

Westinghouse Electric Corporation-Micarta Division and United Brotherhood of Carpenters and Joiners of America, AFL-CIO, Southern States Organizing Office, a/w United Brotherhood of Carpenters and Joiners of America, AFL-CIO.
Case 11-CA-12700

October 5, 1989

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
HIGGINS AND DEVANEY

On June 29, 1989, Administrative Law Judge J. Pargen Robertson issued the attached decision. The General Counsel and Respondent filed exceptions and supporting briefs, and the Respondent filed a brief answering the General Counsel's exceptions.

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

The Board has considered the decision and record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions,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, Westinghouse Electric Corporation-Micarta Division, Pendleton, South Carolina, its officers, agents, succes-

sors, and assigns, shall take the action set forth in the Order.

Jasper C. Brown, Jr., for the General Counsel.
Craig M. Brooks, Esq. and *Mary Helen Chiodo, Esq.*, of Pittsburgh, Pennsylvania, for the Respondent.
Alice Dixon, Esq., of Atlanta, Georgia, for the Charging Party.

DECISION

STATEMENT OF THE CASE

J. PARGEN ROBERTSON, Administrative Law Judge. This matter was heard in Anderson, South Carolina, on December 13, 1988. The complaint issued on June 2, 1988. It was based on a charge filed on April 22, 1988.

The complaint, as amended at the hearing, alleges that Respondent violated Section 8(a)(1) of the National Labor Relations Act (Act), by interrogating its employees concerning their union sympathies and by threatening its employee with discharge because of that employee's union activity; and that Respondent violated Section 8(a)(3) and (1) of the Act, by discharging its employee James Earl Wright on April 1, 1988.

Respondent admitted the commerce allegations of the complaint. Respondent admitted that it is engaged in the production of laminated circuit boards at its facility in Pendleton, South Carolina, and that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

On February 3, 1989, Respondent and General Counsel filed posthearing briefs. On February 9 Respondent filed "Respondent Westinghouse Electric Corporation's Motion to Correct General Counsel's Post-Hearing Brief." On February 21 I received "Counsel for General Counsel's Motion in Opposition to Respondent's Motion to Correct General Counsel's Post-Hearing Brief."

I hereby deny Respondent's motion to correct General Counsel's posthearing brief. I do not consider the briefs of the parties as evidence. To the extent briefs conflict with, or misstate, credited evidence, I shall disregard the briefs.

In 1988 the Union began an organizing campaign among Respondent's employees at Pendleton, South Carolina. James Earl Wright testified that that campaign started during the first part of February 1988.

According to Wright, he was approached by his supervisor Tom Carter during "the latter part of February or the first of March," and questioned as to whether he had been contacted by the Union.

Wright testified about another conversation with Tom Carter. The record shows that that conversation was placed around March 16 or 17. According to Wright, Carter took him into the main office located in the engineer's department, where no one else was present, and, among other things, threatened Wright that he would be discharged if he did not quit advocating the Union.

The final allegation involves the discharge of James Earl Wright. The termination slip supplied to unemployment security by Respondent, which was signed by supervisor Bryan Hamrick, indicated,

¹ The Respondent and the General Counsel 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), enf'd 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² The Respondent argued to the judge that the 8(a)(1) interrogation and threat of discharge allegations were improperly litigated because they were neither the subject of separate unfair labor practice charges, nor were they within the scope of the 8(a)(3) charge in Case 11-CA-12700. The judge impliedly rejected this argument by finding merit to the 8(a)(1) allegations. We agree. The allegations that the Respondent unlawfully interrogated employee Wright about the Union and threatened him with discharge if he persisted in his union activities are "closely related" to the charge that Wright was discharged for engaging in union activities. See generally *Overnite Transportation Co.*, 296 NLRB 669 (1989).

In dismissing the 8(a)(3) allegation, the judge rejected the General Counsel's argument that Wright was treated disparately from employees who engaged in similar misconduct. We agree with the judge. The other alleged incidents of employee misconduct were less serious than Wright's March 30, 1988 altercation with employee Patterson. Thus, Patterson was obviously fearful that Wright would strike him, as evidenced by the fact that he reported the incident to personnel and requested to remain there until Wright had left the premises. And, according to credited testimony, Wright expressly admitted that he would have hit Patterson had a guard not entered the cafeteria. Moreover, unlike the other incidents of alleged employee misconduct, Wright had been specifically warned by a supervisor 2 weeks before his discharge, in regard to clashes with another employee, that he could be discharged if he persisted in acting improperly toward other employees.

Employee was terminated effective 3-31-88 for violation of rule A(7) "fighting, assault, or other disorderly conduct" as stated on page 58 Employee Handbook. A class "A" violation are considered extremely serious misconduct and may result in immediate discharge.

The three incidents mentioned above, form the basis of the General Counsel's complaint. It alleged that Wright's discharge violated Section 8(a)(3) and (1), and that the two earlier incidents violate Section 8(a)(1).

Interrogation

As shown above, according to James Earl Wright, he was approached by his supervisor Tom Carter during "the latter part of February or the first of March." Mike Schiflett, Ted Patterson, and Gerald Rice were also present. Wright testified that Carter:

come up to me and asked me had the union contacted me and I told him no. And he said that the union had contacted Mike Schiflett and Mike Schiflett had told George Knight that the union had contacted him. And at this time Mike Schiflett stepped up and told me that he had given the union my name and address and other people's names and the union would be contacting me.

Plant Engineering Supervisor Tom Carter testified that he talked to James Earl Wright about Wright talking to his coworkers about the union, because he had some complaints from some of the employees that Wright had been soliciting their signatures on union cards. According to Carter, the employees indicated that the solicitation occurred at the employees' workplaces during work time in February 1988. Carter was not asked, and he did not testify, as to whether he questioned Wright about Wright's union activities.

Carter testified that he talked to Wright about Wright's solicitation of union cards during an early March meeting with Wright:

Basically that he could only do this on his break, his lunch breaks, or his ten minute breaks, and while the other employees were also on break, or in the parking lot or outside the plant, but he could not do it during their working time or during his working time.

Gerald Rice, one of the employees identified by Wright as being present during his late February or early March, conversation with Carter, was called by Respondent. Rice was not asked about the specific conversations recalled by Wright and Carter. Rice was asked if Carter ever questioned Wright or anybody else about their union beliefs and Rice responded, "no."

Mike Schiflett did not testify.

Ted Patterson testified but he was not asked about the conversation recalled by Wright and he was not asked about the conversation recalled by Carter.

Rice and Patterson testified that Wright frequently spoke in favor of the Union during shift meetings.

Tom Carter admitted that he was aware where James Earl Wright stood on the Union.

Findings

There is no evidence which specifically disputes James Earl Wright's account of an alleged conversation which included Supervisor Tom Carter and fellow employee Mike Schiflett.

In view of the state of the record I credit Wright's testimony in that regard.

Even though Wright became known as a strong union advocate, the substance of his early March or late February conversation with Carter shows that that conversation occurred before it became known that Wright favored the Union.

The credited account of that conversation shows that Supervisor Carter questioned Wright as to whether Wright had been contacted by the Union. In view of the fact that Wright was not known as a union supporter at the time he was questioned by Carter, the questioning constitutes interrogation in violation of Section 8(a)(1) in that it tends to restrain and coerce employees in the exercise of protected rights.

Threat of Discharge

As shown above, Wright testified about another conversation with Tom Carter around March 16 or 17. According to Wright, Carter took him into the main office located in the engineer's department, where no one else was present:

He told me that George Knight and Bess Payton wanted to talk to me personally, that I had been talking the union. And I said, "yes, sir, I've been talking on the union while on break and while on lunch break to maintenance out on the floor." And Mr. Carter said, "well, you've got to talk to George Knight and Bess Payton about this incident." And he said, "if you don't quit advocating the union, you're going to get fired." So I told Mr. Carter that I would talk to George Knight and Bess Payton and asked him when. And he said as soon as possible. And—

Wright testified that he did talk with George Knight and Bess Payton. As to his conversation with Knight, Wright testified:

I told Mr. Knight that Tom told me that he wanted me to talk to him and he said, "well, I know who's up here. I know the organizers." They's up here from Hampton. He called Willard Wilson by name, said Willard used to work for me. And I told Mr. Knight that I wasn't talking union for the simple reason I was afraid of getting fired. And he said, "okay, forget about it." And we went on our ways.

Wright recalled that he talked to Payton on the morning after he had talked to Knight:

Ms. Payton told me that people, and groups of people, had told her I had been talking about the

union. And, I told her I had been talking about the union on breaks and on lunch time. And, I asked Ms. Payton who give her this information and she told me she couldn't tell me. And, that was about the end of the conversation.

Tom Carter denied that he ever had a private conversation with Wright about the Union. Carter denied that he ever told Wright that he was to see George Knight or Bess Payton because of his union activities.

Human Resources Manager Bess Payton testified about a conversation she had with Wright:

I can't remember exactly the date but it was sometime at the beginning of mid March and Earl came up to my office and he wanted to talk to me and he—it was more or less he was asking me why I thought that—he wanted me to know that he was not advocating the union and why did I think that. And I told him that a number of employees had come to me and had indicated that he was out advocating the union. And I said which I really don't have a problem with that except that you know that it can only be done at certain times and he stopped me and he said yes, I know what the rules are. And he went through to tell me about that he knew that he could only do it on break time, on his own time, away from the plant, etc. He also said that I wanted you to know that the way I feel about unions is that they may have served their usefulness at the time of my forefathers, but they've outlived that usefulness, and that I am not advocating the union. And then he got right up to me and he said I wouldn't lie to you. And I didn't respond and he left.

Payton testified that she did not ask Tom Carter to have Wright talk to her about the Union and, in fact, she called Carter after Wright came to her office and asked Carter if he knew that Wright was coming to her office. Carter told her that he had no idea that Wright was coming to see her, that it was "completely something that Earl had decided to do on his own as far as he knew."

George Knight testified that he never asked Tom Carter to have Wright see him about the Union. Knight testified that he did have one conversation with Wright about the Union. According to Knight he met Wright on the sidewalk between the security guard shack and the main employee entrance and Wright stopped him:

the conversation went something like, George, you need to do something, you need to have employee meetings, you need to talk to the employees, that the union is out contacting people, two representatives contacted him and were at his house and that they were asking for names of additional employees, names and addresses. And also, he went on to say that essentially that the union had its purpose and that he had a union background and something to the effect that his Father would roll over in his grave if he knew that he was not on the bandwagon, more or less.

Q. On what band wagon?

A. The union bandwagon, but he told me that he didn't think we needed a union.

Findings

James Wright's version of this second conversation with Tom Carter is supported by the record as a whole. Wright testified that Carter told him he would have to talk with Payton and Knight.

Wright did that. Even Payton and Knight admitted that Wright came to them around that period of time, to talk about his role in the union campaign.

Regardless of whether Payton and Knight asked Carter to have Wright see them or if Carter took it on himself to tell Wright to see Payton and Knight in an effort to stop Wright's union activities, the impact on employee Wright is the same.

I credit the testimony of James Earl Wright regarding his conversation with Tom Carter. The entire record illustrates that Wright's version is more likely to be true than the version of Tom Carter. Of the two I was more impressed with Wright's demeanor. I am convinced that Carter did tell Wright that Wright would be discharged if he did not quit advocating the union.

By telling Wright that he would be discharged if he did not quit his union activities, Carter engaged in conduct which is violative of Section 8(a)(1) of the Act.

The Discharge

As shown above, the final allegation involves the discharge of James Earl Wright. The termination slip supplied to unemployment security by Respondent indicated,

Employee was terminated effective 3-31-88 for violation of rule A(7) "fighting, assault, or other disorderly conduct" as stated on page 58 Employee Handbook. A class "A" violation are considered extremely serious misconduct and may result in immediate discharge.

Respondent's employee handbook provides, inter alia:

A. Any of the following actions by an employe are considered extremely serious misconduct and may result in immediate discharge:

...

7. Fighting, assault, or other disorderly conduct.

On April 5 Bess Payton wrote James Earl Wright regarding his discharge. That letter, in pertinent part, reads:

On 3/11/88 you received a verbal warning for use of threatening and abusive language involving an employe on two separate occasions and told that continued conduct of this nature may result in your termination.

On 3/30/88 at approximately 12:30 AM, your disorderly conduct precipitated a confrontation with an employe whom you assaulted and upon whom you threatened to commit bodily harm. This

was an extremely serious act of misconduct under our Plant Rules of Conduct, Section A-7 covering "fighting, assault or other disorderly conduct," a dischargeable offense.

After a careful review of your total employment and the specifics of this case we have no alternative but to terminate your employment effective 3/31/88.

Wright testified that around March 11 or 12, 1988, he had a run in with employee Butch Bowen. During that encounter Bowen invited Wright to meet him outside after work.

After his encounter with Bowen, Supervisor Tom Carter told Wright to stay away from Bowen. According to Wright, Carter told him "don't even talk to" Bowen.

Despite testimony that Wright made comments to the effect that he did not support the Union, all the evidence indicated that Respondent felt that Wright was the most vocal union supporter among Respondent's employees. Plant Manager Knight testified that he was aware that Wright was pushing the Union. Knight indicated that he was not aware of the identity of other union pushers.

Wright's supervisor, Tom Carter, testified that he knew where Wright stood on the Union and that he "did not know of anybody else out there" supporting the Union.

Discussion

In consideration of the discharge issue I shall first consider whether General Counsel established a prima facie case. If General Counsel established a prima facie case by showing that union activity played a part in the Respondent's decision to discharge James Earl Wright, I must then look to see if that employee would have been discharged or warned regardless of his union support (*Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983)).

The question of whether General Counsel has established a prima facie case was considered by the Sixth Circuit Court of Appeals in *NLRB v. Townsend & Bottum, Inc.*, 114 LRRM 3548, 3551 (6th Cir. 1983):

Under the Board's Wright Line test, the General Counsel is required to show that antiunion animus was a substantial or motivating factor in the employer's decision to discharge the alleged discriminatee. This proof, standing alone, clearly meets the statutory requirement. Absent a showing by the employer of affirmative reasons for its actions, notwithstanding an employee's exercise of his lawful Section 7 rights under the NLRA, the ALJ would automatically find an unfair labor practice based on the preponderance of all the evidence submitted.

In determining whether a violation has occurred I must consider several factors including such things as disparity—i.e., whether the involved employee was treated in an unusual manner—see *Hussman Corp.*, 290

NLRB 1108 (1988); *Kent Corp.*, 275 NLRB 138 (1985); *Clear Pine Mouldings*, 268 NLRB 1044 (1984); *Diversified Products*, 272 NLRB 1070 (1984); *Tom's Foods*, 287 NLRB 645 (1987); *Chem-Nuclear System*, 281 NLRB 65 (1986); *Storall Mfg. Co.*, 275 NLRB 220 (1985); *Sioux Products*, 257 NLRB 353 (1981); *McLean Trucking Co.*, 257 NLRB 1349 (1981); *Methodist Home*, 253 NLRB 458 (1980).

Prima Facie Evidence

Here the record provides supports for General Counsel. The plant manager and human resource manager admitted that James Earl Wright was the only employee that they could recall by name as supporting the Union at the time of his discharge. Additionally, as shown above, Wright was the object of illegal interrogation and a threat of discharge by Supervisor Tom Carter. Finally, the actions which led to Wright's discharge, originated from a discussion regarding the Union.

However, should I find that the record established a prima facie case, I must consider whether Respondent illustrated that James Earl Wright would have been discharged in the absence of his protected activities.

On April 5 Human Resource Manager Bess Payton detailed the basis for his discharge in a letter to James Earl Wright. Payton pointed to two events, a verbal warning which Wright received on March 11, 1988, and his conduct during an encounter with employee Ted Patterson on March 30, 1988.

March 11

As to the alleged warning on March 11, James Earl Wright testified about a confrontation he had around that time with employee Butch Bowen:

I carried my coffee in a quart thermos bottle and Butch Bowen came in the canteen and he said, "hey, old man, you got whiskey in that coffee jug." I said, "no, where do you keep your pot?" And, Butch got upset at this and we had a few words passed. I don't remember what was said exactly but I called him a "kinky head" and he said, "well, I'll just meet you in the morning after work." And, the rumor was out that he had lost his license, DUI, I don't know. This is hearsay, but I told him, I said, "you can't meet me, Butch, you don't have any wheels." And, he said, "I'll meet you after work if you agree to it." So, that was about the end of the conversation.

Q. Did you meet him after work?

A. No, sir.

Q. Did any supervisor ever speak to you about this incident?

A. Yes, sir.

Q. Alright. Who talked to you?

A. Tom Carter.

Q. When was this?

A. The following morning.

Q. Alright. Where was it?

A. In the maintenance department.

Q. What was said?

A. Tom asked me what happened between me and Butch and I told him that I was teasing with Butch but Butch got upset and was mad and that Butch could dish it out, but he couldn't take it.

Q. What happened, did Mr. Carter say anything else?

A: At this time Mr. Carter told me that he—to stay away from Butch, don't even talk to him, that it seemed that somebody might have it in for me.

Wright admitted that despite Carter's admonition for him to stay away from Bowen, he confronted Butch Bowen about whether Bowen "had gone to Personnel on" Wright on the next workday. After that encounter Carter phoned and asked Wright why he was harassing Bowen:

So Mr. Carter was on the phone, Tom Carter, and he said, "why have you been harassing Butch Bowen?" I said, "Mr. Carter, I haven't been harassing Butch Bowen," and I told him that Steve Kelly was present when I talked to Butch. And he said, "stay away from him, don't even talk to him, and I'll talk to you in the morning."

Supervisor Tom Carter testified about his talk with Wright concerning the Butch Bowen incident:

I did explain to him our rules of conduct and that his job would be in jeopardy if that continued.

Q. Did you specify what he was to not continue?

A. I specifically told him that he could not continue to harass Butch Bowen or any other employees, specifically talking about Butch or trying to - picking on Butch or trying to get him mad as he had done.

. . . .

He did make the statement that Butch could dish it out but he couldn't take it. . . .

Finally Bess Payton testified that she mentioned the Butch Bowen incident to Wright during the interview that led to Wright's discharge:

I asked him, I said, "Earl, hasn't Tom talked to you before about harassing or arguing with employees" and he said no, he really didn't remember. And I said, "Well, didn't he talk to you about Butch Bowen and did he not tell you that your job was in jeopardy if you continued to do that with Butch." And he said yes, that Tom did tell him that, that he could be fired. . . . you were aware that Mr. Bowen had threatened Mr. Wright, threatened to fight him?

A. Yes. . . . Although the threat was made, Mr. Wright did not come to Personnel or to anyone else that he feared for his well-being or that he was concerned that Butch Bowen was going to actually fight him. I did not learn about that until after the fact, and only through the supervisor, and also Butch Bowen going to Personnel. Never Mr.

Wright coming forward saying that he was concerned about his—

Payton's testimony appears to agree with the situation explained by Wright. Wright admitted that he made a sarcastic comment to Butch Bowen about Bowen going to Personnel. Wright never claimed that he went to Personnel and complained about Bowen.

Counsel for General Counsel argued in his brief, that the above verbal reprimand demonstrated that Respondent discriminated against Wright because "Respondent was well aware that Bowen had threatened to fight with Wright, Payton acknowledged that Bowen was not reprimanded for his part in this matter." (Tr. 150, 151.)

However, Respondent's Employee Relations Manager Bryan Hamrick testified that he did talk to Butch Bowen and that he cautioned Bowen that this type incident could cost him his job.

Moreover, I have trouble finding discrimination in the respective treatments of Wright and Bowen, in view of the record evidence regarding Wright's comments to supervision.

According to Wright, the only supervisor that talked to him about the Butch Bowen incident contemporaneous with his reprimand, was Tom Carter. Wright's testimony as to what he reported to Carter—(see above)—shows no basis for disciplinary action against Bowen:

Q. Did any supervisor ever speak to you about this incident?

A. Yes, sir.

Q. Alright. Who talked to you?

A. Tom Carter.

Q. When was this?

A. The following morning.

Q. Alright. Where was it?

A. In the maintenance department.

Q. What was said?

A. Tom asked me what happened between me and Butch and I told him that I was teasing with Butch but Butch got upset and was mad and that Butch could dish it out, but he couldn't take it.

Q. What happened, did Mr. Carter say anything else?

A. At this time Mr. Carter told me that he—to stay away from Butch, don't even talk to him, that it seemed that somebody might have it in for me.

Nevertheless, according to Wright's own testimony, he again confronted Bowen on his next work day, regarding Bowen's reporting Wright to Personnel. Because of that Wright received a phone call from Carter. Carter again cautioned Wright to stay away from Bowen.

March 30

As to the record regarding Respondent's asserted basis for taking action because of an encounter Wright had with Ted Patterson, I am convinced that the testimony of Human Resource Manager Payton accurately shows what occurred during her interview with Wright. Payton was the supervisor most directly involved with the dis-

charge as evidenced by her April 5 letter to James Earl Wright. (See *infra*.)

Payton's testimony was clear and detailed. Her recollection of her interview with Wright was supported by other credited evidence regarding her investigation into the matter which ultimately led to Wright's dismissal. I found that Payton demonstrated good demeanor. To a great extent Payton's testimony accorded with the testimony of James Earl Wright regarding his confrontation with Ted Patterson and his interview by Payton.

I credit the testimony of Bess Payton. As the record shows, Payton was not employed by Respondent at the time of this hearing.

Bess Payton testified about James Earl Wright's final interview:

Well, when he came in I just asked him to tell me what happened, tell me what happened last night between you and Ted. And he started to tell me that they were at supper and they started to talk and about the union. And he indicated some comments that were made about Mr. Knight's meeting and that he called—that he did call Ted a scab and that Ted got upset about it. And, that Ted got up from the table and told him again, do not call me a scab. And then when Ted got over near the trash can, Ted stopped, turned around again, and said, "And Earl, you will not call me a scab again." And, at that point he said he got up and went over, drew his fist back, and told Ted that he would "punch him out." And I asked Earl if he really meant that he was going to punch Ted out. And Earl said yes, he really meant it. I asked him again, "did you really mean you were going to hit him? Did you really mean that?" And he said, "Yes, I did." And I said, "Why didn't you do it?" He said, "Well, I believe if the guard hadn't come in, I really would have hit him." Okay. I asked Earl, I said, "well, what made you so angry that you would want to hit him just because he said don't call me a scab again. I mean scab is not a nice word. Why would you get that angry because he asked you not to call him a scab again." And he said, "well, because he was talking down to me." And I said, "well, what do you mean talking down to you. What do you mean?" He said, "well, he was standing up and he got all red faced, and he was talking loud, I was sitting down." And I said, "you mean you considered that as talking down to you? All he was saying to you was don't call me a name again." And he said, "Yes, he took it that way, that he was being talked down to."

Q. Did you ask Mr. Wright whether he made a fist at Mr. Patterson?

A. Yes, I did.

Q. And what was the answer?

A. Yes, he said that he did make a fist.

Q. And did you ask him what, if anything, he was going to do with that fist?

A. Yes. He said he made the fist and that he intended to punch Ted.

James Earl Wright testified regarding his run in with Ted Patterson after plant manager gave an antiunion speech on March 29:

And I asked Ted how he felt about the union and he said, "my feelings are if everybody at Westinghouse signed a union card, that he wouldn't." And I said they's names for people like that, scabs. Ted said, "don't ever call me a scab." He got up from the table. He started shouting, hollering, turned red in the face, and walked over to the trash can and continued to shout, "don't ever call me a scab. I mean, don't ever call me a scab."

Q. How far was the trash can from where you were sitting?

A. Approximately twenty foot.

Q. Okay. Go ahead.

A. I walked over to Ted and told him I'd punch him out. Ted put up his hands to square off or as if to fight and said, "well have at it." At this time the security officer came in the door, Ted and I put our hands down and went back to our work place.

Ted Patterson's testimony of his run-in with Wright corroborated what Bess Payton testified she was told by Wright. Patterson reported the incident to Human Resources on the morning following his run in with Wright. Human Resources Manager Bess Payton asked Patterson to tell her what occurred.

Security Guard John Cantrell wrote an account of his observation of the Wright-Patterson incident:

When I walked into canteen Ted Patterson was up and pointing finger at Earl Wright and I heard him say don't call me a scab he was real mad. Ted walked over to water fountain and look back and said I mean don't call me a scab. Earl jumped up and went over to him and said well that is what you are. then Ted walked out the door. Earl came back to table and said boy he was mad wasn't he. About that time Edne came in door I went to let her into Medical Room and office.

Ted Patterson testified that he was afraid of what might happen on the night he had the run in with Wright and, because of that, he did not report the incident until the following morning. He reported the incident to Bryan Hamrick. Upon Bess Payton's arrival at work Hamrick came to her office regarding Patterson's report. Payton testified:

And before Bryan could really get into the detail, Ted Patterson came back up to Personnel and said, "Do you mind if I wait out here?" And, you know, Bryan asked him why and he said, "Well, I'm concerned, I'd rather that Earl went ahead and left the parking lot before I went out there. I don't want anything else to happen."

The above-credited evidence illustrates to me that Respondent was presented with a situation that demanded its attention. Respondent contended, and the record sup-

ported, that it was presented with a complaint from an employee that appeared frightened.

Respondent's investigation of that complaint by Bess Payton led to evidence, including admissions by Wright, that Wright called Ted Patterson a "scab" because Patterson responded to a question from Wright to the effect that he would never sign a union card. After Patterson became angry because Wright called him a scab, Wright threatened that he would hit Patterson. Both Patterson and Wright told Respondent that there was an immediate danger.

Payton's credited testimony shows that Wright told her that he would have hit Patterson if the guard had not come into the room.

I am convinced that the above evidence supports Respondent's determination that disciplinary action was in order after it investigated the complaint of Ted Patterson regarding his incident with Wright. In view of my determination that Respondent's verbal warning to Wright on March 11 was not discriminatorily motivated, I find nothing illegal in Respondent's decision to discharge Wright following his encounter with Ted Patterson absent evidence of disparity.

Counsel for General Counsel argued that Respondent did not normally discharge employees for offenses similar to those allegedly committed by James Earl Wright. Counsel argued that the evidence in that regard shows the following.

Counsel for General Counsel points first to the incident between Wright and Butch Bowen, arguing that Respondent's failure to discipline Bowen illustrates disparity. However the record showed that Bryan Hamrick issued the same sort of verbal reprimand to Bowen that was issued to Wright. Additionally, Bess Payton testified that she did not receive a complaint from Wright showing that Wright felt threatened by Bowen's remarks. On the other hand, the evidence shows that Butch Bowen did complain to Respondent about Wright's activities.

Next, counsel points out that in the only other instance of discharge for violation of the rule invoked, the discharged employee actually struck a contractor at Respondent's plant.

Counsel points to testimony from employee Danny Reid about an incident at Respondent's plant around 4 years back:

Mike Whitworth was the employee and we were working on a plate cleaner. He had a cutting torch and I was working right beside him and he raised up with the cutting torch, the flame came across my arm and I felt the heat, but it didn't burn me. And, I said something that made him mad and I'm not exactly sure what I said, but he told me to take that torch and stick it up my butt.

Reid testified that the supervisor, who saw the incident, told him and Whitworth to "cool it, that we had to work together." Neither employee was disciplined.

Former employee Stewart Jenkins testified about an incident at Respondent's plant with Mike Whitworth in late 1985, early 1986:

Basically I went to Terry Whitten to get, I wanted to get work done in the lab. I went to see Terry and get something line up and Mike Whitworth was fabricating something out of steel. I'm not sure what it was. He was making something out of steel there and I started asking Terry about getting somebody in the lab to get some things fixed up. And, I'm not sure why and I don't remember if Mike—I mean I don't remember if I said anything to Mike or he heard something that I was saying to Terry and misunderstood it, but at any rate, he got mad at me and—

. . . .

He—eventually he said several things, eventually he asked me to go out to the pump house or the fire house and fight it out with him. And, that was about—that was—

. . . .

There was no physical confrontation.

. . . .

The next day Terry Whitten came to me, and then Tom Carter came to me, and then they both said I needed to talk to Mike and work it out. And I waited until Mike came back from lunch. I figured he'd feel a little better after eating lunch and it'd be easier for us to resolve it. And I caught him, he was coming out of the lunch room and I stopped him and I said I understand you, you know, you're real—you're still really hot at me, and he said yes, and we talked about it in a matter of say five or six minutes we were walking off laughing about it.

Jenkins testified that neither he nor Whitworth was disciplined because of the above incident.

Counsel for General Counsel argued that disparity was illustrated by Supervisor Tom Carter's testimony about an incident with employees Mike Jenkins and David Patterson. The testimony in that regard follows.

Q. Okay. Let me see if I can refresh your recollection here. Mr. Mike Jenkins and Mr. David Patterson were involved in a verbal confrontation wherein one of these two gentlemen threatened to fight the other one. Isn't it true that that came to your attention? This is approximately two years ago?

A. I was told about that incident, yes, sir, much later, after it occurred.

. . . .

I talked to the two—both of these two—these two men worked for me and I talked to them later about it.

. . . .

I did learn that there had been words between the two, yes.

Former first-line Supervisor Glenda Scott was called by counsel for General Counsel.

Q. While working as a first line supervisor, did you ever become aware of any verbal or physical

confrontations between employees? Did any of that ever come to your attention?

A. Yes, during those—

. . . .

There was one between Derenda Robinson and Joan Wilson.

. . . it's probably been approximately a year and a half ago. . . . Joan came into the office and she said Derenda had elbowed her. . . . Well, I called Derenda in and I talked to her. In fact, I talked with both of them. And Derenda said it was an accident, that she didn't do it intentionally. . . . I don't remember if it was a written warning. I know that there were notes made of it. . . . There was a similar situation with Marie Galloway and I don't remember the operators that were involved, but there was two or three operators involved. . . . There was disagreement. Marie thought they were slowing her down on the job and they weren't getting it done as fast as she thought they should have and there were some words exchanged. . . . I wrote it up. . . . She was reprimanded.

Counsel for General Counsel also pointed to testimony of Manufacturing Manager Larry Hubbard regarding meetings in consideration of whether to discharge Wright. Counsel pointed out that Hubbard "did not deny that Wright's union involvement was one of the factors discussed by Respondent in determining whether to discharge Wright." The actual testimony by Hubbard in that regard, includes:

Q. I'm referring to the meetings that you had among yourselves, among the supervisors? Was there any discussions in those meetings regarding Mr. Earl Wright's union activities?

A. I don't remember for sure, but more than likely, since there was word around out in the plant that Earl was promoting it, there very possibly could have been. But, I don't remember anything specific.

Findings

Regarding the question of disparity, counsel for General Counsel argued that the evidence shows that James Earl Wright was the first employee discharged under rule A(7), other than an employee that was discharged for actually fighting.

Respondent countered with the argument to the effect that no one who engaged in an offense under rule A(7) that was as serious as the March 30 actions by Wright was not fired. In other words, the only employee that exceeded the conduct of Wright, under Respondent's argument, was the employee that was fired for fighting.

I have weighed the above arguments and I must agree with Respondent.

General Counsel did raise two instances which justify concern as to disparity. It appears that the Reid-Whitworth and the Jenkins-Whitworth incidents should have resulted in some form of disciplinary action against Whitworth.

Nevertheless, the evidence does show that Wright admittedly engaged in actions on March 11 and 30 which justify discipline over and above what should have occurred regarding Mike Whitworth.

The testimony of James Earl Wright shows that he told Supervisor Tom Carter that he had teased Butch Bowen. It was after hearing Wright's account of that incident that Carter first cautioned Wright to stay away from Bowen. Wright admittedly ignored Carter's first warning. He confronted Bowen about Bowen going to Personnel. Carter then gave a second verbal warning for Wright to stay away from Bowen.

Additionally Wright's testimony, and his credited admissions to Human Resource Manager Payton, show that he created the confrontation with Patterson by calling Patterson a scab because Patterson said he would not sign a union card. Subsequently Wright threatened to hit Patterson at a time when Patterson had taken no action to show that he wanted to fight.

I am aware that Wright testified that Patterson assumed a defensive position with his fists up after Wright threatened to hit him. Even if credited that evidence really does not change the situation regarding James Earl Wright. It is clear that Wright had already precipitated an unfortunate incident, then threatened to fight Patterson because Patterson objected to being called a scab.

I am persuaded that General Counsel failed to prove a violation. While the disparity arguments raised questions, there was no evidence that Respondent had failed to discharge anyone that engaged in conduct similar to that engaged in by Wright. The actions engaged in by Wright were serious. The evidence shows that he placed another employee in fear of having to fight. Respondent was confronted with direct evidence that Patterson feared that Wright would force a fight and Respondent was confronted with Wright's admission that he would have struck Patterson if the guard had not entered the room. Despite the evidence of animus and knowledge of Wright's union activity, I find that Respondent was justified in discharging Wright.

James Earl Wright was engaged in protected activity when he discussed the union with other employees. At the very least his discussions during nonworktimes such as breaks, were protected. Where it is shown that an employee was engaged in protected activity the jurisprudence provides that an employee may be disciplined only on a showing that the employer honestly believed that the employee engaged in misconduct. In that case the employer's honest belief provides a defense to a charge of discrimination absent a showing that the employee did not, in fact, actually engage in the alleged misconduct (*Rubin Bros. Footwear, Inc.*, 99 NLRB 610 (1952); *NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21 (1964); see also *Clear Pine Moldings*, 268 NLRB 1044 (1984); cf. *Central Management Co.*, 284 NLRB 825 fn. 1 (1987), where the Board found that the employer did not have a good-faith belief that the employee engaged in misconduct and *Super One Foods, No. 601*, 294 NLRB 462 (1989), where the Board found that the evidence showed that the reason given for the disciplinary action was not employee misconduct but was the protected activity).

Here the record illustrated that Respondent had an honest belief that James Earl Wright engaged in misconduct. General Counsel did not show that James Earl Wright did not actually engage in misconduct.

CONCLUSIONS OF LAW

1. Westinghouse Electric Corporation—Micarta Division is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Respondent, by coercively interrogating its employees concerning their union activities and by threatening its employee with discharge unless that employee quit advocating the Union, violated Section 8(a)(1) of the Act.

4. Respondent did not engage in conduct violative of Section 8(a)(1) and (3) by discharging and refusing to reinstate James Earl Wright.

5. The aforesaid 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 Respondent has engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, it is ordered that Respondent, Westinghouse Electric Corporation—Micarta Division, Pendleton, South Carolina, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating its employees concerning their union activities; and threatening its employee with discharge unless the employee stops advocating the Union.

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

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

(a) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, and timecards, personnel records, reports, and all other records

necessary to analyze the amount of backpay due under the terms of this Order.

(b) Post at its facility in Pendleton, South Carolina, copies of the attached notice.² Copies of the notice, on forms provided by the Regional Director for Region 11, 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.

² 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.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT coercively interrogate our employees concerning their union activities.

WE WILL NOT threaten our employees with discharge unless they quit advocating the United Brotherhood of Carpenters and Joiners of America, AFL-CIO, Southern States Organizing Office, affiliated with United Brotherhood of Carpenters and Joiners of America, AFL-CIO, or with any other labor organization as their collective-bargaining representative.

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

WESTINGHOUSE ELECTRIC CORPORATION—MICARTA DIVISION

¹ 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.