

United Rubber, Cork, Linoleum and Plastic Workers of America, Local 250, AFL-CIO (Mack-Wayne Closures) and International Union of Tool, Die and Mold Makers. Case 22-CB-4927

22 May 1986

DECISION AND ORDER

**BY CHAIRMAN DOTSON AND MEMBER
DENNIS, JOHANSEN, AND BABSON**

On 13 April 1984 Administrative Law Judge Howard Edelman issued the attached decision. The Respondent filed exceptions.

The Board has considered the decision and the record in light of the exceptions and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order as modified.

In this proceeding the judge held that the Respondent Union had breached its duty of fair representation to employee David O'Neill by certain actions which amounted to an arbitrary refusal to process his grievance. The judge found that, by this breach, the Respondent had violated Section 8(b)(1)(A) of the Act. We agree with this conclusion. For the following reasons, and contrary to our dissenting colleague, we enter the provisional make-whole remedy set out below.

In entering a provisional make-whole remedy, we are aware that the merits of O'Neill's grievance are uncertain. This uncertainty, however, derives in large measure from the Respondent's breach of its duty to provide fair representation, which prevented resolution of the grievance in the first instance. In the absence of evidence warranting a finding that the grievance lacks merit,² and in order to restore the status quo existing before the Respondent Union violated the Act by precluding the grievance's proper resolution, we resolve any uncertainty in favor of the victim and against the wrongdoer. Such a remedy in cases in which there has been a breach of the duty of fair representation is consistent with fundamental equitable principles and with longstanding Board precedent. See *Graphic Communications Local 4 (San Francisco Newspaper)*, 272 NLRB 899 (1984).

¹ The judge inadvertently stated that employee O'Neill filed a grievance on 1 July 1983. The record shows he filed the grievance on 1 June 1983.

² The Respondent could have adduced evidence at the hearing about the merits of the grievance to show that even if the grievance had been fairly processed, an arbitrator would have denied it. The Board has withheld a make-whole remedy for an 8(b)(1)(A) violation when the evidence showed that a grievant, who sought reinstatement from a layoff based on his seniority, could not prevail in his grievance in any event because he was a temporary employee who did not accrue seniority. See *Teamsters Local 705 (Associated Transport)*, 209 NLRB 292, 293 (1974), *aff'd sub nom. Aaron Kesner v. NLRB*, 532 F.2d 1169 (7th Cir. 1976).

Prior to granting a make-whole remedy in a case such as this, our dissenting colleague would require the General Counsel to establish not only a breach of the duty of fair representation, but also to establish that the grievant had a meritorious claim against the employer—a two-pronged requirement. We believe that such a two-pronged requirement, however, misapprehends the nature of a breach of the duty of fair representation, for in this context it is the failure to process *itself* which has legal significance, not the meritoriousness of the grievance.³ Having breached its affirmative obligation to the grievant, however, an obligation which we all find is mandated by the Act, the offending union hardly can be heard to complain about having to assume the burden of establishing, by way of defense, that its breach makes no difference because the grievant would have failed in his cause anyway. Having determined that the Union failed to represent O'Neill fairly, we believe the Union properly bears the risk of its misconduct. Otherwise, O'Neill's injury would remain unaddressed and the Union's violation largely undeterred—a result wholly at odds with the Act's remedial purposes.

Our dissenting colleague, in reaching a contrary conclusion, relies on two circuit court decisions,⁴ which in turn relied heavily on Section 301 cases in reaching their conclusions. But Section 301 actions, such as *Hines v. Anchor Motor Freight*,⁵ which is cited by the dissent, involve suits based on contract—matters which clearly require a showing of contract *breach*, i.e., merit, prior to recovery. And although the liability of a union in Section 301 action in some sense may derive in part from the statutory requirements to fairly represent, such contract cases simply are not statutory cases like the one before us today. *DelCostello v. Teamsters*,⁶ also cited by the dissent, would be a long shoehorn indeed if it could be used to incorporate the elements of a contract action into a claim of statutory violation like the one here.⁷

³ Of course, there must be, as here, a nexus between the unfair labor practice and the remedy.

⁴ *NLRB v. Electrical Workers UE Local 485*, 454 F.2d 17 (2d Cir. 1972); *Steelworkers v. NLRB*, 692 F.2d 1052 (7th Cir. 1982).

⁵ 424 U.S. 554 (1976).

⁶ 103 S.Ct. 2281 (1983).

⁷ We note also that in neither of the two circuit court decisions cited by our colleague was the court analyzing the precise type of provisional make-whole remedy we enter here today in which the Respondent Union will only have to pay backpay if there is no resolution of O'Neill's grievance on the merits. Moreover, neither court had as extensive an analysis before it of the reasons behind a remedial order, entered here, which reflects the basic premise that a wrongdoer should bear the burden of showing that no ill effects flowed from its wrongdoing.

Member Johansen agrees that Sec. 301-suit remedies flow from the contract while remedies under our statute flow from Sec. 10(c).

We reiterate that the absence of evidence regarding the merits of the grievance in issue should not be confused with the fundamental question of who has the burden of adducing such evidence. We do not quarrel with the fact that no evidence of merit appears in this record. We simply adhere to the traditional view that the wrongdoer should bear the burden of demonstrating that its breach of its duties to the employee, which breach itself stands as an independent violation of the Act, was a monetarily harmless one because the employee would have lost anyway. The failure of the Respondent to demonstrate that its breach was monetarily a "harmless" one does not result in a speculative award. It results in a proper disposition of the equities against a wrongdoer in furtherance of the remedial purposes of the Act.

In this case, we shall enter an order and remedy, as set out in *San Francisco Newspaper*, supra, rather than the remedy given by the judge. Thus, we shall order the Respondent to ask O'Neill's employer to rescind the third warning and discharge and to reinstate him to his former position of employment. If the Employer refuses to do so, then the Union shall promptly pursue the remaining stages of the grievance procedure, including arbitration, in good faith and with all due diligence. We shall also order that O'Neill be permitted to be represented by his own counsel at the remaining stages of the grievance procedure and at the arbitration proceeding and that the Union pay the reasonable legal fees of such counsel. And if for any procedural or substantive reason the Respondent is unable to pursue the remaining stages of the grievance procedure, resulting in the inability to resolve O'Neill's grievance on the merits, then the Respondent shall be required to provide appropriate backpay. We shall revise the judge's order herein to so provide.

ORDER

The National Labor Relations Board orders that the Respondent, United Rubber, Cork, Linoleum and Plastic Workers of America, Local 250, AFL-CIO, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Restraining or coercing any employee in the exercise of rights guaranteed by Section 7 of the Act by failing to process in good faith, and with due diligence, grievances or by arbitrarily refusing to consider and process grievances.

(b) Restraining or coercing any employees in any like or related manner.

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

(a) Request Mack-Wayne Closures to reinstate David O'Neill to his former position of employ-

ment and, if it refuses to do so, promptly pursue the remaining stages of the grievance procedure, including arbitration, in good faith with all due diligence.

(b) Permit David O'Neill to be represented by his own counsel at the remaining stages of the grievance procedure and at the arbitration proceeding, and pay the reasonable legal fees of such counsel.

(c) In the event that it is not possible to pursue the remaining stages of the grievance procedure, resulting in the inability to resolve the grievance of David O'Neill on the merits, make O'Neill whole for any loss of pay he may have suffered as a result of its unlawful conduct in processing his grievance in an arbitrary or perfunctory manner, by payment to him of the amount he would normally have earned from the date of his discharge until he obtained substantially equivalent employment, less his net earnings during the backpay period, together with interest.

(d) Post in all places where notices to employees, applicants for referral, and members are posted copies of the attached notice marked "Appendix."⁸ Copies of the notice, on forms provided by the Regional Director for Region 22, 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 members 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.

MEMBER DENNIS, dissenting in part.

I agree with my colleagues that the Respondent violated Section 8(b)(1)(A) of the Act by breaching its duty of fair representation to employee David O'Neill, but disagree that a make-whole remedy is warranted. For the following reasons, I believe that as part of her case the General Counsel should prove the grievance is meritorious before the Board may assess backpay liability against the Union.

On 30 May 1983 the Company informed O'Neill that because he had three written warnings he would be discharged. O'Neill filed a grievance

⁸ 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"

about the third warning. The judge held that the Respondent breached its duty of fair representation by refusing to advocate O'Neill's grievance after agreeing to represent him. Citing Board precedent, the judge concluded that a make-whole remedy was appropriate because there was no evidence that the grievance was without merit.

In Section 301 suits the burden is on the plaintiff to establish that his grievance is meritorious in order to obtain backpay from a union for failing to represent him fairly. *Hines v. Anchor Motor Freight*, 424 U.S. 554, 570-571 (1976). Section 301 cases of the *Hines* type are closely analogous to Board fair representation cases. *DelCostello v. Teamsters*, 103 S.Ct. 2281 (1983). *DelCostello*, which held that the 10(b) 6-month period rather than state law establishes the limitation period for employee actions under Section 301, suggests that similarity of result in Section 301 suits and parallel 8(b)(1)(A) cases is desirable.¹ Circuit courts, relying on Section 301 precedent, have denied enforcement of Board decisions assessing backpay liability against unions for breach of the duty of fair representation if there was no showing that the underlying grievances had merit, because without such a finding a backpay award "might well be speculative and punitive and a windfall to [the employee]," and thus "at odds with the remedial aims of the Act." *Steelworkers v. NLRB*, 692 F.2d 1052, 1057 (7th Cir. 1982); *NLRB v. Electrical Workers UE Local 485*, 454 F.2d 17 (2d Cir. 1972).²

In its recent *Sure-Tan* opinion, the Supreme Court reviewed the Board's authority under Section 10(c) to remedy unfair labor practices and stated that "it remains a cardinal, albeit frequently unarticulated assumption, that a backpay remedy must be sufficiently tailored to expunge only the actual, and not merely speculative, consequences of the unfair labor practices." *Sure-Tan, Inc. v. NLRB*, 104 S.Ct. 2803, 2813-2814 (1984) (emphasis in original). The Court held that a minimum award of 6 months' backpay for each discriminatee "does not lie within the Board's own powers" because it "is not sufficiently tailored to the actual, compensable injuries suffered by the discharged employees." *Id.*

¹ See also *Self v. Teamsters Local 61*, 620 F.2d 439 (4th Cir. 1980), *St. Clair v. Teamsters Local 515*, 422 F.2d 128 (6th Cir. 1969).

² Consistent with this view, other courts have held that a make-whole remedy is appropriate when the union's breach caused the loss of the employees' jobs, *Teamsters Local 860 v. NLRB*, 652 F.2d 1022 (D.C. Cir. 1981), and when the record established that the employer unlawfully discharged the employee and the union thereafter unlawfully failed to represent him *NLRB v. Pacific Coast Utilities Service*, 638 F.2d 73 (9th Cir. 1980) ("Given the determination that discharge was wrongful, it follows that the failure of the union to represent the employee was damaging to him and a contributing factor to his loss of pay.")

In the instant case, there is no evidence concerning the merits of O'Neill's grievance. The backpay award is based instead on a "presumption" that O'Neill's grievance, if fully and fairly processed, would have been found meritorious. See, e.g., *Service Employees Local 579 (Beverly Manor Convalescent Center)*, 229 NLRB 692, 696 (1977), which the judge cited in his decision's remedy section. Such a presumption has no factual basis and rests on nothing more than sheer speculation. On the present record, we simply do not know whether the Respondent's misconduct damaged O'Neill. Absent proof that O'Neill's grievance had merit, the backpay award lacks the necessary tailoring "to expunge only the actual, and not merely speculative, consequences of the unfair labor [practice]." *Sure-Tan*, supra. The result in this case is a windfall for O'Neill at Respondent's expense.

In accordance with the above-cited court authority, I would place the burden on the General Counsel to establish not only the 8(b)(1)(A) violation, but also that the underlying grievance is meritorious.³ If the grievance is not meritorious, a make-whole remedy is inconsistent with the fundamental requirement that the Board restore only actual losses.⁴

Recognizing that my position is a departure from precedent that the parties could not anticipate, and that it is the Board's responsibility to fashion remedies that effectuate the policies of the Act, I would exercise the Board's discretion and remand for further hearing.

³ The General Counsel may choose to allege the 8(b)(1)(A) violation, but forgo a make-whole remedy.

⁴ My position finds further support in *Taracorp Inc.*, 273 NLRB 221 (1984), in which the Board discussed its authority to order make-whole remedies. *Taracorp* recognized that a make-whole remedy is appropriate if an employee is discharged for exercising Sec. 7 rights, or if the discharge, though apparently for a legitimate reason, is the result of an act that was an unfair labor practice, such as failure to bargain over a subcontracting decision. The Board rejected a make-whole remedy in *Taracorp*, however, when the employer violated an employee's Sec. 7 right to union representation in an investigatory interview, but discharged the employee for "cause" (a term signifying the absence of a prohibited reason). *Taracorp* held that when an employee is discharged for "cause," Sec. 10(c) precludes the Board from imposing a make-whole remedy, even though the employer violated the employee's statutory right to union representation.

Here, there was no showing that O'Neill's discharge was for engaging in Sec. 7 activity, was the result of an act that was an unfair labor practice, or was otherwise wrongful. Compare the cases cited in fn. 2, supra. Accordingly, as in *Taracorp*, the Board lacks authority under Sec. 10(c) to order a make-whole remedy, even though the Union violated O'Neill's statutory right to fair representation.

APPENDIX

NOTICE TO MEMBERS
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 restrain or coerce any employee in the exercise of rights guaranteed by Section 7 of the Act by failing to process in good faith, and with due diligence, grievances or by arbitrarily refusing to consider and process grievances.

WE WILL NOT in any like or related manner restrain or coerce employees.

WE WILL request Mack-Wayne Closures to reinstate David O'Neill to his former position of employment and, if it refuses to do so, WE WILL promptly pursue the remaining stages of the grievance procedure, including arbitration, in good faith with all due diligence.

WE WILL permit David O'Neill to be represented by his own counsel at the remaining stages of the grievance procedure and at the arbitration proceeding, and WE WILL pay the reasonable legal fees of such counsel.

WE WILL make David O'Neill whole, with interest, for any loss of pay he may have suffered as a result of our failure to fairly process his grievance concerning his third warning and discharge by Mack-Wayne Closures if his grievance concerning his discharge cannot be processed through the remaining stages of the grievance procedure.

UNITED RUBBER, CORK, LINOLEUM
AND PLASTIC WORKERS OF AMERICA,
LOCAL 250, AFL-CIO

Marta Figueroa, Esq., for the General Counsel
Howard A. Goldberger, Esq. (Goldberger, Siegel & Finn),
for the Respondent.

DECISION

STATEMENT OF THE CASE

HOWARD EDELMAN, Administrative Law Judge. This case was tried before me on January 23 and 24, 1984

On August 15, 1983, the International Union of Tool, Die and Mold Makers (the Union) filed a charge against United Rubber, Cork, Linoleum and Plastic Workers of America, Local 250, AFL-CIO (Respondent), alleging that Respondent refused to represent David O'Neill, an individual, in violation of Section 8(b)(1)(A) of the Act. On September 29, 1983, a complaint alleging that Respondent violated Section 8(b)(1)(A) of the Act in a manner consistent with the charge issued.

A brief was filed by counsel for the General Counsel. Respondent made an oral argument at the conclusion of its case. On consideration of the entire record, the brief, the oral argument, and my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

Mack-Wayne Closures (the Employer), is a New Jersey corporation with an office and place of business in Wayne, New Jersey. The Employer is engaged in the manufacture, sale, and distribution of plastic products. The Employer annually sells and ships in the course of its normal business operations products valued in excess of \$50,000 directly to points located outside the State of New Jersey

It is admitted, and I find, that the Employer is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

It is also admitted, and I find, that Respondent is a labor organization within the meaning of Section 2(5) of the Act

Respondent and the Employer are parties to a collective-bargaining agreement which was entered into on November 22, 1982, and expires on November 26, 1985. The agreement encompasses a unit of production and maintenance employees. The agreement, also contains grievance arbitration provisions

O'Neill was hired by the Employer on March 1982 as a machinist in the toolshop. Pursuant to the union-security provisions of the collective-bargaining agreement, he became a member of Respondent. Sometime during the summer of 1982 he became a shop steward

In April 1982, O'Neill became instrumental in organizing the toolroom employees on behalf of the Union in connection with a proposed craft severance. Sometime during the beginning of this campaign, Joe Huther, president of Respondent and an admitted agent within the meaning of Section 2(13) of the Act, approached O'Neill during working hours and advised him that he was aware of his activities on behalf of the Union.

On August 30, 1982, the Union filed a petition for an election in a unit of tool employees. On October 8, 1982, the petition was dismissed.

During the fall of 1982, O'Neill, in his capacity as shop steward, filed a grievance on behalf of Eileen Reily, a unit employee. According to O'Neill's credible and uncontradicted testimony, he referred the grievance to Huther.¹ Thereafter, O'Neill, who evidently had taken a personal interest in the Reily grievance, spoke to Huther at various times to determine Respondent's position and the present stage of the grievance. According to O'Neill's credible and uncontradicted testimony, he got into repeated arguments over the manner in which Respondent was proceeding on the grievance. On other occasions when O'Neill would question Huther the state of

¹ I found O'Neill to be a credible witness. I was impressed with his overall demeanor. His testimony was candid and forthright on both direct and cross-examination. His recollection of facts was good. Additionally, his testimony was corroborated by both Respondent and employer witnesses. Joe Huther was not called as a witness by any party to this proceeding.

of his business. Sometime during the late fall of 1982, as a result of his dissatisfaction with the way Respondent was handling the Reily grievance, O'Neill resigned his position as shop steward.

About December 15, 1982, O'Neill was discharged by the Employer for leaving the plant during working hours. He filed a grievance with Respondent concerning his discharge. On December 21, Respondent's representatives, including Huther, met with O'Neill and employer representatives. During this meeting it was agreed that O'Neill would be reinstated with full backpay. The Employer, as part of the settlement, wanted the incident reduced to a written warning to be placed in O'Neill's personnel file. O'Neill objected to this, and the issue was tabled.

International Respondent Representative John McGowan, who was present at the O'Neill grievance meeting, credibly testified that later that same night (December 21), he spoke to Huther over the phone and agreed with Huther to accept the written warning in complete settlement of the grievance. O'Neill was not informed by either Respondent or the Employer of this resolution at the time but learned of it some time later from employer representatives.

About December 30, 1982, O'Neill received a written warning for leaving work early. It appears the Employer later changed this to a written warning without so informing O'Neill.

Sometime in May 1983, O'Neill received a written warning for poor work performance. On May 30, he met with Employer Representative John Quinn and Phil Colangelo and then Respondent Shop Steward Al Ferry. During this meeting, Quinn advised O'Neill that he had three written warnings and that pursuant to the Employer's established policy he would be discharged. O'Neill denied that he had received three written warnings and suggested that Quinn check it out. Quinn agreed to do so.

On July 1, 1983, O'Neill filed a grievance concerning the May warning letter.

On June 2, a Respondent-Employer meeting was held to discuss O'Neill's grievance. Present at this meeting were O'Neill, Employer Representatives Quinn and Colangelo, and Respondent Representatives Ferry and Huther. Ferry testified as follows:²

The meeting started off by Mr. Quinn stating to the effect that he had three written warnings in front of him and the last one being for supposed poor work and this could not go on and that the reason that he called the meeting, directing the question to Dave O'Neill, was to see what he had to say, if anything, for himself.

At this point, Dave started to say something, but Joe Huther jumped up and said, "Wait a minute, wait a minute. I'm the Union president. We're here to fire the guy and that's it. And at this point I asked Mr. Huther to lower his voice because he was literally screaming and ranting and raving, like

² At the time of the trial of this case Ferry was Respondent's president.

I really didn't believe especially in front of the company officers. He said pointedly, "You two guys are nothing but trouble makers and I'm not going to have anything to do with it. I'm the Union president. We're here to fire the guy and it is my job to see that it's done, and that's it." O'Neill's testimony corroborates that of Ferry. Quinn conceded that Huther "lost his cool" at the meeting. He testified that Huther hollered that he was going to run this meeting, not Ferry and O'Neill, and that if O'Neill's work was bad he would have to be fired just like anyone else. He did not specifically deny the testimony of O'Neill and Ferry concerning Huther's statements about being present at the meeting for the purpose of firing O'Neill. I credit the testimony of O'Neill and Ferry.³ After Huther's outburst, Quinn calmed him down. Ferry then spoke up in O'Neill's defense pointing out that experienced tool-makers like O'Neill were hard to find. Quinn and Colangelo left the meeting room to caucus. They returned in a few minutes and Quinn stated the Employer had decided that O'Neill would be terminated, effective immediately. Thus, the meeting ended.

Analysis and Conclusions

It is well settled law that a labor organization which enjoys the status of exclusive collective-bargaining representative has an obligation to represent employees fairly, in good faith, and without discrimination against any of them on the basis of arbitrary, irrelevant, or invidious distinctions. *Vaca v. Sipes*, 386 U.S. 171 (1966), *Miranda Fuel Co.*, 140 NLRB 181 (1962).

Once a union commits itself to the prosecution of a grievance on behalf of an employee, the union is under a duty to present the grievance most favorably to the employee. Such duty requires the union to act as the advocate for the grievant. *Teamsters Local 705 (Associated Transport)*, 209 NLRB 292 (1974), *aff'd Aaron Kesner v. NLRB*, 532 F.2d 1169 (7th Cir. 1976).

Applying these legal principles to the instant case, it is crystal clear that Respondent utterly failed to fulfill its obligation to act as the advocate for O'Neill. In this connection the grievance meeting opened with employer representatives pointing out that O'Neill had three written warnings, the last warning was for poor work, and he wanted to hear O'Neill's position on the matter. Before O'Neill could respond, Huther, Respondent's president, who should have been O'Neill's principal advocate, commenced his tirade against O'Neill stating that "We're here to fire the guy [O'Neill] and that's it." Thereafter he accused O'Neill of being a "trouble

³ As set forth above, I found O'Neill to be a credible witness. I also found Ferry to be a credible witness. His demeanor impressed me very much. He was most candid and forthright throughout both direct and cross-examination. Further, he displayed an excellent and concise recollection of the facts. Moreover, he was Respondent shop steward at the time of the meeting and Respondent's president at the time of the trial and therefore his testimony constitutes an admission against Respondent. As set forth above, Huther did not appear as a witness during the course of this trial.

maker."⁴ Huther thereafter concluded his tirade by stating "I'm the union president. We're here to fire the guy and it's my job to see that it's done." A clearer case of failing to act as O'Neill's advocate cannot be imagined. O'Neill's fate at the hands of the Employer was sealed by Huther's opening statements. As the Seventh Circuit stated in *Aaron Kesner v. NLRB*, supra at 1175.

It is one thing for a grievant to attempt to pursue his remedy without assistance and opposed only by one adversary. When that situation is compounded by two opponents, one of whom is supposedly his "own people," the bearing on the likelihood of his success assumes substantial significance. When the one's own representative who has been willing to assume that status proclaims a lack of merit, it is indeed likely to be *coup de grace* to the claim.

I conclude Huther's actions and statements were tantamount to an arbitrary refusal to process O'Neill's grievance.

Respondent counsel contended in his oral argument that assuming that Huther made the statements attributed to him, the effect of such statements was overcome by Ferry's presentation of O'Neill's grievance. However, Huther was Respondent's president, its highest official representative. Ferry, at the time, was merely a shop steward, the lowest in authority, of Respondent's representatives. It was Huther who had the final authority to determine Respondent's position concerning a grievance and in the instant case he set forth his position unmistakably. Accordingly, I reject Respondent counsel's contention.

Respondent counsel further contends that O'Neill, following his discharge, never filed a grievance alleging an improper discharge by the Employer. However, the evidence established that, during the meeting on May 30, Quinn advised O'Neill that with this last warning concerning his alleged poor work, he had in his file three written warnings and, pursuant to its policies, the Employer intended to fire him. It was after being notified of the Employer's intention to discharge him that O'Neill filed his grievance concerning the last warning. Although the grievance did not specifically set forth the Employer's intention to discharge him, such issue was necessarily implied. Moreover, in view of the nature and extent of Huther's statements during the June 2 meeting, filing of an additional grievance by O'Neill would have been senseless. Accordingly, I reject Respondent counsel's contention.

⁴ I conclude this reference to O'Neill as a "trouble maker" was a reference to O'Neill's participation in organizing for a craft severance on behalf of the Union and his participation in connection with the Reily grievance.

I therefore conclude, based on the above discussion, that Respondent breached its duty to fairly represent O'Neill and thereby violated Section 8(b)(1)(A) as alleged.

CONCLUSIONS OF LAW

1. The Employer is an employee engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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

3. By refusing to advocate O'Neill's grievance during the June 2, 1983 Employer-Respondent grievance meeting in a manner favorable to O'Neill, Respondent breached its duty of fair representation and thereby restrained and coerced O'Neill in the exercise of rights guaranteed in Section 7 of the Act and thereby violated Section 8(b)(91)(A) of the Act.

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

THE REMEDY

Having found that Respondent has engaged in unfair labor practices within the meaning of Section 8(b)(1)(A) of the Act, I shall recommend that it be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Affirmatively, I shall recommend that Respondent process, or attempt to process, if time-barred by the collective-bargaining agreement between Respondent and the Employer, O'Neill's grievance in good faith and with all due diligence, and that Respondent shall make O'Neill whole for any loss of earnings he may have suffered as the result of his discharge on June 2, 1983, until the earlier of the following occurs: Respondent processes O'Neill's grievance in good faith with all due diligence, or O'Neill is reinstated by the Employer or obtains other substantially equivalent employment. Backpay shall be computed with interest in a manner set forth in *Florida Steel Corp.*, 231 NLRB 651 (1977). See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962); *F. W. Woolworth Co.*, 90 NLRB 289 (1950).

Such affirmative remedy is appropriate unless the facts establish that the grievance was without merit. *Associated Transport*, supra; *Grover-Granite*, 229 NLRB 56 (1977); *Service Employees Union Local 579*, 229 NLRB 692 (1977). In the instant case there is no evidence relating to the merits of the third warning which was the subject of the grievance, much less evidence to establish that such grievance was without merit. Accordingly, I conclude such affirmative relief is justified.

[Recommended Order omitted from publication.]