

**All-Glass Aquarium Co., Inc. and John Joseph Schwartz.** Case 30-CA-2546

October 17, 1974

**DECISION AND ORDER**

BY MEMBERS FANNING, KENNEDY, AND PENELLO

On May 28, 1974, Administrative Law Judge Elbert D. Gadsden issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and a motion to reopen the record and a brief in support of that motion. Counsel for General Counsel filed a brief in support of the Administrative Law Judge's Decision and in opposition to the motion to reopen the record.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge only to the extent consistent herewith.<sup>1</sup>

The Administrative Law Judge found that Respondent had violated Section 8(a)(3) of the Act by its layoff and eventual termination of the Charging Party, John Joseph Schwartz. In so concluding, the Administrative Law Judge found that the circumstances surrounding Schwartz' layoff and termination indicated a discriminatory motive in those actions. Having also found that Respondent had demonstrated an animus toward certain union activity Schwartz had undertaken shortly before his layoff, the Administrative Law Judge therefore found that it was, in fact, Respondent's concern over Schwartz' union activity which propelled its actions of placing Schwartz on layoff and ultimately terminating his employment. We disagree, as we find no union animus in any of the incidents recited by the Administrative Law Judge and in any event we find no circumstances surrounding Schwartz' layoff and termination which would yield an inference of a discriminatory motive. We shall therefore dismiss the complaint in its entirety.<sup>2</sup>

Schwartz started working for Respondent in September 1970 and between that time and the date of his layoff on November 8, 1973,<sup>3</sup> he worked at a variety of jobs, including the job of aquarium assembler,

<sup>1</sup> In light of our decision here, we find it unnecessary to rule on Respondent's motion to reopen the record.

<sup>2</sup> The Administrative Law Judge had dismissed the only other allegation of a violation in the complaint and counsel for General Counsel has taken no exception to that dismissal.

the position he held until shortly before his layoff. On October 31, Schwartz presented a doctor's slip to Respondent's superintendent Eich, which indicated that for health reasons Schwartz should be transferred to an area free of air irritants. Respondent did immediately transfer Schwartz from his job as an aquarium assembler but he was told at that time he would just be doing fill-in work until Respondent could find a suitable job for him or decided what to do with him.

Schwartz did this fill-in work until November 8. On that day, he was called into the office of Respondent's president, Ritzow. After first informing Schwartz that Respondent could not create a position for him,<sup>4</sup> Ritzow did inform Schwartz of two job openings it then had. Ritzow informed Schwartz that if he did not accept either of the jobs then he would have to be placed on layoff and would be notified of any other job openings that might arise. Rather than accept either of the jobs that were offered him, both of which paid lower than his aquarium assembler job,<sup>5</sup> Schwartz elected to go on layoff. A few days after Schwartz went on layoff, Respondent advised him by letter that the jobs he had been offered were no longer posted and that no other jobs had opened up.<sup>6</sup> Respondent reconfirmed that it would notify Schwartz of any posted job openings and also notified him that, if no opening arose within 30 days of his layoff, he would be terminated in accord with its policy on layoff. In the 30-day period of his layoff, Schwartz was not advised of any other job openings and therefore, pursuant to its policy, Respondent terminated Schwartz on December 10.

On October 31, the day Schwartz presented the doctor's slip to Superintendent Eich, Schwartz also began distributing union authorization cards. Respondent admittedly became aware of this activity almost immediately.<sup>7</sup> Although knowledge of such activity is not indicative of an animosity toward it, the Administrative Law Judge concluded that certain incidents noted below demonstrated Respondent's animus toward Schwartz' union activities. We disagree that the incidents demonstrated any such animus.

<sup>3</sup> All dates are 1973 unless otherwise noted.

<sup>4</sup> Ritzow testified Respondent never has had a full-time position akin to that which Schwartz was then filling on a temporary basis.

<sup>5</sup> Schwartz' aquarium assembler job was rated at a G3 in Respondent's scale. The two jobs offered were terrarium assembler, rated at G1, and belt sander, rated at G2. Respondent had two belt sander openings at the time.

<sup>6</sup> Although Ritzow admitted that the jobs which had been offered Schwartz were not filled at the time Ritzow sent Schwartz this letter, neither were the jobs still posted to the employees. Ritzow testified without contradiction that once the posting period to the employees had expired (which it had in the case of the jobs offered Schwartz) those jobs were no longer open to the employees, even if they were still vacant, but rather Respondent would then hire from the outside.

<sup>7</sup> Superintendent Eich knew of it on the same day and so informed Respondent's president, Ritzow.

The first such incident noted by the Administrative Law Judge was a brief conversation between Schwartz and Eich and that occurred about 2 p.m., October 31. Schwartz had been handing out cards during the 2 p.m. breaktime and Eich instructed him that if he handed out any union cards he should "do it on [his] own time and not on the company time" (emphasis supplied). Although the Administrative Law Judge initially set out this testimony, he thereafter inadvertently characterized Eich's instructions to Schwartz to be that Schwartz should distribute the cards only "on [his] own time and not on the company property" (emphasis supplied). Noting that Schwartz in fact distributed cards only on his own time, the Administrative Law Judge found that the restriction that Schwartz could not distribute cards on company property at any time demonstrated Respondent's animus toward Schwartz' union activity. As we have noted, however, the instruction that Eich gave Schwartz referred only to the time of distribution and did not limit this distribution to off-company property only. Although Eich's instructions to Schwartz concerning solicitation on company time appear to be stated in overly broad terms, we note that the statement, itself, was not alleged to be a violation and was isolated in nature.

The Administrative Law Judge also noted another conversation Eich and Schwartz had later on October 31. In the conversation, which lasted about 5 minutes, Schwartz made the assertion as an absolute statement that, if the Union entered the plant, the starting salary would be in excess of \$4 per hour.<sup>8</sup> According to Schwartz' credited testimony, Eich stated that, if the Union did get in, Respondent's management could, if they desired, withdraw all the fringe benefits the employees had. The Administrative Law Judge found, however, that Eich also told Schwartz that whatever was achieved by the Union would have been the product of negotiations between Respondent and the Union. According to Schwartz, Eich also explained this to the other employees.<sup>9</sup>

In light of Eich's followup statement to Schwartz that the Union *could* obtain benefits, although only through negotiations, and Eich's telling this to the other employees as well, we cannot find, as the Administrative Law Judge did, that Eich's initial statement on withdrawal of benefits demonstrated any

union animus. Moreover that statement, coming as it appears to have in reply to certain boasts by Schwartz as to the "automatic" beneficial effects of unionization, may well have been only a retort in kind, neither of which was meant to be taken seriously by the other party.

We also find no union animus was exhibited in a 30-second conversation Eich and Schwartz had on November 1 wherein Schwartz asked Eich if President Ritzow and Respondent's vice president were "mad at all about the Union." Eich's reply, "wouldn't [Schwartz] be if it [were his] company," was found by the Administrative Law Judge to have been an indicator of such animus. However, we find this statement was purely speculative. Eich did not state how the owners actually felt but only how he personally perceived they felt. Such an observation, in the absence of information that Eich was, in fact, aware of the feelings of Ritzow or Respondent's vice president on the subject, and given as it was only in answer to a question rather than voiced as an unsolicited statement, will not serve as an indicator of animus toward the Union.

Nor will another Schwartz-Eich conversation on November 1 serve as such an indicator. This conversation occurred shortly after 4 p.m. and lasted about 30 seconds. Schwartz had just ended his shift and had punched out but he was engaged in a conversation by the lockers when Eich asked him if he had punched out and when he replied he had, Eich told him to leave the plant. The Administrative Law Judge found this action of Eich demonstrated union animus since he found no evidence that the following work period had begun and noted Eich admitted he had instructed Schwartz to leave because he thought Schwartz would try to solicit support for the Union while on "company property."

Contrary to the Administrative Law Judge, the record shows that the next shift had started working when Eich instructed Schwartz to leave.<sup>10</sup> Further, while Eich did state, as a reason for instructing Schwartz to leave, that he did not want Schwartz to solicit "on company property," it is clear from Eich's testimony that he did not intend this as a blanket prohibition on Schwartz' union solicitation but meant it to cover only those activities of Schwartz directed toward the second-shift employees, while they were working, at a time when Schwartz himself had punched out. This is so since Eich also said Schwartz could have solicited the second-shift workers when they were on their own breaks, or the first-shift workers, after 4 p.m., in the parking lot. In such

<sup>8</sup> At the time, the starting salary for a G1 rated job (Respondent's lowest classification) was \$2 per hour; a G2 starting salary was \$2.31 per hour; a G3 starting salary (Schwartz' level) was \$2.67 per hour; a G4 started at \$3.10 per hour; a G5 at \$3.59 per hour; and a G6 leadman at \$3.79 per hour.

<sup>9</sup> This is in line with Eich's testimony that, notwithstanding his denial that he made such a statement, having heard a report that he had said Respondent was going to take away a number of the employees' benefits, he went to the various departments to tell the employees that this was not true.

<sup>10</sup> Eich testified that the second shift starts work at 4 p.m. and Schwartz testified this incident occurred shortly after 4.

circumstances there was no union animus in this instruction of Eich.<sup>11</sup>

Nor can we find any union animus in the last incident relied on by the Administrative Law Judge; namely, that, after Respondent discovered Schwartz was engaged in union activities, it immediately called its attorney and its business consultant. While the Administrative Law Judge inferred that Respondent must have been "adversely concerned" about Schwartz' activity or it "probably would not have sought such counsel," we note that Ritzow testified he wanted to know what he could and could not do as a result of this situation with Schwartz. Such would seem to be a perfectly reasonable response of a businessman confronted with union activity in his plant who wishes advice on how to proceed. Further, we note that Respondent had just received notice that Schwartz for health reasons could no longer perform his regularly assigned job. In such circumstances, with Schwartz' job situation in an ambivalent state but with Schwartz also then engaged in union activity, it was perfectly understandable that Respondent might wish to be apprised of the parameters in which it could act toward Schwartz.

We therefore disagree with the Administrative Law Judge that Respondent demonstrated any animosity toward Schwartz' union activities prior to the time of his layoff. Further, even were we to find that any of Respondent's actions arguably indicated an animus toward Schwartz' union activities, we would still find no violation in the layoff since, unlike the Administrative Law Judge, we find no discriminatory motivation in that layoff.

In so finding a discriminatory motivation, the Administrative Law Judge noted that at the time of the layoff Respondent did not inform Schwartz that, pursuant to its new layoff policy, employees in a layoff status more than 30 days were automatically terminated. He further noted that, during the 30-day period in which Schwartz was on layoff, a vacancy arose at Respondent, of which Respondent did not inform Schwartz, contrary to its earlier assurances that he would be informed of any posted jobs. Unlike the Administrative Law Judge, we find no discriminatory motive in these incidents.

Respondent's policy on layoff was part of a gener-

al business program set up for it by its business consultant in late September 1973. Prior to the implementation of the program, Respondent had no layoff policy, with automatic termination being the only alternative if one could not perform his job or there arose a situation where no job was available for an employee. While Respondent admits it did not inform Schwartz on November 8 that his taking layoff might result in his termination, if no job opened for him within 30 days of his layoff, there is no contention that the layoff program as instituted was discriminatory. In fact, Respondent had informed none of the employees of the consequences of its new layoff policy and in such circumstances it may well have been mere inadvertence on Respondent's part in failing to notify Schwartz and the other employees of this part of the policy which had just been instituted.<sup>12</sup>

And while we think it unfortunate that Schwartz was not notified of the full ramifications of his taking layoff, we note that Respondent did in fact offer Schwartz two jobs which he turned down before he went on layoff. We note also that it was Respondent who called Schwartz into the November 8 meeting to offer him these jobs because the job posting period for these two positions was due to end on November 9 and thereafter Schwartz would not be eligible for these jobs.<sup>13</sup> In such circumstances, Respondent's failure to inform Schwartz of the full extent of its layoff policy, when viewed in light of its other actions relative to the November 8 meeting (i.e., calling Schwartz in and offering him various jobs before all job opportunities were foreclosed to him), was not indicative of a discriminatory motive.

We also find that Respondent did not demonstrate any discriminatory motivation in not notifying Schwartz of the job which became vacant on November 27.<sup>14</sup> While Respondent had informed Schwartz it would notify him of any job that was posted, Respondent, as was its prerogative, treated the job that opened as a temporary job for which no posting was undertaken until December 26. Respondent treated the opening as a temporary one for economic reasons. There was no assurance that Schwartz would accept the job if it were posted, and if he did not and Respondent then had to hire a new employee for the job, that new employee would have become automatically eligible for various upcoming holidays and for

<sup>11</sup> We note too Eich's testimony that his instructions to Schwartz were pursuant to the rules in Respondent's handbook. One of those rules prohibits "Unauthorized presence of any employee on Company premises for any purpose other than assigned work" and accordingly Eich said employees are not supposed to "hang around" after work. In *GTE Lenkurt, Incorporated*, 204 NLRB 921 (1973), we held that where an employer's no-access rule is nondiscriminatory, that is, it denies off-duty employees access to the premises for any purpose, and is not disparately applied against union activities, it is presumptively valid absent a showing that no adequate alternative means of communication are available. Eich's instruction to Schwartz was thus fully justified.

<sup>12</sup> The Administrative Law Judge inadvertently found that Ritzow testified he had told the employees of the layoff policy and then the Administrative Law Judge discredited this statement. As noted, Ritzow admittedly never told the employees of the possibility of termination after 30 days under the layoff policy.

<sup>13</sup> See fn. 6, *supra*.

<sup>14</sup> That job was a glasscutter classification, rated G3 on Respondent's scale. Respondent filled the job temporarily by transferring another employee from terrarium work.

Respondent's pension plan if he had been hired before the year's end.

In sum, we find no union animus in any of Respondent's actions and no indication of a discriminatory motive in Respondent's layoff and eventual termination of Schwartz<sup>15</sup> and therefore we shall dismiss the complaint.

### ORDER

It is hereby ordered that the complaint herein be, and it hereby is, dismissed.

MEMBER FANNING, dissenting:

I think it clear the evidence demonstrates the pretextual nature of Respondent's inducement of Charging Party Schwartz into taking layoff and its eventual termination of him. Since Respondent was admittedly aware of Schwartz' union activities shortly before his layoff and demonstrated an animosity toward those activities, I therefore conclude that the true reason for Respondent's actions in inducing Schwartz to take layoff was to terminate him because of his union activities. Therefore, I agree with the Administrative Law Judge that Respondent's layoff and termination of Schwartz was in violation of Section 8(a)(3) and (1) of the Act and I dissent from the majority's failure to so find. I set out first my reasons for finding pretext in Schwartz' termination and then my conclusions on Respondent's animus toward Schwartz' union activities.

While the evidence indicates that Respondent's new policy on layoff was instituted in late September 1973 on a nondiscriminatory basis, the evidence equally demonstrates that the implementation of that policy in Schwartz' case was patently discriminatory. According to the policy, when an employee was placed on layoff, he was to be kept informed of all job openings as posted on the bulletin board. Em-

<sup>15</sup> Counsel for General Counsel also argued as an indicator of a discriminatory motive that, at the November 8 meeting, although Ritzow offered Schwartz various jobs Ritzow did not correct Schwartz when Schwartz told him he had been informed that he would receive the *starting* rate for the lower classification jobs. Thereafter, in its letter reconfirming the layoff, Respondent then listed the jobs at the actual rate Schwartz would have received, which the General Counsel contends was substantially higher than what was stated to Schwartz at the November 8 meeting. The General Counsel therefore contends Respondent tricked Schwartz into taking layoff. The General Counsel's contention as to what was said at the November 8 meeting was based on Schwartz' testimony. Ritzow, however, testified that the wage rate was not discussed. There is therefore a conflict as to what occurred concerning the wage rate but we cannot say from a close reading of the Administrative Law Judge's Decision that the Administrative Law Judge made a credibility resolution on this issue. We therefore cannot resolve the issue or consider it as an indicator of a discriminatory motive. In any event, we note that, some 10 days before the November 8 meeting, the employees were notified in a general meeting and individually of Respondent's new wage and transfer policy and were told then that an employee's seniority and tenure would enable him to have a higher rate, if he transferred jobs, than merely the starting rate for the job. The wage rate scale was also posted prior to the November 8 meeting.

ployees who were in a layoff status for over 30 days were thereafter automatically terminated.

Schwartz and Ritzow conferred on Schwartz' status on November 8, 1973. It is undenied that at that time Ritzow offered Schwartz a job in either of two job classifications but because those jobs paid lower than what Schwartz was then earning,<sup>16</sup> he decided to go on layoff, as offered by Ritzow. It is further undenied that Ritzow told Schwartz that he would be notified of any other job openings that might arise. Lastly, it is undenied that Ritzow did *not* tell Schwartz that he would be automatically terminated at the end of the 30 days if he was still on layoff.

This latter point is the first of the two indicators of Respondent's pretext in inducing Schwartz to take layoff. Although Respondent was quick to inform Schwartz he would be notified of other job openings, which of course proved not to be the case as discussed *infra*, it somehow "inadvertently" forgot to inform him of probably the most basic fact of the layoff; i.e., that it could well lead to his automatic termination. It is no answer that Respondent also did not inform any of its other employees of the possibility of discharge built into its new layoff system since Schwartz was the first and, in fact, the only employee laid off pursuant to the new policy and thus was the only employee who ever had a need to know the full ramifications of a decision to take layoff.<sup>17</sup> Needless to say, Respondent did not supply Schwartz with this information until it notified him that the jobs he had originally turned down were not in any event open to him any more. But even in that communication, Schwartz was told he would be informed of any jobs that were posted during the layoff period.

Respondent's opportunity to keep its promise occurred on November 27, 1973, when one of its glasscutters quit. The job of glasscutter was rated at G3 on Respondent's scale, which was the same level as Schwartz' job at the time of his layoff. Additionally, Schwartz had, at times previous, filled in as a glasscutter. With this as background, and with this job seemingly one Schwartz qualified for and might well accept, Respondent instead filled the job with an employee it moved from terrarium work. This transfer, of an employee with admittedly no previous experience as a glasscutter, was concededly only temporary and on December 26 (some 29 days after the job

<sup>16</sup> There is a dispute as to whether Schwartz was told his wage rate would be at the starting rate or higher. While a resolution of that issue would have been helpful, the lack of such a resolution is not fatal in finding a violation. There is no dispute that whatever the rate of those jobs offered they were below that which Schwartz had been earning.

<sup>17</sup> Nor is it an answer that prior to the new layoff policy Schwartz would have been automatically terminated without any layoff period if there were no job available for him. We are dealing with Respondent's actions under its new policy, which provided a 30-day layoff period, and what went before in this regard is irrelevant.

opened up and beyond the expiration date of Schwartz' layoff period) the job was first posted by Respondent. Schwartz, of course, was then ineligible for the job since his last day of employment was his last day on layoff, December 10.

Respondent's answer to its failure to notify Schwartz of the job was indeed unique. In Respondent's view, the vacancy was not a job opening "as such" and hence it had no obligation to offer Schwartz the job. Respondent listed as its reason for not considering this a job that had opened its desire not to fill the job until after the Christmas holidays for the economic reason that it did not wish to give some new employee various holidays and an access to Respondent's pension fund to which the employee would be immediately entitled if hired pre-Christmas.

This argument completely ignores the strong possibility that Schwartz would have accepted this job, for which he qualified, if he had been offered it. This conclusion is supported by the fact that the only reason in the record for Schwartz having turned down the two jobs offered him was their lower paying salary. The job that became vacant, however, was rated at the same pay level as the job Schwartz had before his illness necessitated his transfer. Also, since Schwartz would have been "more" entitled as a long-time employee to the various holidays coming up than a new employee, Respondent's fear in that regard would have been allayed also.

Respondent's argument that it was for economic reasons that the job was not posted until after Schwartz' layoff period had expired is also undercut by the fiscal picture of Respondent painted by its own president. Ritzow testified that Respondent began operations full time in April 1970 with only two employees. In the intervening years, however, Respondent's operations have been, in Ritzow's words, "continually expanding," and its labor force has consequently been "constantly expanding." In October-November 1973, Respondent embarked on a 40,000-square-foot addition to its plant and in January 1974 Respondent hired "something like thirteen people to expand and to better organize [its] work force" according to Ritzow. In contrast to this picture of a healthy growing company, we have Respondent's assertion that it was for the economic reason of not wishing to give one employee various benefits "right off the bat," in Ritzow's terms, that it did not post this job. I am unable to accept such a justification for a failure to post this job.<sup>18</sup>

<sup>18</sup> I note also that Ritzow testified that Respondent has always had two glasscutters and that he also testified December is one of Respondent's busiest months. In these circumstances, Respondent still refused to post the job and fill it with a permanent employee but instead transferred over an

Rather, it seems clear to me that Respondent was able to induce Schwartz to take layoff rather than certain lower paying jobs by not informing him such action on his part could lead to automatic termination. Once on layoff, Schwartz, according to Respondent's plans, was never going to be recalled. That this conclusion is inescapable can be seen from Respondent's attempts to keep a job from Schwartz' knowledge once one became vacant during Schwartz' layoff period. Respondent's actions clearly yield the inference that Schwartz' discharge was for a discriminatory reason and I find that reason in Schwartz' union activities of which Respondent was well aware and to which it was opposed.

While the majority discounts all the incidents described by the Administrative Law Judge in his finding that Respondent possessed an animus toward Schwartz' union activities, I think certain of the incidents considered, *in toto*, clearly demonstrate that animus. Most notable of those incidents was Eich's ordering Schwartz out of Respondent's plant only a few minutes after Schwartz' shift had ended on November 1. Eich admitted it was only because he did not want Schwartz to solicit for the Union among the employees then working that he ordered Schwartz out of the plant. Yet I note that Schwartz, at the time he was ordered out, was not engaged in conversation with any working employee, and was not in a working area but was talking by the lockers. Schwartz was not then even engaged in any conversation about the Union but rather was chatting with nonworking employees after his shift as he had done for 3 years previously. Schwartz was, in fact, the only one of the employees who was ordered out. In this context, and noting Eich's admission of the reason for his ordering Schwartz out of the plant, I find this incident a strong indicator of Respondent's union animus.<sup>19</sup>

Also indicative of Respondent's animus toward the Union was Eich's answer to Schwartz' question whether higher management was upset at the presence of the Union. The majority finds Eich's response "wouldn't [you] be if it [was your] company" too speculative an answer to warrant any inference of union animus. The answer, however, clearly indicates Respondent's position that it was "upset" at the Union's presence. Such a remark, coming from a responsible member of Respondent's organization,

inexperienced employee on a temporary basis during one of its busiest months.

<sup>19</sup> While Eich noted that a rule of Respondent prohibited off-duty employees from "hanging around" the plant, Schwartz testified, without contradiction, that he had been engaging in conversations such as the one on November 1 for years prior to this incident. Thus, Respondent's rule was not a valid reason for Eich's action since Respondent only applied it when Schwartz became involved in union activities. In any event, I would not find such a rule to be valid. See *GTE Lenkurt, Inc.*, and my dissenting opinion therein.

clearly is not too speculative to be considered as an indicator yielding an inference of union animus.

And in the context of the two incidents noted above which involved Plant Superintendent Eich, I must also conclude that Eich's statement to Schwartz to solicit for the Union only on his own time and not on the Company's time also demonstrated union animus. I note that Schwartz testified without contradiction that he had in fact only solicited on his own time when Eich made that statement. Since Schwartz had only solicited on his own time, I conclude Eich need not have given Schwartz such an order and further conclude, in light of Eich's similar order to Schwartz to get out of Respondent's plant, which order was motivated by animosity toward the Union, that this order to Schwartz to solicit only on his own time was also an indication of Respondent's antiunion attitude.

In sum, I think it clear Respondent demonstrated an antagonism toward the presence of the Union and toward Schwartz' activities in its behalf. Viewing Respondent's clearly pretextual reasons for eventually terminating Schwartz in light of that antagonism toward his union activities, I can only conclude that Respondent's termination of Schwartz was for his union activities and I would find Respondent thereby violated Section 8(a)(3) of the Act.<sup>20</sup>

<sup>20</sup> I would also deny Respondent's motion to reopen the record. Respondent's motion is based on its claim that evidence discovered after the close of the hearing suggests that Schwartz was not terminated but rather quit his employment with Respondent on November 16, 1973. Respondent submits information that in applying for a job at another employer on November 16, Schwartz listed on the application "laid off—then quit" employment at Respondent and that on November 20, 1973, Schwartz was hired by the other employer.

By Respondent's own admission, it was not aware that Schwartz had supposedly taken other employment at the time of its discriminatory discharge of him on December 10, 1973. There is no evidence and no assertion that Schwartz took any action to inform Respondent that he intended to terminate his employment and the validity of Respondent's contention of what Schwartz may have indicated to another party not involved in this matter has no bearing on any issue involved herein. The record is clear that on November 8, Respondent discriminatorily laid off Schwartz and on December 10 discriminatorily discharged him. Respondent's "newly discovered" evidence is irrelevant to the above conclusions, which are the issues in this case.

## DECISION

### STATEMENT OF THE CASE

ELBERT D. GADSDEN, Administrative Law Judge: Upon a charge of unfair labor practices filed on December 4, 1973, by John Joseph Schwartz, the Charging Party herein, against All-Glass Aquarium Co., Inc., herein called the Respondent, the General Counsel of the National Labor Relations Board issued a complaint against Respondent on January 30, 1974, alleging that Respondent had threatened to withdraw current benefits from its employees if a union

were elected their representative, and that it laid off the Charging Party herein because of his union activities in violation of Sections 8(a)(1) and (3) and 2(6) of the National Labor Relations Act, as amended, herein called the Act.

A hearing in the above matter was held before me at Milwaukee, Wisconsin, on February 28, 1974. Briefs have been received from counsel for the General Counsel and counsel for the Respondent and have been carefully considered.

Upon the entire record in this case and from my observation of the witnesses, I hereby make the following:

### FINDINGS OF FACT

#### I. JURISDICTION

Respondent is now, and has been at all times material herein, a corporation duly organized under the laws of Wisconsin and engaged in the manufacture of aquariums and related products from its headquarters and manufacturing facility located in Franklin, Wisconsin. In the course of conducting its business operations at Franklin, Wisconsin, during the past calendar year, a representative period, Respondent purchased and received goods valued in excess of \$50,000 in interstate commerce directly from points outside the State of Wisconsin.

The complaint alleges, the answer admits, and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

#### II. THE LABOR ORGANIZATION INVOLVED

The complaint alleges, the parties stipulated, and I find that Glazier's Union, Local 1204, is now, and has been at all times material herein, a labor organization as defined in Section 2(5) of the Act.

#### III. THE ALLEGED UNFAIR LABOR PRACTICES

##### A. Background Information

Respondent is a relatively new and expanding corporation, having commenced business in 1970 when it shortly thereafter employed John Joseph Schwartz, the Charging Party herein, at a rate of \$2.50 per hour. Schwartz started his employment as a cleanup man, then an inspector, belt sander, loader and unloader of trucks, aquarium assembler helper, and finally an aquarium assembler for \$3.65 an hour. On October 30, 1973,<sup>1</sup> Schwartz asked Plant Superintendent<sup>2</sup> John Eich for permission to leave the job early to keep a doctor's appointment. On the next morning, October 31, Schwartz submitted to Supervisor Eich a statement from his doctor which in essence said Schwartz is subject to upper respiratory infections and bronchitis and needs to be transferred to a work area free of irritants in the air he

<sup>1</sup> Hereafter all dates will refer to the year 1973 unless otherwise specified.

<sup>2</sup> Gerald Ritzow is established to be president of Respondent and John Eich is established to be plant superintendent and supervisor or plant foreman and, therefore, both are established of record to be supervisors within the meaning of Section 2(11) of the Act.

breathes. Whereupon Schwartz was transferred from the aquarium assembly, where he was exposed to silicone and vinegar type fumes, and was thereafter used to fill in for personnel on vacation and sick leave for 2 weeks, loading and unloading trucks, working on a new saw, and tearing down aquariums. On the afternoon of October 31, Schwartz and Superintendent Eich had a discussion of the advantages and disadvantages of unionization of the plant.

After Schwartz made several inquiries to Superintendent Eich about a permanent job assignment, Eich arranged a conference for Schwartz with President Ritzow on November 8, during which time President Ritzow advised Schwartz that the only permanent job openings were the two G2 belt sander jobs and the one G1 terrarium job which were currently posted on the bulletin board, and that he would have to sign up for one of these or he would have to be put on layoff, in which case he would be thereafter advised of *any* job openings. President Ritzow learned about Schwartz' distributing union cards on October 31. Since Schwartz was told he would have to start at the starting salary in either of the three jobs posted, which were a lower rate of pay than his current G3 pay, he elected to go on layoff on November 10.

On November 11 or 12, Schwartz received a letter from Respondent advising him that the three jobs posted November 8, 9, and 10 were no longer posted; that Respondent would keep him informed of any new jobs posted; and that according to the Company's new layoff policy, he (Schwartz) would be automatically terminated after 30 days.<sup>3</sup>

#### Issues

The principal subordinate issues presented for decision are whether Respondent, through its supervisor, Eich, threatened employee Schwartz with the withdrawal of employee benefits if the Union were elected representative of the employees, in violation of Section 8(a)(1) of the Act, and whether Respondent discriminatorily laid off and ultimately discharged employee Schwartz for his union activity (passing out cards) in violation of Section 8(a)(3) and (1) of the Act.

#### B. Respondent-Schwartz, Employer-Employee Relationship

A composite of the credible testimony of Respondent President Ritzow, Plant Superintendent Eich, and employee Schwartz established that Schwartz was employed by Respondent since September 1970; that during the course of his work tenure, Schwartz has worked as a cleanup man, inspector of aquariums, belt sander, light assembler, plate canopies assembler, helper in assembling and packing terrariums, operated a fork lifter, loaded and unloaded trucks, filled in as a glasscutter, and finally he worked as an aquarium assembler. Although Schwartz started his employment with Respondent at a pay rate of \$2.50 per hour, he was earning \$3.65 per hour on November 8. Schwartz has never been given any written complaint about his work perfor-

mance or personal relations with plant personnel. Schwartz is also qualified as a glasscutter helper.

On October 30 Schwartz asked permission to leave the job early to see his doctor and on the next day, October 31, he gave Superintendent Eich the following note from his physician:

To whom it may concern:

This is to certify that John Schwartz is subject to recurrent upper respiratory infections and bronchitis & needs transfer to area free of irritants in the air he breathes.<sup>4</sup>

Thank you

Schwartz further testified that Superintendent Eich asked him if he would be willing to take sick leave and he responded that the handbook says:

that anyone that takes sick leave and it's job related, that he would get workman's compensation, and they would have to pay me then if I took sick leave.

Schwartz also testified that several minutes after he gave his physician's note to Superintendent Eich, the following conversation between himself and Eich took place:

A. He said the Jerry said that he couldn't give me—there was no jobs available, they were all filled with that wage schedule thing, and I would just be doing fill-in jobs until they found something for me to do, or made up their mind.

Q. What job, if any, were you then assigned to?

A. For a period of time, I was—I loaded trucks, unloaded trucks when they came in, and worked for a time on tear down of aquariums and cleanup. I worked on the saw, too.

Q. During what period of time was this?

A. During the time after the doctor's excuse and some before.

Q. Between what dates?

A. The 31st and the 8th.

Q. The 31st of October?

A. October, and November 8th, the day of my termination.

Schwartz' testimony in this regard is essentially corroborated by President Ritzow, who credibly testified that after receiving the doctor's notes from Mr. Eich, he instructed the latter to take Schwartz off the aquarium assembly where he was exposed to vinegar type fumes and put him on temporary work elsewhere as described by Schwartz. He further stated that he became aware of Schwartz' union activity the day before he received the doctor's excuse but he did not know the identity of other employees who were involved.

Subsequently about 2 p.m., during the employees' break period while passing out union cards, Schwartz said Eich said to him: "If I handed out union cards, I'd do it on my

<sup>4</sup> I credit the above testimony because all of said witnesses appeared to be telling the truth and because their respective testimonial versions were not in dispute.

<sup>3</sup> The facts set forth above are undisputed in the record.

own time and not on company time." Schwartz said he only distributed the cards in the morning before work, 7:30 a.m., and during the employee's break period. His testimony is not in conflict with Eich's in this regard and I therefore credit it.

Based upon the foregoing credible testimony, I conclude and find that on October 31, employee Schwartz presented the Respondent a note from his physician, stating that he (Schwartz) should not continue to work in aquarium assembly because the fumes therein affected his respiratory system; that Respondent immediately reassigned Schwartz to fill-in work free of the irritants in the aquarium assembly; that Schwartz was a G3, earning \$3.65 per hour; that Schwartz qualified for a G3 glasscutter but there were no G3 positions of any type vacant on October 31–November 8; that Schwartz distributed union cards on his own time before worktime (7:30 a.m.) and also at 2 p.m. during employee's breaktime on October 31, when he was told by Superintendent Eich that "If I handed out union cards, I'd do it on my own time and not on company property"; and that the latter statement by Eich to Schwartz is evidence of Respondent's union animus when considered along with the total evidence of record.

### C. Schwartz' Union and Nonunion Activity

Schwartz credibly testified further that during the afternoon (2 p.m.) of October 31 a conversation was held between himself and Superintendent Eich, in the presence of employee Ken Heritz, during which he (Schwartz) said if the Union comes in the plant, the starting salary would be \$4 an hour after 1 year's employment. He further testified as follows:

A. Mr. Eich stated that if a Union did get into the shop, that Jerry and Roger could, if they wanted to, withdraw all the benefits that we had, our fringe benefits.

Q. Did he refer to any particular benefits?

A. One was our \$50 deductible that Jerry and Roger pay for our Blue Cross-Blue Shield, and maybe our pension plan, too.

Q. Who do you refer to when you say Jerry and Roger?

A. Jerry Ritzow, the president, and Roger, the vice president of All-Glass Aquarium.

Superintendent Eich denied that he threatened Schwartz with withdrawal of employee benefits and to correct any misunderstanding, he thereafter told all employees that there would be no withdrawal of benefits if the Union came in.

Schwartz did not deny that Superintendent Eich said whatever was achieved by the Union would have been the product of negotiation between Respondent and the Union and that he explained this to other employees.<sup>5</sup>

<sup>5</sup> I credit Schwartz' testimony that Superintendent Eich made the statement about withdrawal of employee benefits, because not only did he impress me as testifying truthfully on this point, as opposed to Superintendent Eich, but the statement is also consistent with other statements and posi-

Schwartz credibly testified that he had another conversation with Foreman Eich on November 1 which ensued as follows:

A. I asked him if Mr. Ritzow and the vice president were mad at all about the Union.

Q. And what, if anything, did he say in response?

A. He said wouldn't I be if it [were] my company?

Schwartz' testimony was corroborated by Superintendent Eich, in this regard.

He (Schwartz) said he held another conversation with Foreman Eich on November 1 which was as follows:

A. He asked me if I was punched out, and I said, "Yeah," and then he told me to get out of the plant, leave.

John Eich credibly testified that he is plant superintendent of Respondent, with the responsibility of overlooking foremen. He further testified that on or about October 31, Schwartz asked him if he wanted to join the Union because the rate of pay would be \$4 per hour; that he simply told Schwartz wages and other benefits would have to be negotiated if the Union came in and he denied that he said employees would lose their benefits but since that rumor spreaded throughout the plant, he went to all employees and denied the rumor; that he told the employees if they wanted the Union they can have it.

Superintendent Eich testified that when Schwartz presented him with the doctor's note, on October 31, he took it to President Ritzow to see where he was going to assign Schwartz, since the latter had performed several jobs and that he was advised to use Schwartz to fill in for workers on leave, which Schwartz did for 2 weeks.

With respect to his ordering Schwartz to leave the plant on or about November 1, he said:

A. I think the reason on that was—well, I knew he was starting a Union, and I figured if he's going to be passing out cards, this was on, you know, it maybe wasn't on his time, but it was on company property where he had no business, as far as being there.

Q. At the time you told him to leave, was he doing anything with respect to union activity?

A. No, as far as I'm concerned he wasn't. I think he was just talking to Kenny or something, but I figured as long as the second shift was in there working, maybe he wanted to talk to them or something, so instead of disturbing them during their work hours, I figured he should go.

With respect to the prospective pay discussion, Superintendent Eich said he told Schwartz that he really did not know what Schwartz would receive but he would be going down a grade because, as far as the merit system goes, he had an in-between percentage, between an 8 to 28 or a 9 to

tions of Eich's attitude toward the employee's efforts to unionize the Respondent. Moreover, Superintendent Eich does not deny that he made a statement about withdrawal of employee benefits but he simply says he did not threaten the employees with such withdrawal.

30, but where President Ritzow is going to set it, he did not know, that Schwartz would have to talk to Mr. Ritzow. Eich continued as follows:

A. Because I was actually told, you know, what I can do and what he can do and so forth and so on, and I was supposed to leave him alone and let him more or less do his stuff. If he wants to pass out during lunch time, fine, but when he's not supposed to be on company property, well then he's not supposed to be on company property. No stranger can just walk in any time and start disturbing the workers. My production comes first, that's the way I feel. If he comes in at a break for the second shift or something, fine.

The only employee to whom Schwartz was talking was Kenny. He never told Schwartz that he was permanently or temporarily employed because he did not know the status of the fill-in work assignment. When the three jobs were posted in November with respect to future employment he said:

"You're going to have to sign for a job." I said, "Maybe you're going to have to stay in a Grade 2 until a Grade 3 or Grade 4 opens up again," and I said, "The opportunity is here, because the addition is coming on, because you're about fourth or fifth in line in seniority." He would have a great chance of, you know, picking his job.<sup>6</sup>

I therefore conclude and find upon the foregoing credible evidence that on October 31 Superintendent Eich did tell employee Schwartz that if the Union gets into the plant, Jerry and Roger [Ritzow] could, if they wanted to, withdraw all employee fringe benefits, however, that since the latter statement was made during a personal discussion of the Union between Schwartz and Eich and because it was stated as a possibility rather than as a positive fact, I do not find that such statement was coercive and threatening within the meaning of Section 8(a)(1) of the Act. I further conclude and find that while said statement was not coercive and threatening, I do conclude and find that it is another item of evidence of union animus as was Eich's answer to Schwartz when he asked was President Ritzow mad about the Union, and Eich replied: "wouldn't I be if it were my company." Also evident of union animus is Superintendent Eich's ordering Schwartz to leave the plant on November 1 because he thought Schwartz would solicit support for the Union on his own time while on company property.

<sup>6</sup> I credit the testimony of Superintendent Eich, except his possible denial that he made the statement about withdrawal of employee benefits, not only because I received the impression that he was testifying truthfully, but also, because his version of the conversation with Schwartz is essentially consistent with that of Schwartz.

#### D. Schwartz' Layoff and Discharge by Respondent

##### Respondent's Wage Scale and Layoff Policy

President Ritzow credibly testified further that in August or September Respondent engaged Colette of Carlson and Associates, a personnel management consulting firm (Resp. Exh. 3), to study and recommend a wage scale system and other policies, including a layoff policy, which were established in September. Respondent implemented the wage scale plan in October by advising all the employees about the same, by posting the wage scale system (G.C. Exh. 3) on the plant's bulletin board on October 29, and by talking to each employee individually to explain the system. He admitted that the layoff policy was not communicated to the employees but that management personnel knew about it.

On the afternoon of November 8, Superintendent Eich arranged a meeting for Schwartz to talk with President Ritzow at 3:30 p.m. regarding his future job status. Schwartz stated that the conversation during the meeting between them was as follows:

A. Mr. Ritzow offered me two jobs in Grade 1 or Grade 2, or I could take a lay-off instead. He had this sheet here on his desk, and I asked him how come I couldn't be put in a different job, and he said, "Well, there's a new policy," he couldn't bump anybody, and there were no positions opened, except those two. The only way I could get a job, he says, was if I would quit or . . .

Q. Did he indicate what the two jobs were?

A. Grade 1 and Grade 2, one was on terrariums and one was on belt sanders.

Q. Did he indicate what the wage salary would be?

A. I told him what I told Eich before. He said it would be—it was the starting. It would be a starting pay, if I had gone to another job.

Q. Did he indicate any numerical figure for the wage that you would be receiving?

A. No.

Q. You referred to—that he had a sheet on his desk. Could you tell us what that was?

A. This wage scale and increase chart.

Q. I show you General Counsel Exhibit 3, is this the sheet that he had on his desk?

A. Yes.

Q. Was anything else said during that conversation?

A. I just said that I'd take the lay-off, because if I—I could make just as much on unemployment sitting home at forty hours as I could working for \$2.30, or something, for forty hours, and he said, "Okay," the lay-off was fine.

Q. Did you mention that specific figure in your conversation?

A. I mentioned it was like about \$2.37 an hour. The other one would be like \$2.48, and that was less than I started at three years ago.

Q. Did you mention that figure in your conversation?

A. Yes.

On or about November 11 or 12 he (Schwartz) received a letter in the mail (G.C. Exh. 5) advising him that the two jobs he had been offered were no longer posted and that Respondent would keep him advised of any new jobs posted. The last sheet in the letter contained the Company's layoff policy, advising Schwartz for the first time that after 30 days he would be automatically terminated. Subsequently, he received his last two checks from Respondent.

On cross-examination Schwartz said President Ritzow explained the wage scale to him and thereafter had a copy thereof posted on the bulletin board for employees' inspection prior to November 6 and he admitted that he understood the posting procedures and that he could post for one of the jobs posted on November 8.

President Gerald Ritzow testified that upon his receipt of the doctor's excuse from Schwartz on October 31 he immediately removed him from the job which was affecting his respiratory system and he was placed in a temporary job, filling in for people on sick leave or vacation, since the Company does not have temporary positions. President Ritzow continued to testify as follows:

A. After repeated requests for information through John Eich, I told John Eich to have Schwartz come in to the office and I would discuss whatever he wanted to discuss. I explained to him the two job openings that were there. I told him I could not create a position for him. He understood this. I told him if he did not accept one of these positions, I would have to put him on lay-off, I had no other choice.

Q. Now, can you tell me if there was any particular occurrence or event that you anticipated that necessitated this meeting on November 8th between yourself and Mr. Schwartz?

A. The—as of Monday—November 8th was a Thursday, the posting would end on Friday, November 9th, and as of Monday, the best we could determine we'd be up to full strength, and we would have no other temporary openings that I could put him in.

Q. Now, on November 8th at your meeting with Mr. Schwartz, did you fire John Schwartz?

A. No, I didn't.

The two jobs he offered to Schwartz were two belt sander G2 jobs and a terrarium assembler G1 job posted at that time, November 8 (Resp. Exh. 1). The first consideration for posted jobs is qualifications and the second is seniority. This posting procedure, the layoff policy, and the wage scale system were implemented upon the recommendation of the consulting concern of Carlson and Associates.

President Ritzow further testified as follows:

Q. Can you recall approximately what time Carlson and Associates completed its work at All-Glass Aquarium Company?

A. It was completed late in September.

Q. What did All-Glass Aquarium Company do in response to the work that was done by Carlson and Associates?

A. We immediately put into operation what things could be put into operation at that time, such as the various policies and the organizational chart. The other job progression required more work. We had the tools to do it with, but now we had to set up cards on each individual employee, what their rate is now, figure out how they were going to fit into this program, so that at the meeting that I had with each individual employee, I could discuss with them what their rate was now, when their next raise would be, and this took a considerable amount of time, it took for the better part of October to complete this.

All of the implemented wage scale procedures heretofore described were posted on the bulletin board for the employees October 29 and it is still posted. President Ritzow also had a meeting with all employees and met with each of them individually to explain the systems, including the transfer system but not the layoff policy about which only management personnel were informed. During his conference with Schwartz on November 8, Schwartz declined to sign up for either of the jobs posted and elected to take a layoff. The layoff policy, part 2 of G.C. Exhibit 5, was completed and recommended by Carlson and Associates and adopted by Respondent in September. Prior to the adoption of said layoff policy, Respondent had no such policy for a person with no job and consequently such persons were terminated. No other jobs were posted subsequent to November 12, until December 26, and that job was not filled until early January. Upon the advise of his counsel herein, and Colette of Carlson and Associates, he took no action against Schwartz for his union activity. He explained to the employees that the Company has an open door policy with its employees and that means any employee is invited into his office or that of his brother, vice president, to discuss any problem they have. This policy is set forth in the employees handbook (Resp. Exh. 4) which is distributed to all employees. Schwartz has never contacted him about any alleged harassment for his union activity.

During his meeting with Schwartz on November 8, President Ritzow said he told Schwartz he could not create a position for him; that there were three jobs posted at the time (two belt sander G2 jobs and one terrarium G1 job); and that if he (Schwartz) did not sign up for the posted openings, he would have to lay him off. President Ritzow further testified that the first jobs ever posted were posted October 29 and thereafter on November 1-5. He said he did not want to lay off Schwartz but the latter indicated he did not want to sign up for either of the jobs posted. Schwartz mentioned the possibility of going on unemployment and he was the first and only employee laid off pursuant to the new layoff policy and ultimately terminated by letter (G.C. Exh. 5) on December 10. President Ritzow admitted that Respondent did not inform Schwartz of any job vacancies or postings between November 8 and December 10. When he was asked did any employees quit during that interim, he said it was possible, but when asked did a glasscutter, Randy Czerwinski, quit he said I believe he did quit November 27. Paul Imes was moved into

Czerwinski's position to fill in until January 2, 1974. Imes had been working for Respondent for a few months in terrariums where it was getting pretty slow. He had no prior experience as a glasscutter.

As of December 26 or 27 President Ritzow posted the position for glasscutter and three or four people signed up for it. Randy Moze was selected for the position. He has always had two glasscutters and he did not inform Schwartz that Czerwinski had quit because the position was not posted until December 26 or 27. For the three positions that were posted on November 7-9, two persons were hired in late November and one was hired December 3. At the time of termination, Schwartz was earning \$3.65 an hour and if he had accepted a grade 2 position he would have earned \$3.26 per hour, and had he accepted a grade 1 position he would have received \$2.82 an hour. Manager Ritzow did not explain this wage breakdown to Schwartz on November 8 or when he was officially laid off November 10 because he said this had been explained to the employees before. Reviewing the Company's official records (G.C. Exh. 7), Mr. Ritzow said Antoinette Paulson was hired as a grade 1 terrarium assembler on November 29; Bob Weber was hired as a G2 belt sander on November 30; and Gary Hauck was hired as a belt sander on November 12 and terminated on November 28, 1973. On December 3, Bob Angus was hired as a G2 belt sander.

Terminations During November and December were: Joy Peterson, terrarium taper G1, 11/28/73; Randy Czerwinski, glasscutter G3, 11/27/73; Timothy Braun, part-time helper, 11/9/73; Daniel Braun, part-time helper, 12/20/73.

Schwartz had worked as a G3 aquarium assembler for about 1 year or more prior to the doctor's notice.

The Company only gave verbal warning to employees for infractions of rules. The Company's reorganization after the first of the year resulted in the hiring of 13 people because the Company did not want to hire them before the holiday season because they would have been entitled to paid holidays and December is the busiest month of the year.<sup>7</sup>

Finally I conclude and find upon the foregoing credible evidence that when Respondent learned about Schwartz' union activity on October 31, he consulted with its attorney and with Carlson and Associates to ascertain what could be done about the same; that such consultation at least indicates that Respondent was adversely concerned about the Union; that Respondent's layoff policy was established in September but was not communicated to the employees

nor to Schwartz on November 8 when he elected to go on layoff; that Schwartz was orally advised on November 8, and in writing on November 10 or 11, that he would be advised by Respondent of any job vacancies; that although a job vacancy (glasscutter G3) for which Schwartz could qualify occurred on November 27, Respondent did not inform Schwartz about the same, but instead had another employee fill in the vacancy until after December 10 (30 days after Schwartz' layoff) when it posted the job; that another Respondent employee posted for the job and was hired in the same; that such application of its posting and layoff policy on the part of Respondent was discriminatory and reveals that it used its layoff policy as a pretext layoff and discharged Schwartz for his union activity, of which it knew and against which it had previously manifested animus.

### Analysis and Conclusions

The Respondent herein is charged with having threatened its employees with the withdrawal of employee benefits if the Union were elected their collective-bargaining representative and with having discriminatorily discharged employee Schwartz for his union activity. In reviewing the entire record of evidence in the context of these alleged charges, it is readily observed that Respondent's conduct, through its supervisors, manifested some evidence of union animus. Specifically, on or about October 31 employee Schwartz was advised by Plant Superintendent Eich that if he handed out union cards, he should do it on his own time and not on company property. Since the undisputed evidence shows that Schwartz distributed union cards in the lunch area before worktime on the morning of October 31, and during the employee's break period on the afternoon of the same day, it is obvious that Eich was opposed to Schwartz' efforts to unionize the plant. This is especially so since the plant was not shown to have had a no-solicitation rule and because Schwartz was not distributing the cards during work periods or in any manner interfering with the production of fellow employees. Moreover, Superintendent Eich had not only already advised Schwartz that he was not interested in the Union but on the following day (November 1) he ordered Schwartz out of the plant because he was talking to fellow employees after he punched out and without any evidence that the following work period had begun or that Schwartz was interfering with employees at work but simply because (as Eich admitted) he figured Schwartz was going to solicit employee support for the Union.

Further evidence of Respondent's union animus is manifested in Superintendent Eich's statement to Schwartz on October 31, that "If the Union did get into the shop, that Jerry and Roger could, if they wanted to, withdraw all the benefits that we had, our fringe benefits." Since this statement by Eich was made as a *personal* observation of an adverse possibility, in response to a discussion of the advantages of unionization initiated by Schwartz, I do not construe it as a positive threatening statement of fact made on behalf of management. Therefore the allegation and charge that Respondent threatened to withdraw employee benefits if the Union were elected representative of the em-

<sup>7</sup> I credit the literal testimony of President Ritzow as to the policies recommended by Carlson and Associates and as to the conversations he held with Schwartz because their testimonial versions of what was said are essentially not in conflict. However, I do not credit the witness' stated and implied reasons and motives for his application of the layoff policy and his conversations about job openings and layoff which he held with Schwartz on November 8, because they are inconsistent with other facts established by the entire tenor of the evidence of record. I discredit his statement that the layoff policy was explained to the employees because it is contradictory to his previous statement that only management personnel knew about it, and he admitted he did not explain said policy to Schwartz on November 8.

ployees should be dismissed. However, since the statement is again evidence of Eich's opposition to the Union and he is, nevertheless, a supervisor in frequent communication with management (President Ritzow) which admitted it had knowledge of Schwartz' union activity on October 31, I am persuaded by all of the evidence that such statement is a manifestation of Respondent's union animus. Superintendent Eich's undenied response to Schwartz' question on November 1, as to whether President Ritzow was mad about the Union, is also indicative of evidence of union animus on the part of Respondent. Finally, while there is nothing improper about Respondent consulting its attorney about what to do about Schwartz' union activity, it is nevertheless evidence that Respondent was adversely concerned or it probably would not have sought such counsel. Moreover, while each of the above-described instances may not conclusively establish union animus when considered singly, there can hardly be any question that their combined effect clearly establish union animus on the part of Respondent.

With respect to the allegation and charge of discriminatory layoff and ultimate discharge of Schwartz, a cursory review of the evidence of record readily leads one to the conclusion that Schwartz relinquished his job on account of his health, declined to accept several lower paying jobs, and elected to go on layoff until he was discharged for cause on November 10. However, a very careful examination of all of the evidence of record clearly shows that although Schwartz declined to sign up for either the G1 or two G2 jobs, which were considerably less in pay than his G3 position with 3 years' seniority, he was nevertheless not fully and properly informed by Respondent of all of the options available to him at the time he elected to go on layoff. More specifically, Schwartz was not advised by Respondent that it had a revised and secret 30-day limited layoff policy which, at the expiration of 30 days, resulted in job termination. Corresponding to this omission by Respondent was its recitation to Schwartz, orally and in writing, that part of its layoff policy was that he (the laid off) would be informed of any job vacancy and postings during the layoff period. Perhaps if Respondent had given Schwartz the whole story on its policy and had not misrepresented that it would keep him informed of job openings or postings, Schwartz might not have taken layoff. However, Respondent did not follow through on its own policy in this regard since a glasscutter G3 vacancy occurred on November 27 and Respondent failed either to post the vacancy or to advise Schwartz about it during his 30-day layoff period. Instead, Respondent used another employee to fill in the subject vacancy until after the expiration of Schwartz' 30-day layoff period and then posted and filled the vacancy with an employee no more qualified than Schwartz.

Since Respondent admitted that prior to September, it had no employee layoff policy and that it did not timely inform Schwartz of its new 30-day layoff policy, I am persuaded by the evidence that Schwartz was laboring under a misunderstanding of the layoff policy (not knowing it would result in his termination in 30 days), especially since Respondent suggested it to him as an alternative with the promise that it would keep him informed of all job vacan-

cies posted during the next 30 days, but did not post a job opening which occurred on November 27. While the recommended and newly adopted wage scale and layoff policies of Respondent appear to be a sound and reasonable managerial implementation, the evidence clearly shows that its use and application in Schwartz' case was discriminatory, at least, in favor of another employee (glasscutter) of equal or less qualifications and experience (tenure) as Schwartz. This raises the question then as to why and how was Schwartz disparately treated. At no time is it shown by the record that Respondent wanted to discharge Schwartz because he could no longer work in the aquarium assembly, which it could have done immediately upon receipt of his doctor's statement.

It is well established by the evidence that although Schwartz was removed from his aquarium assembly job at his request on October 31, Respondent (President Ritzow and Superintendent Eich) also learned and had actual knowledge of Schwartz' union activity on the same date October 31. At the time Respondent gave Schwartz fill-in work until November 8 when it suggested that he sign up for one of the G2, G1 jobs, the evidence does not indicate that Respondent was trying to get rid of Schwartz. However, when Respondent suggested that Schwartz sign up for one of the lesser paying jobs or go on layoff, without explaining the 30 days limitation and promising to inform him of occurring vacancies or postings, Respondent's motives for Schwartz' layoff and discharge then came into question. Respondent's real motive became apparent when it failed to post and/or notify Schwartz of the glasscutter G3 position which became available November 27 but was not posted nor permanently filled until after December 10 (subsequent to the expiration of Schwartz' 30-day layoff period.). Such conduct on the part of Respondent is inconsistent with his statement under oath that he did not want to lose Schwartz as an employee. At this juncture, the evidence is clear that Respondent used its new and secret layoff policy to lay off and ultimately discharge Schwartz. Since the record is sufficiently replete with evidence of Respondent's animus toward Schwartz' union activity of which it had full knowledge, I am persuaded by the evidence that Respondent's initial layoff and ultimate discharge of Schwartz was substantially motivated by its union animus. Respondent's contention that Schwartz' layoff and ultimate discharge was for cause is obviously predicated upon its use of its new wage scale posting and layoff policies as a pretext to discharge Schwartz. Such discharge having been carried out for Schwartz' union activity, it was obviously discriminatory and violative of Section 8(a)(3) and (1) of the Act.

Since Schwartz' discharge was discriminatory, the cases cited by counsel for Respondent are inapplicable to the facts in the instant case. Suffice it to say that if the discharge is substantially motivated by union animus, the real cause, the discharge is unlawful. Here, if Respondent really wanted to retain Schwartz it would have posted the G3 glasscutter position prior to December 10 and notify Schwartz of the same and/or rehire him since the job was not filled until January. Since Schwartz was not a new employee, he would have been essentially entitled to the upcoming paid holidays.

## THE REMEDY

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

It having been found that Respondent discharged John Schwartz in violation of Section 8(a)(1) and 8(a)(3) and (1) of the Act, the recommended Order will provide that Respondent offer reinstatement to his job and make him whole for any loss of earnings within the meaning and in accord with the Board's decisions in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962), except as specifically modified by the wording of such recommended Order.

Because of the character of the unfair labor practice herein found, the recommended Order will provide that Respondent cease and desist from or in any manner interfering with, restraining, and coercing employees in the exercise of their rights guaranteed by Section 7 of the Act.

*N.L.R.B. v. Entwhistle Mfg., Co.*, 120 F.2d 532, 536 (C.A. 4, 1941).

Upon the basis of the above findings of fact and upon the entire record in this case, I make the following:

## CONCLUSIONS OF LAW

1. All-Glass Aquarium Co., Inc., the Respondent, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Glazier's Union 1204 is and has been at all times material herein a labor organization within the meaning of Section 2(5) of the Act.

3. By discriminating in regard to the tenure of employment of John Schwartz, thereby discouraging membership in the Union, a labor organization, Respondent has engaged in unfair labor practices condemned by Section 8(a)(3) and (1) of the Act.

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

[Recommended Order omitted from publication.]