

Panoramic Industries, Inc. and Carlos Hernandez and Service Employees International Union, Local 32E, AFL-CIO and Edwin Santiago.
Cases 2-CA-17125, 2-CA-17179, and 2-CA-17220

8 August 1983

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS
JENKINS AND HUNTER

On 8 November 1982 Administrative Law Judge Steven Davis issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

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

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,¹ and conclusions of the Administrative Law Judge and to adopt his recommended Order.

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 and hereby orders that the Respondent, Panoramic Industries, Inc., Bronx, New York, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

¹ Respondent has excepted to certain credibility findings made by the Administrative Law Judge. 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.

DECISION

STATEMENT OF THE CASE

STEVEN DAVIS, Administrative Law Judge: Pursuant to charges filed by Carlos Hernandez, Edwin Santiago, and Service Employees International Union, Local 32E, AFL-CIO, herein called Local 32E, an order consolidating cases and amended consolidated complaint and notice of hearing was issued by Region 2 of the National Labor Relations Board on February 26, 1981, against Panoramic Industries, Inc., herein called Respondent.

The main issue presented at the hearing, which was held before me on April 26-28, 1982, was the alleged discharge of Carlos Hernandez, all other matters alleged in

the complaint having been settled before the hearing opened.¹

Upon the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel and Respondent, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent, a New York corporation having its office and place of business in the Bronx, New York, is engaged in the production, assembly, and nonretail sale and distribution of lamps and lighting fixtures. It annually sells and ships goods valued in excess of \$50,000 directly to customers located outside New York State. 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 Local 32E, Local 137, and Local 400, Sheet Metal Workers International Association, AFL-CIO, are labor organizations within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

Prior to 1980, Respondent maintained one shop in Long Island City and one shop in Maspeth, New York. The employees at those two locations were covered by a collective-bargaining agreement with Local 400, which was effective from May 19, 1974, to May 19, 1977.

Local 400 had been under trusteeship since at least 1976, and on July 17, 1978, the general president of the Sheet Metal Workers International Association ordered that the membership of Local 400 employed at both locations of Respondent be transferred to Local 137, and that thereafter Local 137 represent the bargaining unit employees there.

The six to eight employees employed at the Long Island City location were not members of Locals 137 or 400, were never asked to join either union while employed at Long Island City, no contributions were made to either union's pension and welfare fund in their behalf and union dues were not deducted from their wages. They were also apparently unaware that they were represented by a union. On the other hand, the contract was fully applied to the Maspeth employees, who were members of the unions.

The two plants were consolidated into one location, in the Bronx. The Long Island City employees and equipment were transferred to the Bronx in November 1979, and the Maspeth facility was moved in the last week in January 1980.

¹ Issues which were settled included allegations that Respondent (a) warned and directed its employees to refrain from becoming members of Local 32E; (b) applied its contract with Local 137, Sheet Metal Workers International Association, AFL-CIO, only to members of Local 137, failed to apply it to nonmembers of Local 137, and failed to make payments to the welfare and pension funds of Local 137 on behalf of nonmembers; and (c) discharged and failed to reinstate Edwin Santiago, in violation of Sec. 8(a)(1), (2), and (3) of the Act.

On January 3, 1980, a collective-bargaining agreement was executed between Respondent and Local 137. The contract stated that Local 137 represented all the employees of Respondent.

B. *The Organizing Campaign of Local 32E*

In about early March 1980, Carlos Hernandez and other employees went to the office of Local 32E, and told Business Representative Edward Gonzales that they were not represented by a union, and requested that he organize the shop. Gonzales gave authorization cards to the men. Hernandez and employee Paul distributed the cards to the men at the shop and a couple of days later 15 to 25 signed cards were returned to Gonzales.²

Shortly after the cards were returned to the union office, Gonzales called Alvin Ziegler, the president of Respondent, and told him that he had signatures of certain employees and that he wanted to discuss a contract. In response to that call, Ziegler called a meeting of the employees who had come from Long Island City—including Hernandez and Santiago—and about seven other employees.

At the meeting Ziegler informed the employees that Respondent had a contract with Local 137 which covered all of them. Hernandez asked why he should join Local 137. Ziegler read certain contractual provisions such as sick leave, and a 25-cent-per-hour raise, effective January 2, 1980. Hernandez asked why they never received that raise, and asked that the money owed them due to the increase be paid to them. Ziegler refused, saying that he could not give one employee more money than another. At the end of the session Ziegler announced that in a few days a Local 137 representative would address them.

On or about March 10, Ziegler called a meeting of employees, at which he introduced Martin Fruchter, the business manager of Local 137. Present were Hernandez, Santiago, and other former Long Island City employees. Fruchter informed those assembled that Respondent had a contract with Local 137. Several employees replied they did not believe that such a contract existed, and said they wanted a new union—Local 32E. Fruchter responded that the contract contains a union-security clause, which requires that they join Local 137 after 30 days of employment, and that if they did not do so they would be discharged. Fruchter distributed authorization cards and certain employees including Hernandez refused to join Local 137. Then, according to Ziegler, "pandemonium"³ broke out. Employees shouted, cursed, screamed, acted belligerent, and were verbally abusive to whatever he or Fruchter said. Ziegler stated that the "dissidents" who included Hernandez and his "followers" left the plant.

Immediately after the walkout, Ziegler called Local 32E representative Gonzales and told him that employees had left the shop. Meanwhile, seven to eight employees, including Hernandez, walked to the Local 32E office and told Gonzales that they left Respondent's premises because a Local 137 representative threatened

that they would be discharged if they refused to join that union.⁴ The employees and Gonzales then returned to the shop.

On the street in front of Respondent's building, Fruchter told Gonzales that inasmuch as both Unions were members of the AFL-CIO, Gonzales' attempt to organize the Company constitutes a raid upon the shop. Gonzales replied that there was a special unrepresented bargaining unit doing a specific type of work which could be separately represented by Local 32E.⁵ Fruchter replied that no such special unit exists and that the employees are all general production workers. Gonzales then said that once a charge was filed he had to follow it through.⁶ Gonzales stated that he asked Ziegler to have the men return to work pending the Board decision. All employees then resumed work after having been out for 2 hours.

Two days later, on March 12, Hernandez went to the Board with Edwin Santiago, and filed an 8(a)(1), (2), and (3) charge against Respondent which alleged that on March 6 it dominated and interfered with the formation among its employees of a labor organization called the Sheet Metal Workers Union, and threatened him and other employees with discharge if they did not join the Sheet Metal Workers Union. They returned to work at 11:30 a.m. on March 12 and found their timecards missing. They reported to Ziegler who told them that they were "up to something," and that he did not know what it was. Hernandez replied that they were at the Board. Ziegler said that was their choice. He told Hernandez that he (Hernandez) was a smart fellow and that he could get more money and could become a supervisor, and then asked them why they did not open their minds and "do things." Ziegler then stated that he could have discharged Hernandez because of an argument with Ziegler's father.⁷ Hernandez replied that that incident was not his fault.

On March 17, Hernandez and employee Sierra went to the Board and gave affidavits. They returned to work after lunch that day, and found their timecards missing. They reported to Ziegler and asked for their cards. Ziegler told them that he has a business to run and would not tolerate their arriving at work so late. He refused to permit them to work. Hernandez said that they were at the Board. Ziegler told them to return to work the next day.

The following day, March 18, Ziegler called Hernandez into his office and told him that he was fighting for

⁴ Local 32E is located only a couple of blocks from the shop.

⁵ Gonzales was apparently referring to the former Long Island City employees.

⁶ No charge was filed by March 10. Hernandez filed a charge on March 12. Either this incident occurred after March 12, or Gonzales was referring to the petition which he filed with the New York State Labor Relations Board seeking to represent the employees. That petition was later withdrawn and Local 32E filed a petition with the National Labor Relations Board on March 25, 1980, in Case 2-RC-18762. No date appears in the record for the filing of the State Board petition, but inasmuch as the NLRB petition stated that recognition was requested on March 6, it is likely that the State Board petition was filed on that date or thereafter, but before March 10.

⁷ That incident, which occurred in February 1980, will be discussed *infra*.

² The cards were signed outside Respondent's building.

³ Fruchter called it an "open rebellion."

five to six employees, some of whom were not worth the struggle. Ziegler complimented Hernandez upon being smart and said that he could become a supervisor and could be given a \$10 raise and then \$5 more. He then asked Hernandez to help him have the other employees join Local 137. Hernandez replied that he would help, but he would only join Local 137 if the other employees did so first.

Ziegler conceded that it was possible that he asked Hernandez to speak to other employees regarding joining Local 137, because such employees were not "working," "performing"—punching in, or following work rules and were acting "very belligerent."

Between March 12 and 28, Ziegler told Hernandez that he and the Union had him "by the balls." Hernandez replied that he should have given the employees the 25 cent raise that was provide for in the contract. He accused Ziegler of putting words in his mouth and picking arguments with him. Ziegler responded that he could "get rid of one of you . . . it's a two way street."

Employee Edwin Santiago testified that, after his return to work following the March 10 walkout, Ziegler told him that he has a family to support and that if he listens to other employees talk about Local 32E he would jeopardize his job. Santiago replied that he would nevertheless continue to support the desires of the majority of the employees in the shipping and receiving department.

Santiago further stated that a few days after he accompanied Hernandez to the Board on March 12, Harold Lillienfeld, Respondent's vice president, told him that he should not get involved "in this thing," and reminded him that he was being paid more than the other employees and could perhaps become a supervisor.⁸

C. *The Alleged Discharge*

The General Counsel alleges that Hernandez was discharged on April 3, 1980. Respondent alleges that he quit.

Mass disruptions in transportation occurred in New York City during the first week of April 1980 due to a strike of bus and subway employees.

Hernandez testified that on April 2, he arrived with other employees and punched in about 10:30 a.m. They told Ziegler that because of their difficulty in traveling because of the transit strike they should not be penalized by their late entrance. Ziegler changed the time punched on their cards, from 10:30 a.m. to 9 a.m.⁹

On April 3, Hernandez again traveled to work with other employees, who punched in at 9:15 a.m. upon their arrival. However, Hernandez went to a local eatery for breakfast and punched in, alone, at 9:40 a.m. Nothing was apparently said to Hernandez about that.

Hernandez testified that that afternoon, 10 to 12 employees were washing up in the men's room just prior to

⁸ As noted above, on March 12 Hernandez admitted to Ziegler that he and Santiago had gone to the Board that day.

⁹ Ziegler testified that Hernandez refused to punch in upon his arrival at 10:30, arguing that he should be paid from 8 a.m. Ziegler punched the cards at 10:30 and told them that he would look into whether he was required to pay the employees from 8 a.m. Negotiations took place and it was agreed that the employees be paid from 9 a.m.

the end of the workday. As he emerged from the bathroom at or about 4:10 p.m., Ziegler saw him and asked him whether he always washes before quitting time. Hernandez replied that when he finishes work he washes, and asked Ziegler why he did not call the other employees over who were in the men's room with him. Ziegler then said that he could not put up with Hernandez any longer. Hernandez responded that he (Ziegler) promised that there would be no more arguments until the Board resolved the matter.¹⁰ Ziegler then told foreman-shop steward Louis Pearson to get Hernandez' final check. This was done and Hernandez warned Ziegler that he would pursue his discharge in court. Hernandez then left.

Employees were to be paid at 4:15 p.m. on April 3.¹¹

Ziegler testified that on April 3, he was speaking on a telephone located near the men's room, and watched continuously as Hernandez entered the bathroom alone at 3:55 p.m. and exited at 4:15 p.m. As Hernandez left the men's room, he threw a paper towel on the floor. Ziegler told him that aside from being a "slob" he had no regard for work rules.¹² Hernandez replied that Ziegler should not tell him what to do. Ziegler responded that he had a right to tell him to abide by the work rules. An angry confrontation then occurred with shouting, curses, and threats. Ziegler then said that if Hernandez did not like the work rules he knew what to do. Hernandez then replied that he was sick and tired of Ziegler's behavior which included "picking on" him and said that he wanted to leave. He asked for his money and said "let me get the hell out of here." Hernandez was paid and his parting words to Ziegler were that he was glad to "get rid" of him and the shop.

Employees Louis Pearson and Malcolm Rodriguez generally corroborated Ziegler's testimony that Hernandez quit and was not discharged. However, in an affidavit given on May 2, 1980, Pearson stated that on April 3 Ziegler told Hernandez that he was laid off—"I don't need him anymore." It is also noteworthy that Pearson contradicted Ziegler's testimony that he was on the telephone, watching the bathroom doorway. Rather, Pearson testified that he and Ziegler were walking around the shop and observed Hernandez exit from the men's room at 4 or 4:05 p.m. Pearson checked the men's room at that time and found no one else there.¹³

Santiago testified that on April 7 he received a phone call at home from Ziegler who asked him why he had not yet come to work.¹⁴ Santiago explained that he was

¹⁰ On cross-examination, Hernandez stated that he told Ziegler that he (Ziegler) promised Gonzales that he would not "lay off" Hernandez before the labor board matter was resolved.

¹¹ Usually, the workday ends at 4:30, but on paydays it ends at 4:15 in order to give employees time to cash their paychecks.

¹² This was a reference to the quitting time of 4:15 p.m.

¹³ Santiago's testimony in this regard is not worthy of belief. In an affidavit given to the Board on April 25, 1980, he stated that he was in the bathroom with Hernandez and other employees when Ziegler confronted him. However, at the hearing, he testified that he was not in the men's room with Hernandez, but rather was at his desk working when the dispute arose. Such clearly self-contradictory versions of the same event renders his testimony useless as to that incident.

¹⁴ The transit strike was still in effect.

waiting for a ride from a coworker. Santiago told Ziegler that he was wrong in discharging Hernandez. Ziegler replied that people like Hernandez who tried to be revolutionaries, imperialists, and conquerors were attempting to run his business. Santiago responded that a mistake was made in discharging Hernandez because he (Hernandez) may believe that he was fired for union activities and because other employees were in the bathroom at the same time as Hernandez. Ziegler replied that the main reason Hernandez was fired was because he was washing his hands too early, and also because Hernandez "charged" him and was "putting him against the wall."¹⁵ Ziegler said that he and Santiago have known each other for a while, and added that he (Santiago) was not patient enough, and that he could become an assistant foreman.

On April 10, 1980, Local 32E filed an 8(a)(1), (2), and (3) charge against Respondent which alleged that since March 10, 1980, Respondent unlawfully recognized Local 137, and also alleged the discharge of Hernandez on April 3.

Santiago gave an affidavit at the Board on April 25, 1980. On the following workday, April 28, he was discharged. He filed charges on May 5 and June 4, 1980, alleging that his discharge was in violation of Section 8(a)(1), (3), and (4) of the Act.¹⁶

D. Hernandez' Return to Work

On July 11, 1980, Respondent sent Santiago a letter requesting that he return to work. Pursuant to the letter, Santiago went to the shop on July 15 and spoke with Ziegler about a pay raise, backpay that he claimed, and a bonus. Ziegler also told Santiago that if he returned to work he would be required to sign a card for Local 137 and Santiago agreed to do so. Ziegler and Santiago reached agreement and he was reinstated. Santiago stated that a condition to the agreement was that he would withdraw the charge that he had filed with the Board, and he did so.¹⁷

Sometime in July 1980, Hernandez heard that Santiago was reinstated and he called Respondent. Ziegler told him that he reached a settlement with Santiago and that all the employees signed cards for Local 137. Hernandez replied that he needed a job and Ziegler asked him to come to the shop. Hernandez visited the shop and was told by Ziegler that Santiago withdrew his charge. Ziegler asked Hernandez to ask Local 32E to withdraw its charge and Hernandez would be reinstated. Hernandez went to the Union and told Gonzales to withdraw the charge so that he could be reinstated. Gonzales refused, saying that he could do nothing while the charge was pending at the Board. Hernandez reported this to Ziegler who said that he could not be reinstated and that they would have to await the hearing.

Gonzales testified that in June or July 1980, Hernandez told him that he wanted to settle with Ziegler, but

Gonzales denied that Hernandez asked him to withdraw the charge so that he could be reinstated. Rather, according to Gonzales, Ziegler told Gonzales that he would have to withdraw the case in order to have Hernandez reinstated. Gonzales replied that he would withdraw the petition in any event because Local 137 had a contract with Respondent.¹⁸

A few days later, Hernandez again called Ziegler and asked about returning to work. Ziegler asked Hernandez to come in. Hernandez returned to the shop and was given a letter which stated:

This will confirm our offer to put you back to work, effective immediately, as of today, Monday July 21, 1980.

This is an unconditional offer of employment under the same conditions and rate of pay that you had when you left our employ, last April.¹⁹

Hernandez returned to work on July 23, 1980. Upon his return to work Vice President Harold Lilienfeld brought him to a foreman who assigned him to a sanding machine.²⁰ Hernandez, who was hired as a packer in September 1979, had never operated a sanding machine for Respondent. Hernandez testified that he had no skill in operating the machine and that the foreman complained slightly that he was not sanding properly, and corrected his work. Hernandez complained to the foreman that he could not perform the work because he had never done such work. Hernandez testified that the sanding job entailed too much pressure—he could not "look back"—he had to be at his machine. He also stated that the blowing sand bothered him. He asked for a mask and the foreman said he would attempt to obtain one, but apparently none was available.

Later that day, Hernandez went to Lilienfeld and told him that sanding was not his job and that he could not do it. Lilienfeld asked him to leave his phone number in the event that another job became available. He did not ask Lilienfeld to transfer him to the packing department. Hernandez then left.

Foreman Louis Pearson testified that he showed Hernandez how to use the sanding machine, he was able to operate it properly and performed well although he spoiled a couple of pieces of wood.

Lilienfeld testified that upon Hernandez' arrival on July 23, he brought him to a supervisor and directed that he be assigned to an available job. At 2 or 2:30 p.m. that day Hernandez entered Lilienfeld's office and said that he did not like to work on the sanding machine, and that he wanted to do packing work. Lilienfeld offered to reassign other employees so that Hernandez could perform packing duties. Hernandez then told Lilienfeld not to bother with such arrangements, adding that he did not want to work for Respondent anymore. Lilienfeld asked why he did not want a packing job, and Hernandez re-

¹⁵ Santiago denied that there was any mention of charges being filed by Hernandez against Respondent.

¹⁶ Those charges were settled prior to the opening of the instant hearing.

¹⁷ Ziegler did not tell Santiago to ask Local 32E to withdraw its charge.

¹⁸ Local 32E did not file a request for withdrawal of its petition until about January 2, 1981.

¹⁹ Hernandez denied seeing the letter but he did testify that he was told that he was being unconditionally reinstated.

²⁰ Ziegler was not at work that day.

plied that he was not important at the shop, that he has "lost face" with the employees and does not want to work with them. According to Lilienfeld, Hernandez returned the following day for his pay and Lilienfeld again offered him a job as packer. Hernandez answered that he did not want to do packing work and did not want to work at the shop.

Ziegler testified that, when Hernandez came in for his check on July 24, he told Hernandez that Respondent would attempt to have him do packing work. Hernandez refused saying that his coworkers are no longer his friends and that he lost his status at the shop and no longer wanted to work there.

Hernandez denied that Lilienfeld offered him a packing job on July 23 or 24.

E. The Settlement Agreement

On February 27, 1981, the Acting Regional Director for Region 2 issued a letter dismissing a charge filed by Hernandez against the Sheet Metal Workers International Association.²¹ The letter stated essentially that Local 137 has been the exclusive representative of the employees of Respondent since July 1978. On the same day, the Acting Regional Director approved Local 32E's request for withdrawal of its petition, and on March 3, 1981, he issued an order accordingly.

Hernandez testified that, in early June 1981, he began settlement discussions with Respondent in which Ziegler offered him \$600. Shortly thereafter, Hernandez received a telegram from Local 32E asking him to report to that office. He went to the Union and was told by Vice President McDonald that the Union could not help him.²² Hernandez reported that he had been offered \$600 by Ziegler. McDonald told him that he should accept it.

Hernandez stated that he discussed settlement with Ziegler, despite certain Board agents telling him not to, because Local 32E could not help him. He was presented with a settlement agreement which he read and signed on August 17, 1981. He also that day signed a letter, prepared by Respondent, requesting withdrawal of his charge.

The settlement agreement states, *inter alia*, that Hernandez "walked out" of Respondent's employ after a disagreement with Ziegler on April 3, 1980, and that after returning to work on July 23 he told Ziegler that he did not want to work at Respondent because he had "lost status" with the other employees. The agreement also states that:

I also agree that if Panoramic or Mr. Ziegler or any of Panoramic's other employees should have levied against them any monetary fines, fees or financial obligations of any kind because of any obligations and/or charges made by me to the National Labor Relations Board, I shall hold Panoramic or any such employee harmless for any and all such amounts and I shall indemnify each of them or all of them for any such payments that they may have to make.

²¹ Case 2-CB-8259.

²² This was apparently a reference to the Union's withdrawal of its petition.

Finally, I agree that I will waive the receipt of any monies that may be ordered paid to me from Panoramic or any of its employees by the National Labor Relations Board or any other body.

Hernandez accepted a check for \$600 from Respondent, and the letter requesting withdrawal of his charge and the settlement agreement were sent to the Board which received them on August 19. On October 20, 1981, Hernandez signed a letter prepared by a Board agent, revoking his withdrawal of the charge. The letter stated that he was "pressured and coerced" by Local 32E and Ziegler into signing the request for withdrawal of the charge. At the hearing, Hernandez explained that he was pressured by Local 32E because the Union said it could not help him. He did not explain how he was pressured or coerced by Respondent, but presumably the offer of \$600 influenced him to agree to attempt to withdraw his charge.

Ziegler testified that in about May or June 1981, Hernandez called him and requested a settlement of the case. They discussed a sum of money but no agreement was reached. In early June, Hernandez and his wife came to Respondent's premises and they again discussed money with the same results. Later, Hernandez called again and they agreed upon \$600. Ziegler consulted his attorney who called the Board and then sent written instructions to Ziegler regarding the procedure to be followed. Ziegler also called the Board and asked if the case could be settled. Ziegler and his attorney were properly advised that they could reach an agreement with Hernandez but that the Regional Director would not automatically approve Hernandez' request for withdrawal of his charge, and could give no guarantee that such a request would be approved. Ziegler testified that because he was aware that the Board might not approve the settlement agreement or Hernandez' request for withdrawal of his charge, an indemnification clause was included with the intent that the agreement be a contractual obligation binding on both parties by which, if Hernandez accepted \$600 from Respondent, he would not accept any additional money ordered to be paid by the Board.²³

According to Ziegler, he gave Hernandez the settlement agreement in June 1981 and told him to show it to his attorney or to the Board. Hernandez returned nearly 2 months later on August 17, and signed the agreement and letter requesting withdrawal of his charge.

Hernandez did not recall taking the settlement agreement with him before signing it, and he contradicts Ziegler's suggestion that he show it to counsel. According to Hernandez, Ziegler told him on August 17 to read the agreement but not tell anyone about it.²⁴

Contentions of the Parties

The General Counsel argues that Hernandez was discharged on April 3, 1980, because of his activities in

²³ Of course, the settlement agreement is broader than that. It requires that Hernandez indemnify Respondent and any employee for any sums that the Board orders them to pay.

²⁴ I need not resolve this conflict in view of my finding that the settlement agreement is without effect.

behalf of Local 32E, and that his return to work operating a sanding machine was not reinstatement to his former position or to a substantially equivalent position. The General Counsel finally contends that the settlement agreement executed on August 17, 1981, was not binding upon him.

Respondent contends that Hernandez quit his employment on April 3 and was not discharged, and that his re-employment on July 23 to the sanding machine constituted full and unconditional reinstatement and that its obligation to reinstate Hernandez is satisfied and its backpay liability is tolled. Respondent finally argues that even assuming that Hernandez' request for withdrawal of his charge was not accepted by the Board, he and Respondent executed a valid, binding settlement agreement which precludes the award or payment of any money to Hernandez.

Analysis

The evidence is quite clear that Hernandez was a very active supporter of Local 32E, that his activity was known to Respondent, and that Respondent discharged him for that reason.

Thus, Ziegler and Vice President Lilienfeld testified that Respondent learned that Hernandez was attempting to bring in Local 32E, was trying to have employees join that union, was seen speaking to Gonzales outside the shop, and frequently left the premises with the announced intention of visiting Local 32E. Ziegler characterized Hernandez as a "dissident" who had "followers" among certain other workers who sought to have Local 32E represent them and supplant Local 137. Ziegler also admitted that he was happy to be rid of Hernandez. It is clear that he would be, in view of the fact that he perceived Hernandez as leading the cause to have Local 32E represent the employees and led a 2-hour walkout upon Local 137's demand that they join that union or be discharged.

The evidence clearly shows that Hernandez was discharged on April 3, 1980, and did not quit as alleged by Respondent. Prior to that date, Ziegler enlisted Hernandez' support to attempt to convince other employees to join Local 137. It is apparent that Ziegler became more unhappy with Hernandez when his "followers" did not join Local 137²⁵ and threatened that he could "get rid of one of you . . . it's a two way street."²⁶ Ziegler's animus toward Local 32E and Hernandez was also demonstrated in his threat to Santiago, when according to Santiago's credited testimony, Ziegler told him that if he listened to other employees talk about Local 32E he would jeopardize his job.

Hernandez credibly testified that he was discharged on April 3. He quoted Ziegler as telling him that he could not put up with him any longer.²⁷ This has a ring of

²⁵ Santiago did not join Local 137 at the time he was discharged on April 28, 1980.

²⁶ I credit Hernandez' testimony for the reasons set forth *infra*.

²⁷ Hernandez impressed me as being a thoroughly credible witness. Although there were times that his testimony was hesitant and halting, and he was unsure of certain dates, I attribute that to the passage of 2 years from the date of discharge to the hearing. He was forthright and candid in his responses and he testified as to events which would have been in-

truth, especially when one considers Ziegler's testimony that on April 3 he was tired of employees not punching in, not doing their work, and being belligerent.²⁸ Further evidence that Hernandez was discharged and did not quit may be seen in Foreman Pearson's affidavit that Ziegler told Hernandez that he was "laid off—I don't need him anymore."²⁹ In addition, I credit Santiago's testimony that Ziegler called him 3 days after the discharge and told him that Hernandez charged him and put him against the wall, and said he was a revolutionary, imperialist, and conqueror who was trying to run his business.³⁰ I do not credit the testimony of those witnesses who stated that Hernandez quit.³¹ It would have made no sense for Hernandez to have quit at that time during the pendency of the Local 32E petition and, if I am to believe Ziegler's testimony, he was given *carte blanche* at work. The evidence is thus clear that Hernandez was discharged.

Having found that Hernandez was discharged, I further find that the General Counsel has made a *prima facie* showing that Hernandez' activity in behalf of Local 32E was a motivating factor in Respondent's decision to discharge him.³² It is clear that Local 32E was anathema to Respondent. Its employees at the former Long Island City plant had not been represented by Local 137, and when they sought representation in the Bronx by Local 32E they were met with strong opposition by Respondent. Hernandez was identified by Respondent as the leader of the other "dissident" employees, and it unsuccessfully sought to convince him to renounce his interest in Local 32E and persuade his coworkers to join Local

deliberly impressed upon him. I therefore credit his testimony where it conflicts with Respondent's witnesses.

²⁸ I reject Ziegler's testimony that he restrained himself, pursuant to advice from the two unions, his attorney, and the Board, from discharging anyone during the pendency of the petition and charges. Ziegler stated that he could have fired employees for absenteeism but did not do so. However, he did dismiss Santiago for that reason on April 28, 1980, notwithstanding his protestations that he kept in check his desire to discipline employees who "took advantage" of the pending Board matters to engage in "nonsense," and belligerent behavior.

²⁹ Under the circumstances, Pearson's affidavit, given 1 month after the event, is much more reliable than this testimony, given 2 years after the incident at issue. I therefore rely upon his affidavit as to his true recollection of the incident.

³⁰ Santiago, who was employed by Respondent at the time of the hearing, impressed me as a person who, although he settled his case with Respondent and received a promotion and certain pay raises, still would testify truthfully regardless of his current association with Respondent. He was especially definite and insistent that this conversation occurred and, in view of Ziegler's testimony that Hernandez was the leader of the dissidents, I credit Santiago's testimony regarding this conversation. There was testimony that during the hearing Santiago invited Hernandez to pay him \$1,000, the implication being that Santiago would testify in Hernandez' behalf. The alleged statement by Santiago was vague and ambiguous and, accordingly, was of no effect.

³¹ The testimony of Lilienfeld, Ziegler, and Malcolm Rodriguez was to the effect that Hernandez said that he was fed up with Ziegler and with the job and asked to be paid off so that he could leave. Rodriguez, Respondent's maintenance and security worker, appears to have a special relationship with Respondent whereby, although ostensibly covered by the contract with Local 137, he is not a member of that union and receives Blue Cross, Blue Shield benefits and unlimited sick leave, benefits which are not accorded other employees under the contract. By virtue of his special status with Respondent, Rodriguez would have much to lose if he testified adversely to Respondent's position. I do not credit his testimony.

³² *Wright Line a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980).

137. The threats to Santiago and Hernandez that they could be discharged for their activities in behalf of Local 32E, when viewed against the short period of time following the filing of a petition by Local 32E on March 25 to the discharge on April 3, all lead to the conclusion that Hernandez was discharged because of his union activities.

The reason advanced for the discharge was that Hernandez washed up prior to the 4:15 quitting time on April 3. Exactly how early he entered the men's room to wash is disputed. Hernandez claims he washed up about 4:10 with 10 to 12 other employees and was singled out by Ziegler.³³ Ziegler claims that he saw Hernandez enter the bathroom at 3:55 p.m. and watched the doorway continuously until he emerged at 4:15 p.m. That testimony is contradicted by Foreman Pearson, who stated that he and Ziegler were walking around the shop and observed Hernandez exit from the bathroom at 4 or 4:05 p.m. Consequently, Hernandez was in the men's room at the earliest at 3:55 p.m., 20 minutes before quitting time.

Respondent maintained certain work rules as to the times for washup. Such rules were not enforced in the Long Island City plant, and it does not appear that they were enforced in the Bronx. Thus Pearson, the foreman who was in charge of checking the bathrooms to see if any employees were washing early, testified that, in the past, if no one is watching them, employees "usually" go into the bathroom early, and if they are caught Respondent "tells them something." Apparently at the most the errant employees were warned. There was no evidence that anyone has been discharged for washing up early.

It is thus clear that Respondent would not have discharged Hernandez for washing up early in the absence of his union activities.

Other incidents were cited by Respondent as grounds for termination of Hernandez but his discharge was not effected after any of those incidents, allegedly because Respondent was advised not to fire anyone during the pendency of the Board cases.³⁴ These incidents included: (a) An alleged threat by Hernandez in February 1980 to beat up Ziegler's 80-year-old father, Harry, when he accused Hernandez of not working. Harry Ziegler recommended that Hernandez be discharged, but no action was taken by Respondent with the exception of President Ziegler speaking to Hernandez about it and admittedly "letting it go." (b) An alleged threat by Hernandez in February 1980 to punch Vice President Lilienfeld who asked him to stop smoking while he was packing. Lilienfeld testified that Hernandez was "extremely threatening and violent" and was about to punch him. Lilienfeld incredibly testified that he was "extremely tempted" to discharge Hernandez upon that incident but did not because he recognized that Hernandez was a good worker, and was volatile and emotional, and Respondent was busy and needed the work done. Lilienfeld also added that he did not wish to create greater union problems by discharging Hernandez. (c) Alleged threats by Hernandez

³³ There is no evidence that Hernandez was in the men's room with anyone. Santiago gave contradictory testimony as to that and cannot be credited.

³⁴ This advice apparently was not heeded because Respondent admittedly discharged Santiago on April 28, 1980.

to employees Lenox and Jimmy Lolong if they did not sign cards for Local 32E.³⁵

I find that these alleged threats did not occur. It is inconceivable that Respondent would not have discharged Hernandez had they been made. Threats to beat up the president's 80-year-old father and to punch the vice president are most serious incidents which would have been met with immediate discharge had they occurred. To have tolerated those incidents and yet created a confrontation over a minor early washup episode could only have as its motivation the continued espousal by Hernandez of Local 32E and the recognition by Respondent that it must rid itself of him. Indeed, Ziegler testified that he was happy to be rid of Hernandez because of his troublesome ways.

I accordingly find and conclude that the discharge of Hernandez on April 3, 1980, violated Section 8(a)(1) and (3) of the Act.

Respondent is under an obligation to unconditionally restore a discriminatee to employment at the same position if it exists, or to a substantially equivalent position.

Hernandez was hired as a packer and shipper. When he was discharged on April 3 he worked as a packer. However, Hernandez also performed additional work such as assembling and wiring lamps, loading and unloading trucks, sweeping floors, cleaning the bathroom, and drilling holes in lamp bases, although there is no evidence as to the proportion of time he spent on packing as compared to these other duties. There was also evidence that employees in the shop occasionally are transferred from one department to another as needed. Indeed, Pearson, the foreman of the woodworking shop, testified without contradiction that it is his regular practice to take employees from the shipping and packing departments and have them perform work on the sanding machine. However, Pearson was not the foreman on April 3, and it does not appear that he was foreman on July 23 since on that date Lilienfeld took Hernandez to Anatoly, who was the foreman—even according to Pearson. Thus, Pearson's testimony as to his present practice of interchanging employees is irrelevant. The more critical evidence would have come from Foreman Anatoly, who did not testify.

It is clear that Hernandez was not reinstated to his former position as a packer. Respondent, in its written communication to him, offered to put him "back to work . . . under the same conditions" that he received when he was last employed in April. This, Respondent did not do. Respondent misconceives the situation it was in. It had discriminated against an employee within the meaning of Section 8(a)(3) of the Act. It was therefore required to reinstate him to his former position as packer. "Where a discriminatee's former position is in existence . . . the restoration of the status quo requires that the employer reinstate him to that position."³⁶ As a discriminatee under the Act, Hernandez was entitled to the

³⁵ Neither Lenox nor Lolong testified. Hernandez denied threatening anyone.

³⁶ *Lakewood Inn, Inc.*, 182 NLRB 127, 131 (1970); see *Wonder Markets, Inc.*, 236 NLRB 787 (1978).

usual Board order of reinstatement to his former position, even if that required firing his replacement.³⁷

It is clear that the position of packer existed.³⁸ I simply do not believe that Lilienfeld or Ziegler offered Hernandez a job as packer on July 23 or 24 when Hernandez complained that he could not perform the sanding work.³⁹ Hernandez made repeated calls to Respondent before July 23 requesting reinstatement and asked Local 32E to withdraw its charge so that he could be reinstated. He needed a job and money badly and there was absolutely no reason for him to have refused a packing job had one been offered to him.

I conclude that Respondent did not offer Hernandez his former position as packer and did not reinstate him to such position although it existed on July 23.

I reject Respondent's argument that no specific category of employee exists, and that all employees generally perform many jobs, and that therefore Respondent was justified in reinstating Hernandez to a job as sander. Although it may be true to some extent that employees were occasionally transferred to other positions as needed to help fill a job where an employee was not at work temporarily or where a large shipment of goods was received and many employees were needed to unload a truck, nevertheless it does appear that specific job categories existed. Thus, Pearson testified that he was foreman of the woodworking department, and that he occasionally transfers people from the packing and shipping departments. It thus appears that Hernandez' regular job was that of packer.

The reinstatement of Hernandez was not made in good faith, as required.⁴⁰ He was reinstated to a position as sander, a job he never held and did not know.⁴¹ Even assuming that the job of packer was not in existence, it has not been shown that the sanding job was substantially equivalent to the work that Hernandez had performed. The job of packing required mental and writing skills. The job of sander required the use of an electric machine, significant eye-hand coordination and more intense concentration.

Moreover, Ziegler stated that he was "pressured" into reinstating Hernandez and that he did not want to do so. Significantly, the events which followed the flawed reinstatement, especially the settlement agreement of August 17, 1981, to be discussed *infra*, clearly show that Respondent's intense dislike for Hernandez demonstrate that its reinstatement of him on July 23 was not in good faith and that it never intended to fully reinstate him.

I accordingly find and conclude that Respondent did not properly reinstate Hernandez on July 23, 1980.

The legal principles which the Board will apply in determining whether or not to approve a settlement agreement and withdrawal of unfair labor practice charges are

well settled. In *Jack C. Robinson, doing business as Robinson Freight Lines*,⁴² the Board stated:

... the Board's power to prevent unfair labor practices is exclusive, and . . . its function is to be performed in the public interest and not in vindication of private rights. Thus, the Board alone is vested with lawful discretion to determine whether a proceeding, when once instituted, may be abandoned. Such discretion to dismiss charges will be exercised only when the unfair labor practices are substantially remedied and when, in the Board's considered judgment, such dismissal would effectuate the policies of the Act.

The Board has also long recognized that the willingness of a charging party to withdraw charges is not necessarily a ground for dismissal of a complaint "for once a charge is filed, the General Counsel proceeds, not in vindication of private rights, but as the representative of an agency entrusted with the power and the duty of enforcing the Act in which the public has an interest."⁴³

With respect to the instant facts, the General Counsel argues that because the settlement agreement did not provide for the payment of a substantial amount of back-pay that was allegedly due Hernandez and because the agreement included an indemnification provision, the Regional Director properly refused to approve the charging party's request for withdrawal of his charge based upon such agreement.⁴⁴ I agree. It appears that the Regional Director acted properly within his discretion in declining to approve the withdrawal request. Accordingly, the settlement agreement is not binding upon the General Counsel.

However, Respondent asserts that notwithstanding that the settlement agreement may not be binding upon the General Counsel, it is nevertheless a valid document between it and Hernandez, pursuant to which Hernandez may not accept any money that the Board orders be paid to him, or, if he accepts it, to pay back such money to Respondent or to employees who may also be ordered to pay Hernandez. I disagree. From the point of view of contract law, it would appear that a condition of the settlement agreement, or at the least a substantial provision thereof—the requirement that the charge be withdrawn—not having been satisfied, the parties are excused from performance of the contract.⁴⁵ Moreover, public policy dictates that there be free access to and utilization of Board processes. Respondent violates this precept by including in the settlement agreement that Hernandez indemnify Respondent and any employee for any money they are required to pay by virtue of the charge he filed. Such an agreement violates basic concepts of fairness and justice and accordingly is not binding upon Hernandez. The fact that Respondent would present this agreement to Hernandez more than 1 year after his return to work on July 23 is illustrative of the intensity of feeling

³⁷ *Curtis Manufacturing Co., Inc.*, 189 NLRB 192, 198 (1971).

³⁸ Lilienfeld testified that he offered to shift employees around so that Hernandez could return to his packing job.

³⁹ I similarly reject their testimony that he said that he did not want to work there any longer or that he had lost status with his coworkers. I also find it hard to believe that, as Lilienfeld testified, Hernandez would request his packing job and in the same breath say he did not want it.

⁴⁰ *Kut-Kwik Corporation*, 176 NLRB 635, 651, fn. 61 (1969).

⁴¹ *Curtis Manufacturing Co., Inc.*, 189 NLRB 192, 198 (1971).

⁴² 117 NLRB 1483, 1485 (1957).

⁴³ *The Ingalls Steel Construction Company*, 126 NLRB 584, fn.1 (1960).

⁴⁴ There was no evidence of the exact amount of money due Hernandez.

⁴⁵ Samuel Williston, *A Treatise on the Law of Contracts*, § 663 (1961).

toward him because of his union activities and further indicates that his reinstatement was not in good faith. Accordingly, I find that the settlement agreement is unenforceable and void as against public policy.

CONCLUSIONS OF LAW

1. Respondent Panoramic Industries, Inc., is and at all times material herein has been an employer engaged in commerce within the meaning of the Act.

2. Service Employees International Union, Local 32E, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) and (3) of the Act by discriminatorily discharging and failing to reinstate its employee Carlos Hernandez for engaging in union activities in behalf of Service Employees International Union, Local 32E, AFL-CIO.

4. Respondent did not fully or properly reinstate Carlos Hernandez on July 23, 1980.

5. The settlement agreement executed on August 17, 1981, is void as against public policy and is unenforceable.

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

THE REMEDY

Having found that Respondent unlawfully discharged Carlos Hernandez on April 3, 1980, I recommend that Respondent be ordered to reinstate him and make him whole for any loss of earnings he may have suffered as a result of the discrimination against him. The amount of backpay shall be computed in the manner set forth in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest thereon to be computed in the manner prescribed in *Florida Steel Corporation*, 231 NLRB 117 (1977).⁴⁶

Upon the foregoing findings of fact and the entire record in this proceeding, I make the following recommended:

ORDER⁴⁷

The Respondent, Panoramic Industries, Inc., Bronx, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging and thereafter failing to reinstate its employees because they engage in union activities.

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

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

(a) Offer Carlos Hernandez immediate and full reinstatement to his former position as packer or, if that position no longer exists, to substantially equivalent employ-

ment, without prejudice to his seniority or any other rights and privileges previously enjoyed, and make him whole for any loss of earnings he may have suffered as a result of his discharge in the manner set forth in the section of this Decision entitled, "The Remedy."

(b) Expunge from its files any reference to the discharge of Carlos Hernandez, on April 3, 1980, and notify him in writing that this has been done and that evidence of this unlawful discharge will not be used as a basis for future personnel actions against him.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facility in the Bronx, New York, copies of the attached notice marked "Appendix."⁴⁸ Copies of said notice on forms provided by the Regional Director for Region 2, after being duly signed by Respondent's representative, shall be posted by it, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 2, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

⁴⁶ 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."

APPENDIX

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 have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT discharge our employees because they engage in union activities.

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

WE WILL offer Carlos Hernandez immediate and full reinstatement to his former job as packer or if the job no longer exists to a substantially equivalent position, without prejudice to his seniority or other rights and privileges.

WE WILL make Carlos Hernandez whole, with interest, for any loss of pay he may have suffered as a result of our discrimination against him.

⁴⁶ See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

⁴⁷ 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.

WE WILL expunge from our files any reference to the disciplinary discharge of Carlos Hernandez on July 1, 1980, and WE WILL notify him that this had been done and that evidence of this unlawful dis-

charge will not be used as a basis for future personnel actions against him.

PANORAMIC INDUSTRIES, INC.