William C. Shopovick & Co., Inc. ***and*** **Horst Sollfrank.** Case 2–CA–24088

September 30, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

On July 17, 1991, Administrative Law Judge Steven Davis issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in answer to the Respondent's exceptions.[1]

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, and conclusions and to adopt the recommended Order as modified.[2]

[1] No exceptions were filed to the judge's findings that the Respondent violated Sec. 8(a)(1) and (3) of the Act by discharging employee Horst Sollfrank and violated Sec. 8(a)(1) by threatening employees with discharge for seeking the assistance of the Union concerning their rate of pay.

[2] The Respondent filed exceptions regarding, inter alia, the judge's recommended make-whole remedy of reinstatement and backpay and also filed a motion to reopen the record to adduce evidence regarding its alleged offer of reinstatement to Sollfrank at a November 1989 grievance meeting on his discharge. We deny the motion to reopen the record of the unfair labor practice proceeding, but will permit the Respondent to submit its evidence at the compliance stage of the proceeding since it pertains to whether the Respondent has satisfied the reinstatement requirement and, hence to whether—and if so, when—the backpay period has been tolled. The Respondent will also be permitted to submit evidence on the question of whether employee Sollfrank would have been transferred or reassigned to other jobsites were it not for the unlawful discharge. See *Dean General Contractors*, 285 NLRB 573 (1987).

Contrary to the dissent, we do not find that the judge abdicated his decision-making responsibility or that a remand is appropriate. The focus of the hearing was on the alleged unfair labor practices, and not on the matter of remedies. The judge found that the record was ''insufficient to make a finding whether Respondent made a firm, unconditional offer of immediate reinstatement to Sollfrank.'' We agree with that finding. Where the record is not fully developed on the issue of whether a respondent made a valid offer of reinstatement, it is appropriate for the Board to leave the matter to the compliance stage of the proceeding but to include in the Order a provision requiring that the respondent offer reinstatement and backpay *if it has not previously done so*. We shall amend the judge's recommended Order and notice to expressly include this conditional language. See *M.P.C. Plating*, 295 NLRB 583 fn. 2 (1989), modified on other grounds 912 F.2d 883 (6th Cir. 1990), modified mem. 917 F.2d 24 (6th Cir. 1990). See also *Baker Mfg. Co.*, 269 NLRB 794 fn. 2 (1984), enfd. in pertinent part and remanded in part 759 F.2d 1219 (5th Cir. 1985). Thus, the general order of reinstatement and backpay can be adjusted at the compliance proceeding to fit the circumstances of Sollfrank's unlawful discharge.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, William C. Shopovick & Co., Inc., White Plains, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a).

''(a) Offer, if it has not already done so, to Horst Sollfrank full and immediate 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 and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.''

2. Substitute the attached notice for that of the administrative law judge.

MEMBER OVIATT, dissenting in part.

The judge in this case held that the record before him was ''insufficient to make a finding whether Respondent made a firm, unconditional offer of immediate reinstatement'' to employee Sollfrank. The majority adopts the judge's findings but permits the Respondent to introduce evidence at compliance showing that it has satisfied the reinstatement requirement. I dissent. For the reasons set forth below, I find that this record contains sufficient evidence on which the judge could make, and should have made, a finding as to whether the Respondent made Sollfrank a valid offer of reinstatement. I would remand the case for that finding.[1]

As reported by the judge, the Respondent's president, William Shopovick, testified that Shopovick was asked by Union Business Manager Lyons at a November grievance meeting whether he would rehire Sollfrank and ''Shopovick said he would.'' Shopovick also testified without contradiction that to the best of Shopovick's knowledge the ''offer'' was ''communicated to Mr. Sollfrank'' but that Lyons ''came back'' to Shopovick ''and said that Mr. Sollfrank declined the offer.'' (Tr. 97.) The General Counsel's witness, Sollfrank, initially corroborated Shopovick. According to the judge, ''Sollfrank testified [on cross-examination] that at the grievance meeting, Shopovick offered to reemploy him, and he refused the offer.'' (JD, sec. II,4; see Tr. 48.)[2] The administrative law judge observed that ''Sollfrank *also* testified [later on cross] that the Union agent told him that Respondent asked

[1] In all other respects, I agree with the majority's disposition of the case.

[2] Neither Shopovick's nor Sollfrank's testimony suggests or implies that the offer was a conditional one.

if he wanted to be reemployed, and he refused.'' (Emphasis added.) (Id.; see Tr. 49.)

It is settled law that for an offer of reinstatement to be valid it must be sufficiently specific to put the employee on notice that he is unconditionally being offered back his job. See, e.g., *Daniel Construction Co*., 276 NLRB 1093, 1097 (1985), enfd. 731 F.2d 191 (4th Cir. 1984); *Hudson Neckwear*, 302 NLRB 93, 94 (1991). But the offer need not specify the title of the job being offered or that the offer is one of reinstatement rather than as a new hire. If the record shows that the employee understood that he was being offered immediate reinstatement to his old job (or to a substantially equivalent one) that is sufficient. See *Daniel Construction Co*., supra (''it was all right for [Norris] to come back to work, and if he would report back Monday he could go to work,'' was a valid offer because it was unconditional, the employee believed he was being offered reinstatement, and it was sufficiently specific); *Hudson Neckwear*, supra (a letter notifying the discriminatee that the respondent was ''calling [him] back to work as of today,'' was a valid offer of reinstatement); *Moro Motors*, 216 NLRB 192 (1975) (an offer stating, ''We are in a hole for mechanics, would you like to come back to work here?'' was valid because it was free of conditions and the discriminatee's testimony revealed that he understood the offer to be one of reinstatement to his former position, not just a general inquiry as to his interest in returning to work).

It is also the law that an employer may transmit an unconditional offer of reinstatement to an employee through that employee's bargaining representative. See, e.g., *Hotel Roanoke*, 293 NLRB 182 (1989); *Lipman Bros*., 164 NLRB 850 (1967).

Viewed in a light favorable to the Respondent, the testimonial evidence in my opinion is sufficient to show that the Respondent made Sollfrank a valid, unconditional offer of reinstatement. Thus, Shopovick testified that he made an offer to Union Business Agent Lyons to rehire Sollfrank. Sollfrank testified that at the November grievance meeting Shopovick, through Lyons, offered to reemploy Sollfrank. Sollfrank also testified that he refused the offer. In my view this testimony shows that Shopovick made a valid offer of reinstatement. See *Hudson Neckwear*, supra; *Daniel Construction Co*., supra; *Moro Motors*, supra.

Later on cross, Sollfrank also testified, however, that Lyons told him that the Respondent asked if he wanted to be reemployed, and Sollfrank refused. While this additional testimony standing alone is not evidence of a valid offer, the judge did not treat it as overriding Sollfrank's earlier testimony which, as I have explained, was evidence of a valid offer. Indeed, Sollfrank's later testimony on cross could reasonably be read as being consistent with his earlier testimony, since in eliciting the later testimony the questioner did not ask Sollfrank whether the Respondent's inquiry concerning Sollfrank's interest in reemployment was the *only* thing the Respondent conveyed to Sollfrank through Lyons (Tr. 49). The General Counsel did not clarify the matter on redirect.

The judge, to whom this case was entrusted, should have made a finding whether Sollfrank's later testimony on cross overrode Sollfrank's earlier testimony—which, in my opinion, was proof of a valid offer of reinstatement—or simply complemented that earlier testimony. Instead of resolving this critical question, which, as the trier of fact he was bound to do, the judge found the record ''insufficient to make a finding whether'' the Respondent made an unconditional offer.[3] In so doing, he abdicated his responsibilities.

While there may be times when it is appropriate to consider reinstatement offers at compliance, this is not one of them. Here, a record has been made before the judge on an offer of reinstatement, and the judge, who heard that testimony, should be the one forthrightly to decide that issue.

In sum, I would remand the case to the judge for his resolution of the possible conflict in Sollfrank's testimony on the reinstatement offer, and for a reasoned decision on whether what was conveyed to Sollfrank was a valid reinstatement offer.[4] Because my colleagues are unwilling to do so, I dissent.

[3] The judge also relied on the fact that the date of the grievance meeting was not specifically identified in the record. This is a weak reed indeed on which to find an ''insufficient'' record. Shopovick testified that he received a certified letter from the Union identifying the date of the meeting, and it has been established that the meeting was in November 1989. (Tr. 96.) It would be a small matter in compliance to get the exact date from the letter. Equally weak in my view is the judge's reliance on the fact that Lyons was not called to testify. Where the discriminatee himself has testified that he did receive an offer of reemployment—and Sollfrank's testimony reasonably could be read that way—Lyons' testimony was not necessary.

[4] Like the majority, I would deny the Respondent's motion to reopen the record. The Respondent has not shown that the evidence it now proffers was previously unavailable had it exercised due diligence in seeking that evidence.

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 discharge our employees because they make claims that we are not paying them the proper wages or benefits, and seek the Union's help in support of their claim.

WE WILL NOT threaten to discharge our employees because they seek the Union's help concerning their rate of pay.

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

WE WILL, if we have not already done so, offer to Horst Sollfrank full and immediate reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position without prejudice to his seniority or any other rights and privileges previously enjoyed and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, plus interest.

WE WILL remove from our files any reference to the unlawful discharge of Horst Sollfrank and notify him in writing that this has been done and that the discharge will not be used against him in any way.

WILLIAM C. SHOPOVICK & CO., INC.

Gregory B. Davis, Esq., for the General Counsel.
Wayne P. Stix, Esq, of White Plains, New York, for the Respondent.

DECISION

STATEMENT OF THE CASE

STEVEN DAVIS, Administrative Law Judge. Pursuant to a charge filed on January 25, 1990, by Horst Sollfrank, an individual (Sollfrank), a complaint was issued against William C. Shopovick & Co., Inc. (Respondent) on June 26, 1990. The complaint alleges that Sollfrank was discharged in violation of the Act because he claimed that he was not being paid the proper amount of wages he was entitled to under a contract between Respondent and the Carpenters District Council of Westchester County, New York, United Brotherhood of Carpenters and Joiners of America (Union), and because he sought the assistance of the Union in support of his claim. The complaint also alleges that Respondent threatened its employees with discharge because they sought the assistance of the Union concerning their rate of pay.

Respondent's answer denied the material allegations of the complaint and, on November 13, 1990, a hearing was held before me in New York City. On the entire case, including my observations of the demeanor of the witnesses and after consideration of the brief filed by the General Counsel, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, having an office and place of business in White Plains, New York, has been engaged in the construction of condominiums and other housing on a nonretail basis. It was stipulated, and I find, that in 1989, Respondent's gross revenues exceeded $250,000, and in the calendar year 1989, it was paid in excess of $50,000 from Ginsberg Development Corp. (Ginsberg) a New York corporation, for its services. It was also stipulated that in 1989, Ginsberg received gross revenues in excess of $250,000, and purchased goods valued in excess of $50,000 from Trust Tech, Inc., located in Connecticut. Based on these facts, I find and conclude that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Respondent's answer denied knowledge or information as to the labor organization status of the Union. The facts establish that Respondent executed a collective-bargaining agreement with the Union on May 1, 1989, for the Clarewood Village project, and the evidence also shows that Respondent obtained all its labor from the Union, and paid its employees the terms and conditions set forth in its collective-bargaining agreement. Based on the above, I find and conclude that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

1. Background

Respondent's full-time employees consist of William Shopovick, its president, and his wife, who keeps its books. Respondent obtains carpenters for jobs as needed by calling the Union and requesting that a certain number of carpenters be sent. Shopovick stated that the period of employment consists of the job for which he hires the carpenter, unless the employee is discharged sooner for some reason. However, it appears that, in this case at least, although a carpenter's assignment was complete on one job, he would be transferred to other jobs which Respondent was engaged in.

Respondent paid its employees based on the collective-bargaining agreement it had with the Union. Pursuant to that contract, one rate of pay was payable to the carpenter—$3.15 per hour. The contract specifies no difference between the type of job worked on, but the Respondent and the Union apparently had an understanding that as to jobs classified as commercial, the carpenter is employed for 35 hours per week and receives one stamp each week equal in value to the total of all fringe benefits due each week. Respondent purchases the stamps from a bank, and then places the stamp in the pay envelope of the employee. As to jobs classified as residential, the carpenter is employed for 40 hours per week, and receives no benefit stamps. Employees are paid weekly.[1]

2. Sollfrank's work record

In January 1989, Shopovick called Union Business Agent Gordy Lyons and requested carpenters. Sollfrank, one of the carpenters sent by Lyons, thus became employed by Respondent for the first time. He was employed at Baldwin Place in Lake Mohegan, a commercial rate job, for about 3

[1] The contract provides that ''on payday the funds that have been provided for fringe benefits due . . . shall be paid by stamps to be purchased . . . and placed in the envelope. The stamps shall be equal in value to total all fringe benefits due that week.''

weeks, during which time he received the proper pay, including a stamp each week. Sollfrank was then transferred to another job being performed by Respondent in Armonk.[2] Again, he was properly paid during his 2-week period of employment, and received stamps each week.

Respondent then transferred Sollfrank to a job at Clarewood Village, a condominium and townhouse construction project. According to Shopovick, Ginsberg and the Union agreed that the project would be classified as commercial for 1 month, and then reclassified as residential. Shopovick was not consulted as to the decision to reclassify the job. Sollfrank worked at Clarewood for about 4 months. He received benefit stamps for about the first month of his work there, and then, on the reclassification of the project, he received no further stamps for the remainder of his work there. Although Sollfrank no longer received stamps for that job, he continued to receive welfare, pension, and apprenticeship program benefits. It was only the vacation benefit, valued at $1.75 per hour, which Sollfrank no longer received as a result of the reclassification of the project.

At the time of the reclassification, although not required to, Respondent increased the pay of Sollfrank, from $23.15, the contractual rate, to $24.15, because it believed that the employees were being ''short-changed'' by losing their vacation benefits as a result of the reclassification.

Following the Clarewood job, on about July 6, 1989, Sollfrank was transferred by Respondent to a commercial project in Mt. Vernon. Sollfrank received a paycheck the following day, July 7. That check included sums owed for the Clarewood job, and 1 day's work at Mt. Vernon. The pay for Mt. Vernon was at a rate of $24.15. A benefit stamp was required for the day's work at Mt. Vernon because this was a commercial job, but none was included in Sollfrank's pay envelope due to an oversight caused by Sollfrank being previously employed at the residential Clarewood job, at which no stamps were payable. Sollfrank did not notify Respondent of this error.

3. The discharge

The following week, on August 3, Sollfrank received a paycheck for 1 week's work at Mt. Vernon, which was at the $24.15 rate. No stamp was included in his pay envelope, although it was required. Sollfrank inquired of Respondent's foreman and Noel, the Union's shop steward, both of whom received the stamp that week. Sollfrank then determined that he had not been paid correctly because he had not received the benefit stamp to which he was entitled. Although Sollfrank never saw a copy of the collective-bargaining contract between Respondent and the Union prior to his discharge, he assumed there was such an agreement because, as he testified, he would not work in the absence of a contract.

Sollfrank immediately asked Noel to notify the union delegate that he was not paid the correct wages and had not received a stamp.[3] Noel said he would do so. That evening, Sollfrank called delegate Gordy Lyons, telling him that he had not been paid the correct amount, and had not received benefit stamps. Sollfrank stated that he called immediately because he was once told that the employee has 72 hours within which to file a grievance.

Sollfrank testified that the following day, August 4, he asked Shopovick why he was not paid correctly, and why he did not receive the benefit stamp. Shopovick replied that he was keeping Sollfrank on the books of the Clarewood project.

On Monday, August 7, Shopovick was told by union delegate Lyons that Sollfrank claimed that he was not being paid the correct rate and was not receiving benefits. Shopovick replied that he was not aware of any such improper payments.

Sollfrank testified that that day, Shopovick came to the Mt. Vernon jobsite and said to him: ''You son of a bitch. You called the union on me. You are going to be fired. You will be gone by Thursday.'' Sollfrank did not reply.

Shopovick's version of the confrontation is that he asked Sollfrank: ''What's going on? You called the business representative stating that I did not pay you. That's news to me. What didn't I pay you?'' According to Shopovick, Sollfrank replied: ''I don't give a shit. No one is going to screw me out of anything.'' Shopovick replied that he was not in business to ''screw anyone out of anything. I am not aware of your problem. If I was aware of your problem I would correct it. If I had any intent of screwing you, why would I be paying you one dollar over rate?'' Sollfrank allegedly replied: ''I'm not going to get screwed by anybody.''

Shopovick determined that Respondent had improperly recorded Sollfrank as working on a residential job when in fact he was employed on a commercial project. The following day, August 8, Shopovick gave Sollfrank his pay with all the stamps which were due and owing, and said ''that's it.'' Respondent admits discharging Sollfrank that day.

Shopovick testified that he was told that Sollfrank told the job foreman and shop steward that he (Shopovick) was a ''crook'' and that he was ''gypping him out of his money.'' Shopovick stated that he fired Sollfrank because of such accusations inasmuch as Sollfrank was ''jeopardizing my reputation.'' He also faulted Sollfrank for not discussing his complaint with him. Shopovick was also offended at Sollfrank's actions because, in the past, he always paid him on time, and in addition paid him $1 over the contractual rate.

Shopovick denied discharging Sollfrank for going to the Union with his complaint. Sollfrank denied calling Shopovick a ''crook'' or a ''gyp.''

Shopovick testified that he was not satisfied with Sollfrank's performance of his work at the Clarewood project. He stated that he urged him to work faster and in a neater manner. Sollfrank denied that any complaints were made about his work. I need not resolve this conflict since Respondent did not discharge Sollfrank for this reason. Moreover, it appears that it tolerated his allegedly poor work performance, and retained him until his complaint to the Union.

4. The alleged offer of reinstatement

In November 1989, a grievance meeting was held on the issue of Sollfrank's discharge. Shopovick testified at the Board hearing that he was asked by union agent Lyons at the grievance meeting whether he would rehire Sollfrank.

[2] Respondent sought and received permission from the Union to transfer Sollfrank to its various jobs.

[3] On cross-examination, Sollfrank conceded that he had been paid the proper wages at all times. Indeed, he admitted that from the beginning of the Clarewood job until his discharge, he was paid $1 more than the contractual rate.

Shopovick said he would. This offer was communicated by Lyons to Sollfrank who refused the offer. Sollfrank testified that at the grievance meeting, Shopovick offered to reemploy him, and he refused the offer. However, Sollfrank also testified that the union agent told him that Respondent asked if he wanted to be reemployed, and he refused.

B. *Analysis and Discussion*

1. General Counsel's prima facie case

General Counsel's case essentially is that Sollfrank believed that he was not receiving the benefit stamps that he was entitled to, he complained to the Union concerning this matter, and was discharged for that reason.

I credit the testimony of Sollfrank concerning the August 7 confrontation with Shopovick. According to Sollfrank, Shopovick cursed him, accused him of calling the Union, and threatened that he would be ''gone'' by Thursday.[4] Respondent made good on its promise and discharged Sollfrank the following day. Shopovick was admittedly angry at Sollfrank's complaint to the Union concerning his nonreceipt of the benefit stamps. Thus, Shopovick admitted that he was ''completely offended'' by Sollfrank's manner in which he sought his correct payments, and was upset that he did not first ask him (Shopovick) about the matter before going to the Union. This supports General Counsel's theory that Sollfrank was discharged because he sought the Union's help regarding his benefit stamps.

In this connection, it should be observed that the complaint in this case states that the violation consists of Respondent's discharge of Sollfrank because he ''claimed that Respondent was failing to pay him full and proper wages and sought the assistance of the Union in support of his claim.'' (Emphasis added.) The evidence establishes that Sollfrank received the proper amount of wages at all times. However, as will be discussed infra, he had a reasonable, honest belief that he was not being paid the proper wages, and was correct in his complaint to the Union that he had not received benefit stamps, which was part of his remuneration, as required. Accordingly, the complaint, as worded, is proper.

I find that Sollfrank's actions in seeking the Union's help to obtain the benefit stamps that he believed he was entitled to constitutes protected, concerted activity within the meaning of Section 7 of the Act. Sollfrank, in seeking the stamps, was asserting a right set forth in the collective-bargaining agreement between Respondent and the Union to receive stamps which represent payment of the fund contributions by Respondent in Sollfrank's behalf.

The Supreme Court, in *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984), noted with approval the Board's doctrine in *Interboro Contractors*, 157 NLRB 1295 (1966), enfd. 388 F.2d 495 (2d Cir. 1967). The Court observed that in *Interboro*, it was held that an individual's assertion of a right grounded in a collective-bargaining agreement is recognized as concerted activity and accorded the protection of the Act. The Court further noted that the Board has recognized two reasons for this doctrine: (a) the assertion of a right contained in a contract is an extension of the concerted action that produced the agreement and (b) the assertion of such a right affects the rights of all employees covered by the contract.

The Court in *City Disposal*, 465 U.S. 82, 840–841, held that:

> As long as the grievance is based on an honest and reasonable belief that a right had been violated, its filing is a concerted activity because it is an integral part of the process by which the collective bargaining agreement is enforced.

It is clear that Sollfrank's action in seeking help from the Union, in effect grieving the Respondent's failure to provide the required stamps, was concerted activity. He had a reasonable and honest belief, which in fact was true, that he was entitled to the stamps and had not received them.

I accordingly find that Sollfrank was engaged in protected, concerted activity in enlisting the Union's help to obtain the stamps to which he was entitled.

I further find and conclude that General Counsel has made a prima facie showing that Sollfrank's activity in seeking help from the Union to receive the stamps was a motivating factor in Respondent's decision to discharge him. *Wright Line*, 251 NLRB 1083 (1980).

2. Respondent's defense

Once a prima facie case has been established, it is Respondent's burden to demonstrate that it would have discharged Sollfrank in the absence of his engaging in protected, concerted activities. *Wright Line*, supra.

Respondent took pains to prove that at all times it sought to pay its employees the sums to which they were entitled, and that it scrupulously honored the terms and conditions of its collective-bargaining agreement. In fact, it obtained admissions from Sollfrank that the wages which he received were equal to, and greater than, that required to be paid under the contract. In this connection, Sollfrank's complaint to the Union that he was not paid wages at the proper, commercial rate, was wrong. However, he had a reasonable, honest belief that he was not being paid at the proper rate. In fact, Shopovick testified that Sollfran was improperly listed as working at a residential, and not commercial rate. Sollfrank received the proper amount of wages because the rate is the same for both residential and commercial jobs. However, Sollfrank was correct in his assertion to the Union that he was not receiving benefit stamps, as required.

I accordingly find that there was no intent by Respondent to fail to give Sollfrank the benefit stamps to which he was entitled.

That does not answer the question, however. Shopovick asserts that it discharged Sollfrank because he learned that Sollfrank had told the job foreman and shop steward that he was a crook and was ''gypping'' him out of his money, thereby damaging his reputation.

First, the evidence does not support a finding that Respondent discharged Sollfrank for making those remarks. According to Sollfrank's credited testimony, on August 7 Shopovick accused Sollfrank of going to the Union, and said he would be fired within 3 days. Shopovick did not mention the allegedly defamatory statements when he informed Sollfrank that he would be fired. Second, we do not know

[4] I find, as alleged in the complaint, that Shopovick's threat to discharge Sollfrank because he sought the Union's assistance concerning the benefit stamps violates Sec. 8(a)(1) of the Act.

when Shopovick learned of these statements in relation to the time he was discharged.

Even assuming that Sollfrank made such comments, such accusations were not so ''defamatory or opprobrious'' as to remove Sollfrank from the protection of the Act. The remarks were made in the context of Sollfrank's assertion of a right grounded in the collective-bargaining agreement, based on his reasonable belief that he had not received the proper amount of benefit stamps.

In *Hamlet Steak House*, 197 NLRB 632, 635 (1972), an employee told her employer that he had ''cheated'' her and other employees with respect to their pay. The Board found that such a statement did not remove her from the protection of the Act:

> The employee's right to engage in concerted activity may permit some leeway for impulsive behavior, which must be balanced against the employer's right to maintain order and respect.

In *Abbey's Transportation Services*, 284 NLRB 698, 700 (1987), an employee complained to his fellow workers, and workers in another company, that his employer had ''cheated him.'' The Board found that the employer's discharge of the employee for that reason was pretextual, and that the real reason was his union activities. The Board noted that, as to the statements made concerning the pay dispute, ''there is no contention that [the employee's] complaints constituted disparagement of the Respondent's product or service.''

In *Multi-Medical Convalescent*, 225 NLRB 429, 436 (1976), the Board held that a statement by an employee to her fellow employees that their employer was a ''crook'' was not sufficient to forfeit the protection of the Act.

I accordingly find and conclude that Respondent has not established that it would have discharged Sollfrank even in the absence of his union and protected, concerted activities. *Wright Line*, supra.

3. The alleged offer of reinstatement

The evidence concerning Respondent's offer of reinstatement is vague and ambiguous. As set forth above, Shopovick testified that at the November grievance meeting he said he would rehire Sollfrank. In response to a leading question, Sollfrank testified that at that meeting, Respondent offered to reemploy him. However, Sollfrank also testified that Respondent merely asked if he wanted to be reemployed. Sollfrank did not wish to return to work with Respondent.

Shopovick and Sollfrank did not speak directly regarding this issue at the grievance meeting. Rather, union agent Lyons, who did not testify here, acted as intermediary, relaying the questions and responses.

If Respondent, through Shopovick, properly made an offer of reinstatement to Sollfrank at the November meeting, Respondent's backpay liability would be tolled as of the date of the offer. However, if Respondent simply was inquiring whether Sollfrank was interested in becoming reemployed by Respondent, such an inquiry is not a proper offer of immediate reinstatement. *Jones Plumbing Co*., 277 NLRB 437, 450 (1985); *Seligman & Associates*, 273 NLRB 1216 (1981).

The record before me is insufficient to make a finding whether Respondent made a firm, unconditional offer of immediate reinstatement to Sollfrank. This is particularly true where Lyons, the person who transmitted the purported offer and its response, did not testify, and there is no evidence of the date of the November meeting.

In addition, the fact that Sollfrank stated that he did not wish to be reinstated is immaterial. As the Board stated in *Seligman:*

> It is well settled that only when a proper offer is made and unequivocally rejected by the employees is the employer's backpay obligation tolled.
>
> . . . .
>
> As the wrongdoer, the Respondent bears the burden of remedying its unfair labor practices. We impose no hardship by requiring that it meet that burden by making a clear, unequivocal, legitimate reinstatement offer even in the face of a discriminatee's apparent understanding and repudiation of the concept of reinstatement.

I will accordingly require that Respondent make an offer of reinstatement as part of the remedy ordered herein.

CONCLUSIONS OF LAW

1. William C. Shopovick & Co., Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Carpenters District Council of Westchester County, New York, United Brotherhood of Carpenters and Joiners of America is a labor organization within the meaning of Section 2(5) of the Act.

3. By discharging Horst Sollfrank because he claimed that Respondent was failing to pay him the proper wages and benefits, and sought the assistance of the Union in support of his claim, Respondent violated Section 8(a)(1) and (3) of the Act.

4. By threatening its employees with discharge because they sought the assistance of the Union concerning their rate of pay, Respondent violated Section 8(a)(1) of the Act.

5. The above-described unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

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

Having unlawfully discharged Horst Sollfrank, Respondent shall offer him reinstatement and make him whole for lost earnings and other benefits computed on a quarterly basis from the date of discharge to the date of a proper offer of reinstatement, less net interim earnings in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

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[5] 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

ORDER

The Respondent, William C. Shopovick & Co., Inc., White Plains, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging employees because they make claims that Respondent is not paying them the proper wages or benefits, and seek the Union's help in support of their claim.

(b) Threatening to discharge employees because they seek the Union's help concerning their rate of pay.

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

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

(a) Offer Horst Sollfrank immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position without prejudice to his seniority or any other rights or privileges previously enjoyed and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination aainst him in the manner set forth in the remedy section of the decision.

(b) Remove from its files any reference to the unlawful discharge of Horst Sollfrank and notify him in writing that this has been done and that the discharge will not be used against him in any way.

(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 White Plains, New York location copies of the attached notice marked ''Appendix.''[6] 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.

adopted by the Board and all objections to them shall be deemed waived for all purposes.

[6] 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.''