is thereby forced to quit his job." And I find that this language applies to the finding herein that Mrs. Murphy's quitting in fact was a constructive discharge because assigning her to a day job prevented her from continuing her occupation as a school patrol worker.

4. As to whether Mrs. Murphy was constructively discharged because she testified in Case 8-CA-8669

As found above, Respondent harassed and coerced Barbara Murphy because she engaged in union and other protected activities and because she gave testimony as a witness in Case 8-CA-8669, a complaint case under the Act. Also, it has been further found above that said harassment became so unbearable that it caused her to quit her job, but that said quitting was not voluntary so that it amounted to a constructive discharge of Mrs. Murphy by Respondent for said union and other protected activities and for giving said testimony.

I now find that said constructive discharge also was resorted to by Respondent because Mr. Murphy gave evidence for the General Counsel in said Case 8-CA-8669. The subsidiary findings from which this ultimate finding is

derived are the same as those recited in the previous subsection, i.e., subsection 3, and need not be restated here at length. However, it is desirable briefly to mention that Respondent was aware of Mrs. Murphy's testifying in said Case 8-CA-8669 and that I infer from his conduct and attitude set out above that he wanted to get rid of her because he might lose the Harrison Medical Building as a customer.

In this connection I credit Mrs. Murphy that Nemeth not only so told her shortly after the hearing ended in Case 8-CA-8669, but he also asked her to quit so that he would not lose said Harrison Medical Building as a customer. And I credit Mrs. Murphy that Nemeth told his employees that "trouble was starting already" when he read a note to him from Mrs. Esber, the wife of the head administrator of the respondent Nursing Home in Case 8-CA-8669 and the sister of a tenant on the second floor of the Harrison Medical Building. Hence I infer, and therefore find, that Nemeth was trying to cause Mrs. Murphy to quit so as to enjoy the good will of Mr. and Mrs. Esber.

Finally, in finding that Mrs. Murphy was constructively discharged for engaging in union and other protected activities as well as for testifying in a Board unfair labor practice case, I have followed the rule of law that it is not necessary that conduct protected by the Act be the only reason for Mrs. Murphy's termination. If her constructive discharge was inflicted because of her protected conduct, such discharge violates the Act notwithstanding that a valid ground for discipline such as her refusal to accept a transfer might exist. *Betts Baking Co., Inc. v. N.L.R.B.*, 380 F.2d 199, 203 (C.A. 10, 1967); *N.L.R.B. v. Whitin Machine Works*, 204 F.2d 883, 885 (C.A. 1, 1953). "It's not necessary that [illegal] motivation be the only reason for the discriminatory action complained of. It is sufficient if it is a substantial reason, despite the fact that other reasons may exist." *N.L.R.B. v. Electric Steam Radiator Corporation, A Subsidiary of Landers, Frary and Clark*, 321 F.2d 733, 738 (C.A. 6, 1963). See *Tompkins Motor Lines, Inc. v. N.L.R.B.*, 337 F.2d 325, 330 (C.A. 6, 1964). I find that, Mrs. Murphy's protected conduct was a substantial—but not necessarily the only—reason for her constructive discharge. Cf. *N.L.R.B. v. Symons Manufacturing Co.*, 328 F.2d 835, 837 (C.A. 7, 1964); *N.L.R.B. v. Park Edge Sheridan Meats, Inc.*, 341 F.2d 725, 728 (C.A. 2, 1963). See *Nachman Corp. v. N.L.R.B.*, 337 F.2d 421, 423 (C.A. 7, 1964).

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

Those activities of Respondent set forth in section III, above, found to constitute unfair labor practices, occurring in connection with his operations described in section I, above, have a close, intimate, and substantial relation to trade, traffic and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

As Respondent has been found to have engaged in certain unfair labor practices, I shall recommend that he cease

and desist therefrom and that he take specific affirmative action, as set forth below, designed to effectuate the policies of the Act.

In view of the finding that Respondent discriminated against Barbara Murphy by constructively discharging her I shall recommend that he offer her immediate and full reinstatement to her former position or one substantially equivalent thereto which does not interfere with her school patrol job, without prejudice to her seniority and other rights and privileges previously enjoyed by her, and to make her whole for any loss of earnings she may have suffered by reason of her constructive discharge, with interest thereon at 6 percent.

In making Mrs. Murphy whole Respondent shall pay to her a sum of money equal to that which she normally would have earned as wages from the date of her discharge to the date of reinstatement or a proper offer of reinstatement, as the case may be, less her net earnings during such period for work performed after 5 p.m. Such backpay shall be computed on a quarterly basis in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and shall include the payment of interest at the rate of 6 percent calculated according to the method set forth in *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962). I shall also recommend that Respondent preserve and, upon request, make available to the Board or its agents all pertinent records and data necessary to ascertain whatever backpay may be due.

The conduct of Respondent in my opinion does not reflect a general disregard or hostility to the Act, and I so

find. Accordingly, I find that a broad remedial order against Respondent is not warranted. Rather, I find it will effectuate the policies of the Act to enjoin Respondent from repeating the conduct found above to constitute unfair labor practices and similar or like conduct.

Upon the foregoing findings of fact and the entire record in this case, I make the following:

CONCLUSIONS OF LAW

1. The Union is a labor organization within the meaning of Section 2(5) of the Act.
2. Respondent is an employer within the meaning of Section 2(2), and is engaged in commerce within the meaning of Section 2(6) and (7), of the Act.
3. By harassing and coercing Barbara Murphy because she engaged in union and other activities protected by the Act, and because she gave testimony under the Act in Case 8-CA-8669, Respondent committed unfair labor practices proscribed by Section 8(a)(1) of the Act.
4. By constructively discharging Barbara Murphy because she engaged in union and other activities protected by the Act, and because she gave testimony under the Act in Case 8-CA-8669, Respondent committed unfair labor practices interdicted by Section 8(a)(1), (3), and (4) of the Act.
5. The unfair labor practices set forth above affect commerce within the contemplation of Section 2(6) and (7) of the Act.

[Recommended Order omitted from publication.]