

**CER, Inc. and Frank L. Vernagallo. Case 23-CA-9018**

19 April 1984

## DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS  
ZIMMERMAN AND DENNIS

On 18 July 1983 Administrative Law Judge Richard J. Linton issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the judge's decision.

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 judge's rulings, findings,<sup>1</sup> 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, CER, Inc., Houston, Texas, its officers, agents, successors, and assigns shall take the action set forth in the Order.

<sup>1</sup> 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), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Additionally, we are satisfied that the Respondent's contention that the judge should be disqualified is without merit. In our opinion, there is nothing in the record to suggest that his conduct at the hearing, his resolutions or credibility, or the inferences he drew were based on either bias or prejudice.

Members Zimmerman and Dennis find it unnecessary to determine which labor agreement was in effect as Vernagallo's work assignment claims were made in good faith and were colorable under either of the contracts arguably in effect.

### DECISION

#### STATEMENT OF THE CASE

RICHARD J. LINTON, Administrative Law Judge. This case was tried before me in Houston, Texas, on April 20-21, 1983, pursuant to the September 29, 1982 complaint issued by the General Counsel of the National Labor Relations Board through the Regional Director for Region 23 of the Board. The complaint is based on a charge filed August 12, 1982, by Frank L. Vernagallo (Vernagallo or Charging Party) against CER, Inc. (Respondent or CER).<sup>1</sup>

<sup>1</sup> All dates are for 1982 unless otherwise indicated. Although the charge and complaint placed periods in CER's name, I have spelled it as shown to conform to the spelling used by Respondent.

In the complaint the General Counsel alleges that Respondent violated Section 8(a)(1) of the Act on June 17, 18, and 19, 1982, when General Foreman Curtis Roberts threatened employees with discharge for complaining to their union (Local 450, and fully identified momentarily) about working conditions on the job, and by discharging Vernagallo on June 24, 1982, because of the Charging Party's protected concerted activities relating to complaints about working conditions.<sup>2</sup>

By its answer, as amended, Respondent admits certain factual matters, denies violating the Act, and asserts that Vernagallo quit.

On the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel and Respondent, I make the following

#### FINDINGS OF FACT

##### I. JURISDICTION

CER, a Texas corporation, performs site preparation excavation and soil stabilization in the building and construction industry. At all times material herein CER has been performing such work at a construction site in Houston, Texas, involving an expansion of the Anheuser-Busch brewery. During the past 12 months CER has performed services valued in excess of \$50,000 for H. K. Ferguson Co., of Cleveland, Ohio, an enterprise which is directly engaged in interstate commerce and which meets the Board's nonretail jurisdictional standard by virtue of performing building and construction services valued in excess of \$50,000 in several States of the United States. Respondent admits, and I find, that it is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

##### II. LABOR ORGANIZATION INVOLVED

Respondent admits, and I find, that International Union of Operating Engineers, AFL-CIO, Local Union No. 450 (Union or Local 450), is a labor organization within the meaning of Section 2(5) of the Act.

##### III. THE ALLEGED UNFAIR LABOR PRACTICES

###### A. Introduction

###### 1. The motion to disqualify

At the beginning of the hearing Respondent, pursuant to Section 102.37 of the Board's Rules and Regulations, filed its motion and affidavit that I disqualify myself from presiding as the administrative law judge in this proceeding. Essentially the matter is based on two grounds. First, that I had served on the staff of NLRB Region 23 for several years during which time I was opposing counsel to Respondent's counsel (including the law firm, Fulbright & Jaworski) here, and second, I recently presided at a hearing involving Local 450 in which Curtis Roberts testified. CER anticipated that Roberts would be its primary witness here.

<sup>2</sup> Vernagallo's first day on the job was June 8, 1982 (Tr. 257).

Respondent did not argue in its motion or at the hearing that in serving as opposing counsel I ever displayed hostility or personal animus toward Respondent's counsel or the firm of Fulbright & Jaworski. I denied this ground of the motion and its additional argument that my former association with Region 23, which I left in April 1980 on my appointment as an administrative law judge,<sup>3</sup> would somehow render me biased or give an appearance of impropriety. Former service as an attorney for the General Counsel, at least in the absence of evidence indicating a personal bias, does not disqualify an administrative law judge from presiding over a case. *Heads & Threads Co.*, 261 NLRB 800 fn. 1 (1982). Bare conclusory statements are insufficient. *Garry Mfg. Co.*, 242 NLRB 539 fn. 1 (1979). Regarding the second ground of an earlier case involving Curtis Roberts, I note that such earlier case with Local 450 involved allegations of backdooring by that labor organization.<sup>4</sup> Roberts allegedly received favored referrals by Local 450. Although I found merit to one such allegation, I dismissed at least five similar allegations. My findings generally were based on hiring hall records rather than on any assessment of Roberts' credibility. I adhere to my denial of the motion as to this ground, and I reaffirm my ruling at the hearing denying the motion in its entirety. (Tr. 19.)

## 2. The applicable work rules

H. K. Ferguson Co. is the general contractor for the expansion project on the Anheuser-Busch brewery in Houston, Texas, and CER is a subcontractor performing site preparation work (Tr. 126, 430). Robert Kaiser, president of CER, testified that CER is signatory to a certain collective-bargaining agreement (G.C. Exh. 2) with the Houston Chapter of the Associated General Contractors of America, Inc. (AGC) and the Construction Employers' Association of Texas (CEA). He also testified that CER is signatory to a certain project Agreement (R. Exh. 2) covering construction of the expansion (Tr. 429).

The AGC contract contains many work rules typical in such contracts, such as a ratio of operators to foremen, the requirement of a shelter in which the operators can change clothes, repairs to be done by operators (rather than foremen), and the like. However, it can be argued that the "Project Agreement" (PA) is the controlling agreement for the expansion project, and that substantially all the usual work rules contained in the AGC contract are not applicable under the general provisions of the PA.

A conference was held at the jobsite on June 18, 1982, between Charles D. "Junior" Taylor, CER's vice president, Operator General Foreman Curtis Roberts, Ty Bloodworth, president of Local 450, and Mike Tolopka, job steward for Local 450.<sup>5</sup> From the credited testimony

<sup>3</sup> My first appointment was with another agency, and in July 1980 I was appointed as an administrative law judge with the Board.

<sup>4</sup> *Operating Engineers Local 450 (Houston Chapter, AGC)*, Case 23-CB-2557-1-2. My decision issued in that case on December 10, 1982, as JD-(ATL)-104-82.

<sup>5</sup> Of those in attendance at the meeting, only Tolopka testified. Because of his convincing demeanor, I credit Tolopka.

of Mike Tolopka, the job steward for Local 450, I find that at the conference Vice President Taylor agreed with Bloodworth that CER would work under that agreement (Tr. 64, 70).

The relevance of whether CER adopted the work rules of the AGC contract is that it is the AGC contract, not the PA, which provides the contractual basis on which the General Counsel relies in arguing that Vernagallo was terminated in violation of Section 8(a)(1) of the Act. In view of the foregoing finding, I need not reach the issue of whether a mistaken belief by Vernagallo that the work rules of the AGC contract applied to the job would serve to protect his effort to enforce such work rules under *Interboro Contractors*, 157 NLRB 1295 (1966), *enfd.* 388 F.2d 495 (2d Cir. 1967).

## 3. Vernagallo seeks to enforce the work rules

Based on the uncontradicted and credible testimony of the General Counsel's witness, it is clear that Charging Party Vernagallo vigorously sought to enforce union work rules in an effort to have General Foreman Curtis Roberts cease his practice of frequently performing craft work, and also in order to protect such craft work from the laborers. Vernagallo's enforcement efforts generally were addressed to Mike Tolopka, the job steward, but on one occasion, June 11, 1982, he and Tolopka visited with Local 450's president, Ty Bloodworth, and registered their complaints in person.<sup>6</sup>

Vernagallo did not serve on the job in any official union capacity, such as alternate steward, but acted, as Tolopka testified, as a member of Local 450 (Tr. 113). Vernagallo testified, "When it comes to protecting our work, every man on the job is a steward." (Tr. 400, 418.) Although Vernagallo, prior to his termination, never protested by telephone to Bloodworth or any other official at Local 450 concerning Roberts, it is clear that Roberts viewed Vernagallo as a principal source of agitation in that respect on the project.

## B. Threats by General Foreman Curtis Roberts

### 1. Complaint paragraphs 9(a) and (b)

Complaint paragraph 9(a) alleges that on or about June 17 Roberts "informed assembled employees that he had learned one of them had been calling officials at the hall of the Union and complaining about conditions on the job."

Complaint paragraph 9(b) alleges that on or about June 17 Roberts "informed assembled employees that he

While naming witnesses I perhaps should note that the General Counsel called Tolopka; Mike Shuttlesworth, an oiler-apprentice; Robert R. Culver, an operator from Indianapolis, Indiana, working as a traveler out of Local 450; and operator Frank Vernagallo, the Charging Party. CER called Robert Kaiser, its president, who gave some brief testimony. The Charging Party had no witnesses. Curtis Roberts did not testify. Kaiser testified that Roberts had been terminated and is hostile to both CER and the general contractor, H. K. Ferguson Co. (Tr. 432, 438-439). There is some debate in the record concerning the nature of Roberts' departure, but I need not address that subject.

<sup>6</sup> During the 2-1/2 weeks Tolopka was on the job, he telephoned Bloodworth several times and visited the latter at his home three times to protest violations by General Foreman Roberts (Tr. 50).

would terminate the individual who he ascertained was engaging in the conduct referred to" in paragraph 9(a).

The credible and uncontradicted testimony of oiler Mike Shuttlesworth (Tr. 138, 191-193) and Operator Robert R. Culver (Tr. 239-240) established that Roberts made the statements described in the foregoing allegations. Indeed, Respondent's initial answer, submitted on CER's letterhead by President Kasier, and dated October 21, 1982, admits complaint paragraph 9(a) and, in denying paragraph 9(b) states:

Deny—Curtis Roberts stated that the correct response to any complaint was to notify the job steward who would then bring the complaint to the foreman and that to violate this accepted procedure and call the union hall personally could be reason for termination.

The answer was followed by a first amended answer and a second amended answer. In these pleadings Respondent admitted most of paragraph 9(a), although denying the reference to complaints about job conditions, and denied paragraph 9(b). I denied Respondent's trial motion that the first two answers, as superseded pleadings, be excluded from the formal exhibit folder (Tr. 6). It is clear that a superseded pleading may contain an admission. Respondent's original answer by Kaiser certainly falls into the admission category.

Although admitting that Roberts was a statutory supervisor, CER denies that he was an agent. Citing cases such as *Robertshaw Controls Co.*, 263 NLRB 958 (1982), and *Montgomery Ward & Co.*, 115 NLRB 645 (1956), CER argues on brief that the foregoing conduct, even if established, is not violative of Section 8(a)(1) because Roberts, as a member of the bargaining unit, owed his allegiance to Local 450. Respondent contends that there is no evidence it authorized, encouraged, or ratified Roberts' conduct, or acted in such a manner that would lead employees reasonably to believe that Roberts was acting for and on behalf of management. Moreover, CER argues:

It is difficult to imagine why the Company would even care whether or not employees were calling the Union hall complaining about Curtis Roberts. The Company received no complaints about Roberts, and Roberts' reputation at the Union hall had no impact on the Company.

Finally, CER argues that the whole case is nothing more than the outgrowth of an intraunion power struggle involving dissident factions disputing against those holding office and power.

Regardless of whether President Kaiser was personally aware of all events, it is clear that Roberts' conduct of bypassing union work rules and personally performing occasional craft work was in keeping with the latitude available to him under the project agreement. His actions in that regard generally were calculated to advance CER's interests at the jobsite. When Local 450 informed Roberts that complaints were being received about his conduct, his reaction was but an extension of his conduct to "expedite" the work and interests of CER at the job-

site. The issue can hardly be considered an intraunion matter.

Under all the circumstances, I find that CER violated Section 8(a)(1) of the Act as alleged in complaint paragraphs 9(a) and 9(b).

## 2. Complaint paragraphs 9(c) and (d)

Complaint paragraph 9(c) alleges that on or about June 18 Roberts "informed Union Steward Mike Tolopka that he was going to fire employees Vernagallo unless he kept his mouth shut about 'union business.'"

Complaint paragraph 9(d) alleges that on or about June 19 Roberts "informed Steward Mike Tolopka that he was going to discharge Vernagallo because he was calling officials of the Union pertaining to working conditions on the job."

Respondent denies both allegations.

The testimony of Steward Tolopka is uncontradicted that on June 16 Roberts told Tolopka that if Vernagallo did not quit calling the hall Roberts was going to run Vernagallo off the job (Tr. 82, 110). Tolopka told Roberts that Vernagallo had not called the hall. Roberts replied that if he learned who had he would get rid of him.

In a meeting between Tolopka and Roberts, held at a truckstop after work on June 18<sup>7</sup> Roberts stated that, if Vernagallo did not stop causing all the trouble, and calling the hall, "We are going to have to get rid of him." (Tr. 18.) Roberts said that Vernagallo was doing his job, but would not keep his mouth shut (Tr. 81, 114).

Although Vernagallo never telephoned the hall, he did accompany Tolopka on a visit to Bloodworth's home to protest job conditions, and on one occasion, at Tolopka's suggestion, he did complain directly to Roberts about Vice President Taylor's having him leave what he was doing in order to perform some work in another area of the project (Tr. 114-115, 285-286). Vernagallo credibly testified that Roberts agreed that Superintendent Taylor<sup>8</sup> should not have gone directly to operator Vernagallo and that Roberts would get it stopped (Tr. 286).

I find that Roberts believed that Vernagallo was making trouble on the job by calling the union hall to complain that working conditions on the job did not comply with union rules embodied in the AGC contract, and that Roberts threatened to discharge Vernagallo if the operator did not cease his protected conduct. I therefore find that CER violated Section 8(a)(1) of the Act as alleged.<sup>9</sup>

## C. Vernagallo's June 24, 1982 Termination

### 1. The events of June 23, 1982

As earlier noted, the General Counsel alleges that Respondent discharged Vernagallo on June 24, 1982, whereas CER contends that Vernagallo quit.

<sup>7</sup> Tolopka arranged the meeting, at Bloodworth's suggestion, to see if he could obtain the working cooperation of Roberts.

<sup>8</sup> Taylor is referred to in the record under the title of vice president and also superintendent.

<sup>9</sup> The minor variation in dates between those alleged and those described in the testimony is material.

On June 23 Vernagallo was assigned to operate some water pumps on the project. During the course of the morning Vernagallo discovered laborers either operating or attempting to operate certain of the water pumps. Although the Charging Party advised the laborers that the work of operating the water pumps belonged to the operating engineers, the problems persisted. Around 9 a.m. Roberts replaced Vernagallo with operator Earl Rogers on the pumps and assigned the Charging Party to operate a pulverizer. Before departing on his new assignment, Vernagallo told Roberts about the problems he had been experiencing with the laborers and for Rogers to be on watch.

Later that day Vernagallo observed a laborer, whom Charging Party had confronted earlier regarding operation of the water pump, secure some gasoline. Vernagallo alerted oiler Mike Shuttlesworth to the situation and told him not to let the laborer start the water pump but to go over and start it himself (Tr. 310, 399).<sup>10</sup> A few minutes later when Vernagallo was making a pass through the area on his pulverizer, the Charging Party observed the laborer starting the water pump. Vernagallo dismounted, walked over to Shuttlesworth, and inquired why the oiler had not gone over and started the water pump. Shuttlesworth responded that Roberts said operator Ben Milam was assigned to the pumps, and that Shuttlesworth was just following orders (Tr. 137, 311, 400). Shuttlesworth pointed out that the operator was in the area sitting against a fence sleeping and that Vernagallo could go awaken him (Tr. 138, 190). Vernagallo went over and confronted the laborer who told him to take his complaint to the laborers foreman.

Vernagallo then went and protested to Dillard Knapp, the operators' acting steward. After explaining the problem to Knapp, Vernagallo told him to "Get them goddam laborers off my equipment." At that point General Foreman Curtis Roberts and Foreman Curtis Berry drove up. Vernagallo walked over to Roberts and said (Tr. 313-314):

Get them goddam niggers off of my water pump. The water pumps belong to the operating engineers, and I am not going to stay out here and watch some other craft run them.

Roberts told Vernagallo to calm down, and that he would take care of it. He asked what the problem was and Vernagallo explained the entire matter to Roberts. Roberts said he would take care of it and asked Vernagallo to make one more pass with the pulverizer. It was about 20 minutes before quitting time. The Charging Party said he would be glad to, and as he started on the pass Roberts and Berry drove off toward the water pump.

Earlier that day, apparently after Vernagallo asked Shuttlesworth why he had not started the pump, Shuttlesworth, exasperated at being caught between what he considered orders by Roberts and Taylor to violate

union work rules, and pressure from Tolopka and Vernagallo to comply with union rules, asked Roberts for his check and explained why he wanted it and why he could not work under such conditions (Tr. 194).

## 2. CER gives Vernagallo a "Hobson's choice"

When Vernagallo arrived for work the morning of June 24, 1982, Roberts told him to come into the office for a meeting. Inside they went to Superintendent Taylor's office. Present were Taylor, Roberts, and Vernagallo. After some hesitation between Roberts and Taylor, Roberts said (Tr. 316):

We have got two things we can do here; we have got two choices. Either you can stay on your machine and quit jumping on me and these other operators out here about what goes on on this job, or we can terminate you now.

Vernagallo replied in three words: "Get my money."

After waiting for the secretary to prepare his paychecks, and obtaining them, Vernagallo left. On leaving he saw Tolopka and, in response to the steward's inquiry, told him what had happened.<sup>11</sup> Moments later Roberts came out and told Vernagallo, "Frankie, I am sorry it had to end like this." Vernagallo than told him he had the first part right, that Roberts was indeed sorry. Roberts responded that if he felt that way he would not forget it, and Vernagallo asked if Roberts thought the Charging Party was going to forget this matter (Tr. 321-322).<sup>12</sup>

A substantial portion of the hearing was devoted to evidence about subsequent events, particularly internal union charges Vernagallo filed against Roberts and the ensuing internal union events. Such evidence was offered and received for the purpose of showing an interpretation of events by Vernagallo consistent with the position that he was fired on June 24. Except as to one matter, I see no need to describe such evidence here, for a decision can be made without reliance on those events.

The exception referred to is the interpretation Roberts gave to Vernagallo's separation on June 24. Vernagallo testified that after leaving the jobsite on June 24 he proceeded to the Local 450 hall where he spoke with Bloodworth, described what had happened, and said he wanted to file internal union charges against Roberts and Taylor. In this conversation Bloodworth stated that Roberts had just called and reported that Vernagallo had quit. The Charging Party denied quitting, saying he had been fired (Tr. 319-320).

Oiler Shuttlesworth credibly testified that on Friday June 25 Roberts boasted to him that he had gotten rid of Vernagallo; that Vernagallo was making too much trouble on the job; and that he had gotten rid of him so that the job would run smooth; and that he had run off the troublemaker (Tr. 140-141). After the investigating

<sup>10</sup> Although not expressly explained in the record, it appears that Vernagallo addressed Shuttlesworth because the latter was repairing the starter of a steel-wheeled roller which apparently was situated near the water pump.

<sup>11</sup> Tolopka had come to pick up his check. The night before he informed Roberts that he was tired of all the squabbling and had decided to accept a job elsewhere (Tr. 76).

<sup>12</sup> The General Counsel argues that Roberts' expression of "sorry" supports the version that CER had just discharged Vernagallo.

Board agent took statements from Roberts and Taylor during the investigation of the charge in this case, Roberts began telling employees that Vernagallo had quit (Tr. 141-142, 145, 222; Shuttlesworth).

### 3. Analysis and conclusions

As Vernagallo was not fired outright, but given a choice, it is clear that the issue is whether he was constructively discharged by the terms of the choice. The elements of a constructive discharge are set forth in *Crystal Princeton Refining*, 222 NLRB 1068 (1967). First, burdens were imposed on the employee that caused, and were intended to cause, a change in his working conditions so difficult or unpleasant as to force him to resign, and second, those burdens were imposed because of the employee's union or protected concerted activities.

CER contends that resolution of this case is controlled by *Valley West Welding Co.*, 265 NLRB 1597 (1982). The employee there, Charles Doyle Smith, was not allowed to accompany a fellow employee, Nelson Wright, to a disciplinary interview, and was told to return to work or be fired. The employee quit. Dismissing the complaint, the Board stated (id. at 1599, footnotes omitted):

Even though Wright had a right to have Smith present at his disciplinary interview, the Board has long held that an employee who quits in protest against unfair labor practices is not deemed to have been constructively discharged. Further, representation rights accrue[d] to [Wright], not to [Smith]. . . . Thus, Smith cannot be said to have resigned over any illegal action taken by his employer against him.

CER's reliance on *Valley West* is misplaced, for that case is inapposite. Smith was not being deprived of any statutory right there. On the other hand, Vernagallo was given a Hobson's choice of relinquishing his Section 7 rights regarding enforcement of contractual work rules or of being discharged.<sup>13</sup> CER did not repudiate the contract, and Vernagallo could have filed a grievance and continued working. "Had he done so, there would have been no change in his working conditions 'so difficult or unpleasant' that he would have been forced to resign." (CER's brief at 15.) That argument, however, begs the question.

As early as *Atlas Mills*, 3 NLRB 10, 17 (1937), the Board held that to condition employment on the abandonment by employees of rights guaranteed by the Act is equivalent to discharging them outright for such activity. In the recent case of *J. J. Security*, 252 NLRB 1290, 1294 (1980), the Board adopted Judge Leonard M. Wagman's analysis that the employer violated the Act by requiring employees to choose between resigning or surrendering

<sup>13</sup> The option of working without union representation or of resigning has been described as an illegal "Hobson's choice." *Remodeling By Oltmanns*, 263 NLRB 1152, 1162 (1982). As discussed by Judge Burton Litvack there, the Board has held in other cases that a choice between going "open shop" or quitting is an unlawful condition. Even the choice of accepting unilateral changes or quitting is an unlawful condition. *Electrical Machinery Co.*, 243 NLRB 239 (1979).

their statutory rights to concertedly seek a wage increase.

Citing cases such as *Colonial Stores*, 248 NLRB 1198 (1980), for the proposition that it is unlawful to discharge an employee for attempting to enforce the terms of a collective-bargaining agreement, and cases such as *Carlson Corp.*, 195 NLRB 218, 221 (1971), for the proposition that it is unlawful to discharge an employee for protesting that another craft was performing the duties of his craft, the General Counsel contends that Vernagallo's discharge was unlawful.

Roberts told Vernagallo that if he remained he must "stay on his machine" and "quit jumping on me and these other operators" concerning conditions on the job. This is the equivalent of telling Vernagallo that he could remain only if he ceased exercising his statutory right to seek enforcement of the contract. That is an illegal condition. The credited and uncontradicted evidence is that Roberts never asserted that Vernagallo was not doing a good job in his work. It is just that Roberts was upset that Vernagallo would "not keep his mouth shut" when he observed violations of the contractual work rules. I find that this is the very reason CER gave Vernagallo a Hobson's choice on June 24, 1982, and that such a condition to continued employment violated Section 8(a)(1) of the Act as alleged. I further find that the events of June 23 merely solidified Roberts' suspicions all along that Vernagallo was the "troublemaker" on the job, and that Vernagallo's public "jumping" on Roberts on June 23, in seeking to protect craft work, was the final straw that persuaded Roberts that he must carry out his earlier threats to get rid of Vernagallo. I find that CER gave Vernagallo the option it did on the assumption that the Charging Party would reject it and leave. Respondent's assumption was correct. Accordingly, I find that Respondent constructively discharged Vernagallo.

### CONCLUSIONS OF LAW

1. CER, Inc. is an employer within the meaning of Section 2(2), (6), and (7) of the Act.
2. Local 450 is a labor organization within the meaning of Section 2(5) of the Act.
3. By the June 17, 1982 threat of General Foreman Curtis Roberts to discharge the employee who was calling Local 450 to complain about job conditions, and by the June 16 and 18, 1982 threats by Roberts to discharge Frank L. Vernagallo because of his union activities relating to conditions on the job, CER, Inc. violated Section 8(a)(1) of the Act.
4. By causing Frank L. Vernagallo to resign on June 24, 1982, when given the choice of ceasing his union activities or being terminated, CER constructively discharged Vernagallo in violation of Section 8(a)(1) of the Act.
5. The aforesaid threats and discharge constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

### THE REMEDY

In view of the foregoing finding I shall recommend that Respondent be ordered to cease and desist its illegal

conduct, to post an appropriate notice, to offer immediately and full reinstatement to Frank L. Vernagallo, and to make him whole with interest. Backpay shall be computed in the manner established by the Board in *F. W. Woolworth Co.*, 90 NLRB 289 (1959), with interest calculated in the manner prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977). See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962). Expunction of any reference to the discharge from personnel records shall be ordered in accordance with *Sterling Sugar*, 261 NLRB 472 (1982).

Respecting the reinstatement of Vernagallo, the parties stipulated that should CER, Inc. ultimately be faced with an order to reinstate Vernagallo, it would be entitled to raise, at the compliance stage, a certain matter regarding the shooting of another member of Local 450, in relation to Vernagallo's suitability for reinstatement (Tr. 404-407). It is therefore understood that reinstatement may hinge on the outcome of a compliance proceeding regarding the matter reserved by stipulation. In that connection, should Vernagallo waive the offer of reinstatement, and should Respondent then be willing to comply, paragraph 2(a), of the recommended Order regarding offering reinstatement shall not apply and the corresponding clause of the penultimate paragraph of the notice to employees shall be deleted, and the following sentence shall be added at the end of the paragraph: "Frank L. Vernagallo has voluntarily waived any offer of reinstatement to his former job."

On the foregoing findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>14</sup>

#### ORDER

The Respondent CER, Inc., Houston, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with discharge if they complain to their union that working conditions on the job violate contractual work standards or do not otherwise keep quiet about such matters.

(b) Constructively discharging employees because they attempt to enforce the provisions of a collective-bargaining agreement covering them on the jobsite.

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

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

(a) Offer Frank L. Vernagallo immediate and full reinstatement to his former position of employment or, if such position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights or privileges previously enjoyed, and make him whole, with interest, for any loss of earnings suffered by reason of his termination, in the manner set forth above in the section of this Decision entitled "The Remedy."

<sup>14</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Expunge from its files any reference to the June 24, 1982 constructive discharge of Frank L. Vernagallo, and notify him in writing that this has been done and that evidence of such unlawful discharge will not be used as a basis for future personnel action against him.

(c) Preserve and, on 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 amount of backpay due under the terms of this Order.

(d) Post at its Houston, Texas office at the Anheuser-Busch brewery expansion jobsite, or if Respondent is no longer present at such jobsite, at its principal office and its principal Houston, Texas jobsite signed and dated copies of the attached notice marked "Appendix."<sup>15</sup> Copies of notice, on forms provided by the Regional Director for Region 23, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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

<sup>15</sup> 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."

#### APPENDIX

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

After a hearing at which all sides have had the opportunity to present their evidence and cross-examine witnesses, the National Labor Relations Board has found that we violated the National Labor Relations Act, and the Board has ordered us to post this notice and to comply with its provisions.

The National Labor Relations Act gives you, as employees, the right:

- To engage in self-organization
- To form, join, or assist any union
- To bargain collectively through representatives of your own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

WE WILL NOT threaten you with discharge for complaining to your union that working conditions on the job violate contractual work standards or for not otherwise keeping quiet about such matters.

WE WILL NOT constructively discharge you because you attempt to enforce the provisions of a collective-bargaining contract covering you on the jobsite.

WE WILL NOT in any like or related manner restrain or coerce you with respect to your rights guaranteed by Section 7 of the National Labor Relations Act.

WE WILL offer Frank L. Vernagallo immediate and full reinstatement to his former position of employment or, if such job no longer exists, to a substantially equiva-

lent job, without prejudice to his seniority or other rights and privileges previously enjoyed, and WE WILL make Frank L. Vernagallo whole, with interest, for any loss of earnings he may have suffered as a result of our constructively discharging him on June 24, 1982.

WE WILL expunge from our files any reference to the constructive discharge of Frank L. Vernagallo, and WE WILL notify him in writing that this has been done and that evidence of this unlawful discharge will not be used as a basis for future personnel action against him.

CER, INC.