

**Local 456, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO (Louis Petrillo Corp.) and Howard Baum.** Case 2-CB-12755

January 4, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS  
CRACRAFT AND OVIATT

On July 27, 1990, Administrative Law Judge Steven B. Fish issued the attached decision. The Respondent filed exceptions and a supporting brief.

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

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,<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, Local 456, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, its officers, agents, and representatives, 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.

*Randy Gire, Esq.* and *Larry Singer, Esq.*, for General Counsel.

*Wendell Y. Shepherd, Esq. (Roy Barnes, P.C.)*, of New York, New York, for Respondent.

DECISION

STATEMENT OF THE CASE

STEVEN B. FISH, Administrative Law Judge. Pursuant to the charges filed by Howard Baum Jr. in Case 2-CB-12755, the Regional Director for Region 2, on April 27, 1989,<sup>1</sup> issued a complaint and notice of hearing, alleging in substance that Local 456, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO (Respondent) violated Section 8(b)(1)(A) and (2) of the Act, by threatening employees with bodily injury because they made remarks about a representative of Respondent, and by causing and attempting to cause Louis Petrillo Corp. (the Employer) to remove Baum from his regular duties and to lay him off because of the above-described re-

<sup>1</sup>All dates are in 1989 unless otherwise indicated.

marks and for reasons other than an employee's failure to tender dues and initiation fees.

The trial with respect to the issues raised by the complaint was heard before me in New York, New York, on October 16 and 17. Upon the entire record, including my observation of the demeanor of the witnesses, and after consideration of the briefs filed by General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Louis Petrillo Corp. (the Employer) is a New York corporation with an office and place of business in Mount Vernon, New York, where it is engaged in the business of supplying concrete and related products. During the past year, the Employer purchased and received products, goods, and materials valued in excess of \$50,000 directly from companies located outside the State of New York. It is admitted and I so find that the Employer is now and has been at all times material an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

Respondent also admits, and I find, that it is a labor organization within the meaning of Section 2(5) of the Act.

III. FACTS

A. *Background*

The Employer is engaged in the production of ready-mix concrete and performs road construction for public utilities. It employs from 10 to 35 employees depending on the season. The Employer is a party to several collective-bargaining agreements with different labor organizations. Its contract with Respondent covers chauffeurs and with Local 137 Operating Engineers the contract covers employees who operate the backhoe and frontend loaders.

Baum is a heavy equipment operator who has been employed by Petrillo operating backhoes, loaders, cranes, and other heavy equipment for 10-12 years. Baum has been represented by Local 137 and member of that bargaining unit for this period of time.

Prior to the events in February 1989, which gave rise to the instant problem between Baum and Respondent, there has been a history of bad blood between Baum and the Teamsters and Teamsters representatives. Thus in 1987, Shop Steward Noberto, as well as other employees of Petrillo, asked Baum to sign a petition protesting the U.S. Government's attempt to intervene in the affairs of the Teamsters. Baum refused to sign. Noberto threatened Baum that unless he signed the petition Noberto would call Respondent and Baum would be off the job.<sup>2</sup>

Baum has had a number of arguments with Noberto over the years about various matters and, on October 17, 1987, consulted a lawyer about alleged "Teamsters Union harass-

<sup>2</sup>Although I have credited Baum that Noberto made this remark to him in 1987, I do not credit Baum's further testimony that the morning after the conversation he was laid off for 3 weeks. I note in this connection that Petrillo's payroll records do not support Baum's testimony in this regard. I also do not credit Baum's further testimony that Noberto told him, "we got to get all you blacks off the job."

ment.” Baum would frequently engage in name calling and “bad mouthing” Teamsters employees and the Teamsters in general, calling them “faggots,” “queers,” and “gays” from time to time. On one occasion, Baum threatened to beat up Noberto, but Noberto backed away, so there was no physical confrontation between them.

#### B. *The Events of February 23 and its Aftermath*

On Thursday, February 23, 1989, Baum was working on a jobsite in Mount Vernon with three laborers and one driver (Eddie Clark), supervised by Charles Petrillo. Joe Russo, another Teamsters driver, and assistant shop steward, was making a delivery to this jobsite, when Clark informed him that Baum “wants to see you.” Baum told Russo that he had rented porno movies in which truckers (Teamsters) and bikers had appeared. Baum went on to say that Teamsters are nothing but a bunch of “homos” and “queers,” and that in the film, Eddie Doyle (Respondents’ business manager) appeared “humping some guy over the table,” and that Baum had seen Doyle’s name on the credits. Russo replied that, “I can’t listen to this,” and walked away. Baum began to follow Russo, and Russo asked Baum if he knew Eddie Doyle? Baum responded that he did not know Doyle, but was not worried about him. Baum added, “I puts my foot up his ass.” Russo then got into this truck and drove away.

Russo then drove back to the yard and told Shop Steward Noberto, and a few of the other employees what Baum had said about the Teamsters and Eddie Doyle. Noberto stated, “that son of bitch can’t talk like that. He’s calling us queers.”

Later, on that same afternoon, Baum was assigned to work at Petrillo’s yard. Teamsters employee Richard DeVito (a nephew of Eddie Doyle) was operating a forklift when it became stuck on one of the pallets close to a fire which was burning. Thus, he needed the loader to move the forklift. However, the loader was Operating Engineers equipment, so DeVito looked for Baum to ask him to operate the loader but DeVito was unable to locate him. Since DeVito viewed the matter to be an emergency situation, he operated the loader himself and moved the forklift out of the way. Baum arrived on the scene while DeVito was still on the loader and Baum asked him to get off, telling him that he was not allowed to operate that piece of equipment. DeVito replied, by asking who was Baum to tell him to get off the loader. Baum responded that it is a Local 137 piece of equipment and not a Teamsters piece of equipment. DeVito insisted that Baum does not tell him what to do, and added “you are the one that said Eddie Doyle makes porno movies.”

Heated words were then exchanged between the two, including a threat by Baum that if DeVito ever went near the loader again, Baum would break his back. During the course of the argument, Baum grabbed DeVito by the shirt and the two of them had to be separated by Adam Santos an operating engineer.

Later that day, Santos told DeVito that Baum had already called Danny Falcone, business agent for Local 137, and was trying to get DeVito “hung on this.” DeVito then called his business agent, Joe Raguso, and told him that he had an altercation with an operating engineer about his using the loader. Raguso told DeVito that he would be at the yard the next morning. Raguso called Falcone and informed him that there had been a jurisdictional dispute at Petrillo, and asked him

to be there in the morning to straighten the matter out. Falcone agreed.

The next day, Friday, February 24, Raguso arrived at the yard at about 10 a.m. However, he missed Falcone, who had apparently been there and left already. He spoke to DeVito, who explained the fact that he used the loader only because it was an emergency. DeVito added that Baum had also accused Eddie Doyle of appearing in porno films and made derogatory remarks about Teamsters in general. Raguso told DeVito that he would straighten out the problem with the Local 137 business agent and with Eddie Doyle.

As Raguso was leaving, Charles Petrillo asked him what was going on. Raguso responded that some remarks had been made by Baum. Petrillo told Raguso that he did not want the matter to get out of hand and said, “Let’s settle it now.” Raguso replied, “It’s out of my hands and let’s see what happens.”

Towards the end of the day on Friday evening, the Teamsters employees gathered in the Teamsters trailer. Noberto, Russo, DeVito, Clark, and two or three other employees were present. Noberto did most of the talking, but some of the other employees such as Russo and DeVito spoke as well. They discussed their dissatisfaction with Baum’s conduct, particularly his comments about Doyle and porno movies, plus his physical altercation with DeVito. Noberto suggested that the employees refuse to work with Baum. The Teamsters present agreed with Noberto’s proposal, and they told Noberto that they would stand behind him in refusing to work with Baum.

On Monday morning, February 27, Noberto, accompanied by Russo, approached Charles and Louis Petrillo outside the office. Noberto informed the Petrillos that the men would not unload the trucks if Baum was working. Charles Petrillo asked, “Is this a strike?” Noberto replied, “No, call it what you want.” Louis Petrillo asked how this could happen? Noberto responded that Baum was “bad mouthing” everybody and used physical force on his drivers. Noberto added, “Those are my orders to you.” Louis Petrillo told Noberto that he was going into the office to find out.

Charles Petrillo put in a call to Local 137 and spoke to Charles Matero. Petrillo informed Matero of the situation and Matero promised to get back to him. Louis Petrillo telephoned Respondent and spoke with Bernard Doyle, vice president and business agent of Respondent, as well as the brother of Eddie Doyle. Petrillo told Doyle that he had been informed by Noberto that the men would not work with Howard Baum. Petrillo continued that he had a problem at his shop and he would like to set up a meeting to discuss it. Doyle replied that he knew that Petrillo had a problem and that the reason for the problem was that Baum had made some disparaging remarks about his union.<sup>3</sup> Doyle added that he did not have time to meet with Petrillo on that day.

When Baum reported to work that morning, he was met by the Petrillos. They told him that they had just gotten the word that the Teamsters would not pull the truck underneath the machine for him to work. They further told him that the Union said that Baum had made some remarks about Eddie Doyle. Baum was told to go to the maintenance shop and

<sup>3</sup>Doyle had previously spoken to Raguso, who had informed him that the men at Petrillo were upset because Baum had mentioned to them that Eddie Doyle was involved with pornographic movies.

stand by, and the Petrillos would handle the loading of the trucks.

Baum was placed on standby status for the remainder of the week. He was paid, but performed no work for that period of time. Louis Petrillo operated the crane for that week, with the exception of 1 day, when a replacement was sent down from Local 137 when the workload became too much for Petrillo to handle.

Returning to February 27, as Baum was walking toward his car, he was approached by Russo. Russo said to Baum that "Eddie Doyle is up at the Union hall waiting for you to come up to kick his ass." Baum then went over to Charles Petrillo who was standing nearby. Baum asked Petrillo, "Did you hear that?" Petrillo instructed Baum to forget about it, that they were just trying to intimidate Baum, and told Baum to go to the other yard and stand by.

Baum then called his union hall and asked for a delegate, but was unable to reach anyone. Baum walked over to the trailer, where both the engineers and the teamsters usually sit when waiting for work. As he entered, Tony Raguso, a Teamsters employee, told Baum that if he entered the trailer, the yard would be shut down. Baum asked "Do you mean all Engineers or just me?" Raguso responded, "just you." Baum left the trailer and reported this to Charles Petrillo. Petrillo instructed Baum to go to the mechanics' garage and wait for his delegate there. His delegate, Danny Falcone, arrived at or about 9 a.m. and spoke to Baum. Baum related the developments of that day, and Falcone indicated that he had been informed that the Teamsters would not load under Baum because of something he had said about Eddie Doyle. Falcone told Baum that Charlie Matero of Local 137 was trying to get the problem straightened out.

Meanwhile, at or about 4 p.m. on February 27, Bernard Doyle called his brother Eddie who was at home. Bernard told Eddie that Louis Petrillo was excited because the men were refusing to work with Baum, because Baum had said that Eddie was involved in pornographic movies. Eddie Doyle laughed when he heard about the alleged "porno" remarks, and told Bernard that he would handle the problem.

At or about 5 p.m. Eddie Doyle called Noberto at his home. Doyle told Noberto that what he was doing was wrong, and that the men must work with Baum. Noberto tried to explain his side of the story and why the men did not want to work with Baum. Doyle cut Noberto off, and said that Noberto had no right to call a work stoppage, and that Doyle makes these decisions, not Noberto. Doyle ordered Noberto to tell the employees that Doyle's orders were that the men would have to work with Baum, whether they liked it or not. He also told Noberto that he would call a meeting with the men the following week when he returned from Arizona and would tell the employees personally. Doyle also instructed Noberto to notify the Petrillos that the men would work with Baum. While Noberto testified that he did not "agree with Doyle a hundred percent," he agreed to comply with Doyle's instructions.

The above description of the events of February 23, 24, and 27 is based on a compilation of the credited portions of the testimony of Baum, Noberto, DeVito, the Petrillos, Raguso, Russo, and the Doyles. In most instances, I have credited the testimony of the Petrillos, where it conflicts with the testimony of other witnesses, since they are the only "neutral" parties to this dispute, and I perceived them to be

reluctant witnesses, who were trying as best they could to truthfully recount what happened. The same cannot always be said for some of the other witnesses, and my findings above comprise what I believe to be the sequence of events as they occurred.

The next day, Tuesday, February 28, between 7 and 8 a.m., Noberto informed the men that Eddie Doyle had called him at home the night before and instructed him that no matter how they feel about Baum, they have to work with him. The men reluctantly agreed.

Noberto testified further that he also spoke to Louis Petrillo that day at 7:30 a.m. and told Petrillo about his call from Eddie Doyle the previous evening. He allegedly informed Petrillo that Doyle "chewed" Noberto out and told him that men must work with Baum. Petrillo, according to Noberto, made no comment. On direct testimony, Noberto asserted that he told Petrillo that "business will go on as usual." However, on cross-examination, he admitted that he never used the term "business as usual" in his alleged conversation with Petrillo, but he meant that the workers went to work as usual on that day.

Louis Petrillo gave no testimony about such a conversation with Noberto, and was not asked about it on cross-examination by Respondent. However, the testimony of both Petrillos that the matter was not straightened out at the time, and their actions with respect to Baum leads me to conclude, which I do, that Noberto, contrary to the instructions of Doyle, did not inform Petrillo about his conversation with Doyle, nor that the men were ready to work with Baum. Thus, Charles Petrillo credibly testified that during this period of time, Charles Matero, the Local 137 president, had gotten back to him and told Petrillo that Matero had been unable to resolve the situation with the Teamsters. Additionally, Louis Petrillo had informed Charles that in his conversations with Teamsters officials there was still no resolution of the matter. More importantly, the actions of the Petrillos of continuing to retain Baum on standby for the entire week, paying him for doing nothing, and on one of the days, paying another engineer to perform the crane work that Baum had been doing, belies any contention that the matter had been resolved.

Additionally, I was less than impressed with Noberto's testimonial demeanor, and note that he was contradicted by Assistant Steward Russo on the question of who at the meeting of employees had suggested refusing to work with Baum. Therefore, I conclude that Noberto did not inform Petrillo on Tuesday, February 28, that the men would now agree to work with Baum.

On Tuesday morning, February 28, Eddie Doyle testified to a telephone conversation that he had with Andrew Peterson, Petrillo's labor attorney. According to Doyle, Peterson called him while he was in Arizona. Peterson told Doyle that he had heard about the problem on Monday and kiddingly told Doyle that he thought he would have a chance to "fire all of your people." Doyle indicated to Peterson that he had taken care of the problem and that he was going to have a meeting to make sure it does not happen again. Peterson added that he knew that Doyle had taken care of the matter, and told Doyle not to rush home because Peterson understood that Baum was going on vacation next week and would not back for a couple of weeks.

The following week when Doyle returned from vacation, he met with the Teamsters-represented employees at the hall.

He explained to the employees present, which included Noberto and Russo, that there was a grievance procedure under the contract, and that employees cannot refuse to work with someone because they do not like someone. He added that he was not going to have a lawsuit against the Union because of personality problems and "somebody gets a hot head and they decide they're not going to go to work."

Baum remained on standby, as noted, for the rest of the week. On Friday, March 3, Baum was told by Louis Petrillo that Joe Murray, the regular crane operator for whom Baum was filling in, was returning from vacation on Monday March 6. Petrillo added that he would be taking his vacation for the next 2 weeks and would shut down the outside jobs.<sup>4</sup> Therefore, he told Baum that there would be no outside jobs until Con Edison work starts later in the season, so Baum "might as well sign up for unemployment until the situation with the Teamsters is straightened out."

Baum did not work and he was not paid for the next 2 weeks (March 6 to 19). During this period, Baum went to the yard to pick up his paycheck. At that time Baum asked Louis Petrillo if anything had been resolved. Petrillo replied, "not yet."

On March 20, Baum returned to work at the yard. Charles Petrillo, who had returned from his vacation, told Baum that the situation with the Teamsters still was not completely resolved, so he should work in the yard under the hopper, but to take the material in the bucket and carry it to the back. Three days later, Petrillo told Baum that the problem was resolved and he could resume his normal duties and load the material on the truck.

With respect to the decision to lay off Baum from March 6 through 19, Charles Petrillo, in his pretrial affidavit, stated as follows: "However, assuming the weather permitted and the availability of work, Howard Baum would probably have worked on the Con Edison or other small jobs that were going on at that time, but I thought it preferable that Howard not work because of the tension with the Teamsters."

Petrillo elaborated on that statement in his testimony. According to Charles Petrillo, essentially corroborated by his cousin Louis, a lot of variables determine when and who will be laid off. However, it is undisputed that generally there is a layoff each year sometime between January and March, because of the weather and availability of work. It is also undisputed that Charles Petrillo is in charge of the outside work and when he goes on vacation during the January-March period Respondent shuts down the outside work. It is also admitted by Baum that he generally works on outside jobs, and that he was only working in the yard in late February because he was filling in for the regular crane operator who was on vacation.

According to the Petrillos, in 1989 it was decided that since Murray was returning from vacation on March 6, and Charles Petrillo was to start his vacation at that time, that the Company would shut down its outside work for a 2-week period. Therefore, Baum, plus three laborers who work with Baum on the outside work, would be laid off for this period of time, as the Company has traditionally done in the past.

Normally, the Employer closes down its outside operations for longer periods of time due to weather conditions.<sup>5</sup> How-

ever, in 1989, the winter was mild, so it was able to remain operational until March 6, when Charles Petrillo took his vacation, and there was insufficient outside work to warrant continued operation during this time. Charles Petrillo testified that even if there had not been the problem with the Teamsters and Baum, he still would have shut down the outside work at that time. Petrillo testified further that he reopened on March 20 which coincides with the reopening of the asphalt plants, as well as the conclusion of his vacation. At that time, both Baum and the laborers who had been laid off along with Baum, were recalled to work.

Baum testified that Petrillo's general policy of shutting down outside work for various periods of time during the winter months from January through April has in the past resulted in the layoffs of employees, including himself. However, Baum also insisted that for the past 2 years (1987 and 1988), although outside work was shut down, he continued to be employed performing work in the yard, and was not laid off at all at that time. However, an examination of Petrillo's payroll records, as well as the testimony of Louis Petrillo, contradicted Baum's testimony in this regard. Thus, the payroll records reflect that Baum was not on the payroll between the weeks ending January 6 to March 9, 1988. Similarly, for the year 1987, the records indicate that between the weeks ending January 7 and March 4, Baum was not paid.

### *C. The Agency Status of Russo and Noberto*

Noberto was the shop steward for the Union, and has been recognized by the Petrillos in that capacity. Noberto has resolved grievances and other matters with the Petrillos, and both Petrillos testified that they regarded Noberto as a representative of the Union at the jobsite. Noberto also testified that when he spoke to Petrillo and threatened a work stoppage he was doing so in his capacity as shop steward, and that it was clear to the Petrillos that this was the authority under which Noberto was speaking on behalf of the Teamsters-represented employees.

In this connection, however, Charles Petrillo admitted that he did question whether Noberto had the authority to call a work stoppage, which is why calls were immediately made to both Respondent and Local 137.

Additionally, article XXV of the collective-bargaining agreement between the parties provides that the Union "shall designate the Working Teamster Foreman as the Union shop steward on the job." That same article in section I provides that "The Working Teamster Foreman shall have no authority to direct that economic or other action be taken against an Employer." The section further provides that the Employer can discipline employees, including discharge, in the event the "Working Teamsters Foreman has taken unauthorized strike action or instigated a work stoppage which is not approved by the Union."

While Noberto has been the shop steward for 15 years at Petrillo, he displayed an obvious unfamiliarity with the term "working teamster foreman" or this alleged restriction on his authority. Thus, when asked on direct examination by his counsel if shop stewards are known by another name, he could not answer, until prompted by a leading question of what is a working teamsters foreman. When asked by Respondent's counsel where in the contract his authority is set out, he could not do so, and again only in response to a lead-

<sup>4</sup>Baum normally performs most of his work on jobs outside the yard.

<sup>5</sup>For example in 1988, it shut down its outside operations for 8 weeks.

ing question did he testify that he had read this clause and understood that his authority is spelled out in that provision.

Eddie Doyle testified that he, as the chief executive of the Union, is the only official of the Union who has the authority to call a work stoppage or a strike. Doyle also testified that during negotiations in past years, with the association of which Petrillo is a member, including 1986, this matter was discussed in the presence of Louis Petrillo, and it was made clear that no one had the authority to strike unless they come through Doyle. Doyle further testified that he also recalled specific discussion of article IV, during which it was explained by him that a working teamsters foreman is not going to go around and shut down jobs.

Neither of the Petrillos were asked about their knowledge of this provision in the contract, or their presence at negotiations when this clause or the question of who has the authority to call work stoppages was discussed. However, as noted, both Petrillos testified they regarded Noberto as Respondent's representative at the jobsite.

As for Russo, he is the assistant shop steward, and he acts in place of Noberto as steward when Noberto is on vacation or out sick.<sup>6</sup> Russo also has attended two meetings of shop stewards at the union hall, and chose not to attend other such meetings, although he could have done so.

#### IV. ANALYSIS

##### A. *The Alleged Threat of Physical Violence*

The complaint alleges that Respondent, by its agent, Assistant Shop Steward Russo, threatened Baum with bodily injury because he made remarks about a representative of Respondent, in violation of Section 8(b)(1)(A). The incident relied on by General Counsel was Russo's statement to Baum that "Eddie Doyle [Respondent's business manager] is up at the Union hall waiting for you to come up and kick his ass."

While a serious and substantial question exists as to the agency status of Russo in making this remark, I need not and do not make a finding with respect to that issue, since I am not persuaded that Russo's comments are violative of the Act, even if attributed to Respondent.

In my view, it is clear that Russo's comments to Baum were made solely in response to Baum's prior remarks to Russo, during which Baum called Teamsters "queers" and "homos," claimed that he saw Doyle in a porno movie, and wherein Baum threatened to "put his foot" up Doyle's "ass." In these circumstances, I find that Russo's statements were not in response to or related to or in reprisal for any protected concerted activities engaged in by Baum and therefore are not violative of the Act. *Laborers Local 806*, 295 NLRB 941, 961 (1989); *New York City Taxi Drivers Local 3036 (Taxi Maintenance)*, 231 NLRB 965, 968 (1977); *Steelworkers Local 2610 (Bethlehem Steel)*, 225 NLRB 310, 314 (1976).

Here, Baum was not engaging in any protected concerted activity by calling Teamsters names, accusing its business manager of appearing in "porno" movies, or by threatening to "put his foot" up Doyle's "ass." While the record does not disclose why Baum made these remarks, there is no evidence that they were in any way connected to issues involving terms and conditions of employment, criticism of Doyle's

performance as business manager of Respondent, or even the overall relationship between the Operating Engineers and the Teamsters at the jobsite.

Moreover, the remarks of Russo cannot reasonably be construed as an unlawful threat, since in my view Russo was merely responding and accepting on behalf of Doyle Baum's own threatening invitation that Baum would "put his foot" up Doyle's "ass."

Accordingly, I conclude, based on the foregoing, that even if Respondent is deemed responsible for Russo's comments to Baum, that no violation of Section 8(b)(1)(A) of the Act has been established. Therefore, I recommend that this allegation of the complaint be dismissed.

##### B. *Respondent's Alleged Attempt to Cause and Causing Petrillo to Remove Baum from his Regular Duties and to Lay Him Off*

The complaint alleges that Respondent caused and attempted to cause Petrillo to remove Baum from his regular duties and place him on standby status from February 27 to March 3, and to lay Baum off from March 6 through 19 in violation of Section 8(b)(1)(A) and (2) of the Act.

The operative principles governing the disposition of the instant matter are well established. Where a labor organization causes or attempts to cause an employer to discourage or otherwise impair the job status of an employee, it is presumed that the effect of this action is to encourage union membership on the part of employees who have perceived the exercise of the union's power to affect his livelihood. The Union may overcome this inference or rebut this presumption, by proving that the action was necessary to the effective performance of its function of representing its constituency. *Operating Engineers Local 18 (Ohio Contractors)*, 204 NLRB 681 (1973), revd. on other grounds 496 F.2d 1308 (6th Cir. 1984); *Iron Workers Local 15 (Gateway Industries)*, 291 NLRB 369, 374 (1988); *Shipbuilders Local 9 (Todd Pacific)*, 279 NLRB 617, 622-623 (1986); *Operating Engineers Local 478 (Stone & Webster)*, 271 NLRB 1382, 1385 (1984); and *Bricklayers Local 6 (Key Waterproofing)*, 268 NLRB 879, 883 (1984).

Respondent argues that it is not responsible for the conduct of Noberto of threatening a work stoppage of Teamsters employees if Baum continued working for Petrillo. The question of union responsibility for Noberto's conduct is determined by common law principles of agency, which can impose liability on the basis of implied or apparent authority *Hod Carriers Local 341 v. NLRB*, 564 F.2d 834, 839 (9th Cir. 1977). In 1948, the Board set forth the applicable principles in assessing this question.

Agency is a *contractual relationship*, deriving from the mutual consent of principal and agent that the agent shall act for the principal. But the principal's consent, technically called authorization or ratification, may be manifested by conduct, sometime even passive acquiescence as well as by words. Authority to act as an agent in a given manner will be implied whenever the conduct of the principal is such as to show that he actually intended to confer that authority.

A principal may be responsible for the act of his agent within the scope of the agent's general authority, or the "scope of his employment" if the agent is a

<sup>6</sup>Noberto was in the yard at the time of Russo's comments to Baum.

servant, even though the principal has not specifically authorized or indeed may have specifically forbidden the act in question. It is enough if the principle actually empowered the agent to represent him in the general area within which the agent acted. [*Longshoremen Local 6 (Sunset Line & Twine)*, 79 NLRB 1487, 1508–1509 (1948).]

In determining whether a union has clothed an agent with apparent authority sufficient to bind the union to the agent's actions, the Board considers whether the employer reasonably believed that the agent possessed such authority. *Electrical Workers IBEW Local 211 (U.S. Capital Telecommunications)*, 279 NLRB 874, 875 (1986); *Penn Yan Express*, 274 NLRB 449 (1985).

Here it is clear that Noberto was the shop steward or working teamster foreman<sup>7</sup> for Respondent, and was Respondent's sole representative at the jobsite. *Iron Workers Local 433 (United Steel)*, 280 NLRB 1325, 1330 (1986). The Petrillos have dealt with Noberto in the past as Respondent's representative in matters dealing with problems on the job. These facts are normally sufficient to find union responsibility for work stoppages or threats of work stoppages made by shop stewards. *U.S. Capital Telecommunications*, supra; *Bricklayers Local 2 (Glenshaw Glass)*, 176 NLRB 434, 437 (1969). Respondent places substantial reliance on the terms of the collective-bargaining agreement between it and Petrillo, which states that the steward (working teamster foreman) "shall have no authority to direct that economic or other action be taken against the Employer." However, the presence of clauses in collective-bargaining agreements, *Teamsters Local 782 (Overnite Transportation)*, 133 NLRB 62, 71 (1961); *Carpenters Local 2067 (A.G.C.)*, 166 NLRB 532, 540 (1967); *Teamsters Local 82 (Arlington Storage)*, 210 NLRB 838, 842 (1974); *Local 341*, supra at 839, or in union constitution *NLRB v. Electrical Workers IBEW Local 745*, 759 F.2d 533, 534 (6th Cir. 1985), which purport to limit the authority of shop stewards or other agents of Unions, are not determinative.

What is crucial, as noted, is the belief of the Petrillos as to whether Noberto was authorized to instigate a work stoppage. *Penn Yan*, supra. In this connection, Respondent correctly observes that Louis Petrillo questioned Noberto's authority to call a work stoppage. Thus, Petrillo immediately called Respondent and spoke to Bernard Doyle, Respondent's vice president, business agent, and the brother of Eddie Doyle. This conversation between Petrillo and Bernard Doyle is highly significant in assessing Respondent's responsibility for Noberto's actions. During this conversation, Doyle acknowledged that Petrillo had "a problem," because Baum had made disparaging remarks about the Teamsters. Doyle,<sup>8</sup> although given the obvious opportunity to do so, did not inform Petrillo that Noberto had no authority to threaten or cause a work stoppage. Nor did Doyle offer to or speak to Noberto at the time to inform him of his unauthorized action, or order him to revoke his authorized action. Doyle also failed, although requested to do so by Petrillo, to come down

to the site to adjust the problem. In these circumstances, I conclude that Doyle by his failure to take any of the aforementioned steps to disavow the conduct of Noberto and the employees, has acquiesced in and in fact ratified such conduct. See *Hod Carries Local 341 (Bannister Joyce Leonard)*, 223 NLRB 917, 919 (1976) (Agency is inferable from the failure of the business agent and despite the employer's request that he come to the site about it, to involve himself in the matter in any way, let alone disavow it.) See also *Local 341 v. NLRB*, supra at 839 ("Courts have given great weight to a Union's failure to repudiate a steward's conduct.") Additionally, see *NLRB v. Boilermakers Local 83*, 321 F.2d 807, 811 (1963), affg. *Combustion Engineering*, 130 NLRB 184, 201 (1961), in which substantial reliance was attributed to a union business agent's failure to go to the jobsite with knowledge disavow such action when being so informed by the employer, in finding union responsibility for the work stoppage instigated by the shop steward.

I note particularly the testimony of Bernard Doyle on cross-examination. When asked if he took the statements about his brother seriously (the comments about Eddie Doyle appearing in a porno movie), Bernard Doyle responded, "if somebody talks about my brother like that, you bet your life I do." I infer from this testimony as well as from Bernard Doyle's reaction when informed by Petrillo about the threatened work stoppage that Bernard Doyle was as upset about Baum's remarks as were the employees and supported the action of Noberto and the other Teamsters of refusing to work with Baum because of the comments made by Baum about Doyle's brother and chief executive of the Union. I conclude that Bernard Doyle's conduct, including his inaction, sent this same unmistakable message to Petrillo that Respondent was supportive of the threatened work stoppage, and constitutes ratification and condonation of the action of Noberto and the employees, sufficient to establish liability on the part of the Union for such activities. *Combustion Engineering*, supra, *Bannister Joyce*, supra; *Penn Yan*; *Carpenters Local 2067 (A.G.C.)*, 166 NLRB 532, 540 (1967); *Meat Cutters Local 540 (Kroger Meat)*, 219 NLRB 331, 336 (1975).

Having found that the Respondent is responsible for the threatened work stoppage, there is little question that it bears responsibility for Petrillo's decision to place Baum on standby status. While Respondent made no express demand that Petrillo terminate Baum or otherwise affect his employment status, the statement to Petrillo that the employees would not work with Baum is more sufficient to constitute "an efficacious request" that Petrillo terminate Baum. *Key Waterproofing*, supra at 883; *Todd Pacific*, supra at 623; *Stone & Webster*, supra at 1385; *Electrical Workers IBEW Local 262 (Arthur Paul, Jr.)*, 264 NLRB 251, 253 (1982); see also *Gateway Industries*, supra.

The fact that Petrillo chose to comply with Respondent's demands by imposing a lesser penalty on Baum, i.e., by placing him on standby status, cannot serve to exonerate Respondent or relieve it of liability for Petrillo's change in his work status. Therefore, I conclude that Respondent is also responsible for Petrillo's action in continuing Baum's standby status for the remainder of the workweek. While it is true that Eddie Doyle, upon being informed of Noberto's actions by his brother, immediately took some steps to alleviate the situation, I do not deem Respondent's action sufficient to relieve it of responsibility for the continuation of Baum's

<sup>7</sup>The working teamster foreman has been found to be an agent of the Union. *Teamsters Local 282*, 262 NLRB 528, 533 (1982).

<sup>8</sup>I note that Bernard Doyle had previously been informed by Raguso that the Teamsters employees were upset about Baum's comments about Eddie Doyle being involved in porno movies.

standby status. Doyle did instruct Noberto to tell the employees that they must work with Baum, and Noberto complied with these instructions the next day. Doyle also instructed Noberto to inform Petrillo of his (Doyle's) orders and that the men would agree to work alongside Baum. However, I have found that Noberto did not comply with this instruction of Doyle, so that as far as the Petrillos knew, Respondent's threat that the Teamsters would refuse to work with Baum was still outstanding, and had not been retracted. Petrillo acted in accordance with his belief, and continued to assign Baum to remain on standby status.

In this connection, I place little or no significance to Doyle's hearsay testimony about his alleged conversation with Peterson, Petrillo's attorney. It is not even clear from this conversation where Peterson had obtained his alleged information that he knew that Doyle had taken care of the problem. It is possible that Peterson could have spoken to another union business agent about the matter. In any event in my view the Petrillos' testimony, plus their conduct of retaining Baum on standby status, convinces me that they were unaware of Doyle's instructions to Noberto, and that as far as they were concerned, the problem had not been resolved.

I note that neither Doyle nor any of Respondent's officials made any attempts to visit the site to make sure that the employees were willing to work with Baum, and that the Petrillos were aware of this fact. Bernard Doyle's testimony that he did not go to the jobsite because he knew the employees were working is unconvincing, since he admits that he made no effort to find out, and did not know whether Baum was working during those days. Therefore, I conclude that Respondent did not strongly or affirmatively disavow the threat to cause a work stoppage, and continued to be responsible for Baum's standby status for the entire week. See particularly *Combustion Engineering*, supra at 201, where the failure of the Union to notify the Employer of its instructions to the employees to go back to work was deemed crucial to a finding that the Respondent was liable for a termination made by the Employer acting under the impetus of the prior stoppage. I would add that even if it was deemed that Doyle's efforts to disavow the strike were sufficient, Respondent would still be responsible for the fact that Baum was placed on standby status for Monday, February 27, which occurred prior to Doyle's conversation with Noberto.

The next question to be decided is whether Respondent had adduced sufficient evidence to rebut the presumption of illegality that exists from its actions, by establishing that its threats of a work stoppage was "necessary to the effective performance of its function of representing its constituency." *Ohio Contractors*, supra.

In fact, Respondent had adduced no such evidence, since its basic contention is that it was not responsible for the actions taken against Baum. Indeed, Respondent does not even make this argument in its brief that its actions were necessary for the effective performance of representing its constituency, or otherwise attempt to justify its conduct.

It appears that the main reason for the action taken by Respondent was Baum's conduct in making comments maligning the sexual habits of Teamsters in general, and most significantly its chief executive officer, Eddie Doyle, in particular. A subsidiary and in my view from an evaluation of the record, minor reason for Respondent's action was Baum's argument with employee DeVito over the use of Op-

erating Engineers' equipment, which included a brief physical confrontation between the two of them.<sup>9</sup>

I conclude that neither of these reasons, either singularly or collectively, are sufficient to meet Respondent's heavy burden of establishing adequate justification for attempting to cause Baum's termination from Petrillo. *Gateway Industries*, supra; *Key Waterproofing*, supra; *Todd Pacific*, supra; *El Dorado Mfg. Co.*, 249 NLRB 646, 653 (1980), enf. denied 660 F.2d 1207 (7th Cir. 1981). Therefore, Respondent has violated Section 8(b)(1)(A) of the Act by attempting to cause Petrillo to discharge Baum and causing Petrillo to place Baum on standby status.

Turning to the question of Petrillo's decision to lay Baum off from March 6 to 19, whether or not Respondent bears legal responsibility for this action presents more difficult issues. General Counsel relies primarily upon the statement made to Baum by Petrillo at the time of the layoff that since there was no work for Baum, "he [Baum] might as well sign up for unemployment until the situation with the Teamsters is straightened out." Additionally, General Counsel notes that statement in the pretrial affidavit of Charles Petrillo that Baum "would probably have worked, but I thought it preferable that Howard not work because of the tension with the Teamsters." Coupling these statements with the fact that Respondent's threat of a work stoppage had still not been retracted at the time of the layoff, General Counsel argues that Respondent has caused Baum to be laid off in violation of the Act. I do not agree.

Assuming that the above-described evidence is sufficient to establish a prima facie case that Respondent's actions caused Petrillo to lay Baum off, I am persuaded that the credible evidence demonstrates that Petrillo would have laid off Baum, even absent Respondent's unlawful activity. See *Wright Line*, 251 NLRB 1083 (1980).

I note initially that the above-quoted statements of the Petrillos are both ambiguous, and can be construed as supportive of my conclusion set forth above. Thus, Louis Petrillo's remarks to Baum on his last day of work, referred to the fact that Murray (who Baum was filling in for) was returning from vacation, that he would be taking his vacation for the next 2 weeks and shutting down the outside jobs, where Baum usually works. Thus, the statement that he made to Baum, to sign up for unemployment until the situation with the Teamsters is straightened out, can reasonably be construed as Petrillo informing Baum that he was being laid off as he usually is when Petrillo goes on vacation and shuts down outside jobs, and that Petrillo hoped that by the time he returned from vacation the situation with the Teamsters would be straightened out and Baum could return to his normal duties.

As for the statement in Charles Petrillo's affidavit, I note that it was preceded by his explanation, "assuming the weather permitted and the availability of work," Baum probably would have worked. Thus, this statement is also perfectly consistent with the testimony of the Petrillos that there

<sup>9</sup>While there was some vague testimony in the record as to Baum's failure to have a crane operator's license, I find such testimony unpersuasive. Baum has never had such a license, and Respondent never complained about it before. Moreover, most of Respondent's witnesses never even mentioned it as a reason for the threat not to work with Baum. Thus, I find that Baum's failure to have a license was not a factor in the action of Respondent.

was no work for Baum during this 2-week period and that he was laid off as per Petrillo's normal practice.

It is also significant that Petrillo, notwithstanding Respondent's unlawful threat, allowed Baum to remain on standby status, and continued to pay him during the week in question, since Murray was on vacation, and Baum could have performed Murray's work should the problem with the Teamsters be resolved. Nothing changed between the beginning and end of the week as far as the Teamsters' situation was concerned. There were no additional threats or stoppages or any efforts by Respondent to have Baum removed. What did change, however, was the availability of work, caused by Murray returning from vacation, Louis Petrillo taking his vacation, and Petrillo shutting down outside jobs where Baum performed most of his work.

In my view, these were the reasons that Petrillo decided to lay off Baum. The record is clear that Petrillo normally lays off employees in the winter, due to weather conditions and availability of work. Baum has been laid off in the past, and I have found that he has always been laid off when Louis Petrillo takes his vacation and shuts down the outside jobs. I have not credited Baum's testimony that he had been permitted to work in the yard for the past two winters, even after the outside jobs were shut down, since Petrillo's payroll records establish that Baum was in fact laid off for even longer periods of time in the past 2 years. Moreover, Petrillo, in 1989, also laid off as it had done in past years, three laborers who worked with Baum on outside jobs.

Based on the foregoing, I am convinced that Respondent would have laid off Baum, even absent Respondent's unlawful threats of a work stoppage. Therefore, Respondent has not caused Petrillo to lay off Baum, and has not violated Section 8(b)(1)(A) or (2) of the Act, as so alleged in the complaint.

#### CONCLUSIONS OF LAW

1. Respondent is a labor organization within the meaning of Section 2(5) of the Act.
2. Louis Petrillo Corp. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
3. By threatening Petrillo with a work stoppage if Petrillo continued to employ Howard Baum, and causing Petrillo to place Baum on standby status, Respondent engaged in unfair labor practices affecting commerce within the meaning of Section 8(b)(1)(A) and (2) and Section 2(6) and (7) of the Act.
4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.
5. Respondent has not otherwise violated the Act as alleged in the complaint.

#### THE REMEDY

Having found that Respondent has violated Section 8(b)(1)(A) and (2) of the Act, I shall recommend that it cease and desist therefrom and take certain affirmative action necessary to effectuate the policies of the Act.

Respondent shall notify Petrillo in writing and Baum that it has no objection to Baum's employment by Petrillo. Since

Baum received his pay from Petrillo while he was on stand-by status and there was no evidence that he suffered any loss of earnings or benefits as a result of Respondent's actions, it is not appropriate to order any backpay remedy against Respondent.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>10</sup>

#### ORDER

The Respondent, Local 456, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Causing Louis Petrillo Corp. to remove Howard Baum or any other employee from their regular duties by placing them on standby status, or attempting to cause Louis Petrillo Corp. to terminate the employment of Howard Baum or any other employee, unless the employee fails to tender or pay periodic dues and initiation fees uniformly required as a condition of maintaining membership in Respondent or unless Respondent's action is necessary to the effective performance of its function of representing its constituency.

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

2. Take the following affirmative action designed to effectuate the policies of the Act.

(a) Notify Louis Petrillo Corp. in writing, and furnish a copy of such notification to Howard Baum, that it has no objection to Baum's continued employment by Petrillo.

(b) Post at its business office, copies of the attached notice marked "Appendix."<sup>11</sup> Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members 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.

(c) Forward a sufficient number of signed copies of the notice to the Regional Director for Region 2 for posting at Petrillo at its place of business in places where notices to employees are customarily posted, if Petrillo is willing to do so.

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

IT IS FURTHER ORDERED that the complaint be dismissed as to all allegations of the complaint not found violative of the Act.

<sup>10</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.

<sup>11</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 MEMBERS  
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.

WE WILL NOT cause or attempt to cause Louis Petrillo Corp. to remove Howard Baum or any employee from their regular duties by placing them on standby status, or attempt to cause Louis Petrillo Corp. to terminate the employment of Howard Baum or any other employee, unless the employee

fails to tender or pay periodic dues and initiation fees uniformly required as a condition of maintaining membership in the Union or unless our action is necessary to the effective performance of our function of representing our constituency.

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

WE WILL notify Louis Petrillo Corp. in writing, and furnish a copy of such notification to Howard Baum, that we have no objection to Baum's continued employment by Petrillo.

LOCAL 456, INTERNATIONAL BROTHERHOOD  
OF TEAMSTERS, CHAUFFEURS, WAREHOUSE-  
MEN AND HELPERS OF AMERICA, AFL-CIO