

Meating Place at Sylvan Glen, Inc. d/b/a Double Eagle Restaurant and Ahmad Shayesteh. Case 7-CA-20727

25 November 1983

DECISION AND ORDER

BY MEMBERS ZIMMERMAN, HUNTER, AND DENNIS

On 20 June 1983 Administrative Law Judge Joel A. Harmatz 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,¹ findings,² and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Meating Place at Sylvan Glen, Inc. d/b/a Double Eagle Restaurant, Detroit, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order, except that the attached notice is substituted for that of the administrative law judge.

¹ The Respondent contends that the judge erred in not permitting it to call the counsel for the General Counsel as a witness in order to examine him as to the manner of taking the affidavits in this case, and the completeness of the reduction of the answers to narrative style in the affidavits. The Respondent further contends that the General Counsel should have withdrawn from the hearing because he was a potential witness. We disagree. Sec. 102.118 of the Board's Rules and Regulations states that no attorney in a Regional Office and subject to the supervision or control of the General Counsel may testify on behalf of any party to any cause pending before the Board without the written consent of the General Counsel. Sec. 102.118 further states that a request that such consent be granted shall be in writing and shall identify the person whose testimony is desired, and the purpose to be served by the testimony of the official. There is no evidence nor does the Respondent assert that it made such a request or received consent of the General Counsel to call counsel for the General Counsel as a witness in the instant case. Additionally, we note that the General Counsel took the affidavits in this case in the fashion set forth in sec. 10058.5 of the National Labor Relations Board Case-handling Manual. None of the affiants asserts that counsel for the General Counsel failed to accurately record their statements. The affiants read the affidavits and under oath certified the contents of the affidavits by signing them. We, therefore, find nothing improper in the conduct of the counsel for the General Counsel or the decision of the judge in refusing to permit the Respondent to call the counsel for the General Counsel as a witness.

² The 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), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

APPENDIX

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

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT discourage membership in a labor organization by discharging or otherwise discriminating against any employee because he or she decides to join, assist, or otherwise speak out for representation by a union.

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

WE WILL offer Ahmad Shayesteh immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed and WE WILL make him whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL expunge from our files any reference to the discharge of Ahmad Shayesteh on 25 May 1982, and WE WILL notify him 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.

**MEATING PLACE AT SYLVAN GLEN,
INC. D/B/A DOUBLE EAGLE RESTAURANT**

DECISION

STATEMENT OF THE CASE

JOEL A. HARMATZ, Administrative Law Judge: This proceeding was heard by me in Detroit, Michigan, on March 21, 1983, on a charge filed on May 26, 1982, and a complaint issued on July 29, 1982, which alleges that the Respondent independently violated Section 8(a)(1) of the Act by threatening employees, that the Respondent

would close a segment of its business on designation of a collective-bargaining agent, and that the Respondent violated Section 8(a)(3) and (1) by discharging Ahmad Shayesteh because of his union views and activities. In its duly filed answer the Respondent denies that any unfair labor practices were committed. Following close of the hearing, briefs were filed on behalf of the Respondent and the General Counsel.

Upon the entire record in this proceeding,¹ including consideration of the posthearing briefs, and my opportunity directly to observe the witnesses while testifying and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a Michigan corporation which operates a restaurant in Troy, Michigan, the sole facility involved in this proceeding. In connection therewith, during the calendar year preceding December 31, 1981, a representative period, the Respondent received gross revenues in excess of \$500,000 and purchased liquor valued in excess of \$20,000, which liquor was purchased from the Michigan Liquor Control Commission which in turn received said liquor directly from points located outside the State of Michigan.²

Accordingly, it is found that the Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

Primarily at stake in this proceeding is the question of whether the Respondent terminated employee Ahmad Shayesteh in reprisal for his union activity.

The Respondent is 1 of 10 dining facilities owned and operated by Bruce Cameron. Immediate supervision at that location is provided by Mario Scussel and Rock Supan. Supan and Scussel rotate shifts, with Scussel being the superior.

Shayesteh was hired in April 1981. He worked continuously as a waiter until his discharge.

Prior thereto, a union organization campaign began at the Double Eagle location in the winter of 1981. It concluded on January 5, 1982, in consequence of a Board-conducted election. The final tally showed that 3 voted for, and 34 against, union representation. On May 25, 1982, 5-1/2 months later, Shayesteh was terminated.³ Shayesteh and another employee Stephen Wasielewski⁴ were known by the Respondent's representatives to be the key protagonists of the Union during this campaign.

Cameron, Scussel, and Supan all offered testimony justifying the termination of Shayesteh on grounds divorced

from any union activity. Based on their testimony, it is argued that Shayesteh was discharged because of his accumulation of points under a disciplinary system established by the Respondent after the election.

Shayesteh on the other hand afforded testimony which imputed directly to the Respondent an unlawful motivation. As foreground to this latter testimony, it is noted that Cameron testified that, prior to the election, the Respondent received information as to the employee grievances which gave impetus to the organization campaign. Cameron went on to admit that, within the critical pre-election period, assurances were afforded employees by management that these "problems" could be resolved, without intervention of a union.⁵

Against this background Shayesteh testified that *after* the election he opined to kitchen workers that management had not kept its promises and that things were worse than before the Union filed its petition.⁶ He further claims that on May 25, at the close of his shift, after clocking out, Supan called him aside and asked him, "What is this story about talk going around, talk about the Union again?" Supan allegedly went on to indicate that "we have had enough of the Union and we cannot tolerate any more." Supan threatened Shayesteh that the same thing would happen to him as Steve Wasielewski, who had been terminated a few weeks earlier. At this, Shayesteh claims to have asked if he were going to be fired, to which Supan answered in the affirmative. When Shayesteh argued that Supan could not do so without justification, Supan allegedly responded, "well, I can always find a reason," and specifically referred to a rip in the tuxedo jacket worn to work by Shayesteh on Friday, May 21, and May 25. To this, Shayesteh defended that, under Cameron's disciplinary point system, the torn tuxedo sleeve was only worth two or three points.⁷ Supan is alleged to have then said that "that piece of paper was bull shit; and you know it." At this point, Shayesteh threatened to call Cameron, but was prevented from doing so by Supan who grabbed the phone stating, "No, get out . . . you are fired and get out the premises." Shayesteh claims that he obliged.

Quite obviously, the scenario depicted by Shayesteh, if credited, would establish an unmistakable violation of Section 8(a)(3) and (1) of the Act. However, his testimony was not viewed as impeccable. Reservations were held as to his objectivity and I viewed with suspicion segments of his testimony which were neither strikingly plausible nor corroborated either directly or inferentially. In this category was his testimony concerning a conversation with Scussel prior to the election, in which Scussel allegedly indicated that employees would be out of a job because if the Union came in, Cameron would close

¹ Pursuant to my instruction, the General Counsel, after close of hearing, submitted Jt. Exh. 1. The record is hereby reopened for the limited purpose of receiving that document.

² The above is based on a stipulation contained in a "Stipulation for Certification from Consent Election Agreement" in Case 7-RC-16594, together with parol testimony of Bruce Cameron, the Respondent's president and sole shareholder. See G.C. Exh. 2(a).

³ Unless otherwise indicated all dates refer to 1982.

⁴ Wasielewski was discharged in May 1982 on grounds which, for purposes of this proceeding, are assumed to have constituted good cause.

⁵ In this regard, Cameron indicated that, at a pre-election meeting with employees, held for the purpose of propagandizing against the Union, after employee complaints were uncovered, a statement was made on behalf of management that "we can correct this . . . we will work towards that end."

⁶ Coincidental is Cameron's testimony that it was the chef that first informed him of the organizational drive in 1981.

⁷ Under the disciplinary system referred to in this testimony of Shayesteh, discharge would occur only after accumulation of 10 points. See G.C. Exh. 4.

the restaurant. Scussel denied any such threat and in this respect I was inclined to give the Respondent the benefit of the doubt, and to dismiss the 8(a)(1) allegation relevant thereto. On the other hand, as to what transpired at the time of discharge, the various offerings on behalf of the defense, as shall be seen, lacked plausibility and often were contradictory, while laced with breakdowns in recollection as to highly significant events. On an overall basis, the testimony possessed characteristics familiar in pretext situations and seemed so blatantly false as actually to enhance the credibility of Shayesteh's account of the circumstances under which he was terminated.

My suspicion as to the defense was triggered initially by disbelief of Cameron's attempt to impress that a special care was taken to avoid the possibility of reprisal against Shayesteh, a known union protagonist. He claims that a labor attorney, whom he consulted in connection with the organization campaign, instructed management as to the obligations and restrictions under the law with respect to employee organizational rights. Based on this legal advice, although Supan and Scussel had authority, independently, to effect discharges of waiters, Cameron claimed to have removed this authority from them in the case of Shayesteh.⁸ This advice, according to Cameron was based on the fact that Shayesteh was a known union protagonist, and the labor attorney had counseled against reprisals for union activity.⁹ In any event, neither the testimony of Supan and Scussel nor Cameron's own suggested an attitude of caution or deep concern for fairness in the execution of this discharge. Indeed, portions of their testimony suggested that a unified understanding between them of just what occurred was lacking.

Cameron supposedly decided to terminate Shayesteh in conformity with a recently established disciplinary system. He testified that the system was developed in consequence of grievances that produced union activity in the first place. He acknowledged that, during the preelection period, meetings were held with employees at which he learned that management had not administered rules and regulations uniformly, that discipline was not meted out evenhandedly, and that there seemed to be a lack of communication among employees, the managers, the general manager, and himself. To ameliorate these problems, efforts were made after the election to draft a "fair" point system, by which employees would be informed when their jobs were in jeopardy. Ultimately, at a date not defined in the record, the system was presented at a meeting of employees who consented to it unanimously.¹⁰ Under this system, various offenses were

⁸ Nowhere in the testimony of Supan or Scussel does it appear specifically that they received any such instruction. As shall be seen their testimony implies to the contrary.

⁹ Despite representations as to his desire to adhere to the advice of counsel, Cameron volunteered that during the preorganization campaign, he met with employees on an individual and collective basis, learning from them the reasons that they sought out a union, and telling them that these matters could be resolved without a union and that the Company would work to that end. It is difficult to imagine that any attorney, competent in matters of labor law, would not have counseled Cameron as to the pitfalls, under the Act, of soliciting grievances and promising benefits.

¹⁰ Cameron testified that the efforts to develop the system "dragged through the month of January." From this, it is assumed that this meeting occurred some time between February and May.

assigned certain points, with the employee vulnerable for discharge if he accumulated 10 or more within a 12-month period. A written warning is provided to the employee affected, who is asked to sign, at least by the day after the incident on which the discipline was based. The Respondent would have me believe that the termination of Shayesteh entailed a routine application of this progressive disciplinary system.

It is true that, prior to his discharge, Shayesteh had received written warnings and that none was challenged by the General Counsel as founded on discriminatory considerations. Yet, with implementation of the new point system, only offenses occurring thereafter were to count against an employee. Although the Respondent contends otherwise, objective evidence suggests strongly that not all the warnings related to that period. The questionable warnings are outlined below chronologically and by exhibit numbers:

Respondent Exhibit 6(a)—February 26, 1982. Shayesteh was sent home because unfit to perform his duties and appearing to be under the influence of an unknown substance.

Respondent Exhibit 6(b)—March 1, 1982. Shayesteh was 20–25 minutes late without calling in.

Respondent Exhibit 6(c)—March 12, 1982. Shayesteh feigned intoxication, challenging management to send him home. Shayesteh appeared to be smarting at the treatment given him on February 26, 1982.

As indicated below, warnings were also issued to Shayesteh on May 21 and May 25. Cameron, Scussel, and Supan testified that *all* of the above were issued on events occurring after implementation of the point system. However, their sworn positions were not in complete harmony. In a prehearing affidavit given by Supan on June 28, little more than a month after the discharge, Supan averred that "Shayesteh had several infractions against him but the two dealing with 5-21-82 were the only ones occurring after the institution of the point system." Although the affidavit was recanted by Supan at the hearing, other factors confirm its accuracy. Thus, the Respondent made no effort specifically to establish the date on which the point system was implemented. The three earlier warnings, unlike those issued on May 21 and May 25, contain no indication that points were assessed.¹¹ They also differed from the May 21 and 25 grievances in that they each signified the offense number, a marking irrelevant to the 10-point system, which, quite properly, was omitted on the May 21 and 25 warnings.

¹¹ This would seem to be an important omission in that how else would management and employee be aware of his or her status under the point system? There was no indication in the Respondent's evidence as to where points assessed on the February 26, March 1, or March 12 warnings would have been recorded. Although no points were allegedly assessed in connection with the March 12 warning, that too would require recordation. Under a fair, point system, leading ultimately to discharge, employees who are shown and asked to sign a formal warning should also be extended the opportunity to acknowledge the amount of points assessed. The Respondent intended to administer its system in this fashion and I find that these matters were omitted because the point system was not in effect at the time.

Suspicion is also generated by Scussel's testimony that no points were charged in conjunction with the March 12 warning. He, of course, was hemmed in to this assertion. For discharge would have been impelled at that time if the new system had been in place as of February 26, and if it were to be administered uniformly, as was the Respondent's avowed intention. Contrary to the Respondent, I believe that the May warnings were the first issued after the new system became operative. The latter coincidentally charged Shayesteh with the requisite accumulated total of 10 points. I am convinced that five points each were assessed for the incidents of May 21 and May 25, as a strained effort at manipulation to force conformity between the discharge and the newly installed point system.¹²

More specifically, it appears that on Friday, May 21, Shayesteh worked both the noon and dinner shifts. During the lunch shift, Supan noticed that Shayesteh's tuxedo was ripped at the undersleeve, and he was told by Supan to get the jacket fixed, if possible, by the next shift, which was to begin 3 hours later. If this were not possible, Shayesteh was told that, since he would be off until next Tuesday, he could get it fixed by then. Scussel, who managed the evening shift on May 21, also testified that he noticed the rip, but said nothing to Shayesteh, because he was aware that Supan had instructed that the jacket be repaired. There is no evidence whatever that either Supan or Scussel informed Shayesteh that he would be warned or otherwise disciplined in this regard.

That evening, a second incident occurred involving Shayesteh, another waiter, Brian Cochell, and a receptionist. Thus, according to Cochell, a witness for the Respondent, he and Shayesteh were idling at the service bar when Cochell stated, "it would be nice to go home . . . it doesn't look like it will be real busy." According to Cochell's credited testimony, when he went to serve his table, as it came up in rotation, the customers indicated that their drink order had already been taken. Cochell complained to the hostess, who explained, "well, Mike took it because he . . . said . . . that you were leaving." The hostess was upset and reported the incident to Scussel, who confronted Shayesteh. Scussel indicated to Shayesteh that he could not believe that he had done this, indicating that he had checked with Cochell who denied having told Shayesteh that he was going home.¹³ According to Scussel, he took no action at that time and did not tell Shayesteh that he would be written up for the incident. Scussel claims that he did in fact do so. However, the warning based on this incident was never shown to Shayesteh,¹⁴ nor does it appear that he was in-

¹² Under the point system "unauthorized uniform" was the only relevant criteria for Shayesteh's May 25 offense. It called for three points, not enough to support termination.

¹³ Scussel acknowledged that Brian Cochell may have said, "I wanna go home."

¹⁴ The document in question is in evidence as R. Exh. 6(b). It indicates that Shayesteh was assessed five points. Scussel could not identify who placed this on the warning. Supan testified that, although Scussel decided to charge the five points, Supan made the entry on the warning. It does not appear, however, that Supan was on duty on the evening of May 21. He was in fact the sole manager present on May 25 during the noon shift when Shayesteh was terminated. Is it possible that this inscription was made by him on an after-the-fact basis in order to cover the fact that the Respondent, under its disciplinary point system, could not effect the dis-

formed of its existence at any time prior to the instant hearing.¹⁵

Shayesteh next reported for work on Tuesday, May 25. He claims to have arrived early to obtain a needle and thread from a laundress and to have himself repaired the torn sleeve.¹⁶ However, Supan described the events leading up to the discharge as follows:

MR. O'HARA: Tell us what happened?

MR. SUPAN: I noticed that his tuxedo, when he was dressed and ready for work on the floor at 11:30, that his tuxedo was still in need of repair, okay.

I looked at it, and I said, "Mike, you did not get your tuxedo fixed." And he said, "Yes, I did." You know, I looked at it and it was a little thread in it, a quick repair; he said that he had the lady do it in the laundry room.

But it did not last for very long; it did expand throughout the day of the shift, okay. And that is when I wrote up the report and then called Mario and told him that I wanted to terminate Mr. Shaeysteh; and that is when he told me, he goes, "Yes, okay. Wait, I will give you a call back."

And that is when he did call me back and we decided to terminate him because of the points that were—because of the points that were accumulated; because of the fact that a problem was persisting and kept on persisting; and, you know, where do you see the end?

Though in this rendition, Supan omitted reference to Cameron, the latter's involvement is central to the defense. Indeed Cameron's attempt to convince that this was so contributed to my complete lack of confidence to the genuineness of the defense. Thus, Cameron in his third visit to the stand as a witness for the Respondent testified as follows:

BY MR. O'HARA: Normally, would Mario [Scussel] or Rock Supan have the authority to fire an individual?

charge until Shayesteh had accumulated 10 points? It was the sense of Scussel's testimony that only three points could be assessed for the condition of Shayesteh's uniform on May 25. Indeed, inconsistent allocation of points—a consequence Cameron sought to avoid through development of this "fair system"—was inherent in this discharge were I to believe Scussel. Thus, he claims that on May 25 he informed Cameron that Shayesteh had acquired 11 points in a single weekend, as follows:

- (1) Incorrect uniform—May 21: 3 points
- (2) Cochell incident—May 21: 5 points
- (3) Unrepaired uniform—May 25: 3 points

I sensed that, in this respect, Scussel was extemporizing. It is clear that no warning was issued nor points assessed on May 21 for the state of Shayesteh's uniform. Indeed, since it appears that the rip occurred during his work shift that day, no foundation for discipline in that connection would have existed.

¹⁵ I have no intention to pass on the fairness of the discipline imposed on May 21 or May 25. However, inasmuch as Cameron professed to the need for extreme caution in handling of the discharge of this known union protagonist, nondisclosure to Shayesteh of the May 21 warning and the points assessed are certainly relevant to assessment of the testimony offered in support of the defense.

¹⁶ I was inclined to believe the testimony of Supan that this was merely a patch job and that, as the shift progressed, the rip reopened, exposing the white lining of the black tuxedo jacket.

BY MR. CAMERON: Yes.

BY MR. O'HARA: Could they have fired Mr. Shayesteh?

BY MR. CAMERON: No.

BY MR. O'HARA: Because of what reason?

BY MR. CAMERON: Because of the instructions from the attorney who handled the National Labor Relations vote and instructed us not to have any reprisals; and I did not want to give that authority to a unit manager.

I personally wanted to be involved in anything related to the individuals involved in the union organization which I thought was protection of my business; and I could not delegate this to somebody else.

I had to be personally involved, which I was, and I wanted these people to be given any consideration because there was always a possibility that *a manager that can have a vindictive attitude towards an employee and contrive things that would seemingly be significant, or get even, so to speak, to causes, because, obviously, the union activity did result in the managers of that particular unit being chastised by me because of the treatment they had given the employees in the past.* [Emphasis added.]

So I have to get myself personally involved in this particular incident; and I wanted to be abreast of everything that transpired relating to those employees so that they were treated fairly and justly as far as I was concerned. And that was my instructions from the attorney; and I tried to carry it out completely.

Supan, however, had previously testified as follows:

JUDGE HARMATZ: Let's change the subject for a minute. Now you knew that you had no authority to terminate Mr. Shayesteh, isn't that true?

MR. SUPAN: No, we do have the authority.

JUDGE HARMATZ: But he could not be terminated, though?

MR. SUPAN: Well, we were very worried about the situation from earlier in the year and we wanted to check with Mr. Cameron to make sure on someone before we did make a decision like that . . .

Scussel's sworn declarations also suggest that he had authority to terminate Shayesteh. Accordingly, in his prehearing affidavit given on June 28, slightly more than a month after the termination, he states as follows:

During the weekend of the Friday 5-21), I told Supan to fire Shayesteh if he came in with his coat still ripped. I did this because there had just been too many problems.

Indeed, Scussel, in his first description of the May 25 incident related as follows:

MR. O'HARA: On . . . Tuesday, May 25th, were you aware of his discharge?

MR. SCUSSEL: Yes.

MR. O'HARA: What part did you take in it?

MR. SCUSSEL: . . . Rock worked the Friday; Rock called me at home Tuesday and said, "Ahmad still does not have his coat fixed." He had come into work, I don't know, early, late, rushed around to get needle and thread to sew his tuxedo after . . . a requested weekend off, three days; he had asked to go to Cedar Point or something, Saturday, Sunday, Monday, which we had felt had given him enough time to have it fixed professionally, not with white thread, in the back of the coat room, or the laundry room, which he did sew it up real quick at about 11:00 o'clock.

Rock called me and I said, ". . . Hold on," I said, "I think we are going to have to let him go. Just let him work out his shift."

And I called him back later and told him, "Let him go. I cannot put up with this anymore."¹⁷

Needless to say, I reject Cameron's testimony that he expressly limited authority of his subordinates in connection with Shayesteh. But even more damaging to the defense is my disbelief that he was involved in the incident at all. The logic of his testimony, which if believed, would negate the existence of spontaneous, precipitant discharge, but it is overridden with flaws. Thus, in explaining his alleged removal of authority from Scussel and Supan to treat with the known union protagonist, he justified this step by himself expounding the possibility that one of his managers might well hold a "vindictive attitude" toward the union protagonist and act on it, using pretext, to effect reprisal.¹⁸ It is difficult to comprehend, if one were to accept the Respondent's own description of the nature of Cameron's involvement, just how he could have avoided this possibility. It is clear on all the evidence that only Supan was on duty on the morning of May 25 and he alone had direct knowledge of the event which triggered the termination. Indeed, it was he who initiated the discipline. Yet, Cameron spoke only with Scussel, conducted no independent investigation, and not only failed to show interest in the position of the known union supporter, but also seemingly rubber stamped Scussel's second hand report. Although Cameron knew that employees were concerned with a lack of uniformity of discipline and committed himself to correction of that complaint he obviously made no attempt to verify that Shayesteh had been informed as to all points accumulated by him under the disciplinary system.¹⁹ In

¹⁷ Among a number of curious contradictions in the Respondent's evidence is the testimony of Scussel as to his involvement in the discharge process. His first expression as to that event plainly implied that he was not involved at all and did not learn of the matter until after the discharge was effected. The relevant testimony is as follows:

MR. O'HARA: . . . I hand you Exhibit 6E; and I ask you whether you signed that?

MR. SCUSSEL: No, I did not.

MR. O'HARA: Were you familiar with what happened?

MR. SCUSSEL: Yes, I was.

MR. O'HARA: Were you there at the time?

MR. SCUSSEL: No, I was not. I was familiar with it by Rock Supan when I walked into work that evening of what had gone on during the day. [Emphasis added.]

¹⁸ Note that, under Shayesteh's account of the events leading to discharge, one gets the impression that Supan might well have acted precisely in this fashion.

¹⁹ See fn. 14, supra, for an outline of the conflict between Scussel and Supan as to the number of points assessed on May 21 and 25.

short, his limited involvement depicted by the Respondent's own testimony was incompatible with a genuine concern for possibilities that a subordinate manager may have acted in reprisal or that his own disciplinary system might well have been invoked unfairly. Cameron did not impress me as the type manager who would act in such haphazard fashion with respect to his avowed objectives. I do not believe he did, because I do not believe that he played any role whatever in the discharge decision, a conclusion that derives further support from testimonial accounts by Scussel and Supan. Thus, neither mentioned any telephone call to Cameron on May 25 in their initial versions.²⁰ The prehearing affidavits given by Scussel and Supan only 5 weeks after the discharge also fail to mention any involvement by Cameron.²¹ It is difficult to accept that during this brief interlude both could have forgotten such unusual and significant matters as the limitation placed on their authority to effect discipline and the fact that it was not they, but Cameron who made the decision to terminate Shayesteh.

Although the demeanor of Shayesteh left me unimpressed with his overall reliability, the blatantly false testimony presented by the defense renders Shayesteh's version of what occurred on May 25 as plausible and what I consider to be an accurate account. Accordingly, on the total record it is inferred that Supan learned that Shayesteh, a known supporter of the Union, was again agitating for the need for an outside representative, confronted him with that fact, and hastily terminated him as their discussion became more heated. I am convinced that the Respondent sought falsely to involve Cameron in the discharge process to lend an aura of deliberateness to what in reality was a spontaneous act, and to offer a pretextual basis for combatting Shayesteh's truthful account. Based on the credited testimony of Shayesteh, it is concluded that the Respondent seized on the torn tuxedo sleeve and Shayesteh's past infractions as contrivances to mask the unlawful, but true reason for his termination. Accordingly, it is found that the Respondent violated Section 8(a)(3) and (1) of the Act by on May 25, 1982, terminating Ahmad Shayesteh because of his union activity.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent violated Section 8(a)(3) and (1) of the Act by discharging its employee, Ahmad Shayesteh, on May 25, 1982.

3. The unfair labor practice set forth in paragraph 2, above, constitutes an unfair labor practice affecting commerce within the meaning of Section 2(6) and (7) of the Act.

²⁰ Scussel first averred that Cameron made the discharge decision on cross-examination by me. However, his recollection as to just where the telephone call with Cameron fit into the sequence of events was hazy and lacking in the degree of clarity that one would expect of one privy to so important an event. Similarly, Supan did not mention Cameron's involvement until recross-examination.

²¹ Supan's affidavit is in evidence as G.C. Exh. 6 and Scussel's as R. Exh. 7.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, it shall be recommended that it cease and desist therefrom and take certain affirmative action designed to effectuate the purposes of the Act.

It has been concluded that the Respondent discharged Ahmad Shayesteh unlawfully. Accordingly it shall be recommended that the Respondent be ordered to offer him immediate reinstatement to his former position, without prejudice to his seniority or other rights and benefits or, if that job no longer exists, to a substantially equivalent position, and to make him whole for any loss of earnings he may have suffered by reason of the Respondent's discrimination against him. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977).²²

Consistent with the directive of the Board in *Sterling Sugars*, 261 NLRB 472 (1982), it shall further be recommended that the Respondent expunge from its records any reference to the unlawful discharge of Ahmad Shayesteh on May 25, 1982. The Respondent shall be required to provide written notice of such expunction to Shayesteh and to inform him that said unlawful discharge will not form the basis for or contribute to any further disciplinary action against him.

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

ORDER²³

The Respondent, Meating Place at Sylvan Glenn, Inc. d/b/a Double Eagle Restaurant, Troy, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discouraging membership in a labor organization by discharging or in any other manner discriminating against an employee with respect to wages, hours, or other terms and conditions of employment.

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

2. Take the following affirmative action which is deemed necessary to effectuate the purposes of the Act.

(a) Offer Ahmad Shayesteh immediate reinstatement to his former position or, if that job no longer exists, to a substantially equivalent position without prejudice to his seniority or other rights and privileges and make him whole for any loss of earnings he may have suffered in the manner set forth in the section of this decision entitled "The Remedy."

(b) Expunge from its files any reference to the discharge of Ahmad Shayesteh on May 25, 1982, and notify him in writing that this has been done and that evidence

²² See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

²³ 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.

of this unlawful discharge will not be used as a basis for future personnel actions against him.

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

(d) Post at its restaurant in Troy, Michigan, copies of the attached notice marked "Appendix."²⁴ Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecu-

tive 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 the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 7 in writing within 20 days from the date of this Order what steps Respondent has taken to comply.

²⁴ 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."