



Warning
As of: Jul 19, 2012

WRIGHT LINE, A DIVISION OF WRIGHT LINE, INC. and BERNARD R.
LAMOUREUX

Case 1-CA-14004

NATIONAL LABOR RELATIONS BOARD

*251 N.L.R.B. 1083; 1980 NLRB LEXIS 1639; 105 L.R.R.M. 1169; 1980 NLRB Dec.
(CCH) P17,356; 251 NLRB No. 150*

August 27, 1980

JUDGES: Jenkins, Member, concurring.

OPINION:

[**1] DECISION AND ORDER

[*1083] On October 27, 1978, Administrative Law Judge Lowell Goerlich issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief and counsel for the General Counsel filed a brief in support of the Administrative Law Judge's Decision.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, n1 findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified herein. n2

n1 Respondent contends that the Administrative Law Judge's credibility resolutions, findings of fact, and conclusions of law stem from bias or hostility. We find no merit in this contention. There is no basis for finding that bias or partiality existed merely because the Administrative Law Judge resolved important factual conflicts in favor of the General Counsel's witnesses. As the Supreme Court stated in *N.L.R.B. v. Pittsburgh Steamship Company*, 337 U.S. 656, 659 (1949), "Total rejection of an opposed view cannot of itself impugn the integrity or competence of a trier of fact." Moreover, it is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[**2]



251 N.L.R.B. 1083, *1083; 1980 NLRB LEXIS 1639, **2;
105 L.R.R.M. 1169; 1980 NLRB Dec. (CCH) P17,356

n2 Respondent has excepted to the Administrative Law Judge's recommended broad cease-and-desist order. In our recent decision in *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979), we held that such broad injunctive language is warranted only when a respondent has been shown to have a proclivity to violate the Act, or has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees' fundamental statutory rights. Inasmuch as the instant violations do not meet this test, we shall modify the Administrative Law Judge's Order to require Respondent to refrain from violating the Act in any like or related manner.

Respondent excepted, *inter alia*, to the Administrative Law Judge's conclusion that it violated Section 8(a)(3) and (1) of the Act when, on December 30, 1977, it discharged Bernard Lamoureux. We agree with the result reached by the Administrative Law Judge, but only for the reasons that follow.

In resolving cases involving alleged violations of Section 8(a)(3) and, in certain instances, Section 8(a)(1), it must be determined, [**3] *inter alia*, whether an employee's employment conditions were adversely affected by his or her engaging in union or other protected activities and, if so, whether the employer's action was motivated by such employee activities. As discussed *infra*, various "tests" have been employed by the Board and the courts to aid in making such determinations. These tests all examine the concept of "causality," that is, the relationship between the employees' protected activities and actions on the part of their employer which detrimentally affect their employment.

The Administrative Law Judge's Decision in the instant case reveals some uncertainty regarding the appropriate mode of analysis for examining causality in cases alleging unlawful discrimination. Indeed, similar doubts as to the applicable test appear to have become widespread at various levels of the decisional process primarily as a result of conflict in this area among the courts of appeals and between certain courts of appeals and the Board.

After careful consideration we find it both helpful and appropriate to set forth formally a test of causation for cases alleging violations of Section 8(a)(3) of the Act. We shall examine [**4] causality in such cases through an analysis akin to that used by the Supreme Court in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977).

It is our belief that application of the *Mt. Healthy* test n3 will maintain a substantive consistency with existing Board precedent and accommodate the concerns expressed by critics of the Board's past treatment of cases alleging unlawful discrimination. We further find the *Mt. Healthy* test to be in harmony with the Act's legislative history as well as pertinent Supreme Court decisions. Finally, in this regard, enunciation of the *Mt. Healthy* test will alleviate the confusion which now exists at various levels of the decisional process and do so in a manner that, we conclude, accords proper weight to the legitimate conflicting interest in this area, thereby advancing the fundamental objectives of the Act.

n3 For ease of reference, we shall refer to this test of causality as the *Mt. Healthy* test. We note, however, that *Mt. Healthy* itself does not constitute a construction of the National Labor Relations Act and, accordingly, our Decision here is not compelled by *Mt. Healthy*. We do not view *Mt. Healthy* as at odds with our previous construction of the Act.

[**5]

I. THE DISTINCTION BETWEEN PRETEXT AND DUAL MOTIVE

It is helpful, initially, to distinguish between what are termed "pretext" cases and "dual motive" cases because it is in the dual motive situation where the legitimate interests of the parties most plainly conflict. Consequently it is in such situations that the existing controversy and confusion in this area are highlighted. n4

251 N.L.R.B. 1083, *1083; 1980 NLRB LEXIS 1639, **5;
105 L.R.R.M. 1169; 1980 NLRB Dec. (CCH) P17,356

n4 As is demonstrated herein, under the *Mt. Healthy* test, there is no real need to distinguish between pretext and dual motive cases. The distinction is nonetheless useful in setting forth the controversy surrounding dual motive cases.

In modern day labor relations, an employer will rarely, if ever, baldly assert that it has disciplined an employee because it detests unions or will not tolerate employees engaging in union or other protected activities. Instead, it will generally advance [*1084] what it asserts to be a legitimate business reason for its action. Examination of the evidence may reveal, however, that the asserted justification [**6] is a sham in that the purported rule or circumstance advanced by the employer did not exist, or was not, in fact, relied upon. When this occurs, the reason advanced by the employer may be termed pretextual. Since no legitimate business justification for the discipline exists, there is, by strict definition, no dual motive.

The pure dual motive case presents a different situation. In such cases, the discipline decision involves two factors. The first is a legitimate business reason. The second reason, however, is not a legitimate business reason but is instead the employer's reaction to its employees' engaging in union or other protected activities. This latter motive, of course, runs afoul of Section 8(a)(3) of the Act. This existence of both a "good" and a "bad" reason for the employer's action requires further inquiry into the role played by each motive and has spawned substantial controversy in 8(a)(3) litigation. n5

n5 Unfortunately, the distinction between a pretext case and a dual motive case is sometimes difficult to discern. This is especially true since the appropriate designation seldom can be made until after the presentation of all relevant evidence. The conceptual problems to which this sometimes blurred distinction gives rise can be eliminated if one views the employer's asserted justification as an affirmative defense. Thus, in a pretext situation, the employer's affirmative defense of business justification is wholly without merit. If, however, the affirmative defense has at least some merit a "dual motive" may exist and the issue becomes one of the sufficiency of proof necessary for the employer's affirmative defense to be sustained. Treating the employer's plea of a legitimate business reason for discipline as an affirmative defense is consistent with the Board's method of deciding such cases. See *Bedford Cut Stone Co., Inc.*, 235 NLRB 629 (1978).

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II. THE "IN PART" TEST

For a number of years now, when determining whether the Act has been violated in a dual motivation case, the Board has applied what is termed the "in part" causation test. In its present form the "in part" test provides that if a discharge is motivated, "in part," by the protected activities of the employee the discharge violates the Act even if a legitimate business reason was also relied on. *The Youngstown Osteopathic Hospital Association*, 224 NLRB 574, 575 (1976). This "in part" analysis has taken various forms with the "in part" language being modified while the underlying concept remains intact. Thus, the Board has used the following terms in dual motivation cases: "the motivating or moving cause," *The Bankers Warehouse Company*, 146 NLRB 1197, 1200 (1964); "the motivating factor," *Tursair Fueling, Inc.*, 151 NLRB 270, 271, fn. 2 (1965); "the substantial, contributing factor," *Erie Sand Steamship Company*, 189 NLRB 63, fn. 1 (1971); "motivated principally," *P.P.G. Industries, Inc.*, 229 NLRB 713 (1977); "a [**8] substantial cause," *Broyhill Company*, 210 NLRB 288, 296 (1974); "a substantial or motivating ground," *KBM Electronics, Inc.*, t/a *Carsounds*, 218 NLRB 1352, 1358 (1975); "in substantial part," *Central Casket Co.*, 225 NLRB 362 (1976).

Since its inception, the "in part" test has been perceived by some to be, at least conceptually, at odds with the oft-repeated idea that:

Management can discharge for good cause, or bad cause, or no cause at all. It has, as the master of its

251 N.L.R.B. 1083, *1084; 1980 NLRB LEXIS 1639, **8;
105 L.R.R.M. 1169; 1980 NLRB Dec. (CCH) P17,356

own business affairs, complete freedom with but one specific, definite qualification: it may not discharge when the real motivating purpose is to do that which Section 8(a)(3) forbids. [*N.L.R.B. v. MaGahey*, 233 F.2d 406, 413 (5th Cir. 1956)]. See also *Klate Holt Co.*, 161 NLRB 1606, 1612 (1966). Compare *Shattuck Denn Mining Corporation v. N.L.R.B.*, 362 F.2d 466 (9th Cir. 1966).]

A conflict between this concept and the "in part" rationale is seen because, in a dual motivation case, the employer does have a legitimate reason [**9] for its action. Yet, an improper reason for discharge is also present. Thus, the employer's recognized right to enforce rules of its own choosing is viewed as being in practical conflict with the employees' right to be free from adverse effects brought about by their participation in protected activities. Critics of the "in part" test have asserted that rather than seeking to resolve this conflict and accommodate the legitimate competing interests, the analysis goes only half way, in that once hostility to protected rights is found, the inquiry ends and the employer's plea of legitimate justification is ignored.

III. THE ADVENT OF THE "DOMINANT MOTIVE" TEST AND THE LAW OF THE CIRCUITS

In recent years, various courts of appeals have become increasingly critical of the "in part" analysis. The earliest, most outspoken critic of the "in part" test has been the First Circuit, which in *N.L.R.B. v. Billen Shoe Co., Inc.*, 297 F.2d 801 (1st Cir. 1968), examined the Board's application of the "in part" analysis and found it lacking. n6 Fundamental to its rejection of the "in part" test is the court's view that the test ignores the legitimate business motive [**10] of the employer and places the union activist in an almost impregnable position once union animus has been established.

n6 Actually, as early as 1953, in *N.L.R.B. v. Whitin Machine Works*, 204 F.2d 883, 885 (1st Cir. 1953), that circuit court expressed disagreement with Board analysis in 8(a)(3) cases. Yet, it was not until 1963 that Judge Aldrich of the First Circuit formally initiated the "dominant motive" or "but for" test. See *N.L.R.B. v. Lowell Sun Publishing Co.*, 320 F.2d 835, 842 (1st Cir. 1963).

[*1085] In an effort to remedy what it viewed as the inequities of the test, the First Circuit began to advance its own process of analysis in dual motivation cases. Thus, in *Billen Shoe, supra*, the First Circuit stated that:

When good cause for criticism or discharge appears, the burden which is on the Board is not simply to discover some evidence of improper motive, but to find an affirmative and persuasive reason why the employer rejected [**11] the good cause and chose a bad one. The mere existence of anti-union animus is not enough. [397 F.2d at 803.]

In other opinions, the First Circuit has termed its test a "dominant motive" (see fn. 6, *supra*) or a "but for" test. *Coletti's Furniture, Inc. v. N.L.R.B.*, 505 F.2d 1293 (1st Cir. 1977). For our purposes, this test will be referred to as the "dominant motive" test, which, in its most simple form provides that when both a "good" and "bad" reason for discharge exist, the burden is upon the General Counsel to establish that, in the absence of protected activities, the discharge would not have taken place. *Coletti's Furniture, supra* at 1293, 1294; *N.L.R.B. v. Fibers International Corporation*, 439 F.2d 1311, 1312, fn. 1 (1st Cir. 1971).

Conflict between the Board and the First Circuit in this area has escalated to the point where in *Coletti's Furniture, supra* at 1293, the court stated that "There can be little reason for us to rescue the Board hereafter if it does not both articulate and apply our rule." In addition, [**12] the conflict over which test to apply in dual motive cases has now spread throughout the circuit courts to the extent that a review of the tests currently applied by the Board, our Administrative Law Judges, and the various courts of appeals reveals a picture of confusion and inconsistency. n7

n7 Although it is responsible for the advent of the "dominant motive" test, which now is found in various

251 N.L.R.B. 1083, *1085; 1980 NLRB LEXIS 1639, **12;
105 L.R.R.M. 1169; 1980 NLRB Dec. (CCH) P17,356

forms in the circuits, the First Circuit, in its recent decision in *N.L.R.B. v. Eastern Smelting and Refining Corporation*, 598 F.2d 666 (1st Cir. 1979), appears to have moved away from the "dominant motive" test as earlier expressed. In *Eastern Smelting*, the First Circuit articulated and applied for the first time the *Mt. Healthy* test set forth in this opinion. In *Eastern Smelting*, however, the First Circuit did not explicitly abandon its "dominant motive" test, nor did it abate its criticism of the "in part" test.

Thus, the District of Columbia Circuit, in *Allen v. N.L.R.B.*, 561 F.2d 976, 982 (D.C. Cir. 1977), [**13] applied an "in part" test, stating that:

The cases are legion that the existence of a justifiable ground for discharge will not prevent such discharge from being an unfair labor practice if partially motivated by the employee's protected activity . . . n8

Several months later, another panel applied the "dominant motive" test as propounded by the First Circuit in *Billen Shoe, supra*, holding that:

The burden on the Board is not simply to discover some evidence of improper motive, but to find an affirmative and persuasive reason why the employer rejected the good cause and chose an illegal one. [*Midwest Regional Joint Board, Amalgamated Clothing Workers of America, AFL-CIO v. N.L.R.B.*, 564 F.2d 434, 440 (D.C. Cir. 1977).] n9

n8 An "in part" test has also been applied by the Sixth, Seventh, and Tenth Circuits. See *N.L.R.B. v. Retail Store Employees Union, Local 876, Retail Clerks International Association, AFL-CIO*, 570 F.2d 586, 590 (6th Cir. 1978), cert. denied 439 U.S. 819; *N.L.R.B. v. Gogin, d/b/a Gogin Trucking*, 575 F.2d 596, 601 (7th Cir. 1978); *M. S. P. Industries, Inc., d/b/a The Larimer Press v. N.L.R.B.*, 568 F.2d 166, 173-174 (10th Cir. 1977).

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n9 This "dominant motive" test has also been applied by the Fourth Circuit. See *Firestone Tire and Rubber Company v. N.L.R.B.*, 539 F.2d 1335, 1337 (4th Cir. 1976).

Similarly, the Ninth Circuit has applied both a "dominant motive" and an "in part" test. n10 Then, in *Polynesian Cultural Center v. N.L.R.B.*, 582 F.2d 467, 473 (9th Cir. 1978), that court noted that:

Several of our cases have said that the discriminatory motive must be the moving cause for the discharge. . . . On the other hand, this court has indicated that it too, on occasion, employs the but-for approach.

n10 Compare *Western Exterminator Company v. N.L.R.B.*, 565 F.2d 1114, 1118 (9th Cir. 1977), with *Penasquitos Village, Inc. v. N.L.R.B.*, 565 F.2d 1074, 1082-83 (9th Cir. 1977).

Tests which have been applied by other circuit courts [**15] fit neatly into neither the "in part" nor "dominant motive" category. For example, in *Waterbury Community Antenna, Inc. v. N.L.R.B.*, 587 F.2d 90, 98 (2d Cir. 1978), the Second Circuit stated its test as follows:

The rule of causation applied in this Circuit is that "the General Counsel must at least provide a

251 N.L.R.B. 1083, *1085; 1980 NLRB LEXIS 1639, **15;
105 L.R.R.M. 1169; 1980 NLRB Dec. (CCH) P17,356

reasonable basis for inferring that the permissible ground alone would not have led to the discharge, so that it was partially motivated by an impermissible one." . . . The magnitude of the impermissible ground is immaterial . . . as long as it was the "but for" cause of the discharge

The Third Circuit stated in *Edgewood Nursing Center, Inc. v. N.L.R.B.*, 581 F.2d 363, 368 (3d Cir. 1978), that:

The employer violates the Act if anti-union animus was the "real motive" If two or more motives are behind a discharge, the action is an unfair labor practice if it is partly motivated by reaction to the employee's protected activity. . . . On the other hand, if the employee would have been fired for cause irrespective [*1086] of the employer's attitude toward the union, the real reason [**16] for the discharge is nondiscriminatory. . . . Thus, if the employer puts forward a justifiable cause for discharge of the employee, the Board must find that the reason was a pretext, and that anti-union sentiment played a part in the decision to terminate the employee's job.

The Fifth Circuit, in *N.L.R.B. v. Aero Corporation*, 581 F.2d 511, 514-515 (5th Cir. 1978), ruled that:

The Board is not required to establish substantial evidence that the conduct is motivated solely by anti-union animus. It is sufficient if substantial evidence shows that the force of anti-union purpose was "reasonably equal" to the lawful motive prompting conduct.

Finally, the Eighth Circuit has held that:

The mere existence of valid grounds for a discharge is no defense to a charge that the discharge was unlawful, unless the discharge was predicated solely on those grounds, and not by a desire to discourage union activity. [*Singer Company v. N.L.R.B.*, 429 F.2d 172, 179 (8th Cir. 1970).]

We note that our citation of the foregoing cases is intended neither to explain nor vindicate the position expressed by any particular circuit [**17] court. Rather, it is intended to demonstrate that in an area fundamental to the Act, namely, Section 8(a)(3), disagreement and controversy are rampant among the various decisionmaking bodies.

IV. THE MT. HEALTHY TEST

As the preceding two sections have demonstrated, the issue of what causation test is to be used to determine whether the Act has been violated in dual motivation cases is now in a position where some view the "in part" test as standing at one extreme, while the other extreme is represented by the "dominant motive" test first advanced by the First Circuit. Despite this perceived polarization, room for accommodation and clarification does exist in the test of causality set forth in the recent Supreme Court decision of *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274.

The *Mt. Healthy* case arose when Doyle, an untenured teacher, brought suit against the Mt. Healthy School Board, alleging that it had wrongfully refused to renew his contract. The school board presented Doyle with written reasons for their refusal. The two reasons cited were: (1) Doyle's use of obscene language and gestures in the school cafeteria, [**18] and (2) Doyle's conveyance of a change in the school's policies to a local radio station. In his suit, Doyle alleged that the refusal to renew his contract violated his rights under the first and fourteenth amendments. He sought reinstatement and backpay.

The district court found that of the two reasons cited by the school board, one involved unprotected conduct while the second was clearly protected by the first and fourteenth amendments. The district court reasoned that since protected activity had played a substantial part in the school board's decision, its refusal to renew the contract was improper and Doyle was, therefore, entitled to reinstatement and backpay. The court of appeals affirmed, *per curiam*.

251 N.L.R.B. 1083, *1086; 1980 NLRB LEXIS 1639, **18;
105 L.R.R.M. 1169; 1980 NLRB Dec. (CCH) P17,356

The Supreme Court reversed. In a unanimous opinion, the Court rejected the lower court's application of such a limited "in part" test and ruled that the school board must be given an opportunity to establish that its decision not to renew would have been the same if the protected activity had not occurred. The Court reasoned as follows:

A rule of causation which focuses solely on whether protected conduct played a part, "substantial" or otherwise, in a decision not to rehire, [**19] could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing. The difficulty with the rule enunciated by the District Court is that it would require reinstatement in cases where a dramatic and perhaps abrasive incident is inevitably on the minds of those responsible for the decision to rehire, and does indeed play a part in that decision--even if the same decision would have been reached had the incident not occurred. The constitutional principle at stake is sufficiently vindicated if such an employee is placed in no worse a position than if he had not engaged in the conduct. A borderline or marginal candidate should not have the employment question resolved against him because of constitutionally protected conduct. But that same candidate ought not to be able, by engaging in such conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record, simply because the protected conduct makes the employer more certain of the correctness of its decisions. [429 U.S. at 285-286.]

From this rationale, [**20] the Court fashioned the following test to be applied on remand:

Initially, in this case, the burden was properly placed upon respondent [employee] to show [*1087] that his conduct was constitutionally protected, and that this conduct was a "substantial factor"--or, to put it in other words, that it was a "motivating factor" in the [School] Board's decision not to rehire him. Respondent having carried that burden, however, the District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct. [429 U.S. at 287.]

Thus, the Court established a two-part test to be applied in a dual motivation context. Initially, the employee must establish that the protected conduct was a "substantial" or "motivating" factor. Once this is accomplished, the burden shifts to the employer to demonstrate that it would have reached the same decision absent the protected conduct.

This test in *Mt. Healthy* is further explicated by the Court in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), [**21] a case decided the same day as *Mt. Healthy*. A brief discussion of *Arlington Heights* is helpful in examining the parameters of the *Mt. Healthy* test.

Arlington Heights involved an effort by a real estate developer to obtain a zoning change enabling it to construct a housing development. During the zoning hearing, it became apparent that the new development would be racially integrated. The Village ultimately denied the rezoning and, in response, a group brought suit seeking injunctive and declaratory relief alleging that the decision was racially motivated. The Supreme Court ruled that plaintiffs had "failed to carry their burden of proving that discriminatory purpose was a motivating factor in the Village's decision." (429 U.S. at 270.)

In reaching its decision, the Court invoked the *Mt. Healthy* test. Thus, the Court, citing *Mt. Healthy*, stated that:

Proof that the decision by the Village was motivated in part by a racially discriminatory purpose would not necessarily have required invalidation of the challenged decision. Such proof would, however, have shifted to the Village the burden of establishing that the same decision would [**22] have resulted even had the impermissible purpose not been considered. [429 U.S. at 270-271, fn. 21.]

The *Arlington Heights* decision is instructive in one other respect as well. For in its decision, the Court recognized

that efforts to determine what is the "dominant" or "primary" motive in a mixed motivation situation are usually unavailing. In this regard, the Court stated that a plaintiff is not required

to prove that the challenged action rested solely on racially discriminatory purposes. Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the "dominant" or "primary" one. [429 U.S. at 265.]

Assuming for the moment that the *Mt. Healthy* test is applicable to dual motive discharges under Section 8(a)(3), it is evident that *Mt. Healthy* represents a rejection of an "in part" test which stops with the establishment of a *prima facie* case or at consideration of an improper motive. Indeed, rejection of such an "in part" test is implicit in the Supreme Court's reversal of the district [*23] court's application of such an analysis.

The "dominant motive" test fares no better under *Mt. Healthy*. While a surface similarity between *Mt. Healthy* and the "dominant motive" test exists in that both reject a limited "in part" analysis and both require proof of how the employer would have acted in the absence of the protected activity, the similarity ends there. For the *Mt. Healthy* test and the "dominant motive" test place the burden for this proof on different parties.

As has been noted, under the "dominant motive" test it is the General Counsel who, in addition to establishing a *prima facie* showing of unlawful motive, is further required to rebut the employer's asserted defense by demonstrating that the discharge would not have taken place in the absence of the employees' protected activities. However, it is made abundantly clear in *Mt. Healthy* (and was specifically reiterated in *Arlington Heights*) that after an employee or, here, the General Counsel makes out a *prima facie* case of employer reliance upon protected activity, the burden shifts to the employer to demonstrate that the decision would have been the same in the absence of protected activity. [*24] This distinction is a crucial one since the decision as to who bears this burden can be determinative.

The "dominant motive" test is further undermined by the *Arlington Heights* decision. As noted above, the Court in *Arlington Heights* eschewed the "dominant motive" analysis by specifically stating that it is practically impossible to examine a dual motivation decision and arrive at a conclusion as to what was the "dominant" or "primary" purpose or motive. *Arlington Heights*, 429 U.S. at 265. Finally, the shifting burden analysis set forth in *Mt. Healthy* and *Arlington Heights* represents a recognition of [*1088] the practical reality that the employer is the party with the best access to proof of its motivation.

V. APPLICATION OF THE MT. HEALTHY TEST TO SECTION 8(a)(3)

In the final analysis, the applicability of the *Mt. Healthy* test to the NLRA depends upon its compatibility with established labor law principles and the extent to which the test reaches an accommodation between conflicting legitimate interests. For, as the Supreme Court noted, in unfair labor practice cases:

The ultimate problem is the balancing of the conflicting [*25] legitimate interests. The function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review. [*N.L.R.B. v. Truck Drivers Local Union No. 449, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL*, 353 U.S. 87, 96 (1957).]

Initially, support for the *Mt. Healthy* test of shifting burdens is found in the 1947 amendment of Section 10(c). That amendment provided that:

No order of the Board shall require the reinstatement of any individual as employee who has been suspended or discharged, or the payment to him of any backpay, if such individual was suspended or discharged for cause.

251 N.L.R.B. 1083, *1088; 1980 NLRB LEXIS 1639, **25;
105 L.R.R.M. 1169; 1980 NLRB Dec. (CCH) P17,356

While the amendment itself does not address the "in part" or "dominant motive" analysis or the allocation of burdens, the legislative history does. In explaining the amendment Senator Taft stated:

The original House provision was that no order of the Board could require the reinstatement of any individual or employee who had been suspended or discharged, unless [**26] the weight of the evidence showed that such individual was not suspended or discharged for cause. In other words, it was turned around so as to put the entire burden on the employee to show he was not discharged for cause. Under provision of the conference report, the employer has to make the proof. That is the present rule and the present practice of the Board. [93 Cong. Rec. 6678; 2 Leg. Hist. 1595 (1947).]

The principle that "the employer has to make the proof" is also found in the Supreme Court's decision in *N.L.R.B. v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967). In that case the Court was concerned with the burden of proof in 8(a)(3) cases. It first noted that certain employer actions are inherently destructive of employee rights and, therefore, no proof of antiunion motive is required. Of course, the discharge of an employee, in and of itself, is not normally an inherently destructive act which would obviate the requirement of showing an improper motive. In this context, the Court in *Great Dane* stated that:

If the adverse effect of the discriminatory conduct on employee rights is "comparatively slight," an antiunion motivation [**27] must be proved to sustain the charge if the employer has come forward with evidence of legitimate and substantial business justifications for the conduct. Thus . . . once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to some extent, the burden is upon the employer to establish that he was motivated by legitimate objectives since proof of motivation is most accessible to him. [388 U.S. at 34.]

Thus, both Congress and the Supreme Court have implicitly sanctioned the shift of burden called for in *Mt. Healthy* in the context of Section 8(a)(3). n11

n11 It should be noted that this shifting of burdens does not undermine the established concept that the General Counsel must establish an unfair labor practice by a preponderance of the evidence. The shifting burden merely requires the employer to make out what is actually an affirmative defense (see fn. 6, *supra*) to overcome the *prima facie* case of wrongful motive. Such a requirement does not shift the ultimate burden.

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Indeed, as is indicated by the above quotation of legislative history and the citation of *Great Dane*, the shifting burden process in *Mt. Healthy* is consistent with the process envisioned by Congress and the Supreme Court to resolve discrimination cases, although the process has not been articulated formally in the manner set forth in *Mt. Healthy*. Similarly, it is the process used by the Board. Thus, the Board's decisional process traditionally has involved, first, an inquiry as to whether protected activities played a role in the employer's decision. If so, the inquiry then focuses on whether any "legitimate business reason" asserted by the employer is sufficiently proven to be the cause of the discipline to negate the General Counsel's showing of prohibited motivation. n12 Thus, while the Board's process has not been couched in the language of *Mt. Healthy*, the two methods of analysis are essentially the same.

n12 The absence of any legitimate basis for an action, of course, may form part of the proof of the General Counsel's case. See, e.g., *Shattuck Denn Mining Company v. N.L.R.B.*, 362 F.2d 466 (9th Cir. 1966).

[**29]

251 N.L.R.B. 1083, *1088; 1980 NLRB LEXIS 1639, **29;
105 L.R.R.M. 1169; 1980 NLRB Dec. (CCH) P17,356

Perhaps most important for our purposes, however, is the fact that the *Mt. Healthy* procedure accommodates the legitimate competing interests inherent in dual motivation cases, while at the same [*1089] time serving to effectuate the policies and objectives of Section 8(a)(3) of the Act. As the Supreme Court noted in *N.L.R.B. v. Erie Resistor Corp.*, 373 U.S. 221 (1963), it is fundamental in "situations presenting a complex of motives" that the decisional body be able to accomplish the "delicate task" of

weighing the interests of employees in concerted activity against the interest of the employer in operating his business in a particular manner and of balancing in the light of the Act and its policy the intended consequences upon employee rights against the business ends to be served by the employer's conduct.
[373 U.S. at 229.]

Mt. Healthy achieves this goal.

Under the *Mt. Healthy* test, the aggrieved employee is afforded protection since he or she is only required initially to show that protected activities played a role in the employer's decision. Also, the employer is provided with a formal framework [**30] within which to establish its asserted legitimate justification. In this context, it is the employer which has "to make the proof." Under this analysis, should the employer be able to demonstrate that the discipline or other action would have occurred absent protected activities, the employee cannot justly complain if the employer's action is upheld. Similarly, if the employer cannot make the necessary showing, it should not be heard to object to the employee's being made whole because its action will have been found to have been motivated by an unlawful consideration in a manner consistent with congressional intent, Supreme Court precedent, and established Board processes.

Finally, we find it to be of substantial importance that our explication of this test of causation will serve to alleviate the intolerable confusion in the 8(a)(3) area. In this regard, we believe that this test will provide litigants and the decisionmaking bodies with a uniform test to be applied in these 8(a)(3) cases. n13

n13 Still an additional benefit which will result from our use of the *Mt. Healthy* test is that the perceived significance in distinguishing between pretext and dual motive cases will be obviated.

[**31]

Thus, for the reasons set forth above, we shall henceforth employ the following causation test in all cases alleging violation of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation. First, we shall require that the General Counsel make a *prima facie* showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. n14

n14 In this regard we note that in those instances where, after all the evidence has been submitted, the employer has been unable to carry its burden, we will not seek to quantitatively analyze the effect of the unlawful cause once it has been found. It is enough that the employees' protected activities are causally related to the employer action which is the basis of the complaint. Whether that "cause" was the straw that broke the camel's back or a bullet between the eyes, if it were enough to determine events, it is enough to come within the proscription of the Act.

[**32]

Finally, inherent in the adoption of the foregoing analysis is our recognition of the advantage of clearing the air by abandoning the "in part" language in expressing our conclusion as to whether the Act was violated. Yet, our abandonment of this familiar phraseology should not be viewed as a repudiation of the well-established principles and

concepts which we have applied in the past. For, as noted at the outset of this Decision, our task in resolving cases alleging violations which turn on motivation is to determine whether a causal relationship existed between employees engaging in union or other protected activities and actions on the part of their employer which detrimentally affect such employees' employment. Indeed, it bears repeating that the "in part" test, the "dominant motive" test, and the *Mt. Healthy* test all share a fundamental common denominator in that the objective of each is to determine the relationship, if any, between employer action and protected employee conduct. Until now, in making this determination we frequently have employed the term "in part." But in so doing it only was a term used in pursuit of our goal which is to analyze thoroughly and completely [**33] the justification presented by the employer. It is, however, our considered view that adoption of the *Mt. Healthy* test, with its more precise and formalized framework for making this analysis, will serve to provide the necessary clarification of our decisional processes while continuing to advance the fundamental purposes and objectives of the Act.

VI. APPLICATION OF THE MT. HEALTHY TEST TO THE FACTS OF THE INSTANT CASE

In the instant case, the General Counsel alleges that Respondent discharged Bernard Lamoureux in violation of Section 8(a)(3) and (1) of the Act. Respondent denies this allegation, asserting that Lamoureux was discharged for violating a plant rule against "knowingly altering, or falsifying production time reports, payroll records, time cards." The Administrative Law Judge found that Respondent's discharge of Lamoureux violated Section 8(a)(3) and (1) of the Act. For the reasons set forth below, we agree.

[*1090] The record reveals that at the time of his discharge Lamoureux had been employed by Respondent for over 10 years. He had occupied the position of inspector for 2 years and was considered a better than average employee. Indeed, at the hearing, his work [**34] was described as admirable. On the day prior to his discharge, Lamoureux's supervisor, Forte, was instructed by the plant superintendent to "check" on Lamoureux, who had been observed entering a restroom carrying a newspaper. n15 The next morning, Forte discovered certain discrepancies in Lamoureux's timesheet. The timesheet indicated that Lamoureux had been working on certain jobs at the time when Forte had been looking for him the previous day but had been unable to find him at his work station. n16 Upon reporting this finding to his own supervisor, Forte was told that "the offense was a dischargeable offense."

n15 Respondent never contended that such conduct violated shop rules.

n16 It was conceded that Lamoureux's work activities might legitimately have carried him to other parts of the plant. Nevertheless, Forte did not use the paging system to try to locate Lamoureux, or even check the men's room where Lamoureux was last seen.

Thereafter, Forte was instructed to ask Lamoureux for an explanation. Although Forte [**35] did so, the record reveals that Lamoureux's final check had already been prepared when Forte confronted him with the discrepancy. Respondent then rejected Lamoureux's explanation, in which he conceded that he may not have performed the jobs at the times indicated on his timesheet but maintained that the jobs had in fact been performed that day. Lamoureux was promptly discharged, purportedly for violating a plant rule against "knowingly altering, or falsifying production time reports, payroll records, time cards." Respondent conceded that Lamoureux was not discharged for being away from his work station or for not performing his assigned work. n17

n17 In this connection, we note that Respondent did not seek to determine where Lamoureux had been when Forte discovered him absent from his work station, nor did Respondent seek to verify whether Lamoureux had, as he claimed, performed the inspections indicated on his timesheet. Rather, Respondent simply informed Lamoureux that he was no longer worthy of Respondent's trust.

[**36]

251 N.L.R.B. 1083, *1090; 1980 NLRB LEXIS 1639, **36;
105 L.R.R.M. 1169; 1980 NLRB Dec. (CCH) P17,356

In presenting his *prima facie* case of wrongful motive, the General Counsel demonstrated that Lamoureux had become a leading union advocate, beginning in 1976. During both the 1976 and 1977 election campaigns, both of which were lost by the Union, Lamoureux actively solicited support for the Union among his fellow employees. It is undisputed that Respondent was well aware of his sympathies and activities. Thus, during the 1977 campaign, which like the 1976 campaign appears to have included aggressive electioneering on both sides, Lamoureux was reprimanded by management, allegedly for pressuring an employee regarding the Union. n18 Also, during the 1977 campaign, Respondent's supervisors on several occasions directed gratuitous remarks regarding the Union toward Lamoureux, once calling him the "union kingpin." We also note that the discharge took place just 2 months after the 1977 election.

n18 Respondent's witness later conceded that the word "pressure" was too strong.

In addition, it can scarcely be disputed that [**37] Respondent harbored animus toward both the Union and union activists, including Lamoureux. Respondent's antiunion campaign included, *inter alia*, references to the murder indictment of an official of one of the Union's sister locals in another State, as well as an unsupported claim that Respondent's "chances for survival and growth would be seriously hurt by the presence of a union." In view of the tone of the campaign, along with Respondent's remarks directed specifically to Lamoureux, we agree with the Administrative Law Judge that Respondent displayed considerable animus toward Lamoureux, whom it considered to be the "union kingpin."

The General Counsel also demonstrated that Respondent never previously had discharged an employee under these circumstances, although, as detailed by the Administrative Law Judge, the record shows that employees commonly completed timesheets as Lamoureux had and that such discrepancies had no effect on the accuracy of the system of production control. It also appears that, of the only two other employees ever discharged for violating the rule regarding the falsification of company records, one was discharged for embezzlement and the other for deliberate [**38] forgery of sales records in order to collect fraudulent sales commissions. n19 Furthermore, two employees who had deliberately violated the same rule by falsifying their timecards were issued warnings and were not discharged.

n19 Unlike these employees, it was conceded that Lamoureux could not have benefited financially from the discrepancies on his timesheet.

From the foregoing, we conclude that the General Counsel made a *prima facie* showing that Lamoureux's union activity was a motivating factor in Respondent's decision to discharge him. Our conclusion is based on Respondent's union animus, as reflected in the hostility directed toward Lamoureux resulting from his active role in the union campaign as well as the timing of the discharge, which occurred shortly after completion of the latest union election. Also of significance is Respondent's sudden and unexplained departure from its usual practice of declining to discharge employees for their first violation of this nature. Such action here is especially suspect [**39] in light of Lamoureux's admirable [*1091] work record and the fact that his timesheet discrepancies neither inured to his benefit nor served to affect detrimentally Respondent's production control system.

We further find that Respondent has failed to demonstrate that it would have taken the same action against Lamoureux in the absence of his engaging in union activities. In this regard we note that the record discrepancies were only discovered by Forte following the plant supervisor's directive to "check" on Lamoureux, despite the fact that Respondent had no reason to believe that Lamoureux was untrustworthy. Under the circumstances, such actions suggest a predetermined plan to discover a reason to discharge Lamoureux and thus rid the facility of a union activist. n20 Further undermining Respondent's defense is the evidence which demonstrates disparate treatment. As noted previously, the only instances where discharge was imposed by Respondent as a result of "record discrepancies" were where the employee in question sought to embezzle funds or collect fraudulent sales commissions. Lamoureux's

251 N.L.R.B. 1083, *1091; 1980 NLRB LEXIS 1639, **39;
105 L.R.R.M. 1169; 1980 NLRB Dec. (CCH) P17,356

infraction clearly did not rise to such a level. Indeed, the record demonstrates that [**40] such record discrepancies were commonplace and generally resulted in no discipline whatsoever. In those instances where discipline was imposed, Respondent issued warnings or other forms of discipline short of discharge.

n20 See, e.g., *Lipman Bros., Inc., et al.*, 147 NLRB 1342, 1376 (1964), *enfd.* 355 F.2d 15, 21 (1st Cir. 1966).

Accordingly, for the reasons noted above, we find that Respondent's discharge of Bernard Lamoureux violated Section 8(a)(3) and (1) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Wright Line, a Division of Wright Line, Inc., Worcester, Massachusetts, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 1(b):

"(b) [**41] In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them under Section 7 of the Act."

2. Substitute the attached notice for that of the Administrative Law Judge.

CONCUR BY:

JENKINS

CONCUR:

MEMBER JENKINS, concurring:

I am willing to apply the shifting burden-of-proof standard my colleagues adopt for determining whether a discharge was caused by an unlawful purpose where the discharge may have had more than one cause, not all of them unlawful. This standard may suffice for most cases. However, there may remain a residue, perhaps small, of cases of mixed motive or cause, where the purposes are so interlocked that it is not possible to point to one of them as "the" cause. All of them, both lawful and unlawful, may have combined to push the employer to the decision he would not have reached if even one were absent. In such cases, it is plainly not the latest event, the most recent purpose, which is the cause of the discharge; rather, it is all of them together, from earliest to latest, which cause the discharge. n21

n21 It is the difficulty in singling out one individual cause in such situations which has led to criticism and rejection of a "but for" standard as a measure of cause; there is no logical way to apply a "but for" standard in such cases except to fasten upon the most recent event or motive. See Prosser, "Handbook of the Law of Torts" at 238-239, 4th ed. (1971); LaFave and Scott, "Handbook on Criminal Law," at 249-251 (1972).

[**42]

Where the evidence does not permit the isolation of a single event or motive as the cause of the discharge, then plainly the unlawful motive must be deemed to be part of the cause of the discharge, and the discharge is unlawful. By definition, it took all these straws to break the camel's back, so each of them provides a contribution "but for" which the camel would have survived. It is fair that the party who created this situation, in which isolation of a single cause is

251 N.L.R.B. 1083, *1091; 1980 NLRB LEXIS 1639, **42;
105 L.R.R.M. 1169; 1980 NLRB Dec. (CCH) P17,356

impossible, bear the burden created by his venture into an area prohibited by the Act. Thus, the "in part" standard, as distinguished from the "but for" and "dominant motive" tests, is the only criterion which will effectuate the purposes of the statute. As my colleagues note, the legislative history shows plainly that Congress itself struck this balance, and I read *Mt. Healthy* as also in effect adopting this standard.

Thus, my only reservation now is the way in which the shifting burden-of-proof standard may be applied to prevent unlawful conduct. If experience shows it to be inadequate in application, modification may be required.

ALJ:

LOWELL GOERLICH

ALJ-DECISION:

[*1092] DECISION

STATEMENT OF THE CASE

LOWELL GOERLICH, Administrative [**43] Law Judge: The charge filed by Bernard R. Lamoureux on January 3, 1978, was served on Wright Line, a Division of Wright Line, Inc., the Respondent herein, on January 4, 1978. A complaint and notice of hearing was issued on February 23, 1978. In the complaint it was charged that the Respondent unlawfully discharged Lamoureux on December 30, 1977, in violation of Section 8(a)(1) and (3) of the National Labor Relations Act, as amended, herein referred to as the Act.

The Respondent filed a timely answer denying that it had engaged in or was engaging in the unfair labor practices alleged.

The case came on for hearing at Boston, Massachusetts, on June 19 and July 10, 11, 12, and 13, 1978. Each party was afforded a full opportunity to be heard, to call, examine, and cross-examine witnesses, to argue orally on the record, to submit proposed findings of fact and conclusions, and to file briefs. All briefs have been carefully considered.

FINDINGS OF FACT, n1 CONCLUSIONS, AND REASONS THEREFOR

n1 The facts found herein are based on the record as a whole and observation of the witnesses. The credibility resolutions herein have been derived from a review of the entire testimonial record and exhibits, with due regard for the logic of probability, the demeanor of the witnesses, and the teachings of *N.L.R.B. v. Walton Manufacturing Company & Loganville Pants Co.*, 369 U.S. 404, 408 (1962). As to those witnesses testifying in contradiction to the findings herein, their testimony has been discredited, either as having been in conflict with the testimony of credible witnesses or because it was in and of itself incredible and unworthy of belief. All testimony has been reviewed and weighed in the light of the entire record. No testimony has been pretermitted.

[**44]

I. THE BUSINESS OF THE RESPONDENT

The Respondent is and has been at all times material herein a corporation duly organized under and existing by virtue of the laws of the Commonwealth of Massachusetts.

At all times herein mentioned, the Respondent has maintained its principal office and place of business at 160 Gold Star Boulevard, in the city of Worcester and Commonwealth of Massachusetts (herein called the Worcester location), and is now and continuously has been engaged at said plant in the manufacture, warehousing, and distribution of accessory products for computer rooms to be purchased and transported in interstate commerce from and through

251 N.L.R.B. 1083, *1092; 1980 NLRB LEXIS 1639, **44;
105 L.R.R.M. 1169; 1980 NLRB Dec. (CCH) P17,356

various States of the United States other than the Commonwealth of Massachusetts, and causes, and continuously has caused at all times herein mentioned, substantial quantities of materials to be sold and transported from said plant in interstate commerce to States of the United States other than the Commonwealth of Massachusetts.

The Respondent annually ships materials valued in excess of \$ 50,000 from its Worcester, Massachusetts, location to points outside of the Commonwealth of Massachusetts. The Respondent annually receives materials [**45] valued in excess of \$ 50,000 at its Worcester, Massachusetts, location directly from points outside the Commonwealth of Massachusetts.

The aforesaid Respondent is and has been engaged in commerce within the meaning of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Truck Drivers Union Local 170, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (herein referred to as the Union or Teamsters Local 170), is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The Facts*

On August 27, 1976, and October 20, 1977, representation elections were conducted in Cases 1-RC-14576 and 1-RC-15338, respectively, at the Respondent's facility in a unit of "all production and maintenance employees, including warehousemen, truck drivers, tool-and-die room employees, new product department employees, and cafeteria employees employed by the Employer at its 160 Gold Star Boulevard and 150 Grove Street, Worcester, [*1093] Massachusetts locations, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act." Teamsters Local 170, the only Union on the [**46] ballots, lost both elections. During both election campaigns, the Respondent opposed the Union and urged employees to vote against it. In the most recent campaign in 1977, the Respondent issued antiunion letters and leaflets to the employees. In pressing its intense antiunion campaign, the Respondent published reproductions of certain newspaper articles, derogatory of the Teamsters, one of which displayed a picture of Anthony Provenzano in handcuffs with the caption "Teamster Provenzano Indicted in 1961 Murder."

Moreover, the Respondent couched its appeal in terms of survival, for it wrote its employees, "It is our firm belief, which by the way many of our loyal employees share with us, that Wright Line's chances for survival and growth would be seriously hurt by the presence of a union here . . . and with your NO vote, Wright Line in Worcester can continue on its competitive drive for survival in a very difficult industry." It is positive that the Respondent does not want the Union in its plant.

Lamoureux was the employee who first brought the union to the Respondent's plant in 1976. He "got things going as far as getting pledge cards, getting lieutenants to pass them out. And so [**47] forth." He attended union meetings and solicited union affection at the Respondent's plant. Lamoureux served as an alternate observer at the 1976 election. Lamoureux was as active in the second election as in the first except that he did not serve as an alternative observer. During the 1977 election campaign, Francis O. Forte, supervisor of quality control and timestudy and Lamoureux's boss, called Lamoureux to Manager of Product Engineering Donald McCallum's office and charged him with having been seen "pressuring someone to vote union in the paint department." Lamoureux denied the accusation and stated if Forte persisted he would like a grievance form. Later Forte apologized and said that his use of the word "pressure" was too strong." On another occasion while Lamoureux was counting his paycheck money, Forte remarked, "What's that. Union campaign funds?" Shortly before the 1977 election Rudolph Tuoni, the maintenance foreman, said to Lamoureux, "Everybody knows you're the Union kingpin." n2

n2 This testimony was not denied.

[**48]

Lamoureux was employed as an inspector and was assigned to departments 12 and 14 where he inspected pieces fabricated by the machines in these departments. The function of department 12, the forming department, was to "form bends and angles of the sheet metal parts." Department 14 "performs the operation of welding one or more sheet metal parts together to form components." n3 Lamoureux's job was (as explained by Lamoureux) "just to see that all manufactured items were within blueprint specifications, and through job experience there were a lot of other small areas, such as fit and things like that, which were not on the blueprint."

n3 The Respondent "primarily makes sheet metal parts that form a storage system for the computer industry."

When a machine was set up in either department 12 or 14 n4 Lamoureux performed what was termed a first-piece inspection by which he determined whether the piece produced came up to the blueprint specifications. If it did not, production was not permitted until the piece passed inspection. [**49] When the inspector was not available, the setup man or the foreman was authorized to pass a first piece. After a favorable first-piece inspection was completed a written approval was endorsed on the "traveling inspection document [traveling inspection report] which goes with the blueprint for each job." In addition to first-piece inspections, Lamoureux also performed intermediate inspections of the fabricated piece while the machines were running in order to ascertain whether a variance from the specifications had occurred. The "start" time of each inspection, whether first-piece or intermediate, was recorded on a daily activity sheet n5 on which the piece inspected was identified by number. In addition to the first-piece and intermediate inspection, Lamoureux from time to time also performed visual spot inspections of finished pieces stored in holding areas located in the vicinity of the departments. No entries for such spot inspections were required on the daily activity sheet. As part of Lamoureux's job, according to Forte" there would be times that possibly a part might not conform to the blueprint and if Mr. Lamoureux would feel better by going into another area and checking [**50] to see that the part could function as is before making a disposition, he had this universal authority to do that in the holding areas or the Assembly Department or even Product Development. n6

n4 There were 15 or 20 machines in department 14, and 12 machines in department 15.

n5 While the daily activity sheet provided for an entry of the start time, Lamoureux testified that he usually entered the finish time. The sheet provided no place to enter the finish time.

n6 An inspector's assignments are always sufficient "to consume 100% of his time."

On the morning of December 29, 1977, Paul Southard, the plant superintendent, around 9:55 a.m. came to Forte's office and told Forte that he had seen Lamoureux "taking a newspaper and going into the men's room." He asked Forte to "check it out and find out what was going on." Forte went to departments 12 and 14 and continually walked back and forth through these departments for about 35 minutes looking for Lamoureux. n7 About 10:35 a.m., Lamoureux, approaching from the [**51] direction of department 16, appeared in department 14. Forte said nothing to Lamoureux but returned to his office where he allegedly wrote, "Bernie not in Dept. 12 or 14 from 10:00 to 10:35--Then saw him at far end of Dept. near time clock." In the afternoon, about 1 o'clock, Forte was distributing a description of a dental plan to the inspection department and was unable to find Lamoureux in department 12 or 14. After about 25 minutes Forte found Lamoureux at a workbench inspecting a part. Forte said, "I've been looking for you. I've got to give you this dental plan." Nothing else was said. Forte returned to the office and allegedly noted, "12:50 to 1:05 not in Dept. 12 or 14, 1:10 to 1:20 not in Dept. 12 or 14. [*1094] Then he was at coil bench w/pc at 1:20 p.m." Forte did not ask

251 N.L.R.B. 1083, *1094; 1980 NLRB LEXIS 1639, **51;
105 L.R.R.M. 1169; 1980 NLRB Dec. (CCH) P17,356

Lamoureux where he had been.

n7 Forte did not check the men's room referred to by Southard nor did he use the paging system to try to locate Lamoureux.

According to Forte, the next morning he checked Lamoureux's daily activity sheet and [**52] discovered that Lamoureux had noted that he had performed four inspections between 10 a.m. and 10:35 a.m. and three inspections between 12:55 p.m. and 1:15 p.m., the times when Forte had not seen him in either department 12 or 14. Forte reported his findings to his supervisor, McCallum. McCallum thought that "the offense was a dischargeable offense" and asked Forte to immediately accompany him to the office of Carl Dean, the vice president of manufacturing, and "explain the situation to him in regard to the violation." Forte reviewed his findings for Dean, after which Kendall Allen Hodder, the personnel director, was called to the meeting. Dean allegedly said "to check it out with Mr. Lamoureux to find out what the story was. And if what [Forte] found was substantiated through Mr. Lamoureux's description of what might have gone on, then we could discharge him." Thereafter Forte reduced the events involving Lamoureux to writing. A part of this memorandum recited:

His record sheet shows he allegedly performed specific inspection operations [in] designated departments at times he himself recorded when he was not here as determined by personal and direct observation of his supervisor. [**53] This is a categorical violation of group 1 rule #2--falsification of time reports.

Group 1, rule 2, provides that an employee may be discharged for the first infraction of "knowingly altering or falsifying production time reports, payroll records, or time cards, or punching another employee's time card without supervisory approval." n8

n8 Personnel Director Hodder testified that the Respondent, under the rule, could exercise its discretion whether to discharge an employee or administer a lesser penalty.

An examination of the traveling inspection report and the credible record reveals that Lamoureux had performed all the inspections noted on his daily activity sheet during the times he was absent from departments 12 and 14. In this regard, Forte testified that "it was irrelevant as far as whether he did the work or didn't do the work as far as the decision to discharge." Forte testified also that he made no effort to determine whether inspections had actually been made, n9 although that fact could have been ascertained. [**54] Later in his testimony on redirect examination, Forte said he was instructed by McCallum to check the traveling sheets while the summary was being typed up and before Lamoureux was contacted. Forte said that he discovered from the traveling sheets that Lamoureux had signed the sheets. Prior to Forte's testimony, McCallum had testified, when called by the General Counsel, to the question:

Q. But you never made a check on it to see if he actually did [the work] or not?

A. That was not the issue here.

Later, after Forte had testified, McCallum as the Respondent's witness testified that:

I went with him [Forte] for a brief moment of time to evaluate the traveling inspection documents which also go with the job. This evaluation did not indicate anything that would change our mind regarding the offense; here were some documents which had been signed by Mr. Lamoureux and others that had not and in some cases he would not have been required to sign them as there were intermediate inspections involved. n10

n9 Forte was asked:

Q. Then I can assume, can I not, that you made no effort to determine if, in fact, these particular inspections were or were not made, correct?

A. Correct.

[**55]

n10 The change in the testimony of Forte and McCallum appears to have been an attempt to create the semblance of an investigation whereas there had been none.

At 3 p.m. Lamoureux was called to a meeting with Hodder, McCallum, and Forte. Lamoureux described what occurred:

Well, they had me read the report and Mr. Forte said that he was out in the departments at that time, and he could not find me there and he showed me my sheets with the times on them. He asked me where I was and I told him I had gone to the men's room, but I had checked the jobs out. n11 So they said, "Well, you've got the times wrong." I believe it was Mr. Hodder and he said, "Didn't you read your rule book?" So I think it was around that time that I told him, "C'mon, you guys, you know I'm in here because of the Union."

And, Mr. McCallum stated that he didn't believe Frank could trust me anymore, n12 and he didn't even know if the jobs were checked out or not, and that they were going to discharge me; and they gave me my check.

During the conversation Lamoureux told them that the "times weren't accurate and they never were, [**56] but [he] told them, "If you want them right to the second, I can put them right to the second." Lamoureux also said that he had made visual checks during the time he was away from departments 12 and 14. n13

n11 McCallum testified that Lamoureux told them that he had "performed them earlier, and then just wrote these times in there to fill out this sheet."

n12 McCallum testified that he told Lamoureux that "we could no longer trust him to perform his function, and the requirements of this job, and for falsification of these records." McCallum also observed that "Union activity in no way had anything to do with it."

n13 Forte testified that Lamoureux said he was "down probably in the back checking something."

McCallum asserted that Lamoureux was discharged for falsification of time reports and for no other reason. McCallum explained, "Both Mr. Forte . . . and myself felt that we could no longer trust Mr. Lamoureux in performing his duties. He was indicating that he was on the job, specifying that he actually performed [**57] work when he was nowhere near the area; and therefore we could no longer trust him to carry out the duties of his function."

[*1095] No other employee had been discharged under the same circumstances as Lamoureux. n14 However, employee Geradi, who violated a group I rule, was warned, not discharged; n15 employee Gleason, who also violated a group I rule, was likewise warned and not discharged. n16 In fact, it would appear from an examination of the Respondent's handbook of information for employees that the Respondent was not a harsh employer but tried to

understand and be helpful with its employees' problems. In referring to the personnel department, the handbook reveals that they are here to give you help and guidance. They are expected to insure that both sides of the problem are being brought out fairly . . . We believe it is healthy to talk about grievances." Moreover, Forte said that there would have been "nothing wrong" with Lamoureux being in the "bathroom for 15 to 20 minutes." Indeed, Forte agreed that Lamoureux could have been legitimately away from departments 14 and 15 during the time involved for a "multitude of reasons," including conferring with other inspectors [**58] in other parts of the plant which could have kept him away from the departments for 10 or 15 minutes, "getting a part from stock" which could have consumed "Maybe forty-five minutes," or going to the research and development department. n17 McCallum agreed that a dollar value could not be placed on Lamoureux's inaccurate reporting and considered money not to be the "issue." Moreover, McCallum admitted that Lamoureux had nothing to gain by the alleged falsification.

n14 The only other discharges for falsification of records involved one employee, a salesman who falsified his call reports, thus enabling him to collect money for calls he was not making, and another employee, an accountant, who was embezzling money.

n15 His offense had been deliberate slowing down of production.

n16 Other employees who were only warned were D. Geoffrey, who punched another employee's timecard, and Valerie Rousseau, chief inspector, who failed to punch her timecard and "admitted . . . that someone was punching her timecard. Did not notify her supervisor."

n17 It would seem that the reason Forte failed to inquire of Lamoureux as to his whereabouts during his absence was due to the fact that he did not consider Lamoureux's absence to require explanation.

[**59]

Lamoureux commenced working for the Respondent in November 1966, and had been an inspector for over 2 years. n18 His work was satisfactory; he received merit increases. When Forte rated Lamoureux in 1977, he was rated average or better than average in all categories (eight categories were marked average; seven better than average). In "potential for advancement," he was rated better than average. In this regard, Lamoureux was trained in the use of the optical comparator, a task which only one other inspector (Rousseau) was capable of performing. It involved the inspection of plastics, a difficult job. Lamoureux had instructed other inspectors and had instructed both McCallum and Forte on the optical comparator. Lamoureux had never been disciplined nor had any foreman found fault with his work. From time to time, Lamoureux made helpful suggestions to the Respondent, for which he was commended. Forte agreed that Lamoureux showed concern about doing a good job. A few weeks before Lamoureux was discharged, Forte had commended him for the good work he had performed on the night shift. Forte agreed from his observation of Lamoureux that he "knew what he was doing and could do the job." [**60] In fact, Forte said that Lamoureux "seemed to be very proud of the amount of work he was doing." Indeed, Forte commented, "I was very satisfied with the amount of work that it appeared that he was doing." Forte added, "Just looking at the sheets, I would assume that Mr. Lamoureux was performing in an admirable fashion." There is little question that the credible evidence establishes that Lamoureux did perform in an "admirable fashion," except for the inaccuracies which appeared on his daily activity sheet for December 29, 1977. The inattention which the Respondent allowed this detail is illustrated by an examination of several inspectors' daily activity reports. John Murdock's sheet for October 30, 1977, reveals that he entered a start time at 7:75 and the next at 8, another at 12:90 and the next at 1:10; and another at 1:75 and the next at 2. Other sheets reveal the same discrepancies. On V. Rousseau's sheet of October 28, 1977, she reported start times of 7:60, 7:70, 7:80, and 8. On another sheet, she reported 14:80 and 15:00 as successive start times. Her October 25, 1977, sheet shows starting times of 7:50, 7:60, 7:70, 7:80, and 8. The same was true on October 24. Other discrepancies [**61] appear in her sheets which lead to the conclusion that these were "plugged" entries. A cursory examination of these sheets would have revealed these inaccuracies.

n18 McCallum agreed with the General Counsel that the Respondent had a "real investment" in Lamoureux as an inspector.

Lamoureux testified that when the form first came out John Larson, n19 his supervisor at the time, told the employees that recording "the time was just to have a general idea of when the part was in a particular area of the shop." Lamoureux further said that Forte had not given oral or written instructions on the subject. Larson testified that he wanted something to the "closest five minutes." Larson also testified that the Brooks system, which was instituted after he put the daily activity sheets into effect, used the form to relate the total number of inspections to production. Larson explained:

If there were fifty operations run in the department and we covered forty, if we inspected forty of them, we'd have got an eighty percent coverage.

[**62]

Precise time entries were not considered much of a factor as long as the inspection actually occurred. Both Larson and Forte, who followed Larson as supervisor, reviewed the daily activities sheets of all inspectors and entered on a weekly performance report the percent coverage for each department. The percent coverage was derived from comparing the number of new operations with the number of first-piece inspections. Nothing in this report was related to the time of each piece inspection. These reports were reviewed by McCallum.

n19 Larson is no longer in the Respondent's employ.

According to McCallum the weekly performance reports covered "the percent of coverage in relationship to first piece inspections to the total number of jobs that ran that particular area for the previous week" (80-percent coverage was the norm); "the average number of inspections performed by each individual inspector in a 1-hour period"; the number of inspections performed per hour [*1096] per inspector (the average inspection took 10 [*63] to 15 minutes; n20 and "the actual hours worked both in a daily and weekly basis by inspectors versus planned work hours." Precise time entries for the inspection of each piece were not essential to preparing the weekly performance report. n21 Referring to the daily activity sheet, McCallum said, "We utilize these records for determining levels of staffing, and department and individual performance within a department." Since the sheet noted only start times, there was no way of ascertaining from the sheet (unless otherwise noted) what had been done between the times of the entries. n22 However, the procedure which requires the approval by an inspection before a piece may be produced and the inspector's notation on the traveling inspection report is a positive check as to whether the inspector has performed the inspection.

n20 Forte said the average inspection took about 12 minutes.

n21 McCallum agreed with the General Counsel that the form could be filled out without reference to the entry of a starting time.

n22 Forte testified that a completion time was not included because "the Inspector's job is to continually inspect. When you finish one job and start the next, that is an encompassing factor of the operation. It may be getting of tools and putting away of tools that have to go with the inspection of any given part."

[**64]

II. CONCLUSIONS AND REASONS THEREFOR

It is well established that the General Counsel bears the burden of proving an unlawful discharge, n23 however,

251 N.L.R.B. 1083, *1096; 1980 NLRB LEXIS 1639, **64;
105 L.R.R.M. 1169; 1980 NLRB Dec. (CCH) P17,356

"once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to some extent, the burden is upon the employer to establish that he was motivated by legitimate objectives since proof of motivation is most accessible to him." n24

n23 See *N.L.R.B. v. Borden Co.*, 392 F.2d 412, 416 (5th Cir. 1968); *G. H. Hicks and Sons, Incorporated*, 141 NLRB 1272, 1273 (1963).

n24 *N.L.R.B. v. Great Dane Trailers, Inc.*, 388 U.S. 26, 34 (1967).

Here, the General Counsel has provided ample proof of the Respondent's antiunion motivation. In this regard, the General Counsel has offered credible proof that the discharge of Lamoureux, a union kingpin, would have gratified the Respondent's antiunion stance; n25 that the Respondent [**65] had knowledge of Lamoureux's union connections and knew that he was a union kingpin; n26 that usually the Respondent did not discharge an employee for the commission of a first offense of the kind here committed; and that the Respondent sustained no losses by reason of Lamoureux's misconduct. Moreover, the Respondent had a substantial investment in the cost of training Lamoureux as an inspector. Additionally, Lamoureux was a satisfactory employee, considered by the Respondent to have been good material for advancement. n27 Without a doubt, the General Counsel has established a *prima facie* case. n28

n25 "Of course, the company has a legal right to 'make no bones about its opposition to the Union.' *Hendrix Manufacturing Co. v. N.L.R.B.*, 321 F.2d 100, 103 (5th Cir. 1963). However, the Board is entitled to consider emphatic anti-union attitudes as 'background' against which to measure the impact on employees of management's statements and conduct. 321 F.2d at 103-04, fn. 6." *Independent Inc., d/b/a The Daily Advertiser v. N.L.R.B.*, 406 F.2d 203, 205 (5th Cir. 1969).

[**66]

n26 "The discharge of employees who are actively engaged in union affairs gives rise to an inference of violative discrimination." *N.L.R.B. v. Montgomery Ward & Co., Incorporated*, 554 F.2d 996, 1002 (C.A. 10, 1977).

n27 "The rule is that if the employee has behaved badly it won't help him to adhere to the Union, and his employer's anti-union animus is not of controlling importance. But if the employee is a good worker and his breach of the work rules trivial, the more rational explanation for discharge may be invidious motivation. Such motivation can be found from the absence of any good cause for discharge. This must be so unless we are willing to assume something we know to be false: that businessmen hire and fire without any reason at all.

"In the end after weighing all relevant factors including particularly the gravity of the offense, an unfair labor practice may be found only if there is a basis in the record for a finding that the employees would not have been discharged, though he may have been subjected to a milder form of punishment for the offense, except for the fact of his union activity." *Neptune Water Meter Company, a Division of Neptune International Corporation v. N.L.R.B.*, 551 F.2d 568, 570 (4th Cir. 1977).

[**67]

n28 "Fundamentally, a *prima facie* case is one which is established by sufficient evidence and can be overcome only by a preponderance of competent, credible rebutting evidence." *National Automobile and*

251 N.L.R.B. 1083, *1096; 1980 NLRB LEXIS 1639, **67;
105 L.R.R.M. 1169; 1980 NLRB Dec. (CCH) P17,356

Casualty Insurance Co., 199 NLRB 91, 92 (1972).

In response to the General Counsel's *prima facie* case, the Respondent claims as "legitimate objectives" the fact that Lamoureux must remain discharged because his recording of inaccuracies in start times for inspections exhibited an untrustworthiness which it cannot abide in its employees. n29 It added at the hearing that Lamoureux's alleged offense jeopardized the Brooks system of production control. n30 In weighing the Respondent's alleged justification for its conduct, it must be considered that "an employer may hire and discharge at will, so long as his action is not based on opposition to union activities." *N.L.R.B. v. The Little Rock Downtowner, Inc.*, 341 F.2d 1020, 1021 (8th Cir. 1965), citing *N.L.R.B. v. South Rambler Company*, 324 F.2d 447, 449 (8th Cir. 1963). [**68] "Absent a showing of antiunion motivation, an employer may discharge an employee for a good reason, a bad reason, or for no reason at all." *N.L.R.B. v. O. A. Fuller Super Markets, Inc.*, 374 F.2d 197, 200 (5th Cir. 1967). However, "the mere existence of valid grounds for a discharge is no defense to a charge that the discharge was unlawful, unless the discharge was predicated solely on those grounds, and not be a desire to discourage union activity." *N.L.R.B. v. Symons Manufacturing Co.*, 328 F.2d 835, 837 (7th Cir. 1964). "A justifiable ground for dismissal is no defense if it is a pretext and not the moving cause." *N.L.R.B. v. Solo Cup Company*, 237 F.2d 521, 525 (8th Cir. 1956). "The 'real motive' of the employer in an alleged 8(a)(3) violation is decisive. . . ." *N.L.R.B. v. Brown Food Store*, 380 U.S. 278, 287 (1965). I am convinced that the "real motive" for the Respondent's discharge of Lamoureux was to discourage membership in a labor organization. As for trustworthiness, Lamoureux's work pattern had been the same for over 2 [*1097] years, [**69] concerning which the Respondent had registered no complaints. His work had been satisfactory. The amount of work he produced indicated that he had not and was not cheating the Respondent. His production satisfied the norm set by the Brooks system. Moreover, if the untrustworthiness charge (which sprang from the inaccuracies in the start time recording) is valid, then other inspectors would also have been guilty of untrustworthiness since their daily activity reports disclosed on their faces (and easily discernible) inaccuracies in the recording of start time. n31 Indeed, the credible evidence does not reveal that the Respondent had insisted on a wholly accurate recording of the start times. Furthermore, other employees who were guilty of group 1 rule offenses were warned rather than discharged for the first offense. n32 Moreover, considering the high standard of trustworthiness which the Respondent was exacting from Lamoureux, it is incongruous that it required so little from Chief Inspector Rousseau that she received only a warning for having another employee punch her timecard. Her "phonied up" timecard should arouse a strong suspicion of dishonesty since she could have used the [**70] phony card to cover up an absence, tardiness, or early quitting time, any of which would have cost the Employer money. Moreover, if Rousseau had "phonied up" her timecards, it seems likely that she might have "phonied up" her start times on her daily activity sheets. For this offense Rousseau could have been discharged (see Group 1, rule 2, cited above,) but she was not. Disparate treatment is obvious; discrimination proved. n33

n29 "There is clearly no obligation on the Board to accept at face value the reason advanced by the employer." *N.L.R.B. v. Buitoni Foods Corp.*, 298 F.2d 169, 174 (3 Cir. 1962).

n30 This alleged justification has no validity at all. The credible evidence discloses that the start time entries are not essential nor are they noticed in the compilation of the weekly performance report which is the only document from the inspection department which is utilized within the Brooks system. The Brooks system functions without reference to the start time entries. The Respondent's reliance on this unsubstantiated justification is totally unconvincing and "bears the hallmarks of after-thought." *N.L.R.B. v. S. E. Nichols-Dover, Inc.*, 414 F.2d 561, 564 (3d Cir. 1969)

[**71]

n31 The little apparent attention which the Respondent gave this detail obviously invited abuse.

n32 "Variance from the employer's 'normal employment routine'" further supports illegal motive.

251 N.L.R.B. 1083, *1097; 1980 NLRB LEXIS 1639, **71;
105 L.R.R.M. 1169; 1980 NLRB Dec. (CCH) P17,356

McGraw-Edison Company v. N.L.R.B., 419 F.2d 67, 75 (8th Cir. 1969).

n33 This discrimination assumes a more pronounced aspect when one considers the reprehensible character of phony timecards which the Board describes in *Rock Tenn Company, Corrugated Division*, 234 NLRB 823 (1978), "Falsification of the timecard amounts to dishonesty and theft."

Thus, the record reveals that Lamoureux's first offense of seemingly inoffensive significance n34 (at least when measured by the Respondent's past practice) was blown up to a point where it accommodated the Respondent's antiunion stance.

n34 When measured in terms of need for the information to be derived from exact start times, the offense becomes trivial.

[**72]

The credible evidence further supports a finding that Forte showed little concern for Lamoureux's absence from his job on the two occasions even though Plant Superintendent Southard asked him to check Lamoureux out. His concern deepened only after his conference with McCallum, and the whole incident ripened into a discharge after Dean and Hodder became involved. Indeed, the decision to discharge and the preparation of Lamoureux's final check were wholly completed before the Respondent allowed Lamoureux to counter the charge of untrustworthiness. His discharge was already a *fait accompli*. His good points, the fact that he had actually made the inspections and was not cheating the Respondent, and his explanation for the inaccurate recordings were ignored in reaching the decision to discharge him. The Respondent's attitude was--"Ah ha, we caught him committing an infraction, he must be summarily fired without recourse. "This attitude seems strange and unexplainable for an employer who boasts an enlightened approach to employee problems and grievances in its handbook. It is obvious that the seriousness of the offense was magnified to fit the Respondent's predetermined penalty. When [**73] "the reasons advanced [for a discharge] are not persuasive, the [protected activity] may well disclose the real motive behind the employer's action." *N.L.R.B. v. Melrose Processing Co.*, 351 F.2d 693, 699 (8th Cir. 1965).

I am convinced that the Respondent's "real reason" for discharging Lamoureux was concealed and the reason asserted by the Respondent was false. I draw this conclusion from the record as a whole and from the demeanor of the witnesses produced by the Respondent. I do not believe that they were truthful in revealing the "real reason" for Lamoureux's discharge. The Board has recently said in *Best Products Company, Inc.*, 236 NLRB 1024 (1977):

In Shattuck Denn Mining Corporation v. N.L.R.B., 362 F.2d 466, 470 (9th Cir. 1966), the court stated that where the trier of fact finds that an asserted motive for discharge is false he can infer that there is another motive. "More than that, he can infer that the motive is one that the employer desires to conceal--an unlawful motive--at least where the surrounding facts tend to reinforce that inference."

In any event I conclude [**74] that the discharge of Lamoureux was not based on the reasons declared by the Respondent, but resulted from the Respondent's desire to discourage union activity and gratify its antiunion purposes. n35 "It is well settled that the mere existence of a valid ground for discharge is no defense to an unfair labor charge if such ground was a pretext and not the moving cause.' It must be shown, however, that the improper motive--union activity--is the dominant reason for the discharge." *N.L.R.B. v. Pioneer Plastics Corporation*, 379 F.2d 301, 307 (1st Cir. 1967). "[A] business reason cannot be used as a pretext for a discriminatory firing." *N.L.R.B. v. Ayer Lar Sanitarium*, 436 F.2d 45, 50 (9th Cir. 1970). The Respondent clearly used its reasons as pretexts. It is also clear that the "dominant reason for discharge" was Lamoureux's union activities. Cf. *Berbiglia, Inc.*, 237 NLRB 102 (1978).

n35 In this regard, the Respondent had vigorously opposed the Union during the 1976 and 1977 election

251 N.L.R.B. 1083, *1097; 1980 NLRB LEXIS 1639, **74;
105 L.R.R.M. 1169; 1980 NLRB Dec. (CCH) P17,356

campaigns, and no doubt by the discharge of Lamoureux was preparing for the 1978 campaign.

[**75]

In consideration of this finding, I have reviewed the decisions of the First Circuit upon which the Respondent so heavily relies. The Respondent asserts that the General Counsel has not met the burden of proof in such decisions, specifically citing *N.L.R.B. v. Rich's of Plymouth, Inc.*, 578 F.2d 880, 886 (1st Cir. 1978), as follows:

Respondent having offered a legitimate business justification for its conduct, the burden shifted to the Board to establish by substantial evidence "an affirmative and persuasive reason why the employer rejected the good cause and chose a bad one," [*1098] *N.L.R.B. v. Billen Shoe Co.*, 397 F.2d 801, 803 (1st Cir. 1968). In our repeated efforts to impress this standard upon the Board, we have variously redefined it to mean that the decision would not have been made "but for" the employee's union activity, *Coletti's Furniture, Inc. v. N.L.R.B.*, 550 F.2d 1292, 1293 (1st Cir. 1977), that union animus was the "dominant" reason, *N.L.R.B. v. Lowell Sun Publishing Co.*, 320 F.2d 835, 842 (1st Cir. 1963), or the "controlling" [*76] motive, *N.L.R.B. v. Fibers International Corporation*, 439 F.2d 1311, 1315 (1st Cir. 1971). By whatever phraseology, we have attempted to make it clear that "the mere existence of antiunion animus is not enough" to make out an 8(a)(3) violation, *N.L.R.B. v. Billen Shoe*, supra, 397 F.2d at 803. [Emphasis supplied.]

In addition, I have examined the First Circuit decision cited in the *Rich's of Plymouth* case, *Hubbard Regional Hospital v. N.L.R.B.*, 579 F.2d 1251 (1978), cited by the Respondent, and *P.S.C. Resources, Inc. v. N.L.R.B.*, 576 F.2d 380 (1978). n36 While I am not convinced that the Respondent has offered a legitimate business justification for its conduct (since Lamoureux's omission could have been easily corrected by counseling without any serious consequence to the Respondent), n37 nevertheless, assuming *arguendo* that a legitimate business justification was forthcoming, I am convinced that the General Counsel has met the First Circuit's burden. The Respondent chose the "bad" cause because it wanted to rid itself of a union partisan [*77] and commence to gird itself against the probable next union election campaign. I do not think this was Forte's idea. It originated with Forte's supervisors. I consider Forte to be an honest, forthright individual who was not generally given to lying. As I watched him testifying, this impression prevailed until he was subjected to questions concerning Lamoureux's discharge. Here, being generally a truthful man, he showed physical signs of dissembling. One would have had to have been a novice in this business not to have known he was covering up for his superiors. The Lamoureux incident became a "Federal case" upon its having reached a level of supervision beyond Forte where it was decided that Lamoureux should be discharged forthwith. Indeed, his final check was drawn before he was allowed to state his position. n38

n36 In this case, the court used the language: "However, the evidence that the reasons petitioner has offered for the discharge are 'inconsistent with its previous practice, against its apparent interest and inconsistent with its subsequent actions' . . . sufficiently compensates for the other weak links in respondent's case." 576 F.2d at 384. In the instant case, it obviously was not in the Respondent's best interests to discharge a welltrained, competent employee (who was considered a "real investment"). Moreover, for offenses involving untrustworthiness of as serious a nature, the Respondent had not discharged employees. Indeed, there was no showing by credible evidence that it had been the Respondent's general practice to discharge an employee where the consequences of his offense caused little serious detriment to the Respondent, as here, for the first offense.

[**78]

n37 "Such action on the part of an employer is not natural. If the employer had really been disturbed by the circumstances it assigned as reasons for these discharges, and had had no other circumstances in mind, some work of admonition, some caution that the offending lapse be not repeated, or some opportunity for correction of

251 N.L.R.B. 1083, *1098; 1980 NLRB LEXIS 1639, **78;
105 L.R.R.M. 1169; 1980 NLRB Dec. (CCH) P17,356

the objectionable practices, would be almost inevitable. The summariness of the discharges of these employees, admittedly theretofore satisfactory, gives rise to a doubt as to the good faith of the assigned reasons." *E. Anthony & Sons, Inc.*, 163 F.2d 22, 26-27 (D.C. Cir. 1947).

n38 As the court observed in *United States Rubber Company v. N.L.R.B.*, 384 F.2d 660, 662-663 (5th Cir. 1967), "Perhaps most damning is the fact that [the employee] was summarily discharged after reports of . . . misconduct . . . without being given any opportunity to explain [his conduct] or give [his] version of the incidents." Here Lamoureux's hearing was to give an air of legitimacy to unlawful action already taken.

The Respondent's [**79] reasons for Lamoureux's discharge were both false and pretextual. Accordingly, I find that the Respondent violated Section 8(a)(1) and (3) of the Act by discharging Bernard R. Lamoureux on December 30, 1977. n39

n39 I have considered the decision of the Massachusetts Division of Employment Security in which it was found that "the claimant did not falsify his daily quality control sheet as alleged by the employer," pursuant to the Board's decision on the subject. *Duquesne Electric and Manufacturing Company*, 212 NLRB 142 (1974). However, had I not considered it, my decision would have been the same.

CONCLUSIONS OF LAW

1. The Union is a labor organization within the meaning of Section 2(5) of the Act.
2. The Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and it will effectuate the policies of the Act for jurisdiction to be exercised herein.
3. By unlawfully discharging Bernard R. Lamoureux on December 30, 1977, and refusing thereafter to reinstate [**80] him, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.
4. 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

It having been found that the Respondent has engaged in certain unfair labor practices, it is recommended that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. It having been found that the Respondent unlawfully discharged Bernard R. Lamoureux on December 30, 1977, in violation of Section 8(a)(3) and (1) of the Act, it is recommended in accordance with Board policy that the Respondent be ordered to offer the foregoing employee immediate and full reinstatement to his former position or, if such position no longer exists, to a substantially equivalent position without prejudice to his seniority or other rights and privileges, dismissing if necessary any employee hired on or since December 30, 1977, to fill said position, and make him whole for any loss of earnings that he may have suffered by reason of the Respondent's act herein detailed, [**81] by payment to him of a sum of money equal to the amount he would have earned from the date of his unlawful discharge to the date of an offer of reinstatement, less net earnings during such period, with interest thereon, to be computed on a quarterly basis in the manner established by the Board in [*1099] *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977). n40

n40 See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

251 N.L.R.B. 1083, *1099; 1980 NLRB LEXIS 1639, **81;
105 L.R.R.M. 1169; 1980 NLRB Dec. (CCH) P17,356

Additionally, because the Respondent's unfair labor practices go to the very heart of the Act, a broad order requiring the Respondent to cease and desist from in any other manner infringing upon rights guaranteed to its employees by Section 7 of the Act is recommended. *N.L.R.B. v. Entwistle Manufacturing Co.*, 120 F.2d 532 (4th Cir. 1941).

Upon the basis of the foregoing finding of fact, conclusions of law, and the entire [**82] record in this proceeding, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER n41

n41 In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

The Respondent, Wright Line, a Division of Wright Line, Inc., Worcester, Massachusetts, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in Truck Drivers Union Local 170, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization, by unlawfully discharging any of its employees or discriminating against them in any other manner with respect to their hire or tenure of employment [**83] in violation of Section 8(a)(3) of the Act.

(b) In any other manner interfering with, restraining, or coercing any employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act, as amended, to engage in self-organization, to bargain collectively through a representative of their own choosing, to act together for collective bargaining or other mutual aid or protection, or to refrain from any and all these things.

2. Take the following affirmative action which will effectuate the policies of the Act:

(a) Offer Bernard R. Lamoureux immediate and full reinstatement to his former position or, if such position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, discharging if necessary any employee hired to replace him and make him whole for any loss of pay that he may have suffered by reason of the Respondent's unlawful discharge of him in accordance with the recommendations set forth in the section of this Decision entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security [**84] payment records, time-cards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this recommended Order.

(c) Post its facility at Worcester, Massachusetts, copies of the attached notice marked "Appendix." n42 Copies of said notice, on forms provided by the Regional Director for Region I, after being duly signed by the Respondent's representative, shall be posted by it, immediately upon receipt thereof, for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

251 N.L.R.B. 1083, *1099; 1980 NLRB LEXIS 1639, **84;
105 L.R.R.M. 1169; 1980 NLRB Dec. (CCH) P17,356

n42 In the event that 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."

[**85]

(d) Notify the Regional Director for Region 1, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

APPENDIX:

[*1091contd]

[EDITOR'S NOTE: THE PAGE NUMBERS OF THIS DOCUMENT MAY APPEAR TO BE OUT OF SEQUENCE; HOWEVER, THIS PAGINATION ACCURATELY REFLECTS THE PAGINATION OF THE ORIGINAL PUBLISHED DOCUMENTS.]

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we [*1092] have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT discourage membership in Truck Drivers Union Local 170, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization, by unlawfully discharging any employees or discriminating against them in any other manner with respect to their hire or tenure of employment.

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

WE WILL offer Bernard R. Lamoureux reinstatement to his former job or, if his job no longer exists, to a substantially equivalent [**86] job, discharging, if necessary, any employee hired to replace him.

WE WILL restore his seniority and other rights and privileges and WE WILL pay him the backpay he lost because we discharged him, with interest.

WRIGHT LINE, A DIVISION OF WRIGHT LINE, INC.

Legal Topics:

For related research and practice materials, see the following legal topics:

Administrative Law Agency Adjudication Decisions General Overview Labor & Employment Law Collective Bargaining & Labor Relations Discipline, Layoff & Termination Labor & Employment Law Collective Bargaining & Labor Relations Unfair Labor Practices Interference With Protected Activities



Caution

As of: Jul 19, 2012

SPIELBERG MANUFACTURING COMPANY and HAROLD GRUENBERG

Case No. 14-CA-1103.

NATIONAL LABOR RELATIONS BOARD

112 N.L.R.B. 1080; 1955 NLRB LEXIS 415; 36 L.R.R.M. 1152; 112 NLRB No. 139

June 8, 1955

OPINION:

[1] DECISION AND ORDER**

[*1080] On November 30, 1954, Trial Examiner Reeves R. Hilton issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom, and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. The Trial Examiner also found that the Respondent had not committed any unfair labor practices in connection with the discharge of Mae Biondolillo and recommended the dismissal of that allegation of the complaint. Thereafter the Respondent filed exceptions to the Intermediate Report and a supporting brief, n1 and the General Counsel filed a brief in support of the Intermediate Report.

n1 The Respondent's request for oral argument is hereby denied because the record, including the exceptions and briefs, adequately presents the issues and the positions of the parties.

The Board has reviewed the rulings of the Trial Examiner [**2] made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and briefs, and the entire record in the case and, for the reasons set forth below, has decided to dismiss the complaint in its entirety.

The Trial Examiner found that the Respondent had violated Section 8 (a) (1) and (3) of the Act by its refusal to reinstate Lillian Dalton, Rita Burzinsky, Mary Hocher, and Vida Henthorne at the [*1081] conclusion of a strike at the Respondent's plant. In reaching this result he rejected the Respondent's two primary defenses, which were (1) its refusal to reinstate these employees was in accordance with an arbitration award and therefore proper; and (2) the misconduct of these employees during the strike was in any event sufficient to warrant a refusal to reinstate them. Contrary to the Trial Examiner, we agree with the Respondent's first defense. We therefore find it unnecessary to pass upon its

contention with respect to the strike misconduct.

As part of the settlement of a strike of the Respondent's employees called by Luggage and Leather Workers Local 160, herein called the [**3] Union, the Respondent and the Union agreed to arbitrate the question of whether the four above-named strikers, whom the Respondent did not wish to reinstate because of conduct they assertedly engaged in on the picket line, should be reinstated.

Thereafter, the union membership ratified the contract negotiated by the Union and the Respondent, which provided, *inter alia*, that the arbitration would be held. An agreement executed by the Respondent and the Union simultaneously with the collective-bargaining contract described the method of choosing a three-man arbitration panel and provided that the parties would be bound by the decision of the panel majority.

Shortly thereafter, as described in the Intermediate Report, the arbitration proceeding was held. The Respondent submitted evidence. Three of the four strikers appeared personally and testified. All four were represented by an attorney who filed a brief in their behalf. In these circumstances, it is clear that the four individuals concerned, as well as the Union, actively participated and acquiesced in the arbitration proceeding.

The arbitration award, by a majority of the panel, with the union member dissenting, held that the [**4] Respondent was not obligated to reinstate these four employees. Thereafter, they filed a charge, and the complaint upon which this proceeding is based issued. n2 In finding that the Respondent's refusal to reinstate these four strikers violated the Act, the Trial Examiner rejected the defense based on the arbitration award, on the ground that the Board is not bound by such an award.

n2 We find no merit in any of the Respondent's contentions based upon asserted irregularities in the issuance of the complaint, and agree with the Trial Examiner's disposition of them in the Intermediate Report.

We agree with the Trial Examiner that the Board is not bound, as a matter of law, by an arbitration award. As the court said in the *Disney* case: n3

Clearly, agreements between private parties cannot restrict the jurisdiction of the Board. We believe the Board may exercise [*1082] jurisdiction in any case of an unfair labor practice when in its discretion its interference is necessary to protect the public rights defined [**5] in the Act.

n3 *N. L. R. B. v. Walt Disney Productions*, 146 F. 2d 44 (C. A. 9), cert. denied 324 U.S. 877.

The Board has exercised its discretion in the past to remedy an unfair labor practice even though the parties had used arbitration to dispose of an issue. In so doing, in the *Monsanto* case, n4 the Board said:

There can be no justification for deeming ourselves bound, as a policy matter, by an arbitration award which is at odds with the statute. We shall therefore disregard the award in this case.

n4 *Monsanto Chemical Company*, 97 NLRB 517, enfd. 205 F. 2d 763 (C. A. 8).

And in the *Wertheimer* case, n5 the Board pointed out that where the arbitration had been carried out over the opposition of the individual involved [**6] the circumstances were not such as to warrant the Board, in the exercise of

its discretion, to decline to assert its jurisdiction.

n5 *Wertheimer Stores Corp.*, 107 NLRB 1434.

In the instant case the factors which impelled the Board to exercise its jurisdiction in *Monsanto* and *Wertheimer* are not present. Thus, the arbitration award is not, as it was in *Monsanto*, at odds with the statute. This does not mean that the Board would necessarily decide the issue of the alleged strike misconduct as the arbitration panel did. We do not pass upon that issue. And unlike *Wertheimer*, all parties had acquiesced in the arbitration proceeding. In summary, the proceedings appear to have been fair and regular, all parties had agreed to be bound, and the decision of the arbitration panel is not clearly repugnant to the purposes and policies of the Act. In these circumstances we believe that the desirable objective of encouraging the voluntary settlement of labor disputes will best be served [**7] by our recognition of the arbitrators' award. Accordingly, we find that the Respondent did not violate the Act when, in accordance with the award, it refused to reinstate the four strikers. n6 We shall therefore dismiss the complaint in its entirety.

n6 As noted above, we do not, by this decision, express any opinion as to the legality of the picket-line conduct.

[The Board dismissed the complaint.]

APPENDIX:

INTERMEDIATE REPORT

STATEMENT OF THE CASE

This proceeding brought under Section 10 (b) of the Labor Management Relations Act of 1947, 61 Stat. 136 (herein called the Act) was heard in St. Louis, Missouri, on October 18, 19, and 20, 1954, pursuant to due notice to all parties. The complaint issued on July 23, 1954, by the General Counsel of the National Labor Relations Board, n1 based on charges, as amended, duly filed and served, alleges that Spielberg Manufacturing Company, herein called the Respondent or the Company has engaged in unfair labor practices in violation of Section 8 (a) (1) and (3) of the Act by reason of [**8] its refusal to reinstate 4 employees following a strike and discharged 1 employee because of their membership in and activities on behalf of the Leather and [*1083] Luggage Workers Union, Local No. 160, herein called the Union. The answer of the Respondent admits certain allegations of the complaint but denies the commission of any unfair labor practices.

n1 The General Counsel and the staff attorney appearing for him at the hearing are referred to as the General Counsel, and the National Labor Relations Board as the Board.

At the outset of the hearing the Trial Examiner, without objection, granted the motion for leave to intervene by the International Handbag, Belt and Novelty Workers' Union, AFL, herein called the Intervenor or the International, since the local Union is an affiliate of that organization.

All parties, except Attorney Gruenberg, were present and represented at the hearing and were afforded opportunity to be heard, to examine and cross-examine witnesses, to introduce relevant evidence, to argue orally, and to [**9] file briefs. At the conclusion of the hearing counsel argued the case and thereafter the General Counsel and counsel for the

Respondent submitted briefs which have been duly considered.

Prior to the hearing counsel for the Respondent filed a motion for dismissal of the complaint and for abatement of the proceedings on the grounds that: (1) The charges do not contain a proper jurat; (2) the Regional Director's refusal to issue a complaint was overruled by the General Counsel on appeal by one of the alleged discriminatees rather than the charging party; and (3) the Union and the Company submitted to arbitration the question of whether the four strikers had been unlawfully refused reinstatement and the arbitrators entered a decision to the contrary. The motion was referred to a Trial Examiner who denied the same. The Respondent then made application for special permission to appeal from the ruling, which application was denied by the Board on October 5, 1954. Counsel renewed his motion at various stages of the hearing and each time the Trial Examiner denied the same. The rulings are hereby affirmed. It is well settled that the General Counsel has final authority in respect to the issuance [**10] of a complaint under Section 10 (b) and the exercise of that power is purely a matter of administrative discretion for which the Act makes no provision for review by either the Board or the courts. (*Lincourt v. N. L. R. B.*, 170 F. 2d 306-307 (C. A. 1).) Further, the argument that the discriminatee's appeal did not comply with the technical requirements of the Board's Rules and Regulations is without merit. But assuming it to be true, neither the Administrative Procedure Act nor the Act prohibit the General Counsel from sustaining the appeal for it is always within the discretion of a court or an administrative agency to relax or modify its rules when in a given case the ends of justice require it. Such action is not reviewable, except upon a showing of substantial prejudice and here no such showing has been made. (*N. L. R. B. v. Monsanto Chemical Company, et al.*, 205 F. 2d 763 (C. A. 8).) That phase of the motion based upon the effect of the arbitration award is discussed below.

Upon the entire record in the case and from his observation of the witnesses, the Trial Examiner makes the following:

FINDINGS OF FACT [**11]

I. THE RESPONDENT'S BUSINESS

The pleadings and the stipulation of the parties disclose that the Company, a Missouri corporation, maintains its office and manufacturing facilities in St. Louis, Missouri, where it is engaged in the manufacture and sale of ladies' handbags. The Company annually sells products valued in excess of \$ 100,000 to Edison Brothers Stores, Inc., located in St. Louis, which company sells and ships the products thus purchased from their place of business to places outside the State of Missouri. The Trial Examiner finds that the Company is engaged in commerce within the meaning of the Act.

II. THE LABOR ORGANIZATIONS INVOLVED

The International Union and the Union are labor organizations as defined in the Act.

III. THE UNFAIR LABOR PRACTICE

A. Preliminary statement

Walter A. Deans, an organizer employed by the International Union, testified the Union commenced organizing the employees about April or May 1953, n2 and on August 5, a strike was called, which ended August 24. At that time the Company, according to Saul Spielberg, its president, had some 220 production employees. Richard Kavner, who represented the Union, said that approximately 100 employees actually [**12] participated in the strike, with about 30 more refraining from working.

n2 All dates refer to 1953, unless otherwise stated.

[*1084] On September 22, the Company and the Union executed a contract effective for a period of 5 years. The Company reinstated all striking employees, whose reemployment was requested by the Union, except the four persons herein, namely, Rita Burzinsky, Lillian Dalton, Mary Hocher, and Vida Henthorne, each of whom was denied reinstatement because of misconduct on the picket line. On September 22, the Company and the Union agreed to special arbitration procedure as to these individuals and a special board of arbitration met on October 5 to hear the cases. On October 19, a majority of the board decided that the Company had valid and sufficient reasons for refusing to reinstate them.

B. The issues

The questions to be determined here are: (1) whether the discriminatees engaged in conduct of such a character as would warrant the Company's refusal to reinstate them; and (2) whether the arbitration award [**13] constitutes a bar to these proceedings.

C. The activities of the discriminatees during the strike

The discriminatees were all members of the Union, served on the strike or organizing committee, which was composed of about 18 members, and performed picket duty during the strike. Burzinsky stated, and it is not disputed, that the Company occupied 1 floor in a 7-story building and picketing took place at both the front and rear entrances to the building. Dalton said that at the outset of the strike there were about 80 or 90 persons on the picket line but after a day or so the number fell off and the Union arranged a schedule so that during the normal work shift only 2 pickets were maintained at each entrance. Dalton further stated that the pickets at the front entrance were required to walk near the curb of the sidewalk and that a policeman was on duty at all times. Each of the discriminatees admitted asking the employees not to cross the picket line and calling "scabs" to those who did so. They denied using profane, insulting, or vile language toward any of the company officials or workers.

In support of its contention, the Company, in addition to other witnesses produced 2 supervisors [**14] and 6 employees who related their experience with the individuals in question. Their testimony concerning the acts and conduct of the respective discriminatees is as follows:

Rosemary Walters, department supervisor, said the 4 individuals were the loudest on the picket line and when employees would leave the building in the evening, usually in groups of 20 or 30, they used "foul language to everyone." Walters heard Dalton and Burzinsky call the girls "prostitutes and whores and bitches." She could not remember Hocher or Henthorne saying anything. Walters heard of no complaints from the employees in respect to working with the discriminatees in the event of their reemployment.

Emma Favier, a supervisor, stated she always used the front entrance of the building and constantly observed Dalton and Burzinsky "scream and holler and call the girls s--o--b--s." She saw Hocher and Henthorne only once or twice but made no mention of any remarks by them. While some of the girls in her department said they would not want to work with Dalton, Favier made no report of their sentiment to management officials.

Nellie Williams considered the four girls to be ringleaders of the strike and while she [**15] heard the pickets curse the employees, she said, "but to point out one certain one, I won't, but there were certain ones." Williams and Hocher had been good friends and prior to the strike Hocher had solicited her to sign a union card. Although Williams did not sign up she said she would not cross a picket line. Williams worked on August 5, and that evening Hocher telephoned her and called her a liar because she went through the picket line. Williams replied the strike was not justified because no vote had been taken and Hocher then told her some of the girls would beat her up if she continued to work. Hocher called her a second time but Williams did not relate this conversation other than "she wasn't so mad then." Except for 1 day, Williams worked throughout the strike. She also told her supervisor, Margaret Renner, she would quit if Hocher returned to work.

Hocher said she telephoned Williams and asked her to sign up and stay out with the strikers. She also reminded

Williams of her earlier promise not to cross a picket line and she answered the strike was not legal. n3

n3 The transcript incorrectly shows her reply to be, "it's not me gal."

[**16]

Julia York related that on one occasion Hocher remarked she was a "yellow scab a--" and a "big sucker" for working. Another time she called her a "b--d." [*1085] While Burzinsky called her a yellow scab she could not remember her using any foul language. Dalton likewise called her a yellow scab and a "damned scab." York concluded by saying "they would scream out and call us names but I don't recall any particular ones." York made no mention of any remarks by Henthorne. She also told Renner she would not work with Hocher.

Elda Heinen stated that she used the front entrance and practically every morning Hocher called her a "dirty" or "yellow b--d," "a--kisser" and scab. She informed Renner of these remarks and added that if she returned there would be trouble and she did not care to work with Hocher. Burzinsky and Dalton also cursed and called names to Heinen and other employees. One evening Burzinsky told her to "Kiss Dimples good night because you have kissed his a--all day." One morning when Heinen used the rear entrance Henthorne offered her a pamphlet and remarked "take this, you old scab."

Elizabeth Ely said she saw the four discriminatees at various times on the picket line. She could [**17] not remember "too much" about Burzinsky except that she was with the pickets who were "real loud" and one time, in the presence of Saul Spielberg, called her a "suck a--" for working. Dalton addressed a similar remark to her and also cursed her because she "didn't appreciate the trouble they were going to" in an attempt to obtain better wages and working conditions. She also heard Dalton call Saul Spielberg an "s--o--b--," but she did not say whether the remark was made to him or about him. Ely told Favier she would quit if Dalton came back to work. Ely never heard any remarks on the part of Hocher or Henthorne.

Mae Gillardi related that one time when Hocher was leading the pickets she touched her and called her a scab. Another time she cursed her and called her names. Burzinsky and Dalton also cursed her and called her vile names and one time when she was using the rear entrance Burzinsky shoved her. Gillardi made mention of Henthorne.

Louis Dawson, porter and messenger, stated that Hocher and Burzinsky cursed him and called him a "yellow nigger" and all sorts of "nasty names like that." Dawson made no reference to Dalton or Henthorne.

Eli Spielberg, secretary-treasurer of the Company, [**18] said he was at one of the entrances every morning and evening and heard "a constant flow of abusive language." Dalton, he stated, called him a "fat b--d" and "Jew s--o--b--." Dalton and Burzinsky constantly cursed the girls and called them "streetwalkers" and "whores." When questioned about Henthorne's conduct Spielberg answered:

Well, I can't remember, I mean I would be guessing, but Vida used words and mannerisms and as far as the girls were concerned, the same thing. Constantly cussing them and calling them names for going in there and "don't go in there, the dirty S. B."

He also stated that acts of violence were almost a daily occurrence, which acts consisted of "grabbing the girls . . . physically tampered with them. . . ." Spielberg was not interrogated concerning the acts or conduct of Hocher. Spielberg stated that 3 or 4 days after the strike started from 12 to 50 or 60 pickets, many being employees from nearby factories, would gather at the building in the morning and during the day picketing was limited to 6 or 10 employees. In evening this number increased slightly but the principal picketing, insofar as numbers were concerned, took place in the morning. Spielberg [**19] heard pickets, other than those in question, use vile language.

Saul Spielberg testified he could not recall the number of employees participating in the strike but after its

termination he reemployed all of them, perhaps 100, except the 4 persons involved here, whose activities during the picketing were outstanding. In this respect he stated that Dalton and Burzinsky cursed him and the employees and he received reports from their supervisors concerning their conduct. Hocher likewise called the employees vile names. Spielberg said he received information from his supervisors on Henthorne's activities during the strike and added that she called him a "dirty jew," jostled an employee and "was very boisterous" on the picket line. For these reasons Spielberg refused to reinstate the four strikers.

Irl B. Baris, company attorney, was advised of the events occurring on the picket line the first day, so early the following morning he went to the scene "to observe first hand the characters described" to him. Baris, after walking about the entire area, stationed himself at the rear entrance where there were 12 or 15 pickets including Dalton and Henthorne. While the other pickets called the [**20] workers "scabs," Dalton and Henthorne "were the ones that really used the vile language." He related that when the pickets became aware of his identity "they called me a variety of names," and in particular Dalton called him a "lanky shyster s--o--b--." [*1086] Dalton and Henthorne also directed profane language towards the workers and called them "whores, prostitutes, a--suckers . . . and things of that nature." Again, while other pickets simply requested employees not to cross the line, Dalton and Henthorne used the expression "don't go to work for that b--d, don't cross our picket line you s--o--b--and things of that nature."

Sid Miller, operator of a handbag concession in a store, said he went to the building several times during the strike and one time he observed Dawson attempting to load his truck while 8 or 10 pickets were around him. One of the pickets, he did not know which one, cursed Dawson, and he identified Henthorne as being in the group. He stated that police officers immediately dispersed the pickets and Dawson proceeded with his work.

Testifying on rebuttal, Burzinsky, Hocher, and Henthorne reiterated their denials that they used profane or abusive language to anyone and [**21] stated that Gillardi, Ely, and York cursed them as they went through the picket line.

Alleged Damage to the Company Truck; Remarks to Customers

Eli Spielberg said that one time the air was let out of the truck tires and again sugar was put in the gas tank which ruined the engine. Following one of these acts one of the discriminatees asked him if he would like to know who did it. At different times he also heard all girls say that Dawson, who drove the truck, "would be gotten."

Saul Spielberg stated that Burzinsky intimated that something might happen to the truck and the next day the air was let out of the tires.

Dawson said that once someone let the air out of one tire. In respect to the threats, he stated that "a bunch" of pickets, Burzinsky and Dalton being present, "as a whole" said something about getting him.

Miller related that on one occasion he was looking at the company window display when two pickets rushed up and told him "not to buy that crappy merchandise." He immediately reported the incident to Saul Spielberg and the two of them then returned to the street where he identified Henthorne, and apparently Dalton, as the persons making the remark.

Henthorne admitted addressing [**22] the remark to Miller.

It is sufficient to state that there is no evidence even remotely connecting any of the discriminatees with the alleged damages to the truck and Henthorne's single, innocuous comment to Miller can hardly be construed as a boycott of the Company's products. The Trial Examiner so finds.

D. Settlement of the strike; the collective-bargaining contract and the agreement to arbitrate

Kavner, representative of the International Brotherhood of Teamsters, Chauffeurs and Warehousemen, AFL, and director of negotiations for its St. Louis local, stated that during the course of the strike, around August 22, he received

a request from Ossip Walinsky, president of the International Union, asking his assistance in settling the dispute. Kavner had no connection with either the International Union or the local Union, nor did he have any part in the strike against the Company. Upon receiving this request Kavner talked to one of his superiors, Harold Gibbons, an officer of the Teamsters Union in St. Louis, who granted him permission to enter into the instant controversy.

On August 24, Kavner met with Victor Packman, company attorney, and discussed the possibility of resolving [**23] the dispute by means of a collective-bargaining agreement. Packman suggested that the picket line be removed at once to insure better bargaining conditions and also stated one of the "troublesome features" in concluding an agreement would be the reinstatement of certain employees because of their conduct during the strike. Kavner believed it would be desirable to remove the picket line without an agreement, although he was concerned as to whether the Union would be successful in working out the details of an agreement, especially on the question of arbitration in the event of the Company's refusal to reinstate some of the strikers. Packman then prepared a letter for Kavner, dated August 24, in which he expressed confidence that a contract could be reached but that picketing should be terminated at once. When this was accomplished the Company would resume normal operations and within 1 week, "reemploy those not working for one reason or another." The letter concluded by stating that when terms, already "informally understood," had been worked out the contract would cover present and new employees of the Company.

The same day Kavner called a meeting of the strike committee and read [**24] the letter to them. Kavner discussed the subject with them and informed them that if the [**1087] Union and the Company could not agree on the question of reinstatement, the issue would be submitted to arbitration. That afternoon the Union held a meeting of the striking employees at which time they voted to end the strike.

Approximately 1 week later, Kavner and Walinsky met with Packman, his associate Baris, and Saul Spielberg and concluded an agreement subject to ratification by the union members and resolution of the question of reinstatement of 12 strikers. The parties then held a series of meetings and by September 20, the Company had agreed to reinstate all the strikers except the four discriminatees. As to these persons, the parties tentatively agreed, by separate memorandum, that their cases be submitted to a "special board of arbitration," which agreement was to be considered as part of the contract.

On September 21, the Union held a meeting of its employee members at which Deans read the entire contract and Walinsky explained its terms and conditions. Kavner and Deans were certain that Walinsky advised the members of the special arbitration clause and the fact that the issue concerning [**25] the Company's refusal to reinstate the four employees would be submitted to arbitration. The membership then voted to accept the agreement.

As previously stated the Company and the Union executed a contract, on September 22, effective for a period of 5 years, and which provided, *inter alia*, for maintenance-of-membership and checkoff of dues and provisions governing grievance and arbitration procedure. At the same time the parties also executed the memorandum agreement providing for special arbitration procedure in the cases of the four discriminatees. The agreement stated that Kavner and Packman would be members of the special board of arbitration and would select a third member of the board. It concluded by stating that the decision of the board would be binding upon the parties and the employees to the exclusion of any other procedure or tribunal.

Deans testified that on August 23, Kavner advised him the Company had tentatively agreed to contract terms but he was afraid that 12 employees might not be reinstated. Kavner told Deans not to mention this to any of the strikers since he did not have the names of the employees involved. Deans stated that at the meeting of August 24, [**26] the membership voted to terminate the strike with the understanding that all strikers would be reinstated by August 31, and no mention was made of any arbitration matters at this meeting. By September 21 the Company had reinstated all strikers whose reinstatement had been requested by the Union, except the four discriminatees. At the meeting held on the above date Deans read the entire agreement to the membership and Walinsky referred to the fact that the Company and the Union had agreed to arbitrate the cases of certain employees whom the Company had refused to reinstate. The members then voted to accept the contract. About a week or 10 days after August 31, Deans informed the individuals of

the Company's refusal to reinstate them and that they would submit their cases to arbitration.

Burzinsky testified that at the meeting of the strike committee on August 24, Kavner read Packman's letter and advised them if the picket line was removed the strikers would be called back to work by August 31. When Dalton inquired what would happen if all the employees were not called back, Kavner replied, "You will be called back and if not you will be paid for every day you are out after August 31." [**27] Later that day at the meeting of the membership Kavner and Deans reiterated that if the picket line was removed all the strikers would be reemployed by August 31. Burzinsky and the three other individuals were not reemployed and several weeks later Deans advised her that the Company and the Union would arbitrate their cases. At the meeting of September 21, Walinsky explained the terms of the contract and while he stated there would be arbitration proceedings he did not outline the same nor did the membership vote on whether the cases should be submitted to arbitration. Dalton, Hocher, and Henthorne testified to substantially the same effect.

E. The arbitration proceedings

Kavner and Packman agreed upon Felix Kraft as the third member of the board of arbitration. In brief, Kraft, a public accountant, testified that he had known Packman for some 20 years, that they had represented mutual clients, not including the Company, and that he had had no prior experience in matters of this kind. In agreeing to act as arbitrator Kraft said he understood from Packman that the proceedings "wouldn't last long" and he "got the impression that it would be more or less of a formality."

On October [**28] 5, the board met in Packman's office with Burzinsky, Dalton, Hocher, Attorney Harold Gruenberg, Deans, Baris, and the Spielbergs present. Henthorne [*1088] was informed of the meeting but was sick and unable to attend. n4 The evidence pertaining to the events at this meeting is to the effect, as stated by Baris, that at the outset Gruenberg, who acted as counsel for the Union, questioned Kraft's qualifications to act as arbitrator and announced he would not be bound by any decision of the board. Baris and Packman then showed him the memorandum agreement of September 22, and Gruenberg, after conferring with Deans, agreed to proceed with the matter. The meeting lasted about 2 hours during which Saul Spielberg read a statement giving his position and the 3 discriminatees were asked some questions by counsel.

n4 During the cross-examination of Henthorne, counsel for the Intervenor inquired if Attorney Gruenberg had any interest in this case. The transcript (page 234) quotes the Trial Examiner as stating this to be "a very tricky or low-bred question." This is erroneous for the Trial Examiner did not use the characterization "low-bred," but simply commented it was a very tricky or very broad question.

[**29]

As appears above, a majority of the board, Kraft and Packman, entered a written decision which merely states that the Company was justified in refusing to reinstate the four individuals. Kavner said he disagreed with the majority.

The discriminatees were notified of the decision and thereafter, about October 26, met with Gruenberg, Kavner, Deans, and Gibbons, at the latter's office. Dalton asked why they were not being reinstated and Gibbons told her, "Well, in a case like this some people have to sacrifice their job to get a union contract in, that is what happened here." Gibbons concluded by saying the only thing that could be done would be to find new jobs for them. Burzinsky, Hocher, and Henthorne corroborated Dalton's testimony concerning her conversation with Gibbons.

Deans said Gibbons told them it was regrettable but "they ought to look on the fact their jobs were now lost as a sacrifice for the overall good of the rest of the workers . . ."

At this hearing the International Union took the position that although they disagreed with the decision they would honor their agreement with the Company and abide by its terms.

Concluding Findings

The testimony bearing upon the conduct [**30] of the discriminatees on the picket line is sharply conflicting with numerous company witnesses stating they were cursed and vilified by these persons and the discriminatees denying the use of improper language and, in turn, asserting some of the nonstrikers directed profanity to them. The eight employee-witnesses produced by the Company uniformly testified that these individuals were the loudest of the pickets and described the various name-calling incidents to which they were subjected to on one or more occasions. Although Burzinsky, Dalton, and Hocher were accused of name-calling at some time or another by one or more of this group of witnesses, not one of them mentioned the use of any improper language or conduct on the part of Henthorne. On the other hand Saul Spielberg related that Henthorne personally called him an insulting name and Baris, on the basis of his single visit to the scene, declared that she and Dalton were cursing and degrading the nonstrikers who crossed the picket line. While Eli Spielberg could not remember Henthorne's conduct, nevertheless he proceeded to testify that she acted in the same manner as the other discriminatees and cursed the nonstrikers. Oddly [**31] enough, he did not refer to any misconduct by Hocher, although 5 of the employee-witnesses branded her as one of the principal offenders and 2 of them, Williams and York, claimed they would not work with Hocher, if she was reemployed.

The evidence adduced by the Respondent with respect to Henthorne is plainly inconsistent and contradictory. Thus, eight of its employee-witnesses absolved her of any misconduct while the Spielbergs and Baris claimed the contrary. Certainly, if Henthorne had engaged in the activities asserted by company officials, those acts would have been well known to the nonstrikers and, in view of the attitude of those appearing at the hearing, it is reasonable to assume they would have testified to any such actions on her part. In the teeth of this testimony it would surely tax one's imagination to find that although Henthorne did not use abusive language to the workers, yet she personally insulted Saul Spielberg, the company president. Moreover, Eli Spielberg, concededly without any knowledge or basis therefor, proceeded to condemn her for constant cursing and name-calling. Likewise, Baris, as a result of his one visit to the picket line, accused her of misconduct. [**32] The testimony of the Spielbergs and Baris considered in the light of their other witness is neither plausible nor convincing, and leads to the conclusion that they were simply attempting to support a case against Henthorne. Accordingly, their testimony is rejected. The [*1089] Trial Examiner therefore, concludes and finds that Henthorne did not utter any insulting remarks to Saul Spielberg and that she did not engage in any improper, obnoxious, or questionable acts or conduct while on the picket line.

Further, although Dalton did not specifically deny Eli Spielberg's assertion that she addressed remarks to him personally, the Trial Examiner has considered her general denial adequate and having found Spielberg to be an unacceptable witness concerning similar accusations, the Trial Examiner finds that Dalton did not make the statement claimed by him.

Having closely observed all the witnesses herein and having listened to company witnesses willingly and eagerly unfold a stream of profanity and vile names allegedly directed against them by Burzinsky, Dalton, and Hocher, the Trial Examiner is convinced that they grossly exaggerated the degree and intensity of the discriminatees' conduct on the [**33] picket line. Manifestly, it is hard to believe they ran up and down the streets of St. Louis yelling and cursing and insulting the nonstrikers, even apart from the constant presence of police at the building. In considering the entire record the Trial Examiner entertains no doubt that Burzinsky, Dalton, and Hocher, as well as the nonstrikers and some of the company witnesses, exchanged profane and strong terms with each other during the strike, but that the discriminatees did not go to the extremes as contended by the Company. Indeed, Eli Spielberg admitted that pickets other than those in question resorted to vile language and it is undisputed they were reinstated.

Equally without substance is the contention that the four discriminatees engaged in "common action" and were "*particeps criminis*" in regard to the truck incident and verbal and physical assaults upon nonstrikers. Apart from general accusations against all of the group there is no credible evidence to show that the discriminatees agreed to act in concert. In fact Eli Spielberg said the individuals usually walked in pairs, two being at each entrance. Favier's testimony is to the same effect.

The General Counsel does [**34] not contend that the strike was caused or prolonged by any unfair labor practices by the Company. The strikers therefore were, upon application, entitled to reinstatement unless they had been permanently replaced by new employees. With the possible exception of Henthorne, the discriminatees admitted they had not made individual application for reinstatement. Since Kavner and Packman conducted the bargaining negotiations and as the reinstatement of these persons was one of the principal issues it is reasonable to conclude that the Union made adequate request for reinstatement on behalf of the discriminatees. There is no contention that the Company refused to reemploy these individuals because they had been replaced by new employees.

The question to be determined therefore, is whether Burzinsky, Dalton, and Hoher by indulging in some profanity and name-calling thereby afforded the Company sufficient grounds for its refusal to reinstate them.

The Board and the courts have frequently held that the use of profane and disparaging language by a striker on the picket line does not affect his right to reinstatement. (See e. g., *N. L. R. B. v. Deena Artware, Inc.*, 198 F. 2d 645, 652 [**35] (C. A. 6), cert. denied 345 U.S. 906, enforcing as modified 86 NLRB 732 and 95 NLRB 9; *Kansas Milling Co. v. N. L. R. B.*, 185 F. 2d 413, 420 (C. A. 10), enforcing as modified, 86 NLRB 925, 928.) Again, the Board in *Efco Manufacturing Company*, 108 NLRB 245, ordered the reinstatement of a striker despite the fact that he had called a nonstriker a "wop-bastard," challenged a company official to a fist fight as a means of settling the strike, and called him "yellow" when he failed to accept the challenge. In holding this conduct insufficient to warrant the employer's denial of reinstatement, the Board said:

While the Board has repeatedly stated it does not condone the use of profane epithets in the heat of picket-line animosity, it has nonetheless uniformly said that it does not ignore the realities of speech in the industrial world and has refused to hold that their use renders strikers unsuitable for further employment and justifies denial of reinstatement.

At the same time, the Board plainly stated that [**36] another striker who had addressed a foul and unmentionable remark to a nonstriker exceeded the bounds of permissible, and predictable, picket-line conduct abuse and warranted the company's refusal to reinstate him. There is no evidence in the present case that the discriminatees resorted to any such language while on the picket line.

Accordingly, the Trial Examiner finds that the conduct alleged to have been engaged in by Burzinsky, Dalton, and Hoher is insufficient to justify the Company's denial of reinstatement. The Trial Examiner further finds that by refusing to reinstate Burzinsky, Dalton, Hoher, and Henthorne following the termination of the strike, the Company discriminated against them in regard to their hire or tenure of [*1090] employment and interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed under Section 7 of the Act and engaged in, and is engaging in, unfair labor practices within the meaning of Section 8 (a) (3) and (1) of the Act.

The final issue to be resolved is what effect, if any, does the arbitration award have upon these proceedings. It is, of course, undisputed that on September 22, the Union and the Company signed the [**37] memorandum agreement to arbitrate the cases of the four individuals, that a board of arbitrators was selected and that a hearing of some sort was held on October 5. However, the Trial Examiner entertains serious doubt that the discriminatees agreed to be bound by the decision of the board. Indeed, Dalton testified that when Gruenberg asked, "if we wanted to be bound by any decision and we told him no, we didn't." Henthorne could not recall talking to Gruenberg and was not even present on October 5, because of illness. Whether their continued presence at Packman's office constituted an implied acceptance of the agreement to arbitrate seems rather thin, for it strikes the Trial Examiner that they had little or no choice under the circumstances. However, the Trial Examiner will assume that by taking part in the hearing, Burzinsky, Dalton, and Hoher gave their implied assent to the arbitration agreement. The same cannot be said of Henthorne since she did not attend, although the Union and Gruenberg acted on her behalf. In any event the result would be the same.

It is quite clear that as a matter of law the Board is not bound by the arbitration award and the implied agreement of the discriminatees [**38] to comply therewith.

112 N.L.R.B. 1080, *1090; 1955 NLRB LEXIS 415, **38;
36 L.R.R.M. 1152; 112 NLRB No. 139

In *N. L. R. B. v. Walt Disney Productions* (146 F. 2d 44, 48, (C. A. 9)), the court stated that Section 10 (a) of the Act provides that the Board's power to prevent unfair labor practices affecting commerce shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise and

Clearly, agreements between private parties cannot restrict the jurisdiction of the Board. Therefore, we believe the Board may exercise jurisdiction in any case of an unfair labor practice when in its discretion its interference is necessary to protect the public rights defined in the Act.

The Board, in *Monsanto Chemical Company* (97 NLRB 517, 520), in disregarding an arbitration award stated it has in the past exercised the "discretion" alluded to in the *Walt Disney* case and has remedied an unfair labor practice even though arbitration had been used by the parties to dispose of an issue arising under an agreement. The Board held there can "be no justification for deeming ourselves bound, as a policy matter, by an arbitration award which is at odds [**39] with the statute." The Board therefore ordered reinstatement of an employee whom the arbitrators had decided should be dismissed. The order was enforced in *N. L. R. B. v. Monsanto Chemical Company*, 205 F. 2d 763 (C. A. 8).

Again, in *Wertheimer Stores Corp.*, (107 NLRB 1434) the Board restated the principle that as a matter of law it is not bound by an arbitration award.

In *International Union, United Automobile, Aircraft and Agricultural Implement Workers (Wisconsin Axle Division)* (92 NLRB 968, 971), the Board found the discharge of one employee and threatened discharge of other employees to be discriminatory. Speaking of the effect of arbitration and State Board proceedings upon the unfair labor practices the Board said: "Nor do the arbitration awards directing the discharge of Luebke, or the State Board, whatever its eventual outcome may be, compel a different result." The Court of Appeals for the Seventh Circuit enforced the order of the Board. (194 F. 2d 698.) In rejecting the contention that an order of the Wisconsin Board, as well as the arbitration [**40] award, precluded the Board from finding a violation of the Act, the court, after quoting Section 10 (a) of the Act, declared (p. 702):

Thus the Act confers upon the Board exclusive jurisdiction to prevent unfair labor practices within the meaning of the statute. The Board's exclusive function in this field may not be displaced by action before State agencies or by arbitration. (Cases cited.)

The cases relied upon by company counsel in their brief touch upon the conclusiveness and finality of a valid arbitration award as between private parties, hence, are easily distinguishable from the foregoing authorities and the principles established thereby.

Having concluded, as set forth above, that the conduct of the discriminatees on the picket line was insufficient to justify the Company's refusal to reinstate them, the adverse award is plainly contrary to the policy and decisions of the Board and the courts, and the Board is by no means bound to accept the same. The Trial Examiner [*1091] therefore finds as a matter of law, as well as for the reasons stated above, that the arbitration award does not preclude the Board from exercising its exclusive power to prevent the commission of unfair [**41] labor practices on the part of the Company.

F. *The alleged unlawful discharge of Mae Biondolillo*

Biondolillo was employed in May, worked continuously during the strike and was discharged October 23. About 1 week before her dismissal Biondolillo signed a union card. A few days later she was removed from her regular job and then terminated by Walters because her work was unsatisfactory. Biondolillo engaged in no activities on behalf of the Union and there is no evidence that Walters, or any other supervisory employee or company official, was aware of her having signed the membership card. The General Counsel sought to establish knowledge on the part of the Company by means of the dues checkoff list which the Union submitted to the Company once a month. In this respect, Arthur M. Rueter, business manager for the Union, testified that on October 15, Biondolillo signed a membership card and a card

authorizing the Company to make certain deductions from her wages to be turned over to the Union. Rueter prepared the checkoff list and sent the same to the Company. Under the present circumstances the list would have been sent to the Company during the third week in November and, ordinarily, [**42] Biondolillo's name would have been included. However, she was discharged before Rueter made up the list, consequently her name was omitted therefrom.

Since the evidence failed to establish company knowledge of Biondolillo's union membership and there are no circumstances which would warrant imputing knowledge on the part of the Company, the Trial Examiner granted the Respondents' motion to dismiss her case.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Respondent set forth in section III, above, occurring in connection with the operations of the Company described in section I, above, have a close, intimate, and substantial relation to trade, traffic and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, it is recommended that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. Ordinarily, striking employees are required to make application for reinstatement and here the discriminatees, with the possible exception [**43] of Henthorne, conceded they made no formal application for their jobs. However, in view of Packman's letter of August 24 to Kavner, in which he stated the Company would reinstate all the strikers within 1 week, which letter was read to the striking employees on the same date, the Trial Examiner finds that no individual application for reinstatement was necessary under the circumstances. It is therefore, recommended that the Company offer to Rita Burzinsky, Lillian Dalton, Mary Hocher, and Vida Henthorne immediate and full reinstatement to their former or substantially equivalent positions, n5 without prejudice to their seniority and other rights and privileges. It is also recommended that the Company make whole Rita Burzinsky, Lillian Dalton, Mary Hocher, and Vida Henthorne for any loss of pay they may have suffered because of the discrimination against them, by payment to each of them of a sum of money equal to the amount each would have earned as wages from August 31, 1953, to the date of offer of reinstatement, less their net earnings during such period. Back pay shall be computed in accordance with the Board's *Woolworth* formula n6 on the basis of each separate calendar quarter [**44] or portion thereof during the period from the date of the discriminatory refusal to reinstate to the date of proper offer of reinstatement. Loss of pay shall be determined by deducting from a sum equal to that which each employee would normally have earned for each quarter or portion thereof, less her net earnings n7 if any, in other employment during that period. Earnings in a particular quarter shall have no effect upon the back-pay liability for any other quarter.

n5 *The Chase National Bank of the City of New York, San Juan, Puerto Rico, Branch*, 65 NLRB 827.

n6 *F. W. Woolworth Co.*, 90 NLRB 289.

n7 *Crossett Lumber Company*, 8 NLRB 440.

[*1092] It is also recommended that the Company make available to the Board or its agents, upon request, payroll and other records to facilitate the checking of the amount of back pay due.

Since it has been found that the Company did not unlawfully discharge Mae Biondolillo, it is recommended [**45] that the complaint be dismissed insofar as it alleges her discriminatory discharge.

On the basis of the foregoing findings of fact, and upon the entire record in the case, the Trial Examiner makes the

following:

Conclusions of Law

1. The operations of Spielberg Manufacturing Company occur in commerce as defined in Section 2 (6) and (7) of the Act.
2. International Handbag, Belt and Novelty Workers' Union, AFL, and Leather and Luggage Workers' Union, Local No. 160, are labor organizations within the meaning of Section 2 (5) of the Act.
3. By discriminatorily failing and refusing to reinstate Rita Burzinsky, Lillian Dalton, Mary Hocher, and Vida Henthorne because they engaged in concerted activities, the Company thereby engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (3) and (1) of the Act.
4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.
5. The Respondent did not unlawfully discharge Mae Biondolillo.

[Recommendations omitted from publication.]

Legal Topics:

For related research and practice materials, see the following legal topics:

Labor & Employment Law
Collective Bargaining & Labor Relations
Arbitration
Awards
Labor & Employment Law
Collective Bargaining & Labor Relations
Strikes & Work Stoppages
Labor & Employment Law
Collective Bargaining & Labor Relations
Unfair Labor Practices
Jurisdiction



Questioned
As of: Jul 19, 2012

OLIN CORPORATION and LOCAL 8-77, OIL, CHEMICAL AND ATOMIC
WORKERS INTERNATIONAL UNION, AFL-CIO

Case 3-CA-10410

NATIONAL LABOR RELATIONS BOARD

*268 N.L.R.B. 573; 1984 NLRB LEXIS 1171; 115 L.R.R.M. 1056; 1983-84 NLRB Dec.
(CCH) P16,028; 268 NLRB No. 86*

January 19, 1984

JUDGES: By Donald L. Dotson, Chairman; Robert P. Hunter, Member; Patricia Diaz Dennis, Member; Don A. Zimmerman, Member

OPINION:

[**1]

DECISION AND ORDER

[*573] On 29 April 1983 Administrative Law Judge Bernard Ries issued the attached decision. The General Counsel filed exceptions and a supporting brief, and Respondent filed cross-exceptions and a supporting brief.

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

The facts are fully set forth in the judge's decision. In brief, the Union is the exclusive collective-bargaining representative of Respondent's approximately 260 production and maintenance employees. The 1980--83 collective-bargaining agreement contained the following provision:

Article XIV - Strikes and Lockouts

During the life of the Agreement, the Company will not conduct a lockout at the Plant and neither the Local Union nor the International Union, nor any officer or representative [sic] of either, will cause or permit its members to cause any strike, slowdown or stoppage (total or partial) of work or any [**2] interference, directly or indirectly, with the full operation of the plant.

Employee Salvatore B. Spatorico was president of the Union from 1976 until his termination in December 1980.

268 N.L.R.B. 573, *573; 1984 NLRB LEXIS 1171, **2;
115 L.R.R.M. 1056; 1983-84 NLRB Dec. (CCH) P16,028

n1 On the morning of 17 December, Respondent suspended two pipefitters for refusing to perform a job that they felt was more appropriately millwright work. A "sick out" ensued during which approximately 43 employees left work that day with medical excuses. Respondent gave formal written reprimands to 39 of the employees who had engaged in the sick out. In a letter dated 29 December, Respondent notified Spatorico that he was discharged based on his entire record and in particular for threatening the sick out, participating in the sick out, and failing to prevent it.

n1 Unless otherwise indicated, all dates hereafter are in 1980.

Spatorico's discharge was grieved and arbitrated. After a hearing, the arbitrator found that a sick out had occurred at Respondent's facility on 17 December, that Spatorico "at least partially caused or participated" in it, and that he failed to try to stop it until after it had occurred. The arbitrator concluded that Spatorico's conduct contravened his obligation [**3] under article XIV of the collective-bargaining agreement set forth above. The arbitrator also stated, "Union officers implicitly have an affirmative duty not to cause strikes which are in violation of the clause, not to participate in such strikes and to try to stop them when they occur." Accordingly, the arbitrator found that Spatorico had been appropriately discharged.

Noting that the unfair labor practice charges had been referred to arbitration under *Dubo Mfg. Corp.*, 142 NLRB 431 (1963), the arbitrator addressed these charges and found "no evidence that the company discharged the grievant for his legitimate Union activities." The arbitrator again stated his conclusion that Spatorico had been discharged for participating in and failing to stop the sick out because Spatorico "is a Union officer but the contract's no strike clause specifically prohibits such activity by Union officers." (Emphasis added.)

The judge declined to defer to the arbitration award on the grounds that although the arbitrator referred to the unfair labor practice issue he did not consider it "in any serious way." The judge determined that the arbitrator was not competent to decide that unfair labor [**4] practice issue because the award was limited to interpretation of the contract. Moreover, he determined that the arbitrator did not explicitly refer to the statutory right and the waiver questions raised by the unfair labor practice charge. On the merits, however, the judge agreed with the arbitrator's conclusion in that he found Spatorico's "participation in the strike was inconsistent with his manifest contractual obligation to attempt to stem the tide of unprotected activity." The judge concluded that article XIV of the collective-bargaining agreement was sufficiently clear and unmistakable to waive, at the least, the sort of conduct in which Spatorico engaged, that, therefore, "Spatorico exposed himself to the greater liability permitted by the Supreme Court" in *Metropolitan Edison Co. v. NLRB*, 103 S.Ct. 1467 (Apr. 4, 1983), and that Respondent did not violate Section 8(a)(3) and (1) of the Act by discharging him while merely reprimanding other employees.

We agree with the judge that the complaint should be dismissed. We do so, however, without reaching the merits because we would defer to the arbitrator's award consistent with the standards set forth in *Spielberg Mfg.* [**5] Co. n2 In its seminal decision in *Spielberg*, the Board held that it would defer to an arbitration award where the proceedings appear to have been fair and regular, all parties have agreed to be bound, and the decision of the arbitrator [**574] is not clearly repugnant to the purposes and policies of the Act. The Board in *Raytheon Co.*, n3 further conditioned deferral on the arbitrator's having considered the unfair labor practice issue. Consistent application of the *Raytheon* requirement has proven elusive, and as illustrated by the recent *Propoco* n4 case, its scope has expanded considerably. Accordingly, in his dissent in *Propoco*, Member Hunter proposed certain standards limiting the application of *raytheon*. As set forth below, we adopt these standards which in our view more fully comport with the aims of the Act and American labor policy.

n2 112 NLRB 1080 (1955).

n3 140 NLRB 883 (1963).

n4 *Propoco, Inc.*, 263 NLRB 136 (1982), enf. with unpublished, nonprecedential opinion, Case No.

268 N.L.R.B. 573, *574; 1984 NLRB LEXIS 1171, **5;
115 L.R.R.M. 1056; 1983-84 NLRB Dec. (CCH) P16,028

83--4058 (2d Cir. 1983). See also *American Freight System*, 264 NLRB No. 18 (Sept. 27, 1982).

It hardly needs repeating that national policy strongly favors the [**6] voluntary arbitration of disputes. The importance of arbitration in the overall scheme of Federal labor law has been stressed in innumerable contexts and forums. n5 In our view, the Propoco majority diminished significantly the role of private dispute resolution by formulating a standard of review that arbitration awards are appropriate for deferral only when the Board determines on de novo consideration that the award disposes of the issues just as the Board would have. This approach of determining the merits before considering the appropriateness of deferral was applied here by the judge, and he predictably reached a decision not to defer. The judge's decision here, like so many other past decisions of this sort, serves only to frustrate the declared purpose of Spielberg to recognize the arbitration process as an important aspect of the national labor policy favoring private resolution of labor disputes.

n5 See for example Sec. 203(d) of the LMRA, 29 U.S.C. 173(d) and the so-called Steelworkers Trilogy, *Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); and *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). See also *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957).

The Supreme Court in *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965), recognized the importance of grievance-arbitration as a machinery for dispute resolution.

Congress has expressly approved contract grievance procedures as a preferred method for settling disputes and stabilizing the "common law" of the plant. LMRA § 203(d), 29 U.S.C. § 173(d); § 201(c), 29 U.S.C. § 171(c)... Union interest in prosecuting employee grievances is clear. Such activity complements the union's status as exclusive bargaining representative by permitting it to participate actively in the continuing administration of the contract. In addition, conscientious handling of grievance claims will enhance the union's prestige with employees. Employer interests, for their part, are served by limiting the choice of remedies available to aggrieved employees. And it cannot be said, in the normal situation, that contract grievance procedures are inadequate to protect the interests of an aggrieved employee until the employee has attempted to implement the procedures and found them so." *Id.* at 653.

[**7]

Accordingly, we adopt the following standard for deferral to arbitration awards. We would find that an arbitrator has adequately considered the unfair labor practice if (1) the contractual issue is factually parallel to the unfair labor practice issue, and (2) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice. n6 In this respect, differences, if any, between the contractual and statutory standards of review should be weighed by the Board as part of its determination under the Spielberg standards of whether an award is "clearly repugnant" to the Act. And, with regard to the inquiry into the "clearly repugnant" standard, we would not require an arbitrator's award to be totally consistent with Board precedent. Unless the award is "palpably wrong," n7 i.e., unless the arbitrator's decision is not susceptible to an interpretation consistent with the Act, we will defer.

n6 This approach is supported by Board precedent. See, e.g., *Kansas City Star Co.*, 236 NLRB 866 (1978), and *Atlantic Steel Co.*, 245 NLRB 814 (1979).

n7 *International Harvester Co.*, 138 NLRB 923, 929 (1962), *affd. sub nom. Ramsey v. NLRB*, 327 F.2d 784 (7th Cir. 1964), cert. denied 377 U.S. 1003 (1964), quoted in former Member Penello's dissenting opinion in *Douglas Aircraft Co.*, 234 NLRB 578, 581 (1978), *enf. denied* 609 F.2d 352 (9th Cir. 1979).

[**8]

Finally, we would require that the party seeking to have the Board reject deferral and consider the merits of a given case show that the above standards for deferral have not been met. Thus, the party seeking to have the Board ignore the

268 N.L.R.B. 573, *574; 1984 NLRB LEXIS 1171, **8;
115 L.R.R.M. 1056; 1983-84 NLRB Dec. (CCH) P16,028

determination of an arbitrator has the burden of affirmatively demonstrating the defects in the arbitral process or award.
n8

n8 To the extent that *Suburban Motor Freight*, 247 NLRB 146 (1980), provided for a different allocation of burdens in deferral cases, it is overruled.

The dissent attempts to distort our holding here by asserting, in essence, that we are depriving employees of their statutory forum. On the contrary, the Board expressly retains and fulfills its statutory obligation to determine whether employee rights have been protected by the arbitral proceeding by our commitment to determine in each case whether the arbitrator has adequately considered the facts which would constitute unfair labor practices and whether the arbitrator's decision is clearly repugnant to the Act. We differ with our dissenting colleague concerning the scope of the inquiry into the arbitrator's consideration of unfair labor practices because our [**9] clarifications of the Spielberg standards are, in our view, necessary to restrict the "overzealous dissection of [arbitrators'] opinions by the NLRB" decried by the Ninth Circuit in *Douglas Aircraft Co. v. NLRB*, 609 F.2d 352, 355 (9th Cir. 1979). That misdirected zeal has resulted in such infrequent deferral by the Board that its occasional exercise has had little substantive relationship to a mechanism which daily settles uncounted labor disputes to the satisfaction of the labor relations community.

[*575] Accordingly, the infrequent deferrals by the Board (and the General Counsel's concomitant failure to defer at the complaint stage) under the allocation of burdens set forth in *Suburban Motor Freight*, 247 NLRB 146 (1980), lead us to the conclusion that a different allocation of burdens is more consistent with the goals of national labor policy. n9 For these reasons we are requiring that the party seeking to have the Board reject deferral and consider the merits of a given case show that the above standards for deferral have not been met. Thus, if a respondent establishes that an arbitration concerning the matter before the Board has taken place, the burden of persuasion [**10] rests with the General Counsel to demonstrate that there are deficiencies in the arbitral process requiring the Board to ignore the determination of the arbitrator and subject the case to de novo review. n10

n9 We note that no party to this proceeding has placed in the record those statistics relied on by our dissenting colleague. The basis for the statistics and how they were compiled is unexplained. For these reasons we find it inappropriate to base any decision on this equivocal material.

Furthermore, the statistics cited by the dissent, even if they established the proposition our dissenting colleague urges, do not diminish the need to adopt the standards enunciated today. Our primary concern is with the failure of the Board itself to defer in a consistent manner thus setting an improper example for the General Counsel and administrative law judges. We are aware that arbitration has been successful and consider that all the more reason to provide the General Counsel with firm guidelines particularly in the area of discriminatory treatment of individuals now subject to deferral once again under Collyer as set forth in our decision in *United Technologies Corp.*, 268 NLRB No. 83, issued today. In this regard we note that the statistics relied on by our colleague are not enumerated according to types of charges filed nor do they indicate what percentage of the total figures are being referred to, nor even whether those charges were meritorious and would otherwise have resulted in issuance of complaint; the last being a discretionary decision of the General Counsel not reviewable by the Board. In addition, the statistics do not reveal how many of the previously deferred cases were dismissed or withdrawn for reasons unrelated to the deferral such as the merits of the underlying charge.

Member Dennis does not quarrel with the dissent's citation of agency statistics, but she finds that the statistics at most show that deferral by the General Counsel at the regional level works. The past policy of inconsistent and infrequent deferral by the Board itself, however, has created misunderstanding and has overly restricted deferral. Member Dennis agrees with her colleagues in the majority that the correction of this past policy is especially important to give full force and effect to today's decision in *United Technologies Corp.*

n10 Contrary to the dissent's claim, we are not returning to *Electronic Reproduction Service*, 213 NLRB 758

268 N.L.R.B. 573, *575; 1984 NLRB LEXIS 1171, **10;
115 L.R.R.M. 1056; 1983-84 NLRB Dec. (CCH) P16,028

(1974), in its entirety. Rather, we agree only with that part of *Electronic Reproduction* which placed on the General Counsel the burden of demonstrating that the arbitration is unworthy of deferral. We do not resurrect that part of *Electronic Reproduction* which required no more than an "opportunity" to present the unfair labor practice issue to the arbitrator to warrant deferral. We further note that although *Electronic Reproduction* was criticized by the Ninth Circuit in *Arthur N. Stephenson v. NLRB*, 550 F.2d 535 (1977), that court's subsequent decisions in *NLRB v. Max Factor & Co.*, 640 F.2d 197 (1980), cert. denied 451 U.S. 983 (1981), and *Ad Art v. NLRB*, 645 F.2d 669 (1980), made clear that its objection was to that part of *Electronic Reproduction* which we do not adopt today. These later decisions also cast doubt on that court's adoption of the criteria set forth in *James Banyard v. NLRB*, 505 F.2d 342 (D.C. Cir. 1974). Thus, the dissent's reliance on *Stephenson* is questionable.

[**11]

The dissent argues that some courts have, at least implicitly, approved the *Suburban Motor Freight* standard. The decisions cited, however, have said no more than that *Suburban* fell within the Board's "wide discretion"; the decisions do not find that the *Suburban* standards are the only ones consistent with the statute. Similarly, although some of these decisions have approved the Board's refusal to defer, these decisions have been based on the Board's conceded discretion in this area. Significantly, some courts have concluded that the Board failed to exercise its discretion under *Spielberg* consistently and evenhandedly. At least six circuits have found that the Board abused its discretion in failing to defer to arbitral awards; three of those decisions reversed Board decisions not to defer made under *Suburban Motor Freight*.ⁿ¹¹ Indeed, recently one court noted that the only explanation for the erroneous refusal of the Board (including our dissenting colleague) to defer, while deferring correctly in a prior similar case, was the intervening issuance of *Suburban Motor Freight*.ⁿ¹² Contrary to the dissent, therefore, we find that the courts' opinions are [**12] further evidence that the Board's past *Spielberg* policy was not so much policy as it was whim. What we declare today is [*576] our commitment to a policy of full, consistent, and evenhanded deference to a significant process within our national labor policy where it meets what we understand to be appropriate safeguards for statutory rights.

ⁿ¹¹ *Douglas Aircraft Co. v. NLRB* (9th Cir.), *supra*; *NLRB v. Pincus Brothers*, 620 F.2d 367 (3d Cir. 1980); *Liquor Salermen's Local 2 (Charmer Industries) v. NLRB*, 664 F.2d 318 (2d Cir. 1981); *NLRB v. Motor Convoy*, 673 F.2d 734 (4th Cir. 1982); *American Freight System v. NLRB*, 114 LRRM 3513, 99 LC P10,581 (D.C. Cir. 1983); and *Richmond Tank Car Company v. NLRB*, F.2d (5th Cir. 1983). In *Douglas Aircraft* and *Pincus Brothers* the courts found, contrary to the Board, that the arbitrator's decisions were not repugnant to the Act and were thus worthy of deferral. The courts used formulations essentially similar to the one we rely on here. In this regard, the Ninth Circuit in *Douglas Aircraft* held that "[i]f the reasoning behind an award is susceptible of two interpretations, one permissible and one impermissible, it is simply not true that the award is 'clearly repugnant' to the Act." (Id. at 354.) Similarly, the Third Circuit in *Pincus Brothers* stated:

As a result of both judicial and Board deference to arbitration awards, an arbitral result could be sustained which is only arguably correct and which would be decided differently in a trial de novo. The national policy in favor of labor arbitration recognizes that the societal rewards of arbitration outweigh a need for uniformity of result or a correct resolution of the dispute in every case. The parties are not injured by deference to arbitration because it is the parties themselves who have selected and agreed to be bound by the arbitration process. To the extent that the parties surrender their right to a subsequent full hearing before the Board or a court, it is a voluntary waiver, consistent with the national policy. [650 F.2d at 374. Footnote omitted.]

The other three cases arose subsequent to *Suburban Motor Freight* and concerned the requirement that arbitrators consider the unfair labor practice issues. These courts found that the Board had abused its discretion by construing this requirement too broadly. We note in particular that in *Charmer Industries* the court stated: "Because both the contractual and statutory issues rest on the same factual determinations, the arbitrator's better position and expertise as a factfinder strengthen the case for deference to his findings. [Citation omitted.] Under these circumstances, to insist here that the arbitrator announce that his resolution of the contractual dispute is

268 N.L.R.B. 573, *576; 1984 NLRB LEXIS 1171, **12;
115 L.R.R.M. 1056; 1983-84 NLRB Dec. (CCH) P16,028

intended as a resolution of the statutory issue as well is to impose a purely formalistic requirement." *664 F.2d* at 325.

n12 American Freight System, above, denying enforcement of the Board's decision, *264 NLRB No. 18* (Sept. 27, 1982) (former Chairman Van de Water and Member Hunter dissenting separately). Most recently the Board has been criticized for its failure to defer in *Richmond Tank Car*, supra, in which the Fifth Circuit agreed with Member Hunter's dissenting position that deferral was appropriate.

[**13]

Turning now to the case before us, we find that the arbitral proceeding has met the Spielberg standards for deferral, and that the arbitrator adequately considered the unfair labor practice issue. First, it is clear that the contractual and statutory issues were factually parallel. Indeed, the arbitrator noted that the factual questions that he was required to determine were "1) whether or not there was a sick out and 2) whether the grievant caused, participated in or failed to attempt to stop the sick out, i.e., whether the grievant failed to meet the obligation imposed upon him by Article XIV." These factual questions are coextensive with those that would be considered by the Board in a decision on the statutory question---i.e., whether the collective-bargaining agreement clearly and unmistakably proscribed the behavior engaged in by Union President Sparatorico on 17 December 1980.

Second, it is equally apparent that the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice. n13 In this respect, the General Counsel has not shown that the arbitrator was lacking any evidence relevant to the determination of the nature of the obligations [**14] imposed by the no-strike clause in the collective-bargaining agreement and to the determination of the nexus between that clause and Sparatorico's conduct. Thus the evidence before the arbitrator was essentially the same evidence necessary for determination of the merits of the unfair labor practice charge.

n13 The only factual discrepancy revealed by the record is one which, if anything, might have made the record of the arbitral proceeding more favorable to the alleged discriminatee than the record in the instant proceeding. Thus, in the arbitration hearing Sparatorico apparently testified that he was genuinely physically ill and was unaware of the work stoppage when he left the plant. At the unfair labor practice hearing, however, Sparatorico conceded that he was not physically ill and did know that a work stoppage was underway as he left the plant.

Finally, we turn to whether the arbitrator's award is clearly repugnant to the purposes and policies of the Act. n14 In this regard, the Supreme Court in *Metropolitan Edison Co.*, supra, recently addressed the merits of the substantive issue involved here. In *Metropolitan Edison* the collective-bargaining agreement contained [**15] only a general no-strike/no-lockout clause. Two arbitral awards had interpreted a similar clause in prior contracts to impose a higher duty on union officials, but the currently operative collective-bargaining agreement stated that arbitral awards were binding only for the term of the agreement. On these facts, the Court found that the Union had not clearly and explicitly waived the Section 7 rights of its employee officials, and accordingly that the employer violated Section 8(a)(3) and (1) of the Act by disciplining the officials more severely than rank-and-file employees. The Court noted, however, that a "union and an employer reasonably could choose to secure the integrity of a no-strike clause by requiring union officials to take affirmative steps to end unlawful work stoppages," n15 and that a union lawfully may bargain away the statutory protection accorded union officials in order to secure gains it considers more valuable to its members. A union's "decision to undertake such contractual obligations," the Court added, "promotes labor peace and clearly falls within the range of reasonableness accorded bargaining representatives." n16

n14 No party contends that the parties had not agreed to be bound by arbitration or that the proceedings were not fair and regular.

n15 *Metropolitan Edison Co. v. NLRB*, supra at 1477.

n16 Id.

[**16]

Article XIV of the parties' contract here, in addition to a general no-strike/no-lockout obligation similar to the clause in issue in Metropolitan Edison, includes a proscription that "neither the Local Union nor the International Union, nor any officer or representative [sic] of either, will cause or permit its members to cause any strike, slowdown or stoppage (total or partial) of work or any interference, directly or indirectly, with the full operation of the plant." Certainly, were we reviewing the merits, Board members might differ as to the standards of specificity required for contractual language waiving statutory rights and as to whether the above language meets those standards at least as applied to employee Sparatorico. The question of waiver, however, is also a question of contract interpretation. An arbitrator's interpretation of the contract is what the parties here have bargained for and, we might add, what national labor policy promotes. Particularly in view of the additional proscriptions in the no-strike clause quoted above, the arbitrator here had a reasonable basis for finding as he did, in reference to the unfair labor practice charge, that the clause "specifically [**17] prohibits" union officers from engaging in activity of the sort engaged in by Sparatorico. n17 We find that the arbitrator's contractual interpretation is not clearly repugnant to either the letter or the spirit of the Supreme Court's opinion in Metropolitan Edison, which held that a union may waive the right of its officials to acquiesce in unprotected work stoppages.

n17 See generally the dissent of former Chairman Van de Water and Member Hunter in *United States Steel Corp.*, 264 NLRB No. 10 (Sept. 24, 1982).

Accordingly, we find that there is no evidence that the statutory and contractual issues are factually [*577] dissimilar or that facts generally relevant to the unfair labor practice issue were absent from the record made before the arbitrator. Additionally, the General Counsel has failed to show that the arbitrator's award is clearly repugnant to the Act, i.e., that the arbitrator's decision is not susceptible to an interpretation consistent with the Act. Thus, we shall defer to the grievance arbitration award and dismiss the complaint in its entirety.

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

DISSENT BY:

ZIMMERMAN

DISSENT:

MEMBER [**18] ZIMMERMAN, dissenting in part:

I dissent from the overruling of *Suburban Motor Freight*, 247 NLRB 146 (1980), and *Propoco, Inc.*, 263 NLRB 136 (1982). My colleagues in the majority have grossly mischaracterized and unjustifiably rejected a well-reasoned and judicially approved addition to the original Spielberg n1 standard for Board review of arbitration decisions. That standard, properly applied, is entirely consistent with and promotes the national labor policy favoring the resolution of disputes through the arbitral process. Instead, the majority has articulated a new standard which is indistinguishable in result from the rule of *Electronic Reproduction Service*, 213 NLRB 758 (1974), a judicially discredited case which the majority opinion (not surprisingly) refrains from expressly endorsing.

n1 In *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955), the Board established a policy of deferring to an arbitrator's award if the following criteria were met: (1) all parties agreed to be bound by the results of the arbitration; (2) the arbitration proceedings were fair and regular; and (3) the arbitrator's decision is not repugnant to the Act.

268 N.L.R.B. 573, *577; 1984 NLRB LEXIS 1171, **18;
115 L.R.R.M. 1056; 1983-84 NLRB Dec. (CCH) P16,028

This new standard is significantly [**19] flawed in several respects. Specifically, (1) it represents an impermissible abdication of the Board's statutory obligation to prevent unfair labor practices; (2) it contradicts a substantial body of judicial precedent; (3) it imposes a novel and inequitable burden of proof on the General Counsel; (4) in conjunction with the unwarranted change in prearbitral deferral doctrine announced today in *United Technologies Corp.*, 268 NLRB No. 83, the standard here signals a Board policy of broadscale deferral which, contrary to the majority's intent, may actually discourage the use of grievance and arbitration dispute resolution systems; (5) it proceeds from the wholly erroneous premise that under the Board's prior policy, overruled today, deferral to the arbitral process has only been infrequent; and (6) ironically, the new standard is unnecessary to justify deferral in this case, where the Board should in any event reverse the judge, defer under *Suburban Motor Freight* and *Spielberg* to the arbitration award, and dismiss the complaint.

Very early in the Board's experience with the *Spielberg* doctrine, it became apparent that there must be some minimal proof that an unfair [**20] labor practice issue has been resolved in arbitration before the Board can defer to an arbitration award. With such proof, the Board can reasonably evaluate the award according to the *Spielberg* standards and can accommodate and encourage the arbitral process by deferring to it when the award meets those standards. Without such proof, the Board cannot defer because it has no reasonable basis for determining whether the award fulfills the Board's obligation under Section 10(a) of the Act to prevent unfair labor practices.

Accordingly, the Board refused to defer to an arbitration award in *Monsanto Chemical Co.*, 130 NLRB 1097 (1961), where an arbitrator expressly refused to resolve an unfair labor practice issue presented to him. The Board reasoned that:

It manifestly could not encourage the voluntary settlement of disputes or effectuate the policies and purposes of the Act to give binding effect in an unfair labor practice proceeding to an arbitration award which does not purport to resolve the unfair labor practice issue which was before the arbitrator and which is the very issue the Board is called upon to decide in the proceeding before it. [130 NLRB at 1099.]

In [**21] *Raytheon Co.*, 140 NLRB 883 (1963), the Board again refused to defer to an arbitration award. The employer in arbitration had expressly limited the scope of the arbitrator's authority to the contract issue whether two employees had violated a contractual no-strike provision and were consequently subject to discharge. The union acquiesced to this limitation and the arbitrator ruled solely on the contract issue in upholding the discharges. In refusing the defer to the award, the Board reiterated the principles of *Monsanto* and stated that it could not defer where the arbitrator had failed to resolve, indeed could not resolve, the unfair labor practice issue of whether the assigned cause for discharge was a pretext for unlawful antiunion motivation. Notably, the *Raytheon* majority expressly rejected a contention by the dissenting minority that the unfair labor practice issue had been resolved in arbitration because "the underlying factual issue in both the arbitration and the unfair labor practice proceedings was whether the discharges engaged in a walkout or in conduct inciting a walkout." In other words, mere factual parallel between contract and statutory issues will [**22] not suffice to prove [**578] that an arbitrator must have resolved an unfair labor practice issue.

Subsequent cases further refined the *Monsanto/Raytheon* requirement that an unfair labor practice issue must be presented to and considered by an Arbitrator if the Board is to defer to an arbitration award. In *Airco Industrial Gases*, 195 NLRB 676 (1972), the Board held that it would not defer to an arbitration award which gave no indication that the arbitrator ruled on the unfair labor practice issue. Furthermore, the Board indicated that the statutory issue had not even been presented where the issue in arbitration was where the employer had "just cause" to impose the discipline grieved. In *Yourga Trucking*, 197 NLRB 928 (1972), the Board logically held that the burden of proving that an unfair labor practice issue had been presented and considered in arbitration must be borne by the party asserting the affirmative defense that the Board's statutory jurisdiction to resolve the issue should not be exercised.

In *Electronic Reproduction*, *supra*, the Board abruptly departed from a consistent line of precedent and held that in the absence of "unusual circumstances" it would [**23] defer to an arbitrator's decision even in cases where there was

268 N.L.R.B. 573, *578; 1984 NLRB LEXIS 1171, **23;
115 L.R.R.M. 1056; 1983-84 NLRB Dec. (CCH) P16,028

no indication that the arbitrator had considered or was even presented with the unfair labor practice issue before the Board. Simply stated, the Electronic Reproduction Board adopted a presumption that an arbitrator's resolution of a contract issue must also have resolved the unfair labor practice issue. The principal justification for this presumption was that prior Board requirements had artificially separated contract and unfair labor practice issues and had thereby discouraged the use of grievance and arbitration by permitting parties to withhold evidence from arbitration in order to get a perceived "second bite of the apple" in Board litigation. In particular, the Electronic Reproduction majority rejected Board precedent by holding that resolution in arbitration of the contract issue whether discipline was for "just cause" necessarily entailed resolution of the unfair labor practice issue whether discipline was for unlawful discriminatory reasons.

The Electronic Reproduction rule was not well received. In *Arthur N. Stephenson v. NLRB*, n2 the Ninth Circuit expressly rejected the rule because [**24] the Board would defer to arbitration upon "mere presumption in total absence of any evidence" whether the unfair labor practice issue had been resolved, thereby failing to meet the "clearly decided" criterion which the Ninth Circuit adopted from the D.C. Circuit's decision in *James Banyard v. NLRB*. n3 The Stephenson court reasoned that "legislative history of [the Act] does not support the interpretation that arbitration is meant to be a substitute for Board resolution of statutory issues or that the arbitration process is a prerequisite for the resolution of unfair labor practice charges." It went on to state that it was "illogical for the Board, which is responsible for resolving the unfair labor practice issues, to defer to a decision by an arbitrator, who is under no duty and indeed may not be particularly predisposed to consider the statutory issue, solely on the basis of a factually unfounded presumption that the arbitrator has considered the issue." n4

n2 550 F.2d 535 (1977).

n3 505 F.2d 342 (1974).

n4 550 F.2d at 540. For other criticism of the Electronic Reproduction rule, see Simon-Rose, "Deferral under Collyer by the NLRB of Section 8(a)(3) cases," 27 *Lab. L.J.* 201, 209--221 (1976), and Schatzki, "Majority Rule, Exclusive Representation, and the Interests of Individual Workers: Should Exclusivity be Abolished?," 123 *U. Penn. L. Rev.* 897, 909 (1975).

[**25]

Recognizing the validity of criticism leveled against Electronic Reproduction, the Board overruled that case in *Suburban Motor Freight, supra*, and returned to the standard for deferral set by *Monsato, Raytheon, Airco, and Yourga*. Consistent with that precedent, the Board held that it again would "no longer honor the results of an arbitration proceeding under Spielberg unless the unfair labor practice issue before the Board was both presented to and considered by the arbitrator." This threshold requirement for deferral under Spielberg has now been endorsed by numerous circuit courts of appeals, which in the process either expressly or implicitly rejected the Electronic Reproduction rule. n5 In addition, a Board majority recently reaffirmed the *Suburban Motor Freight* standard in *Propoco, supra*. n6

n5 *Pioneer Finishing Corp. v. NLRB*, 667 F.2d 199 (1st Cir. 1981); *NLRB v. Designcraft Jewel Industries*, 675 F.2d 493 (2d Cir. 1982); *NLRB v. General Warehouse Corp.*, 643 F.2d 965 (3d Cir. 1981); *NLRB v. Motor Convoy*, 673 F.2d 734 (4th Cir. 1982); *NLRB v. Magnetics International*, 699 F.2d 806 (6th Cir. 1983); *St. Luke's Memorial Hospital v. NLRB*, 623 F.2d 1173 (7th Cir. 1980); *Ad Art v. NLRB*, 645 F.2d 669 (9th Cir. 1980). See also *Banyard v. NLRB, supra*; and *Illinois Ruan Transport Corp. v. NLRB*, 404 F.2d 274, 280 (8th Cir. 1968).

n6 The majority opinion today contains the inexplicable statement that *Propoco* "diminished significantly the role of private dispute-resolution by formulating a standard of review of arbitration awards as appropriate for deferral only when the Board determined on de novo consideration that the award disposed of the issues just as the Board would have." *Propoco* did nothing of the kind.

268 N.L.R.B. 573, *578; 1984 NLRB LEXIS 1171, **25;
115 L.R.R.M. 1056; 1983-84 NLRB Dec. (CCH) P16,028

A reader of the Propoco majority opinion will search in vain for the standard which my colleagues attribute to it. Contrary to their view, Propoco merely reaffirmed and applied the Suburban Motor Freight and Spielberg standards for limited review of an arbitration award. The majority incorrectly implies that my views necessarily require the Board to withhold deferral whenever the result on the merits would be decided differently in a hearing de novo. To the contrary, in applying the prior standards in recent cases, particularly as to the test of whether the arbitration award is repugnant to the Act, it has consistently been my view that "the test to be applied is not whether the Board would have reached the same result, but whether the award is palpably wrong as a matter of law [footnotes omitted]." *G & H Products*, 261 NLRB 298 (1982). Only after the Board determines under Suburban Motor Freight that there is no discernible "result" to the unfair labor practice issue in arbitration, or that the arbitration award otherwise fails to satisfy Spielberg, will the Board engage in de novo review of the statutory issue.

The United States Court of Appeals for the Second Circuit enforced the Board's order in Propoco in an unpublished decision dated 16 September 1983 (Case No. 83--4058). The court expressly approved the Board's refusal to defer to the arbitration award there.

[*579] [**26] Offering no explanation other than the unsubstantiated conclusion that the judicially approved Suburban Motor Freight standard is not consistent with the national labor policy favoring the voluntary arbitration of disputes, my colleagues in the majority have today rejected that standard for one which they insist, again without legal or factual substantiation, more fully comports "with the aims of the Act and American labor policy." Under the new standard, more recently proposed by Member Hunter in his dissenting opinion in Propoco, an arbitrator need no longer actually consider and pass upon the unfair labor practice issue before the Board defers to his award. Instead, the Board will now presume that the unfair labor practice issue has been "adequately considered" by the arbitrator, and it will defer to an arbitration award if (1) the contractual issue is factually parallel to the unfair labor practice issue and (2) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice question. Moreover, it will now be the General Counsel's burden to rebut the presumption that these criteria have been met.

The majority suggests that Suburban [**27] Motor Freight has been overruled only to the extent that it "provided for a different allocation of burdens in deferral cases." I will not indulge my colleagues in the canard that Propoco, Suburban Motor Freight, Yourga, and Airco have not been totally overruled, or that Raytheon and Monsanto have not suffered the same fate, or at least been limited strictly to their factual circumstances.

Initially, I note the conundrum presented by the two-step majority rule here. If the contractual issue is factually parallel to the unfair labor practice issue, then how can one possibly prove that the facts relevant to resolving the unfair labor practice issue have not been presented to the arbitrator unless one proves the absurdity that even the facts relevant to the contract issue were not presented? In reality, the majority's new test involves only one step. It will presume that an arbitrator has considered both contract and unfair labor practice issues unless the General Counsel can prove that there is no factual parallel between the issues. The more broadly the Board construes the notion of factual parallelism, the more difficult the General Counsel's task [**28] becomes.

n7 Deferring to arbitration on the basis of factual parallelism, of course, is a broader standard for deferral than deferring only when contract and statutory issues are identical. See, e.g., *NLRB v. Motor Convoy*, *supra*.

The majority makes only brief footnote reference to Electronic Reproduction in its opinion. Yet the doctrine of factual parallelism ---a doctrine rejected in Raytheon and Airco---is precisely the doctrine upon which the Electronic Reproduction majority founded its presumption that an arbitral resolution of a contract issue necessarily resolved an unfair labor practice issue in discharge and discipline cases. In addition, I note the identity between the rule announced today and the Electronic Reproduction rule, as accurately summarized by the dissenting opinion in that case:

Now it becomes the burden of the party seeking correction of an alleged violation of the Act to show that the

268 N.L.R.B. 573, *579; 1984 NLRB LEXIS 1171, **28;
115 L.R.R.M. 1056; 1983-84 NLRB Dec. (CCH) P16,028

arbitrator did not decide the statutory issue, and next, or perhaps now, that the arbitrator could not have decided the issue regardless of whether it was presented to him. [*Electronic Reproduction, supra at 765.*]

Under Electronic [**29] Reproduction and under the rule adopted today, the result is the same: the Board will now defer to an arbitrator's award based on a presumption that an unfair labor practice issue has been resolved, without actually knowing if the issue was presented to or considered by the arbitrator. I understand my colleagues' reluctance openly to embrace the Electronic Reproduction rule, but their reformulation of that rule here suffers from the same infirmity of the original. First, and most importantly, the new standard expands the Board's deferral policy beyond permissible statutory bounds. For all the reasons stated by the Board in the long line of cases upon which I rely, I find that the use of a presumption here to justify deferral amounts to an abdication by this Board of its obligation under Section 10(a) of the Act to protect employees' rights and the public interest by preventing and remedying unfair labor practices. Nowhere in the Act itself, its legislative history, or in its judicial interpretation is there authority for the proposition that the Federal labor policy favoring arbitration requires or permits the Board to abstain from effectuating the equally important Federal [**30] labor policy entrusted to the Board under Section 10(a).

Second, I emphasize that the overwhelming weight of judicial precedent stands for the proposition that the Board has no authority to defer if it does not have some affirmative proof that an unfair [*580] labor practice issue was presented to and considered by an arbitrator. Judicial rulings on this point stand in sharp contrast to the general proposition that the Board has broad discretionary authority to defer to the grievance and arbitration process. n8

n8 *Carey v. Westinghouse Electric Corp.*, 375 U.S. 261, 271 (1964).

For example, in *Stephenson v. NLRB, supra*, the Ninth Circuit stated that the "arbitral tribunal must have clearly decided the unfair labor practice issue on which the Board is later urged to give deference." The court defined the "clearly decided" requirement as meaning that "the arbitrator's decision must specifically deal with the statutory issue." (Emphasis added.) It went on to state that:

Merely because the arbitrator is presented with a problem which involves both contractual and unfair labor practice elements does not necessarily mean that he will adequately consider the statutory, [**31] and merely because he considers the statutory issue does not mean that he will enforce the rights of the parties pursuant to and consistent with the Act. The "clearly decided" requisite is designed to enable the Board and the courts to fairly test the standards applied by the arbitrator against those required by the Act. n9

n9 *540 F.2d at 536*. Contrary to the suggestion of the majority, the "clearly decided" requirement remains the law of the Ninth Circuit, as explained in *Ad Art v. NLRB*, 645 F.2d 669 (1980), where the court affirmed the Board's refusal to defer to an arbitration award.

In *NLRB v. Magnetics International, supra*, the Sixth Circuit stated that it would honor the Board's decision to defer "only when it appears from the arbitrator's award that the arbitrator considered and clearly decided all unfair labor practice charges." Of particular significance, the court further commented that it would not "speculate about what the arbitrator must necessarily have considered" and that any doubts regarding "the propriety of deferral will be resolved against the party urging deferral." Similarly, in *United Parcel Service v. NLRB*, 706 F.2d 972 (1983), the Third [**32] Circuit held that "for the Board's deferral policy not to be one of abdication, the Board must be presented with some evidence that the statutory issue has actually been decided," (Emphasis added.) n10 It thus upheld the Board's refusal to defer on the ground that the statutory issue had not been fully presented to or considered by the grievance panel. n11

n10 The Third Circuit recently reaffirmed this view and expressly endorsed the Propoco majority opinion in *Ciba-Geigy Pharmaceuticals Div.*, 114 LRRM 3650, Daily Labor Report, D--1, 4 (Dec. 13, 1983).

268 N.L.R.B. 573, *580; 1984 NLRB LEXIS 1171, **32;
115 L.R.R.M. 1056; 1983-84 NLRB Dec. (CCH) P16,028

n11 I do not "argue," as my colleagues put it, that "some courts have, at least implicitly, approved the Suburban Motor Freight standard." It is incontrovertible that the First, Second, Third, Sixth, and Seventh Circuits have expressly approved that very standard and that the Fourth, Ninth, and D.C. Circuits have applied a similar standard. Not a single circuit court of appeals has approved the Electronic Reproduction rule or even suggested that it or a similar rule would fall within the Board's discretion to defer. Cases cited by the majority are not to the contrary. They involve situations where the reviewing court disagreed with the Board about whether an arbitrator had clearly decided a statutory issue under Suburban Motor Freight, or whether an arbitrator's decision on the statutory issue was "clearly repugnant" under Spielberg.

[**33]

A third unacceptable aspect of the majority's new rule is the inequity of requiring that "the party seeking to have the Board reject deferral... show that the above standards for deferral have not been met." In *Yourga Trucking, supra*, the Board confronted the question of which party to a proceeding under the Act must adduce proof regarding the "scope of matters presented in the arbitration proceeding." The Board there held that:

... the burden to adduce such proof rests on the party asserting that our statutory jurisdiction to resolve the issue of discrimination should not be exercised. That party may be presumed to have the strongest interest in establishing that the issue has been previously litigated, if that is the case. Moreover, in the usual case, that party will have ready access to documentary proof, or to the testimony of competent witnesses, to establish the scope of the issues submitted to the arbitrator.

The Board readopted the Youga allocation of proof in Suburban Motor Freight and I adhere to the view that it is proper to place the burden of establishing an affirmative defense on the party raising the defense. To invoke a presumption and shift [**34] the burden of disproving a naked defense claim to the General Counsel amounts to an abuse of the Board's discretion. In effect, once the existence of an arbitration award has been proved by a respondent, the majority will transform an affirmative defense into part of the General Counsel's prima facie case. As previously discussed, rebutting the presumption will be difficult enough in light of the doctrine of factual parallelism. Moreover, there appears to be no sound procedural basis at all for imposing on the General Counsel---the one party in unfair labor practice litigation who is not in privity through a collective-bargaining agreement---the responsibility of producing evidence about arbitral proceedings under that agreement.

A fourth major criticism of the new standard for postarbitral deferral involves the relationship of this standard to the expansion of prearbitral deferral policy announced by the majority today in *United Technologies, supra*. In that decision, my colleagues seek to temper the broadened "postponement of the use of the Board's processes" by noting that those processes "may always be invoked if the arbitral result is inconsistent with the standards of [**35] Spielberg." The majority's reversal of [**581] policy in this case, however, suggests that such postarbitral review will be of scant significance. This raises a broader question about my colleagues' assumption that the more the Board defers to arbitration awards---and it undoubtedly will defer more under the law announced today in this case and in *United Technologies*---the better it will serve the Federal labor policy favoring dispute resolution through grievance and arbitration proceedings. They do not articulate any rationale for this assumption nor do they refer to any particular administrative expertise which might warrant judicial deference to their view.

I suggest that the Board has reached a point where it actually discourages arbitration by the extent to which the Board defers to it. Sometimes less expensive, more informal, or more expeditious arbitration may be an attractive way to resolve minor grievances and disputes which are essentially contractual in nature. The more we force parties to resolve unfair labor practice issues in a contractual forum, however, the more we risk impairing those attributes which make arbitration attractive. Knowing the risks of failing [**36] to litigate statutory issues in arbitration, unions might best serve their duty of fair representation by insisting in collective bargaining that arbitration have all the formal procedural features of an unfair labor practice case before the Board. Even without such a development, an increase in the arbitration caseload could strain the resources of many unions, employees, and arbitrators, as well as delay the hearing and resolution of each grievance. The final irony of the stress created by a Board policy of wholesale deferral

268 N.L.R.B. 573, *581; 1984 NLRB LEXIS 1171, **36;
115 L.R.R.M. 1056; 1983-84 NLRB Dec. (CCH) P16,028

may be that one or both parties to collective-bargaining negotiations will oppose the inclusion of any form of arbitration provision in a contract.

Fifth, the majority's attack against the purported infrequency of deferrals by the Board under the law overruled today is uninformed and contrary to the Agency's actual experience. It seems that the majority's perception has been distorted by the disposition of the handful of contested cases present the most difficult issues under Suburban Motor Freight and Spielberg and are decided by the Board members themselves. A vast number of cases are disposed of through deferral accommodation procedures, however, [**37] before they ever reach the Board. The Agency's own statistics, officially maintained by the Data Systems Branch of our Division of Administration, indicate that at the end of December 1983 there were 2185 pending unfair labor practice cases which had been deferred to arbitration machinery under *Dubo Mfg. Corp.*, 142 NLRB 431 (1963), or *Collyer Insulated Wire*, 192 NLRB 837 (1971). Between 1 October 1981 and the end of December 1983, in excess of 3800 cases were deferred under Collyer and Dubo. During the same period, the General Counsel's application of Suburban Motor Freight and Spielberg standards resulted in the issuance of complaints in only 163 previously deferred cases. In sharp contrast, over 1700 previously deferred cases were dismissed (357), withdrawn (1159), n12 or settled (62). These statistics dramatically belie the majority's specious claim of infrequent deferrals.

n12 Cases classified as withdrawn include those numerous cases in which the General Counsel has formally notified the charging party that the case will be dismissed if not withdrawn.

For all of the foregoing reasons, I dissent from the change in Board law made today. As a final [**38] point, however, I reiterate that no change in law was necessary to justify Board deferral to the arbitration award at issue here. I agree that the judge should have deferred to the arbitration award by applying the proper standard of Suburban Motor Freight. The arbitrator expressly found that Spatorico was not discharged for his legitimate union activities, but instead was discharged pursuant to the contractual no-strike clause which specifically prohibits union officers from causing work stoppages. It is clear that the arbitrator was presented with, considered, and ruled on the statutory issue. Further, I find that the arbitrator's award is not repugnant to the Act. The award is consistent with the Supreme Court's decision in *Metropolitan Edison Co. v. NLRB*, 103 S.Ct. 1467 (Apr. 4, 1983). The award also comports with the Board's holding in *Midwest Precision Castings Co.*, 244 NLRB 597 (1979), that employees---be they union officers or not---who instigate unauthorized strikes are properly subject to more severe discipline than are employees who merely participate in such activity. In this case, the arbitrator found that Spatorico "at least partially caused" the work [**39] stoppage.

Dated, Washington, D.C. 19 January 1984

ALJ:

BERNARD RIES

ALJ-DECISION:

DECISION

Bernard Ries, Administrative Law Judge: This matter was tried in Buffalo, New York, on January 11, 1983. The legal issues presented are whether the Board should defer to an arbitration award rendered with respect to the suspension of employee Salvatore B. Spatorico on December 17, 1980, and his discharge on December 23, 1980; and, if not, whether those actions were unlawful under Section 8(a)(3) and (1) of the National Labor Relations Act.

Briefs have been by the parties. Having carefully considered the briefs, the entire record, and my recollection of the demeanor of the witnesses, I make the following findings of fact, n1 conclusions of law, and recommendation.

n1 The transcript of proceedings is hereby corrected as follows:

To	Page	Line	Change
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48	14	cancer	canker
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[*582] I. Findings of Fact

Respondent manufactures chemical products in a plant in Niagara Falls, New York, where it employs about 375 workers. For many years, Respondent has recognized Local 8-77 of the Oil, Chemical and Atomic Workers International Union, [**40] AFL-CIO, as the collective-bargaining representative of its approximately 260 Niagara Falls production and maintenance employees. As of the time of the hearing, the most recent bargaining agreement executed by the Respondent and the Union covered the period April 1, 1980, to April 1, 1983. The agreement contained the following provision relevant to this case:

Article XIV - Strikes and Lockouts

During the life of this agreement, the Company will not conduct a lockout at the Plant and neither the Local Union nor the International Union, nor any officer or representative [sic] of either, will cause or permit its [sic] members to cause any strike, slowdown or stoppage (total or partial) of work or any interference, directly or indirectly, with the full operation of the plant.

Salvatore B. Spatorico began employment with Respondent on February 1, 1970. A millwright, Spatorico became active in the Union and served in various capacities over the years, most prominently as the president of Local 8-77, beginning in 1976 and still so serving at the time of his termination from employment in December 1980.

The bulk of the testimony at this hearing relating to Spatorico's termination was [**41] given by Spatorico himself. The focus of that testimony was on the nature of the role played by Spatorico in a "sickout" in which some 40 maintenance employees engaged on December 17, 1980. n2 In an unusual development, Spatorico here dramatically and deliberately altered his testimony from that given by him in an earlier arbitration hearing concerning this same incident. At the prior hearing, Spatorico had asserted, under oath, that he had been genuinely ill when he left the plant on December 17, and had further stated that he had no knowledge that an undeclared concerted work stoppage was in progress when he himself left the plant. At the present hearing, Spatorico conceded that, in fact, he had not been physically ill when he departed on December 17, and he further admitted that he had known that a work stoppage was under way, having been made aware of that fact by the purported instigator, fellow employee and Union Secretary Gary Prokop.

n2 Unless indicated otherwise, all dates hereafter refer to 1980.

The record affords no more reason to believe Spatorico's present tale that Prokop was the provocateur behind the sickout than there was to believe Spatorico's original [**42] version before the arbitrator that he was sick and had no knowledge that a work stoppage was taking place; presumably, the change of heart represents a pragmatic assessment that the first account is not very marketable. No matter how often or in what terms Spatorico describes the events, I suspect that any reader of the record will come away, as I did, with the indelible impression that Spatorico deliberately instigated and participated in the sickout. However, it is unnecessary to find causation here, since Respondent refrained from making such a judgment and confined its conclusion to the more limited "encouragement" of other employees.

268 N.L.R.B. 573, *582; 1984 NLRB LEXIS 1171, **42;
115 L.R.R.M. 1056; 1983-84 NLRB Dec. (CCH) P16,028

The uncontroverted testimony of Michael C. Bentley, Respondent's industrial relations manager at Niagara Falls, furnishes a context for the events of December 17 and thereafter. Bentley testified that Spatorico had received a "final written warning" in February 1979 for "using abusive and threatening language towards supervision, engaging in self-help methods basically, rather than going through the grievance procedure." Subsequently, in October 1980, Spatorico was given a written reprimand for "threatening a walk-out and usin abusive language [**43] towards a member of management." Very soon thereafter, Spatorico was suspended for a week for "interfering with out rights to manage." On October 31, Bentley sent Spatorico a letter, outlining his entire record to that point, reminding him of "numerous informal counseling sessions that we had with him over a period of two or three years" regarding his "disruptive behavior in the plant," and telling him that he would have to "take corrective action or he would not have a job at Olin." It was against this background that the events of December 17 were played out.

The work stoppage on that day was triggered by the refusal of two pipefitters to perform a certain job which they deemed to be millwright work. After Spatorico was notified in the morning of December 17 about the suspension of the pipefitters, he contacted Bentley. Bentley looked into the problem and notified Spatorico that the company considered the work assignment to be a proper one. Angered by this stance, Spatorico told Bentley, "There are some sick people working and that if you, by flexing your muscles like you had the week before, you are going to cause people to become sick and go home." n3

n3 The incident of the "week before" is not further mentioned in the record. I do not accept Spatorico's explanation that by this statement he was merely attempting to inform Bentley that many of the workers had been loyally working even though genuinely sick, and that management's callousness might cause them to stop being as heroic as they had been up to that point.

[**44]

Bentley investigated further, but came to the same conclusion as before, and he so informed Spatorico. When the latter inquired as to the length of the suspension of the pipefitters, and Bentley replied that they would discuss that matter later on, Spatorico responded, according to his own testimony, "We are going to talk about it today. We are going to shut down. You are talking thirty-two more men. We need to get this resolved. We are not letting this wait." When Bentley refused to budge on the point, Spatorico got "very hot" and said, as he testified, "you are just playing with my string. If you don't want these two, then I'm not available and I'm sick. My ulcer is bothering me and I'm going home."

Spatorico thereupon wrote a note to his supervisor stating that he was going home for medical reasons, and left his work area. Instead of going directly to the medical department, however, he went to the "HTH repair [*583] shop," assertedly for the purpose of informing Union Vice- President Bateman that he was going home, so that Bateman could assume the presidential duties. Bateman was not at work that day, but Spatorico did fall into conversation with other employees at the [**45] HTH repair shop. He recalled speaking to steward Atkinson and employee Shirback and "a few pipefitters." He testified that Atkinson had told him about an aspect of the pipefitters-suspension incident in which he had been personally involved. There is no direct evidence that Spatorico encouraged the employees to join in a sickout, although such an invitation might to suggested by the fact that when a supervisor walked up to the group to make work assignments, Spatorico resisted: "I told him that I was on Union business and that I needed to talk to these individuals."

When Spatorico left the HTH repair shop, he went looking for chief steward Frank Presutti, again assertedly for the purpose of appointing a substitute in his absence. Since Presutti "historically" ate his lunch in either of two places, Spatorico first went to the HTH maintenance shop. He did not find Presutti there, but he was approached by some employees who asked about the suspension of the pipefitters. As more employees began to crowd around, perhaps 10-16 in all, Spatorico "gathered all the individuals together" and purportedly told them that the two pipefitters were going home and "we got a job that we have [**46] to do out there. Let's do what we have to do and that means we are going to work under protest for the rest of the day, but we have to get the job done." There is no testimony which

contradicts the foregoing, but I consider it quite unlikely that Spatorico, in such marked contrast to his angry and defiant attitude exhibited elsewhere that morning, would have affirmatively exhorted these employees to "get the job done."

Spatorico then went to the locker room of the shipping department and found Presutti. After bringing Presutti up to date, Spatorico proceeded to the medical department, where 6-8 employees were waiting. Spatorico told the nurse that his gums were hurting from new dentures; she gave him some medicine to swab on the gums. n4

n4 As previously indicated, Spatorico acknowledged at the hearing that neither this gums nor his ulcer had played any part in his presence at the medical department. He testified, however, that his reason for leaving the plant was essentially health-related, referring to a longstanding "mental disorder" which had in the past caused him to become violent when subjected to a stressful situation. His concern that the problem might recur because of the conflict over the pipefitters' suspension led him, he testified, to leave the plant. Nurse Sylvia Burke, who appeared as a witness for Respondent, agreed that upon prior occasions, Spatorico had "probably" said that "simply because of the emotional stress in the plant he had to go home." In view of that prior history, it is difficult to understand why Spatorico would have on this occasion conjured up gum and ulcer problems if he was really concerned about his mental state, a problem which he obviously had not been shy about alluding to in the past.

[**47]

The record does not set out in any precise fashion Spatorico's activities between 12:05 p.m., the time at which, he says, he entered the medical department, n5 and 1:05 p.m., when, he says, he signed out. n6 He did say that after the nurse gave him some medication for his gums, he left her office, went to a foyer area in front of the medical department, and attempted to page maintenance superintendent Robert F. Histing, purportedly on the theory that Histing might be more amenable to settling the pipefitters dispute than would Bentley. Unable to reach Histing immediately, Spatorico returned to the nurse and said that his ulcer was bothering him; she gave him a pill.

n5 He conceded at the hearing that he might have arrived as early as 11:55 a.m.

n6 The sign-out sheet states that he left at 1:30. At the hearing, Spatorico testified that he falsified his time of signing out in order to gain a half-hour's pay, offering what he plainly recognized as a lame half-excuse that two foremen had briefly detained him to inquire about "what's going on" as he was leaving the plant. It may be that this display of candor was prompted by the fact, testified to by Spatorico and Bentley, that the latter found the former at home about 1:30 on December 17 when Bentley had called to say that Spatorico was suspended.

[**48]

Perhaps 20 minutes later, Histing responded to Spatorico's page. Spatorico testified that he took the call in the safety department office and asked to see Histing that day for an "investigatory meeting about the two pipefitters" (seemingly an unlikely course of action, despite the distinction drawn by Spatorico between Bentley and Histing, for a person who wanted to leave the plant in order to avoid a stressful situation). Histing would only agree to meet the following day. Spatorico then went home.

The foregoing would indicate that Spatorico spent at least one hour in and around the medical department, but his activities during that time are not clearly accounted for, other than his two conversations with the nurse, his attempt to page Histing, and his later conversation with Histing. During this period, according to Spatorico, some 20-24 maintenance employees visited the nurse. Spatorico did state that it was in the medical department that Union Secretary Prokop told him, at about 12:15, that a concerted sickout was in progress, saying, "We are not going to take this shit no more. We are going to walk. I'm going to get everybody organized and we are going to do it." When [**49] he was initially asked about his response to Prokop, Spatorico quoted himself as merely saying, "Sounds like a good idea." When asked again, Spatorico had himself answering Prokop's announcement with amazement: "You got to be kidding me," and, after Prokop had stated that they were going out for sure, Spatorico remarking, "It's a good idea. I don't know

if we can pull it off." Prokop reportedly replied, "I'm taking care of it." n7

n7 Although there was no contradiction of this testimony, I consider Spatorico's asserted response "You got to be kidding me" inherently improbable; Spatorico was an aggressive Union president who had himself only recently been threatening a walkout and who was even then in the medical department admittedly under false pretenses.

At the hearing, Spatorico conceded that he stayed in the medical department as long as he did because he "wanted to see if it could be pulled off... I wanted to see how strong the Union was."

After being informed by Bentley at 1:30 p.m. of his suspension from employment, Spatorico consulted Union representative Alvarez about his situation. Alvarez worked out an arrangement with Bentley that if the sickout employees returned [**50] to work the next day, they would only receive written reprimands. Spatorico procured a list of these employees and, at about 10 p.m. on December 17, he called, from Respondent's guardhouse, each of the 43 employees who had departed on a medical pretext, telling them that "if you are participating in this sickout, I need you to stop" and urging them to report for work the following day (except for the ones who were "really sick"). He also gave each one the opportunity to directly report his availability to the guard, the normal procedure for returning from sick leave. n8 All the employees returned to work the next day.

n8 Spatorico had already declared his own availability at 4:30 p.m.

[*584] On December 18, in letters to 39 employees, Respondent accused them of having engaged in a work stoppage, indicated that the letters constituted a "formal written reprimand," and warned that similar future activity would subject them to more severe discipline. n9

n9 The record does not reconcile the discrepancy between the 43 employees assertedly telephoned by Spatorico and the 39 who received letters.

On December 22, an "investigatory" meeting was held with Spatorico and other Union [**51] representatives at which the Company stated its "tentative conclusions" that Spatorico had violated the bargaining agreement in a manner which provided grounds for discharge. In a detailed letter dated December 29, Respondent notified Spatorico of his discharge "effective December 23, 1980."

Thereafter, the matter was grieved and arbitrated (together with two other grievances filed by Spatorico which were already pending at the time of his discharge). The arbitrator held, inter alia, that there had been, in fact, a sickout, and that, by virtue of his having "participated in it" and having "failed to try to stop it until after it occurred," Spatorico had not honored Article XIV of the agreement, earlier set out, under which, according to the arbitrator, Union officers such as Spatorico "implicitly have an affirmative duty not to cause strikes which are in violation of the clause, not to participate in such strikes and to try to stop them when they occur."

Somewhat diffuse is the evidence relating to the Respondent's reasons for discharging Spatorico. So that a full understanding of the point can be had, it seems useful to quote at length from the December 29 termination [**52] letter from Bentley to Spatorico, the first excerpt being a recitation of the "tentative conclusions" given by the Company to Spatorico at the December 22 meeting:

1. You threatened a work stoppage when you stated to me that the Company was "just asking" for people to get sick and not work. This threat of a work stoppage was a direct violation of Article 14 of the Agreement. In light of the fact that you have previously been warned and disciplined for making threatening remarks of this kind, as recently as October of 1980, your threat of a work stoppage on December 17, 1980 is grounds for discharge.

268 N.L.R.B. 573, *584; 1984 NLRB LEXIS 1171, **52;
115 L.R.R.M. 1056; 1983-84 NLRB Dec. (CCH) P16,028

2. Within minutes of your threat of a work stoppage, an actual work stoppage began. This work stoppage consisted of a sickout in which 42 people participated over a mere two (2) hour period and you were one of the participants. Your participation in a work stoppage in direct violation of Article 14 of the Agreement is grounds for discharge.

3. You knew first hand precisely what was occurring. You knew that a work stoppage in the form of a sick-out was occurring. You knew that a work stoppage of any kind is prohibited under Article 14 of the Agreement and you knew that you [**53] had an obligation as a Union officer to prevent your Union members from engaging in a work stoppage. You did absolutely nothing to prevent your Union members from engaging in the work stoppage. In fact, you were present in the Medical Department when 14 of the 42 people who participated in the work stoppage entered the Medical Department with the express purpose of alleging to be too sick to continue working.

You failed to fulfill your contractual obligation to prevent your Union members from causing any work stoppage or any interference, directly or indirectly, with the full operation of the plant. Moreover, your participation in the work stoppage actually supported and encouraged your Union members to engage in the work stoppage.

Your failure to exercise your duties and responsibilities under Article 14 of the Agreement is particularly serious and is grounds for discharge.

4. Your involvement in the events of December 17, 1980 is particularly intolerable in light of your entire disciplinary record. You have been repeatedly warned and disciplined for engaging in disruptive behavior, for making threatening statements and for interfering [sic] with the Company's rights to [**54] manage. As recently as October of 1980 you were warned specifically about violating Article 14 of the Agreement.

Your entire record in this regard is totally unacceptable and is grounds for discharge.

Thereafter in the letter, Respondent set out the defenses and explanations urged by Spatorico at the December 22 meeting and then concluded: The Company has carefully reviewed and considered your explanation of your involvement in the events of December 17, 1980. The Company's conclusions are as follows:

1. There was indeed a collective work stoppage on December 17, 1980. The work stoppage took the form of a sick-out and a significant number of hourly Maintenance personnel assigned to different areas of the plant participated in the sick-out. The sick-out was sudden, it was rapid, it began almost immediately after the two (2) Pipefitters had been suspended and after our telephone conversation and no employees, hourly or salaried, from other departments were affected by the "sickness". The suggestion that 42 hourly Maintenance and Services personnel working in different areas of the plant all becoming sick at approximately the same time is mere coincidence is simply not credible. [**55]

2. While the Company does not know for a fact that you advised any hourly Maintenance or Services personnel to become sick and go home, the Company maintains that you encouraged your Union members to engage in a sick-out by doing so yourself. The fact that you have previously gone home sick when your ulcer flared [sic] up does not excuse you from encouraging, by your action, other personnel to engage in a work stoppage. Moreover, you neither said nor did anything to discourage and to prevent your Union members from engaging in a work stoppage.

[*585] 3. Your claim that your statement to me that the Company was "just asking" for Maintenance employees to get sick and not work was merely a statement of fact is not credible in light of your previous record and particularly in light of the fact that an actual work stoppage, in the form of a sick-out, occurred.

4. Your claim that you had no knowledge of any organized or collective sick-out by your Union members is impossible to believe. While you were not directly involved in the actual suspensions of the two (2) First Class Pipefitters, you knew of the suspensions immediately after they were imposed. And, despite the fact that you [**56] were assigned to work in Plant 2 on the morning of December 17, 1980, you were observed meeting with groups of hourly Maintenance employees in Plant 1 shortly after the two (2) First Class Pipefitters were suspended and

268 N.L.R.B. 573, *585; 1984 NLRB LEXIS 1171, **56;
115 L.R.R.M. 1056; 1983-84 NLRB Dec. (CCH) P16,028

immediately prior to the sick-out. It is significant that you left your assigned work area (Plant 2) without permission from your supervisor and without notifying your supervisor. It is also significant that after meeting with Maintenance personnel in Plant 1 you proceeded immediately to the Medical Department. Moreover, you were present in the Medical Department while 14 of the 42 hourly Maintenance and Services employees who went home sick filed through Medical. And, while in the Medical Department area you were also observed making phone calls. It must be obvious that you knew first hand precisely what was occurring. You knew that your Union members were engaging in a work stoppage in violation of Article 14 of the Agreement. You did absolutely nothing to prevent this work stoppage. In fact, as stated before, you participated in the work stoppage thereby supporting and encouraging a direct violation of Article 14 of the Agreement by 41 of your Union members. [**57]

5. Your claim that you were quoting me when talking on the phone in Guard House #1 to hourly Maintenance personnel is flattering but, again, not very credible. If you made reference to a walkout it was because that is precisely what happened on December 17, 1980, not because I labeled it as such.

Therefore, effective December 23, 1980 you have been discharged for threatening a work stoppage. You have been discharged for participating in that work stoppage. You have been discharged for failing to prevent that work stoppage. And, you have been discharged because your entire record, including your involvement in the events of December 17, 1980, is totally unacceptable.

As can be seen, a concise articulation of Respondent's reason or reasons for discharging Spatorico is not so easy. On December 22, the Company listed four independent potential "grounds for discharge": Spatorico's "threat" of a work stoppage on December 17; his "participation" in the stoppage; his failure to "fulfill [his] contractual obligation" to prevent Union members from engaging in a work stoppage, and "support[ing] and encourag[ing]" the other Union members to engage in the impermissible conduct by "participat[ing]" [**58] in it (termed "particularly serious"); and his "involvement in the events of December 17" in the light of his "entire disciplinary record." The December 29 letter referred separately to the foregoing four "grounds for discharge" and concluded, almost liturgically, that Spatorico "[has] been discharged" for each such ground.

Since, presumably, Respondent did not intend to undertake the metaphysically questionable task of discharging Spatorico four times, it must be assumed that each of the grounds set out was simply a component of the decision to terminate. The decision-making process was further complicated by Bentley's insistent testimony at the hearing that the decision was jointly made by himself, four other Company officials, and Company counsel. Despite the improbability that all six men shared power equally, Bentley was rather adamant in maintaining that the decision was "joint." I was much impressed with Bentley as a witness, and on this point, I suspect, he simply had not thought through prior to hearing the complicated, and perhaps hypothetical, matter of the exercise of authority involved in the termination of Spatorico.

II. Discussion

A. Deferral to Arbitration [**59]

At the threshold, I see no merit in Respondent's contention that deference to the arbitration award is in order here. In *Spielberg Manufacturing Company, 112 NLRB 1080*, the Board spelled out the basic criteria to be applied in evaluating the propriety of such deferral, i.e., that all parties agree to be bound by arbitration, that the arbitration proceeding be fair and regular, and that the arbitrator's award not be repugnant to the policies of the Act. Recently, the Board has refined these criteria to specify that an arbitration award will not be honored "unless the unfair labor practice issue before the Board was both presented to and considered by the arbitrator." *Suburban Motor Freight, Inc., 247 NLRB 146, 147*. n10 It is obvious here that the unfair labor practice issue was not in any serious way presented to and considered by the arbitrator, even though reference was made in the arbitration proceeding to the existence of such an issue.

268 N.L.R.B. 573, *585; 1984 NLRB LEXIS 1171, **59;
115 L.R.R.M. 1056; 1983-84 NLRB Dec. (CCH) P16,028

n10 This principle has been approved by several Courts of Appeals. *Banyard v. N.L.R.B.*, 505 F.2d 342 (C.A.D.C.); *Stephenson v. N.L.R.B.*, 550 F.2d 535 (C.A. 9); *Pioneer Finishing Corporation v. N.L.R.B.*, 667 F.2d 199 (C.A. 1); *N.L.R.B. v. Magnetics International, Inc.*, 699 F.2d 806 (C.A. 6).

[**60]

Initially, it does not appear that the arbitrator was competent to decide the unfair labor practice issue, since the bargaining agreement only provides for arbitration of a grievance which "involves the interpretation or application of any specific provision or specific provisions" of the agreement. Moreover, the arbitrator at several points indicated that he did not think himself empowered to pass upon an unfair labor practice issue. He began his award with a paragraph headed "The Issues," under which appeared the limiting statement, "The following [*586] mutually agreed upon issues have been submitted for consideration." The third issue, and the only one material here, was phrased "Under the terms of the collective bargaining agreement, was the discharge of the grievant effective December 23, 1980 for just cause? If not, what shall be the remedy?".

After lengthy consideration of Spatorico's discharge in the context of the contract, the arbitrator concluded, "The grievance is denied." Immediately following that statement of denial is a section entitled "The Unfair Labor Practice Charges," in which the arbitrator briefly discusses some charges filed against the Respondent, including [*61] one relating to Spatorico's discharge. The discussion reads in its entirety:

For reasons of record, I have concluded that the grievant was discharged for his participation in a sick out and for his failure to try to stop it until after it had occurred in violation of the contract's no strike clause. The grievant is a Union officer but the contract's no strike clause specifically forbids such activity by Union officers. I find no evidence that the Company discharged the grievant for his legitimate Union activities.

While the arbitrator came to the same conclusion reached here, his post-denial discussion of the unfair labor practice charge demonstrates no cognizance of the statutory right and waiver issues implicated by the charge, as hereafter discussed. Abstention from deferral has been approved by the Court of Appeals for the First Circuit in a similar case, *Pioneer Finishing Corporation v. N.L.R.B.*; supra; see, as well, *Professional Porter and Window Cleaning Company, A Division of Propoco, Inc.*, 263 NLRB No. 34.

Accordingly, I find unmeritorious Respondent's deferral contention.

B. The Merits

Quite recently, in *Metropolitan Edison Company v. [**62] N.L.R.B.*, U.S. (April 4, 1983), the Supreme Court imposed some order upon the theretofore uncertain area of disparate punishment of union officials for their participation in wildcat strikes. In essence, the Court (1) approved the Board's view that an employer cannot, consistent with Section 8(a)(3) of the Act, unilaterally insist that union officials must assume greater obligations than rank-and-file employees with respect to the enforcement of a general no-strike clause, and (2) concluded that "[a] union and an employer reasonably could choose to secure the integrity of a no-strike clause by requiring union officials to take affirmative steps to end unlawful work stoppages." Such an added burden upon union officials, however, with its implied additional sanctions, must be clearly shown: "Thus, we will not infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is 'explicitly stated.' More succinctly, the waiver must be clear and unmistakable." (Footnote omitted.)

The Court examined in *Metropolitan Edison* whether such a waiver might be found in that case, an examination which sheds light on [*63] the proper approach to the problem. The contract clause involved was totally silent on the obligation of union officials, n11 but the employer argued that rulings by two arbitrators under previous agreements, holding that the identical clause gave rise to an implied "affirmative" duty on the part of union officials to take corrective action against unlawful work stoppages, were implicitly incorporated into the latest contractual adoption of the language.

268 N.L.R.B. 573, *586; 1984 NLRB LEXIS 1171, **63;
115 L.R.R.M. 1056; 1983-84 NLRB Dec. (CCH) P16,028

n11 "The Brotherhood and its members agree that during the term of this agreement there shall be no strikes or walkouts by the Brotherhood or its members, and the Company agrees that there shall be no lockouts of the Brotherhood or its members, it being the desire of both parties to provide uninterrupted and continuous service to the public."

The Supreme Court disagreed. While it did "not doubt that prior arbitration decisions may be relevant--both to other arbitrators and to the Board--in interpreting bargaining agreements," the Court believed that the renegotiation of the same clause did not necessarily constitute an adoption of "only two" arbitration decisions imposing higher duties on union officials, and that this was [**64] "especially so" in the light of the limiting provision in the bargaining agreement that arbitral decisions should only be "binding... for the term of this agreement." While the Court several times referred to the "clear and unmistakable" requirement, it also found consistent its holding in *Teamsters v. Lucas Flour Co.*, 369 U.S. 95, where a waiver of the right to strike was inferred from the existence of a binding arbitration clause: "Lucas Flour established that there does not have to be an express waiver of statutory rights, but waiver was implied in that situation only because of the unique conjunction between arbitration and no-strike clauses."

The "clear and unmistakable" standard is the one which the Board has applied for many years in determining whether a statutory right has been waived. The Court of Appeals for the Sixth Circuit, however, has recently pointed out certain variances in the Board's application of the standard, saying, in *Tocco Division of Park-Ohio Industries, Inc. v. N.L.R.B.*, F.2d (March 15, 1983):

... The Board has been somewhat inconsistent, however, when delineating what evidence may establish a clear and unmistakable waiver. [**65] In *McDonnell-Douglas Corp.*, 224 NLRB 881, 895 (1976), the Board held:

Whether there has been such a "clear and unmistakable" relinquishment of a right is determined on the basis of the contractual language as well as the facts and circumstances surrounding the making of the contract.

Under this test, the Board and the courts may infer from the contract and form extrinsic evidence of surrounding circumstances that a party to a collective bargaining agreement has waived its right to bargain.

The Board used a slightly different test in *American Cyanamid Co.*, 246 NLRB 87 (1979), which concerned a union's right to engage in sympathy strikes. The Board held that absent express contractual provisions indicating a waiver of the union's [**587] rights, "unequivocal bargaining history evidencing an intent to waive the right" (emphasis supplied) would be required before a waiver would be found. *Id.* Though similar to the McDonnell-Douglas formulation, this standard on its face additionally requires that extrinsic evidence be "unequivocal" or at least very clear before an inference of waiver may be based upon it. See also *Daniel Corp.*, 239 NLRB 1335 (1979).

The [**66] Board formulated a significantly different test, however, in *International Union of Operating Engineers, Local Union 18*, 238 NLRB 652 (1978) (hereinafter referred to as *Operating Engineers*):

Waiver may be found in express contractual language or in unequivocal extrinsic evidence bearing upon ambiguous contractual language. (Emphasis supplied.)

Under this standard, evidence of bargaining history and of the parties' practice under a collective bargaining agreement is only admissible if the contractual language is ambiguous. In contrast, neither the McDonnell-Douglas nor the American Cyanamid tests for waiver contain any prerequisites for admitting extrinsic evidence. The Board applied the *Operating Engineers* formulation in the present case.

In the case under consideration here, there is no direct evidence of the bargaining history of, or the practice under, the clause in question. Accordingly, the issue is whether it may be said that the Union expressly agreed in Article XIV to impose a greater strike obligation upon its officials.

Article XIV is a rather unusual provision. Unlike the more traditional language employed in the Metropolitan

Edison [**67] contract, the clause at hand does not in so many words constitute an agreement by the bargaining unit employees themselves to refrain from striking; rather, the sole burden, literally read, is thrust upon the officials of the Union ("... neither the Local Union nor the International Union, nor any officer or representative [sic] of either, will cause or permit its [sic] members to cause any strike....). n12

n12 The parties, however, clearly consider the clause to be binding upon the members of the bargaining unit as well.

The clause, therefore, being so pointedly addressed to the Unions and their officers and representatives, plainly seeks to impose some sort of duty upon them in relation to strikes. They first promise not to "cause" a strike, and the meaning of the word is plain enough. Spatorico was not discharged, however, for "causing" the sickout; as shown above, the Respondent, with a superabundance of caution, wrote Spatorico that "the Company does not know for a fact that you advised any hourly Maintenance or Services personnel to become sick and go home." n13

n13 At the hearing, however, Bentley rather clearly evidence a belief that Spatorico had indeed instigated the work stoppage. Given such facts as Spatorico's contemporaneous threats to call a strike, his admitted statements to Bentley in the late morning of December 17 such as "We are going to shut down" and "You are talking thirty-two more men," followed closely by an obviously contrived and concerted sickout in which Spatorico participated and over which he stood watch in the medical department for an hour, Bentley had every reason to believe that Spatorico initiated, fostered, and controlled the strike.

[**68]

Thus, we come to the promise not to "permit" a strike. No mortal can, of course, unequivocally agree not to "permit" other employees to engage in a work stoppage; some things will happen no matter how Herculean the effort to not "permit" them to occur. But the obvious sense of the agreement struck here is that the Union officials pledged that they would attempt to persuade strikers or potential strikers not to violate the agreement. In order to make sense of the provision, that must have been the intention of the parties. And while the contract does not spell out the precise steps which are expected of the Union officials toward that end, it can at least be said with certainty that Spatorico's participation in the strike was inconsistent with his manifest contractual obligation to attempt to stem the tide of unprotected activity. In this regard, the words of the Court of Appeals for the Third Circuit in *Metropolitan Edison v. N.L.R.B.*, 663 F. 2d 478, 481, are relevant (emphasis added):

In the collective bargaining agreement requires in general terms that union officials take affirmative action to end an illegal work stoppage, a union official does not breach that duty [**69] simply because he does not take the exact affirmative steps the employer ordered him to take. Only if his actions in complying with that duty are not in good faith does he become subject to greater discipline.

In this case, Spatorico did not undertake in good faith to comply with his contractual responsibility. That he, the spokesman for the Union negotiating committee, was fully aware of that obligation was made evident by his testimony at the hearing. In speaking of his endeavors, and those of two other Union officials, to return the strikers to work on the evening of December 17, Spatorico said that the three telephoned from the guard house so that the guard would witness "that we did indeed perform our duties as the local heads of Union to get the men to come back work." However, Spatorico has failed in fulfilling his earlier duty to try to keep the men from going out; even assuming that he was not responsible in the first place for the walkout, his ostentatious participation in it surely added momentum to the event.

The Court of Appeals for the Sixth Circuit recently noted in *N.L.R.B. v. Babcock and Wilcox Company*, 697 F.2d 724, 731, that "a union officer's [**70] tacit support of a strike can be substantiated by his failure to cross the picket line and failure to go to work." That Spatorico's position vis-a-vis an illegal walkout influenced the other employees can hardly be questioned, and that ability to influence is tellingly pointed up by his own testimony that at about 2:30 p.m. on December 17, a production employee called him at home and asked, "Sal, do you want us production guys to walk

too?". Spatorico's answer was negative: "[I]t only pertains to maintenance."

I conclude that Article XIV of the contract was sufficiently "clear and unmistakable" so as to proscribe the behavior of Spatorico on December 17, behavior which [*588] was completely inimical to his contractual duty to not "permit" a work stoppage. I see no need to explore the outer boundaries of "permit"; it is only necessary to conclude here that Spatorico's conduct was plainly inconsistent with the most minimal meaning of Article XIV. When such a conclusion is manifest, I think the "clear and unmistakable" standard can be invoked even though there may be uncertainty at the perimeters. Spatorico had only recently been formally warned about such behavior, and his testimony [**71] indicates that he understood very clearly what posture the contract required him to take. Having acted in a manner totally at odds with his contractual obligation, Spatorico exposed himself to the greater liability permitted by the Supreme Court in *Metropolitan Edison*. I must, accordingly, recommend dismissal of the complaint allegations on this basis.

Respondent makes an alternative argument which, in view of the foregoing, need not be formally resolved. The argument is that, assuming arguendo that Spatorico's conduct here was no more unprotected than that of the other employees, Spatorico's disciplinary record was so unacceptable that his termination "would have taken place even in the absence of protected conduct," the second part of the test formulated by the Board in *Wright Line, A Division of Wright Line, Inc.*, 251 NLRB 1083, 1089. The record does not lend any direct support to that claim. Bentley did not so testify, and the termination letter does not give overriding weight to Spatorico's record. I question whether I may conclude that Respondent has "demonstrate[d]," as required by *Wright Line*, that had Spatorico not held Union office, he would have been [**72] discharged simply for participating in this concerted action.

As indicated above, Respondent issued written reprimands to the other 39 employees who engaged in the sickout. While Bentley testified that, before doing so, he considered their past disciplinary records in determining their proper punishment, and had completed that thought process within a half-hour after hearing about the sickout, it does seem difficult to believe that he consciously engaged in any real deliberative process. On the other hand, it may have been unnecessary for Bentley, who was familiar with the conduct of all the employees, to have to consider such an issue for very long. As he put it, "I didn't know of anyone that had any kind of a record that would warrant anything more than a written reprimand."

The evidence shows that a few of the other sickout employees had committed rule violations, but none very recently. DiFranco had received a warning in 1977 for being out of his work area and performing personal business on Company time, and had been told that "such actions, if repeated, will warrant more severe discipline up to and including discharge"; Kontabecki had been given a 30-day suspension, probably [**73] in 1978, which "dealt with theft"; and there were others. n14 The 39 other employees, including these miscreants, received the uniform penalty of a written reprimand for the December 17 walkout, while Spatorico was discharged.

n14 A sickout participant named Zemszal had received a 30-day suspension, but that was in 1974.

Nonetheless, Spatorico's more recent misbehavior, resulting in the issuance of two "final" warnings in 1979 and October 1980, and his repetition of the same general kind of conduct on December 17, would obviously have made him a candidate for more stringent treatment even if Respondent had considered his breach of contract in a more limited way. On the other hand, the fact that Spatorico had received a "final warning" in February 1979 did not automatically result in his discharge when he engaged in misconduct in October 1980.

I cannot say that Respondent has "demonstrated" that it would have discharged Spatorico in any event, instead of, say, giving this ten-year employee a month's suspension; accordingly, if I were to reach this argument, I would probably reject it.

Conclusions of Law

I. Respondent is an employer engaged in commerce within the meaning [**74] of Section 2(2), (6), and (7) of the

268 N.L.R.B. 573, *588; 1984 NLRB LEXIS 1171, **74;
115 L.R.R.M. 1056; 1983-84 NLRB Dec. (CCH) P16,028

Act.

2. Local 8-77, Oil, Chemical and Atomic Workers International Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. General Counsel has not established that Respondent violated the Act as alleged in the complaint.

On the basis of the foregoing findings of fact and conclusions of law, I make the following recommended: n15

n15 In the event no exceptions are filed as provided in Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

ORDER

The complaint herein is dismissed in its entirety.

Dated: Washington, D.C. April 29, 1983

Legal Topics:

For related research and practice materials, see the following legal topics:

Labor & Employment Law Collective Bargaining & Labor Relations Arbitration Enforcement Labor & Employment Law Collective Bargaining & Labor Relations Discipline, Layoff & Termination Labor & Employment Law Collective Bargaining & Labor Relations Strikes & Work Stoppages



**CHARLES E. LEWIS, Petitioner, v. NATIONAL LABOR RELATIONS BOARD,
Respondent, UNITED PARCEL SERVICE, INC., Intervenor**

No. 84-6072

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

*779 F.2d 12; 1985 U.S. App. LEXIS 25475; 120 L.R.R.M. 3559; 103 Lab. Cas. (CCH)
P11,727*

**November 4, 1985, Argued
December 10, 1985, Decided**

SUBSEQUENT HISTORY: [**1] Petition for Rehearing Denied January 24, 1986.

PRIOR HISTORY: ON PETITION to Review a Decision of the National Labor Relations Board.

COUNSEL: Account of Appellant: Counsel for Intervenor: Robert M. Vercruyse (argued), Laura B. Demetry, Butzel, Long, Gust, Klein, & Van Zile, Detroit, Michigan.

Attorneys for Appellant: Ellis Boal (argued), Detroit, Michigan.

Attorneys for Appellee: Elliott Moore, Deputy Associate General Counsel, National Labor Relations Board, Washington, District of Columbia, Marion Griffin, Bernard Gottfried, Director, NLRB, Detroit Michigan.

JUDGES: Lively, Chief Judge; Martin and Jones, Circuit Judges.

OPINION BY: PER CURIAM

OPINION

[*12] The petitioner Lewis seeks review of a decision of the National Labor Relations Board affirming the decision of an administrative law judge who found that Lewis' employer, United Parcel Service, Inc., did not commit an unfair labor practice in terminating him. The decision of the Board is reported at *270 NLRB No. 50, 116 L.R.R.M. 1064 (1984)*.

After Lewis was terminated he filed a written grievance that went to arbitration before a panel of the UPS Joint Area Committee. The panel upheld the termination, following [**2] which Lewis filed an unfair labor practice charge. UPS moved to dismiss the unfair labor practice charge on the ground that the Board should defer to the arbitration panel's decision. This motion was granted by the administrative law judge and the General Counsel sought review. Before the administrative law judge and the Board, the General Counsel argued that the written decision of the arbitration panel did not reflect that the issue that underlies the unfair labor practice charge was considered by the panel. Lewis had filed a large number of grievances during the time he was employed by UPS and he contended that he was terminated for resorting too often to the grievance procedure.

The decision of the arbitration panel was very brief and did not refer specifically to the fact that Lewis had filed numerous grievances and was contending that this [*13] was the reason for his discharge. Taped records of the hearing before the arbitration panel were presented at the hearing before the administrative law judge and in addition UPS called the union co-chairman of the arbitration panel to testify that the panel had indeed heard testimony concerning the claim of discriminatory firing [**3] before reaching its decision. The administrative law judge stated his finding as follows:

Accordingly, I find that the panel had presented to it, and that it did consider, all of Lewis' and Erreger's evidence relating to Lewis' claim of harassment for filing grievances and found it insubstantial and

779 F.2d 12, *; 1985 U.S. App. LEXIS 25475, **;
120 L.R.R.M. 3559; 103 Lab. Cas. (CCH) P11,727

decided on the remaining evidence that the grievance lacked merit.

In affirming the decision of the administrative law judge, the Board found that deferral to the decision of the arbitration panel was appropriate under the standards set forth in *Spielberg Mfg. Co.*, 112 N.L.R.B. 1080 (1955), and that nothing in its more recent decision in *Olin Corp.*, 268 NLRB No. 86 (1984), would alter the result reached under the preexisting standards. The Board concluded its decision, "As we find that the judge correctly determined that the unfair labor practice alleged here was litigated and decided in the arbitration proceeding and that the decision of the State Panel was not repugnant to the Act, we affirm his dismissal of the complaint." (Footnote omitted).

Upon consideration of the briefs and oral arguments of counsel together with the administrative [**4] record on appeal, this court concludes that the Board did not abuse its discretion in affirming the decision of the administrative law judge which deferred to the decision of the arbitration panel. The record before the administrative law judge showed that Lewis' claim that he was unlawfully terminated for filing numerous grievances was litigated in the proceedings before the arbitration panel. The decision of the arbitration panel could have dealt

more fully with the issues presented at the hearing. However, if the record shows that the statutory issue was presented and considered, there is no requirement that the decision of the arbitration panel explicitly set forth this fact. See *NLRB v. Magnetics International, Inc.*, 699 F.2d 806, 811 (6th Cir. 1983) ("We will not require [that the] evidence that the unfair labor charge was presented and considered be in written form. . .").

We reach our conclusion that the administrative law judge properly granted deferral to the decision of the arbitration panel and that the Board correctly affirmed the decision of the administrative law judge without reference to the testimony of a member of the arbitration panel. If [**5] that were the only evidence in support of these decisions we would be compelled to reverse. We do not approve the practice of calling arbitrators as witnesses with respect to the matters heard by the panel or considered by them in reaching their decisions. Though counsel in this case meticulously avoided asking questions that would require the arbitration panel member to testify concerning the deliberations of the arbitration panel, the practice of calling a member of a quasi-judicial body to explain or otherwise embellish its decision is not permitted.

The petition for review is denied, and the decision of the Board is affirmed.



Positive
As of: Jul 19, 2012

IAP World Services, Inc. and Teamsters, Chauffeurs, Warehousemen, Industrial and
Allied Workers of America, Local 166.

Case 31-CA-29505

NATIONAL LABOR RELATIONS BOARD

2012 NLRB LEXIS 92; 192 L.R.R.M. 1519; 358 NLRB No. 10

February 24, 2012

NOTICE:

[*1]

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

PRIOR HISTORY:

IAP World Servs., 2011 NLRB LEXIS 358 (N.L.R.B., July 19, 2011)

COUNSEL:

Michelle Scanlon, Esq., for the General Counsel.

James G. Brown, Esq. (Ford & Harrington, LLP), of Orlando, Florida, for the Respondent.

George A. Pappy, Esq. (Reich, Adell & Cvitan), of Los Angeles, California, for the Union.

JUDGES: By Mark Gaston Pearce, Chairman; Brian E. Hayes, Member; Richard F. Griffin, Jr., Member

OPINION:

DECISION AND ORDER

On July 19, 2011, Administrative Law Judge William G. Kocol issued the attached decision. The Acting General Counsel filed exceptions and a supporting brief. The Respondent filed a brief in support of the judge's decision and an answering brief to the Acting 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 judge's decision and the record in light of the exceptions n1 and briefs and has decided to [*2] affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

n1 The Acting General Counsel requests that the Board adopt a new framework for considering post-arbitration deferral cases. Because, in our view, the proposed framework would not lead to a different result in this case, we decline to consider that request at this time.

ORDER

The complaint is dismissed.

ALJ:

WILLIAM G. KOCOL

ALJ-DECISION:

DECISION

STATEMENT OF THE CASE

WILLIAM G. KOCOL, Administrative Law Judge. The Teamsters, Chauffeurs, Warehousemen, Industrial and Allied Workers of America, Local 166 (herein the Union) filed the charge on November 19, 2009 n1 and on December 29 the Regional Director deferred the case to arbitration. After the arbitration award issued the General Counsel issued the complaint on March 29, 2011. The complaint alleges that IAP World Services, Inc. (herein IAP) discharged Larry Treen in violation of *Section 8(a)(3)* and *(1)* of the Act. IAP filed a timely answer that admitted the allegations in [*3] the complaint concerning the filing and service of the charge, interstate commerce and jurisdiction, the Union's labor organizations status, agency and supervisory status, and of its collective-bargaining agreement with the Union. IAP denied that it unlawfully discharged Treen. As affirmative defenses IAP alleged that Treen was fired for misconduct, that his discharge had been submitted to arbitration, and that arbitrator had issued a decision, and that the Board should defer to that decision.

n1 All dates are 2009 unless otherwise indicated.

I. JURISDICTION

IAP, a corporation, is a government contractor providing services at the United States Army's Fort Irwin, California, training center where it annually purchases and receives goods valued in excess of \$ 50,000 directly from points located outside the State of California. IAP admits, and I find, that it is an employer engaged in commerce within the meaning of *Section 2(2)*, *(6)*, and *(7)* of the Act and that the Union is a labor organization within the meaning [*4] of *Section 2(5)* of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Legal Standards

The issue presented in this case is whether the Board should defer to a decision issued by Arbitrator Joseph E.

Grabuskie. On June 20, 2011, IAP filed a motion to adopt the record in the arbitration hearing as the record in this case, to defer to the factual findings of the arbitrator, and to cancel the hearing scheduled in this case. On June 22, 2011, the General Counsel filed a motion opposing IAP's motion. I granted IAP's motion and accepted the record in the arbitration proceeding to determine whether arbitration award is in accord with *Olin Corp.*, 268 NLRB 573 (1984) and *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955).ⁿ² Under the *Spielberg* doctrine, the Board will defer to an arbitration award where "the proceedings appear to have been fair and regular, all parties had agreed to be bound, and the decision of the arbitrator is not clearly repugnant to the purposes and policies of the Act." The General Counsel concedes that the arbitration proceedings were fair and regular, and the parties agreed to be bound, so the only issue that remains is whether the decision is clearly repugnant [*5] to the Act. In that regard the Board does not require an arbitrator's award to be totally consistent with Board precedent. Rather, the inquiry is whether the award the award is "palpably wrong." Unless the arbitrator's decision is not susceptible to an interpretation consistent with the Act, the Board will defer. Also, the party seeking to have the Board reject deferral and consider the merits of the unfair labor practice matter has the burden of showing that the standards for deferral have not been met. *Olin Corp.*, *supra* at 574. In *Olin* the Board added that the requirements that (1) the contractual issue be factually parallel to the unfair labor practice issue and (2) the arbitrator be presented generally with the facts relevant to resolving the unfair labor practice. The factual setting of the complaint allegations in this case present the issue of whether Treen lost the protection of the Act by conduct and remarks he made while engaged in protected, concerted activity. In the arbitration hearing the parties directly presented the unfair labor practice issue to the arbitrator, briefed the issue, and generally presented the same evidence to the arbitrator as would [*6] be presented in an unfair labor practice hearing. Moreover, as described more fully below, the arbitrator applied the same legal standard that I would apply and specifically resolved the unfair labor practice issue.

ⁿ² A review of case law informs me that in cases such as this the Board goes through a two-step process. First it determines whether the arbitrator's decision is repugnant to the Act. It makes this assessment based record and decision in the arbitration process. *Olin Corp.*, *supra* at 574; *Atlantic Steel Co.*, 245 NLRB 814 (1979). See also the late Chairman John Truesdale's concurring opinion *Kansas City Star Co.*, 236 NLRB 866, 868 (1978). If the arbitrator's decision is not repugnant, the complaint is dismissed. If the Board determines that the decision is repugnant, then the Board will not consider that decision and will instead decide the case on its merits after a full hearing. *Pincus Brothers*, 237 NLRB 1063, 1065-66 (1978), *enfd.* denied *NLRB v. Pincus Brothers*, 620 F.2d 367 (3rd Cir. 1980).. On occasions the hearing on the merits takes place before a decision is made on whether to defer to the arbitrator's award. See, for example, *Dreis & Krump*, 221 NLRB 309 (1975). In those cases it appears that no pretrial motion was filed that raised the issue of deferability. In any event, there is no requirement that a hearing be held when the issue can be resolve by a ruling on a properly filed motion. Rather, I conclude this is a matter left in the first instance to the discretion of the judge. In this case I exercise that discretion and first determine whether the arbitrator's decision is repugnant to the Act.

[*7]

Arbitrator's Decision

The following facts are as described by the arbitrator. IAP has a collective-bargaining agreement with the Union that runs from October 1, 2008 through September 30, 2013. On March 17 IAP sent a memo to all employees that began:

Attached is your new copy of the CBA. The Company is implementing the new language only in the new CBA effective Monday, March 23, 2009. The Company is still waiting on approval of the CBA by the Contracting Officer, hence, all economic issues such as wages, shift differential changes, insurance co-pay, etc. remain in effect from the old CBA until such approval time. Also, the Company is further waiting for the approval of the retroactive pay.

The memo ended:

When approval of the CBA is made by the Contracting Officer, you will immediately be notified of such approval of the economic issues and implementation processes.

Treen worked for IAP as a boiler operator; he worked there since 2004. Treen was fired for his behavior in three separate incidents. The first occurred on March 19, two days after the March 17 memo. On that day David Dearman, Treen's supervisor, was conducting a safety meeting. During that [*8] meeting Treen asked Dearman when IAP was going to sign the contract and pay backpay. Dearman replied that he believed the contract would take effect on March 23. Treen then uttered phrases such as "Fuck the Company and this job." Treen then was suspended for 2 days. A grievance was filed and IAP and the Union settled the grievance. The settlement reduced the suspension to a reprimand, gave Treen backpay for the 2 days, and required that Treen go to anger management class.

The second incident occurred during a weekend shift on July 26; Treen's hours that day were 7 a.m.-- 3:30 p.m. Treen complained that he was sweating too much and it was too hot in the boiler room so he left the area, drank some ice tea and worked on paperwork. Treen's replacement R.J. Steele arrived. Treen complained to Steele about the heat. At some point Treen put his tools away and went to the gym to shower. Steele then reported the matter to the weekend supervisor, Andy Uraine. Uraine in turn called Treen on Treen's mobile phone, but Treen did not answer because he was apparently in the shower. When Treen did return the call, Uraine asked if Treen needed any medical attention but Treen laughed and said no. Uraine [*9] then completed a disciplinary action form recommending that Treen be discharged for insubordination because Treen was supposed to report his medical condition to his supervisor rather than abandon his post. The arbitrator indicated that although Treen was not provided with due process concerning this incident, he concluded that Treen was obligated to notify his supervisor of his condition so that appropriate precautions could be taken. And he concluded that Treen was not entitled to use an hour before the end of his shift to shower. The arbitrator also concluded that Treen falsely reported the time he spent working that day.

The third incident occurred on July 31 during a division-wide meeting conducted by General Manager Jeff Williamson; about 130-140 employees attended. The main topic of the meeting was safety, but Williamson said he would entertain questions after the safety discussion. At this meeting Treen again interjected the subject of backpay. Treen said that he did not work for the government, he worked for IAP. The arbitrator noted that Treen had options other than interrupting the safety meeting; Treen could have spoken with management away from the meeting, he could have [*10] consulted with the Union, he could have filed a grievance, or he could have written his congressman. The arbitration award described the testimony of the witnesses concerning what Treen said and did at the safety meeting. Those descriptions included that Treen spoke in a loud angry voice about the backpay, that Treen was insubordinate and disrespectful, that Treen was very agitated, and that Treen was loud and aggressive. The arbitration decision then described Treen's version of the events. The arbitrator concluded:

It is clear that the Grievant's attitude was argumentative and disruptive and completely out of place in that type of meeting. All witnesses confirmed that out of frustration, Williamson asked the Grievant to leave the room.

After this meeting Treen was suspended and then fired. In the termination notice IAP referenced the March 20 and July 26 incidents as well as the July 31 incident.

The arbitration award noted that Treen had filed a charge with the Board alleging that his termination was unlawful and that the Regional Director had deferred the case to arbitration. It then described the issues as whether Treen's termination violated the "just cause" provision [*11] in the contract and noted that the decision would also address Treen's charge with the NLRB. The award described the positions of the parties, including IAP's contention that Treen's discharge did not violate the Act. IAP's position in that regard, as described by the arbitrator, was that while the Act protected employees who engage in protected concerted activity, employees who do so could lose the protection of the Act if their conduct is "egregious or flagrant." The award then mentions *Atlantic Steel, supra* and lists the four criteria the Board considers in resolving the issue of whether conduct loses the protection of the Act and recites how IAP

applies those criteria. The Union's position is also portrayed in the arbitration award; it asserts that the Act protects certain activity and that attempting to enforce the contract is an activity protected by the Act. The Board and the courts have found discharges to be unlawful even when the employee interrupts management, becomes aggressive, insistent, and contains some name-calling.

The arbitrator concluded that IAP did not take any action against Treen because of any activity protected by the Act; he noted:

While [*12] the Grievant's back pay question was appropriate, even if misplaced, his demeanor was disruptive, disrespectful, argumentative, and he refused to accept Williamson's answer given in good faith.

Based on all of the above, the arbitrator held that IAP properly terminated Treen and IAP's decision was not "arbitrary, capricious or discriminatory." The decision ended:

Due to the facts outlined above, it is concluded that in terminating the Grievant the Company did not violate the National Labor Relations Act as charged by the Union.

Analysis

As indicated above, the General Counsel shoulders the burden of establishing that arbitration decision was clearly repugnant to the Act and was palpably wrong. The General Counsel begins by citing cases where the Board held that an employee's attempt to enforce a collective-bargaining agreement is activity protected by the Act. But none of those cases deal with the peculiar fact setting presented in this case. In one sense Treen was attempting to enforce the collective-bargaining agreement. But in another sense he was attempting to disrupt the understanding between IAP and the Union, common under government contractors, that an appropriate [*13] government official or agency first had to approve the increased monetary items in the contract before they could be implemented. Treen was informed of this process in the March 17 memo, yet he continued to press for immediate money. In this sense Treen's conduct was not an attempt to enforce the contract; rather it was an attempt to undermine it.

Assuming Treen's conduct was for the purpose of enforcing the contract, the General Counsel presents no case directly on point with the fact pattern in this case. Indeed, it is unlikely that the General Counsel could do so because cases of this type are fact intensive and require the balancing of the factors described in *Atlantic Steel, supra*. For example, although Treen's conduct was not prompted by any unfair labor practice, the setting in which it occurred was at the lower end of protection. That is, Treen's conduct did not occur at the bargaining table or during the grievance process where an employer and union are in an equal position. Rather, they took place during work meetings involving other employees and they to some extent disrupted those meetings. Although the Board could find Treen's conduct during these meeting [*14] still protected, it would depend on the nature of Treen's conduct. Here the arbitrator assessed all the evidence and concluded that Treen's conduct was disruptive, argumentative, and disrespectful. Remember, this was in the context where in March Treen had raised the same matter and had said, according to the arbitrator, "Fuck the Company and this job." A conclusion that Treen's conduct at the July 31 meeting, in this context, could be sufficient to strip an employee of the protection the Act otherwise would provide is not palpably wrong. *Aramark Services, 344 NLRB 549 (2005)*. I conclude that the General Counsel has not established that the arbitrator's decision is clearly repugnant to the Act.

In his latest brief the General Counsel concedes that the only issue left under *Spielberg* and *Olin* is whether the award is repugnant to the Act. More specifically he again concedes that the arbitrator considered and resolved the unfair labor practice issue. But yet later in that brief he inconsistently argues that the arbitrator should have applied *Wright Line, 251 NLRB 1083 (1980)*, enfd. *662 F.2d 899 (1st Cir. 1981)*, cert. denied *455 U.S. 989, 102 S. Ct. 1612, 71 L. Ed. 2d 848 (1982)*. [*15] This argument fails for several reasons. First, it is directly contrary to *Olin, supra*. Second, if adopted it would allow a union to get two bites at the apple by allowing it to litigate one theory in arbitration (*Atlantic*

Steel) but withhold another theory to litigate in an unfair labor practice hearing (*Wright Line*). Just as the charge in this case would have been dismissed if the Union failed to take the case to arbitration, so too is must be dismissed if the Union failed to present all its evidence and legal theories at arbitration. To do otherwise would undermine the very reasons the Board has adopted its current deferral policy. Finally, the General Counsel indicates that incident that should be subject to a *Wright Line* analysis is July 26 discipline stemming for overheated/early shower matter. But this discipline is not alleged as an unfair labor practice in the complaint and I likely would not allow the General Counsel to litigate the matter in the absence of such an allegation. The General Counsel asserts he would present evidence with respect to IAP's "past practice with respect to employees showering during working time." But this shows the General [*16] Counsel is merely seeking to relitigate the finding of the arbitrator that Treen took a 1-hour shower and that a shower of that length was certainly improper.

The General Counsel next argues that the Board should modify approach under *Olin*. Of course, I can not modify existing Board law. But I consider and comment on the General Counsel's arguments in the event the Board considers that useful. The General Counsel urges the modifications are necessary to provide a "greater weight to safeguarding employees' statutory rights in *Section 8(a)(3)* and (1) case, such as the case herein." This is entirely understandable because, as this case may show, the current deferral scheme allows for the possibility that a claim involving discriminatory discipline that might have been meritorious if litigated in an unfair labor practice proceeding could be lost in an arbitration proceeding. Stated differently, in such a case the statutory rights are not vindicated. Of course, the Board has held that other considerations outweigh the vindication of these statutory rights.

The new standard proposed by the General Counsel is

[T]he party urging deferral must demonstrate that: (1) the contract [*17] had the statutory right incorporated in it or the parties presented the statutory issue to the arbitrator; and (2) the arbitrator correctly enunciated the applicable statutory principles and applied them in deciding the issues. Then, if the party urging deferral makes that showing, the Board should, as now, defer unless the award is clearly repugnant to the Act.

The General Counsel does not seek modification of the deferral standards or procedures under *Collyer Insulated Wire*, 192 NLRB 837 (1971).

What the proposed standards do is challenge the concept that a "just cause" provision in collective-bargaining agreement implicitly prevents employers from discriminating against employees because of conduct protected by the Act. This in turn undermines the basis for deferring *Section 8(a)(3)* cases that resulted from the progeny of *United Technologies*, 268 NLRB 557 (1984). There are practical problems with the new standard. It would require continued deferral of those cases in which there is no clause in a collective-bargaining agreement that matches *Section 7* or *Section 8(a)(3)*. What would the incentive be under those circumstances for a union to present [*18] the arbitrator with the unfair labor practice issue? It would be better off not to do so because if it lost in arbitration under the "just cause" standard the Board would not defer to the award because the arbitrator did not set forth the correct legal standard. The union could then try again to overturn the discipline in an unfair labor proceeding. Meanwhile, the unfair labor proceeding is held in limbo while the grievance is processed through arbitration. What is the judicial and resource economy in such a process? The application of the second point in the proposed standard poses difficulties in this case. The arbitrator here described the correct *Atlantic Steel* standard only in the sense that he described it IAP's position. Although implicitly he took that standard into account, he did not go through each of the four elements and then weigh them as was done in *Atlantic Steel*. n3

n3 In his brief the General Counsel argues that under the proposed standard deferral to the arbitration award in this case would be inappropriate because the arbitrator "did not correctly enunciate and apply" the applicable statutory standard. To the extent that this comment suggests that under the proposed standards the arbitrator must "correctly apply" the law, it is incorrect. The proposed standard preserves the repugnancy standard; it does

not require that the arbitrator correctly apply the legal standards.

[*19]

It seems to me that a better approach would be to modify *United Technologies* to require deferral in Section 8(a)(3) cases only where the collective-bargaining agreement explicitly and clearly contains language that affords employees the same protection that they would have under the Act, i.e., language that mirrors *Section 7* and/or *Section 8(a)(3)*. This would enhance the collective-bargaining process by letting the parties themselves decide in the first instance whether or not they want to arbitrate matters that otherwise might be litigated in an unfair labor practice proceeding. This would also directly and more efficiently rescind the judicial construct, undermined by stealth in the proposed standard, that the resolution of the whether discipline was for "just cause" also resolves the issue of whether the discipline was discriminatory under the Act. And it would achieve the General Counsel's goal of better protecting the statutory rights of employees.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended n4

n4 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.

[*20]

ORDER

The complaint is dismissed.

Dated, Washington, D.C. July 19, 2011

Legal Topics:

For related research and practice materials, see the following legal topics:

Labor & Employment Law Collective Bargaining & Labor Relations Discipline, Layoff & Termination Labor & Employment Law Collective Bargaining & Labor Relations Unfair Labor Practices Interference With Protected Activities Labor & Employment Law Wrongful Termination Remedies Backpay



VERIZON NEW ENGLAND, INC. and INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 2324, AFL-CIO

Case Nos. 1-CA-44539, 1-CA-44556, 1-CA-44612

NATIONAL LABOR RELATIONS BOARD

2011 NLRB LEXIS 630

November 15, 2011

COUNSEL:

[*1] Laura Sacks, Esq. and Daniel Fein, Esq., Counsel for the General Counsel.

Arthur Telegen, Esq. and John Duke, Esq., Seyfarth Shaw LLP, Counsel for the Respondent.

Alfred Gordon, Esq., Counsel for the Charging Party.

ALJ:

Joel P. Biblowitz

ALJ-DECISION:

DECISION

Statement of the Case

Joel P. Biblowitz, Administrative Law Judge: The Consolidated Complaint herein, which issued on June 30, 2011, and was based upon unfair labor practice charges that were filed on March 27, April 9 and April 29, 2008 n1 by International Brotherhood of Electrical Workers, Local 2324, AFL-CIO, herein called the Union, alleges that Verizon New England, Inc., herein called Respondent, violated *Section 8(a)(1)* of the Act, by telling employees in about March and April that they could not display signs containing such statements as "Verizon Honor Or Existing Contract," "Verizon We Are Ready Contract 08" and "Every Verizon Worker Should Be A Union Worker" in personal vehicles parked on company property. Among other defenses, the Respondent defends that this Complaint should be dismissed because the Board should defer to an arbitrator's decision which meets the standards set forth in *Olin Corp. 268 NLRB 573 (1984)* [*2] and is dispositive of the charges herein.

n1 Unless indicated otherwise, all dates referred to herein relate to the year 2008.

I. Jurisdiction and Labor Organization Status

Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of *Section 2(2)*, (6) and (7) of the Act, and that the Union is a labor organization within the meaning of *Section 2(5)* of the Act.

II. The Facts

The record herein is based solely upon stipulations and exhibits agreed to by the parties; there was no record testimony. The Respondent is engaged in the business of providing telecommunications services nationwide; however, only three of its facilities in Massachusetts are involved herein: the facilities in Westfield, Springfield and Hatfield, herein called the Westfield facility, the Springfield facility, and the Hatfield facility. Mark Brown was the manager of the Westfield facility, Tony Collier was the area operations manager of the Springfield facility, and David Walker was the

area operations [*3] manager of the Hatfield facility, and each of them is admitted to be a supervisor and agent of the Respondent within the meaning of *Section 2(11)* and *2(13)* of the Act.

Respondent was party to a collective bargaining agreement effective from August 3, 2003 to August 2, covering so called "plant" employees in Massachusetts and Rhode Island. This bargaining unit is represented by a number of local unions of the International Brotherhood of Electrical Workers, including the Union. The contract contains a grievance and arbitration provision as well as a No Strike provision, which states:

The Union agrees that during the term of this Agreement, or any extension thereof, it will not cause or permit its members to cause, nor will any member of the Union take part in, any strike or other interference with any of the Company's operations or picketing of any of the Company's premises...

In addition the contract provides that the Respondent shall furnish the Union with bulletin boards at its facilities, with the *caveat*:

Bulletin boards are to be used by the Union for posting notices concerning official Union business, or other Union related matters, provided that [*4] if anything is posted on these bulletin boards that is considered by the Company to be controversial or derogatory to any individual or organization the Union agrees to remove such posted matter on demand and if it fails or refuses to do so, such matter may be removed by the Company.

The Union has engaged in ambulatory informational picketing at or near Respondent's facilities over the years. This informational picketing was most common when contracts were nearing expiration. Employees engaged in informational picketing would arrive at work before the start of their shifts and carry picket signs either on the sidewalk in front of Respondent's facilities, or in a nearby public area. In March 2008, in preparation for contract negotiations that were to take place in August 2008, without notice to Respondent, the Union began engaging in informational picketing at some of Respondent's facilities in Massachusetts. While there was no picketing at or near the Westfield, Springfield or Hatfield facilities in March 2008, the Union planned to engage in informational picketing at or near these facilities beginning in April 2008. Accordingly, in March 2008, the Union distributed informational [*5] picket signs to employees, which contained language to the effect of: "Verizon, Honor Our Existing Contract." These signs, measuring about twenty eight inches wide by twenty two inches high, are in black with white lettering.

Bargaining unit employees at the Springfield facility displayed these signs in the windshields of their personal vehicles parked on the Respondent's property during the first week of April 2008, and the signs were displayed in the cars every day that week. A line of about thirty cars with these signs was visible upon entering the parking lot and, depending on which way the cars were facing, some of these signs displayed in the cars were visible from the street. On about Friday, April 11, Collier instructed bargaining unit employees to remove these signs from their car windows while the cars were parked on its premises, and the employees complied with these instructions and no employee was disciplined as a result of displaying the signs. At the time that these signs were displayed at the Springfield facility, and at the time that Collier instructed the employees to remove the signs, no ambulatory informational picketing had occurred at the Springfield facility. [*6] Rather, the ambulatory informational picketing began in the street in front of the facility between 7:00 a.m. and 7:30 a.m. on Thursday, April 24, and continued at this facility at these same times on Thursday mornings thereafter for a period of time, using the signs that were placed in the car windows as discussed above.

Bargaining unit employees at the Westfield facility displayed these signs in the windshields of their personal vehicles parked on the Respondent's property on Thursday, March 20 and Friday, March 21. The signs displayed in the car windows were not visible from the public street, but were visible to Respondent's bargaining unit employees and managers, and were visible to employees of the Penske Trucking and Agway facilities that share the property with Respondent, and were visible to delivery drivers and others entering the property. On about Monday, March 24 or Tuesday, March 25, Brown instructed bargaining unit employees to remove these signs from their car windows while the cars were parked on its premises, and the employees complied with these instructions and no employee was disciplined as a result of displaying the signs. At the time that these signs were displayed [*7] at the Westfield facility, and at the time that Brown instructed the employees to remove the signs, no ambulatory informational picketing had occurred at the

Westfield facility. Rather, the ambulatory informational picketing began in the street in front of the facility between 7:00 a.m. and 7:30 a.m. on Friday, April 25, and continued occasionally thereafter at this location at these same times.

Bargaining unit employees at the Hatfield facility displayed these signs in the windshields of their personal vehicles parked on the Respondent's property on Wednesday, April 23. The signs displayed in the car windows were not visible from the public street, because they were facing the wrong direction, but were visible to Respondent's bargaining unit employees, managers, and contractors, and to others entering the property, such as personnel of waste removal and landscaping contractors and personnel of the Postal Service, Federal Express and United Parcel Service. Later that day, Walker instructed bargaining unit employees to remove these signs from their car windows while the cars were parked on its premises, and the employees complied with these instructions at the time it was given, and [*8] no employee was disciplined as a result of displaying the signs. At the time that these signs were displayed at the Hatfield facility, and at the time that Walker instructed the employees to remove the signs, no ambulatory informational picketing had occurred at this facility. Rather, the ambulatory informational picketing began in a private parking lot approximately one half mile from the Hatfield facility between 7:00 a.m. and 7:30 a.m. on Thursday, April 24, and continued occasionally thereafter at this location at these same times.

The signs displayed in the bargaining unit employees' personal vehicles in March and April at the Springfield, Westfield, and Hatfield facilities as described above were not on sticks and when the bargaining unit employees engaged in the informational picketing at or near these facilities, as described above, they used the same signs again, without sticks. Respondent is not aware of any interruption or other disruption of its operations caused by the ambulatory picketing at these facilities.

On May 21 and June 18, Region 1 of the Board deferred these unfair labor practice charges to the grievance and arbitration procedures of the parties' collective [*9] bargaining agreement. Subsequently, the Union grieved the issue of whether the Respondent violated the contract by requiring the employees to remove the signs from their personal vehicles. An arbitration hearing was held on October 26, 2009 before Arbitrator Timothy Bornstein, one of a group of arbitrators regularly selected by the parties to resolve contractual disputes, and the Union presented six witnesses and Respondent presented one. Both sides were afforded the opportunity to examine and cross examine the witnesses and both submitted post hearing briefs.

The arbitrators' Award issued on January 20, 2010, with the Union's designated arbitrator dissenting. The award summarizes the testimony of the business managers of the Union, as well as another IBEW local union, three employees and Walker, and sets forth the contractual language of the following provisions: Bulletin Board, Arbitration, No Strike, and Management Rights, and the contentions of both sides. The Opinion concludes:

The core question here is whether management violated the parties' contract when it required removal of Union protest signs from employee vehicles parked on Company premises. That was the issue [*10] which the NLRB *Collyerized*. We conclude that several contract clauses reflect the parties' agreement that the Union- and its members- would not engage in picketing on Company premises during the life of the collective bargaining agreement.

Article G10, the No Strike article, provides that the "Union...will not cause or permit its members to cause, nor will any member of the Union take part in, any strike of or other interference with any of the Company's operations or picketing of any of the Company's premises." By any other name, Union members who place protest signs in their cars to inform the public of its contract concerns with Verizon are engaged in picketing. While the Union argues that placing signs in cars is not picketing because doing so only communicates a message, that is precisely what picketing is: to inform the public of the Union's concerns. Picketing does not have to be a sign on a stick.

The Union also contends that the Company decision to order the signs removed from cars was arbitrary or in bad faith in violation of Article G9.03(b), but there is no such evidence.

Whether the Company's demand that the signs be removed from employees' vehicles [*11] infringed employees' *Section 7* rights is a question that we do not have the authority to resolve. Our authority is limited to interpreting the contract. We do no more.

By letter dated August 27, 2010, Region 1 of the Board notified the parties that it was refusing to issue a Complaint in the matter and was dismissing the Union's unfair labor practice charges, stating:

By letter dated May 21, 2008, pursuant to the Board's decision in *Collyer Insulated Wire*, 192 NLRB 837 (1971), and pursuant to "Arbitration Deferral Policy under *Collyer-Revised Guidelines*" publicly issued by the General Counsel on May 10, 1973, I deferred a decision on the charges in the above-captioned cases pending the outcome of an arbitration proceeding.

On January 20, 2010, the arbitrator selected by the parties issued an award ruling that the Employer acted within its rights when it required that the picket signs be removed from personal vehicles in the Company parking lots.

I have made a careful review of this matter and find that the arbitration proceedings were fair and regular, that the parties had agreed to be bound by the results of the proceedings, that the unfair [*12] labor practice issue alleged and involved in the charges were presented to and considered by the arbitrator, that the contractual issue was factually parallel to the unfair labor practice issue, that the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice, and that the award is not in conflict with the purposes or policies of the National Labor Relations Act. Thus, the award meets the standards set forth by the Board in *Olin Corporation*, 268 NLRB 573 (1984), and the Board would defer to the award.

Here, the unfair labor practice issue is whether the Employer violated employees' *Section 7* rights by requiring employees to remove picket signs from their personal vehicles on the Employer's property. The issue presented to the Arbitrator was: Whether management violated the parties' contract when it required removal of Union protest signs from employees' vehicles parked on Company property. Both the unfair labor practice and the grievance contemplate the same actions by the employees, putting the picket signs in the cars and the same action by the Employer, requiring the removal of the signs. Therefore, the issues are factually [*13] parallel.

In regard to your claim that the arbitrator's award was repugnant to the Act, the Board will not find an award is clearly repugnant unless it is shown to be palpably wrong, i.e., not susceptible to an interpretation consistent with the Act. The arbitrator's finding that the collective-bargaining agreement prohibited picketing on the Employer's premises and the union signs constituted picketing is susceptible to an interpretation with the Act and, therefore is not repugnant.

I am, therefore, refusing to issue a Complaint in this matter, and the charges are hereby dismissed.

Subsequently, Region 1 conducted a further investigation, determined that deferral to the arbitrator's award was not appropriate, but dismissed the charges on the merits stating, by letter dated February 14, 2011:

The Region has carefully investigated and considered the charges against Verizon, Inc., alleging violations under *Section 8* of the National Labor Relations Act.

The charges allege that the Company interfered with employees' rights to engage in protected concerted activities under *Section 7* of the Act, by ordering employees who displayed union signs in their cars, while [*14] the cars were parked on Company property, to remove them.

The case was originally *Collyer* deferred on May 21, 2008, and the Office of Appeals denied the Union's appeal of the deferral determination on June 28, 2008.

On January 20, 2010, an Arbitrator's Award issued in favor of the Employer, stating that the Employer acted within its rights when it required that the picket signs be removed from personal vehicles in the Company parking lots.

On May 14, 2010, the Union submitted a position statement requesting that the Region not defer to the Arbitrator's Award and, instead, process the case further. The Union argued that the Region should not defer to the Arbitrator's Award because: (1) The arbitrator did not consider the unfair labor practice issue; and (2) the award was repugnant to the Act.

On August 27, 2010, the Region deferred to the Arbitrator's award and dismissed the unfair labor practice charges, basing its decision upon its *Spielberg/Olin* review of the arbitration award. The Region determined that the proceedings were: fair and regular; the parties had agreed to be bound by the results of the proceeding; the unfair labor practice issue alleged in [*15] the charges were presented to, and considered by the arbitrator; the contractual issue was factually parallel to the unfair labor practice issue; the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice; and the award was not in conflict with the purposes or policies of the Act. *Olin Corporation, 268 NLRB 573 (1984)*. Accordingly, the Region deferred to the award and dismissed the charge.

On September 5, 2010, the Union appealed the Region's dismissal. Prior to a finding by the Office of Appeals, the Region conducted further investigation. Based upon that investigation, I find that deferral to the Arbitrator's Award is not appropriate because his conclusion that the Union's conduct of seeking to communicate a message by displaying signs in parked vehicles constituted picketing was overly broad and, therefore, repugnant to the Act. I am, therefore, revoking my August 27, 2010 dismissal letter. I further find, however, that further proceedings on your charges are not warranted based on additional evidence obtained in the further investigation.

Decision to Dismiss: Based on additional investigation, I have concluded [*16] that further proceedings are not warranted, and I am dismissing your charge for the following reasons:

After further investigation, the Region found that the Union's informational picketing against the Employer was an area-wide effort that began two weeks prior to the Employer's prohibition against sign posting in employee vehicles on the Employer's property. Further, the directive to remove the signs at the locations at issue in your charges began one day prior to traditional picketing at two of the three locations at issue and within a couple of weeks at the third location. I note that the Union made and distributed the picket signs for the purpose of engaging in informational picketing, conduct the Union had a practice of engaging in prior to the expiration of prior contracts. Accordingly, it is reasonable to conclude that the conduct engaged in here was part and parcel of an area-wide picketing campaign in furtherance of a labor dispute rather than the mere placement of signs in employee vehicles on Company property. This finding is consistent with the Board's recent case on bannering. In *United Brother of Carpenters and Joiners of America (Eliason & Knuth of Arizona, Inc.), 355 NLRB No. 159 [*17] (August 27, 2010)*, the Board acknowledged that there are prior Board decisions finding picketing during periods when there was no patrolling or other ambulation, and found those cases distinguishable because the display of stationary signs or distribution of handbills in those cases was preceded at the same location or accompanied at other locations by traditional ambulatory picketing and, in many instances, the same signs were displayed that had been utilized in traditional picketing. Accordingly, the Employer, relying on that portion of the collective-bargaining agreement in which the Union clearly and unequivocally waived the employees' right to picket on the Employer's premises, lawfully directed employees to remove signs from vehicles parked on the Employer's premises. I note that the Employer's directive was narrowly tailored to restrict picketing on the Employer's property in accordance with the parties' collective-bargaining agreement.

The Union appealed this dismissal on about March 6, 2011, and on June 2, 2011, the Office of Appeals sustained the Union's appeal, and remanded the case to the Region with instructions to issue a complaint, absent settlement, stating [*18] only: "The Employer's prohibition on employees from displaying union signs in their vehicles located in the employees' parking lot raised issues warranting Board determination based on record testimony developed at a hearing before an administrative law judge."

III. Analysis

The initial question herein is whether the arbitrators' decision satisfies the requirements of *Olin, supra*, which modified the Board's deferral standards somewhat. In *Olin*, the administrative law judge, finding that the arbitrator had not properly or seriously considered the unfair labor practice, declined to defer to the arbitrator's decision, but dismissed the Complaint on the merits. The Board reversed, finding that the judge should have deferred to the arbitrator's decision under the standards set forth in *Spielberg Manufacturing Co., 112 NLRB 1080 (1955)*, while also setting forth more specific standards for arbitration deferral, specifically rejecting the proposition that "...arbitration awards are appropriate for deferral only when the Board determines on de novo consideration that the award disposes of the issue just as the Board would have." Rather, the Board [*19] adopted the following standard for deferral:

We would find that an arbitrator has adequately considered the unfair labor practice if (1) the contractual issue is factually parallel to the unfair labor practice issue, and (2) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice. In this respect, differences, if any, between the contractual and statutory standards of review should be weighed by the Board as part of its determination under the *Spielberg* standards of whether an award is "clearly repugnant" to the Act. And, with regard to the inquiry into the "clearly repugnant" standard, we would not require an arbitrator's award to be totally consistent with Board precedent. Unless the award is "palpably wrong," i.e., unless the arbitrator's decision is not susceptible to an interpretation consistent with the Act, we will defer.

In addition, the Board placed upon the party seeking to have the Board ignore the arbitrator's decision, "the burden of affirmatively demonstrating the defects in the arbitral process or award." Therefore, the issues herein are whether the contractual issues as presented to the arbitrator were [*20] factually parallel to the unfair labor practice issues and whether the parties to the arbitration litigated the facts relevant to the unfair labor practice issue, as well as the contractual issue, and whether the arbitration decision was repugnant to the Act or was palpably wrong, remembering that it is the burden of Counsel for the General Counsel and counsel for the Charging Party to establish that the Board should not defer to the arbitration award

In *Andersen Sand and Gravel Company, 277 NLRB 1204 (1985)*, the administrative law judge, in finding that deferral was inappropriate, relied on the absence of any rationale in the arbitration award indicating that the panel considered the unfair labor practice allegation. The Board reversed, finding that deferral was appropriate as the Counsel for the General Counsel did not sustain her burden:

First, it is clear that that the contractual and statutory issues are factually parallel. Indeed, as admitted by the General Counsel, the question of whether an employee may be discharged for violating a no strike clause is one which must be decided on a determination of the meaning and interpretation of the collective-bargaining [*21] agreement. Thus, the statutory question of whether the right to strike for less than 24 hours is protected under a 24 hour clause, or has been clearly and unequivocally waived under the no-strike provision of the contract, is a question of contract interpretation.

The Board found that the contractual and statutory issues were coextensive and that the arbitration panel was presented generally with the facts relevant to resolving the unfair labor practice. The Board stated further:

Although the judge premised his decision in part on a finding that the arbitration panel did not receive or consider the law relating to the unfair labor practice, we believe the judge misinterprets the requirements of *Olin*. Under *Olin*, the arbitrator need only be "generally presented" with the facts relevant to resolving the statutory issue.

The Board concluded:

In the absence of any evidence to the contrary, it is reasonable to conclude that resolution by the panel of the contractual issue required the same evidence relevant to resolving the unfair labor practice issue. Therefore, because the evidence before the arbitration panel was essentially the same evidence necessary [*22] for a determination of the merits of the unfair labor practice charge, we are satisfied that this requirement has been met.

Finally, in response to Counsel for the General Counsel's argument that the award was repugnant to the purposes and policies of the Act, the Board, at footnote 6, states: "Deferral recognizes that the parties have accepted the possibility that an arbitrator might decide a particular set of facts differently than would the Board. This possibility, however, is one which the parties have voluntarily assumed through collective bargaining."

In *Specialized Distribution Management, Inc.*, 318 NLRB 158 (1995), four employees left their work stations without permission, in apparent violation of a number of contractual provisions. When they were called into the manager's office, were told that they were being suspended pending further investigation and were told to punch out and leave the facility, they refused to leave without a letter of explanation. Three eventually left after the security department was called, and the fourth did not leave until the sheriff's department was called. The arbitrator found that walking off the job was not a dischargeable [*23] offense, but that the insubordination charge warranted substantial disciplinary action. He converted the discharges of the three who left the facility into suspensions without backpay and found that the discharge of the fourth employee was for just cause. Counsel for the General Counsel argued against deferral, alleging that the unfair labor practice issue was not considered, and that the decision was repugnant to the Act. The judge, as affirmed by the Board deferred. Citing footnote 6 of the Board decision in *Andersen, supra*, the judge stated:

Arbitrator Kagel has found facts that generally track those alleged to be unfair labor practices and the General Counsel has not established that the arbitrator was lacking any evidence relevant to the determination of that issue. Moreover, Kagel found that the insubordination overrode the other considerations, including what might be a protected circumstance.

In *Laborers International Union, Local 294*, 331 NLRB 259 (2000), the Complaint alleged that the Respondent Union violated Section 8(b)(1)(A) & (2) of the Act by dispatching three individuals to jobsites, in violation of its contract and hiring [*24] hall rules, thereby bypassing other employee-registrants who were entitled to be dispatched. The relevant contractual provision relating to hiring hall dispatching generally provides that referrals are in the order of registration on the out-of-work list, with certain exceptions whereby an employer may request that a specific individual be referred. The judge refused to defer to an arbitrator's decision; the Board reversed, finding that the contractual issue before the arbitrator was factually parallel to the unfair labor practice issue:

The critical point of both the contractual grievance and the unfair labor practice was that the Respondent Union violated the hiring hall rules in making specific dispatches to Valley Fence and Fresno Paving. Thus, the arbitrator considered substantially the same issue as that raised by the General Counsel's complaint. The arbitrator also had before him and reviewed the same facts that would be relevant to the unfair labor practice.

In *Smurfit-Stone Container Corp.*, 344 NLRB 658, 659-660 (2005), the Board, in deciding to defer to the arbitrator's decision, further defined "susceptible to an interpretation consistent with [*25] the Act" as stated in *Olin, supra*:

"Susceptible to an interpretation consistent with the Act" means precisely what it says. Even if there is one interpretation that would be inconsistent with the Act, the arbitral opinion passes muster if there is another interpretation that would be consistent with the Act. Further, "consistent with the Act" does not mean that the Board would necessarily reach the same result. It means only that the arbitral result is within the broad parameters of the Act. Thus, the Board's mere disagreement with the arbitrator's conclusion would be an insufficient basis for the Board to decline to defer to the arbitrator's award.

In *Kvaerner Philadelphia Shipyard, Inc.*, 347 NLRB 390 (2006), the Board affirmed the judge's dismissal of a Section 8(a)(3) allegation and deferred to an arbitrator's decision upholding the discharge. The employee wrote a letter to

fellow employees containing false allegations that the employer had withheld some of their pay and benefits and had earned interest for itself with the withheld money. The employee and the union contended that he was engaged in protected concerted activities, but [*26] the arbitrator distinguished his conduct from protected conduct: "However, by publishing unjustified allegations of intentional bad faith to other employees without attempting to ascertain the facts, the grievant rendered himself vulnerable to the imposition of substantial discipline. There is no merit to the Union's assertion that the grievant was engaged in protected speech or concerted action. His action recklessly publishing accusations of dishonesty for other employees to take or see is not protected speech under these circumstances..." The Board, quoting from *Smurfit, supra*, found that the arbitrator adequately addressed the unfair labor practice allegation in finding that the grievant lost the protection of the Act and that his result was not repugnant to, or inconsistent with Board precedent: "The arbitrator's factual finding here, that Smith had acted with reckless disregard for the truth, is not palpably wrong, and is susceptible to an interpretation consistent with Board precedent. We therefore find that deferral is appropriate."

On the other hand, there are cases that go the other way, finding that the arbitrator's decision is repugnant to the purposes [*27] and policies of the Act. In *Garland Coal & Mining Co., 276 NLRB 963 (1985)*, the Board refused to defer to an arbitrator's decision upholding the discharge of a union president who was fired for refusing to obey a supervisor's order to sign a memo setting forth the employer's position on an issue relevant to the union. The arbitrator found his refusal to be insubordination. The Board agreed with the judge that the discriminatee "...was espousing a view and engaging in activity in support of the union's interpretation of the collective bargaining agreement. To find that Oldham was insubordinate under these circumstances is not susceptible to any interpretation consistent with the Act." Similarly, in *110 Greenwich Street Corp., 319 NLRB 331 (1995)*, the Board refused to defer to an arbitrator's award upholding the discharge of an employee for engaging in concerted activities. The employee was fired for posting signs in his car windows while the car was parked in front of the building where they were employed. The signs objected to the fact that the employer was regularly late in paying the employees and that the employer should sell his expensive car and [*28] pay the employees in a timely manner. The arbitrator ruled that the "display of controversial placards in front of the building" justified the discharge of the employee. The judge, as affirmed by the Board, found that "...the arbitrator's finding that the display of controversial placards is a just basis for disciplinary action is similarly misguided; the award is not susceptible to an interpretation that is consistent with the employees' rights to engage in concerted activities under Section 7 of the Act" and was therefore repugnant to the Act.

In *Mobil Oil Exploration & Producing, U.S., Inc., 325 NLRB 176 (1997)*, the discriminatee/Charging Party had an ongoing dispute with the union president, alleging that he was working at another job while allegedly conducting union business, and he reported the situation to his (and their) employer. The employer told him that he would investigate the allegations, but that it was confidential, and that he was not to discuss it with anyone. Shortly thereafter, he was overheard discussing the investigation with fellow employees and he was fired for improper interference with the investigation and for insubordination. The arbitrator [*29] upheld the discharge finding that the Charging Party was insubordinate by not complying with the instructions that he received to keep the investigation confidential. The Board refused to defer to the arbitrator's award:

We agree with the General Counsel that the arbitration award is palpably wrong and repugnant to the Act because the precipitating event that caused Pemberton's termination was his exercise of protected concerted activities. Because the arbitration award upholds Pemberton's discipline based on his protected concerted activities, we find that deferral to the award is inappropriate and that the Respondent violated Section 8(a)(1) as alleged.

The initial requirements of *Spielberg* and *Olin* have clearly been met as the proceedings appear to have been fair and regular and all parties agreed to be bound by the arbitrator's decision. I also find that the arbitrator was presented with the facts relevant to resolving the unfair labor practice issue and adequately considered the unfair labor practice issue, which was factually parallel to the contractual issue. The panel discussed all the relevant contractual terms, interpreted them and determined (right or [*30] wrong) that the signs in the car windows violated these contractual provisions and that the Respondent's directives to the employees to remove the signs did not violate the contract. The decision concluded by saying that the arbitration panel did not have the authority to resolve the issue of whether the management directive infringed on employees' Section 7 rights, and the panel was correct. That is a Board function to resolve and, if appropriate, to correct.

The final issue in determining whether to defer to the arbitration ruling is whether Counsel for the General Counsel and the Charging Party have sustained their burden that the arbitrator's decision is repugnant to the Act, or palpably wrong. I find that they have not. Counsel for the General Counsel, in his brief, forcefully argues that the Respondent's direction to the employees to remove the signs from their vehicles was unlawful because the no-picketing provision contained in the contract did not "clearly and unmistakably" waive the Union's statutory right to engage in lawful informational picketing. Citing a recent case, *Carpenters Local 1506 (Eliason & Knuth of Arizona, Inc.)*, 355 NLRB No. 159 (2010), [*31] Counsel for the General Counsel also argues that the signs in the employees' vehicles did not constitute picketing and, further, for a stationary sign to qualify as picketing there must be an element of confrontation. Although these arguments may be correct, that is not helpful in sustaining his burden herein. More to the point is the argument made by counsel for the Respondent: "There is nothing in Board law that prevents an arbitrator from interpreting the word 'picket' in a collective bargaining agreement provision prohibiting picketing more broadly than the Board would in an unfair labor practice case not involving such a provision. This is especially so given the vacillations in Board precedent over the definition of 'picketing' under the Act." In *Bell-Atlantic-Pennsylvania, Inc.*, 339 NLRB 1084, 1087 (2003), the employer prohibited its employees with customer contact from wearing "Road Kill" shirts which it felt reflected negatively on its image and employees who failed to comply with this directive were suspended for one day without pay. The arbitrator sustained the punishment, finding that the employer reasonably could believe that observing the employees wearing [*32] the shirt would unsettle the public. In deferring to the arbitrator's decision, the Board stated that they could not say that the arbitrator was "palpably wrong" in striking the balance of interest as he did:

In short, we find that although the Road Kill shirt was protected under *Section 7*, it was not repugnant or "palpably wrong" for the arbitrator to find that employees' *Section 7* interests may give way to the Respondent's legitimate interests in protecting its public image under the circumstances of this case.

I therefore find that although the Board, upon hearing this case *de novo* might have reached a different conclusion than that reached by the arbitrator, finding that the signs in the vehicle windows was not picketing and were protected, the arbitrator's decision was neither repugnant to the Act nor was it palpably wrong. I would therefore defer to the arbitrator's decision, and recommend that the Complaint be dismissed.

Conclusions of Law

1. The Respondent is an employer engaged in commerce within the meaning of *Section 2(2)*, (6) and (7) of the Act.
2. The Union is a labor organization within the meaning of *Section 2(5)* of the Act.
3. The arbitrator's [*33] decision should be deferred to, and therefore the Respondent did not violate *Section 8(a)(1)* of the Act as alleged in the Complaint.

On these findings of fact, conclusions of law and based on the entire record, I hereby issue the following recommended n2

n2 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.

ORDER

It is recommended that the Consolidated Complaint be dismissed in its entirety.

Dated, Washington, D.C. November 15, 2011

Legal Topics:

For related research and practice materials, see the following legal topics:

Labor & Employment Law Collective Bargaining & Labor Relations Strikes & Work Stoppages Labor & Employment
Law Collective Bargaining & Labor Relations Unfair Labor Practices Interference With Protected Activities Labor & Em-
ployment Law Collective Bargaining & Labor Relations Unfair Labor Practices Strikes



Positive
As of: Jul 19, 2012

Sunrise Health Care Corporation d/b/a Mediplex of Stamford and New England Health
Care Employees Union, District 1199, AFL-CIO

Cases 34-CA-7692-1, 34-CA-7691-2, 34-CA-7709, 34-CA-7751

NATIONAL LABOR RELATIONS BOARD

*334 N.L.R.B. 903; 2001 NLRB LEXIS 561; 172 L.R.R.M. 1012; 2001-2 NLRB Dec. (CCH)
P15,932; 334 NLRB No. 111*

August 2, 2001

NOTICE:

NOTICE: This opinion is subject to formal revision before publication in the board volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

PRIOR HISTORY:

[**1] Original ALJ-Decision can be found at *1999 NLRB LEXIS 42*.

COUNSEL:

Rick Concepcion, Esq., for the General Counsel.

Thomas R. Gibbons, Esq. (Jackson, Lewis, Schnitzler & Krupman), for the Respondent.

JUDGES: By Wilma B. Liebman, Member; John C. Truesdale, Member. Peter J. Hurtgen, Chairman, concurring.

OPINION:

DECISION AND ORDER

[*903] On February 4, 1999, Administrative Law Judge Howard Edelman issued the attached decision. The General Counsel filed exceptions and a brief in support. The Respondent filed an answering brief. n1

n1 The Respondent has filed a motion to strike portions of the General Counsel's brief. In light of our disposition of this case, we find it unnecessary to pass on the Respondent's motion.

[**2]

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, n2 and conclusions, n3 as modified below, and to adopt the recommended Order.

n2 The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products, 91 NLRB 544 (1950)*, enfd. *188 F.2d 362 (3d Cir. 1951)*. We have carefully examined the record and find no basis for reversing the findings.

n3 The judge's third Conclusion of Law is amended to read, "Respondent did not violate Section 8(a)(1), (3), and (4) of the Act as alleged in the complaint."

The judge dismissed the complaint [**3] allegations that Supervisor Carlos Pena threatened employees with more onerous working conditions and that various actions taken by the Respondent against certified nursing assistants (CNAs) Marie Montas, Judy Davis, Minouche Ferdinand, and Marie Duclos, including changes in working hours, suspensions, and terminations, were discriminatory. With respect to the actions taken against the four CNAs, the judge concluded that the General Counsel failed to establish knowledge or animus.

Contrary to the judge, we find that the General Counsel established that the Respondent had knowledge that Montas, Davis, Ferdinand, and Duclos supported, and were active on behalf of, the Union. All 4 CNAs, along with approximately 75 other union supporters, signed a petition on the eve of the August 1996 election indicating their support for the Union. The Respondent received a copy of this petition and carefully reviewed the signatures. Indeed, it based two of its objections to the August 1996 election on the petition. The Respondent alleged that the Union "fraudulently published the forged signatures of employees misrepresenting that they endorsed the Union" and "fraudulently procured signatures indicating [**4] the employees who supported the Union." At the objections hearing, Lynn Hawkins-Winslow, the Respondent's administrator, testified that she reviewed the petition on the morning of the election and circled certain names that she believed were forged. n4 The Respondent's handwriting expert also testified that he believed that as many as 11 signatures were forged. Obviously, in order to determine which signatures were not authentic, the Respondent had to review all the signatures on the petition, including those of Montas, Davis, Ferdinand, and Duclos (whose signatures the Respondent did not challenge). n5

n4 All of the alleged actions against the CNAs occurred after the August election. Contrary to the judge's finding, Davis was suspended on September 25, rather than June 25.

n5 Moreover, the record establishes that both Ferdinand and Montas attended the objections hearing on behalf of the Union. While only Ferdinand actually testified, the Respondent's management observed Montas sitting at the hearing with other union witnesses.

[**5]

The judge also found that the General Counsel failed to establish antiunion animus. n6 The judge acknowledged that Board law permits the use of evidence of an employer's election campaign in order to show animus in an unfair labor practice trial. n7 Nevertheless, he found that such evidence could not be used by the General Counsel in the instant case to establish animus.

334 N.L.R.B. 903, *903; 2001 NLRB LEXIS 561, **5;
172 L.R.R.M. 1012; 2001-2 NLRB Dec. (CCH) P15,932

n6 The judge states that he refused to accept evidence regarding the nature of the Respondent's campaign in order to establish animus, but that he permitted the General Counsel to make an offer of proof regarding such evidence. The record clearly shows that the judge did not require such an offer of proof and that he accepted such evidence in its entirety.

n7 *Holo-Krome Co.*, 293 NLRB 594 (1989), enf. denied 907 F.2d 1343 (2d Cir. 1990).

The judge's finding directly contravenes well-established Board precedent holding that while protected speech, such as an employer's expression of its views [**6] or opinions against a union, cannot be deemed a violation in and of itself, it can nonetheless be used as background evidence of antiunion animus on the part of the employer. See, e.g., *Affiliated Foods, Inc.*, 328 NLRB 1107 (1999); *Lampi, LCC*, 327 NLRB 222 (1998), enf. denied 240 F.3d 931 (11th Cir. 2001); and *Gencorp*, 294 NLRB 717 fn. 1, 731 (1989). However, even assuming that the General Counsel established animus, we find, given the judge's credibility based findings, that the Respondent met its *Wright Line* n8 burden of showing that it would have taken the same actions even in the absence of any union activity on the part of Montas, Duclos, Ferdinand, [*904] and Davis. Accordingly, on this basis, we adopt the judge's dismissal of the complaint allegations.

n8 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[**7]

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Dated, Washington, D.C. August 2, 2001

Wilma B. Liebman, Member

John C. Truesdale, Member

CONCUR BY:
HURTGEM

CONCUR:

Chairman Peter J. Hurtgen, concurring.

I join my colleagues in dismissing the complaint.

I have previously stated, and I repeat here, that I do not believe that employer statements protected by Section 8(c) of the Act may be used to establish antiunion animus in support of an 8(a)(3) violation. n1 Nonetheless, assuming arguendo that the General Counsel in this case established both that the Respondent had knowledge of the employees' union support and that the Respondent harbored antiunion animus, I would dismiss the complaint. I find, as do my colleagues, that the Respondent met its rebuttal burden of demonstrating that it would have taken the same actions even in the absence of union activity.

n1 See, e.g., my statement set forth in *Affiliated Foods, Inc.*, 328 NLRB 1107 fn. 3 (1999).

334 N.L.R.B. 903, *904; 2001 NLRB LEXIS 561, **7;
172 L.R.R.M. 1012; 2001-2 NLRB Dec. (CCH) P15,932

I reach [**8] the same conclusion in regard to the 8(a)(4) allegations. That is, assuming arguendo, an animus against employee use of the Board's processes, the Respondent would have taken the same action even if that animus were not present.

Dated, Washington, D.C. August 2, 2001

Peter J. Hurtgen, Chairman

ALJ:

HOWARD EDELMAN

ALJ-DECISION:

DECISION

Statement of the Case

HOWARD EDELMAN, Administrative Law Judge: This case was tried before me on August 18 through 21, and on December 15 and 16, 1997. On various dates in November 1996 through April 1997 New England Health Care Employees Union, District 1199, AFL-CIO, herein called the Union, filed unfair labor practice charges against Sunrise Health Care Corporation d/b/a Mediplex of Stamford, herein called Respondent. On June 17, 1997 a complaint issued alleging violations of Section 8(a)(1), (3) and (4) of the Act.

Upon the entire record in this case, including my observation of the demeanor of the witnesses and a consideration of the briefs submitted by Counsels for General Counsel and Respondent, I make the following findings of fact and conclusions of law.

Respondent is a corporation with an office and place of business in Stamford, Connecticut, engaged [**9] the operation of a health care facility. Respondent annually derives gross income exceeding \$ 100,000 from the operation of this facility. Respondent, in connection with its operation of this facility, annually purchases and receives goods valued in excess of \$ 50,000 directly from points outside the State of Connecticut.

It is admitted, and I conclude, Respondent is an employer within the meaning of Section 2(2), (6) and (7) of the Act.

It is also admitted, and I conclude, the Union is a Labor organization within the meaning of Section 2(5) of the Act.

Respondent owns a chain of nursing home facilities in Connecticut, including the Stamford facility herein.

At this facility, Respondent provides skilled nursing and convalescent services to elderly patients and houses a total of approximately 120 patients on its three floors. Respondent provides rehabilitative services, known as sub-acute care, on two of its three floors. This service provides either rehabilitative or other specific treatment courses to short-term patients who are subsequently discharged upon receiving their respective treatment. Of Respondent's 120 patients, approximately 35 live at the facility on a long-term basis. [**10]

On its first floor, Respondent houses the sickest patients, approximately 30 at any time. On its second floor, Respondent maintains about 45 beds dedicated to its rehabilitative services. On its third floor, Respondent maintains about 45 beds which it reserves for both short-term and long-term case patients. Patients on the third floor range in age between about 65 and over, and suffer from physical and/or mental infirmities, including dementia. Some of these patients can therefore pose a danger to either themselves or others by engaging in activities that are otherwise unsuitable for them.

Responsible for the facility's day-to-day operations is Administrator Lynn Hawkins-Winslow. Those reporting to

334 N.L.R.B. 903, *904; 2001 NLRB LEXIS 561, **10;
172 L.R.R.M. 1012; 2001-2 NLRB Dec. (CCH) P15,932

Hawkins-Winslow include the Director of Nursing Services, Rosella Crowley. On each of its three floors, Respondent has a Nurse Manager who is responsible on a 24-hour basis for the overall operations of that floor, including patient care and personnel issues. Each of these Nurse Managers reports directly to Crowley. The Nurse Manager on the first floor is Jackie Pinto, and the Nurse Manager on the third floor is Carlos Pena. Pena works all of the first shift and into the second shift, [**11] usually working until 7:00 p.m.

At its facility, Respondent employs approximately 150 nurses, including Registered Nurses ("RNs"), Licensed Practical Nurses ("LPNs"), and Certified Nurse's Aides ("CNAs"), and maintains three shifts - 7:00 a.m. to 3:00 p.m. (first shift), 3:00 p.m. to 11:00 p.m. (second shift), and 11:00 p.m. to 7:00 a.m. (third shift) (Tr. 32, 895). Respondent's RNs and LPNs are not represented by a union. Respondent schedules more nurses during the first shift than on its other two shifts. All of Respondent's nurses report directly to the Nurse Manager on their respective floor. CNA are assigned to primarily provide care to approximately 9 or 10 patients per shift. Generally, CNAs remain assigned to the same patient for approximately one month before being rotated to a new set of patients.

All of Respondent's nurses are primarily responsible for ensuring proper patient care, and to this end, "are expected to work together and assist one another" in providing care. CNAs are primarily responsible for assisting RNs and LPNs. When a patient rings for assistance on the call bell, all personnel are responsible for answering the call bells and responding to resident requests. [**12]

During the course of their shift, CNAs, are responsible for monitoring and charting certain of a patient's daily activities, [*905] such as the percentage of a patient's food intake during meals, the number of bowel movements experienced by the patient, whether a patient has showered, has undergone daily physical therapy or changed position while sleeping, etc. CNAs record this activity on a patient flow sheet, adjusting their entries throughout their shift as patients' daily activities and conditions occur or change.

At its facility, Respondent maintains, a progressive discipline policy which applies to all employees. Under this policy, Respondent will use a progressive discipline for most disciplinary actions, as follows: Verbal warning, written warning, suspension (or final written warning), and termination. According to Crowley, all terminations" must be for just cause.

Federal and State Regulations specifically protect residents From abuse. Residents of nursing facilities are a particularly exposed population. Their stay in such a facility is necessitated by a short or long term illness or infirmity. These weaknesses leave them vulnerable on many fronts.

These protections include the [**13] right to be free from restraints. The right to be free from physical or mental abuse, corporal punishment, involuntary seclusion, and any physical or chemical restraints, imposed for purposes of discipline or convenience and not required to treat the resident's medical symptoms.

Ultimately, if a facility does not meet the Federal and State standards it will suffer financially. If it is determined that a facility is not in compliance with Federal Regulations, Medicare reimbursement is interrupted. Continued violations could require closure of the facility. State agents periodically examine the health facility. This is termed a "Survey". It involves interviews, on site inspections and record analysis to determine whether the facility is meeting the statutory and regulatory requirements.

In addition to these statutory restrictions, Respondent maintains an internal policy further regulating patient abuse. The facility's patient abuse policy proscribes abuse generally and also specifically forbids verbal, sexual, physical and mental abuse. These events are defined in the policy as follows:

"Verbal Abuse" refers to any use of oral, written or gestured language that includes disparaging [**14] and derogatory terms to residents or their families, or within their hearing distance, to describe residents, regardless of their age, ability to comprehend or disability.

"Physical Abuse" includes hitting, slapping, pinching, kicking etc. It also includes controlling behavior through corporal punishment.

"Mental Abuse" includes but is not limited to, humiliation, harassment, threats of punishment or deprivation.

Respondent's attempts to prohibit this misconduct are far reaching. The rule against abuse is applicable to everyone related to the facility. Facility staff specifically must "refrain from all actions that could be considered abuse, mistreatment and/or neglect". The rule however, is applied beyond only staff. According to the policy; residents of Respondent will not be subjected to abuse by anyone, including but not limited to facility staff, other residents, consultants, volunteer staff, family members, friends or other individuals.

Respondent also commits not to employ persons who have been found to be abusers, to thoroughly investigate abuse allegations and to "ensure that further potential abuse will not occur while the investigation is in progress." Finally, [**15] the policy enunciates the penalties for abuse by staff, "Based on the results of the facility's investigation, appropriate disciplinary action will be taken, up to and including termination of an employee."

Respondent enforces a four step system of progressive discipline. The first step is a recorded verbal warning. The second step is a written warning. The third step is a final written warning or disciplinary suspension. Termination is the final step in the system.

The steps of progression are generally applicable to discipline. There are circumstances however, when the step system is not followed. In situations of severe misconduct, one or more of the steps may not be applied.

As set forth above Federal Regulations govern the facility's reaction to allegations of resident abuse. The facility is specifically required to "prevent further potential abuse" while it investigates abuse allegations.

Prior to June 13, 1995, the Union commenced a campaign to organize Respondents service and maintenance employees. The CNA's were included in this unit. LPN's and RN's were not included.

On June 13, 1995 the Union filed a Representation Petition seeking to represent the above unit. On June 26 [**16] of that year the Regional Director approved a Stipulated Election Agreement calling for an election to be conducted on August 3, among the "unit" employees..

The Union lost the election 51 to 50. There were 2 challenged ballots. The Union filed timely objections to the election.

A Hearing on the Union's Objections was conducted on November 27 and 28, 1995. The Hearing Officer found, and the Board affirmed, that Jose Charles a low level supervisor in the dietary department, told approximately four kitchen employees that he would surveil their union activity and impose discipline on them. Charles was also found to have told employees that receiving a raise depended on the failure of the Union's campaign. These statements found to have been made to a very small percentage of the more than 100 voters, there was no allegation or evidence of any impermissible conduct in the Nursing Department, the Department in which all of the alleged discriminatees in the instant case worked.

The Hearing Officer concluded that Charles statements to the employees, set forth above, were made pursuant to a management meeting of all managers about a week before the election. At this meeting Respondent's [**17] then labor relations consultant, Davey James, suggested that Respondent get rid of the active Union supporters. The other objections were set aside. In this regard the Hearing Officer found that Respondent otherwise conducted itself appropriately during the Union organizing campaign. Respondent thereafter terminated its relationship with James and subsequently hired its present counsel Thomas Gibbons, a member of the the firm Jackson, Lewis, Schnitzler &

Krupman, a specialized law firm engaged in labor law.

[*906] A second election was ordered on July 19, 1996. On August 15, 1996, over a year after the first election. The Union won this election. During the year period between elections the Union did not file any unfair labor practice charges, or in any other manner allege that Respondent was engaging in any unlawful conduct. It is admitted that both the Union and Respondent waged intensive election campaigns.

Counsel for General Counsel attempted to call witnesses and introduce other evidence to establish that Respondent conducted an intense campaign and to establish Union animus, although admitting that such campaign did not violate the parameters of Section 8(c) of the Act. I refused [**18] to hear such evidence, but permitted Counsel for General Counsel to make an offer of proof. I affirm my ruling.

My ground for such ruling was that General Counsel had alleged independent violations of Section 8(a)(1), and had already introduced testimony concerning various statements by floor supervisor Pena, discussed below, which General Counsel contended would add something in establishing Union animus. I concluded that taking evidence on the lawful election campaign could result in calling witness to give testimony and to identify and introduce, documents, cross-examination by Respondent on such testimony; that Respondent would call his own witnesses to establish the Union's extensive campaign against Respondent, and why Respondent had to wage such an extensive campaign; and then cross-examination by Counsel for the General Counsel. I concluded that although such testimony concerning a lawful election campaign, may have some slight relevance, it was far outweighed by the time such litigation might extend an already long and complicated case.

Section 8(c) of the Act provides;

(c) [Expression of views without threat of reprisal or force or promise of benefit] The expressing [**19] of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act [subchapter], if such expression contains no threat of reprisal or force or promise of benefit.

The Board held in *Holo-Krome Company*, 293 NLRB 594 (1989), reversing the Administrative Law Judge, that notwithstanding Section 8(c), evidence concerning an employers election campaign can be introduced as evidence to show animus in an unfair labor practice trial.

The 2nd circuit reversed the Board in *Holo-Krome*, finding that it was improper to refer to an employer's lawful expressions of opinion during a representation election campaign, as a basis for finding anti-union animus. 907 F.2d 1343 (2nd Cir 1990). The Court pointed out that

"Several circuits have construed Section 8(c) as barring the "use [of] protected expression to build a case" against an employer or union, *NLRB v. Eastern Smelting & Refining Corp.*, 598 F.2d 666, 670 (1st Cir. 1979), and have found substantial [**20] evidence lacking where the Board makes reference to a company's lawful expression of opposition to the union as a basis for concluding that subsequent acts or statements were unlawful. See *Florida Steel Corp. v. NLRB*, 587 F.2d 735, 750-54 (5th Cir. 1979); *NLRB v. Rockwell Manufacturing Co.*, 271 F.2d 109, 118-19 (3d Cir. 1959); *Pittsburgh Steamship Co. V. NLRB*, 180 F.2d 731, 735 (6th Cir. 1950) ("Section 8(c) of the Taft-Hartley Act was specifically intended to prevent the Board from using unrelated non-coercive expressions of opinion on union matters as evidence of a general course of unfair labor conduct"), *aff'd*, 340 U.S. 498, 71 S.Ct. 453, 95 L.Ed. 479 (1951)."

I conclude that the language in Section 8(c): "... the expressing of views ... shall not constitute evidence of an unfair labor practice ..."; means what it says. Animus is a necessary element to establish a violation of Section 8(a)(1) and (3). The election campaign evidence General Counsel wanted to introduce was for the purpose of establishing a necessary

element [**21] to the commission of an unfair labor practice. To permit General Counsel to routinely try the facts of a lawful Section 8(c) campaign would in my opinion intrude on the protection established by Section 8(c) of the Act.

In order to support a prima facie case of discrimination the General Counsel must prove unlawful motivation. Unlawful motive can be proven by direct evidence or by circumstantial evidence which would establish general animus, *Lewis Grocer Co.*, 282 NLRB 166 (1986).

Independent violations of Section 8(a)(1) constitute evidence of animus toward a union. The instant complaint alleged a single Section 8(a)(1) violation. Respondent is alleged to have threatened employees with more onerous working conditions in August 1996, sometime prior to the August 15 election. Specifically, floor supervisor Pena is alleged to have made such threat.

General Counsel tried to support this allegation with testimony from Marie Cadot, a CNA. Cadot testified about a meeting in the third floor lounge before the August 1996 election. According to Cadot, Pena was discussing the Union with employees. Cadot testified that Pena said that if employees were represented [**22] by the Union, things would be different. She also testified that Pena said, with the Union, employees would not be able to talk to management as they "do now". During cross-examination Cadot amplified this statement. She testified Pena told her "There would be delegates and stewards, and people would have to go through the Union".

The Board has held that an employer is allowed to tell employees that Union organization will result in, "a change in the manner in which employer and employee deal with each other." *Tri-Cast, Inc.* 274 NLRB 377 (1985). Specifying that the change which will occur will result in loss of direct access to management is similarly legitimate. *Koons Ford of Annapolis*, 282 NLRB 506 (1986). These principles were recently reaffirmed by the Board. *Ben Venue Laboratories*, 317 NLRB 900 (1995).

An employer is also privileged to point out legal facts to employees. It is legal fact that if employees are represented, the union is their collective voice. This is the essence of Section 9(a) representation. I conclude the statements ascribed to Mr. Pena merely reflect these facts. [**23]

According to Cadot, Mr. Pena first said that things would change with unionization. He then explained that employees would not [*907] be able to go directly to management with problems but would have to go through their union representatives.

These statements simply reflect the legal realities of organization. If the employees select the union as their representative, the union is their spokesman. Rather than dealing directly with supervision, represented employees must utilize their representative as an intermediary.

I conclude the statements attributed to Mr. Pena are not threatening or coercive. Rather they merely reflect the effect of Section 9(a) representation and are thus not violative. *Ben Venue Laboratories*, 317 NLRB 900.

Accordingly, I conclude this Section 8(a)(1) of allegation in the Consolidated Complaint should be dismissed.

General Counsel called Donna Brown, a former employee, employed by Respondent from October to December 1996; as a per diem LPN.

Brown testified that almost immediately upon her employment she attended an orientation meeting with other LPM and RN's. The meeting was conducted by the Staff Development Coordinator, Sue Bocchetta. [**24] According to Brown, during the course of orientation, Bocchetta told the new employees that the Union represented certain employees at Respondent. The Union had won the August 15, 1996 election. These employees were also informed that Respondent had been mismanaged, but those mistakes were being remedied. According to Brown examples of poor management were given. These included letting nurses work without current licenses, not checking references and not requiring I-9 Forms. Brown also testified that Bocchetta told the new employees that certain people were causing

problems and should be written up if they did something wrong.

Brown also testified that shortly after Bocchetta's meeting, DNS Crowley met with the group. According to Brown, Ms. Crowley mentioned the Union represented employees and said that employees had sought representation because previous managers had done a poor job. Brown testified that Crowley told the Nurses to discipline CNAs if they saw them acting improperly.

Brown also testified that she later attended a floor meeting conducted by Mr. Pena to discuss a staff member being struck by a resident. According to Brown, after the full meeting, Pena spoke to the [**25] Nurses by themselves. In addition to Brown, Penaredondo and Quiblan, Respondent nurses, were present at this smaller meeting. According to Brown, Pena told the three Nurses that some people at Respondent were problems and they needed to get rid of them. She testified he also told them to "write them up" for anything they do. However, according to Brown, Pena did not mention the Union during this meeting.

I conclude Brown's testimony was not credible. She was evasive and hostile during cross-examination. She was reluctant to answer questions on cross-examination and equivocated on harmless questions. Brown's lack of candor was apparent at the very beginning of cross-examination. Brown had been terminated by Ms. Crowley for several No Call - No Show incidents. Brown acknowledged that per diem status did not excuse employees from the obligation to follow Respondent's procedures regarding call outs. Nonetheless, in her testimony she tried to show that *she* did not have any such obligation. Moreover, she even denied being terminated, claiming that she left because Crowley did not respect her children.

Brown's incredible statements were at times made gratuitously. When she was questioned [**26] as to the circumstances of her leaving Respondent, Brown was evasive. After she had maneuvered around several questions in this vein, I concluded on the record, that she "left with ill feeling". Notwithstanding such conclusions, and the improbability of her claim, Brown denied any bias. In fact, she testified incredibly that she "liked Mediplex"!

Even crediting Brown's testimony, it does not show any hostility, or unlawful intent on the part of Respondent. Brown admitted that as an LPN it was her responsibility to discipline CNAs who act improperly. After more of reluctance and evasion, Brown acknowledged that this is something expected of nurses, even in the organized facility where she now works. Careful examination of her testimony reveals that this is all she claimed was said to her by Pena. She was instructed to do what she knew to be her duty as a nurse. If CNAs made mistakes, they were to be disciplined. She was not told to fabricate performance errors. Nor was she told to "set up" certain aides for discipline. Rather, she was simply told to hold the CNAs to the appropriate standard of care. This is particularly significant because these statements were not linked to the Union. [**27] Even according to Brown's testimony, at orientation, new employees were merely told certain employees were represented. Finally, during the meeting with Pena, Brown said he made no mention of the Union at all.

Bocchetta, The Facility Staff Development Coordinator, testified that Pena's responsible for conducting new employee orientation. She specifically recalled orienting Ms. Brown when she started at Respondent. Bocchetta was new herself and Brown's group was the first orientation she conducted. She also remembered Brown because Brown asked many questions.

During orientation Bocchetta testified she made a very limited mention of the Union. When she described the chain of command, she told the orientees that the Union represented certain employees. Bocchetta denied that she said that some CNAs were "troublemakers and would have to be fired because of the Union." She denied telling nurses to write CNAs up for no reason. She denied saying that the Union had to go. She also denied she was instructed by anyone else in Respondent to do these things.

Rosella Crowley, testified she did not conduct orientation meetings. She admitted addressing one group regarding scheduling; this was the [**28] exception and not her practice. Crowley testified never attended a meeting where she

told Brown or anyone else that the Union has "got to go", or gave instructions to write up CNAs. Crowley denied making such comments to Brown in any other setting, nor was she given any such instructions by other Respondent officials.

I conclude Crowley's testimony was credible. n1 Crowley had no ax to grind with the Union. She has worked in the organized facilities, and in fact, has been both Director and Assistant Director of Nursing in homes represented by District 1199. When Crowley interviewed for the DNS position with Respondent, she knew that a representation election was scheduled. When [*908] she accepted position, she did not know if the employees had chosen to be represented or not. Crowley had nothing to do with the Union campaigns and had no dealings with her superiors regarding hostility toward the Union.

n1 As set forth below, I conclude that Crowley was a very credible witness throughout her entire testimony.

Pena supervised [**29] Nurses Penaredondo and Quiblan. He also recalled working with Brown. Pena denied he ever held a meeting with Brown, Penaredondo, and Quiblan, where he told them to write CNA's up for any thing they did. Nor did he ever tell them to write employees up in order "to get rid of them." Further, Mr. Pena denied making any such statements in any context, in or out of a meeting.

Pena's testimony in this regard was very clear and definite. He admitted to having worked with Brown and was unequivocal in his responses on both direct and cross-examination. Moreover, his testimony was consistent with that of Penaredondo and Quiblan, discussed below.

Shantii Penaredondo is a Registered Nurse assigned to the day shift on the third floor. She had been employed at Mediplex since July 1995. During the time in question in this case, Penaredondo's immediate supervisor was Pena.

Penaredondo works with Dennis Quiblan, an LPN who is also assigned to the third floor. Penaredondo remembered Brown to be an LPN who had worked various shifts on the third floor.

Penaredondo specifically denied, during her testimony, ever being present at a meeting with Quiblan and Brown where she heard Pena said, "guys, this [**30] is what I want you to do, anything the CNAs do, I want you to write the up". Nor was she ever at a meeting where she heard Pena say, I want you to write them up and get rid of them". Penaredondo, denied ever hearing Pena make any such statement, in any context.

As a registered nurse Penaredondo is not a bargaining unit employee. However, neither is she a supervisor or agent of Respondent. As set forth in detail below, I conclude she was a truthful witness who was not reluctant to make admissions, during her testimony, which were not in her best interests. There is no evidence that she was granted any particular favors or special treatment. In fact, she was disciplined as the result of one of the incidents at issue in this case. Her testimony was direct and forthright. Her demeanor made it clear she was only interested in presenting the truth. Moreover, Counsel for the General Counsel elected not to cross examine Penaredondo on this issue.

Quiblan is employed by Respondent as an LPN. He works the evening shift on the third floor. Quiblan has been employed at Respondent for about three years.

Pena is Quiblan's Unit Manager. Quiblan works with Penaredondo on the third floor. Quiblan [**31] remembered Donna Brown. He credibly testified she was a per diem nurse with whom Quiblan worked with "a few times". Quiblan testified that Pena conducted frequent meetings with nurses. He specifically testified that he was never at a meeting with Penaredondo and Brown when Pena told them to write the CNAs up for anything they did. Quiblan never heard Mr. Pena say anything like this in any context.

Karen Consavage is an LPN employed by Respondent. She usually works the evening shift. She is a "floating"

334 N.L.R.B. 903, *908; 2001 NLRB LEXIS 561, **31;
172 L.R.R.M. 1012; 2001-2 NLRB Dec. (CCH) P15,932

nurse and is not assigned a regular unit. Consavage began her employment with Respondent in October 1996. She was in the same orientation group as Brown. Consavage credibly testified that the orientation meetings were conducted by Bocchetta. Consavage credibly testified that in these meetings the only mention of the Union was when Bocchetta told the new employees that the CNAs were in the process of organizing.

Consavage credibly testified that neither Bocchetta, nor any other Respondent official made any other statements relating to the Union. She denied that anyone said "the Union was going to have to go". She denied being asked to write CNAs up no matter what they said or did. Consavage [**32] testified she did not attend any meetings with Brown where Crowley said the "the Union has got to go. Some CNAs have got to go and to write up CNAs no matter what they do."

Consavage is an LPN. While she is not in the bargaining unit, she is not a supervisor. I found her testimony, was forthright and candid. She did not exhibit bias or enmity toward Brown. I credit her entire testimony.

All the above witnesses called by Respondent clearly and credibly refuted Brown's testimony. They were similarly consistent in their denials of Brown's allegations.

Bocchetta admitted that she mentioned the Union's organizing campaign. It is clear however, that this was merely general information for new employees. Bocchetta and Crowley were newcomers to the Facility. They started with Respondent when the campaign was over. They had no interest in the CNA's organizing activities. The Union was non issue as far as they were concerned.

Pena also credibly denied making the threats Brown attributed to him. In order to believe Brown's allegations regarding Pena, two non supervisory employees have to be discredited. Quiblan and Penaredondo both testified that they participated in Pena's nurse meetings. [**33] They clearly and credibly testified that Pena did not make the statements Brown attributed to him in those meetings.

I credit the testimony of all Respondent's witnesses. These witnesses' recollections were definite. Their versions were consistent with each other and make sense. Three of them were not agents of Respondent. I set forth, I have concluded Brown was not a credible witness.

In summary, the credible evidence establishes that prior to the August 1995 election, Respondent hired Davey Jonas as a labor relations consultant, and that in a meeting of Respondent's supervisors, he advised them to fire active Union supporters. However, Respondent, contrary to such advice, fired no one. The first election was held on August 3, 1995. Challenges were determinative. Objections were filed by the Union. The Board found that the only objectionable conduct was by Respondent that a low level supervisor told four non-unit kitchen employees that he would surveil their Union activity and impose discipline on them, and that getting a raise depended upon the Union losing the election. The election was set aside. Respondent thereafter terminated Jones' services, and hired its present labor attorney. [**34]

Thereafter, Respondent conducted an election campaign to persuade its employees to vote for no representation. This election was free of any unfair labor practices and was conducted within the limits of conduct permitted by Section 8(c) of the [*909] Act. I conclude the low level kitchen supervisor's conduct was isolated, and did not involve unit employees. I conclude there was no Union animus between the first and second elections. A second election was then conducted which the Union won. Thereafter, the Union was certified.

Following the certification, the parties began collective bargaining negotiations; Respondent bargained in good faith, and within a brief period of negotiations, agreed to a three year collective bargaining agreement.

I conclude Respondent's conduct throughout this entire case was free of any Section 8(a)(1) conduct, and was within the clear meaning of Section 8(c) of the Act. Any objectionable statements that might arguably reflect animus, were isolated and did not relate to unit employees. Moreover, following the Board's certification, Respondent bargained in good faith and agreed upon a collective bargaining with a term of three years.

334 N.L.R.B. 903, *909; 2001 NLRB LEXIS 561, **34;
172 L.R.R.M. 1012; 2001-2 NLRB Dec. (CCH) P15,932

General Counsel has failed [**35] to establish independent violations of the Act by Mr. Pena. Similarly, the discredited testimony Brown of an overarching plan to fire CNAs were convincingly refuted.

An additional weakness in General Counsel's argument is the major source from which the "animus" supposedly emanates. A great deal of testimony was dedicated to Mr. Pena's sentiments during the campaign. Witnesses testified that Mr. Pena did not want employees to vote in favor of representation and that he expressed this to employees in different ways. I find such statements are within the meaning of Section 8(c) and do not establish animus.

There is no dispute that the disciplinary decisions regarding all four of the alleged discriminatees were made by DNS Crowley. She received information from various sources, including Mr. Pena, but the actual decision to suspend or terminate was Crowley's.

I conclude Crowley's lack of animus toward the Union can also not be disputed. It is uncontroverted that she came to Mediplex after the election campaigns which the General Counsel has tried to paint as so bitter. She has worked before in an organized environment. In fact, she had held a Director of Nursing position in a facility [**36] in which District 1199 represented employees. When she took her present position with Respondent she was aware that it was possible that the Union would come to represent Nursing Department employees. However, I found her an extremely credible and non-biased witness. Her excellent recollection of details during both cross and direct testimony and her demeanor, convince me entirety that she is a truthful witness.

The Board looks at the lack of animus on the part of the decision maker to negate any discriminatory motive. In *Alexian Brothers Medical Center*, 307 NLRB 389 (1992), the Board overruled the Judge's findings that the employer discriminatorily withheld a raise from a union supporter. In that case, the alleged discriminatee's immediate supervisor, Carney, initially evaluated his performance as "meets expectations". Carney's supervisor, Schmitt, however reviewed the evaluation and directed Carney to redo the evaluation giving an "unsatisfactory" rating. *Id. At 390*.

In *Alexian Brothers* the Judge found that Carney told the alleged discriminatee the negative reevaluation was, "because of the Union." *Id. At 396*. [**37] The Board discounted Carney's statement however, and noted the lack of animus "on the part of Respondent's higher management . . .". *Id. 389*. In this regard the Board noted several legitimate reasons which were the basis for Schmitt directing Carney to change the review. These reasons "were free of any suggestion of discriminatory intent."

The same reasoning applies in the instant case. The actual events which are alleged to be discriminatory were directed by "higher management" i.e., Crowley. Even if some animus were assigned to Mr. Pena, there is no basis for laying any hostility at the feet of Ms. Crowley. Moreover, the record reveals as set forth in detail below, that Crowley made her decisions based on legitimate concerns.

I conclude there is insufficient animus, if any, to support any of the allegations set forth in the complaint.

Concerning knowledge of Union activities, the credible evidence fails to establish that the Union organizational activities of the four alleged discriminatees was substantial, or that Respondent was aware of such activities. n2

n2 In connection with the 8(a)(1) and (3) violations alleged, I have credited Respondent's witnesses and not credited General Counsel's witnesses. My reasons supporting such findings are set forth below.

[**38]

Although a representative of the Union was present every day during the trial of this case, General Counsel called no Union representative, or any other witness to establish that these alleged discriminatees were any more active than at least 75 other union supporters.

Judy Davis, an alleged discriminatee attended Union meetings. However, there is no evidence that Respondent was aware of such meetings. Davis also signed a union petition along with at least 75 other active Union supporters. Davis also spoke out to other employees in favor of the Union in a variety of places inside Respondent's facility and outside, in Respondent's parking lot. Davis also distributed union buttons, worn by many union supporters, including Davis on three separate dates. However, there is no credible evidence that Respondent was specifically aware of any of her Union activity. Moreover, many other employees engaged in similar activities and were not discriminated against.

With regard to Marie Duclos, she became active on behalf of the Union before the August election by signing the above Union petition, speaking with co-workers about the benefits of joining the Union in Respondent's parking lot during [**39] her breaks, distributing Union flyers; and by wearing the Union's button during the entire course of her shift on two separate occasions. However, there is no credible evidence that Respondent was specifically aware of Duclos' Union activity. Similarly, most other employees engaged in such conduct without suffering any discrimination.

Minouche Ferdinand attended Union meetings at the Union hall, signed the above Union petition, spoke with co-workers in favor of the Union inside Respondent's facility, wore a Union button on her uniform on three separate occasions, and distributed Union flyers and buttons in Respondent's employee parking lot before and after her shifts and during her breaks specifically. There is no credible evidence that Respondent was aware [910] of activities. Many other employees engaged in such activities without suffering any discrimination.

Marie Montas, similar to the other discriminatees, became active on behalf of the Union. In this regard, Montas signed the above Union petition, and spoke with co-workers regarding the benefits of joining the Union, usually either in Respondent's parking lot or in the employee lunchroom. There is no credible evidence that Respondent [**40] was specifically aware of her activities. Many other employees engaged in these same activities without discrimination.

It is clear that over .75 unit employees were active Union supporters. At least that many signed the Union's petition. Many others distributed the petition for additional signatures, distributed and wore Union buttons and were talking to other unit employees in favor of the Union. Respondent was generally aware of such activity. However there is no evidence that the alleged discriminatees were any more active than any other Union supporter. Nor is there sufficient evidence to establish that Respondent was specifically aware of their activities.

Significantly, I find no evidence as to why Respondent would discriminate against only these employees. There is no evidence that they were more active than other employees. Moreover, no Union representative testified as to any Union activities in which they were engaged.

In determining whether an employer discriminates against an employee because of his or her membership in or activity on behalf of a labor organization, General Counsel has the burden of proving that the employees' membership in, or activities on behalf of [**41] such labor organization was a motivating factor in the discrimination alleged. Once such factor is established, the burden then shifts to the employer to establish that such action would have taken place in the absence of the employees' membership in, or activities on behalf of such labor organization, *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1982); *Wright Line, a division of Wright Line, Inc.*, 1251 NLRB 1080 (1980) *enfd.* 662 F2d. 899 (1st Cir.) cert. den. 455 U.S. 989 (1982).

Knowledge of an alleged discriminatee's union activities and union animus are necessary elements in order to establish General Counsel's burden. *Tri-State Truck Serv. v NLRB*, 616 F2d. 65 (CA 3, 1980).

As set forth and discussed above, General Counsel contend that animus can be established by the Section 8(a)(1) conduct alleged in the complaint and by Respondent's general anti-union attitude as evidenced by the Respondent's lawful Section 8(c) election campaign. Based upon my conclusions, discussed above, I conclude the Union has failed to establish [**42] such animus which would support the Section 8(a)(1) and (3) violations.

Accordingly, I conclude General Counsel has failed to establish Union animus and knowledge and therefore failed to meet its *Wright Line* burden.

334 N.L.R.B. 903, *910; 2001 NLRB LEXIS 561, **42;
172 L.R.R.M. 1012; 2001-2 NLRB Dec. (CCH) P15,932

Concerning Respondent's knowledge - the evidence establishes that many employees, if not all, engage in activities similar to those of the alleged discriminatees without suffering any discrimination. There is no evidence that the alleged discriminatees were more active than the other employees. There is no evidence as to why Respondent would single them out for discrimination. Nor is there any evidence that Respondent was aware of their particular Union activities. Accordingly, I conclude that Respondent had no knowledge of the discriminatees Union activities. I also conclude the alleged violations of Section 8(a)(1) and (3) in the Complaint be dismissed.

In connection with the credibility of witnesses, I conclude that General Counsel's witnesses, Montas, Duclos, Ferdinand, Davis and Brown are not credible witnesses.

My reasons for not crediting Brown are set forth above.

As to Duclos, Ferdinand, Montas, and Davis, I was very unimpressed with their demeanor. Duclos, [**43] Ferdinand and Montas were very vague as to the details of the Section 8(a)(1) and (3) allegations concerning them. Their testimony, during cross-examination, impressed me as being evasive. Moreover, their demeanor when testifying as to the details of their conduct with patients strongly impressed me as completely disinterested, indifferent and totally unconcerned, consistent with discharge for patient abuse, and falsification of patient records.

With respect to Davis, her demeanor throughout her entire testimony impressed me as arrogant, with a chip on the shoulder, an attitude, consistent with her discharge for insubordination.

I credit Respondent's witnesses. I was extremely impressed with their demeanor. They testified in detail, with excellent recollection, were responsive to questions put to them on direct and cross-examination, and displayed an impartial attitude throughout their testimony. Moreover their testimony was mutually corroborated, in several important areas by obviously neutral witnesses, including the daughter of an abused patient and several witnesses no longer working for Respondent, described in detail below. Further, much of their testimony was corroborated [**44] by official nursing home records, like patients flow charts, and employee files which established in significant part, Respondent's progressive discipline policy, and the discipline of nurses who were involved to some extent, with the conduct resulting in the alleged discriminatory allegations, described in the Complaint.

I conclude that General Counsel has failed to establish animus and knowledge. Accordingly, I further conclude General Counsel has failed to meet his *Wright Line* burden, and that the allegations of 8(a)(1) and (3) alleged in the complaint be dismissed.

Assuming arguendo, that I were to conclude that General Counsel met his *Wright Line* burden, I would nevertheless conclude that on the basis of the credible testimony of Respondent's witnesses, Respondent has conclusively established by such testimony that the action taken by Respondent, as alleged in the Complaint would have taken place in the absence of any organizational activities of the Union.

The General Counsel alleges that Montas' hours were reduced about October 14, 1996. This was allegedly in retaliation for Montas' participation in the Objections Hearing of October, 1996. However, schedule and payroll [**45] documents establish that Montas' work assignments were consistent throughout the period in issue.

Montas was originally hired to work on a part time basis. She also worked as needed to "cover" for other employees who took time off. At times these coverage assignments were known ahead of time and Montas was scheduled to work. That she was covering for others was apparent from the schedule.

[*911] The Summer and Fall of 1996 schedule sheets establish the anticipated work time of all the Aides. These documents show that Montas was scheduled when other employees were not scheduled to work vacations. Whatever the reason, when regular Aides were off the schedule Montas filled in.

As would be expected during the Summer, Montas covered vacations for other Aides. She also covered when

another Aide was moved to a different shift. There were weeks however, when Montas was not scheduled full time. During two weeks in August, well before the objections hearing, she was scheduled for 8 to 16 hours. This was because there were no leaves planned for other employees.

There were times when the schedule did not reflect actual hours worked. Call outs or other changes happened after the schedule was set and [**46] were not reflected on it. Montas' actual hours worked however, are generally consistent with the schedule.

For three weeks in October, Montas worked 24 or 16 hours. This was down from 40 the weeks before. However, the schedule shows that during those October weeks no leaves were scheduled.

There were also weeks before the Hearing when Montas did not work full time. In each of the months of May, June, July, August and September, Montas worked at least one week under 40 hours, sometime as low as 16 hours. Even after October she had slow weeks. In November she worked only 27 hours one week.

Thus, the evidence establishes that there was no reduction in Ms. Montas' hours. Rather, she worked the same pattern she had throughout the Summer and Fall of 1996. When people were out on leave or otherwise, she filled in for them. When there were no vacations scheduled she did not work. The number of hours she worked each week varied overall. There were times in each month for five months preceding the Objections Hearing when she worked less than full time. There was no change at the time of the Hearing.

Accordingly, I conclude that the reductions of hours alleged in the complaint was not attributable [**47] to her testimony in the objection hearing. Accordingly, I conclude that Respondent did not violate Section 8(a)(1) and (3) as alleged in the Complaint.

In September 1996, Montas was assigned to provide care for patient Susan Annerichio. Annerichio was an elderly, wheelchair bound resident. She was active and mobile with her wheelchair and was usually lucid and communicative. On a weekend day in September, her breakfast tray was missing coffee flavoring. Annerichio wheeled herself into the hallway to ask Montas for the missing flavoring. Montas responded to this request by shouting at Annerichio and angrily pointing her finger at her, telling her to go back to her room.

Annerichio was visited frequently by her niece. She told her niece of Montas' shouting and misbehavior. Later that day her niece experienced Montas' abuse first hand. While she was visiting with her aunt in the dining room, Montas came in and confronted them. Montas went to Annerichio and demanded to know what she was telling her niece, saying that she did not do anything. When the niece told Montas her conduct was inappropriate, Montas began to argue with her.

Annerichios' niece complained of Montas' misconduct to [**48] the Social Service Department. The Social Service Worker documented her complaint and forwarded it to Mr. Pena, Montas' supervisor.

Pena then investigated the allegation. He interviewed Annerichio. She confirmed the report from Social Services. After speaking to Annerichio, Pena spoke to her niece. The niece also confirmed the report from Social Services.

Pena reported his findings to Crowley. She decided that she had sufficient information to conclude that verbal abuse had taken place. Not only had these individuals detailed these events independently to Pena, but the niece had earlier reported the same complaint to Social Services.

Based on this information, Crowley decided Montas should be disciplined. She reviewed Montas' file and noticed that she had received no previous discipline. Crowley considered this and decided that since the abuse was not physical, immediate termination was not appropriate. However, he concluded that any form of abuse is extraordinary and demands strict punishment. Crowley therefore suspended Ms. Montas.

334 N.L.R.B. 903, *911; 2001 NLRB LEXIS 561, **48;
172 L.R.R.M. 1012; 2001-2 NLRB Dec. (CCH) P15,932

Crowley credibly testified that she did not want there to be recurrence of the verbal abuse, or even possibly a worse event. To guard against this, [**49] Montas' return to work was made conditional. Before she came back Montas was reeducated in residents rights and abuse. Thus, if there were any gaps in her training or any misunderstandings which had contributed to her misconduct with Annerichio and her niece, they would be addressed. To make sure that Montas knew what behavior was expected of her, she, Montas was required to work on the day shift. As set out in detail above, there are many more supervisors working on the day shift than at any other time. These people would be available as a resource for Montas if needed. Montas in fact complied with these conditions and returned to work.

I conclude that Respondent's actions in this regard were completely legitimate and Respondent could have seized on the initial complaint to Social Services and fired Montas, immediately. This was not done. Respondent, at that point had two consistent statements from two people detailing abusive conduct. There was clearly grounds to terminate Montas. Yet, Crowley did not take advantage of the "opportunity". She considered Montas' record and decided to give her another chance. In fact, in giving her a second chance she made sure that Montas was not [**50] confused or uninformed as to what was expected of her. Montas was specifically trained resident rights and abuse before she came back. Further, she was put back on the shift that had the most supervisory support available to her to insure proper training.

If Respondent simply wanted to get rid of Montas, for her Union activity, the opportunity was there after this incident. Respondent did not take this "opportunity" and fire Montas. I conclude that Respondent did not violate Section 8(a)(1) and (3) by the suspension of Montas.

In January 1997 Montas was assigned to work the third floor. Also working on that floor was nurse Shantii Penaredondo. One of the patient residents on the third floor was a male patient, Derigibus. Derigibus was an elderly paraplegic, [912] who was incontinent. Because of his condition he wore a diaper and needed to be changed regularly.

At around noon, Derigibus called the nurses station and asked to be changed. Penaredondo told Montas to change Derigibus. A short time later, when Derigibus was not changed, Penaredondo reminded Montas of her instructions. Montas acknowledged the assignment and told Penaredondo that she would change Derigibus.

At about 1:00 p.m. [**51] Penaredondo was administering medications to the residents. This is a function that can only be performed by a licensed nurse and involves the nurse going into resident rooms. While she was medicating the residents, Penaredondo spoke to Derigibus. Derigibus told Penaredondo that he had not yet been changed. Because she was involved in administering medications and because Derigibus indicated he would wait for Montas, Penaredondo instructed Montas, once again, to change Derigibus. Montas said again, she would do so.

When Penaredondo completed her medication duties she asked Montas if she had changed Mr. Derigibus. Montas said she had not and told Penaredondo that she was scheduled for lunch. Penaredondo told her to check with Derigibus to see if he had wanted to be changed before Montas took her break. Montas reported that Derigibus said he would wait. Shortly after Montas left, Derigibus called the nurses station and said that he had still not been changed. He also said that Montas had not checked with him before she went on break. Penaredondo again told Montas to change him. Rather than comply, Montas went to work with another resident first and finally changed Derigibus only after [**52] Penaredondo told her to do, yet again, one more time. Approximately, two hours went by between the first instruction to clean Dregibus, and the time he was finally changed. At the end of the shift Penaredondo told the nurse manager Pena about the event.

Pena investigated this situation after Penaredondo's report. He asked Penaredondo to reduce her story to writing. She did this and it was consistent with her oral report. Pena also spoke to Derigibus. The resident told Pena that he has asked to be changed but had waited two hours before he was given care. He also stated that Montas did not ask him if he would wait until she took her break. Pena also interviewed Derigibus' therapist and unit clerk.

334 N.L.R.B. 903, *912; 2001 NLRB LEXIS 561, **52;
172 L.R.R.M. 1012; 2001-2 NLRB Dec. (CCH) P15,932

The therapist told Pena that Derigibus was upset that day and said he had been left unchanged. The Unit Clerk confirmed that Penaredondo had instructed Montas to change Derigibus at about noon and that Montas said she would do so. The Unit Clerk also told Pena that Derigibus told her Montas had not asked him if he would wait to be changed until after her break. She thus concluded that Montas had lied to Penaredondo. The Unit Clerk gave Pena a written statement detailing this information. [**53]

Pena and Crowley reviewed their results of Pena's investigation. This included the written statements that were provided. Crowley determined that Montas has neglected Derigibus' care. She had been given an assignment and had acknowledged it, saying she would take care of the resident. Despite this she simply ignored him. When reminded again, she lied, saying that Derigibus told her he would wait for her to finish her break to work with him. Crowley concluded that Montas ignored the instructions she was given, ignored the resident and finally, she lied about what the patient said. Crowley further concluded such conduct was even more egregious when the condition of the resident was considered. Crowley finally concluded that Montas conduct was blantly negligent.

Crowley testified that she then considered Montas' disciplinary history. Montas had been verbally abusive to a resident and her family just a few months before. At that time Crowley had considered Montas' then clean record and decided to give her a second chance. Based upon Montas' record and the facts of the Derigibus incident, Crowley terminated Montas. The facts establish that such termination followed Respondent's usual [**54] discipline procedure.

Crowley also reviewed Penaredondo's conduct in this matter. Crowley concluded that although it is not a licensed nurses function to change patients diapers, she should have checked to see if Derigibus' diaper had been changed and that she should have supervised Montas more closely. Accordingly, following Respondents' discipline procedure, since Penaredondo had received an oral warning on another matter, she received a written warning for her neglect.

Accordingly, I conclude that the discharge of Montas did not violate Section 8(a)(1) and (3) of the Act as alleged in the complaint.

In January 1997 the family of patient Musilli reported finding him tied into his wheelchair, facing a wall. The family had confronted Duclos who admitted leaving him in this condition when she went to help another aide. Respondent investigated these allegations. The family member gave a written statement which was consistent with the initial report. Duclos also gave a statement and admitted improperly restraining the resident.

Federal Regulations and State Statutes govern all aspects of nursing home operation. These include prohibitions of patient abuse and neglect. Crowley considered [**55] Duclos' admission in light of these regulations. She testified she considered terminating Duclos but instead decided to give her another chance. Rather than being terminated, Ms. Duclos was suspended for three days.

Before Respondent could allow Duclos to interact with residents again, however, Crowley concluded she needed to be assured that Duclos knew what was required of her. As a condition of her return, Duclos was required to undergo reeducation. She was retrained in resident rights and restraint policy. Further, she was required to work on the first shift as was Mantos, so there would be more supervisory nurses available to her for assistance if she needed it.

Respondent's policy was not applied only to Montas and Duclos. In 1994, alleged discriminate Ferdinand, had also been involved in an abuse allegation. She was suspended just a Montas and Duclos were. Also, just as they were, she was required to undergo retraining and work the day shift.

Thus, a year before the Union's first campaign, Respondent imposed retraining and enhanced supervision as conditions of reinstatement after abuse suspensions. Requiring Duclos to be retrained and work the day shift was nothing new. It [**56] was merely a continuation of Respondent's established policy implemented for the protection of residents.

[*913] There is no credible evidence which would establish that Duclos was singled out for this requirement. She

was merely treated as any other aide would be. She was told what would be required of her before she could return, yet she resisted. Duclos was not satisfied with working the first shift.

Duclos claimed she could not work days because of child care problems. Crowley gave her suggestions to help. She had difficulty resolving these problems, so Respondent let her come to work late until she made arrangements. Finally, when Duclos was able to return to work on the first shift, she immediately hurt herself. She was then out of work or on modified duty for several weeks.

On her first day back to full duty, Duclos was assigned to the first floor under Unit Manager, Jackie Pinto. She was assigned to care for an elderly, wheelchair bound female resident. The resident, Cordaro, spoke only Italian.

The credible testimony of Registered Nurse, Andan established that she helped Duclos put Cordaro on the toilet at about 10:40 a.m. Andan credibly testified that she was aware of the time [**57] because she had spoken to Duclos about showering and dressing another resident who had an 11:00 a.m. therapy appointment. Andan clearly remembered the conversation about the therapy appointment as occurring before 11:00 a.m.

At 11:00 a.m. therapist Roberts brought Cordaro's roommate back to their room. She saw Duclos and Cordaro in the room. As she was working with Cordaro's roommate, Roberts saw Duclos wheel Cordaro into the bathroom. Roberts then heard Duclos shouting at Cordaro. When Roberts went to offer her help, Duclos slammed the bathroom door in her face. Roberts reported this to Andan who later checked the room but did not see Duclos or Cordaro.

Within a short time, Therapist Barcia, who spoke Italian and frequently visited with Cordaro and interpreted for her, stopped in Cordaro's room. Barcia saw that Cordaro was upset and covered with excrement. Cordaro told Barcia that Duclos had shouted at her and pushed her.

Cordaro's daughter also visited her mother that same day. She credibly testified that her mother was upset and asked her what was wrong. Cordaro told her daughter that her Duclos had mistreated her. Cordaro's daughter smelled and then noticed her mother had feces [**58] on her hands but had not been incontinent in her chair. She reported this to Andan.

Respondent collected written statements from all parties involved. Barcia memorialized what Mrs. Cordaro said to her. Roberts wrote what she had seen and heard in the room. Cordaro's daughter and Andan also gave written statements. These documents were all consistent with initial reports and indicated Duclos mistreated Cordaro.

Duclos was asked to provide a statement detailing her actions that morning. Rather than do so, a Union representative gave Respondent an incomplete version of Duclos' position. Nonetheless, Respondent followed up on Duclos' apparent contention that she had never helped Cordaro to the toilet with another Aide or a nurse. Respondent also interviewed CNA Faustin. Faustin said that he had helped Duclos once with Cordaro but had left with Cordaro on the toilet and had not returned.

Faustin saw nothing improper when he was with Duclos, but was not with her other than for a brief time. Faustin was thus not in a position to clear Duclos. He did not claim to be with her in the bathroom when Roberts heard her shout at Cordaro. Moreover, he only helped toilet Cordaro once. Cordaro was [**59] known to use the toilet several times a morning.

Duclos also indicated that Andan had helped her toilet Cordaro. As set out above, Andan did this one time, before Roberts saw Duclos take her into the bathroom and shout at her.

Crowley reviewed the results of the investigation. This included all the written statements including Duclos'. Crowley concluded that Duclos had neglected her responsibility to clean Cordaro, had shouted at her and treated her roughly, pushing her into the chair as Cordaro reported. Crowley credibly testified that she considered this information in conjunction with Duclos's record, specifically her recent suspension for improper restraint. She concluded that

334 N.L.R.B. 903, *913; 2001 NLRB LEXIS 561, **59;
172 L.R.R.M. 1012; 2001-2 NLRB Dec. (CCH) P15,932

notwithstanding having received the suspension and then being retrained, Duclos had again abused a patient. Crowley ordered her terminated.

Duclos denied the patient abuse attributed to her by Crowley. However both Barcia and Cardaro's daughter had no reason to give false testimony. Barcia has left and has no connection with the Respondent's employ. Cordaro has since died, and her daughter has no connection with Respondent at the time she testified. As set forth above, I have concluded Respondent's witnesses, [**60] including Barcia and Cordaro's daughter to be entirely credible.

I conclude that both Andan and Faustin helped Duclos toilet Cordaro on that morning. Andan at about 10:40 and Faustin around the same time. Then at about 11:00 a.m. Cordaro needed to go to the bathroom again. This was not unusual since she went to the toilet several times in the morning. This trip to the bathroom was the one Roberts observed. During this time, Duclos became frustrated with Cordaro and verbally abused her, shouting at her and pushed her. Duclos also left Cordaro to attempt to clean herself and neglected to wash Cordaro's hands afterward. This resulted in Cordaro sitting in her wheelchair, upset about having been mistreated and left with feces on her hands.

I further conclude that her initial suspension for patient abuse and subsequent discharge for a second patient abuse did not violate Section 8(a)(1) and (3) as alleged

The physical and emotional condition of Respondent's patients is closely monitored. One document used in this monitoring is a "Daily Flow Sheet". CNAs are responsible for accurately completing this sheet. Ferdinand, an alleged discriminatee, completed and initialed a resident's sheet [**61] barely half way through a shift. In doing so, she put in information that she could not have known. She inaccurately completed the patient's medical record. She acknowledged having done so, contending that everyone did. Respondent investigated her contention and discovered that, in fact, she was the only CNA acting in this fashion. Each patient has a chart in their file logging various daily activities. These range from food and fluid intake and output to hygiene and sleep patterns. This information is critical to making current assessments of each patient's physical and emotional well being and is noted by each shift 914 each day. Based on information contained in the charts, medications are prescribed and changed and various therapies are ordered. It is the primary responsibility of the CNA to complete the chart. However, a licensed nurse must cosign at the end of each shift.

Because of the requirement for accuracy, CNAs are instructed to wait until about one hour before the end of their shift to complete their charts. A chart is completed when all the information is filled in and the aide has initialed the document.

If a chart is completed early, it is by definition going to be [**62] an inaccurate and false record. The information on the chart reflects the patient's status for the entire shift.

Ferdinand was an evening shift aide. Her shift began at 3:00 p.m. and ended at 11:00 p.m. On October 25, Pena had reason to speak to Ferdinand at dinner time in the middle of her shift. As the result of instructions from Pena, Ferdinand went to pick up dinner trays and left her chart book at the nurses station. Pena reviewed the chart book and discovered that several flow sheets for patients assigned to Ferdinand were completed. Pena noted particularly that patient Love's chart was complete and initialed.

Pena confronted Ferdinand with her having completed her charting too early. Ferdinand did not deny her actions. She claimed in her defense that she had worked with the resident the previous day so she knew what information to log in and, that all the CNAs did the same thing.

I conclude Ferdinand's first defense is invalid on its face. For Ferdinand to be able to accurately chart a patient early because she had worked with her previously, Ferdinand would have to be able to see the future. No patient, no matter how stable, can be assumed to be in exactly the same condition [**63] day after day. Love's hygiene record, her waste functions, whether she had visitors, and how long she slept whether she takes food orally, are all important facts which should be accurately recorded for review by LPN's or doctors, if necessary of whether she takes food orally. Yet each of these factors was completed less than half way through the shift. There is no way at 6:00 or 7:00 p.m., Ferdinand could

know how much sleep the resident was going to get by the end of the shift four or five hours later! Ferdinand could not know early in the evening if the resident would have a visitor later!

When Crowley was informed of Ferdinand's flow sheet she commenced an investigation to determine how the other CNA's charted their flow sheets. Crowley credibly testified that all the other CNA's charted their flow sheets within an hour before the end of their shift.

Because she was a new employee, Crowley testified that she did not know what the practice was regarding when charts were completed. If the staff were routinely completing the charts early, the improper practice would have to be stopped. Ferdinand would have then been only one of many making the same mistake. If that were the case [**64] everyone would have to be retrained and it would have been unfair to single out Ferdinand for any action. To answer this question and follow up on Ferdinand's claim, Crowley had the rest of the CNAs polled to see when they charted. The CNAs all indicated that they charted at appropriate times. Not one indicated that they charted the way Ferdinand did.

General Counsel contends that this survey is somehow tainted. Despite such contention, there is no evidence that Respondent did anything other than try to investigate Ferdinand's claim fairly. There is no testimony that the investigation was conducted coercively. Crowley relied on the integrity of Respondent's employees and presumed that it would receive honest answers. In fact, the results of the investigation were substantiated by testimony of General Counsel's own witness. CNA Faustin testified that he does not complete his charting until the last hour of his shift. Faustin's testimony was consistent with the results of the investigation of the evening aides.

Despite Ferdinand's claim that "everybody does it", Ferdinand simply knew better. Respondent uses a document which details the approximate times for the aides on each shift [**65] to perform their different tasks. This document clearly tells the aides that they are to chart at the end of the shift, just as Faustin and the evening aides all said they did. Ferdinand received a copy of this list when she started and signed the front page. I conclude that for her to claim that she did not know that she was doing anything wrong is disingenuous at best. Moreover, I conclude that it is a matter of common sense that these records can not be completed before hand.

Based upon Crowley's investigation, Crowley credibly testified she was convinced that Ferdinand was not merely one part of a larger record keeping problem. Rather, the facts indicated to her that Ferdinand was intentionally completing her charts well before they should be done.

Crowley testified she viewed this as a very serious matter. It involved a patients medical records. Completing the flow sheet early, at a time when it was impossible to know that the information was accurate, demonstrated a complete lack of concern for the validity of such official records. Since the charts are important information sources for evaluation and treatment of patients, Crowley concluded this conduct jeopardized the case [**66] of the patients.

Crowley aware of the Respondents progressive discipline policy, which also allows for immediate termination under proper circumstances. She concluded that falsification of such records was extraordinary circumstance. She based such conclusion on the fact that such flow sheets bear on the health and safety of its patients. Invalid information on the chart can result in errors in assessment or treatment of a patient. Crowley thus concluded that Ferdinand should be terminated. Crowley credibly testified she had made the same decision when faced with this situation at a previous employer. Crowley made the decision to terminate Ferdinand.

I conclude that Respondent did not violate Section 8(a)(1) and (3) of the Act by such termination.

Davis started working for Respondent in April 1996. Within a month she was leaving work early. During the first week of June, she was given a verbal warning about her attendance problem. She was cautioned that this conduct was not acceptable. The narrative in the warning told Davis she would receive further discipline for any further misconduct. At the time of this warning, Davis admitted she was aware of Respondent's disciplinary policy. [**67] This warning was not alleged to be violative of the Act.

334 N.L.R.B. 903, *913; 2001 NLRB LEXIS 561, **67;
172 L.R.R.M. 1012; 2001-2 NLRB Dec. (CCH) P15,932

[*915] On June 25, Davis did not show up for her work shift. Pena, Davis' supervisor called her at home to see if she was coming in. When Pena told Davis she was supposed to be at work, she cursed at him and said she was not scheduled. She accused Mr. Pena of sabotaging her schedule for some unknown reason.

After first arguing about the schedule and challenging Pena, Davis then claimed not to feel well. Pena asked Davis again if she was coming into work. Davis did not give Mr. Pena a straight answer. He asked her again. This call took place at a desk in the open area around the administrative offices. Crowley was using a telephone near to Pena and overheard the repeated questions from Mr. Pena. She went to Pena to see if she could help. When she was next to him, Pena moved the receiver slightly away from his ear. This allowed both Pena and Crowley to hear what Davis was saying. Both Pena and Crowley credibly testified they heard Davis state to Pena: "I'll fucking be there when I'm there."

Based on her discussion with Pena concerning that part of the conversation she did not overhear, and that which she did overhear, Crowley reviewed [**68] Davis' personnel record and decided that suspension was the appropriate level of discipline. Davis admitted the details of this conversation but denied cursing at Pena. In view of my credibility resolutions described above, I do not credit Davis. Moreover, both Pena and Crowley testified consistently as to the vulgar statement overheard by Crowley.

Crowley credibly testified that in view of Davis' length of employment, two months, in view of her prior warning, and the nature of her insubordination directed to her supervisor, Pena, suspension was appropriate.

Accordingly, I conclude that Davis' suspension was appropriate and did not violate Section 8(a)(1) and (3) of the Act.

On November 26 all the CNAs, on the day shift, on the third floor, heard an employee "calling out". As frequently happens in these situations, the remaining staff have to carry a heavier load because the call out's assignment is divided among them. Pena was attempting to rearrange the work load. Davis was assigned to help with an admittedly difficult patient. She wanted a different assignment. Pena assigned her to another patient. As Davis was voicing her reluctance to work with this second patient. LPN Pizzutti [**69] walked by. Pizzutti overheard Davis, and told her, "Somebody has to care of her". Davis was visibly angry at Pizzutti's remark and left the area.

Davis went to Crowley to complain about her assignment. In an attempt to accommodate Davis, Crowley told Pena to allow the CNAs as a group to determine how the extra work would be assigned. The group of CNA's by a majority vote gave Davis yet a third assignment with which she was not happy, but accepted such assignment.

At about mid-shift Davis asked Pizzutti for help using a mechanical lift with one of the patients she had initially resisted being assigned to at the beginning of the shift. Pizzutti decided that necessary preliminary work had not yet been done and told Davis that she would help her once this preliminary work had been completed.

The anger between Davis and Pizzutti described above, then resurfaced. Davis walked away from caring for the resident and stormed into the nurses station. Pizzutti asked Davis what she was doing. Davis announced that she was taking her break and leaving the floor. Pizzutti and Ms. Davis began to argue, in loud voices, at the nurses station. Their voices were so loud that Pena heard them and went [**70] to the station to see what the ruckus was about.

When Pena saw them, his first act was to stop the argument. Their argument was taking place at the very hub of the patient care area. After Davis and Pizzutti stopped arguing, Pena tried to find out what had happened. He first spoke to Pizzutti and then to Davis. Their versions were consistent. Each felt put upon by the other and neither denied that they were arguing loudly in a patient care area.

Shortly thereafter, Pena made rounds of the patients rooms. He noticed several rooms were not straightened and that several patients had not yet received their scheduled care. The assignments sheets established that these rooms and patients were assigned to Davis.

334 N.L.R.B. 903, *915; 2001 NLRB LEXIS 561, **70;
172 L.R.R.M. 1012; 2001-2 NLRB Dec. (CCH) P15,932

A short while later Pena told Davis and Pizzutti that their conduct was unprofessional and they would receive discipline. He discussed the incident with Crowley. She agreed that Davis and Pizzutti behaved unprofessionally and decided to discipline both employees.

Crowley then reviewed Davis' and Pizzutti's files. Davis had been suspended just a month before and had been warned then that further misconduct would result in termination. Crowley acting consistently with both the progressive [*71] discipline policy and the warning that had been given to Davis, decided that termination was in order and told Pena to deliver a termination notice to Davis.

Crowley also concluded that Davis was not the only one who had acted inappropriately. There was no dispute that Pizzutti was arguing just as loudly. Crowley determined both employees were to be disciplined. Unlike Davis however, Pizzutti had a clean file. Accordingly, Pizzutti was disciplined at the first step. She was given a verbal warning.

Given Davis' work record over a short period of time, that Pizzutti was also disciplined, and that both Pizzutti and Davis were disciplined in accordance with Respondents progressive disciplined policy, I conclude that Davis' termination did not violate Section 8(a)(1) and (3) of the Act.

CONCLUSIONS OF LAW

1. Respondent is an employer within the meaning of Section 2(2), (6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent did not violate Section 8(a)(1) and (3) of the Act as alleged in the Complaint.

ORDER

The Complaint is dismissed in its entirety.

Dated, Washington, D.C. February 4, 1999

Howard Edelman, [*72] Administrative Law Judge

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment Law Collective Bargaining & Labor Relations Discipline, Layoff & Termination Labor & Employment Law Collective Bargaining & Labor Relations Unfair Labor Practices Organizing & Voting Labor & Employment Law Employment Relationships Employment at Will Employers