Woodlawn Cemetery *and* Richard Grosso *and* John Grosso. Cases 2–CA–23628, 2–CA–23748, 2–CA–23905, 2–CA–24386, and 2–CA–23629

November 20, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

On April 23, 1991, Administrative Law Judge James F. Morton issued the attached decision. The General Counsel filed exceptions and a supporting brief. The Respondent filed cross-exceptions and a supporting brief. The General Counsel and the Respondent both filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions, to modify his recommended remedy,[2] and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, The Woodlawn Cemetery, New York, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Ruth Weinreb, Esq., for the General Counsel.
John W. Dean, Esq. (Milbank, Tweed, Hadley & McClay), of New York City, New York, and *David G. Uffelman, Esq. (Crummy, Deldeo, Dolan, Griffinger & Vecchione)*, of Newark, New Jersey, for the Respondent.

DECISION

STATEMENT OF THE CASE

JAMES F. MORTON, Administrative Law Judge. The issues raised in the pleadings in these cases, which were consolidated for hearing, are whether the Woodlawn Cemetery (Respondent) committed unfair labor practices within the meaning of Section 8(a)(1), (3), and (4) of the National Labor Relations Act (the Act). Respondent is charged with having coercively interrogated employees as to their support for Cemetery Workers and Greens Attendant Union, Local 365, Service Employees International Union, AFL–CIO (Union) and with having threatened and warned them in order to discourage them from exercising their rights under Section 7 of the Act. Respondent is also charged with having suspended two employees, with having later discharged one of them, and with having restricted that employee in using a telephone in order to discourage employees from exercising their rights under the Act and, in part, because one of the alleged discriminatees had filed unfair labor practice charges under the Act with the Board.

The hearing was held before me in New York City on various days in July, August, and October 1990. On the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION STATUS

Respondent owns and operates a cemetery in New York City which, as the pleadings establish, meets the Board's standard for asserting its jurisdiction. I find also, based on the pleadings, that the Union is a labor organization as defined in Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Respondent's cemetery is a 400-acre tract in the Bronx, New York City. The gravediggers and maintenance employees there had been represented since 1974 by the Union.

John Grosso, one of the two alleged discriminatees, began working there in 1975. In 1983 he became a union shop steward. His discharge in 1990 is alleged as violative of the Act.

His brother, Richard Grosso, is the other alleged discriminatee. Richard Grosso also began working for Respondent in 1975. In 1983, he became a security guard for Respondent. The guards are unrepresented for purposes of collective bargaining. Richard Grosso is still in Respondent's employ. He and John Grosso allegedly were unlawfully suspended for 30 days in May 1989.

[1] The General Counsel and the Respondent have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The judge erroneously found that the Respondent's assistant superintendent, Nagle, told employee John Grosso on *August* 14, 1989, that he would have no problems raising safety issues. The correct date for that statement is *July* 14, 1989, the same day that the Respondent's supervisor, Multari, had earlier threatened John Grosso with discharge in order to discourage him from participating in OSHA inspections. Although Nagle's statement occurred later on the same day as Multari's threat, we find that it did not effectively disavow Multari's threat under the criteria set forth in *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978). Nagle's statement was not an unambiguous repudiation of the threat. Furthermore, the Respondent thereafter engaged in additional unlawful conduct by restricting John Grosso's use of the telephone in retaliation against his pursuit of a safety grievance. Accordingly, we agree with the judge that the Multari threat violated Sec. 8(a)(1).

Member Devaney agrees with the judge and his colleagues that the Respondent did not unlawfully discharge employee John Grosso. Member Devaney finds it unnecessary to determine whether the General Counsel failed to make a prima facie showing that the discharge was unlawfully motivated. He agrees with the judge's alternative finding that assuming arguendo that the General Counsel has made a prima facie case, the Respondent has rebutted it by establishing that it would have discharged Grosso even absent his protected activity.

[2] Interest on backpay shall be computed as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), rather than as stated in the judge's decision.

B. *Alleged Unlawful Interrogation on April 17*

The complaint alleges that Andrew Nagle, Respondent's assistant superintendent, coercively interrogated employees on or about April 17, 1989.

In support thereof, the General Counsel offered the following testimony of Richard Grosso. On April 23, 1989 (all dates are in 1989 unless stated otherwise), he was present when another guard, Ed Tolan, was talking to the captain of Respondent's security department, Robert McCabe. Tolan was complaining that Respondent did not care about the safety of the guards and that the guards had no union to handle grievances. Richard Grosso said practically the same things to McCabe. McCabe told Grosso then that he should not let his brother, John, influence him. He responded by telling McCabe not to criticize his brother.

On April 30, according to Richard Grosso, another conversation, as follows, took place among Tolan, McCabe, and himself. Tolan complained that the guards were ill treated and that they do not get benefits, such as sick leave, that McCabe enjoys. McCabe told them ''not to make waves'' and that John Grosso represents ''low lifes,'' an apparent reference to the maintenance employees. Richard Grosso asked McCabe why he always criticizes John Grosso. He told McCabe that his brother is an active steward who is just doing his job.

Richard Grosso then testified as follows respecting the allegation in the complaint of coercion by Nagle on April 17. On that day, while on car patrol, he was stopped by Nagle near the World War chapel (Respondent's brief refers to the site as near the Woolworth chapel). Nagle asked him, ''[W]hat is this talk about the security guards wanting a union. This talk is getting back to management.'' He responded by telling Nagle that he has a right to representation if he wants it. Nagle replied that he had no such right as Respondent is the employer. Nagle said also that John Grosso is always complaining and he knows that John Grosso is influencing him. He then asked Nagle why he is criticizing his brother, to which Nagle did not respond.

Nagle testified for Respondent that, except for one occasion when he asked Richard Grosso to check on a car which was inside the cemetery after the closing hour, he has had no conversation with him between July 1988 and May 1989. In explication, Nagle gave the following account. In July 1988 McCabe was promoted to captain and Richard Grosso has been ''in a funk'' since then. Nagle approached Grosso in July 1988 to inquire why he was upset. As he approached, Grosso turned up the volume of the radio then playing in his guard post and ignored Nagle's questions. When Nagle asked him what the problem was, Grosso stated only, ''You know.'' That was the last time they spoke until May 1989, under circumstances discussed separately below.

I am not persuaded that Richard Grosso's account as to a discussion he had with Nagle on April 17 is more probably true than Nagle's testimony that he had no such discussion for the reason he gave. The time sequence contained in Grosso's account as to his discussions with McCabe and Nolan casts some doubt respecting his testimony about April 17. That sequence indicates that the discussion he and Nolan had with McCabe as to unions took place *after* the alleged unlawful interrogation by Nagle on April 17 and not *before*, as is suggested by his account of the alleged coercion. Moreover, Nagle's account was consistent and plausible. I thus find that the evidence is insufficient to establish that Respondent, by Nagle, had unlawfully interrogated employees on about April 17.

C. *Alleged Threat on May 1*

The complaint alleges that, on May 1, Nagle unlawfully threatened employees with discharge. The evidence proffered by the parties pertains to a meeting held that day among Richard Grosso, Nagle, and McCabe.

1. Grosso's version

Grosso's account of that meeting is as follows. Nagle ''initiated'' the meeting which was held in the security office. Nagle said that he had heard that Grosso was arguing with employees and mentioned the name of a guard, William Dempsey. Grosso then asked McCabe if he had told Nagle ''his side of the story.'' McCabe did not answer. Grosso then told Nagle that Dempsey had called him names and insulted him. Nagle then mentioned that Grosso had had a heated argument with a salesman, Ray Capodilupo. Grosso said he did not know what Nagle was referring to. Nagle pressed him. Grosso told Nagle that he did have a discussion with Capodilupo in December 1988. Nagle said that Richard's brother, John, was too outspoken. Richard asked Nagle if he was being picked on so that Nagle could ''get back'' at his brother. Nagle answered by saying that Richard ''should do [his] job if [he knows] what's good for [him].'' Richard then said he would speak with Respondent's president about the whole matter. Nagle and McCabe then told him that they were having a simple discussion with him and that it was not necessary for him to see Respondent's president. Grosso then left.

2. Respondent's evidence

Nagle's and McCabe's accounts of the May 1 meeting are corroborative of each other. In substance, they relate that Richard Grosso was told then that Respondent was concerned with some aspects of his behavior. Their accounts are now set out. McCabe testified that, while Grosso is a diligent worker who is always reliable and on time, he has gotten too excited when arguing with other guards. McCabe told Nagle that Grosso had, on April 23, complained to him that Dempsey had called him an idiot and that he, McCabe, then accompanied Grosso to the carpenter shop where Grosso banged a stick on a table and threatened to use it on Dempsey. McCabe also had reported to Nagle that Richard Grosso had threatened other guards, Tolan and Williams. Nagle then decided to talk with Grosso and arranged the May 1 meeting. There, Nagle told Grosso that he was being warned about his behavior. Nagle mentioned a number of incidents, including one in 1988 involving guard William Tiernan. Grosso denied that he had had any problem with Tiernan and then said that Tiernan was ''a punk anyway.'' Grosso then said that he is getting the picture, that ''you guys are trying to bulldoze [him].'' Grosso became highly agitated and began pacing back and forth. At one point, he stated that he should have called the ASPCA about the dogs. He threw his wallet on the table, walked away and then came back to retrieve it. He kept talking without interruption until he accused Nagle of ''doing this because of [his] brother's union activity.'' Nagle told him that the meeting has ab-

solutely nothing to do with John Grosso but only with him [Richard's] outbursts.'' Nagle warned him that they will not be tolerated.

Respondent presented testimony from others which related to the incidents Nagle referred to in the meeting with Grosso on May 1. Thus, salesman Ray Capodilupo testified that in mid-1988 he greeted Grosso and that Grosso returned the greeting by saying angrily that Capodilupo was responsible for two other guards getting promoted and not him. Capodilupo testified that he had no idea what Grosso was talking about. Other witnesses were called by Respondent. Guard Ed Tolan testified that on April 30 Grosso told him that he was ''not that innocent either'' and mentioned an incident which took place years previously. Guard William Dempsey testified as to the April 23 incident referred to in McCabe's account, discussed above. Maintenance Supervisor Donald Williams Jr. testified that on April 11 Grosso ranted and raved about Williams' wanting Grosso to keep his dog out of the service yard. Williams testified that Grosso had said then that he would see to it that Williams and others would ''end up in the hospital.''

3. Credibility resolution and analysis

It is axiomatic that the General Counsel bears the burden of proving the coercive conduct alleged in the complaint. In weighing Grosso's testimony against the accounts of Respondent's witnesses, I note first that Grosso's own version indicates that he has exhibited hostility at times towards other guards and supervisors and that he had done this on occasions occurring shortly before the May 1 meeting was held. I note too that his brother had been active as steward for an appreciable period of time prior to May 1. These factors tend to negate a finding that Respondent concocted a plan to put pressure on Richard Grosso on May 1 to discourage John Grosso from continuing to pursue his responsibilities as steward. In that matter, the demeanor of Richard Grosso, and that shown by John Grosso at the hearing, along with the views expressed by various of Respondent's witnesses at the hearing, leave little doubt that Respondent had to know that any attempt by it to ''bulldoze'' them, to use Richard Grosso's term, would fail miserably. Under all the circumstances, I find no basis to discount the testimony offered by Respondent's witnesses and thus conclude that General Counsel has not met the burden of persuading me that Nagle unlawfully threatened or warned Richard Grosso on May 1.

D. *The May 2 Warning*

On May 8, Grosso received a copy of a file note dated May 2, prepared by Nagle, and reading:

> A meeting was held on Monday, May 1, 1989, from 3:30 p.m. to 4:30 p.m. at Captain Robert McCabe's office in Woodlawn's Jerome Avenue Building.
>
> Present at the meeting were Richard Grosso, Captain McCabe, and Andrew Nagle. Mr. Grosso was given a very stern warning about engaging in loud and belligerent behavior directed toward other Woodlawn employees. These outbursts sometimes combined with threats of physical harm will not be tolerated.
>
> It was explained to Mr. Grosso that if these outbursts continue, he would forfeit his position at Woodlawn.

The complaint alleged that the issuance of this memorandum was discriminatorily motivated. For the same reasons noted above as to the May 1 meeting itself, I find no merit in the General Counsel's contention that this memorandum, summarizing Respondent's position as stated on May 1, violated the Act.

E. *The 30-Day Suspension and Oral Warning*

When Richard Grosso received, on May 8, the memorandum discussed above, he showed it to his brother John and told him ''about the facts of what happened'' at the May 1 meeting. As noted above, Richard Grosso had left that meeting in an upset state but apparently under the belief that the matter had been concluded. The receipt by him on May 8 of the memorandum reopened the matter, in his view.

John Grosso, with Richard's help, wrote the following letter, dated May 9, to Respondent's president, Edward Laux:

> This is in regard to Woodlawn Cemetery's assistant superintendent Andrew Nagle's vicious, slanderous, and threatening memorandum letter of May 2, 1989, against Woodlawn Cemetery employee Richard Grosso. The letter is full of untrue facts and anyone who knows Richard Grosso, knows that he is not capable of these acts. The employees of the security department at Woodlawn Cemetery do not have any real representation and they really should be protected and represented by a union. I am not their representative but I am representing my brother Richard Grosso because it is personal. I will not stand by and have him abused, harassed, or discredited in any way by an incompetent assistant superintendent Andrew Nagle and a sneaky and incompetent security captain Robert McCabe. This kind of harassment from management will not be tolerated.
>
> The meeting that was held on Monday, May 1, 1989 as stated in the letter, was nothing but a setup against Richard Grosso, an employee who is not only dedicated to his job but is the only one who seems to really care about Woodlawn Cemetery. The sneaky way that it was done by Nagle and McCabe really disturbs me. My brother told me that he was called to the Jerome Avenue office on Monday, May 1, 1989 for a discussion and nothing more. My brother was not warned at that meeting. He was accused of certain things for speaking up but he answered them at the meeting. My brother told Nagle and McCabe at that meeting that he might go to see you [Edward Laux, President of Woodlawn cemetery] about being harassed on the job. They both told him that it was not necessary. Now, one week later on May 8, 1989, a vicious, untrue, and slanderous memorandum letter from Andrew Nagle is given to my brother.
>
> This is an outrage and the letter must be rescinded at once. This letter to you is our response to it, with my brother's full cooperation. If Nagle's slanderous memorandum letter should appear in the future, to try to hurt my brother in any way like him being harassed on the job or losing his job, etc., it be answered with legal action, etc and it will be brought to the attention of the National Labor Relations Board. My own personal opinion of Mr. Nagle is as follows—Andrew Nagle is a very hostile young man who hates people

> and who probably really hates himself, so he takes his frustrations out on others. He is an incompetent individual who should not be in a position of power because he does not have the capability to handle men. He is a very vicious and sneaky person but he is sadly mistaken if he or the Woodlawn Cemetery management thinks that I am going to sit back and let this all happen.
>
> The Woodlawn Cemetery management does not like to hear the truth but it is the ''truth'' that will win out in the end.

The letter came to the attention of Respondent's superintendent, Richard Poolman, who asked Richard Grosso on Monday, May 15, at a meeting with Nagle present, if he had cooperated with John Grosso in writing that letter. Grosso replied that he had. Poolman asked him to sign the letter. Grosso declined. Grosso testified, without contradiction, that Poolman then told him that his refusal could result in his discharge. Grosso still refused. Poolman told him then that he was suspended indefinitely and that he was to report for a meeting on Thursday, May 18. (That meeting was rescheduled to, and held on, May 30 at Richard Grosso's request, as he went on vacation.)[1]

Richard Grosso informed his brother, John, of the meeting with Poolman and Nagle and his suspension. John Grosso then telephoned Poolman to protest the suspension and to inform him that he was going to the Labor Board. John Grosso telephoned Respondent's service manager the next day to say that he was going to the Labor Board and that he would report for work later that day. He filed the unfair labor practice charge in Case 2–CA–23628 on May 16 and reported for work at 1:30 p.m. Later that day, he was told to report to Poolman's office where he was handed the following letter, signed by Poolman:

> I have reviewed your letter to Mr Laux, dated May 9, 1989. As you acknowledge in that letter, Mr. Richard Grosso is not a member of the bargaining unit represented by Local 365. Consequently, you are without standing to represent Richard Grosso in your capacity as a Local 365 Shop Steward and I have concluded that the letter was written by you individually in a purported capacity as Richard Grosso's representative.
>
> In any event, because the content of your letter improperly engages in personal attacks against the characters of two Woodlawn supervisors, Mr. Andrew Nagle and Mr. Robert McCabe, Woodlawn has determined that (A)it cannot and will not tolerate the making of these most serious false accusations made against its supervisory personnel and (B) your conduct merits taking the most strict and severe disciplinary measures.
>
> Accordingly, you are hereby notified that, effective today, you are suspended, without pay, for the balance of today's shift plus thirty (30) days. You should report back to work on Friday, June 16, 1989, at the start of your regular shift. This memorandum will be placed in your personnel file. Any future misconduct of this sort on your part will result in the termination of your employment.

The complaint alleges that, on about May 15, 1989, Respondent, by Poolman, threatened to discharge employees if they engaged in protected concerted activities. The complaint further alleges that the suspensions were meted out to the Grosso brothers because they sent the May 9 letter and to discourage employees from engaged in concerted activities protected by the Act: John Grosso's suspension is further alleged to have been imposed on him because he filed the unfair labor practice charge in Case 2–CA–3628.

Respondent contends that the May 9 letter was a personal grievance that is not protected by the Act and also that any protection it had was forfeited by reason of the scurrilous attacks in it on Respondent's supervisors.

To put these contentions in focus, I shall sum up the relevant evidence.

Richard Grosso was clearly upset on May 1 when Nagle reprimanded him for arguing with coworkers. When a week went by without incident, that matter appeared to be done with. His receiving, on May 8, the warning notice dated May 2 obviously struck him, and his brother, as an unfair attempt by Nagle to reopen the matter. Their combined effort produced the May 9 letter to Respondent's president. The letter protested the treatment accorded Richard Grosso on May 1 by Nagle and McCabe, asserted that it was ''sneaky,'' ''hostile,'' and ''incompetent'' for people like Nagle and McCabe to have issued the May 2 written warning a week later. It contested the assertions made by Nagle in that warning, and demanded that Respondent rescind the warning. On Respondent's receiving the letter, its superintendent confirmed that Richard Grosso had participated in its preparation and threatened him with discharge for refusing to cosign the letter. John Grosso filed an unfair labor practice charge against Respondent. Further, Respondent suspended both Grossos, citing the May 9 letter.

The May 9 letter sought to have Respondent rescind a warning given Richard that he would be subject to discharge if he continued to have altercations with coworkers. Respondent was fully aware that both Grossos participated in preparing that letter. Their concerted effort was clearly aimed at effecting specific changes in one of the conditions of Richard Grosso's employment with Respondent and that is a matter that is clearly protected by the Act. See *Cherokee Heating & Air Conditioning Co.*, 278 NLRB 399, 403 (1986), and cases discussed therein. I thus find no merit in Respondent's initial contention that the letter was a personal matter which is unprotected.

Respondent urges that, by using derogatory language in the May 9 letter, the Grossos forfeited the Act's protection. In the circumstances of this case, I find that the language they used was not so flagrant, violent, or extreme as to render them unfit for further service. See *Reef Industries*, 300 NLRB 956 (1990); *United Cable Television Corp.*, 299 NLRB 138 (1990). Respondent offered testimony to show that John Grosso, on numerous times before May 9, had written derogatory letters and that some of them sought to undermine the Union's former president in the handling of grievances filed by John Grosso. Suffice it to note that John Grosso was never disciplined for any of those asserted infractions. It is unnecessary also to pass on the General Counsel's contention that Respondent had condoned John

[1] Richard Grosso testified that he was suspended for 4 days. The chronology set forth above indicates that his suspension was to be indefinite.

Grosso's conduct in processing grievances. The treatment shown John Grosso for his having prepared the May 9 letter, compared to the asserted earlier infractions he committed for which he was never disciplined, indicates that Respondent was motivated, at least in part, in suspending Grosso, by a concern referred to in the first letter of Poolman's letter—the representational status of the guards. It is however unnecessary, in deciding the merits, to find a specific intent on Respondent's part. Rather, it is clear, and I find, that the suspensions of John and Richard Grosso interfered with, restrained, and coerced employees in the exercise of their Section 7 rights under the Act, as the suspensions penalized the Grossos for their having engaged in an activity protected by the Act.

I further find that Poolman's threat to Richard Grosso on May 15 that he could be discharged for refusing to sign the May 9 letter separately interfered with his Section 7 rights as Respondent sought to dictate to him how the protest respecting his treatment by Nagle is to be submitted. Cf. *Riverside Cement Co*., 296 NLRB 840 (1989).

The complaint alleges that Respondent suspended John Grosso on May 16 also in order to retaliate against him for having filed an unfair labor practice charge earlier on that day. The evidence in this case indicates clearly that the decision to suspend John Grosso was made before he filed the unfair labor practice charge. Thus, I find no merit in that allegation.

F. *Alleged Threat on July 14, 1989*

As the Union's steward, John Grosso filed grievances in May and June 1989 which asserted that the ladders used by unit employees in digging graves were too short, thereby endangering the employees when they climbed out of the graves. He also protested the safety conditions of lawn mowers they used. In addition, he filed OSHA complaints and accompanied OSHA inspectors about the cemetery. On July 14, he informed his supervisor, Nick Multari Jr., that they would be inspecting the switches on the machines in Multari's department.

Grosso testified that Multari then told him that if he wanted to keep his job, he had better keep his nose clean, or else. Multari testified that he had responded by telling Grosso ''if you come in the gang, keep your nose clean. Don't accuse anybody [of] something.'' I credit Grosso's version.

Respondent, by Multari's warning on July 14, sent Grosso a clear message that it would retaliate against him for participating in the OSHA inspection. Respondent thereby interfered with employee Section 7 rights. See *Springfield Hospital*, 281 NLRB 643, 653 (1986).

Respondent contends that the threat by Multari was de minimis and isolated. Factually, that is simply not so. Respondent further contends that no remedial order thereon need issue as Nagle told Grosso, later on August 14 when Grosso complained to him of Multari's threat, that Grosso ''would have no problem raising safety issues.'' That remark and the attendant circumstances hardly meet the criteria set in *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978), for an employer to relieve itself of liability for unlawful conduct.

G. *Restriction on Use of Telephone*

The complaint alleges that on October 5, 1989, John Grosso was unlawfully threatened and also that he was then discriminatorily restricted as to the use of Respondent's telephone. Respondent contends that it was simply enforcing an established rule against employees using its telephones without permission.

John Grosso testified as follows. On October 5, he was asked by a coworker if he thought the mower on which he was riding was safe inasmuch as all the belts on it were exposed. Grosso said he did not believe it was. During his coffeebreak an hour later, he telephoned Nagle from one of the guard booths and told him that the OSHA inspectors did not want the mower operated. Grosso also called some supervisors to tell them that the mower in question was unsafe. One supervisor agreed and had the mower taken to the service yard.

About an hour later, Grosso saw Nagle who was with Supervisor Anthony Rotella and complained to him that the mower should not have been assigned to any employee to operate. Nagle's response was that Grosso was not to call on company time or else. Grosso replied that he called on his own time and that, when it comes to safety matters, he always had the right to call management.

Respondent contends that it has an established rule that employees must first obtain permission to use its phones and, in that connection, notes that, in an arbitration award put in evidence by the General Counsel, the arbitrator relied on that rule in upholding the discharge of an employee. Grosso testified that he has, in the past, often used Respondent's telephones to discuss grievances and that he did so without the necessity of securing permission and without incident thereafter, until October 5.

I credit Grosso's testimony. There is no merit to Respondent's contention that Nagle's directive on October 5 was aimed only at enforcing an established rule. Nagle did not even inquire whether Grosso had obtained permission to use the telephone. In that matter, Nagle's own testimony discloses that he gave the directive after Grosso said he would have OSHA brought to the cemetery.

I find that Respondent selectively and unlawfully seized upon its telephone rule in retaliation against Grosso for pursuing a safety grievance. See *Thiel, Inc*., 298 NLRB 669 (1990); *Garrison Valley Center*, 277 NLRB 1422 (1985).

H. *John Grosso's Discharge*

John Grosso was discharged on May 19, 1990, along with another employee after an altercation between them in the service yard at the cemetery. The General Counsel contends that Grosso simply defended himself against an unwarranted attack by the other employee and that Respondent seized on the incident as an excuse to rid itself of Grosso, a very active union steward. The General Counsel contends that the reason proffered by Respondent also is shown to be pretextual as it treated Grosso differently from other employees who had altercations. Respondent asserts that it discharged Grosso and the employee with whom he fought solely because of the fight and it asserts that it did not treat Grosso differently from other employees who had fought while on the job.

Before discussing the May 19, 1990 incident, I note that the evidence is clear that Grosso was a very active union

steward. Even after his 30-day suspension in the spring of 1989, he continued to press safety and other issues affecting unit employees. As found above, his supervisor had unlawfully warned him in July 1989 to keep his nose clean and Respondent's assistant superintendent, in October 1989, became annoyed with Grosso's protests relating to an unsafe mower and unlawfully instructed him not to use the phone without first getting permission. In the latter part of 1989, Grosso complained of unsanitary restroom conditions. In 1990, he raised issues with OSHA as to problems involving the shoring of graves to prevent their collapsing on gravediggers; he complained of possible asbestos flaking of the ceiling in a mausoleum and of other matters pertaining to working conditions. There is no contention that Respondent, since October 5, 1989, took any action against Grosso to discourage those activities, until his discharge in May 1990.

The evidence discloses that Grosso was a strong union steward and that he had been unlawfully coerced by Respondent respecting his rights under the Act. The last coercive act, however, occurred over 7 months before his discharge, during which interval he had continued his strong union stewardship. Thus, there are factors pointing toward unlawful discrimination—Grosso's protected activities and Respondent's *animus* thereto and there are factors pointing away from such a finding—Grosso's having for over 7 months before his discharge aggressively pursued his steward functions without interference by Respondent. Were these factors, *pro* and *con*, the only one to be considered in determining whether the General Counsel made out a prima facie case, I would be compelled to find that the record is insufficient for choosing one set of factors over the other and thus would have to dismiss this allegation of the complaint. See *Pullman Power Products Corp*., 275 NLRB 765, 767 (1985). But the matter does not rest there. In the General Counsel's case-in-chief, evidence was presented to support General Counsel's contention that Respondent unlawfully seized on the May 19 altercation as an excuse to discharge Grosso. The General Counsel endeavored to show that there was no factual basis to sustain the discharge and, in any event, that Grosso received clearly disparate treatment. To examine into the merits of the General Counsel's assertions, it is necessary to weigh the testimony outlined below.

Grosso's testimony as to the events on May 19, 1990, is as follows: When work finished about 3:45 p.m., he stayed in the service yard after all the other employees went home. (He related that he stayed because someone should watch the service yard until the guard on duty there arrives; Respondent suggests that he was waiting for a ride home with his brother, Richard, whose shift ended at 4:30 p.m. It is unnecessary to resolve that conflict.) While in the carpentry shop in the service at about 4:14 p.m., his brother called and they spoke briefly. As he was hanging up the phone, William Tiernan arrived. Tiernan is the guard assigned to the service yard area. Tiernan told him to hand over ''the f—g phone [as he was] the security guard here.'' Tiernan pushed Grosso and Grosso pushed him back. Tiernan turned and left. He locked the gate to the service yard and drove away.

John Grosso's testimony continues. At this point, Blackie, a dog that Richard Grosso feeds and takes care of as a cemetery pet, began to bark, ''screaming and clawing'' to get out of the foreman's room in which it was locked. For the next 15 minutes, John Grosso made telephone calls to find someone with a key to let the dog out. About 4:30 p.m., Raymond Lopez, a guard, came by. Grosso asked him if he had a key to let the dog out, saying that Grosso would otherwise break the glass to let the dog out. (Lopez testified that Grosso told him that Tiernan had locked the dog in the room.) Lopez said that he would get help and left.

Grosso's account continues. About 4:40 p.m., Tiernan returned to the service yard. Grosso asked him if he had the key to the foreman's office. Tiernan replied, ''F—k you.'' Grosso then heard the phone ringing and answered it. Tiernan came in. He ripped Grosso's shirt and began punching him. Grosso held up his hands in self-defense. Another guard, Tim Kiely, arrived and pulled Tiernan away.

During his cross-examination, Grosso stated that he may have made a fist, that he did swing back at Tiernan, and did hit him.

Tiernan testified that he was assaulted by Grosso when he tried to answer the telephone and that he was only defending himself.

Tiernan is much smaller than Grosso and is an older man. He had served at one time in the U.S. Marine Corps.

Kiely testified that, when he arrived at the service yard, he saw Tiernan ''flying out'' of the carpenter shop with Grosso throwing punches at him and Tiernan punching back. They were then considerably distant from the location of the telephone where both Grosso and Tiernan indicated the altercation began.

Respondent's captain of its security department, Robert McCabe, testified that he learned of the altercation the next day and reported it to Assistant Superintendent Nagle when Nagle came to work on May 21. John Grosso arrived there with a union official and gave his version of incident. McCabe then questioned Tiernan, Kiely, Lopez and others who had at one point or another been at the service yard on May 19. McCabe testified also that Tiernan's midsection was bruised.

As noted above, both John Grosso and Tiernan were discharged on May 21. Incidentally, the night foreman arrived after the altercation on May 19 to open the office in which the dog had been locked.

The evidence is clearly insufficient to establish, as General Counsel contends, that Respondent had no basis to support its conclusion that Grosso participated in a fight at the cemetery with Tiernan on May 19. I therefore cannot find that the reason for Grosso's discharge was clearly pretextual on the ground that there was no probative basis for Respondent to believe he took part in the fight.

The next consideration is whether or not Respondent had treated Grosso differently from other employees who had fought in the past. General Counsel offered testimony by Daniel Altvater, the Union's other steward at Respondent's cemetery, respecting Respondent's treatment of employees who had been involved in altercations at the cemetery. He testified as to four such incidents.

In particular, he testified that he had heard that two employees had been discharged for fighting but, after apologizing, they were reinstated. Respondent showed that those employees had not fought, but had made threats and that they received warnings from Respondent.

Altvater also testified that he heard that two other employees were discharged for having assaulted a foreman but were reinstated with 2-week suspension. In that case, however, the

Union had represented that an independent witness at the arbitration proceeding would have testified that no fight had taken place. Respondent then settled the matter by reducing the discharges to suspensions.

Altvater related another case where an employee had menaced a supervisor. Respondent showed that that employee later was discharged for actually striking a foreman.

Lastly, Altvater referred to an incident where a supervisor discharged an employee who was later reinstated. Respondent demonstrated that the employee in question had done nothing wrong and that the supervisor lacked authority to discharge that employee.

The evidence is insufficient to show that Respondent treated John Grosso in a disparate manner so as to support the General Counsel's contention that its reason for discharging him was a pretext. Absent evidence of pretext, I find that the General Counsel has not established, prima facie, that John Grosso was discharged for discriminatory reasons Cf. *Guyan Valley Hospital*, 198 NLRB 107, 114–117 (1972).

In the event the Board were to find that a prima facie case had been made out, I would find, in agreement with Respondent, that it would have taken the same action against Grosso regardless of his union activities. In that connection, I note that the evidence establishes that Respondent, prior to discharging Grosso reviewed incidents in previous years in which it had discharged employees for fighting and acted consistent with that precedent. I note too that the totality of the evidence it considered in arriving at its decision lends credence to its determination. In sum, I would find that Respondent satisfied its burden under *Wright Line*, 251 NLRB 1083 (1980).

CONCLUSIONS OF LAW

1. Respondent is an employer within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization as defined in Section 2(5) of the Act.

3. Respondent has engaged in unfair labor practices as defined in Section 8(a)(1) of the Act by having:

(a) Warned an employee that he might be discharged for refusing to obey its order that he sign a protest filed in his behalf.

(b) Threatened an employee with discharge in order to discourage him for participating in OSHA inspections.

(c) Restricted an employee from using its telephones because he used one to complain about an unsafe working condition.

(d) Suspended employees because they protested a warning given to one of them.

4. Respondent has not engaged in any other unfair labor practice alleged in the complaint.

REMEDY

In addition to posting a notice to employees as set out in the Appendix, Respondent shall make Richard and John Grosso whole for losses they suffered as a result of their 30-day suspensions and shall pay interest thereon as provided for in *Florida Steel Corp*., 231 NLRB 651 (1977). Respondent shall also be ordered to remove from its files all references to the suspensions and to notify Richard Grosso in writing that his suspension will not be used as a basis for any future discipline.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

ORDER

The Respondent, The Woodlawn Cemetery, New York, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Warning employees that they may be discharged for refusing to obey its order to sign protests filed in their behalf.

(b) Threatening employees with discharge to discourage their participating in OSHA inspections.

(c) Restricting employees from using its telephones because they have used them to complain about unsafe working conditions.

(d) Suspending employees because they protested warnings given them.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

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

(a) Make whole Richard Grosso and John Grosso for all losses they incurred as a result of their having been discriminatorily suspended from employment for 30 days, with interest thereon computed in the manner prescribed in the remedy section above.

(b) Remove from its files all references to those suspensions and notify Richard Grosso in writing that this has been done and that evidence as to his suspension will not be used as a basis for future personnel actions.

(c) Preserve and, on 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.

(d) Post at its facility in New York City, copies of the attached notice marked ''Appendix.''[3] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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

IT IS FURTHER ORDERED that allegations of the complaint, to which merit has not been found, are dismissed.

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

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

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

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT suspend employees to discourage them from protesting in a concerted manner any discipline imposed.

WE WILL NOT warn employees that they may be discharged for refusing to obey an order to sign protests filed in their behalf.

WE WILL NOT threaten to discharge employees to discourage their participation in OSHA investigations.

WE WILL NOT restrict employees from using our telephones because they have used them to protest unsafe working conditions.

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

WE WILL make whole, with interest, Richard Grosso and John Grosso for having unlawfully suspended them because they engaged in activities protected by the Act.

WE WILL remove from our files all references to those suspensions and WE WILL notify Richard Grosso in writing that this has been done and that his suspension will not be used in any way for any future personnel actions.

THE WOODLAWN CEMETERY