

**Communications Workers of America, Local 6360
and Patricia A. Coble and Office and Professional Employees International Union Local No. 320, AFL-CIO. Cases 17-CA-10991 and 17-CA-11093**

10 February 1984

DECISION AND ORDER

**BY CHAIRMAN DOTSON AND MEMBERS
ZIMMERMAN AND HUNTER**

On 12 July 1983 Administrative Law Judge William J. Pannier III issued the attached decision. Charging Party Coble filed exceptions.¹

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 has decided to affirm the judge's rulings, findings,² and conclusions and to adopt the recommended Order.

ORDER

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

¹ We deny Charging Party Coble's request for a hearing as lacking in merit.

Chairman Dotson would not have accepted the exceptions as they are not in compliance with the minimum requirements as set forth in Sec. 102.46(b) of the Board's Rules and Regulations.

² Charging Party Coble 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.

DECISION

STATEMENT OF THE CASE

WILLIAM J. PANNIER III, Administrative Law Judge: This matter was heard by me in Kansas City, Missouri, on January 27 and 28, 1983. On August 27, 1982,¹ the Regional Director for Region 17 of the National Labor Relations Board issued a complaint and notice of hearing, based on an unfair labor practice charge filed in Case 17-CA-11093 on July 15, alleging that Communications Workers of America, Local 6360, herein called the Respondent, had violated Section 8(a)(5) and (1) of the National Labor Relations Act, as amended, 29 U.S.C. § 151, *et seq.*, herein called the Act, by failing and refusing to accept a written grievance submitted by Office and Professional Employees International Union Local No. 320, AFL-CIO, herein called the Union, with regard to the discharge of Patricia A. Coble. On December 14, the said Regional Director issued an order consolidating

¹ Unless stated otherwise, all dates occurred in 1982.

cases, consolidated complaint and notice of hearing, consolidating Case 17-CA-11903 with Case 17-CA-10991, filed on May 18, and alleging, in addition, that the Respondent had violated Section 8(a)(3) and (1) of the Act by having discharged Coble on May 18 because she had "joined, supported, or assisted the Union, and engaged in concerted activities for the purpose of collective-bargaining or other mutual aid or protection, and in order to discourage employees from engaging in such activities or other concerted activities for the purpose of collective-bargaining or other mutual aid or protection." The Respondent denies the commission of any unfair labor practices both with respect to its discharge of Coble and with regard to its refusal to accept the Union's grievance concerning her termination.

All parties have been afforded full opportunity to appear, to introduce evidence, to examine and cross-examine witnesses, and to file briefs. Based on the entire record, on the briefs filed on behalf of the parties, and on my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

At all times material, the Respondent has been an unincorporated association with an office and place of business located at 914 Main Street, Lee's Summit, Missouri, and has been engaged in the organization and representation of employees in collective bargaining with various employers concerning wages, hours, and other terms and conditions of employment. During calendar year 1981, in the course and conduct of its operations, the Respondent collected and received dues and initiation fees in excess of \$250,000, of which an excess of \$50,000 was remitted, as it is annually, to the business office of the Respondent's International. Therefore, I conclude, as admitted by the Respondent, that at all times material, the Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7).

II. THE LABOR ORGANIZATION INVOLVED

At all times material, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Introduction

As must be apparent from the recitation in the Statement of the Case, there are two issues in this proceeding: Whether Coble was terminated on May 18 for reasons prohibited by the Act and, secondly, whether the Respondent's refusal to accept a grievance concerning her discharge was unlawful or, instead, was not a violation of the Act because the circumstances of her discharge were such that a grievance concerning it arguably could not be filed under the terms of the Respondent's collective-bargaining agreement with the Union. Based on the evidence presented, I conclude that Coble was not discharged for reasons proscribed by the Act, but rather was terminated for having engaged in activity not pro-

ted by the Act. Furthermore, I conclude that in refusing to accept a grievance concerning Coble's termination, the Respondent was relying in good faith on a historical interpretation of its collective-bargaining agreement which at one point in the past had been accepted by the Union and, consequently, that its refusal to accept the grievance concerning Coble's discharge was not a violation of the Act in the circumstances presented in this case.

B. The Discharge of Coble

1. Facts

Coble commenced working for the Respondent as a clerk/typist in its Lee's Summit hiring hall on July 27, 1981. At that time, and at all times material thereafter, only one other clerical employee had worked in that hall: Executive Secretary Beverly Webb. On Monday, December 21, 1981, two incidents occurred, mention of which arises in connection with subsequent events surrounding Coble's termination. As she had sat at her desk that day, Chief Steward David Spencer had approached her from behind and, according to Coble, had "put his arms on my shoulders, gave me a squeeze and said, 'Happy birthday.'" Later that same day, she testified, "Burt Geraghty, who is a committee man for the special project committee of [the Respondent] came into the office and told me he wanted me to call in a out on union business for Nigger Mike Harris." Though not herself black, Coble objected to Geraghty's use of that racially derogatory term. Consequently, the two incidents led her to author a letter to Dennis Williams, the Respondent's elected secretary and her immediate supervisor, in which she complained about what had occurred:

First, a Chief Steward gave my shoulder an unsolicited squeeze. This is the first time anyone in this office has made any physical contact with me. I feel that any physical contact is not proper in a professional office.

Secondly, I was given a direct verbal instruction by a committee person who used a racially derogatory word. The members of this Local are of several different races. I feel that me receiving instructions which are racially discriminating is detrimental to my professional reputation. Anyone overhearing me taking such instructions could possibly have a racial discrimination suit against this office.

Please let me know when you have time to meet with me.

During the morning of December 23, 1981, Williams met with Coble to discuss her letter. According to Coble, the only witness who testified about the meetings,² in connection with Coble's complaint about Geraghty's remark, Williams had

... said, "I don't know what I can do about that either," he said, "Everybody on the executive board uses the term nigger." He said, "Dennis Stidham

says nigger." He says, "what am I going to do, tell them not to say it." I said, "I just want you aware that whenever somebody is giving me specific job instructions, not to use the term nigger." He says, "Well, I don't know what I can do about that."

Although, as discussed in greater detail, *infra*, Coble claimed that she had heard other executive board members use that same racially deprecatory term during the time that she had been employed by the Respondent, in contrast to her description of Geraghty's use of it, she did not described any other specific instances where an executive board member, including President Dennis Stidham, had done so. Nor is there any evidence that she ever again has protested or complained about that racial term having been used in her presence.

In March, Williams spoke to both Coble and Webb about overtime claims that had been filed, apparently principally by Coble, and that the Respondent had been obliged to pay. The Respondent concedes that its overtime policy and procedures had not been explained in detail to the two clerical employees prior to this meeting. Thus, no disciplinary action had been taken against either of them and, so far as the record discloses, there were no further overtime problems after Williams' conversation with them.

By the following month, relations between Coble and Webb had become strained to the point where Coble had requested that criticisms of her work be made only in writing by Webb and, consequently, where Webb complained, apparently to Williams, about Coble's attitude.³ On April 6, Williams again met with the two clericals in an effort to ameliorate their problems. During this meeting, testified Coble, Webb had complained that Coble had been performing Webb's functions and, in general, had been "trying to make [Webb] look a fool." In the course of defending herself, Coble had pointed out that her own duties never had been clearly delineated and that she "had to know exactly what types of jobs I was required to do, and what jobs I'm not supposed to do."

Although Williams ended the meeting by admonishing the two clericals to try to get along, Coble remained troubled by the fact "that in reality nothing had been settled out of our meeting because I was still unclear about what I should be doing." Accordingly, on the following day, she prepared another letter to Williams stating:

Yesterday at Beverly's request, you and I had a meeting with her. At this meeting she voiced several complaints and accusations.

I am uncertain of what conclusions were made at this meeting.

What was your conclusion in regard to her remarks?

Please put your reply in writing.

Thank you.

During the morning on April 8, Williams summoned Coble to an inner office at the hall and handed her a letter that read:

² Williams did not appear as a witness, though there was no contention by the Respondent that he had been unavailable to it.

³ Webb did not appear as a witness in this proceeding.

Due to the problem that have arisen in the past few weeks such as lack of communications with fellow workers and staff members and the hostilities that currently exist, I have found it necessary to notify your Union Representative, Harry Rounds [sic] that you are hereby being placed on indefinite suspension without pay until the Executive Board has an opportunity to meet and discuss the fate of your future employment with [the Respondent]. The next scheduled Executive Board meeting is to be held on April 12, 1982. If you have any questions you should contact your Union Steward.

The Respondent's president, Dennis Stidham, testified that the suspension, which is not alleged to have been unlawfully motivated, had been decided on because of Coble's difficulties with Webb, of reports that Coble had been keeping a diary of activities that went on in the Respondent's hall and, at least to some degree, of Coble's earlier overtime claims.

Business Manager Round testified that he had met twice with the Respondent concerning Coble's suspension: Once with Stidham, Williams, and possibly someone else at approximately 1 p.m. on April 12, and, again, with Stidham and Williams on April 16, a meeting that also had been attended by Coble. During the first meeting, testified Round, Stidham had advanced the following explanation for the suspension:

[H]e told me that there was frictions, you know, in the office, and that there had been—well, I'll have to start over. She said that one of the things he said that Pat opened the windows during the winter, it was in the winter, and it was—she said it was stuffy in there, she would open the windows in there, the secretary would become cold because of the air coming in

At that time I believe is when we brought up that she was supposedly, a log or diary being kept of different things going on in the office.

Well, [Stidham] said that it was his understanding that Dennis Williams had told him that there was a diary being kept by Pat telling of different activities that was going on in the office, and about the officers and so forth. And that Pat had told Beverly Webb that she should keep one too for her own protection. And then I believe there was some more statements that the two girls had some arguments on job duties and so forth. But this was mostly the reasons for the suspension at this time.

Asked if any further reasons had been advanced during that meeting for the suspension, Round replied, "I don't recall any right now." At no other point during his testimony did Round add anything further to his above-quoted description of Stidham's explanation for the suspension during the April 12 meeting.

On April 12, the Respondent's executive board did meet and decided to reinstate Coble on Tuesday, April 13, and to reduce her suspension to 1 day's duration,

paying her for the other days during which she had been suspended. Coble, however, was not satisfied with this resolution and asked Round to pursue her grievance, seeking full rescission of the suspension, removal of any notation of it from her employment record, payment for the now 1-day suspension, and an apology letter from the executive board.

At the next meeting concerning the grievance, on April 16, Coble testified that Stidham first had said that he had no complaints about the manner in which she performed her duties, but that he had received "a lot of complaints about her from my members I don't know [how] to put it, but supposedly, she's been making threats about keeping a diary. And this had my officers real upset." According to Coble, after Stidham had explained further the concerns caused the Respondent's officers by her maintenance of a diary, she had denied flatly ever having kept one, asserting, "I have never had a diary. This is the first I have ever heard of a diary," at which point, claimed Coble, Stidham had asked for Williams' notes⁴ and had,

. . . brought up the fact that in December I had complained to Dennis Williams about a steward giving me a hug, and about a committee person using the terms "nigger." He said that they needed a girl in the office who could get along with everybody and who wouldn't get upset if somebody touched her.

He said he needed a girl in the office who wasn't offended by cussing. And I said, "Dennis, I didn't say I was offended by cussing. I do object if somebody cusses at me. I do object if somebody has physical contact with me. And I do object if somebody uses a racial slur whenever they are giving me a direct work instruction, because if anybody overheard that, that would implicate me as being prejudiced."

Then, testified Coble, Williams had raised the matter of Webb's complaint about Coble's attitude and actions that had led to the meeting to resolve their difficulties, pointing out that following that meeting he had received a memo from Coble requesting a reply in writing.

⁴ Although Williams did not testify, counsel for the General Counsel offered into evidence "a copy of a handwritten memo made by Mr. Dennis Williams concerning his conversation with Pat Coble in December of 1981." Presumably, this was the document to which Stidham, under Coble's version of the April 16 meeting, had referred. It reads:

At Pat Coble's request I met with her this morning to discuss what she felt was unprofessional conduct happening in the office. Earlier in the week someone came into the office and left and [sic] article for a Mike Harris. He asked Pat if she knew who he was, she replied no. The person then said he's a big tall nigger. Pat said she was offended by this type of language and would like me to try and up grade [sic] the language used in this office. Also during the week a gentleman came in and offered Pat a plate of cookies and candy. When she took it he put his arm around her and hugged her and wished her a Merry Christmas. She said this offended her as she does not like physical contact. I told her I didn't know what I could do but I could try to work something out. She told me that she would document our conversation for her records in case something like this happened again.

Ultimately, the Respondent's executive board empowered Stidham to rescind the suspension and to pay Coble for the day for which she had not been paid, but not to furnish her with a letter of apology. At a meeting with Round, scheduled for May 13, Stidham had intended to explain that he was going to take the actions authorized by the executive board. However, testified Stidham, prior to that meeting he had spoken by telephone with his son Tim, a member of the Respondent and one with whom the elder Stidham's relations had become strained. Tim Stidham had asked why Coble had been suspended and, after Dennis Stidham had explained that he would not discuss the matter with anyone other than Coble's bargaining representative, the conversation had continued with Tim Stidham saying, "that Pat had told him that Dennis Williams had admitted in a grievance meeting that he had made advances to Beverly" and, further, "that Pat had told him that she was going to be terminated on May the 20th, 1982" Dennis Stidham testified that he had replied that he "didn't know we were terminating her" and when his son had said "everybody out here is madder than hell and we want a meeting," that the executive board would handle the problem.

Later that same morning, testified Dennis Stidham, he had received a call from Bernelle Farmer, a black member of the Respondent, who "said she and some people in the plant wanted a meeting immediately with me concerning racial slurs at the office by the Executive Board." According to Stidham, Farmer had "said that the Executive Board had been accused of calling blacks 'niggers' and gays 'dykes,'" and, further, that she had heard this from Florence Purvey, another black member of the Respondent, who had just been called by Coble. Stidham agreed to meet with Farmer and her group at 4 p.m. that afternoon.

It was after having participated in these telephone conversations that Stidham met with Round and Coble and advised them about the disposition of her grievance. According to Coble, the following had occurred:

When we got into his office, he stated, "Well, I was going to take that letter of suspension off her record, but I've had phone calls all morning long from members over at the plant and they are complaining to me about Pat's grievance."

Harry asked me—Harry Round asked me had I been talking to any of the members at the plant about my grievance. I stated members had called the office and asked me about my suspension, about my grievance, and yes, I did answer their questions, concerning my grievances.

Dennis Stidham said, "if I get anymore phone calls concerning your grievance, then out you go." And I said, "Mr. Stidham, are you saying that you are threatening to fire me?" And he said, "no, that's not a threat." He said, "that's a promise. If I get anymore phone calls from my members about your grievance, then I will fire you."

Stidham agreed that he had said that he had intended to rescind Coble's grievance, but was not going to do it in light of "what we've been through today and what I've

been through on the telephone today," and, further, agreed that he had said that he had gotten "two telephone calls already today concerning your suspension," and that if he got "one more call on this, you are gone."

Initially, Round testified only that Stidham had "said he had been receiving calls from the plant in reference to the suspension or grievance suspension of Pat Coble, and that he didn't want anymore and if he got anymore why he was going to terminate her." However, during direct examination, he was pressed for more detail regarding Stidham's comments concerning the subject and he testified:

And [Stidham] said I just don't want to have anymore, and he said, there is being lies told or untruths told and he said, I don't want anymore of it, that if I have want anymore of it, that if I have anymore, I'm going to terminate you. And I asked Pat, I said, "are you calling the plant out there and telling them things?" And she said, "They call in the days, the members of [the Respondent] plant, Western Electric call in," and she said, "If they ask me about it," she said, I'll tell them," but she said, "I don't call them."

During the afternoon of May 13, Stidham received two more calls, this time from female members, one of whom also was an executive board member, during which the executive board was accused of having referred to gays as "dykes." At 4 p.m. on May 13, a delegation of the Respondent's members did meet with the executive board. All involved in that meeting who testified agreed that it had been an acrimonious one that had ended with everyone still angry and disenchanted. While the reasons for Coble's suspension had been mentioned during it and were discussed at least to a degree, most of the meeting had been devoted to angry accusations, directed at executive board members who had been present, concerning purported derogatory racial and sexual remarks by them, and to denials by those members that they had made such remarks.

During the morning of May 14, the executive board met. There was discussion of resignation by several of the members in light of the confrontation that had occurred during the later afternoon of the preceding day. There also was discussion about terminating Coble but no decision in that regard was reached. Instead, the meeting adjourned and several board members, including Stidham, took time off for the rest of the day.

During the later afternoon of May 14, Coble, who was by herself at the Respondent's hall, called the police and reported having been threatened by someone who had come to the hall, but whose identity was unknown to her. When the police arrived at the Respondent's hall, in response to her call, Coble gave a statement and during the course of that process, David Long, area vice president of 30 building for day shift, arrived and overheard at least a portion of Coble's discussion with the police. According to Coble, once the police had left, Long had threatened that if she filed charges against the unknown individual who had been at the hall that afternoon, she would be fired.

Upon returning late that afternoon from having gone fishing, Stidham was told, by his wife, that an anonymous caller had told his 75-year old mother that he "had taken off with all the union money and left the country." Then he received a call notifying him of Coble's encounter that afternoon and of her police report concerning the unknown individual. That was followed by another call summoning Stidham to a nearby cocktail lounge where a group of the Respondent's members were present and "want[ed] to know what's going on." When he arrived at the lounge, Stidham discovered about 50 members, many of whom inquired concerning what had been happening and one of whom accused Stidham of having "suspend[ed] a woman because she stated her opinion about the Executive Board." At some point during the course of the events of that evening, Stidham became aware that the initially unknown person, whom Coble had accused of threatening her in the hall, was Robert Toft, a member of the Respondent and a storekeeper at Western Electric.

On Monday, May 17, during her lunch hour, Coble went to the police station when she filed charges against Toft for the incident that had occurred on the preceding Friday.⁵ On that same day, the Respondent's executive board voted to terminate Coble.

At two points in his testimony, Stidham recited the reasons for the executive board's decision. During direct examination, he testified that the decision had been, "Based on everything. Based on the fact that she had made the calls into the plant, that she had told lies to the people, that the incident involving Bobby, because we then had the information that we needed to back that up, the whole thing I've been talking about." Under cross-examination, he explained further as follows:

The lies, political pressure, which was covered in her contract that she was not to be involved in any political action. We were involved in a convention election at the time. The whole Executive Board, other than myself, I believe—when I say the whole one, the majority of the Executive Board members were running in the election to the convention. We knew that there would be some effect on that which proved out to be later in the election, there was one man on the Executive Board elected to go. And it was due to political pressure. We didn't know that at the time, but we did know that people were very upset with the Executive Board, not because of the termination of Pat Coble but because of the lies concerning the racial slur and the references to gays as "dykes." Plus charges made by Pat Coble that there were immoral, extra-marital affairs going on at the union hall during working hours.

One other executive board members who had been present during that meeting and who testified in this proceeding was Long. He described several reasons that had been discussed that day as ones that had led to the executive board's decision to discharge Coble:

⁵ Ultimately, according to Coble, the city attorney had decided not to prosecute the basis of her complaint.

Several of them. Because of the fact that she stated to—or called individuals that we represent in the plant and said that we were calling blacks niggers and homosexuals or whatever dikes [sic] and you know, we went all the way back through back history as to the overtime problem, the problem that Ernie Ashlens had, you know, kind of discussed all of the problem that we might have and what would be the solution to them.

Four points raised in connection with the foregoing recitation of the reasons for having terminated Coble require further explication. First, Toft denied flatly ever having threatened Coble during the afternoon of May 14. Rather, he testified that he had heard rumors about executive board members resigning due to things that a secretary named Pat had been saying and, when he had arrived at the hall, he had asked her if she was that secretary. According to Toft, when Coble had not responded to his question, he had said that, "if she was the one that was causing all this trouble, that she would pay for it. And she said, 'Is that a threat?' I said, no, that's just telling you that god will make you pay for your sins." Though Coble testified that Toft had approached her desk and had been speaking "real loud" and shaking his finger while talking to her, Toft denied having done these things. Moreover, he denied having called Coble, as she claimed that he had, a "god damn bitch" or a "f—g liar." Rather, he testified that he only had made the types of remarks described above.

Second, Long testified that he had received a call from Coble on April 10 during which she had reported that she had been suspended and that she wanted to know the reason. According to Long, when he had replied that he did not know the reason and had suggested that she contact Stidham or Williams, Coble had retorted, "that she didn't really trust them or something to that effect, I can't remember the words, and that the only two that she felt like she could talk to would be me or Bill Summers, because we were not involved in immoral extra-curricular activities."

Third, Ernest G. Ashens, the Respondent's vice president for skilled trades, testified that around March 1 he had encountered a problem with Coble when he had taken a half-day vacation and,

... a girl that I'd been going with for about five years called up and was looking for me and [Coble] told her that I was on vacation; and she didn't know why she could be so upset about me being gone because I do it all the time.

And so I went—after that, she was upset and crying and everything. So I went to Ms. Coble and told her. I said, "I would appreciate, on my own personal business, that she would stay out of it."

According to Ashens, Coble had replied, "I'm sorry."

Finally, the collective-bargaining agreement, between the Respondent and the Union, in effect at the time of Coble's termination had contained a provision, article IV, section 5, which reads: "No employee shall, as a condition of his employment, be required or permitted to

participate in any internal union political action of their employer, nor shall he be required or permitted to campaign for any individuals who are candidates for a union office." It was to this paragraph that Stidham was referring in mentioning "political pressure."

2. Analysis

To support the allegation that Coble's discharge had been unlawfully motivated, counsel for the General Counsel, makes a carefully constructed argument that, in effect, proceeds backwards in time and makes the following points. First, Section 7 of the Act protects employee efforts to appeal for support to other employees, customers, and the public where that employee had a dispute with his or her employer. Second, the Respondent terminated Coble primarily for having made appeals to its members for them to support her position in her grievance against it. Third, while in the course of making those appeals, Coble had told the Respondent's members that executive board members were referring to blacks as "niggers," that subject had been directly related to her grievance inasmuch as Stidham had raised it during the April 16 meeting, and it had been an accurate assertion in light of Williams' comment to her during her meeting in December 1981. Consequently, concludes the General Counsel's argument, in the course of appealing for their support, Coble had been doing no more than exercising a statutory right by reciting to the Respondent's members what had been told to her by the Respondent's own officials and, consequently, her termination for that reason had constituted a violation of the Act.

In addition to that primary argument, in support of the allegation that Coble had been unlawfully terminated, counsel for the General Counsel makes the following subsidiary arguments intended to dispose of several other points raised in connection with Coble's termination. First, to the extent that asserted remarks by Coble concerning "immoral extra-curricular activities" may have influenced the Respondent's decision to fire her, the fact is that one of the principal reasons for having suspended Coble had been the Respondent's concern that she had been maintaining a diary that was causing the Respondent's officers to become upset. Thus, the subject of why those officers would have become upset had been one logically related to the subject of Coble's grievance and, concomitantly, to her appeal for support by the Respondent's members. Second, Coble denied ever having said that the Respondent's officers had been calling gays "dykes" and there is no evidence that she ever had done so in the course of appealing to the Respondent's members for support. Accordingly, at best, this accusation is governed by the doctrine enunciated in *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964). Finally, to the extent that Coble's termination may have resulted from the criminal charge that she had preferred against Toft, that charge had resulted from Toft's own conduct to oppose and, in effect, to suppress Coble's efforts to generate support for her grievance among the Respondent's members. Thus, Coble's conduct in connection with the Toft incident had been directly related to her statutorily protected rights to file a grievance and to generate support for it among the Respondent's members inasmuch as, by having filed

charges against Toft, she had been attempting to preserve and to protect her ability to exercise those rights.

While the General Counsel's arguments contain a certain inherent logic, the difficulty with them in the circumstances of this case is that most of them—that Coble's communications to the Respondent's members had been intended only to generate support for her grievance; that she had been told that all executive board members referred to blacks as "niggers" by Williams in December 1981; that she never had told the Respondent's members that executive board members had been referring to gays as "dykes"; and that Toft's conduct on May 14 had been threatening and abusive—rely exclusively on Coble's own testimony and, thus, on her believability. But, when she testified, Coble's demeanor was not impressive and a review of the transcript serves only to confirm my impression that she was not being candid. Rather, when testifying, it appeared that Coble was attempting to tailor her accounts of events and conversations so that they would appear in the light most favorable to her position. Moreover, her testimony during this proceeding appears to have been consistent with a pattern that emerges from review and analysis of her conduct since, at least, her suspension in April. That is, rather than having been a person of good will who took action to correct inequities, as she attempted to portray herself, the evidence discloses that, after the Respondent had failed to erase altogether a concededly not unlawfully motivated suspension, Coble had retaliated by reporting purported pernicious comments by executive board members to the Respondent's members. This seemingly was done by her to impugn the integrity of the members of a body that would not revoke her suspension and, further, to undermine with the Respondent's membership, particularly those who were influential and most likely to be susceptible to the substance of Coble's remarks, any support that executive board members had enjoyed previously.

That Coble was not a reliable witness becomes most apparent when comparing her testimony with that of Florence Purvey, a member of the Respondent and one of the more vocal spokespersons for black members of the Respondent. Called during the General Counsel's case-in-chief, Coble described a telephone conversation with Purvey during the morning of May 13.⁶ Later, Purvey appeared as a witness for the Respondent and contradicted, virtually branch and root, every significant aspect of Coble's description concerning that call. Thus, as quoted above, when asked by Round during the May 13 meeting if she had been called the Respondent's members concerning her grievance, Coble had replied that it had been members who had been calling her. With reference specifically to her conversation with Purvey, during the hearing in this matter, Coble testified expressly, "I have had one conversation with Flo Purvey as she called me at the office." But, Purvey directly contradicted both of those assertions, testifying that initially "[Coble] called me at the plant," and, further, that "I called her back." Thus, there were two conversations by telephone, not

⁶ It had been Purvey who had related Coble's remarks to Farmer and that, in turn, had led the latter to telephone Stidham on May 13.

one as Coble claimed, and it had been Coble, not Purvey, who had initiated the first such call.

Moreover, in describing her purportedly single telephone conversation with Purvey, Coble claimed that the subject of her suspension and grievance had been raised by Purvey who,

. . . wonder[ed] how come I had not been answering the phone lately. I told her I was a clerk typist and answering the phone was not one of my duties anymore, unless, of course, Beverly was on the other line and then I could answer the phone.

She asked me what had come about. How come that was. I told her since my suspension, I'm not—I am clerk typist. I don't answer the phone. She says, she asked me about my suspension and I said, "Well, I am grieving it right now. My suspension is being grieved at this point in time."

On its face, such a sequence of casual questioning by Purvey appears unlikely if, as Purvey testified, it had been Coble who had initiated the telephone calls that morning. And, indeed, Purvey did not corroborate that description which portrays her as having been the one who, through curiosity, had elicited from Coble a statement that she had been suspended. In fact, Purvey did not even recall Coble having mentioned, during their first telephone conversation, having been suspended nor, for that matter, having stated that she had filed a grievance. Instead, Purvey testified that discussion of Coble's personal situation had been initiated by Coble's own assertion "that her job was in jeopardy and could I help her."

On further aspect of Coble's conversation with Purvey is worthy of note at this stage. Coble denied expressly having said anything to the Respondent's members about executive board members having referred to gays as "dykes." As noted above, one of the General Counsel's subsidiary arguments is that there is no direct evidence that Coble had made that particular type of statement to the Respondent's members. Yet, Purvey's account of her first telephone conversation with Coble tends to refute that argument and to support the Respondent's testimony that, in fact, Coble had attributed use of that word to executive board members. Thus, Purvey testified that in the course of their conversation, Coble had said "also that she had gotten in trouble because a member of the—members of the E Board were using racial snares, you know like 'nigger' and 'darks' and 'arises,' no it wasn't—'gays.'" Of course, Purvey's testimony does not recite that Coble had used the word "dyke." But, there is no basis for assuming that Purvey is a member of the latter group whereas she clearly is a member of the former. Consequently, it is somewhat understandable that she would become upset on hearing that slurs were being directed against blacks and might not have been wholly attentive to the precise words immediately following Coble's description of the use of such deprecatory terms. What is clear from Purvey's testimony is that in the course of reciting derogatory remarks purportedly being used by executive board members, Coble had included in

her enumeration terminology referring to sexual preference.

True, Purvey was called as a witness by the Respondent and, at least in theory, there always is the possibility that, with the passage of time, she has become favorable to the Respondent's interest in its dispute with Coble. However, that was not the impression that Purvey conveyed. Rather, she appeared to be testifying candidly, albeit with some uncertainty as to whether the remarks described to her by Coble actually had been uttered by members of the Respondent's executive board or, alternatively, whether she and other members of the group that had gone to the executive board during the afternoon of May 13 had been pawns moved on a board the dimensions of which only were beginning to emerge. In short, Purvey appeared to be an honest and candid individual whose testimony I credit.

With respect to Coble's testimony, a few other points are worth noting. First, as found above, Coble's testimony that she had not called the Respondent's members to solicit their support was contradicted directly by Purvey. While no other member, as distinct from executive board member, was called to corroborate Coble's account by testifying that he or she had initiated a call to inquire about Coble's suspension and grievance. Second, there is no evidence that would support an inference that any of the Respondent's members likely would have contacted Coble to ask about her personal problem. That is, so far as the record discloses, Coble had not become so friendly with any of the Respondent's members that there would have been a basis for concluding that it was only natural for them to have contacted her concerning her dispute with the Respondent. Third, by the time that the calls to Stidham had begun occurring, a month had past since Coble's initial 3-day suspension on April 8, 9, and 12. So far as the record discloses, Coble had worked steadily following her reinstatement on April 13. There is no evidence of any intervening event, between April 13 and May 13, that likely would have suddenly brought the matter of her suspension to the attention of the Respondent's members and would have sparked them to make calls to the Respondent on her behalf.

In sum, based on my impression of Coble when she testified and on a review of the transcript of the testimony and other evidence adduced, I conclude that Coble was not being candid and I do not credit her testimony. Short of Coble's testimony, the only evidence remaining in the record that serves as any support for the General Counsel's basic argument—that Coble's remarks to members about racial slurs by executive board members had been related directly to her suspension by virtue of the Respondent's own reference to the December 1981 complaint about Geraghty's comments concerning Harris—is Round's testimony concerning statements made during the April 16 meeting at which Coble's grievance concerning the suspension was discussed.

Round testified that, during that meeting, Stidham had raised the subject of Coble's complaint about Geraghty's remark in December 1981. However, when testifying, Round did not mention this subject until after having given a full recitation of what had been said by Stidham

during that meeting—a recitation that omitted any mention of Coble's complaint about racial slurs—and not until the topic had been suggested to him by counsel. Even then, when the subject was suggested initially to him, Round first answered by reciting a description of what he understood had happened on that day in December 1981. Only after the subject again was suggested to him did Round finally provide a description as to what Stidham purportedly had said on April 16 regarding Coble's complaint about the racial slur. While Round impressed me as being a basically sincere individual, at this point in his testimony he appeared nervous and desirous of attempting to avoid a direct answer to the question being put to him. It seemed that he felt almost cornered and obliged to provide testimony concerning Stidham's purported remark more from a sense of loyalty to Coble than because Stidham actually had made such a remark concerning Coble's prior complaint about the racial slur.

That conclusion is but confirmed by two other factors. First, as set forth above, Round described an earlier meeting, on April 12, with Stidham, Williams, and possibly one other person at which the Respondent's reasons for having suspended Coble were reviewed. Round's description of what had been said during that meeting is quoted above. Even a cursory examination of it discloses that at no point did Round claim that either Stidham or Williams had even mentioned the events of December 1981 when they described the Respondent's reasons for having suspended Coble indefinitely.

Second, when Coble's above-described recitation of what Stidham purportedly had said on April 16 is compared with Round's recitation, the two versions do not correspond. Thus, while Coble describes Stidham as having objected to her sensitivity to "cussing," Round testified that Stidham had said: "Well, he says that is what a lot of people call this man. And that, you know, they didn't think, apparently, didn't think anything of it, at the time that had been referred to him as far as that." Consequently, while Round attempted to corroborate Coble's claim that the subject of her complaint about the racial slur had been raised on April 16, in fact he failed altogether to corroborate her account of what assertedly had been said that day. In light of the foregoing consideration, and based on my observation of him when testifying, I do not credit Round's testimony regarding this aspect of the April 16 grievance meeting.

In light of the foregoing conclusions, the remaining evidence discloses the following sequence of events. Coble had been suspended indefinitely on April 8 for various reasons, none of which is alleged to have been unlawful. By April 13, she had been reinstated and her suspension had been reduced in duration to a single day. Her bargaining representative had been processing a grievance concerning that 1-day suspension, intending to pursue the matter to arbitration if necessary. Immediately prior to a May 13 meeting, scheduled for the Respondent to make its final reply to that grievance, Stidham had begun receiving telephone calls from the Respondent's members in which accusations were made that there was a plan to fire Coble on May 20 and that executive board members had been making racially derogatory remarks.

Over the course of the remainder of that day and during the following one, members continued to complain about racially and sexually derogatory remarks attributed to executive board members. Coble admits that she had been the source of that information to members although, as noted but not credited above, she denied having initiated such conversations with members, claiming that she merely had responded to their inquiries. Because of the untruthful remarks made to its members by Coble, and in light of her past record of difficulties, as well as because of the criminal charge that she had filed against Toft, the Respondent decided to and did terminate her.

Whether or not an employee of a labor organization engages in activity protected by Section 7 of the Act when he or she contacts its members to solicit their support for a personal dispute with that labor organization is not, in the final analysis, the question presented here. For the protection of Section 7 is not so all-encompassing that it protects, without distinction, all activity by employees aimed at implementing its enumerated objectives. Rather, "even with the protection afforded by the Act to employees who organize and engage in union activities, an employer in the pursuit of the right to manage his enterprise is not left impotent to discharge an employee for misconduct . . . or for other valid reasons." (Footnote and citations omitted.) *NLRB v. Charles Batchelder Co.*, 646 F.2d 33, 38 (2d Cir. 1981). While "not every impropriety committed during such activity places the employees beyond the protective shield of the act [sic]," *NLRB v. Thor Power Tool Co.*, 351 F.2d 584, 587 (7th Cir. 1965), nevertheless there is a point at which "the protection of the right of employees to full freedom in self-organizational activities should be subordinated to the vindication of the interest of society as a whole." *NLRB v. Illinois Tool Works*, 153 F.2d 811, 816 (7th Cir. 1946).

Virtually every circuit court of appeals, as well as the Board and its administrative law judges, has attempted to formulate a more specific general test to measure the point at which that subordination occurs. See, e.g., *NLRB v. Thor Power Tool Co.*, supra; *Syncro Corp. v. NLRB*, 597 F.2d 922, 925 (5th Cir. 1979); *Excavation-Construction v. NLRB*, 660 F.2d 1015, 1020 (4th Cir. 1981). Here, however, analysis need only be concerned with the question of employee disloyalty. "There is no more elemental cause for discharge of an employee than disloyalty to his employer. It is equally elemental that the Taft Hartley Act seeks to strengthen, rather than to weaken, that cooperation, continuity of service and cordial contractual relation between employer and employee that is borne of loyalty to their common enterprise." (Footnote omitted.) *NLRB v. Electrical Workers IBEW Local 1229*, 346 U.S. 464, 472 (1953). For, in the final analysis, it had been Coble's own disloyalty, displayed through the unfounded remarks that she had made to the Respondent's members in a context where, in reality, she really had not been concerned about having them support her grievance, that led to her discharge.

The Respondent's product is its ability to represent employees and, further, its customers are its members. While it deals with employers in negotiations, it does so on behalf of those members. Without them, or at least

without supporters willing to have it serve as their bargaining representative, the Respondent would be out of business.

Coble's accusations about what members of the Respondent's executive board had been saying and doing were severe ones. "It is common knowledge in these sensitive times that misunderstanding in the area of race relations are easily provoked by minimal conduct or a careless word." *H. L. Meyers Co. v. NLRB*, 426 F.2d 1090, 1094 (8th Cir. 1970). Indeed, the serious effect of her remarks about executive board members having used a racially derogatory term was amply illustrated by the reaction of Purvey, Farmer, and certain other members when they heard what Coble had to say. No less sensitive and serious were the remarks concerning the sexual preferences of the Respondent's members. Nor is it unlikely that at least some members would become upset at learning that executive board members, who served as the managing agents of these employees' bargaining representative, had been engaging in extramarital activities. In short, the remarks made by Coble were serious ones, having a natural consequence of creating a fissure between the Respondent and its members.⁷

In making these reports to the Respondent's members, Coble, in effect, was acting as an expert on the subject of remarks by executive board members. Inasmuch as they worked for employers in the area, the Respondent's members were always at its Lee Summit Hall. By contrast, Coble had regularly been working there. Thus, as between the members and herself, she had been in a position to be better informed about what executive board members had been saying while at the hall than would be the members of the Respondent. Indeed, any claim that the Respondent's members would not have relied on what she had told them, even though they personally had not experienced comments of the nature described by Coble being made by executive board members, is dispelled completely by what actually had occurred after Coble's reports to various members. Tim Stidham telephoned his father to protest. Purvey reported what had been said to her by Coble to Farmer and other black members who, in turn, immediately demanded a meeting with the executive board. Other members called to protest the purported use of the word "dyke" in referring to gays.

Nor, in the final analysis, can it truly be said that, at least at the outset, Coble had begun making these calls with the object of generating support for her position in connection with the grievance that she had filed concerning her suspension. As set forth above, Purvey testified that when she had been called by Coble, the latter had only "said that her job was in jeopardy," and Purvey had no recollection of Coble even having mentioned her suspension or grievance during their first tele-

phone conversation. Tim Stidham, when he had telephoned his father, had mentioned Coble's suspension, but he also recited "that Pat had told him that she was going to be terminated on May the 20th, 1982" Yet, as noted above, this record contains no evidence that would afford even a basis for concluding that, following her reinstatement on April 13, there had been even the slightest indication that Coble's "job was in jeopardy" or "that she was going to be terminated on May the 20th, 1982." Furthermore, as concluded above, there is no credible evidence that either Stidham or Williams had made any reference to Coble's complaint about Geraghty's racial slurs in December 1981 during the course of discussing her suspension and grievance with her and Round in April. Consequently, there was no relationship between racial slurs and Coble's suspension had grievance over it. Similarly, there simply was no basis whatsoever for remarks about executive board members calling gays "dykes." The injection of these inflammatory remarks into her discussion with the Respondent's members further evidences that Coble had been engaging in these conversations for purposes ulterior to attempting to generate support among them for her position concerning the 1-day suspension in April.⁸

In sum, a preponderance of the evidence shows that Coble had been making unfounded assertions about her employment status and about the comments of the Respondent's executive board members. Whether, in making those remarks, she had been motivated by a desire to punish the executive board for not having rescinded her suspension⁹ or had been attempting some form of power play to compel the Respondent's executive board to bend to her wishes, neither her statements concerning her future employment nor her recitations of what executive board members purportedly had been saying about certain classes of the Respondent's members had any relation to the merits of her suspension nor to her grievance concerning it. Her remarks impugned the quality of the Respondent's ability to represent certain classes of its members and, accordingly, the quality of its "product." Her remarks were made deliberately. Having been made to Respondent's members, they had been made to its "customers." In having made them, Coble was, in effect, speaking as an expert since she worked regularly, day in and day out, in the Respondent's Lee's Summit Hall where executive board members had their offices. In these circumstances, there is no basis for concluding other than that Coble's conduct had exceeded the bounds of the protection afforded by Section 7 of the Act. *NLRB v. Local Union No. 1229*, supra.

⁷ The absence of direct evidence that Coble actually had intended such a result is not significant. *American Arbitration Assn.*, 233 NLRB 71, 75 (1977). Moreover, Coble appeared sufficiently perceptive to have appreciated that her remarks would have an effect adverse to Respondent's executive board members. In light of the foreseeability of such an adverse consequence, an employee, no less than an employer, "must be held to intend the very consequences which foreseeably and inescapably flow from his actions . . ." *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 228 (1983).

⁸ Although it must be obvious from my disposition of Coble's credibility, it bears stating specifically that I do not credit Coble's testimony that Williams had told her that, "Everybody on the executive board uses the term nigger. . . . Dennis Stidham says nigger." Other than Coble's testimony concerning Williams' purported remark to this effect, there is not a scintilla of evidence in this record that Stidham, Williams, or any other member of the Respondent's executive board had used either that term or the term "dykes."

⁹ The executive board had authorized Stidham to rescind even the 1-day portion of her suspension. However, there is no evidence that Coble had been aware of that fact prior to her meeting with him on the morning of May 13, after she had spoken to Tim Stidham and to Purvey.

Before departing from this subject, certain other points must be considered. First, based on Stidham's own above-quoted testimony concerning his remarks to Coble and Round on May 13, counsel for the General Counsel argues that, whatever the nature of Coble's conduct, Stidham's true concern had been exclusively with the fact that she had contacted the Respondent's members and not with what she had said to them. Yet, pressed for a more detailed description of what Stidham had said during that meeting, Round, a witness sympathetic to Coble's position, described Stidham as having complained specifically that day about "lies" and "untruths" being "told."¹⁰ Considering the tenor and substance of the calls received earlier that day by Stidham, from his son and from Farmer, it is not surprising that Stidham would not have spoken or recalled the words that he had spoken with the precision and detachment of an objective and uninvolved person. But the description furnished by Round leaves unmistakable that Stidham had complained about the substance of what was being reported to him. Moreover, it is a somewhat artificial distinction to separate Stidham's reference to the fact of the calls from the reality of what had been said during his conversations with his son and Farmer.¹¹ In any event, Stidham's remark on May 13 has not been alleged as a violation of the Act and, notwithstanding whatever he may have said that day, the record is clear that the termination decision had been made by the executive board and had been made on the basis of reports to them concerning what Coble had said to the Respondent's members.

Second, at the hearing and in its brief, the Respondent's counsel has argued that Coble's conduct had constituted a violation of article IV, section 5 of the Respondent's collective-bargaining agreement with the Union. While it appears accurate that by the time of this hearing, the Respondent's position had coalesced and had become that Coble's actions had constituted conduct in violation of that contractual provision, it is not so clear that that contractual provision, itself, had been considered in connection with the executive board's decision to fire Coble. Neither Stidham during direct examination nor Long when he testified raised that provision as having been a consideration. During cross-examination,

¹⁰ In light of what happened during this portion of Round's testimony, I place no weight on his similar testimony that in the course of terminating Cole, Stidham had said only that he was doing so because "more phone calls from the plant" had been received, without having gone on to complain specifically about what had been said during those calls. As Round's testimony concerning Stidham's remarks on April 16 tends to show, he equated the fact of the calls and the message being related during them in a manner that reference to the former embraced the latter. As discussed *infra*, the fact of the calls and the substance of what had been said during them appear to have been inextricably linked together by Round, as well as by Stidham, when they testified.

¹¹ It is clear that Stidham was upset that Coble had been calling the Respondent's members and he so testified. Yet, in so testifying, he also made clear that he had been displeased about what Coble had been telling the Respondent's members. In short, in his mind, the two concepts—the calls and what Coble had said during them—were inextricably bound together. In these circumstances, it would be sheer conjecture to attempt to speculate what would have happened had Coble confined her calls to appeals for support by the Respondent's members with regard to her grievance and had she not also seen fit to vilify the members of the Respondent's executive board during the course of them.

Stidham did mention the effects of Coble's statements on executive board members. However, examination of his testimony, quoted above, discloses only that the concern had been with their ability to be elected to the convention in light of "the lies concerning the racial slurs and the reference to gays as 'dykes'" rather than with the propriety of Coble's remarks assessed in light of article IV, section 5. Consequently, while the Respondent's counsel has now chosen to assert a defense based upon that provision, that does not mean that that defense can be raised to the status of having been an actual reason for Coble's termination. Just as administrative law judges are not permitted to construct defenses for the Respondent, *Timken Co.*, 236 NLRB 757, 759-760 (1978), neither may attorneys, through the excesses of argument, even though well intentioned, do so. Here, so far as the record discloses, article IV, section 5 had not been specifically relied on when the executive board had made its decision to fire Coble. Therefore consideration of her conduct in light of its requirement is not warranted.

Third, to the extent that Coble's criminal complaint against Toft might be, as is argued by the General Counsel, activity protected by Section 7 of the Act and to the degree that it had been a factor influencing the executive board's decision to terminate Coble, Coble's activity in this regard can be assessed no differently than her remarks to members about the executive board. That is, in contrast to Coble, Toft appeared to be a candid witness and I credit his description of the events that had occurred on May 14. That is, I find that he neither verbally abused nor threatened Coble that day, at least not with personal action against her. Accordingly, her complaint against him had no basis in fact and, as is true of her unfounded recitations of purported remarks by executive board members, was not protected by the Act, but instead had been a spiteful reaction in retaliation for being admonished by Toft for having baselessly created turmoil among the Respondent's members.

Finally, it is accurate that in arriving at its decision to terminate Coble, the Respondent's executive board had reviewed her employment history. However, there is no evidence that, in having done so, the executive board had considered her complaint about Geraghty, nor is there evidence that it had viewed that complaint as a factor adverse to retaining her as a clerk/typist. To the contrary, a preponderance of the evidence in this matter supports the conclusion that but for her own inaccurate remarks to the Respondent's members about the words and conduct of executive board members, she would not have been terminated.

C. *The Refusal to Accept Coble's Grievance*

1. Facts

As set forth above, the Respondent's executive board made the decision to terminate Coble at a meeting on May 17. During that meeting, the decision also was made to rescind her April suspension, to pay her for the 1-day of work that she lost due to it, and to discharge her under article XI, section 1 of the then existing collective-bargaining agreement. That subsection provides:

"Prior to any termination of employment by the Employer except for just cause, the employee to be terminated shall be given a two (2) week notice or two (2) weeks pay in lieu thereof." Stidham and the executive board felt that it had "just cause" for terminating Coble. But, this provision of the collective-bargaining agreement was invoked to fire her because in 1972 the Respondent had invoked a similarly worded provision when discharging an employee, and the Union had agreed with the Respondent's position, arrived at on the basis of advice of counsel, that terminations pursuant to it were not encompassed by the grievance and arbitration provisions of the then existing collective-bargaining agreement. In subsequently negotiated agreements, that provision had remained in identical form. It was relied on in terminating Coble because, as Stidham explained, "It's the responsibility of the Executive Board of the Union to properly administer the funds that we operate under, the dues money."

Thereafter, the Respondent resisted the Union's efforts to grieve the subject of Coble's discharge. In a letter to the Union's counsel dated June 29, the Respondent's counsel explained fully the basis for its position:

As I informed you on the telephone, it is our position that the termination of Pat Coble is not a matter to be grieved or arbitrated. Article XI is the only article of the contract dealing with termination and provides that prior to termination except for just cause, the employee shall receive two weeks notice or two weeks pay in lieu thereof. Local 6360 paid Ms. Coble two weeks pay and thus complied with all of the terms of said contract. Article XII dealing with grievance and arbitration procedures provides for the grievance and arbitration of any dispute as to the interpretation or application of any provision of the agreement. By our agreeing to pay Ms. Coble the two weeks pay, there can be no dispute as to the interpretation or application of the contract. For this reason we are refusing to grieve her termination.

I will point out that in 1972 another clerical employee was terminated by Local 6360 and your client at that time agreed that if the two weeks were paid, the termination *could not* be grieved. When Ms. Coble was terminated, Mr. Round told Mr. Stidham that he had hoped that he was not aware of this provision in the contract.

2. Analysis

The arguments advanced in support of the allegation that the Respondent violated Section 8(a)(5) and (1) of the Act, by having refused to accept and to process the grievance regarding Coble's termination to arbitration, are straightforward ones. The General Counsel argues that "Respondent's position that it can avoid the contractual grievance procedure if it deems the grievance without merit constitutes a material, substantial, and significant breach of its bargaining obligation to the [Union]." The Union's argument is that having taken the position that Coble had been fired for misconduct, the Respondent acts inconsistently and in bad faith by arguing now

that it can avoid the contractual disputes resolution procedure by effecting her discharge under a provision pertaining to terminations where "just cause" is not involved. Rather, concludes the Union's argument, the contractual provision invoked by the Respondent "was designed to take care of the situation where if a plant was being shut down on a permanent basis, which would not fall under the 'lay-off' provisions of Article XI, Section 3, since there would be no anticipated recall at a later date to provide for, in effect two (2) weeks severance pay." However, in the circumstances of the Respondent's position in this case, these arguments miss the mark.

As a general proposition, it is no doubt a violation of the Act for a party to a collective-bargaining agreement to refuse flatly to honor and to abide by the provisions of its disputes resolution procedures. See, e.g., *Chicago Magnesium Castings Co. v. NLRB*, 612 F.2d 1028, 1034 (7th Cir. 1980); *Independent Slave Co.*, 248 NLRB 219, 227-228 (1980). But, the Respondent did not totally repudiate the grievance and arbitration provisions of its then existing agreement with the Union. Rather, it took the position that specific terminations effected under a particular provision of that agreement were not subject to its grievance and arbitration procedure. That is, that under the terms of its agreement, it was not obliged to arbitrate, and thus not to grieve, terminations effected under that provision. It is well settled that "refusal to arbitrate is not, in itself, a refusal to bargain in violation of the Act." (Citations omitted.) *Whiting Roll Up Door Mfg. Corp.*, 257 NLRB 734 fn. 2 (1981). Moreover, the Board long has held that it does not effectuate the purposes of the Act "for the Board to assume the role of policing collective contracts between employers and labor organizations by attempting to decide whether disputes as to the meaning and administration of such contracts constitute unfair labor practices under the Act." *Consolidated Aircraft Corp.*, 47 NLRB 694, 706 (1943). It is in this area that the issue posed by this aspect of the instant case is rooted.

Contrary to the General Counsel's argument, the Respondent is not simply taking the position that it would not proceed through the grievance procedure to arbitration over Coble's discharge solely because it felt that there was no merit to a grievance concerning that subject, although no doubt it does not feel that such a grievance is meritorious. Instead, its position is that the then existing collective-bargaining agreement had accorded it an option: discharge without regard to the presence or absence of "just cause," even though it existed, and payment of an additional 2 weeks' pay to the terminated employee, or discharge for "just cause" without making any payment to the terminated employee beyond what already was owing for the period worked. There appears to be no dispute that a termination under the latter option would have been subject to the disputes resolution procedure of the then existing agreement, nor that one effected pursuant to the former procedure would not have been subject to it. Rather, the entire dispute in this area is over the Respondent's ability to elect the category under which particular terminations could have been

made. Consequently, the General Counsel's argument is not pertinent to the issue posed here, for the Respondent did not refuse to grieve and to arbitrate the dispute simply because of its belief that it lacked substantive merit, but instead because it had elected to exercise a contractual option which it believed that it had a contractual right to do.

It is the election, itself, that the Union attacks, arguing that the Respondent's construction of the then existing agreement is not correct and so distorts the meaning of the agreement "as to give [the Respondent] a totally free hand to do as it pleases with respect to its employees." In this regard, the Union's argument does not appear to be a totally baseless one. Yet, as noted above, it is undisputed that the Respondent had exercised the identical option in 1972, invoking at the time an identically worded clause to support the termination that it had effected, and that the Union had acquiesced in the Respondent's position that the merits of the termination need not be grieved or arbitrated. While that single incident may *not* be one that can be elevated to the stature of a waiver of the Union's basic contractual right to grieve disputes concerning discharges, the fact that the Union did agree with the Respondent's position at that time does serve to undermine any contention that the Respondent had acted without basis or in bad faith in adopting the position that it did at the time that it discharged Coble. That is, the events of 1972 show that there was some basis for Respondent's position that it was entitled to attempt to avoid the costs of arbitration by electing to terminate Coble under a contractual provision that was beyond the scope of the contractual disputes resolution procedure.

With respect to the issue of the Respondent's good or bad faith in having adopted the position that it did to avoid the disputes resolution procedure, by electing to effect Coble's termination under article XI, section 1, it is worth noting that there did come a point in time, according to the Union's counsel, when the Respondent did agree to bifurcate the dispute and to arbitrate solely the issue of arbitrability of the dispute, though not the merits of Coble's termination. But, the Union rejected this offer, feeling that if it prevailed on this point, it would then have to incur the cost of a separate arbitration concerning whether or not there had been "just cause" for discharging Coble. It would be ironic to conclude that the Respondent had demonstrated bad faith by having chosen to terminate Coble under a contractual provision not subject to the disputes resolution procedure in order to avoid the cost of arbitration in a situation where the Union's approach to arbitration had been influenced by that very same consideration.

In the final analysis, this dispute is one involving no more than a difference of opinion over whether a certain course of action was permitted by a collective-bargaining agreement. The Respondent did not repudiate either the agreement in its entirety nor did it repudiate altogether the disputes resolution provisions of that agreement in particular. There is no evidence that the Respondent, a labor organization, is hostile to the concept of collective bargaining in general, nor to the Union, in particular, acting as the representative of the Respondent's clerical employees. There was a precedent, based on the Union's acquiescence in the Respondent's position on a prior occasion, for the choice of action that the Respondent decided to pursue at the time that the decision was made to fire Coble. It cannot be said that cost-saving is a consideration that is irrelevant to the collective-bargaining process in general, nor to the particular course of action chosen by the Respondent in the circumstances presented here. Therefore, I conclude that a preponderance of the evidence fails to support the allegation that the Respondent had violated Section 8(a)(5) and (1) of the Act by taking the position that it could elect to terminate Cole under article XI, section 1, and that, accordingly, it did not have to grieve and arbitrate concerning that termination. *National Dairy Products*, 126 NLRB 434, 435 (1960); cf. *Airport Limousine Service*, 231 NLRB 932, 934-935 (1977).

CONCLUSIONS OF LAW

1. Communications Workers of America, Local 6360, is an employer within the meaning of Section 2(2) of the Act, engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.
2. Office and Professional Employees International Union Local No. 320, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.
3. Communications Workers of America, Local 6360 has not violated the Act in any manner alleged in the consolidated complaint.

Based on the foregoing findings of fact and conclusions of law and on the entire record, I issue the following recommended

ORDER¹²

It is hereby ordered that the consolidated complaint be, and it hereby is, dismissed in its entirety.

¹² If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."