Antenna Department West *and* Communications Workers of America, District Nine, Communications Workers of America, AFL-CIO

Antenna Department West *and* Communications Workers of America, AFL-CIO, Petitioner. Cases 20-CA-16187 and 20-RC-15311

31 May 1983

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

BY MEMBERS JENKINS, ZIMMERMAN, AND HUNTER

On 16 July 1982 Administrative Law Judge Frederick C. Herzog 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, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

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

IT IS FURTHER ORDERED that the election held on 5 August 1981 be, and it hereby is, set aside and that a new election be held as directed below.

[Direction of Second Election and *Excelsior* footnote omitted from publication.]

DECISION AND REPORT ON OBJECTION

STATEMENT OF THE CASE

FREDERICK C. HERZOG, Administrative Law Judge: Based on a charge filed by Communications Workers of America, District Nine, Communications Workers of America, AFL-CIO (hereinafter referred to as the Union), that Antenna Department West (hereinafter called the Respondent) has engaged in unfair labor practices in violation of Section 8(a)(3) and (1) of the Act, a complaint was issued on May 28, 1981,[1] by the Regional Director for Region 20 of the National Labor Relations Board.

Based upon a petition filed on April 20 by the Union and pursuant to a Stipulation for Certification Upon Consent Election, an election was held on August 5 in a unit of all production and maintenance employees of the Respondent employed at its 10087 F Mills Station Road, Sacramento, California, facility, excluding all other employees, clerical employees, managerial employees, guards and supervisors as defined in the Act. Of approximately 24 eligible voters, 6 cast ballots for and 10 cast ballots against the Union. The four challenged ballots were insufficient in number to affect the results of the election. The Union filed timely objections to conduct affecting the results of the election. The Regional Director thereafter ordered that the issues raised by the Union's Objection 2 should be consolidated and heard with the issues raised in the complaint mentioned above.

Accordingly, this case was heard before me in Sacramento, California, on December 8 and 9. At the hearing all parties were afforded the right to participate, to examine and cross-examine witnesses, and to adduce evidence in support of their positions. In addition, the parties were afforded the right to file briefs and to make oral argument at the conclusion of the hearing.

Based upon the record thus compiled, plus my consideration of the briefs filed by the parties, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The Respondent is a California corporation and a wholly owned subsidiary of California Satellite Systems, with an office and place of business in Sacramento, California, where it has been engaged in the business of installing and servicing home subscription television. In the course and conduct of this business California Satellite systems annually derives gross revenues in excess of

[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

With respect to the sequence of events at the meeting of employees conducted by employee Thompson after work on 15 April 1981 we do not view the order of arrival of General Manager Mustapich and Supervisor Wall at The Bear's Den to be essential to the Administrative Law Judge's findings that Thompson was discharged for his protected concerted activity at The Bear's Den, and that, considering the totality of circumstances, Thompson's outburst following the interruption of the meeting by Mustapich and Wall did not render his activity unprotected. As for the type of language used by Respondent's personnel, we note that Respondent's owner, Ross, testified that, upon hearing Mustapich's account of the 15 April meeting, he informed Mustapich that "No one is going to work for my company with that attitude and that kind of mouth," and then directed Mustapich to "Fire the son of a bitch."

Contrary to the statement by the Administrative Law Judge in fn. 12 of his Decision, Wall testified that he had been invited to the 15 April meeting by employees Fisher and Glade. This statement does not, however, affect the result herein.

Member Jenkins finds that Respondent's reason for discharging Thompson was pretextual. Accordingly, in the absence of a lawful motive on Respondent's part, Member Jenkins would not discuss or rely on *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981). See *Limestone Apparel Corp.*, 255 NLRB 722 (1981).

[1] Unless otherwise noted all dates appearing hereinafter shall refer to the calendar year 1981.

$500,000 and annually purchases and receives products, goods, and materials valued in excess of $1,500 directly from sources located outside the State of California.

I conclude that the Respondent is now, and at all times materlal herein has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION

The Union is now, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Issues*

1. Whether or not the Respondent so interfered with the election as to require that its results be set aside.

2. Whether or not the Respondent violated Section 8(a)(1) of the Act by threatening employees, or by soliciting grievances from employees and promising employees increased benefits and improved terms and conditions of employment.

3. Whether or not the Respondent violated Section 8(a)(3) and (1) of the Act when it discharged employee Steven E. Thompson on or about April 16.

B. *The Background Facts*

The Respondent, as a wholly owned subsidiary of another corporation, California Satellite systems, is used by its parent corporation to perform the work of testing, selling, and installing equipment in the homes or businesses of customers who desire to receive cable television programs in the Sacramento, California, area. Steven Ross is the president of both the Respondent and California Satellite Systems, while Andy Mustapich is a vice president of the parent company and general manager of the Respondent. At all times material herein the immediate supervision of the work done by the Respondent's installers was carried out by Richard Wall,[2] with Ross and Mustapich maintaining their offices at the facility of California Satellite Systems, which happens to be just across the street from the Respondent's facility. While the Respondent's employees ordinarily have no occasion to visit the offices of California Satellite Systems, it is not unusual for Mustapich to have frequent contact with the Respondent's employees.

Both facilities mentioned above are located in or near a shopping center where a tavern called The Bear's Den is situated. Employees frequently went there after work. Not infrequently they were joined there by Wall. Occasionally, Mustapich would come to the tavern and buy drinks for the employees, especially if they had been working under adverse conditions, such as extreme heat or high winds,[3] not to mention the substantial heights at which the installers frequently worked.

Steven E. Thompson began working for the Respondent as an installer on March 26. After a period of orientation and training his regime followed the usual routine of employees such as he. He reported to the Respondent's shop each morning, loaded parts into his truck, checked orders, and went out to customers' homes or businesses to perform work. If he happened to complete his assignments early he called back to the shop for instructions. He generally worked from around 8 a.m. until around 6:30 p.m., and carried out about three or four standard installations per day. It is not claimed that he performed his work exceptionally, whether good or bad.

Noting that employees in the shop were without union representation, in early April Thompson began discussing the possibility of securing such representation with a fellow employee, Ron Hayes. They decided to check into the idea together. They also began to discuss it with other employees.

Such discussions eventually led to a meeting at a nearby restaurant before work began on the morning of April 14. The meeting was attended by four employees besides Hayes and Thompson, and each signed a petition in favor of securing union representation.

That afternoon, after work, another meeting was held by Hayes and Thompson. This was held at the Bear's Den tavern, and was attended by three more employees, who also signed the petition.

C. *The April 15 Meeting at The Bear's Den*

Having obtained a total of nine[4] signatures on their petition, Hayes and Thompson, while on the way to perform a job the following day, April 15, stopped by the Union's office and picked up a supply of "showing-of-interest" cards.

After completlng the day's work around 5 p.m., they once again repaired to The Bear's Den pursuant to plans they had openly discussed with fellow employees upon their arrival at work that morning. Four or five fellow employees were already present when Thompson and Hayes arrived. Thompson went into the bar and began talking to the other employees, who had formed a sort of loose gathering around a table. Hayes remained outside, awaiting the arrival of more employees from the Respondent's shop across the street.

Thompson handed showing-of-interest cards to the five employees inside the tavern and secured their signatures on the cards. He also passed around leaflets he had secured from the Union, which explained in general terms the Act's protection for employees who engaged in union activities.

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[2] Wall, having since been fired by the Respondent, now operates a competitor of the Respondent.

[3] It seems conceded that employees need not possess a high degree of technical skill in order to perform the work of selling and installing the Respondent's equipment. But neither is it disputed that manual dexterity, the ability to work with certain technical equipment, and the ability to be courteous and personable with customers were attributes required of employees. In any event, employee training seems to have been largely carried out while "on the job" by means of the "buddy system," and to have required no longer than a week or two. While "classroom training" was provided at the Respondent's shop, this fact seems unimportant to the resolution of the issues in this case. It is undisputed, however, that all the Respondent's newly hired installers were kept on probationary status at all times material herein, and that the Respondent discharged approximately 12 employees, without explanation of its reasons, in the several months preceding the discharge of Thompson.

[4] Thompson thought this figure constituted a majority of those employees eligible to vote. The record is inadequate to permit determination of whether or not his thought was accurate.

Thompson testified that all went smoothly until around 5:40 p.m. Then, however, one of his fellows said, "Oh, no, look who is coming." Thompson turned and claimed to have seen Richard Wall and Andy Mustapich headed across the room for the table where he and other employees were gathered.[5] Thompson testified that Wall told the employees, "If you guys go on ahead and join this Union, you will all be fired. I just want to make this perfectly clear, before you carry the matter any further." According to Thompson's testimony he and Wall then argued[6] about whether Wall was permitted to make such remarks, and over later remarks by Wall to the effect that the Respondent's parent company could or might simply dissolve the Respondent corporation, causing all of them to lose their jobs. Thompson testified that at or about this point he became involved in a heated, increasingly loud and profane[7] dispute with Mustapich about the possibility of the Respondent's dissolution. Thompson handed Mustapich one of the leaflets and told him, "Before you put your foot in your mouth any further, perhaps you should read this." Mustapich looked at it and put in in his pocket, saying, "I know all this garbage. . . . I can see right now you are nothing but a troublemaker." At that, so Thompson claimed, Thompson realized that he had become "very upset," so he got up and went outside the tavern, where he smoked a cigarette and put his "head back on perspective." After about 10 minutes he walked back into the tavern and rejoined the group of employees in listening to Mustapich explain that he intended to set up a grievance panel,[8] and that he was willing to "come to some sort of terms" with the employees, so that a union would not be necessary. Thompson further testified that Mustapich went on to assure the employees that none would be fired because of what had happened, and that he intended to work with them to resolve their grievances.

At the point an employee who had previously signed a card, Bob Fisher, said, "I want my card back." Though he initially balked, when another employee urged him Thompson returned Fisher's card.

The meeting then began to break up. As the employees and supervisors worked their way toward the door Thompson apologized to Mustapich for having "gotten out of hand" and not "handling things" with "maturity."[9]

The next day, April 16, Thompson completed his assigned work around 3 p.m. and called in to advise that he was available for additional work. However, he was told to return to the shop. He did so, arriving around 3:30 p.m. He attended to his equipment and was completing his paperwork when Wall instructed him to come to Wall's office.

Thompson went to Wall's office. There he met Wall and Mustapich. Wall told him that he had not "worked out" and that the Respondent was discharging him while he was still a probationary employee.[10] Mustapich refused Thompson's requests that he be given a written statement concerning the discharge, and that he be allowed witnesses to his discharge. Thompson refused to leave, saying he feared that if he did so it might be claimed later that he had simply quit. At that Wall or Mustapich caused the sheriff's office to be called. Two officers later arrived and escorted Thompson from the premises, with Thompson protesting that he was being fired because of his union activities, and that he was being ridiculed[11] because of his position of leadership in the movement to secure union representation.

D. *Conclusion*

It is conceded that Wall was engaged in protected activities as he went about seeking to gain the support of fellow employees for the Union during the events described above. And, specifically, in meeting with them on April 15 at The Bear's Den to secure their signatures upon showing-of-interest cards, Thompson remained

[5] The Respondent contends that Thompson's testimony "that Mustapich and Wall walked in together" is obviously incorrect, and demonstrates that Thompson should be discredited. I disagree.

Thompson did not testify that the two entered the tavern together. Rather, Thompson's testimony was to the effect that, when he turned and first observed Wall and Mustapich, they were approaching the table where employees had gathered, and is silent as to whether or not either Wall or Mustapich had been in the tavern prior to that moment.

However, in my view, it may be fairly said that Thompson's testimony demonstrated that he did not recall and recount the details of the confrontation in the tavern with absolute accuracy, especially those dealing with the sequence of events. While I find this detracts from Thompson's credibility, I do not find him lacking in overall credibility. The failures of memory Thompson suffered in recollection of details seemed no worse than those of the Respondent's witnesses, each of whom was also imprecise at certain points in his testimony.

But, more importantly, Thompson was impressive in his testimonial demeanor, sufficiently so that I credit his testimony over that of other witnesses (including Wall, who was himself an impressively forthright witness in some respects) who testified about the events in the The Bear's Den on April 15.

[6] As Wall recalled, he arrived at the tavern, went over and sat down with the employees, "[a]nd then we started talking and everybody seemed like they were being scared and stuff and I said that I just kind of want to know what was basically going on." After Thompson said that the Union was powerful enough to close the Respondent's doors, "I made the statement that—I says, well, if you're going to do that, you've got to go all the way up to the top and go up and start at [the parent corporation in] Canada and come on down from there."

Wall went on to recount the argument which ensued thereafter which culminated in yelling, and "[a] few of the guys were getting upset. One or two of them would say, 'Well, let's take him [Thompson] out on the South forty.'" (Though Wall commented that this threat to beat up Thompson was made in a joking manner it seems unlikely that it would have been so understood by Thompson.) Ultimately, on cross-examination, Wall admitted, "I did tell the men that if we went union, it could very well end up with all of us out of a job." At another point in his testimony Wall interjected, "I can understand why Steve Thompson got a little riled about the situation."

[7] Thompson admitted that he used profanity during this dispute, saying that he and other installers, as well as Wall, routinely used such language while socializing, or even while on the job. He specifically recalled and admitted using the words "hell" and "shit," and possibly the words "screwing," or "fucking." He denied, however, that he used the term "son of bitch," or that he so referred to Mustapich.

[8] By this time, due to late arrivals the group numbered approximately 12 or 13, including Wall and Mustapich.

[9] Thompson is in his early twenties.

[10] Thompson was paid the check he would have normally received that day, but it included payment for the day he had just worked, normally covered by the following paycheck.

[11] Notwithstanding my view that Thompson's sensitivities were quite naturally aroused, I am unable to agree with his views that a sign which was exhibited in Wall's office, and which said, "You, a leader!!", was directed at him, or otherwise has any relevance to the issues in this case. Instead, I accept the Respondent's evidence, which was to the effect that the sign had been in place for a long time and was aimed in jest at Wall.

within the Act's protective cover notwithstanding the fact that the meeting was conducted in a public place. Thus, the Respondent can draw no comfort from the apparent[12] fact that Wall's presence at The Bear's Den that night, in and of itself, cannot be deemed to have been unlawful. For, while I accept as fact that Wall may well have been invited to attend the meeting by one or more of Thompson's fellow employees, it does not follow that such an invitation also afforded Wall the right to disrupt the meeting, or to usurp Thompson's role of "presiding" over the meeting despite Thompson's protests. Yet that is exactly what Wall's presence and words to the assembled employees effected. As Wall himself testified, he went and sat down with a group whose members appeared "scared," he proceeded to satisfy his curiosity about "what was going on," and he started arguing with Thompson.

While I do not believe that either Wall or Thompson was able to recall the exact language used by one another, it seems clear that Wall threatened employees with the loss of their jobs if they persisted in their efforts to secure union representation. Thompson testified that Wall told the employees words to the effect that if they joined the Union they would all be fired, or that the shop could be closed. The Respondent vigorously contests Thompson's credibility on these points. But, it seems to me that I have little choice but to find in favor of the General Counsel's allegations in light of Wall's admissions that he made a number of statements to the employees concerning the pros and cons of unionism, including, pertinently, the rhetorical question about where they had to go to secure work if they were fired or laid off.[13] This, when coupled with the further, similarly admitted argument over the legality of either the Respondent or the Union using its power to cause the shop to close, compels me to conclude that Wall made the threats alleged in paragraph 6 of the complaint. In threatening employees through Wall, the Respondent must be held to have violated Section 8(a)(1) of the Act.

Thompson testified that, shortly before the end of the April 15 meeting at The Bear's Den, he heard Mustapich tell the assembled employees that he intended to set up a "grievance panel," so that the employees could work with the Respondent's management in solving problems without the intervention of a union. He specifically recalled that Mustapich spoke of management's willingness to meet on a regular basis and discuss such things as working conditions, wages, and "all of the things which we were upset with and were wanting a union in to bargain for us to straighten out."

Mustapich, though asked specifically about the violations of Section 8(a)(1) attributed to Wall, each of which he denied hearing, was not questioned about this violation attributed to him; i.e. whether he had offered to help employees work through a "grievance panel" in resolving problems between employees and the Respondent. I infer therefrom that his testimony would have proven unfavorable to the Respondent. *Teamsters Local 959 (Northland Maintenance), supra.*

However, another of the Respondent's witnesses, employee Fisher, testified that Mustapich told the employees that "[they] should have company meetings and discuss the problems that [they were] having and work them out a solution to them."

Thus, the conclusion is obvious and compelling that Mustapich solicited that employees' grievances be handled through the formation of a committee which he proposed to help form, and that he thereby undermined the employees' support for the Union. See *Merle Lindsey Chevrolet*, 231 NLRB 478 (1977); *Uarco, Inc.*, 216 NLRB 1 (1974). Accordingly, I find his conduct to have been violative of Section 8(a)(1) of the Act as alleged in paragraph 7 of the complaint.

Against this background of animosity to the concept of employee organization, and taking the Respondent's admitted knowledge[14] of Thompson's leadership role in such organizational activities into account, the Respondent's precipitous decision during the next workday to fire Thompson seems suspiciously convenient to its desire to prevent the unionization of its employees. *Wright Line*, 251 NLRB 1083 (1980),[15] requires that the General Counsel make a *prima facie* showing sufficient to support the inference that protected conduct was a motivating factor in the employer's decision to discharge in order to shift to the employer the burden of demonstrating that the same action would have taken place in the absence of protected conduct. I find that, having demonstrated the juxtaposition of such key elements of discriminatory motivation as knowledge, animus, and timing, the General Counsel has met that burden.

The Respondent, however, counters by pointing to Thompson's conduct at the meeting, wherein he referred to Mustapich in vulgar and obscene terms, as the basis for its showing that Thompson would have been fired regardless of his protected activities. Thus, the Respondent would have it that Ross was presented with the problem the morning after the meeting at The Bear's Den and that Ross determined, independently of Mustapich and/or Wall, that Thompson should be terminated. I am not persuaded.

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[12] Wall claimed that he had been invited to the meeting by employees Fisher and Langford. Yet it is a fact that the Respondent chose not to seek corroboration from Fisher about this when he later testified on the Respondent's behalf. Thus, an inference that Fisher's testimony on this point would have proven unfavorable to the Respondent is warranted. *Teamsters Local 959 (Northland Maintenance)*, 248 NLRB 693 (1980).

[13] I do not rely on the testimony of employee Bryan Middlestead in making this finding. Middlestead appeared to be greatly confused at several points during his testimony. I cannot credit him in any area of conflict.

[14] The Respondent argues that Ross had no knowledge of Thompson's union activities or sympathies before he determined to fire him. I regard the point as tenuously proven and, even had it been shown with greater certainty, of little benefit to the Respondent. For it is clear that both Wall and Mustapich, upon whose reports the decision was based, had "knowledge" of Thompson's union activities. Their knowledge must be imputed to the Respondent, and cannot, as the Respondent argues, be used as a shield for Ross, and, through Ross, the Respondent.

[15] The General Counsel argues that this is not a proper case for the application of the *Wright Line* test. I disagree, for this is a case alleging a "violation of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation." *Wright Line, supra* at 1089. As the Board stated, "our task in resolving cases alleging violations which turn on motivation is to determine whether a causal relationship existed between employees engaging in union or other protected activities and actions on the part of their employer which detrimentally affect such employees' employment." *Ibid.*

First of all, the facts do not support the Respondent's attempt to portray Wall as a "good ole boy"[16] who cared little about the question of whether employees did or did not select a union. True, the evidence is clear and credible that Wall was a regular patron of The Bear's Den, and that both he and Mustapich occasionally bought employees a round of drinks there after work. But Wall admitted that he was attempting to find out what was "going on" when he sat down among the employees at the tavern. And both employee Fisher and employee Langford, each a witness called by the Respondent, testified that Wall broke into the meeting and remonstrated with the employees for "not talking to him" and for doing "something like this behind his back." Thus, any claim that Wall was simply being his gregarious self is belied. And, whether the meeting was held in a "public" place or not, and, even if he was invited to attend by employees other than Thompson, Wall did not have any warrant for so disruptively interfering with Thompson's conduct of the meeting.

Nor do I believe that the Respondent can use Mustapich's professed surprise and shock at the events of April 15 as a basis to discharge Thompson. For the Respondent cannot have it both ways. It is simply not reasonable to portray The Bear's Den as "public" for purposes of showing that Wall and Mustapich had the right to disrupt employees engaged in protected conduct, but, on *another question*, to treat it as if it was "private," an extension of the Respondent's premises, where Wall and Mustapich could expect to be accorded all the courtesies and civilities inherent to the employee-employer relationship.

Here I find that The Bear's Den was not an extension of the employer's premises. Wall obviously went there with such frequency that he must have been aware of the way in which barroom discussions are conducted, that emotions sometimes flare and that offensive language is common under such circumstances.

If Mustapich was not previously aware of such possibilities I find that he was alerted thereto when Wall called him, well after normal working hours, and asked him to come to the tavern, saying that there was some "trouble" or "problems."

Mustapich would have me believe that after Wall telephoned he immediately went to the tavern without any further explanation from Wall as to the nature of the "problems" he might expect to confront upon his arrival. I find this highly improbable.

And as to why Mustapich failed to suggest, or direct, that Wall and the employees return to the Respondent's premises if they were to deal with work-related problems one can only speculate. In sum, my credulity is overstrained by Mustapich's scenario. Indeed it seems more probable that the opportunity to disrupt the employees' meeting proved irresistible to the gregarious Wall, and that Mustapich was only too eager to step in and finish what Wall had begun.[17]

Thus viewed it becomes easier to understand the emotional upset experienced by Thompson when first Wall and then Mustapich arrived and, in effect, took over the meeting. In this respect even Wall was moved to testify that he could understand why Thompson "got a little riled."

There can be no real question that Thompson became quite "riled," indeed. Or that he repeatedly and loudly used language which can only be described as vulgar and obscene[18] during the course of the meeting. Or that, in doing so, he specifically referred to Mustapich.

Nonetheless, the evidence in this case is insufficient to persuade me that, in doing so, Thompson forfeited the protection of the Act. It is not clear to me, as the Respondent argues, that Thompson's conduct so breached the wall erected by Section 7 of the Act around his organizational activities as to leave him defenseless.

The Respondent argues, rightly, that employers are ordinarily free to discharge for any reason at all, whether good or bad, and that, as in this case, employees need not be told why they are being discharged. However, in my opinion, these arguments are shown irrelevant by the fact that the Respondent has admitted that Thompson was discharged for having engaged in actions it considered insubordinate at the very same time that he was soliciting fellow employees to sign cards showing their support for the Union. This admission removes the case from the "ordinary," and requires that it be resolved by striking a balance between an employee's right to organize and the employer's right to run his business while being treated with dignity and respect by his employees.

Viewing the evidence as a whole, and conceding for the sake of argument that Thompson's verbiage amounted to "misconduct,"[19] I am still led to conclude that in this case the balance tilts in favor of the employee's retention of the Act's protection. As the Board has time and again pointed out, no employee may feel free, simply because he has been engaged in activities in support of the cause of unionization, to insult his employer, or to call his employer's supervisory personnel by obscene and

[16] Wall's testimony was persuasively candid in many respects, and he seemed eager to convey the fact that he had acted only in ignorance. Yet he carried the theme of "candor" and "good ole boy" to such extremes as to provoke suspicions that he was disingenuous. Nor was his credibility enhanced by his portrayal of himself as a wholly neutral and disinterested party, but one who in the end turned for legal counsel to the Respondent's attorney. In sum, while I found Wall an impressive witness in many respects, I credit Thompson's testimony over his.

[17] Mustapich was summoned to the meeting by Wall, not by any employee. While it appears that one or more employees tried to locate Mustapich it remains a fact that they did not succeed.

[18] I find it unnecessary to this Decision to make findings as to the exact language used by Thompson. Suffice it to say it was extreme and, absent the particular circumstances present in this case, would clearly warrant the discharge of any employee so foolish or intemperate as to use it in reference to his employer.

[19] The concession, as applied to this case, is not so insubstantial as it may appear at first glance. The evidence is clear that Thompson's language was no worse than that routinely used at the Respondent's workplace (save only for the area where Respondent's female employees might overhear), and in which Wall was known to regularly participate. There is no claim that Thompson ever used such language around customers, or where it might be overheard by the Respondent's female employees. Further, while I am not free to compel the acceptance of an apology, as was tendered to Mustapich by Thompson before they left the tavern, the very fact that it was offered furnished evidence that Thompson meant no real insolence toward Mustapich.

I regard Ross' attempt to enlarge upon Thompson's alleged misconduct by pointing to the need to avoid usage of such language in the presence of customers as indicative of the Respondent's eagerness to assign blame to Thompson. As noted, no such incident ever occurred.

vulgar names. But, just as obviously, the Board has refused to resort to mechanical application of rules which fail to take into account all the relevant circumstances, including the question of whether or not those circumstance lead to the conclusion that the employee's words have been seized upon as a pretext to cloak the employee's real, though discriminatory, motives.

Here, a proper view cannot ignore[20] that (1) Thompson's protected activities were disrupted repeatedly by the Respondent's agents, (2) part of the disruption took the form of illegal threats and implied promises of benefits to the assembled employees, (3) the alleged insubordination occurred after working hours, away from the workplace, in a tavern, (4) the Respondent's supervisor directly affected by the alleged misconduct went to the tavern having first been warned of "trouble" or "problems" with employees, (5) the language used was of the type routinely used at the Respondent's workplace by supervisor and employee alike, (6) Thompson's work record was otherwise good, and (7) finally, Thompson was apparently neither deliberately insolent nor unrepentant.

As a result, I conclude that the Respondent has failed to show that it would have discharged Thompson even absent his protected activities. As previously shown, Ross' decision cannot be insulated from the discriminatory considerations which underlay its report to him. Accordingly, I conclude and find that Thompson was discharged in violation of Section 8(a)(3) and (1) of the Act, as alleged in the complaint, and that the usual remedy, that Thompson be reinstated with backpay, should be provided.

IV. THE OBJECTION

The Union's objection alleged that the Respondent interfered with the conduct of the election by stationing a supervisor in the polling area while employees were in line waiting to vote and while the polls were open.

While the Respondent disputed the allegation, its truth became obvious during the hearing. The supervisor referred to by the objection was Wall. In the course of his testimony he admitted that he was at the Respondent's shop on the morning of the election, August 5, at approximately 7:45 a.m. Indeed he was in the precise area where the polling was conducted, and, since he heard no request that he leave the area, he stayed there, by his estimate, for about 10 or 15 minutes during the voting period.

Wall's testimony was to the effect that he was located at the back of the shop near bay doors which led to the trucks awaiting loading for the day's work. From his vantage point he had both the trucks outside and the voting area inside in his range of view. He observed a number of employees waiting to vote. He thought they seemed reluctant to go up and vote, so he called out to several of them in turn, by name, urging them to "Come on!" "Let's do your thing!" and "Let's get it over with so we can go on about our regular business!"

Wall also recalled that he walked from the back of the area to the front, where he then sat and talked to some employees, as they waited to vote, about their jobs for that day.

Then Wall got up and went from the voting area into the Respondent's office area. There he was told that he should not have been out in the voting area while the balloting was in process.

In *Milchem, Inc.*, 170 NLRB 362 (1968), the Board concluded that, in order to prevent electioneering by parties to the election among employees preparing to vote, and to protect employees from distraction, pressure, and unfair advantage from prolonged conversations during the important final minutes before employees cast their ballots, a "strict rule" against such conduct, without inquiry into the nature of the conversations, was warranted. The only exceptions announced to this rule were that trifling, chance, isolated, and innocuous comment or inquiry by an employer or union official would not *necessarily* void an election.

I view the rule as having application here. Wall's presence or conduct fits no definition of "chance, isolated, or innocuous comment or inquiry" as defined by the post-*Milchem* cases decided by the Board. Far from being innocuous, Wall was unable to resist the urge to "make over," reinforcing for any so dense as to miss the point that a supervisor who had earlier threatened the loss of all employees' jobs should they persist in selecting a union was watching what they did and whom they spoke to, and, for all employees might know, putting himself in position to learn how they marked their ballots. There can be no doubt that in sitting down to talk with employees waiting to vote and in calling out and directing several others to hurry up and vote Wall underscored to all those waiting to vote that a representative of the Respondent was present and watchful.

Unlike the cases cited by the Respondent, Wall was well within the voting area, whether "clearly defined" as such or not, he was present for a substantial time, and he actually gave directions to employees as they waited to vote. I find, therefore, that each case cited by Respondent is inapposite here.

Wall's actions warrant overturning the election and requiring that it be rerun. In this regard I specifically reject the Respondent's argument that, while some conduct may have been technically objectionable here, it was too isolated and or *de minimis* to warrant setting aside the results of the first election. Compare *Regency at*

[20] The Respondent cites *Fibracan Corp.*, 259 NLRB 161 (1981), and states that I must follow the Board's holding therein affirming the Administrative Law Judge's view that an employee was lawfully discharged. The Respondent argues that *Fibracan* "cannot be distinguished." The argument is plainly wrong. In *Fibracan* the employee spoke at a meeting on the employer's premises just prior to the beginning of a shift. She again spoke at a meeting to discuss her behavior several days later. The Board held that the "repeated and blatant use of profanity in reply to a supervisor's statement of its objectionability" amounted to insubordination. Here, by contrast to *Fibracan's* fact, (1) the Respondent provoked the employee, (2) the language was used in a place where the Respondent's supervisor had a reasonable expectation that it would be used, (3) similar language was routinely used on the Respondent's premises, (4) the employee apologized within minutes of his outburst, and (5) no statement concerning its "objectionability" was made by Wall, Mustapich, or anyone.

Thus, while *Fibracan's* teachings are of value in striking the balance herein, its holding is certainly not "on all fours" with this case.

the Rodeway Inn, 255 NLRB 961 (1981), and *Caron International*, 246 NLRB 1120 (1979), and cases cited therein.

V. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Respondent set forth in section III, above, occurring in connection with the operation of the Respondent corporation described in section I, above, have a close, intimate, and substantial relationship 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.

VI. THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I recommend that it be ordered to cease and desist therefrom and to take certain affirmative actions designed to effectuate the policies of the Act.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The Respondent violated Section 8(a)(1) of the Act by threatening employees with loss of their employment, and by soliciting grievances from employees and impliedly promising them increased benefits or improve terms and conditions of employment.
4. The Respondent violated Section 8(a)(1) and (3) of the Act by discriminatorily discharging employee Steven E. Thompson.
5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER[21]

The Respondent, Antenna Department West, Sacramento, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Threatening employees with the loss of their jobs if they designate or select the Union as their collective-bargaining representative.

(b) Soliciting grievances from employees and impliedly promising them increased benefits or improved terms and conditions of employment.

(c) Discharging or otherwise discriminating against employees in regard to hire or tenure of employment because of their activities on behalf of a labor organization or for engaging in any activity protected by Section 7 of the Act.

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

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

(a) Offer Steven E. Thompson immediate and full reinstatement to his former position or, if that position 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 he may have suffered as a result of the discrimination practiced against him. Backpay is to be computed in the manner provided in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977). See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

(b) Expunge from its files any reference to the discharge of Steven E. Thompson on April 16, 1981, and notify him in writing that this has been done and that evidence of this unlawful discharge will not be used as a basis for future personnel actions against him.

(c) Post the attached notice marked "Appendix" at its Sacramento, Calfornia, place of business.[22] Copies of said notice, on forms provided by the Regional Director for Region 20, after being duly signed by the Respondent or an authorized representative, shall be conspicuously posted immediately upon receipt and be maintained for 60 consecutive days thereafter in all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

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

IT IS FURTHER RECOMMENDED that the election of August 5, 1981, be set aside and a new election directed.

[21] All outstanding motions inconsistent with this recommended Order are hereby denied. In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

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

APPENDIX

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

After a hearing at which all sides had an opportunity to present evidence, the National Labor Relations Board found that we violated the National Labor Relations Act and we have been ordered to post this notice.

The Act gives employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choosing

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

WE WILL NOT do anything that interferes with these rights. More specifically,

WE WILL NOT discourage membership in or activities on behalf of Communications Workers of America, District Nine, Communications Workers of America, AFL-CIO, or any other labor organization, by discharging employees or discriminating against them in their hire or tenure.

WE WILL NOT threaten that you will lose your jobs if you designate or select a union to represent you.

WE WILL NOT tell you to set up a committee to deal directly with us to resolve your grievances without the intervention of a union.

WE WILL NOT in any like or related manner interfere with your rights set forth above, which are among those protected by the National Labor Relations Act.

WE WILL offer Steven E. Thompson immediate and full reinstatement to his former position of employment or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed.

WE WILL remove any reference to the discharge of Steven E. Thompson from his personnel file, or any other records maintained by us, and WE WILL NOT use his discharge as a basis for any future personnel action against him.

WE WILL make Steven E. Thompson whole for any loss of pay he may have suffered as a result of our discrimination against him, with interest.

ANTENNA DEPARTMENT WEST