

Wer-Coy Fabrication Company and Local 292, Sheet Metal Workers' International Association, AFL-CIO. Case 7-CA-18588

14 February 1984

DECISION AND ORDER

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

On 17 February 1982 Administrative Law Judge Arline Pacht issued the attached decision. The Respondent filed exceptions and a supporting brief.

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 brief and has decided to affirm the judge's rulings, findings,¹ and recommendations² and to adopt the recommended Order as modified.

The judge found that Supervisor Colling's discharge was "an essential part of Respondent's unlawful pattern of conduct designed to discourage and prevent any employee from seeking enforcement of his contractual rights or otherwise engaging in concerted activity," and concluded, on the basis of then existing precedent,³ that the Respondent violated Section 8(a)(1) of the Act. In its recent decision in *Parker-Robb Chevrolet*, 262 NLRB 402 (1982), the Board overruled the cited cases and announced that henceforth termination of supervisors for their own union or concerted activity will not be found unlawful whether they have engaged in such activity by themselves or in alliance with rank-and-file employees. Applying *Parker-Robb* to these circumstances, we shall reverse the judge's finding and dismiss the 8(a)(1) violation based on Colling's discharge.

¹ The Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing her findings.

² With respect to the Respondent's contention that a union-sponsored strike on 1 June 1980 was in breach of a no-strike provision in the collective-bargaining agreement and thereby relieved the Respondent from any further obligation to honor it, the judge found that the said strike could not be relied on as grounds for rescission because the Association opted for a judicial resolution of that controversy which precludes the Respondent from claiming a second bite of the apple. In view of the fact that agreement and execution of the successor agreement did not occur until 18 June which reveals the absence of a no-strike provision in effect on 1 June we find it unnecessary to pass on the judge's judicial resolution finding.

³ *Brothers Three Cabinets*, 248 NLRB 828 (1980); *Krebs & King Toyota*, 197 NLRB 462 (1972).

AMENDED CONCLUSIONS OF LAW

Substitute the following for Conclusion of Law 7:

"7. By discharging Anthony Dubich on 5 August 1980 Respondent violated Section 8(a)(3) and (1) of the Act."

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Wer-Coy Fabrication Company, Warren, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.⁴

1. Delete from paragraph 2(d) any reference to Frank Colling.

2. Insert the following as paragraph 2(e) and re-letter the subsequent paragraphs.

"(e) Expunge from its files any reference to the unlawful discharge of Anthony Dubich on 5 August 1980 and notify him in writing that this has been done and that evidence of this unlawful discharge will not be used as a basis for future personnel actions against him."

3. Substitute the attached notice for that of the administrative law judge.

⁴ We shall modify the recommended Order by incorporating a provision requiring the Respondent to expunge from its files any reference to the unlawful discharge of Anthony Dubich, and to notify the said employee in writing that Respondent has taken such action and that evidence of the unlawful discharge will not be used as a basis for future personnel actions against him. See *Sterling Sugars*, 261 NLRB 472 (1982).

APPENDIX

**NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government**

WE WILL NOT refuse to recognize and bargain collectively with Local 292, Sheet Metal Workers' International Association, AFL-CIO, as the exclusive representative of our employees in the following appropriate unit:

All full-time and regular part-time employees employed by the Association engaged in sheet metal work but excluding all office clerical employees, guards and supervisors as defined in the Act.

WE WILL NOT refuse to acknowledge that we are bound by the terms of the collective-bargaining agreement executed by the Union and the Metal Fabricators and Engineers Association effective on

1 June 1980 which agreement expires by its terms on 31 May 1985.

WE WILL NOT discourage membership in or activities on behalf of the Union, or any other labor organization, by terminating employees because they engaged in union or other concerted activity or by discriminating against them in any other manner with respect to their hire, tenure, or any other terms or conditions of employment.

WE WILL NOT in any manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization; to form, join, or assist labor organizations; to bargain collectively through representatives of their own choosing; to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection as guaranteed by Section 7 of the National Labor Relations Act, or to refrain from all such activities.

WE WILL forthwith implement the above-described agreement and give retroactive effect thereto from 1 August 1980.

WE WILL recognize and bargain with the Union as the exclusive bargaining representative of our employees in the above appropriate unit.

WE WILL make whole our employees for any loss of pay or other employment benefits owing which they may have suffered by reason of our refusal to implement the aforesaid agreement from 1 August 1980, with interest.

WE WILL adhere to the collective-bargaining agreement when making job assignments, will allow the Union to conduct an audit of our books and payroll records to determine if any contributions are owing to benefit funds, and will utilize the contractual employment referral procedures.

WE WILL offer reinstatement to employee Anthony Dubich to his former position or, if it no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, dismissing, if necessary, replacement employees hired by us on or after 5 August 1980 and WE WILL make Dubich whole for any loss of earnings he may have suffered by reason of our discrimination against him, with interest.

WE WILL expunge from our files any reference to the unlawful discharge of Anthony Dubich on 5 August 1980 and WE WILL notify him in writing that this has been done and that evidence of the unlawful discharge will not be used as a basis for future personnel actions against him.

WER-COY FABRICATION COMPANY

DECISION

STATEMENT OF THE CASE

ARLINE PACHT, Administrative Law Judge: Upon a charge filed on November 28, 1980, by Local 292, Sheet Metal Workers' International Association, AFL-CIO (hereinafter Local 292 or the Union), a complaint issued on January 15, 1981, and was amended on January 27, charging that Wer-Coy Fabrication Company, the Respondent, had engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1), (3), and (5) of the National Labor Relations Act, herein called the Act. In substance, the complaint alleges that the Respondent repudiated its contractual obligations to the Charging Party and discharged employees Dubich and Colling for engaging in union activity. By timely answer, the Respondent denied any wrongdoing. A hearing at which all parties were represented was held in Detroit, Michigan, on October 29 and 30, 1981.

Upon the entire record, and my observation of the demeanor of the witnesses and consideration of post-hearing briefs, I make the following

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The Respondent, a Michigan corporation with its sole office and place of business at 8646 Nine Mile Road, Warren, Michigan, is engaged in custom metal fabrication. During the year ending December 31, 1980, a representative period, the Respondent in the course and conduct of its business operations purchased and caused to be transported and delivered to its Warren plant various metals and other goods and materials valued in excess of \$100,000 of which goods and materials valued in excess of \$50,000 were transported and delivered to its plant directly from points outside the State of Michigan. Upon the foregoing facts, the General Counsel alleges, the Respondent admits, and I find that the Respondent is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Charging Party, Local 292, is and has been at all times material herein a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Parties' Collective-Bargaining History*

On May 24, 1979, Oscar Werden, the Respondent's president, executed a power of attorney authorizing the Metal Fabricators and Engineers Association (hereinafter the Association) to engage in collective-bargaining negotiations on its behalf with Local 292.¹ A few months later, on August 25, Wer-Coy became a member of the Association and thereby bound itself to the current collective-bargaining agreement effective from June 1, 1978,

¹ The Respondent joined 19 other employer-members of the Association.

to May 31, 1980. In early September, the Respondent's employees joined the Union and were assigned by Werden to one of the three categories covered by the contract; that is, journeymen, apprentice journeymen, and production workers.²

In April or May 1980, shortly before the negotiations were to commence for a new collective-bargaining agreement, Werden confided to employee Anthony Dubich, who then was serving as shop steward, that he wanted to be rid of the Union and return to the policies and procedures the Company had followed before it joined the Association. Notwithstanding this expression of dissatisfaction, Werden did not withdraw from the Association. To the contrary, he participated in a number of bargaining sessions until a somewhat violent incident put an end to his attendance.³

The events which led to Werden's removal from the negotiations stemmed from an unannounced tour of the Respondent's facility by a Federal health and safety inspector who was accompanied by Local 292's president, Willie Shoemaker. The inspector left a three-page letter of alleged violations with the shop foreman, Charlie Hahn, who transmitted it to Werden. Apparently enraged by these intrusions, Werden told Hahn, "[Y]ou tell that son-of-a-bitch Shoemaker if he ever shows his fucking face in here I'm gonna shoot him." With this, Werden drew a handgun from his desk drawer and pointed it out of his office window.

When Shoemaker learned of this threat, he refused to participate in negotiations until Werden was ousted from the Association's bargaining panel. Whether Werden was asked to resign or, as he contended, did so voluntarily because he was "continually upset" with the Union, the upshot was that he ceased attending the bargaining meetings. Thereafter, a new agreement was executed, effective from June 1, 1980, to May 31, 1985.⁴

Werden's dissatisfaction with the Union apparently continued for in July he again expressed his desire to be rid of union interference to his shop foreman, Frank Colling, who also held journeyman status with Local 292. At the same time, he asked Colling whether he would remain in the Respondent's employ if the Union were eliminated. As an inducement, Werden offered Colling a raise from \$32,000 to \$40,000 if he would quit the Union. A week later, Colling declined Werden's offer, indicating that he preferred to stay with the Union. Soon after this conversation, Colling and shop steward Dubich, the only journeymen remaining in the Respondent's work force at that time, were fired.

In mid-August, Werden sought out Donaldson and told him that, since he was a small businessman with few employees engaged in construction work, he wished to be relieved of his obligation under the contract. Donald-

son suggested that Werden contact the Association with respect to his problem. Subsequently, the Association's president called Donaldson and asked if he had agreed to the Respondent's withdrawal as Werden reported to him. Donaldson emphatically denied having given such assent.

Nevertheless, in August, the Respondent ceased submitting reporting forms and payments to various fringe benefit funds as required by the collective-bargaining agreement. Further, although admitting that a number of new employees have been hired since August, the Respondent failed to refer them to the Union or to submit the requisite benefit reports for them. Because of these delinquencies, the Association authorized an audit of the Respondent's payroll records by a certified public accountant. Although the accountant attempted to conduct an audit in 1980 and again in 1981, Werden refused to make the company records available. Consequently, in April 1981, the Respondent was suspended from the Association.

B. *The Alleged Contract Breaches*

The Respondent contends that the Union and its members engaged in strikes and work stoppages in violation of the no-strike provision of the collective-bargaining agreement.⁵ Specifically, the Respondent points to the following five events in support of its contention.

According to Werden, the first incident occurred in mid-November 1979, when the then shop steward protested the assignment of production employees to work on certain equipment—a shear and nibbler—which he believed were reserved for journeymen. As a result of this protest, the production employees were sent home for 1 or 2 days.

The record is vague as to how many employees were involved or how this problem ultimately was resolved. However, at the hearing, Werden asserted that the assignment of the production workers to the machines in question was justified on two grounds. First, he maintained that many, but not all, of the items fabricated in his shop came within the scope of work specifically reserved for production employees under an appendix to the collective-bargaining agreement. Alternatively, Werden claimed that he was permitted to use production employees for journeymen's work under section 1(c) of the labor contract which provides:

All shop fabrication work may be performed by production workers . . . as long as 300 resident journeymen (defined as members of Local 292), are offered jobs of some manner in the industry, i.e., field or shop work.

Donaldson testified that in administering this provision Local 292 maintains a list of all journeymen who currently are employed in the industry whether in field construction or in the shops. An employer wishing to assign a production employee to journeymen's work must con-

² These categories, based on differences in the workers' level of skill and experience, determine the wage scale and benefits which the employees will receive.

³ Adam Donaldson, Local 292's business agent and member of the Union's negotiating committee, recalled that Werden attended two meetings. Werden believed he attended approximately 12 to 15 bargaining meetings.

⁴ A memorandum of understanding was executed between the parties extending the labor contract's termination date from May 31, 1982, to May 31, 1985.

⁵ Art. X of the contract provides for grievance and arbitration machinery and in sec. 3 states: "There shall be no cessation of work by strike or lockout during the pendency of the procedures provided for in this Article."

tact the Association to determine whether the requirement of section 1(c) of the collective-bargaining agreement is fulfilled. If 300 journeymen are not currently employed at that time, the employer then has 30 days to substitute a journeyman for the production employee. Werden conceded that he had not contacted the Association to determine whether or not 300 journeymen were currently employed.

Another incident, similar to the first, occurred a month later on December 21 when the steward again protested the assignment of a production employee to the shear. On this occasion, Donaldson intervened and resolved the matter by entering into an agreement whereby Werden paid that employee a dollar over the contract scale for production workers.

The third incident, occurring on May 23, 1980 while collective-bargaining negotiations were underway, involved a half-day work stoppage by an unspecified number of the Respondent's employees. Werden testified that the steward told him such walkouts were a common tactic designed to bring pressure on members of the bargaining committee.

Shortly thereafter, the Respondent's employees as well as employees of several other Association members took unauthorized vacations of 1 or 2 weeks. The Association promptly brought an action against the Union in Federal District Court. On or about June 8, 1980, an order issued which, *inter alia*, enjoined the Union from encouraging or inducing work stoppages under the guise of vacations.

The fifth and final act which the Respondent alleges constituted both an unlawful strike and cause for discharging two employees will be discussed in greater detail below.⁶

C. The Discharges

Frank Colling began working for the Respondent in 1966 and in the years thereafter held a variety of positions from welder to working foreman.⁷ Although he had no opportunity to lay off or hire employees during the latter months of his employment, there were occasions in the past when he had done so. Colling also was responsible for distributing jobs to the various employees at the start of the shift and assigning any overtime which might become available. He punched a timeclock and took the same lunchbreaks as did the other employees, but as working foreman, he earned 50 cents an hour over the scale for other journeymen and also received a yearly bonus. Both before becoming foreman and while he occupied that position, he also served as a salesman for the Company.

Dubich was employed by the Respondent in November 1979 and was classified as a journeyman. On August 1, 1980, on completion of a construction job in the field, the Respondent laid off a crew of journeymen with the exception of Dubich. However, on the same day,

⁶ These same allegations form the basis for a breach of contract action the Respondent commenced in 1981 against the Union. In that case, which is pending in a Federal District Court, the Respondent seeks compensatory and punitive damages as well as cancellation of the contract.

⁷ From time to time, the Respondent hired other employees who replaced Colling as foreman. However, he had resumed the position of foreman several months prior to his discharge.

Werden warned Dubich that he might have to dismiss him too because he was costing the Company too much money. This forewarning became a reality several days later.

Witnesses for the General Counsel and the Respondent offered widely divergent accounts of the events leading up to the discharge of these two men. Dubich testified that he devoted a portion of the morning to assisting two production employees, Eddie Werden and Simeon Georgievski,⁸ to move steel sheets from the yard to the shop. When a piece of equipment which they were using stalled, Dubich attended to its repair. Then, at Colling's direction, Dubich performed a small task that took another 45 minutes to 1 hour. During the latter part of the morning, Colling received a telephone order for a job to be completed by the end of the day. He began laying out drafting patterns while Dubich gathered together the various metal sheets that would be needed for the operation. Next, the men began lifting 5-by-10 foot sheets weighing approximately 200 pounds onto the shearing table where Dubich cut them to specification. After a lunch break of one-half hour, they resumed this work, cutting in toto some 38 sheets. At approximately 1 p.m., Werden approached them and asked "is that all you've done today?" Dubich attempted to explain what other work he had accomplished, but Werden interjected, "You're on strike." When Dubich protested that he was neither striking nor quitting, Werden told him he was fired. Colling, who took no immediate role in this encounter, corroborated Dubich in all important respects adding only that at some point Werden asked Dubich if he intended to prevent him from using production workers wherever he pleased. Dubich responded to this: "Well, you haven't done anything yet, so there is nothing for me to stop." At Werden's insistence, Dubich left the plant to telephone the Union. While he was gone, Colling indicated to Werden that he did not wish to work without a steward on the job. At this, Werden fired Colling too. Both men then were issued paychecks covering 7 hours of work and received termination slips which offered no reason for the discharges.⁹ Subsequently, at Donaldson's request, identical official separation notices were prepared and signed by Werden which recited as the cause of the discharges: "Fired—was not working. Failed to work to normal capacity—Employer considered worker to be on strike."

According to Werden, on the day preceding the discharges, Dubich cautioned him that since the construction crew had been laid off the previous week no production workers could perform journeyman's work. Werden stated that he tried to arrange a meeting to resolve this problem with Donaldson for the following morning. When Donaldson failed to appear, Werden went on to the floor shop at approximately 11 a.m. and told Dubich that the production workers were going to work.¹⁰

⁸ Ed Werden is Oscar Werden's son. On August 5, three production workers were in the Respondent's employ.

⁹ The August 5 timecards for Dubich and Colling showed that they worked 7 hours and received an additional hour's wages to which they were entitled under the union contract.

¹⁰ Donaldson contended that he had no knowledge of an August 5 meeting with Werden.

Werden further testified that at some point in the morning he instructed his son Edward and Georgievski to begin producing pipe on the rolling machine using the metal sheets which Dubich had cut. On seeing this, Dubich left the shear, approached Werden who was standing near another piece of equipment, a pull-max, and expressed concern for the safety of the production workers who, he contended, were not sufficiently experienced to work on the rolling machine. Werden responded that his son and Georgievski were competent to perform their assigned tasks and ordered Dubich back to work. Werden related that he warned Dubich his conduct was tantamount to a strike and that unless he resumed working Werden would regard him as having quit. When Dubich retorted the only way Werden would get rid of him would be to fire him, Werden fired him on the spot. Werden recalled that during this exchange Colling was 12 feet away.

To the extent that Ed Werden recalls the events of August 5, he corroborates the discharged employees in certain respects and his father in others. Thus, he confirmed that he had worked with Dubich for much of the morning, and agreed that Dubich had cut at least 20 to 24 sheets on the shear. In fact, he indicated that the work which Dubich had produced that morning was sufficient to keep him and his coworker occupied for the balance of the day. However, he supported Oscar Werden's testimony with respect to his and Georgievski's assignment to work on the rolling machine. He further observed a confrontation between his father and Dubich at the pull-max machine which he thought occurred at approximately 11:30 a.m. not 1 p.m. He also had no recollection of Dubich working on the shear immediately prior to the encounter nor could he recall where Colling was during the exchange. Although he was unable to hear what was said, he stated that, after Dubich left the plant, his father said to him, "Oh, another strike" but failed to mention that he had just fired both men or the reason for their discharges. Shortly after this event, Ed Werden testified that he ceased paying his union dues, believing that he should cast his lot with his father.

IV. DISCUSSION

A. *The Respondent Unlawfully Repudiated the Collective-Bargaining Agreement*

As the facts set forth above show, the Respondent was a member of the Association since August 1979 and bound by that organization's current collective-bargaining agreement with Local 292. At no time did the Respondent submit a written notice of withdrawal prior to the commencement of multiemployer negotiations in June 1980. Consequently, absent unusual circumstances which might justify the Respondent's failure to abide by the terms of that agreement, a finding that the Respondent violated Section 8(a)(5) and (1) is warranted. See *Charles D. Bonanno Linen Service v. NLRB*, 454 U.S. 404 (1982); *Retail Associates, Inc.*, 120 NLRB 388 (1958).

Unusual circumstances have been interpreted consistently by the Board and the courts to apply to those situations in which an employer has been faced with dire economic circumstances in which its very existence as a

viable business entity has ceased or is about to cease. See *Charles D. Bonanno Linen Service v. NLRB*, supra; *Custom Sheet Metal Co.*, 243 NLRB 1102, 1110-11 (1979).

During the hearing in this matter, Werden referred vaguely to business losses which he implied were caused by deliberate employee work stoppages or slowdowns. However, the Respondent made no effort to document or substantiate a claim of extreme financial loss which might otherwise justify a failure to comply with its contractual obligations. Instead, the Respondent defended its conduct by arguing that the Union's material breaches of the no-strike provision in the labor contract relieved it from observing the terms of that agreement. In support of this position, the Respondent relies principally on *Marathon Electric Mfg. Co.*, 106 NLRB 1171 (1953), enf. 223 F.2d 338 (D.C. Cir. 1955), cert. denied 350 U.S. 981 (1956). In that case, a union demanded modification of the collective-bargaining agreement without complying with Section 8(d) of the Act and supported its demand by calling a strike of 18 days' duration involving all employees, in violation of a no-strike clause in the contract. Consequently, having no notification of the strike's termination, the employer discharged the striking employees and canceled the contract. The Board held that "In these circumstances, we find Respondent's unilateral cancellation of the contract did not constitute a violation of Section 8(a)(5) and (1)."

Subsequent cases cast some doubt on the continued vitality of the *Marathon* principle and suggest that a union's breach of a no-strike clause is not automatically sufficient to nullify the entire contract. See, e.g., *State Electric Service*, 198 NLRB 595 (1972), enf. 477 F.2d 749 (5th Cir. 1973); *Williams Enterprises*, 212 NLRB 880, 886-887 (1974). However, it is unnecessary to determine whether the *Marathon* doctrine is applicable to the facts of the instant case, for here, there are other reasons why the employer's argument cannot prevail. Even assuming that work stoppages occurred on November 13 and 14, December 21, May 23, and June 1, 1980, in violation of the no-strike provision of the collective-bargaining agreement, these episodes happened during the term of the Association's former contract with Local 292.¹¹ When that contract expired, the Respondent continued its membership in the Association after it executed a new agreement. Accordingly, the Respondent waived any claim of previous breaches and may not resurrect them now as breaches of the superseding contract for purposes of rescission. Of course, the Respondent could seek other remedies such as damages if proof is available. But it may not be discharged of its obligations under the present contract for alleged breaches of a contract which has ceased to exist.

There is an additional reason why the Respondent may not rely on the strike which commenced June 1, 1980, as

¹¹ With the exception of the June 1 strike, there is no evidence that these incidents were prompted or endorsed by the Union. Rather, they appear to have been spontaneous acts of a small number of employees. Thus, the Respondent might have sought timely, appropriate relief against the participants, but could not hold the Union liable for the independent acts of some of its members.

grounds for rescission. That was the only episode cited by the Respondent which clearly had union sponsorship. However, the Association promptly elected to obtain a judicial resolution of that controversy. Having obtained the advantages of injunctive relief, the Respondent may not now claim a second bite of the apple.

The only event which the Respondent mentioned as an alleged breach of the current contract is the purported work stoppage on August 5, 1980. As I find below, however, Dubich was simply attempting to correct what he viewed as the Respondent's violation of a term in the collective-bargaining agreement. Therefore he was engaged in protected concerted activity which in no way violated the no-strike provision of the contract. Even if I were to find that the employees were involved in an illegal work stoppage, as the Respondent contended, such conduct by only two employees which was of such short duration would fall far short of the magnitude required to effect a suspension of the Respondent's duty to fulfill its contractual undertaking. See *Sheet Metal Workers Local 418*, 227 NLRB 300, 302 (1976). If the Respondent believed that its employees were engaged in an illegal work stoppage, then its proper course of action was to invoke the grievance machinery to seek a final and binding construction of the contract. See *Williams Enterprises, Inc.*, supra at 886-887; *NLRB v. State Electric Service*, 477 F.2d 749, 752 (1973). By failing to seek a peaceful resolution, the Respondent revealed that it had decided to seize this opportunity to rid itself of the Union.

In view of the foregoing considerations, I conclude that the Respondent unlawfully repudiated its collective-bargaining agreement with the Union and unilaterally altered the terms and conditions of employment of unit members in violation of Section 8(a)(5) and (1) of the Act.

B. The Discharges Were Unlawful

The General Counsel contends that the discharges of Colling and Dubich must be viewed as an integral part of the Respondent's stratagem to evade the responsibilities imposed by the collective-bargaining agreement. The Respondent counters that the employees brought the dismissals on themselves by refusing to work and engaging in an unlawful strike. In addition, the Respondent contends that Colling was a supervisor and therefore was unprotected by the Act. The General Counsel denies Colling's supervisory status, but submits alternatively that even if he were a supervisor his termination violated Section 8(a)(1) of the Act. I find merit in the General Counsel's contentions.

The discharges of Dubich and Colling must be set in the context of the Respondent's increasing antipathy toward the Union. Thus, on several occasions he expressed his displeasure with the economic consequences imposed by his membership in the Association and also made plain his desire to be rid of his contractual obligations. No more vivid demonstration of his hostility toward the Union can be found than in the gun-slinging episode which occurred during contract negotiations in 1980. Several weeks before the discharge, he tried to undermine Colling's loyalty to the Union with an \$8,000 raise. Within days of the dismissal, he threatened Dubich

with termination because of the costs involved with his wage level.

On August 1, the Respondent was in a position to lay off all but two of the journeymen in his shop for legitimate business reasons. Then, on August 5, Werden seized on a relatively minor event as a ruse to remove from the plant the last two journeymen in the shop and the only persons who might hold him to account for flouting the terms of the collective-bargaining agreement.

An examination of the shifting reasons offered for these terminations exposes the pretextual nature of the Respondent's asserted defense. Thus, initially, the termination notices implied that Dubich and Colling were terminated for being nonproductive over the course of the morning. However, at the hearing, Werden offered different provocations as grounds for the discharges. There, he testified that when Dubich objected to production employees performing journeymen's work and Colling refused to work without a shop steward, both men were engaged in an unlawful strike. Where an employer vacillates in offering a rational and consistent account of its actions, an inference may be drawn that the real reason for its conduct is not among those advanced. See *Electro-Plating Specialties*, 236 NLRB 534 (1978); *Steve Alois Ford*, 179 NLRB 229 (1964). Such an inference is warranted here.

Moreover, neither of the excuses the Respondent tendered as grounds for the terminations has any validity. Werden's first assertion that the men did not work to capacity on the morning of the discharge is flatly contradicted by the record. Timecards introduced into evidence establish that the confrontation between Dubich and Werden did not occur until approximately 1 p.m. Prior to that time, both Dubich and Colling were completely attentive to their tasks. The record also shows, contrary to the Respondent's contention, that Dubich's activity on the date of his discharge was too brief in duration to rise to the level of a strike or work stoppage. See *Anheuser-Busch, Inc.*, 239 NLRB 207 (1978). By Werden's own account, Dubich was fired within minutes of the time he left his work station and approached him at the pull-max machine. Werden never testified that Dubich refused to return to work. The most that can be said, even accepting Werden's version of the encounter, is that Dubich put a temporary halt to his work in an effort to enforce the labor contract.¹² By seeking to obtain compliance with the collective-bargaining agreement, Dubich was serving a concerted purpose in the interest of all employees, and by so doing is guaranteed the protections of the Act. *Key City Mechanical Contractors*, 227 NLRB 1884, 1857 (1957); *Interboro Contractors*, 157 NLRB 1295 (1966), enfd. 388 F.2d 495 (2d Cir. 1967). Whether or not Dubich correctly construed the 300 journeyman rule is immaterial "for even when an employee's construction of a contract is wrong, his efforts in enforce-

¹² Although Dubich did not remember having challenged the performance of journeymen's work by production employees on the date in question, Colling did recall some discussion of that issue. He did not, however, hear any exchange having to do with safety. Colling impressed me as a trustworthy witness. Therefore, based on his testimony, I find that Dubich did not object to the production employees' inexperience in operating the equipment.

ing the agreement are nonetheless protected." *Maryland Shipbuilding & Dry Dock Co.*, 256 NLRB 410 (1981).

The varying reasons offered by the Respondent for Colling's discharge are as spurious as those it gave for Dubich's termination. I am convinced that Colling was dismissed because he, too, posed a threat to Werden's repudiation of the labor contract. Notwithstanding this conclusion, separate questions arise as to whether Colling was a supervisor and, if so, whether he is thereby denied the benefits of the Act.

A fine line often must be drawn in determining whether a senior employee such as Colling is merely implementing decisions of a routine nature or genuinely exercising authority calling for independent judgment. While it is a close question, the evidence leads to the conclusion that Colling was a supervisor within the meaning of Section 2(11) of the Act. It is true that Colling shared some of the same terms and conditions of employment applicable to the rank-and-file employees: he punched a timeclock, was hourly paid, took the same lunch hour, and spent most of his time on the shop floor as a working foreman. Moreover, he clearly did not view himself as arm of management when he allied himself with the Union's cause on August 5. On the other hand, it is equally true that he had the authority to hire and fire even if that authority was not recently exercised. Further, he earned more than the other employees and even received a bonus on at least one occasion. Significantly, he was responsible for assigning tasks to the other employees, for setting up the fabricating jobs on the machines and for insuring that specifications were met. Indeed, on the day of his discharge, with Werden absent for most of the morning, Colling alone was responsible for assuring that a job was completed by the end of the day. In sum, his duties called for the exercise of independent judgment, a hall mark of supervisory status. See *Johnson Bronze Co.*, 232 NLRB 845 (1977).

Although I conclude that Colling was a supervisor, it does not follow that he is altogether deprived of relief under the Act. The general rule is, of course, that supervisors are not per se protected from discharge or other discipline for engaging in union or concerted activity. The Board has carved out certain exceptions to the rule, however, where the discipline imposed on a supervisor infringes on the employees' Section 7 rights. The rationale underlying one such exception is well stated in *Brothers Three Cabinets*, 248 NLRB 828, 828-829 (1980), where the Board observed that:

[T]he evidence may be sufficient to warrant a finding that the employer's conduct, as a whole, including the action taken against its supervisors, was motivated by a desire to discourage union activities among its employees in general and thus constitutes what the Board has characterized as a pattern of conduct aimed at coercing employees in the exercise of their Section 7 rights. By such acts the employer has exceeded the bounds of legitimate conduct intended to discourage union activity among its supervisors. And, more importantly, it has intentionally created an atmosphere of coercion in which employees cannot be expected to perceive the dis-

tinguishment between the employer's right to prohibit union activity among supervisors and their right to engage freely in such activity themselves.

In the present case, the evidence fully supports the General Counsel's contention that Werden viewed the discharges of both Colling and Dubich as necessary to his scheme to extricate himself from the economic consequences of unionization. It may well be that the Respondent was incensed that Colling, an employee of more than 15 years' standing, would align his interests with those of the Union by refusing to work without a shop steward. But the summary dismissal of a long-term and evidently trusted employee because he momentarily resists his employer's command is not an act borne out of "a legitimate desire to assure the loyalty of its management personnel" nor is it "reasonably adapted" to that legitimate end. *Id.* at 828. Rather, Colling fell victim to Werden's antipathy to the Union and his desire to remove any person who might oppose his antiunion maneuvers. The Respondent was not simply ridding itself of another union adherent. Rather, Colling's discharge was an essential part of the Respondent's unlawful pattern of conduct designed to discourage and prevent any employee from seeking enforcement of his contractual rights or otherwise engaging in concerted activity. See *Brothers Three Cabinets*, supra; *Krebs & King Toyota*, 197 NLRB 462 (1972); *Pioneer Drilling Co.*, 162 NLRB 918 (1967), *enfd.* in material part 391 F.2d 961-963 (10th Cir. 1968). Indeed, the Respondent's scheme had its intended effect, for after the discharge, at least two employees ceased paying union dues and no new employee contacted Local 292 thereafter.

Based on all of the above, it is clear that Colling's dismissal violated Section 8(a)(1) and Dubich's termination Section 8(a)(3) and (1) of the Act.

CONCLUSIONS OF LAW

1. Wer-Coy Fabrication Company is an employer within the meaning of Section 2(2) of the Act, engaged in operations affecting commerce within the meaning of Section 2(6) and (7) of the Act.
2. Local 292, Sheet Metal Workers' International Association, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.
3. At all times material herein the Associated Metal Fabricators and Engineers has been an organization composed of employers in the construction industry which exists for the purpose, inter alia, of representing its members in negotiating and administering collective-bargaining agreements with Local 292.
4. All full-time and regular part-time employees employed by the members of the Association who are engaged in sheet metal work, but excluding all office clerical employees, guards and supervisors as defined in the Act constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.
5. At all times material herein, the Association has been authorized by the Respondent to bargain collectively on its behalf with the Union concerning wages, hours,

and other terms and conditions of employment of the Respondent's employees in the above-described unit.

6. At all times material herein, the Respondent has been and is now an employer-member of the Association described above in paragraph 3. Since on or about August 5, 1980, the Respondent by its agent, Oscar Werden, has refused to abide by and has repudiated its obligations under the collective-bargaining agreement between the Association and Local 292 in violation of Section 8(a)(5) and (1) of the Act by (a) not adhering to the terms of the contract when making job assignments; (b) failing to contribute to the benefit funds established by the collective-bargaining agreement; (c) not permitting the Charging Party to audit its books to determine the contributions owing, if any, to the contractual benefit funds; and (d) failing to utilize the contractual employment referral procedures.

7. By discharging Anthony Dubich on August 5, 1980, the Respondent violated Section 8(a)(3) and (1) of the Act and, by discharging Frank Colling on the same date, the Respondent violated Section 8(a)(1) of the Act.

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

THE REMEDY

Having found that the Respondent engaged in unfair labor practices proscribed in Section 8(a)(5), (3), and (1) of the Act, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act, including recognizing the Union as the exclusive collective-bargaining representative of its employees in the appropriate unit described above and complying with the terms and provisions of the collective-bargaining agreement effective June 1, 1980, to May 31, 1985, between the Association and Local 292. Further, having found that the Respondent has unlawfully failed and refused to comply with the terms and provisions of the collective-bargaining agreement negotiated by its duly designated multiemployer bargaining representative, I shall recommend that the Respondent comply therewith retroactive to August 1, 1980, and continuing from that date. Interest shall be paid on any wages or fringe benefit contributions¹³ which may be owed to employees hired since August 5, 1980, in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).¹⁴

In addition, having found that the Respondent unlawfully terminated employees Colling and Dubich, it will be required to offer them immediate reinstatement to their former positions of employment or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, dismissing if necessary anyone who may have been assigned or hired to perform the work that either Dubich or Colling performed prior to their terminations on August 5, 1980. Further the Respondent will be re-

¹³ Because the provisions of employee benefit fund agreements are variable and complex, such matters shall be resolved at the compliance rather than the adjudicatory stage for the imposition of interest at a fixed rate on unlawful withheld fund payments. See *Hayden Electric, Inc.*, 256 NLRB 601 (1981).

¹⁴ See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

quired to make Dubich and Colling whole for any loss of earning they may have suffered by reason of their unlawful terminations on August 5, 1980, with backpay to be computed on a quarterly basis, making deductions for interim earnings, and with interest to be paid on the amounts only and to be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corp.*, 231 NLRB 651 (1977).

Finally because of the egregious nature of the violations found herein; that is, the Respondent's wholesale repudiation of its collective-bargaining obligations, and discharge of the shop steward and foreman, I shall recommend a broad cease-and-desist order. *Hickmott Foods*, 242 NLRB 1357 (1979).

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

ORDER¹⁵

The Respondent, Wer-Coy Fabrication Company, Warren, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to acknowledge that it is bound by the terms of the collective-bargaining agreement executed by Local 292 and the Metal Fabricators and Engineers Association effective on June 1, 1980, which agreement expires by its terms on May 31, 1985.

(b) Refusing to recognize or bargain collectively with Local 292, Sheet Metal Workers' International Association, AFL-CIO, as the exclusive representative of its employees in the following appropriate unit:

All full-time and regular part-time employees employed by the Respondent engaged in sheet metal work but excluding all office clerical employees, guards and supervisors as defined in the Act.

(c) Discouraging membership in or activities on behalf of the Union or any other labor organization, by discharging employees and refusing to reinstate them or by discriminating against them in any other manner with respect to their hire, tenure, or any terms or conditions of employment because they have engaged in union or concerted activities.

(d) Unilaterally changing any of the terms and conditions of employment of the employees in the unit herein found appropriate, without bargaining with the Union.

(e) In any other manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Section 7 of the Act.

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

(a) Recognize and bargain with the Union as the exclusive bargaining representative of its employees in the above appropriate unit.

¹⁵ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Forthwith implement the above-described agreement and give retroactive effect thereto from August 1, 1980, including adhering to the contractual job assignment and employment referral procedures.

(c) Make whole its employees for any loss or disparity of pay or loss of other employment fringe benefits which they may have suffered by reason of the Respondent's refusal to implement the aforesaid agreement since August 5, 1980, with interest in the manner set forth in the section of this Decision entitled "The Remedy."

(d) Offer to Frank Colling and Anthony Dubich immediate and full reinstatement to their former position or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges, dismissing, if necessary, any replacement employees hired on or after August 5, 1980, and make Dubich and Colling whole for any loss of earnings they may have suffered by reason of the discrimination against them, in the manner described in the section of this Decision entitled "The Remedy."

(e) Preserve and, on request, make available to the Board or its agents and to the Charging Party for examination and copying, all payroll records, social security payment records, timecards personnel records and re-

ports and all other records necessary or useful in analyzing the amount of backpay and other contributions which may be owing to benefit funds due under the terms of this Order.

(f) Post at its Warren, Michigan plant copies of the attached notice titled "Appendix."¹⁶ Copies of said notice on forms provided by the Regional Director for Region 7, after being duly signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director within 20 days from the date of this Order what steps the Respondent has taken to comply.

¹⁶ 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."