

**United States Postal Service and New Haven Connecticut Area Local, American Postal Workers Union, AFL-CIO. Cases 39-CA-809(P) and 39-CA-1045(P)**

22 November 1983

**DECISION AND ORDER**

BY CHAIRMAN DOTSON AND MEMBERS  
ZIMMERMAN AND HUNTER

On 19 November 1982 Administrative Law Judge Raymond P. Green issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering briefs.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the rulings, findings,<sup>1</sup> and conclusions of the judge only to the extent consistent with this Decision and Order.

The judge found that the Respondent issued a letter of warning to William Winn because of his protected activities, thereby violating Section 8(a)(3) and (1) of the Act. The Respondent has excepted to that finding, arguing that Winn was disciplined for cause and not because of his protected activities. We find merit in the Respondent's exceptions.

As more fully set forth in the judge's decision, Winn served as the Union's chief steward from 1976 to May 1981 and as an alternate steward from May 1981 to February 1982.<sup>2</sup> On 10 February Winn was reappointed chief steward. Although Winn was an aggressive steward<sup>3</sup> who enjoyed the loyalty of his coworkers, he was not a model employee. Winn had been given letters of warning in December 1980 and April 1981. He also was counseled orally on at least two occasions in 1980 and one in 1981.<sup>4</sup>

The incident which led to the issuance of the 11 February warning letter in issue related to a newly implemented policy about timeclock procedures

and overtime. Under that policy employees were required to punch out for lunch at the exact minute their break was scheduled to start. Similarly, employees were required to punch back in at the exact minute their break ended. Employees who failed to punch their timecards precisely when due to resume work were docked overtime pay. When employees argued that precise clocking would be difficult on shifts where large numbers of employees had to punch the clock, the Respondent agreed that supervisors would be authorized to adjust the timecards of employees who were unable to comply with the policy due to congestion around the clock.

On 3 February Winn inadvertently punched out for lunch at 9:59, 1 minute early. When the lunch break ended, Winn, who desired to punch the clock at 10:29 in order to show a 30-minute lunch break, was unable to reach the clock because his coworkers were gathered there. Thus, he clocked back in at 10:30 and, as a result, would be docked for 1 minute of overtime. Winn approached Acting Supervisor Harold Feeley to have the card corrected, and Feeley responded that, inasmuch as he was only an acting supervisor, he would have to seek the approval of Mark Sullivan, manager of mail processing. A few minutes later Feeley advised Winn that Sullivan was unwilling to correct the timecard because he had witnessed no congestion near the clock.<sup>5</sup> Shortly thereafter, Sullivan appeared on the work floor and asked Winn what the problem was. Winn explained the situation which had existed. When Sullivan reiterated his refusal to correct the timecard, Winn became loud and argumentative. Sullivan accused Winn of putting on a show for the employees and Winn in turn accused Sullivan of being ignorant and belligerent. During the argument, Sullivan, who did not raise his voice, invited Winn to file a grievance about the timecard. Winn rejoined that he would file a grievance whenever an employee experienced a similar problem. Asked by Sullivan if he was threatening management, Winn responded that it was not a threat, that he intended to grieve all timecard adjustment problems. It is clear that during the confrontation several employees stopped working and looked on. When Sullivan told Winn to return to his work area, the latter did so and operations returned to normal. A short time later, Sullivan took Winn away from the work floor for a discussion of Winn's unruly conduct, and, again, Winn became loud and argumentative.

<sup>1</sup> Respondent 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.

<sup>2</sup> Unless otherwise indicated, all dates hereinafter are in 1982.

<sup>3</sup> In a 3- to 4-month period in 1978 or 1979, Winn filed approximately 14,000 grievances, nearly all of which were later withdrawn by the Union.

<sup>4</sup> The judge admitted evidence concerning these incidents only to prove that disciplinary action was taken and not for purposes of proving the underlying conduct.

<sup>5</sup> The judge found that, in fact, the area near the timeclock was congested.

On 11 February Sullivan issued to Winn the following letter of warning:

On Wednesday, 2-3-82, Supervisor, Walt Daniello, had to instruct you to stop shouting and disrupting operations on the workflow.

After that same day, you became loud and abusive towards me, shouting personal, derogatory remarks and threatening to file multiple grievances in order to harass management. When told to lower your voice, you refused to comply. At that point, I took you off the workflow for a discussion, where you continued the shouting and your belligerent conduct.

After our meeting, you spent over 25 minutes away from your assigned work area, in the mens' lavatory.<sup>6</sup> Just this past December, Supervisor Joe Gambardelia [sic] had to order you out of the lavatory after being absent from the assigned work area for an extensive period of time. I have personally observed you leaving the lavatory with folded newspapers in your back pocket, following long absences from your assigned work area.

Your failure to perform work as assigned, disruptive conduct and lack of cooperation are unacceptable. As you have previously been made aware of your responsibilities and obligations in this area, in the future, these non-productive work habits and boisterous, verbal attacks on supervisors will not be tolerated and will lead to disciplinary action.

The judge found, and we agree, that Sullivan was motivated by two factors in giving the warning. One was Winn's insubordinate conduct on the work floor, specifically, shouting, making personal insults, and causing the cessation of normal operations. The other factor was Winn's threat to file multiple grievances. The judge found that the warning was "motivated in large part" by the latter factor and, therefore, that the disciplinary action taken against Winn was violative of Section 8(a)(3) and (1) of the Act. We disagree.

In *Wright Line*, 251 NLRB 1083 (1980), the Board set forth a test of causation to be applied in cases involving actions based on "dual" motives, one of which is permissible and one of which is unlawful. Under that test, the General Counsel is first required to establish a prima facie case sufficient to support the inference that the protected conduct was a "motivating factor" in the employer's decision. If this is established, the burden then shifts to

<sup>6</sup> The judge did not resolve the credibility conflict concerning the Respondent's allegation that Winn spent 25 minutes in the men's lavatory and Winn's denial of that allegation. In view of the result we reach herein, we find it unnecessary to decide this issue.

the employer to demonstrate that it had a legitimate, permissible reason for its actions such that the disciplinary action would have taken place even in the absence of the protected conduct.

In the instant case, the judge found, and we agree, that the General Counsel established a prima facie case. Thus, the warning letter on its face shows that it was motivated in part by Winn's promise to file grievances on behalf of all other employees whose timecards were not corrected when there was congestion at the timeclock. Clearly, such action would be protected concerted activity.<sup>7</sup> However, we further find that the Respondent has met its requisite burden of proof by demonstrating that it had a legitimate, permissible reason for disciplining Winn and that it would have done so even in the absence of Winn's protected activity.<sup>8</sup>

Winn, the Respondent showed, became excessively loud and insulting while discussing his timecard with Sullivan. When asked to contain himself, he would not. Ultimately, his actions caused fellow employees to stop work, albeit briefly, thus disrupting operations at the facility. The Respondent also showed that, over a 2-year period, Winn had been disciplined at least five times. In *Southwestern Bell Telephone Co.*, 260 NLRB 237 (1982), we stated that in the administration and resolution of grievances under the collective-bargaining agreement, because of the nature of these endeavors, tempers of all parties flare and comments and accusations are made which would not be acceptable on the plant floor.<sup>9</sup> However, here Winn was not engaged in the formal pursuit of a grievance. Rather, Winn reacted with insubordination when his request to have his timecard adjusted was refused. The Board recognizes the right of the employer to maintain order and respect in the conduct of its business.<sup>10</sup> Winn's derogation of a reasonable order to quiet down by continuing to shout on the work floor, hurling personal insults, and disrupting operations constituted unprotected activity and gave the Respondent a legitimate, permissible reason to discipline Winn, and we so find. We further find that the Respondent has met its burden to prove that it would have issued the warning to Winn even in the absence of his protected conduct. The record shows that Winn had been disciplined at least five

<sup>7</sup> See *Firch Baking Co.*, 232 NLRB 772 (1977); and *Leviton Mfg. Co. v. NLRB*, 486 F.2d 686 (1st Cir. 1973).

<sup>8</sup> Member Hunter agrees that the Respondent's conduct in issuing a warning to Winn was motivated by Winn's insubordination, and that the Respondent would have imposed that discipline regardless of any other conduct engaged in by Winn.

<sup>9</sup> See also *Atlantic Steel Co.*, 245 NLRB 814 (1979); and *NLRB v. Illinois Tool Works*, 153 F.2d 811 (7th Cir. 1946).

<sup>10</sup> *Southwestern Bell Telephone Co.*, supra.

times in the 2-year period preceding the warning in issue here, and that those instances of discipline related to conduct akin to that shown in the instant case. The record also shows that, in an effort to placate Winn and end the disruption of the workplace, Sullivan told Winn that he could file a grievance over Sullivan's refusal to change the timecard.

Based on the foregoing, we find, contrary to the judge, that Winn was issued the letter of warning because of his insubordinate conduct and that Respondent would have issued the warning even absent Winn's avowal to file numerous grievances if circumstances warranted it. Accordingly, we shall dismiss the complaint.

### ORDER

The complaint is dismissed.

### DECISION

#### STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge: These consolidated cases were heard by me on July 1 and 2, 1982, in Hartford, Connecticut. The charge in Case 39-CA-809(P) was filed by the New Haven, Connecticut Area Local, American Postal Workers Union, AFL-CIO (the Union), on August 27, 1981, and an amended charge in that case was filed on October 14, 1981. A complaint based on that charge was issued by the Officer-in-Charge of Subregion 39 on October 15, 1981. The charge in Case 39-CA-1045(P) was filed by the Union on March 8, 1982, and a complaint thereon was issued on April 12, 1982. Thereafter, on May 4, 1982, the complaints were consolidated for hearing.

In substance the allegations of the complaints are that William E. Winn was given written warnings on April 7, 1981, and February 11, 1982, because of his activities as a union shop steward and because of his other protected concerted activities.

Based on the entire record herein, including my observation of the demeanor of the witnesses, and after consideration of the briefs filed, I hereby make the following

#### FINDINGS OF FACT

##### I. JURISDICTION

Jurisdiction is asserted by virtue of Section 1209 of the Postal Reorganization Act. The parties also agree that the Union involved is a labor organization within the meaning of Section 2(5) of the Act.

##### II. THE OPERATIVE FACTS

###### A. Background

The Union is the recognized collective-bargaining representative of certain of the Respondent's employees including the distribution clerks at its Milford, Connecticut Post Office. William Winn, a distribution clerk has, at various times served as the Union's chief steward and as an alternative steward. In this respect, he was the

chief steward from about 1976 to May 1981 and an alternate steward from May 1981 to February 1982. During the latter period, another employee, Roderick Kennedy, was the chief steward, but when he resigned the position on February 8, 1982, Winn was redesignated as the chief steward on February 10, 1982.<sup>1</sup>

The distribution clerks, of which there are about 18 to 20, work from 4 a.m. to 12:30 p.m. and they have their lunch break from 10 a.m. to 10:30 a.m. They are responsible for sorting the mail by letter carrier routes and they do so by taking trays of unsorted mail and placing them into cubbyholes in something which is called a distribution case. (Each clerk works at his own case.) As the delivery trucks leave the post office soon after 8 a.m., it is imperative that the mail be sorted by that hour because any mail left over will not be delivered until the following day. When the task of sorting the mail is not accomplished by 8 a.m., it is described as "missing the mail" or alternatively as a "first class failure." The record indicates that during a period prior to 1980 there was a high incidence of first-class failures. However, this problem, according to Winn, had largely abated at the time of the events herein.

The record also establishes that during a period prior to 1981, there was a considerable degree of friction between management and the Union due in part to a clash of personalities between Winn as chief steward and the post office's supervisors. In this respect, John Dirzus, president of the Union, testified that in January or February 1981 he had a conversation with the then Postmaster Gallagher regarding overall labor relations. He states that during this conversation he suggested that one of the problems was that Winn and Kennedy were strong personalities who had control over the work force and that this was resented by Sullivan and the other supervisors. Dirzus also testified that he told Gallagher that he (Dirzus) had heard that supervisors were going around and saying that Sullivan was out to get Winn and that the latter better watch himself. He states that Gallagher responded by saying that he thought this was wrong and that he would deal with it even if he had to discipline the supervisors.

In connection with the general labor relations atmosphere at the post office, it is noted that in 1978 or 1979, Winn, over a 3- or 4-month period, filed approximately 14,000 grievances involving such things as the floors and venetian blinds being dirty. All of those grievances were later withdrawn by the president of the Union. It is also noted that, according to Winn, labor relations calmed down after the leaving of Postmaster Brennen, and it appears that this cooling down occurred after the above-noted grievances were withdrawn.

Mark Sullivan assumed the position of manager of mail processing on November 29, 1981. Thereafter, on December 23, 1980 (prior to the 10(b) statute of limitations period), Winn was issued a written warning by supervisor Gambradella. The warning stated:

<sup>1</sup> Kennedy resigned his position as chief steward because he became eligible for a supervisory position in the post office.

On 12-15-80 at 10:45 a.m. you became loud and abusive towards me when questioned about the nature of your union business.

The U.S.P.S. Standards of Conduct . . . states that "Employees are expected to maintain satisfactory personal habits so as not to be obnoxious or offensive to other persons . . ."

You have been made aware, on many occasions, of your obligations in this regard. This letter of warning will serve as written notice that further behaviour in this manner will result in the administration of progressive discipline.

The Union filed a grievance concerning the above-noted warning and it was settled in March 1981 at the third step of the grievance procedure. This settlement was memorialized in a letter dated April 2, 1981, from District Director Employee and Labor Relations J. A. Sprague, to Robert Caracciolo, a National vice president of the Union. In part, the letter reads:

The grievant denies that he was abusive toward his supervisor. However, it appears that the grievant has been involved in similar situations in the past and that he contributed to the incident that occurred in this case.

In an effort to resolve this matter and afford the grievant the opportunity to improve his conduct, the Letter of Warning will be removed from the grievant's record.

The Union expects Management to conduct themselves in a business like and professional manner. It is also expected that Union officials will conduct themselves in a similar manner.

It is additionally noted that apart from a formal warning there is, pursuant to the collective-bargaining agreement, a lower level of discipline called a "discussion." (See art. 16, sec. 2 of the National Agreement.) A formal discussion is generally conducted in private between the employee and the supervisor involved, and does not result in any record being placed into the employee's official personnel record. However, such discussions are in the nature of warnings (albeit not grievable), and supervisors, as a matter of practice, make a memoranda of such discussions for their own records. In the present case, the Respondent introduced into evidence the memoranda of various "discussions" held with Winn from April 2, 1980, to February 5, 1981. By and large, these discussions involved alleged incidents where Winn left his work area, did less than the normal amount of work, made too much noise, and used loud, boisterous, and on occasion profane language.

#### *B. The Warning of April 7, 1981*

Five days after the previous warning to Winn had been withdrawn, he received another warning from

acting Supervisor Anthony Vano.<sup>2</sup> The warning read as follows:

This letter of warning is being issued to you due to your unsatisfactory work performance in distribution assignments. Deficient areas in your performance include:

- (1) Amount of work.
- (2) Constantly leaving your distribution case, to talk to others.
- (3) Obnoxious and disruptive conduct.
- (4) Lack of cooperativeness.

As you have been made aware of your responsibilities and obligations in this regard prior to this letter, an improvement is anticipated. Failure to do so could result in further disciplinary action. You may appeal this action within 14 days of receipt as specified by Article XV, Section 2 of the National Agreement.

According to the General Counsel's theory, Winn and Kennedy were blamed by Vano for a "first class failure" which, according to Winn, occurred about April 5 or 6. He postulates that since neither Winn nor Kennedy could possibly be blamed for that occurrence, and given other evidence of animus against them, then the reason given for Winn's warning must be pretextual and therefore motivated by discriminatory reasons. The Postal Service takes the position that it did not blame either Winn or Kennedy for the "first class failure," and that the April 7 warning to Winn was not, in any way, related to or caused by that incident. In effect, the Respondent seems to argue that the General Counsel has created a strawman, which when knocked down, is being used to prove the allegation.

There is in fact, no dispute that about the first week of April 1981 the distribution clerks "missed the mail." In connection therewith, both Winn and Kennedy testified that they, and they alone, were blamed for that incident by Acting Supervisor Vano. In this respect, Winn testified that, after he received the warning, he asked Vano about it. He states that Vano said that the warning related to the fact that "we" missed the mail and that he was acting under orders from Sullivan. Similarly, Kennedy testified that, after the first-class failure, he had a formal discussion with Vano who told him that his work performance that morning was not satisfactory and that he (Kennedy) had not processed enough trays of mail. Kennedy asserts that, when he told Vano that he was mistaken and asked why he was being singled out, Vano replied that he was under instructions from Sullivan and that Kennedy was not the only person being disciplined.

Vano testified that, although there was a first-class failure, he did not blame either Winn or Kennedy for its occurrence as neither was at fault. He further testified that neither was disciplined because of that event. In the case of Kennedy, Vano states that he had a formal discussion with him on March 31, 1981 (prior to the first-class fail-

<sup>2</sup> Vano, who normally is a letter carrier, was assigned to be a temporary supervisor in the absence of the regular supervisor, Walter Daniello.

ure), relating to Kennedy's productivity.<sup>3</sup> Vano also states that the warning to Winn was not in any way related to the first-class failure, but rather was related to his observation of Winn's performance and conduct over approximately a 2-week period of time, during which he (Vano) was the acting supervisor. Vano further testified that before issuing the warning, he spoke to Sullivan about Winn's conduct and was told that Winn had had prior "discussions." According to Vano, he decided, with Sullivan's concurrence, that a letter of warning was the appropriate measure to take in Winn's case because of the prior "discussions." In relation to Winn's warning, Vano agrees that it is not unusual for distribution clerks to talk at their cases or to take breaks from time to time. He acknowledges that the nature of their work makes this imperative. He asserts, however, that from his observation, both Winn and Kennedy were excessive in this respect, that they were excessively noisy, and that this affected not only their performance but also the productivity of the other employees.

Following the warning to Winn, a grievance was filed by the Union. It appears from the record that this grievance was discussed at the first, second, and third steps of the contractual grievance procedure. Basically, the Union charged in the grievance that management was harassing Winn on account of his union activities and that the warning was an improper imposition of discipline because Vano had not had a previous "discussion" with Winn. Curiously, although Winn asserts that the reason given by Vano for the warning was Winn's responsibility for the first-class failure, nothing in the grievance memoranda relates to that subject. That is, it appears that neither the Union nor the Company claimed, during the processing of the grievance, that the August 7 warning was in any way related to the first-class failure on April 5. Therefore, to this extent, the documentary evidence tends to support Vano's contention that the warning was not related to the first-class failure.

When the grievance was denied by the Respondent at the third step, the Union did not pursue it to arbitration.

### C. *The Warning of February 11, 1980*

According to Winn, sometime in December 1981, he had a conversation with his supervisor, Joseph Gambardella. He states that Gambardella told him to watch himself and not do anything "off color" because Mark Sullivan was out to get him. Kennedy testified that on one occasion during the winter, when he was talking with Gambardella, he told the latter that he could not believe that Gambardella had told Winn that Sullivan was out to get him. He states that Gambardella responded by saying, "yes it was a fact."

Joseph Gambardella's testimony as to the above was as follows:

Q. At anytime . . . have you advised or told Mr. Winn that Mr. Sullivan was out to get him?

A. Specifically to get him, specifically?

<sup>3</sup> The Respondent introduced into evidence, as R. Exh. 2, a copy of Vano's notes relating to a "discussion" with Kennedy on March 31.

Q. Yes?

A. No.

Q. Did you say anything like that to Mr. Winn?

A. I might have said something like that, that Mr. Sullivan's going to get all the 8 balls, that are not working. I might have said that.

Q. Have you had any conversations with Mr. Sullivan . . . where he said anything regarding getting or taking retaliatory action against Mr. Winn?

A. Not to my knowledge.

Q. Have you had any conversations with him where he criticized Mr. Winn's conduct as a Union steward?

A. He might have when they were discussing grievances at Step 2 or something like that.

Q. Do you remember what he said?

A. Like he was loud and boisterous during the step 2 meeting or whatever, maybe in that context, yes.

Q. Did he ever suggest that maybe we ought to take disciplinary action against Mr. Winn because of his activity as a union steward?

A. No.

In order to understand the events leading up to the February 11 warning, a certain amount of background is necessary. It appears that sometime in January 1982, the Postal Service instituted a timeclock policy to deal with unearned overtime. In essence, the then Officer-in-Charge of the Milford Post Office, Andrew Pace, announced, inter alia, that when employees took their lunch breaks they were required to clock out and back in at the precise times of their break. Thus, for the distribution clerks, since their lunch break was from 10 a.m. to 10:30 a.m., they were required to punch out at precisely 10 and punch back in at precisely 10:30. Employees who made a habit of not following this procedure were subject to formal disciplinary discussions. When employees, at a meeting, suggested that there might be occasions when they could not follow the procedure because of congestion at the timeclock, Pace agreed that, if an employee was unable to punch his card at the precisely correct minute because of congestion, the supervisor would adjust the employee's timecard to show the correct time.

On February 3, 1982 (7 days before Winn resumed the position as chief steward), Winn, through inadvertence, punched out for lunch at 9:59 a.m. Winn testified that he returned from lunch before 10:29 a.m. but because of congestion at the timeclock (due to people and materials near the clock), he could not punch in until 10:30 a.m., 1 minute after his allotted time for lunch. (As a result, he received credit for 59 minutes of overtime that day instead of for 60 minutes.) Winn testified that he then approached Harold Feeley, an acting supervisor, and asked him to change his timecard by 1 minute because he had been held up at the timeclock. Winn states that Feeley said he would have to bring the problem to Sullivan and that when Feeley came back from the office he denied Winn's request. According to Winn, when he asked why, Feeley said that Sullivan said he was late. Winn states that he told Feeley that Pace had agreed that the super-

visors should alter the timecards when there was congestion, whereon Feeley said, "What do you want from me, I'm acting" (i.e., acting supervisor).

According to Winn, shortly after his conversation with Feeley, Sullivan came out and asked him what the problem was. He states that he explained the problem to Sullivan who nevertheless refused to alter his timecard. Winn asserts that he pressed Sullivan about his timecard, whereon Sullivan said that Winn was putting on a show for everybody and that he should "keep it down." Winn states he said that Sullivan was being ignorant, and that Sullivan repeated that he (Winn) was putting on a show, and demonstrating how loud he could yell. According to Winn, he rejoined that Sullivan was being boisterous himself, whereupon Sullivan told him to go back to his seat. According to Winn, he told Sullivan that he too was being belligerent and that he (Winn) was sorry "we had to go back to square one of . . . lousy labor relations." He states that he further told Sullivan that he would file a grievance everytime any of the employees had a similar timeclock problem. According to Winn, Sullivan asked, "are you threatening me," whereon he told Sullivan that he was not threatening, but that when he said he was going to file grievances he meant it. At this point, according to Winn, Sullivan directed him to go back to his seat and he did.

According to Winn, about 3 or 4 minutes later, Sullivan approached him and asked to see him privately. Winn states that Sullivan then counseled him about being loud and boisterous toward him and arguing on the work floor. He states that, during this discussion, he argued back and told Sullivan that if the latter wanted the conversation off the floor he should have indicated that immediately. Winn states that after the counseling he spoke to Kennedy (still the chief steward) and told him about what had happened, after which he made some calls to the Union in New Haven. Winn denies that he called Sullivan an "egotistical bastard," or that he spent 25 minutes in the men's room after his counseling by Sullivan.

With respect to the above, Kennedy testified that Winn could not punch his timecard on time because there was congestion at the timeclock that day. He confirms that Winn asked Feeley to change the timecard and referred Feeley to the prior agreement with Pace. Kennedy states that Feeley went to see Sullivan and that, when Sullivan came out, he told Winn that he would not change his timecard. Although not hearing all the words said, Kennedy testified that Winn started arguing with Sullivan and raised his voice. He also states that Sullivan accused Winn of putting on a show to impress the men and that he further accused Winn of disturbing the workroom floor. According to Kennedy, he heard Winn say that Sullivan was ignorant and belligerent and that he would file a grievance on behalf of anyone whose timecard was not corrected when there was congestion. Kennedy states that at this point, Sullivan asked if Winn was threatening him, to which Winn said that it was not a threat and that he (Winn) had filed a lot of grievances in the past. (Recall the 14,000 grievances previously filed by Winn.) Kennedy asserts that both Sullivan and Winn were yelling at each other although acknowledging that Sullivan's yell is a lot softer than Winn's. He states that

he does not remember anyone swearing during this confrontation, but he does concede that other employees stopped work to see what was going on.

Sullivan testified that on February 3 he was standing out on the work floor with Feeley when the men were clocking in from the lunch break and that he did not observe any congestion. He states that about 10:40 he was on the floor when Winn came over and started shouting about why he would not change Winn's timecard. According to Sullivan, Winn called him an "egotistical bastard" and said that he was ignorant and belligerent. Sullivan states that he told Winn to lower his voice and to knock off the personal insults, but that Winn continued to shout. According to Sullivan, he told Winn that if he wanted to file a grievance he could, whereon Winn said, "If you want grievances, we'll give you grievances; we're the guys who filed 14,000 grievances." He states he asked Winn if he were threatening to harass management, whereon Winn replied that it was not a threat, it was a promise. Sullivan asserts that he asked Winn to go into the swing room to talk privately, but that Winn kept up the shouting and the insults. According to Sullivan, he did not raise his voice to Winn's shouting and he states that, during this incident, the other employees stopped work to look. He states that he then spoke to Winn in the swing room, after which Winn requested time to call Dirzus in New Haven. Sullivan asserts that he was later told by Feeley that the latter had seen Winn go to the bathroom with a newspaper and stay there for 25 minutes.

Feeley was called as a witness by the Respondent. He testified that about 10:30 he was talking with Sullivan<sup>4</sup> when Winn came over about the timeclock problem. Feeley states that when he referred Winn to Sullivan, Winn then approached Sullivan and asked him to change his timecard. He states that Sullivan refused whereon Winn became very loud and Sullivan asked him to lower his voice. According to Feeley, Sullivan asked Winn if he were going to file 14,000 grievances and Winn answered affirmatively. (In this respect, Feeley testified that it was Sullivan and not Winn who first said anything about the 14,000 grievances.) According to Feeley, whereas Sullivan spoke in a normal speaking voice, Winn was talking in a loud voice. Although asserting that he heard the entire conversation between Winn and Sullivan, Feeley did not confirm the latter's assertion that Winn called Sullivan an "egotistical bastard." He also testified that later in the day Sullivan asked him if Winn had gone to the bathroom and at what time. Feeley states that he told Sullivan that Winn had gone at 11:40 a.m. with a newspaper, and had come out at 12:05.

As noted above, Kennedy resigned as chief steward on February 8 and Winn was officially appointed to that position on February 10. According to Kennedy, he told Sullivan on February 8 that Winn would be replacing him as chief steward.

<sup>4</sup> He also says that he did not see any congestion. However he concedes that at 10:30 a.m. he and Sullivan were engaged in conversation and that they were standing about 50 to 100 feet away from the timeclock.

On February 11, 1982, Sullivan issued a written warning to Winn. The warning read as follows:

On Wednesday, 2-3-82, Supervisor, Walt Daniello, had to instruct you to stop shouting and disrupting operations on the workfloor.<sup>5</sup>

After that same day, you became loud and abusive towards me, shouting personal, derogatory remarks and threatening to file multiple grievances in order to harass management. When told to lower your voice, you refused to comply. At that point, I took you off the workfloor for a discussion, where you continued the shouting and your belligerent conduct.

After our meeting, you spent over 25 minutes away from your assigned work area, in the mens' lavatory. Just this past December, Supervisor Joe Gambardelia, had to order you out of the lavatory after being absent from the assigned work area for an extensive period of time. I have personally observed you leaving the lavatory with folded newspapers in your back pocket, following long absences from your assigned work area.

Your failure to perform work as assigned, disruptive conduct and lack of cooperation are unacceptable. As you have previously been made aware of your responsibilities and obligations in this area, in the future, these non-productive work habits and boisterous, verbal attacks on supervisors will not be tolerated and will lead to disciplinary action.

In connection with the warning to Winn, Sullivan testified that he decided to give the warning because he did not think there was any reason for Winn to shout and cause a commotion on the workroom floor. Specifically, he mentioned the personal insults and the effect they had on stopping the operation. Sullivan states that he initially recommended to his superiors that Winn be suspended but was told that a warning would be the proper step in the progressive disciplinary system. Although Sullivan, in his testimony, asserted that the warning was not issued because of Winn's threat to file multiple grievances, that assertion cannot be credited in view of the specific reference to that subject in the warning letter itself.

According to Winn, about March 1, 1982, he had a conversation with Supervisor Ronald Joseph. He states that during this conversation Joseph said that he thought the argument over 1 minute was ridiculous, and that Winn should just stay out Sullivan's sight because, "he's going to get you if he gets the chance." Joseph, a witness called by the Respondent, testified, in substance, that he told Winn that Sullivan was going to get Winn if the latter did not stop the loud talking on the floor when he was arguing with Sullivan.

In connection with this case, it is finally noted that the collective-bargaining agreement, at article 15, section 1, defines a grievance as a "dispute, difference, disagreement or complaint between the parties related to wages, hours, and conditions of employment." Grievances are not limited to complaints involving the interpretation,

application, or compliance with these provisions of the agreement. Accordingly, the problem that Winn raised with respect to his timecard would clearly be a grievable matter under the terms of the collective-bargaining agreement, especially in view of the prior agreement by Pace relating to this subject matter.

#### Discussion

There is credible evidence in this case that at least for some time there has existed a fairly high level of tension between the management of the Milford Post Office and the Union's stewards at that location. It also seems apparent that a focal point of that tension related to the personality of Winn who, as a vigorous union steward, was perceived by some of the supervisors, including Sullivan, as enjoying the loyalty of the employees. It also seems, by Winn's own account, that the level of tension between the Union and management calmed down after the prior Postmaster, Brennen, had left the Milford facility. It is of course possible that Sullivan, even with the abatement of tension, continued to harbor resentment and suspicion of Winn. Nevertheless, in the context of this case, the General Counsel must establish that, in the particular circumstances which gave rise to the two warnings involved, those actions were motivated by discriminatory and nonlegitimate reasons.

Insofar as the April 7 warning, the General Counsel asserts that Winn and Kennedy were told by Vano that the reason for Winn's warning, as given to them by Vano (the first-class failure), cannot be true. He argues that it therefore follows that the reason must be a pretext. According to the General Counsel, if the reason for the warning is a pretext, it must be concluded that the warning was issued because of discriminatory reasons, given the past hostility between management and Winn who was an aggressive shop steward. In this respect, I can not help but admire the General Counsel's geometrically organized "proof." However, if one or more of his postulates gives way, then his ultimate conclusion would be significantly weakened.

The Respondent denies that the warning issued to Winn or the formal discussion given to Kennedy was, in any way, related to the first-class failure. That is, Vano testified that neither Kennedy nor Winn was responsible for that event and that neither was warned on that account. Thus, the Respondent's argument strikes at one of the key postulates of the General Counsel's theory, namely, his contention that the reason given for the warning was pretextual in nature.

Vano denied that neither his "discussion" with Kennedy nor his warning of Winn was related to the first-class failure. Rather, he asserts that based on his observation of their performance during the period when he was an acting supervisor he was faced with two employees who simply were not performing enough work and, in the case of Winn, was disturbing other employees during worktime. In this respect, I shall note here that I was favorably impressed by the demeanor of Vano, who struck me as an honest witness. Moreover, the documentary evidence tends to support Vano's assertion that the "discussion" with Kennedy and the warning to Winn were

<sup>5</sup> Daniello, however, did not testify in this proceeding.

not related to the first-class failure. In this regard, although Kennedy states that his formal discussion with Vano took place after the first-class failure the evidence, as reflected by Vano's testimony and notes, indicates that the "discussion" occurred on March 31, about 5 days before it occurred. Also, the documentary evidence reveals that the Union filed a grievance as to Winn's April 7 warning and the respective positions of the parties are set forth on the grievance forms. Yet there is not a single reference in any of the grievance forms to the first-class failure, and it does not appear that, at any time during the first three steps of the grievance procedure, either party contended that Winn's warning was related to that occurrence. To my mind this silence is damaging to the Charging Party's assertion that Winn had been told by Vano that the warning was due to his responsibility for the first-class failure. For if, as shown by the General Counsel, Winn could not have been at fault, it would seem logical that the Union would have used the same pretext argument during the grievance discussions. In fact, the absence of any discussion about the first-class failure during the grievance meetings (which of course were contemporaneous with the events), leads me to believe that the pretext argument is indeed a post hoc rationalization, intended to set up a strawman. As such, and because I shall credit the testimony of Vano, it is therefore recommended that this allegation be dismissed.

The warning issued to Winn on February 11 is, in my opinion, a more complicated issue. There is no doubt in my mind that on February 3, Winn asked to have his timecard changed to reflect the fact that he had taken a 30-minute lunch break, as required, and that he did not reach the clock on time due to congestion. There also is no dispute that, with respect to the timeclock situation, Pace, on behalf of management, had previously agreed with the employees that in the event an employee could not reach the timeclock on time a supervisor on duty would be authorized to change the timecard. While it may seem that Winn's request to change his timecard by 1 minute was a request over a relatively minor issue, it cannot be said that his problem was not a grievable matter under the terms of the collective-bargaining agreement. Moreover, as Winn was the alternative shop steward at the time, it cannot be said that his indication to Sullivan that he would file grievances everytime the Company refused to change timecards resulting from congestion was purely an individual as opposed to concerted complaint. Indeed, it seems to me that in some measure Sullivan issued the warning precisely because he feared that Winn, as a shop steward, would file multiple grievances as he had done in the past. This conclusion is of course based on the warning itself, which establishes prima facie that a reason for the warning was because of the perception that Winn, as shop steward, would file grievances relating to the timecard problem. Since the filing of grievances by employees and shop stewards is considered to be protected concerted activity, a warning issued to deter such activity would, a fortiori, be violative of Section 8(a)(1) of the Act.<sup>6</sup>

<sup>6</sup> See, e.g., *Firch Baking Co.*, 232 NLRB 772 (1977).

Nevertheless, the inquiry does not stop there, as the evidence clearly establishes that Winn, during his confrontation with Sullivan, began shouting on the work-room floor and that he called Sullivan ignorant and belligerent.<sup>7</sup> The evidence also indicates that it was Winn and not Sullivan who did the shouting as even Kennedy indicated that Sullivan's shout was a lot softer than Winn's. Additionally, it is concluded, based on the record as a whole, that Winn continued to shout after Sullivan told him to quiet down and that as a result of this argument the other employees stopped their work to watch what was going on.

In the context of protected activity by employees, a certain degree of leeway is allowed in terms of the manner in which they conduct themselves. Thus, in *Bettcher Mfg. Corp.*, 76 NLRB 526 (1948), the Board stated:

A frank, and not always complimentary, exchange of views must be expected and permitted the negotiators if collective bargaining is to be natural rather than stilted. The negotiators must be free not only to put forth demands and counterdemands, but also to debate and challenge the statements of one another without censorship, even if, in the course of debate, the veracity of one of the participants occasionally is brought into question. If an employer were free to discharge an individual employee because he resented a statement made by that employee during a bargaining conference, either one of two undesirable results would follow: collective bargaining would cease to be between equals (an employee having no parallel method of retaliation), or employees would hesitate ever to participate personally in bargaining negotiations, leaving such matters entirely to their representatives.

We do not hold, of course, that an employee may never be lawfully discharged because of what he says or does in the course of a bargaining conference. A line exists beyond which an employee may not with impunity go, but that line must be drawn "between cases where employees engaged in concerted activities exceed the bounds of lawful conduct in 'a moment of animal exuberance' (*Milk Wagon Drivers Union v. Meadowmoor Dairies*, 312 U.S. 287, 293) or in a manner not activated by improper motives, and those flagrant cases in which the misconduct is so violent or of such serious character as to render the employee unfit for further service."

Similarly, in *NLRB v. Thor Power Tool Co.*, 351 F.2d 584, 587 (7th Cir. 1965), the court affirmed the Board's conclusion that the employer violated the Act when it discharged a grievance committeeman who, during the course of a grievance meeting, called the employer's representative a "horse's ass."<sup>8</sup> The court stated:

<sup>7</sup> As Feeley did not corroborate Sullivan's assertion that Winn called the former an "egotistical bastard," I shall not conclude that this epithet was used.

<sup>8</sup> See also *Crown Central Petroleum Corp. v. NLRB*, 430 F.2d 724 (5th Cir. 1970); *Southwestern Bell Telephone Co.*, 260 NLRB 237 (1982); *Postal Service*, 250 NLRB 4 (1980); *Max Factor & Co.*, 239 NLRB 804 (1978); and *Hawaiian Hauling Service*, 219 NLRB 765 (1975).

As other cases have made clear, flagrant conduct of an employee, even though occurring in the course of section 7 activity, may justify disciplinary action by the employer. On the other hand, not every impropriety committed during such activity places the employee beyond the protective shield of the act. The employee's right to engage in concerted activity may permit some leeway for impulsive behavior, which must be balanced against the employer's right to maintain order and respect. *NLRB v. Illinois Tool Works*, 153 F.2d 811 (7th Cir. 1946). Initially, the responsibility to draw the line between these conflicting rights rests with the Board, and its determination, unless illogical or arbitrary, ought not be disturbed. In the instant case we cannot say that the Board's conclusion that Tinsley's remark was within the protection of section 7 was either unreasonable or capricious.

In *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979), the Board was called on to decide whether an arbitrator's decision was repugnant to the Act where the arbitrator had sustained the discharge of an employee who, in the course of raising an overtime complaint, used obscene language to a supervisor during the regular work shift in the production area. The Board stated:

According to the Administrative Law Judge, Chastain's question about overtime constituted a grievance and protected concerted activity. Therefore, when Chastain used the term "lying son of a bitch," or "m— f— lie" (or "liar"), the Administrative Law Judge reasoned that this conduct, as a part of the *res gestae* of the grievance, was also protected. As support for this conclusion, he relied on two lines of precedent. The first group of cases dealt with formal grievances or negotiating sessions which were conducted away from the production area. There, in the heat of discussion, an employee uttered an obscenity or used extremely strong language. In that context, the employee's conduct was found to be protected as part of the *res gestae*. Under the other line of precedent, represented by *Merlyn Bunney and Clarence Bunney, partners, d/b/a Bunney Bros. Construction Company*, and *Interboro Contractors, Inc.*, the Board concluded that an individual employee's complaint under the contract about working conditions constituted protected concerted activity. The employee in question, however, made no obscene or insulting statement.

The Administrative Law Judge cited no decisions, however, and we know of none, where the Board has held that an employee's use of obscenity to a supervisor on the production floor, following a question concerning working conditions, is protected as would be a spontaneous outburst during the heat of a formal grievance proceeding or in contract negotiations. To the contrary, the Board and the courts have recognized (as did the Administrative Law Judge in passing) that even an employee who is engaged in concerted protected activity can,

by opprobrious conduct, lose the protection of the Act.

The decision as to whether the employee has crossed that line depends on several factors: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice.

To reach a decision, the Board or an arbitrator must carefully balance these various factors.

Here the arbitrator considered the factors which the Board considers, and concluded that the employee's discharge was warranted and based on reasons not repugnant to the Act. He noted that the incident occurred on the production floor during working time (not at a grievance meeting), that the employee's question about overtime expressed legitimate concern which could be grieved, and that the supervisor had investigated and answered his question promptly; but, nevertheless, the employee had reacted in an obscene fashion without provocation and in a work setting where such conduct was not normally tolerated. He further considered the employee's past record and concluded that, considered together, this record established a reasonable basis for the discharge.

We find nothing in the arbitrator's decision that is repugnant to the Act. Indeed, a contrary result in this case would mean that any employee's offhand complaint would be protected activity which would shield any obscene insubordination short of physical violence. That result would not be consistent with the Act. . . .

The distinction between protected, albeit exuberant conduct in the context of a grievance or negotiation meeting, as opposed to similar conduct elsewhere, was further set forth in *New Process Gear, Div. of Chrysler Corp.*, 49 NLRB 1102 (1980).<sup>9</sup> In that case, the administrative law judge, in a decision adopted by the Board, dismissed an allegation involving a shop steward who, in the course of arguing about a work problem, refused the foreman's order to stop shouting and refused an order to leave the production office. The Administrative Law Judge stated:

Respondent acknowledges that loud talk and cursing is not uncommon in a plant environment, however, it contends that personal insulting remarks such as those Allen directed towards Mooney do not have to be tolerated, specially when carried to the point of insubordination. I agree, a distinction between a steward's aggressive union activity and improper behavior is that, in the former, the steward diligently represents his constituents' interests

<sup>9</sup> See also *Postal Service*, 250 NLRB 4 fn. 1 (1980), where the Board held that a shop steward engaged in the "formal investigation" of a grievance did not lose the protection of the Act when he uttered a "single, spontaneous obscene remark" to a supervisor. However, the Board did note that the shop steward's remark was provoked, in part, by the supervisor's failure to answer his inquiries.

by seeing to it that the contract is not violated and that the grievances are presented fairly and with the primary purpose of obtaining satisfactory results in an amicable and procedurally correct manner. Improper or unprotected conduct is demonstrated by a steward who while processing grievances makes personal attacks on foremen and resorts to obnoxious obscenities. He refuses to follow the established procedure in an orderly manner to the point of insubordination. Such was Allen's conduct toward Foreman Mooney.

I reject the position of the General Counsel that Allen's conduct can be classified as shop talk. He pursued Mooney relentlessly and insubordinately. Moreover, Allen was not disciplined because he cursed Mooney but because he would not leave Mooney alone so that Mooney could do his job. Allen continued to follow Mooney while engaging in loud and abusive conduct and he threatened to continue to engage in such improper behavior for the remainder of the shift. It was at that point that Allen was suspended for insubordination.

The employees' right to engage in concerted activity may permit some lee-way for impulsive behavior, which must be balanced against the employer's right to maintain order and respect. *NLRB v. Thor Power Tool Company*, 351 F.2d 584 (7th Cir. 1965), enf. 148 NLRB 1379 (1964). In *Calmos Combining Co.*, supra, 184 NLRB 914, 915, in a strikingly similar situation as in the instant case, the Board stated:

We agree with the Respondent that Harts' refusal to follow the direct order to stop shouting and his abusive language constituted unprotected activity . . . . Harts not only refused to cease shouting, but dared Oshins to discharge him. Thus, Harts' continued intransigence was not a part of the *res gestae* of the grievance discussion. Rather, the order to stop shouting was a reasonable and lawful order that should have been obeyed, and his refusal to do so was not related to Harts' protected processing of the grievance.

In view of the case law cited above, it seems to me that the question as to whether the February 11 warning to Winn was violative of the Act is precariously close. I have concluded that, although Winn had a legitimate basis for complaining about his timecard, he nevertheless escalated the argument with Sullivan to a point beyond which was reasonable given the nature of his complaint. There is also no doubt as to the fact that Winn kept shouting at Sullivan on the workroom floor after the latter told him to quiet down and return to his seat. In this regard, I also conclude that, during the confrontation, Winn made insulting statements to Sullivan and that the heated remarks by Winn attracted the attention of the other employees who stopped work. Further, the evidence in this case indicates that this was not the first time that Winn had been overly boisterous, and in con-

nection with the settlement of a prior grievance involving Winn, both the Union and the Employer had mutually agreed that their respective representatives should conduct themselves in a professional and business like manner.

There is, in fact, little doubt in my mind that the type of overreaction by Winn is not the type of conduct which would be conducive to a rational and mutually productive collective-bargaining relationship. This is not to say, however, that his conduct on this occasion went beyond the pale or that the warning was privileged.

Unlike the facts in *Atlantic Steel Co.*, supra, *New Process Gear*, supra, and the other cases cited by the Respondent, I do not perceive that Winn's conduct was nearly as insubordinate as the activities referred to in those cases. For example, I have concluded that Winn did not use obscene language during his confrontation with Sullivan. Also, while it is true that the argument caused other employees to stop work, the evidence herein does not show that this confrontation, as in the case of *New Process Gear*, was of an extended or prolonged nature. Moreover, it is apparent from the warning letter itself that its issuance was motivated not merely because of Winn's boisterous conduct, but at least in equal measure because Winn had informed Sullivan that he would file grievances on behalf of other employees encountering the same problem. Although Sullivan may have perceived this "threat" as one which involved an intent by Winn to harass management with multiple grievances, it must be said that the problem at issue was, in fact, a grievable matter, and that Winn's position was consistent with the agreement made with Pace. In summary, I therefore conclude that the warning issued to Winn was motivated in large part because of Sullivan's concern that Winn, as shop steward, would file grievances pursuant to the collective-bargaining agreement. I also find that Winn's conduct on February 3, in connection with his conversation with Sullivan, was not so egregious as to remove his activity from the protection of the Act. Accordingly, it is concluded that the warning issued to Winn on February 11, 1980, was violative of Section 8(a)(1) and (3) of the Act.

#### CONCLUSIONS OF LAW

1. The Respondent, the United States Postal Service, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By issuing a letter of warning to William Winn on February 11, 1982, because of Winn's notification to management that he would file grievances pursuant to the collective-bargaining agreement, the Respondent violated Section 8(a)(1) and (3) of the Act.
4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.
5. Except to the extent herein found, the Respondent has not violated the Act in any other manner.

[Recommended Order omitted from publication.]