

**Marty Gutmacher, Inc. and Carmine Bianco.** Case  
2-CA-18489

26 August 1983

### DECISION AND ORDER

BY MEMBERS JENKINS, ZIMMERMAN, AND  
HUNTER

On 30 June 1982 Administrative Law Judge James F. Morton issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief to the General Counsel's exceptions and brief in support of the Administrative Law Judge's Decision.

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

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,<sup>1</sup> and conclusions of the Administrative Law Judge and to adopt his recommended Order.<sup>2</sup>

#### 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 complaint be, and it hereby is, dismissed in its entirety.

<sup>1</sup> Member Hunter agrees with the result here for the reasons stated in his dissent in *Professional Porter & Window Cleaning Co.*, 263 NLRB 136 (1982).

<sup>2</sup> Member Jenkins does not join the majority in finding that deferral to the arbitral award is appropriate. Although the arbitrator had the statutory issues of this matter before him, it does not appear that he fully considered them in reaching his decision that Bianco was discharged for cause and not because of his protected concerted activities. However, Member Jenkins agrees that the complaint should be dismissed in its entirety because, on the merits, the evidence reveals that the General Counsel failed to establish a *prima facie* case that Bianco was discharged for discriminatory reasons. In his view, Bianco's statements of 16 November 1981 concerning his layoff as well as his threats with respect to the Respondent's president were personal in nature and unrelated to his shop steward responsibilities.

#### DECISION

##### STATEMENT OF THE CASE

**JAMES F. MORTON, Administrative Law Judge:** Based on an unfair labor practice charge filed on December 12, 1981, by an individual, Carmine Bianco, a complaint issued on January 28, 1982, against Marty Gutmacher, Inc. (herein called Respondent). The complaint alleges that Respondent violated Section 8(a)(1) and (3) of the National Labor Relations Act, as amended (herein called the Act), by having discharged Carmine Bianco from its

employ on December 14, 1981, because of his activities on behalf of Amalgamated Ladies Garment Cutters Union, Local 10, International Ladies' Garment Workers' Union, AFL-CIO (herein called the Union).

Respondent filed an answer to the complaint which placed in issue the alleged unlawful reason for Bianco's discharge and which asserted as a separate defense that the complaint should be dismissed on the ground that the Board should defer to an arbitration award which upheld Respondent's right to discharge Bianco. The General Counsel contends that the arbitrator, in issuing that award, did not consider the issue set out in the complaint in the instant case; i.e., the alleged violation of Section 8(a)(1) and (3) of the Act. In the alternative, the General Counsel contends that deferral to the award is not warranted on the ground that the award is not consonant with the policies of the Act.

Respondent, in its answer to the complaint, set out as additional separate defenses, various factual assertions to support the nondiscriminatory reason it has proffered for its discharge. In essence, Respondent asserts that Bianco was guilty of insubordinate behavior on November 16, 1981, and that that incident, when taken in context with prior arbitration awards adverse to him and with his overall unsatisfactory work history, was a lawful basis for his discharge.

The hearing was held before me on April 12 and 13, 1982, in New York, New York.

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

#### FINDINGS OF FACT

##### I. JURISDICTION AND THE UNION'S STATUS

Based on the pleadings and the stipulations received at the hearing, I find that Respondent 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 as defined in Section 2(5) of the Act.

##### II. THE ALLEGED UNFAIR LABOR PRACTICE

###### A. Background

Respondent manufactures ladies sportswear in New York, New York. It has been a member of the National Association of Blouse Manufacturers, Inc. (herein called the Association), which negotiates and administers collective-bargaining agreements on behalf of its employer-members. The Association and the Union have been parties to successive collective-bargaining agreements, each of which has named an individual as the impartial chairman to hear and decide disputes thereunder. The current contract covers, *inter alia*, the approximately six cutters employed by Respondent.

The Charging Party in this case, Bianco, began working for Respondent in early 1974 as a cutter. He has been a member of the Union for about 20 years. He had been discharged in September 1975 by Respondent. After a hearing thereon before the impartial chairman as then

named in the applicable contract, an award issued finding that the reasons given by Respondent for Bianco's discharge then "were substantially correct but that the penalty of discharge was too severe." Bianco's reinstatement without backpay was ordered and he was placed on probation; the terms therefor were that there was to be no drinking of alcohol at work, no racetrack sheets brought to work, that Bianco is not to engage in outside business during working hours and that he must not be insubordinate. Bianco was then reinstated.

In mid-1976 Bianco was again discharged, that time on the ground that he had cut goods improperly. Another arbitration hearing was held. On August 23, 1976, the then impartial chairman issued his award thereon which recited that Bianco had been discharged for cause, in view of the prior award and on the facts presented at the hearing in that proceeding. That award, however, further noted that Respondent had "consented to give [Bianco] another chance." On that basis, Bianco was again reinstated without backpay "with the further understanding that additional disciplinary difficulties in the future will subject him to summary dismissal."

On November 29, 1977, Respondent's production manager wrote to the Association to notify it that Bianco had been discharged that day for having caused "a disturbance." His letter related that Bianco "was boisterous in asserting that he was entitled to backpay as work was being given to [Respondent's] regular contractors," as Bianco had said "he would complain to the Union and get this place," as Bianco had made allegations of unfair treatment and underhanded dealings, as Bianco had stated "he would go to the Human Rights Commission" and as "he proceeded with slanderous and defamatory statements about [Respondent] and its production manager." The Union's representative and Bianco met with Respondent's officials on December 1, 1977. Bianco was reinstated that day after having signed the following statement:

I, Carmine Bianco, affirm that the following is a true statement of the facts:

Marty Gutmacher Inc. forgives Mr. Carmine Bianco for being disturbingly insubordinate to their production manager, Mr. Alan Baruch on Tuesday, November 29, 1977. Mr. Carmine Bianco is hereby re-instated as an employee of Marty Gutmacher Inc.

Mr. Carmine Bianco is signing this statement of his own free will and against the advice of his business agent, Mr. Edward Pastel.

The next 3 years passed without incident insofar as Bianco's work history was concerned. In late 1980 and in the spring of 1981, Respondent received several letters from outside firms which complained of poor workmanship. In July 1981, Respondent's president, Martin Gutmacher, and Dick Leone, a representative of the Union, walked through Respondent's cutting shop. Gutmacher told the cutters that he was getting too many complaints about the cutting. Gutmacher also said to Leone that he wanted to "bring [Bianco] up on charges for taking time off." Bianco told Leone that he took time off as he had it

coming to him as a vacation. According to Bianco, Gutmacher then told him that he should keep "his nose clean." Bianco testified that he told Gutmacher that he would get no trouble from him (Bianco) as long as he, Gutmacher, "stick[s] to the contract." According to Bianco, Gutmacher responded, "Fuck you and the contract." Gutmacher denies making any such remark. I credit Gutmacher's denial as there is no firm evidence of any contract violations by Respondent then or grievances thereon<sup>1</sup> and as Leone was not offered as a witness to corroborate Bianco's version.

On July 28, 1981, Gutmacher wrote the Association's manager to arrange to schedule a hearing before the impartial chairman as early as possible. In that letter he also wrote that he was complaining about Bianco as "a constant disruptive factor in the cutting room as well as a costly influence due to his continued mistakes. . . . [and that Respondent] can no longer condone his poor workmanship and belligerent attitude." The Association's manager then requested the impartial chairman issue a notice of hearing. On August 3, 1981, a notice issued scheduling a hearing for August 12, 1981, in the matter of "the discharge of Bianco." It appears that Bianco had not been in fact discharged but that Respondent was seeking an award to authorize it to discharge Bianco. There was no hearing held on August 12, 1981. A credibility issue was raised as to why no hearing was held. The General Counsel contends that the case that had been scheduled to be heard on August 12, 1981, by the impartial chairman was settled informally and thus resolved. Respondent asserts that the merits of that case were in fact heard by the impartial chairman in December 1981, in conjunction with later events. The General Counsel's witness respecting that credibility issue was the Union's attorney who testified simply that in early August 1981 he received a message from the office of the impartial chairman that the August 12 hearing was canceled as the case had been settled. The Association's manager testified that the impartial chairman held the adjourned hearing on December 3, 1981. The award which issued after the December 3, 1981, hearing recites that it was held "[p]ursuant to a letter dated November 18, 1981"; the award makes no reference to the letter of July 28, 1981, discussed above or to any transmittal of that letter to the impartial chairman by the Association's manager, also as related above. I credit the account of the Union's attorney and thus find that the matters which gave rise to Respondent's seeking to discharge Bianco in late July 1981 were resolved amicably before the August 12, 1981, hearing scheduled by the impartial chairman and those matters were not litigated or considered at the December 3, 1981, hearing.

<sup>1</sup> Note that, in a subsequent arbitration award, the one discussed in detail in this case, the impartial chairman observed that "Bianco is regarded as a troublemaker because he made persistent inquiries and objections to [Respondent's] operations." That observation appears to refer to matters that occurred after September 1, 1981, when Bianco became shop steward.

### B. *The Discharge of Bianco*

The General Counsel contends that Bianco was discharged on December 14, 1981, in violation of Section 8(a)(1) and (3) of the Act because he had protested Respondent's laying him and all the other cutters off at a time when the Union was taking Respondent to arbitration for alleged improper subcontracting of unit work. Respondent asserts that it discharged Bianco lawfully as it acted after the impartial chairman held a hearing and ruled that Respondent may discharge Bianco for cause.

On September 1, 1981, Bianco became shop steward of the cutters in Respondent's employ. His duties as steward were to act as a conduit between the unit employees and the Union's delegates; a steward is not authorized to negotiate directly with Respondent's officials.

In late October or early November 1981 (all dates hereafter are for 1981 unless specified otherwise), the Union sought arbitration on a claim by it that Respondent was violating the collective-bargaining agreement by subcontracting unit work. Bianco, as the cutters' shop steward, met with the Union's attorney in early November to discuss that matter.

On November 16, Respondent's production manager, Arthur Friedman, held a meeting of the six cutters employed by Respondent and informed them that, because of business conditions, they were being laid off as of the end of that day and for a period of about 3 weeks. All the cutters returned to their respective tables without comment.

Bianco testified that, as Friedman was leaving, he (Bianco) leaned across his table, and told Friedman that "Marty has some balls laying the men off before a holiday." The reference to "Marty" was to Respondent's president; the event occurred just before Thanksgiving Day.

Friedman testified that shortly after he made the layoff announcement on November 16 and after the cutters returned to their tables, Bianco approached him and said, "You know Marty's got some fucking nerve, laying me off at this time. . . if he thinks that he's going to jeopardize my livelihood because he's got all kinds of fucking money and he can sit around and do whatever the hell he likes, he's not going to be able to do it because I got facts and records and I'll make sure that I create a hard time for him. Friedman testified that he then told Bianco he was "threatening Marty" and that he would report that to Respondent's president. According to Friedman, Bianco then told him to go back and tell Marty because he, Bianco, has "all the records to prove it."

I credit Friedman's account over Bianco's as it was corroborated in substance by Respondent's other witnesses and, more significantly, by Bianco's testimony given before the impartial chairman as recounted by the Union's attorney in that case, when he testified before me.<sup>2</sup> Most significantly, Friedman's account was credited by the impartial chairman, as discussed in detail below.

<sup>2</sup> He testified that Bianco testified before the impartial chairman that he, Bianco, had told Friedman that he could not layoff the cutters while contracting out work and that he, Bianco, "will pursue this."

Friedman reported the incident to Respondent's president when he returned to the office later on the afternoon of November 16. Respondent's president, Martin Gutmacher, immediately telephoned the Association's manager and instructed him to start proceedings to have Bianco dismissed. In turn, the Association's manager wrote to the impartial chairman on November 17 for a hearing "to discuss the proposed discharge of Mr. Bianco" and he observed in that letter that Bianco "in the most recent of his many outbursts . . . created a disturbance, harrassed his supervisors and made direct threats in regard to Mr. Gutmacher."

Bianco was discharged on December 14 as authorized by the December 7 arbitration award discussed below.

### C. *The Arbitration Proceeding*

A hearing had been scheduled for November 18 on the Union's claim that Respondent had improperly subcontracted cutting work. On November 17 the impartial chairman adjourned that hearing to November 24. On November 19, he issued a Notice of Hearing in the Bianco discharge matter, to be held on December 3. On November 24, he met with the parties on the subcontracting grievance and it was agreed that, on December 3, he would hear the subcontracting case right after the Bianco case concluded that day.

The Union's attorney testified before me as to the events at the arbitration hearing on December 3, concerning Bianco's discharge. His account was uncontroverted and I accept it. It is summarized as follows. No transcript was made of the arbitration hearing. The hearing lasted about an hour. Counsel for Respondent made a detailed opening presentation to the impartial chairman. Copies of the prior awards, discussed earlier herein, were given to the impartial chairman together with customer complaint letters, received solely "for background." Respondent then called Friedman as a witness who testified that Bianco told him after the layoff announcement on November 16 that he had records to show that Respondent has no right "to do this," a reference to the layoff announcement. Friedman further stated at the arbitration hearing that "Bianco created an underlying current among the cutters against [Respondent]" and that Bianco "brings up incorrect charges against [Respondent] as a form of harrassment."

The next witness at the arbitration hearing was the cutter foreman who testified then that, after the layoff announcement was made on November 6, Bianco approached Friedman. He further testified then that "Bianco's protest was to the effect that he can't get away with this with all his fucking money, there's no way he can get away with this, I'll fix him." The cutter foreman also told the impartial chairman that Bianco was a "shit-stirrer" who "gets involved with things in the firm that are none of his business."

The last witness called by Respondent in the arbitration hearing was its president, Martin Gutmacher, who was asked in a general way why Bianco was discharged. Gutmacher spent the next 5 or 10 minutes responding by "essentially setting forth [Respondent's] defense in connection with the subcontracting arbitration matter which

was scheduled to be heard later that day." On cross-examination at the arbitration case, Gutmacher answered in the affirmative when asked that, notwithstanding any other problem he may have had with Bianco, "the complaints about subcontracting are the straw that broke the camel's back and that's why we're here on this discharge case." At that point, Respondent's counsel objected to the Impartial Chairman that that was not what Gutmacher meant. Thereupon, Gutmacher stated to the impartial chairman that that was not what he meant.

At the conclusion of Respondent's case before the impartial chairman on December 3, the Union's attorney "indicated that it was the [Union's] position that there was no just cause for discharge . . . [and] that [Bianco's] activities were solely that of a shop chairperson . . . [who has] a legal right [under Federal law] to protest layoffs." Bianco then testified that he protested the layoffs on November 16 by saying to Friedman in substance, "You can't lay us off, you're contracting at the same time and it's a violation." Bianco also said in substance that he will pursue this.

On December 7, the impartial chairman issued the award as to Bianco's case.<sup>3</sup> It is set out below:

Pursuant to a letter dated November 18, 1981 from the National Association of Blouse Manufacturers, Inc., of which the Employer is a member, a hearing was held in the above matter on due and sufficient notice in accordance with the provisions for arbitration in the collective bargaining agreement between the Union and the Association.

In this proceeding, the Employer seeks a determination that it is entitled to discharge for cause its employee, Carmine Bianco.

Bianco, a cutter employed for about seven years, has had an eventful career with the Employer. He was first discharged on September 16, 1975 and reinstated without backpay and on probation by an Award issued by my predecessor once removed. The terms of the probation indicate that the Impartial Chairman found that Bianco had engaged in several types of serious misconduct.

He was again discharged in 1976. My immediate predecessor found the discharge to be for good cause. However, in his Award, dated August 23, 1976, issued with the consent of the Employer, he directed that Bianco be reinstated without backpay "with the understanding that further disciplinary difficulties will subject him to summary dismissal."

Despite the latter Award, the Employer "forgave" Bianco "for being disturbingly insubordinate to their [sic] production manager" [this quotation is an excerpt from a statement signed by Bianco] and reinstated him as an employee on December 1, 1977.

There is no record of any further disciplinary problems concerning Bianco. However, in the past year, the Employer has received several complaints from its contractors concerning the quality of cut-

ting on certain lots, apparently done by Bianco. [Although the Union was notified of these complaints, there was no protest by either the Union or Bianco that he was not at fault.] The incident which precipitated the discharge occurred on or about November 16, 1981. The production manager told the assembled cutters that they would be laid off for two or three weeks because of a lack of work. After the other cutters had dispersed from this meeting, Bianco protested the layoff. According to the production manager, Bianco, who was the Union shop steward, [it appears that Bianco was acting on his own behalf and not as Shop Steward. None of the other cutters voiced objections to the layoff] stated vehemently and profanely that he would not accept the layoff and threatened to cause problems for the Employer.

This testimony was substantially confirmed by the cutting room manager who testified that Bianco's threats included the words "I'll fix him."

Bianco admits to voicing a protest concerning the layoff and to making an aspersive comment about the principal of the Employer. He denies having made any threats.

I credit the testimony of the Employer's witnesses in this regard.

Although the Employer is obviously anxious to terminate Bianco's employment for reasons unrelated to the events of November 16, 1981, (Bianco is regarded as a troublemaker because he made persistent inquiries and objections to the Employer's operations. It is not clear whether in doing so, Bianco overstepped or abused his authority as a Shop Steward.), I conclude that such events warrant discharge.

It is clear that once again Bianco's actions have taken him beyond the bounds of propriety. As an isolated incident, it may not appear to be a severe breach of discipline. However, given his past history and multiple opportunities for reform and warnings as to the consequences of future misconduct, I cannot conclude that there is reasonable possibility of a satisfactory employment relationship in the future.

#### AWARD

The Employer, MARTY GUTMACHER, INC., may discharge its employee, Carmine Bianco, for cause.

In the hearing held before me, the testimony was clear that the use of expletives is not uncommon in Respondent's cutting room.

#### D. Analysis

The Board has held that the desirable objective of encouraging the voluntary settlement of labor disputes will best be served by its deferral 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 arbitration panel is not clearly repugnant to the

<sup>3</sup> He also issued a separate award as to the subcontracting case, heard also on December 3. The award in that case was for the most part in Respondent's favor.

purposes and policies of the Act.<sup>4</sup> That does not mean that the Board would necessarily decide the unfair labor practice issue as the arbitration panel did.<sup>5</sup> The Board has also held that it will no longer honor the results of an arbitration proceeding under *Spielberg* unless the unfair labor practices issue before the Board was both presented to and considered by the arbitrator.<sup>6</sup>

The General Counsel concedes that, in the instant case, the proceedings before the impartial chairman on December 3 were fair and regular, that the Union presented to him the unfair labor practice issue raised now in the instant case, and that all parties had agreed to be bound by the award. The General Counsel asserts that I should not defer to the award either on the ground that the award indicates that the impartial chairman did not consider the unfair labor practice issue or on the ground that his award is clearly repugnant to the purposes and policies of the Act.

Respecting the first contention, the General Counsel notes that the impartial chairman, in his award, has made no clear reference to the unfair labor practice issue despite the fact that the Union's counsel had unequivocally asserted, as Bianco's principal defense, that Bianco was protected by Federal law when he spoke to Friedman on November 16. A reading of the award shows that the impartial chairman declined to make express findings respecting the unfair labor practice issue. In that regard, the award refers in only an oblique manner to the question as to whether Bianco's actions were concerted actions protected under the Act. Thus, the award does not set forth a finding that those actions were or were not so protected but it simply notes that "[i]t appears that Bianco was acting on his own behalf and not as Shop Steward" and again that "[i]t is not clear" whether Bianco was acting as Shop Steward when he made "persistent inquiries and objections to [Respondent's] operations." The award by its terms appears to decide the merits of Bianco's case on a contractual principle—whether a harmonious employment relationship can reasonably be expected to exist were Bianco not discharged. The Board decisions do not appear to set out a uniform approach as to whether or not an arbitrator must articulate a rationale which clearly indicates that the statutory criteria were evaluated. In one case, the Board set aside an arbitration award because the arbitrator never considered the unfair labor practice issue inasmuch as "he did not apply any statutory measure to his analysis in that regard."<sup>7</sup> More recently, however, the Board has asked itself whether an arbitrator must actually discuss the unfair labor practice or is it sufficient that he or she considered all of the evidence relevant to the unfair labor practice in determining whether a discharge was lawful under a contract.<sup>8</sup> It answered that question by then

saying that "(a) review of the decisions shows that, while it may be preferable for the arbitrator to pass on the unfair labor practice directly, the Board has generally not required that he or she do so. Rather, it is necessary only that the arbitrator has considered all of the evidence relevant to the unfair labor practice in reaching his or her conclusion." On those premises and as the uncontroverted testimony given before me by the attorney who represented Bianco at the arbitration shows, the impartial chairman had heard all the relevant evidence on the unfair labor practice issue and, further, as he discussed the relevant considerations in his award, I find that the impartial chairman considered the unfair labor practice matter.<sup>9</sup> I turn now to the General Counsel's alternate contention—that I should not defer to the award issued on December 7 as it is, in the General Counsel's view, repugnant to the purposes and policies of the Act. Very recently, the Board has said that, in resolving that issue, 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.<sup>10</sup> In a case which very closely paralleled the events of November 16 in the instant case, the Board declined to defer to an arbitrator's ruling upholding an employee's discharge.<sup>11</sup> It would thus appear that Bianco's comments on November 16 were clearly protected by the Act and that, as Respondent's president had conceded at one point in the arbitration hearing that the subcontracting complaints were in effect the straw that broke the camel's back, the impartial chairman was obliged to find that Bianco was being deprived of his statutory rights.<sup>12</sup> Even the very comment by Bianco on November 16 appears to be clearly protected, notwithstanding his use of expletives or the fact that he did not consult with the other cutters before making his comment.<sup>13</sup> I note however that the Board has considered another case which, in good part, was based on facts similar to those in the instant case and in which the Board deferred to the arbitration award upholding the alleged discriminatee's discharge.<sup>14</sup> A careful reading of that case indicates that it strongly supports major aspects of the award issued on December 7 by the impartial chairman in the instant case. The employee in the cited case, like Bianco, had a poor work history and

<sup>9</sup> See also *Kansas City Star Co.*, 236 NLRB 866 (1978). Further, in *Bay Shipbuilding Corp.*, 251 NLRB 809, 810 (1980), the Board held that "all that is necessary for deferral" is that the arbitrator make "factual findings in the course of resolving the contractual issue, which resolve the unfair labor practice issue."

<sup>10</sup> *G & H Products*, 261 NLRB 298 (1982); *International Harvester*, 138 NLRB 923, 929 (1962).

<sup>11</sup> *Hawaiian Hauling Service*, 219 NLRB 765 (1975). In *Ad Art*, *supra*, an employee's persistent challenges of management's views were held protected and his discharge was thereby held to be violative of the Act. See also *Clara Barton Terrace*, *supra*.

<sup>12</sup> It, of course, cannot be said that Bianco's actions on November 16 were of such a character as to render him unfit for further service. In that regard, see *Prescott Industrial Products*, 206 NLRB 51 (1971). The impartial chairman stated in his award that the November 16 incident when isolated may not appear to be a severe breach of discipline.

<sup>13</sup> The remark obviously arose out of his employment situation and it is clear that the Union's grievance on the subcontracting matter was set for arbitration 2 days later was a matter of common concern among employees. Cf. *Country Club of Little Rock*, 260 NLRB 1112 (1981). See also *Ajax Paving Industries*, 261 NLRB 695 (1981).

<sup>14</sup> *Atlantic Steel Co.*, *supra*.

<sup>4</sup> *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955).

<sup>5</sup> *Ibid.*

<sup>6</sup> *Suburban Motor Freight*, 247 NLRB 146 (1980). See also *Raytheon Co.*, 140 NLRB 833 (1963), enforcement denied 326 F.2d 471 (1st Cir. 1964).

<sup>7</sup> *Ad Art, Inc.*, 238 NLRB 1124, 1132 (1978) *enfd.* 645 F.2d 669 (9th Cir. 1981). In affirming, the court stated that the arbitrator's decision must specifically deal with the statutory issue. To the same effect, see *Clara Barton Terrace Convalescent Center*, 225 NLRB 1028 (1976).

<sup>8</sup> *Atlantic Steel Co.*, 245 NLRB 814 (1979).

had used expletives in questioning a foreman about the use of seniority in assigning overtime. The Board held that it was appropriate to defer to an arbitration award upholding that employee's discharge as based on his entire disciplinary record, including the use of obscenities about his supervisor. On the basis of that Board determination, there is simply no way I could find that the impartial chairman's award of December 7 was "palpably wrong as a matter of law." Conclusive effect must be given to it.<sup>15</sup>

#### CONCLUSIONS OF LAW

1. Respondent is an employer within the meaning of Section 2(6) and (7) of the Act.

<sup>15</sup> The Board's power to so delegate its decisional functions is not derived from any provision therefor in the Act; presumably it lies in the amorphous body of the Federal Common labor law.

2. The Union is a labor organization as defined in Section 2(5) of the Act.

3. It will effectuate the purposes of the Act to give conclusive effect to the December 7, 1981, award issued by the impartial chairman.

Upon the foregoing findings of fact and conclusions of law, upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

#### ORDER<sup>16</sup>

The complaint is dismissed.

<sup>16</sup> 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.