

**Oil, Chemical and Atomic Workers International Union Local No. 5-114, AFL-CIO (Colgate-Palmolive Company) and Ronald A. Moody.**  
Case 17-CB-3426

August 21, 1991

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS  
CRACRAFT AND DEVANEY

Exceptions filed to the judge's supplemental decision in this case<sup>1</sup> present the question of whether the Respondent met its burden under *Rubber Workers Local 250 (Mack-Wayne)*, 290 NLRB 817 (1988) (*Mack-Wayne II*), of demonstrating that Charging Party Moody's grievance was not meritorious.

The Board has considered the exceptions in light of the record and brief and has decided to affirm the judge's rulings, findings,<sup>2</sup> and conclusions only to the extent consistent with this Supplemental Decision and Order.

On June 15, 1989, the Board issued its Decision and Order in this proceeding finding that the Respondent violated Section 8(b)(1)(A) by its disparate treatment of Charging Party Moody's grievance concerning his disciplinary suspension for fighting with employee Buckley.<sup>3</sup> Applying *Mack-Wayne II*,<sup>4</sup> the Board found that the grievance was not clearly frivolous and remanded the case to the judge for a determination of the merits of the grievance, which the Respondent elected to litigate at a reopened hearing. Based on the evidence presented, the judge found that it was "impossible to conclude that an arbitrator would necessarily have found that Moody was a mutual combatant who deserved the same punishment imposed on Buckley." Finding that under *Mack-Wayne II* the Re-

spondent had to prove that there was no way that Moody could prevail in arbitration, the judge concluded that the Respondent did not meet its burden of proof and, therefore, must make Moody whole for losses arising from its various violations in the handling of Moody's grievance. For the reasons set forth below, we find merit in the Respondent's contention that it met its burden of proof under *Mack-Wayne II*. We therefore reverse the judge and find that the Respondent is not liable for backpay.

The facts as found by the judge and established by the testimony at the hearing are as follows.<sup>5</sup> Moody was hired by the Employer on November 2, 1981, and Buckley was hired on September 7, 1966. Moody was about 5 feet 8 inches tall and weighed 145 pounds; Buckley was about 6 feet tall and weighed 200 pounds. Both employees had good work records. Moody was transferred to the Employer's Osage warehouse in September 1986.<sup>6</sup> On the morning of November 4, Moody was in the warehouse office waiting for a work-related telephone call. Buckley, who passed through the office following his break, expressed displeasure that Moody was able to remain in the office while Buckley had to return to work. After receiving the call, Moody returned to the warehouse and commenced using a forklift to move product from a loaded truck into the warehouse while moving product from the warehouse into an empty truck on the return trip. Buckley, Bratton, Brunson, and Vaughn were working together unloading a trailer at an adjacent location in the warehouse.

In the course of his work, Buckley placed certain pallets near dock door 46, which was the door where Moody was unloading product. Bratton, Brunson, and Vaughn then shuttled the pallets back and forth into the warehouse. It is undisputed that Moody moved the pallets away from door 46 and placed them along the ramp moving up to the dock.<sup>7</sup> Moody testified that as he was moving the pallets, Buckley drove his forklift truck into Moody's forklift truck in the middle of the dock area;<sup>8</sup> jumped off the truck; threw his gloves down; and began walking toward Moody and urging him to "back off." In the meantime, Moody testified that he also jumped off his forklift truck and removed his gloves, standing at the left-hand side of the truck. When questioned by the Respondent as to why he did

<sup>1</sup>On December 5, 1990, Administrative Law Judge Steven M. Charno issued the attached supplemental 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.

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

<sup>3</sup>295 NLRB 742. Specifically, the Board found that the Respondent unlawfully refused to process Moody's grievance to arbitration because of his non-union status. Moody was not a member of the Respondent but was at all relevant times a member of the unit covered by the collective-bargaining agreement between the Respondent and the Employer.

<sup>4</sup>Pursuant to *Mack-Wayne II*, when a union violates Sec. 8(b)(1)(A) by breaching its duty of fair representation with regard to the processing of an employee's grievance, the General Counsel in order to be entitled to a provisional make-whole remedy has the initial burden of establishing that the employee's grievance was not clearly frivolous. If the General Counsel establishes that nexus between the union's unlawful conduct and the remedy, the burden of proof then shifts to the union to establish that the grievance was not meritorious. The union is given the option of litigating the merits of the employee's grievance at either a reopened unfair labor practice hearing or at the subsequent compliance stage.

<sup>5</sup>Buckley was deceased prior to the hearing. In addition, an eyewitness, employee Bratton, was in prison and did not testify. Distribution Manager Freeman, who had retired, also did not testify.

<sup>6</sup>All dates are in 1986 unless otherwise indicated.

<sup>7</sup>Moody testified that he had to move the pallets in order to continue working, and admitted that he did so without first talking to Buckley's crew. Brunson testified that his team moved the pallets within minutes and that he did not understand why Moody did not perform other work during the short time the pallets were being removed. Brunson further testified that by relocating the pallets, Moody created more work for Buckley's team.

<sup>8</sup>There is a factual dispute, which the judge did not resolve, as to whether Buckley elevated the tines on his truck or flashed his headlights as he drove toward Moody.

not backup his forklift truck after being hit by Buckley's truck, Moody stated, "I wasn't going to get in a fork truck fight." Although admitting the possibility that he could have driven away, Moody testified, "I feel he [Buckley] already confronted me. I was just—I was standing up to him." Moody also testified that he assumed a position to defend himself. Similarly, employee Starcher, who was an alternate member of the bargaining committee and union president in 1986, testified that when Moody was asked by an employer representative if he could have avoided the fight, Moody asserted that he does not run away from a fight.

Moody testified that after he jumped off the truck, he had his hands at his side and Buckley reached out and grabbed him by his shirt and coat in straight-arm fashion. Describing the fight that ensued, Moody testified that Buckley began running Moody backward in the direction of an I-beam on the dock, but that he was able to gain control of Buckley by grabbing his ankle, flipping him over, and seizing him by the shirt and collar. Moody recalled that he did not hit Buckley although Buckley urged him to do so. When questioned at the hearing about his recollection of the events, Brunson testified that he heard the clang of metal, looked up, and saw that Buckley's and Moody's trucks were face to face with the forklifts touching the masts. Brunson further testified that he saw Moody and Buckley walk toward one another and that they grabbed one another in the chest area "simultaneously." According to Brunson, they appeared to be "wrestling" in a backward direction when Buckley "got a hold of [Moody] in a bear hug" from the back around his chest. The next time Brunson looked back, he observed that Moody flipped Buckley over and pinned him to the floor. Moody and Brunson both testified that Bratton persuaded Moody and Buckley to stop fighting and return to work. Moody stated at the hearing that he agreed to do so after stating that he did not care and calling Buckley "a worthless son-of-a-bitch." Bratton, Brunson, and Vaughn helped Buckley stand up. It was later established that Buckley had broken his ankle during the altercation.

Several minutes later Moody asked Buckley for an apology, but Buckley declined to apologize. Moody explained at the hearing that he reported the incident to his supervisor, Elliott, because Buckley's refusal to apologize indicated that he was not sorry for his conduct "and probably would just keep continuing on." Elliott reported the matter to Distribution Supervisor Freeman, who planned to investigate the incident. In the meantime, Moody experienced discomfort and received permission to see the nurse.

Later that day, Freeman met with Moody, Buckley, and Plesa, the Respondent's steward. Plesa testified regarding what transpired at that meeting. According to

Plesa, Freeman instructed Moody or Buckley to relate what had happened in the warehouse and, in response, Moody stated that after he had moved some pallets out of the way Buckley had attacked him without provocation. At that point, Freeman asked Buckley if that description was accurate and Buckley acknowledged its basic accuracy and added that he "had had a bad day." Buckley then asked what it would take to resolve the matter, and Moody again requested an apology. After Moody rejected Buckley's apology as not being "sincere," Buckley got down on his knees and apologized once again. Although Moody accepted Buckley's apology, Freeman stated that it was not that simple, and that because the incident had been brought to the attention of management, both Moody and Buckley would be suspended pending an investigation. Peterson, the Employer's supervisor of labor and employee relations, conducted the investigation for the Employer. The Employer's plant work rules provide in pertinent part:

In the interest of safety and orderly production, it is necessary that rules and regulations be posted and maintained. . . . Violation of any work rules may result in disciplinary action up to and including discharge.

1. . . . fighting . . . is prohibited on Company property. . . .

Additionally, the Respondent has cited the following relevant provisions of the collective-bargaining agreement between the Respondent and the Employer:

#### DISCIPLINE AND DISCHARGE

I. In the interest of safety and orderly production, it is necessary that proper discipline be maintained in the Plant. The Management is responsible for the maintenance of that discipline, and in the execution of that responsibility must necessarily have the power to apply appropriate penalties. In extreme cases the penalty may have to be discharge from employment, and the Management has full right to discharge employees in such cases.

. . . .  
VI. Employees shall observe all safety rules and other reasonable regulations made for proper discipline and conduct in the plant.

#### GRIEVANCE HANDLING PROCEDURE

VI. It is understood and agreed that the direction of the working forces is vested exclusively in the Company and the Union shall not abridge or interfere in any way with this right. . . .

## PLANT SAFETY

II. The Company and the Union agree to cooperate in eliminating unsafe conditions and unsafe practices.

Aside from the above provisions, the Employer does not have an automatic rule setting forth the discipline to be imposed on participants in a workplace fight. According to Peterson, the Employer examines all the relevant and mitigating circumstances of a fight, including who initiated the dispute, to determine the appropriate discipline. As part of the investigation, Peterson interviewed employees Vaughn, Brunson, and Bratton, as well as Moody, Buckley, Elliott, and Freeman. The Respondent's chief steward, Rosson, decided that he would rely on Plesa's testimony about the November 4 meeting rather than interview Moody or Buckley. Rosson did, however, talk with Vaughn, Brunson, Bratton, and Elliott.<sup>9</sup> Throughout the investigation, Moody maintained that Buckley was the aggressor and that he was merely acting in self-defense.

Representatives of the Respondent and the Employer met on November 12 and again on November 18 to discuss the results of the investigation and the appropriate discipline.<sup>10</sup> Starcher testified that the Employer at the November 12 meeting indicated that it was considering terminating Moody and Buckley.<sup>11</sup> According to Starcher, the Respondent's representatives made a plea for leniency based on the Employer's past practice, the length of time Moody and Buckley had been employed, and their work records. Starcher recalled that the Employer's officials agreed to consider a lesser discipline.

Union Steward Rosson was questioned about the participants' relative positions at the November 18 meeting. According to Rosson, the Employer listed the individuals it had interviewed and stated that it had concluded that Moody and Buckley were "mutual combatants." The Employer, according to Rosson, explained that it considered Moody and Buckley to be "equally innocent or guilty" because either could have "backed away from the scene." Rosson could not recall discussing with the Employer the "relative positions" of Moody and Buckley or what the eyewitnesses described, but testified that the Respondent stated that it had interviewed the same individuals

"and basically received the same information." Those present at the meeting discussed the only other incident that the Employer had on file involving a fight between employees. In this regard, the Employer's records indicated that in 1982, employees Ragg and O'Malley were each given a 4-week disciplinary layoff and placed on indefinite suspension for "fighting." Rosson testified that the Employer at the November 18 meeting initially reasserted its position that termination was appropriate, maintaining that Ragg and O'Malley were suspended rather than terminated because, unlike Moody and Buckley, each had been with the Company for more than 30 years. However, Rosson recalled that the Employer became receptive to the Respondent's contention that a suspension was appropriate because Buckley had over 20 years of seniority with the Employer. The Respondent was eventually able to persuade the Employer to place both Moody and Buckley on a 13-week disciplinary layoff with a 2-year probation. As part of the discipline, Moody and Buckley were also instructed to seek counseling to improve their ability to "work in harmony with your fellow employees." Rosson testified that the Respondent believed it had negotiated "the minimum discipline we could receive for both employees."<sup>12</sup>

As an initial matter, we disagree with the judge's characterization of the Respondent's burden under *Mack-Wayne II*, above, of proving that an employee's grievance is not meritorious. In this regard, the cases cited by the Board at footnote 17 in *Mack-Wayne II* and relied on by the judge here<sup>13</sup> must be considered in conjunction with the Board's statement in *Mack-Wayne II* that where a union has caused the grievance process to malfunction, a union should assume the burden "of establishing that the employee's grievance would have been denied or that the discharge was justified." 290 NLRB 817, 819.<sup>14</sup> In the instant case we find, contrary to the judge, that the Respondent met its burden of proving by a preponderance of the relevant evidence that Moody's suspension was justified.

Although Moody contends that he was merely acting in self-defense against Buckley's act of aggression, the evidence suggests otherwise. By his own admission, Moody was in his truck when Buckley first backed his truck into Moody's and began walking toward Moody. Thus, Moody was separated from Buckley by a signifi-

<sup>9</sup>Peterson and Rosson both testified that Vaughn told them that he did not witness the start of the fight and that Bratton indicated that Moody and Buckley came together at the same time. According to Peterson, Bratton also stated that Moody provoked the incident. Peterson testified that Brunson told him that he did not know who started the fight. According to Rosson, however, Brunson maintained that Moody and Buckley came together at the same time.

<sup>10</sup>Moody testified that he read a prepared statement at the November 12 meeting. Starcher testified that Peterson read from his notes of Moody's statement, and that Buckley expressed disagreement with several aspects of the statement regarding the nature of the altercation.

<sup>11</sup>Pursuant to the collective-bargaining agreement, management must consult the bargaining committee when it believes that "discipline so severe as discharge" is required.

<sup>12</sup>Buckley accepted the discipline imposed, but Moody filed a grievance, which was denied at each step preceding arbitration. As indicated, the Board found that the Respondent violated Sec. 8(b)(1)(A) by refusing to process Moody's grievance to arbitration.

<sup>13</sup>*Teamsters Local 705 (Associated Transport)*, 209 NLRB 292, 293 (1974), enf. sub nom. *Kesner v. NLRB*, 532 F.2d 1169 (7th Cir. 1976), cert. denied 429 U.S. 983 (1976); and *Security Personnel (Church Charity Foundation)*, 267 NLRB 974, 980 (1983).

<sup>14</sup>The Board's discussion in *Mack-Wayne II* of the union's burden occurred in the context of the particular facts of that case involving the union's unlawful refusal to process O'Neill's grievance concerning his discharge. The standard set forth is, however, equally applicable to the suspension imposed on Moody in the instant case.

cant distance, and was not in immediate danger of physical harm. At this point, Moody deliberately chose not to walk or drive away, but instead jumped down from his truck and exchanged physical blows and angry words with Buckley. Moody admitted at the hearing that he could have avoided the confrontation. His further testimony that he was just “standing up to [Buckley]”—as well as Starcher’s uncontroverted testimony that Moody asserted that he does not run away from a fight—demonstrates that Moody was not acting in a purely self-defensive posture. Rather, it is apparent that Moody’s motive in fighting with Buckley was, at least in part, a response to an affront to his pride. The fact that Moody’s pride may have been at stake is not, however, a justification for violating the Employer’s rule against fighting at the workplace.<sup>15</sup> Further, although it may be true that Buckley initiated the confrontation, Moody responded with a degree of force and aggression that caused Buckley to sustain a broken ankle.

The relevant portions of the Employer’s work rules and its collective-bargaining agreement with the Respondent, cited above, make clear that the Employer has an interest in ensuring safety in the warehouse. Any fight between employees disrupts the workplace and poses a threat to the safety of a company and its employees, and is therefore viewed with concern by an employer.<sup>16</sup> Specifically, the Employer’s plant work rules and the collective-bargaining agreement provide that discharge can be an appropriate penalty for a violation of the work rules concerning plant safety.

For the above reasons, we find that the Employer was warranted in concluding that Moody was a “mutual combatant” and that Moody and Buckley should receive the same punishment. Rather than terminating them, however, the Employer at the request of the Respondent considered the length of seniority and good work records of Moody and Buckley and decided that suspensions were appropriate. An additional mitigating factor considered by the Employer was its past practice.<sup>17</sup> Ragg and O’Malley, who apparently fought at the workplace, were placed on suspensions rather than disciplined. Each of them had worked for the Employer for 30 years. Thus, we note that Moody received discipline that was comparable to—and in the

case of Buckley identical with—employees who had much greater seniority.<sup>18</sup>

For the reasons set forth above, we find that the Respondent has met its burden under *Mack-Wayne II*, above, of proving that Moody’s discipline was justified and, therefore, that his grievance was not meritorious. Accordingly, we reverse the judge to the extent that he found that the Respondent, having violated Section 8(b)(1)(A), was liable for make-whole relief.<sup>19</sup>

#### AMENDED CONCLUSIONS OF LAW

Substitute the following for Conclusion of Law 3.

“3. The Respondent has met its burden of proving that Moody’s grievance was not meritorious within the meaning of *Rubber Workers Local 250 (Mack-Wayne)*, 290 NLRB 817 (1988).”

#### ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Oil, Chemical and Atomic Workers International Union Local No. 5–114, AFL–CIO, its officers, agents, and representatives, shall take the action set forth in the Order as modified.

1. Delete paragraphs 2(b) and (c) and reletter the subsequent paragraph.

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

#### 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 make statements indicating that we intend to treat employees differently with regard to workplace grievances because of their nonunion status.

WE WILL NOT refuse to allow any employee represented by us to attend a meeting of our members in order to seek their vote to arbitrate the employee’s grievance.

<sup>18</sup>In view of the fact that the circumstances of the fight between Ragg and O’Malley are not in the record, there is no way to compare their like treatment with the discipline accorded to Moody vis-a-vis Buckley.

<sup>19</sup>We shall amend the judge’s recommended Order and the notice in accordance with our findings.

For the reasons stated in the underlying unfair labor practice case, Member Cracraft would not have remanded this proceeding and would have found that the General Counsel did not sustain the burden of showing that Ronald Moody’s grievance was meritorious. 295 NLRB 742, 744 fn. 8 (1989). She therefore agrees with her colleagues that Respondent has no backpay liability.

<sup>15</sup>See *General Electric Co.*, 72 LA 441, 444 (1979).

<sup>16</sup>As explained by Arbitrator Raymond R. Roberts in *Alvey, Inc.*, 74 LA 835, 838 (1980):

In the absence of mitigating circumstances, fighting is generally regarded as an industrial felony. This is true because the Company has an obligation to maintain a safe working place for its employees. The Company has a need for a serious penalty as a deterrent to prevent others from engaging in fighting, which is an overriding consideration of progressive and corrective discipline. Additionally, a predisposition to hostility of a serious nature will jeopardize plant safety and made [sic] it unreasonable for the Employer to continue the employment relationship.

<sup>17</sup>To the extent the Employer considered the mitigating circumstances presented by the Respondent, we agree with the Respondent’s contention that its degree of representation is relevant to the merits of the grievance.

WE WILL NOT couple the announcement that an employee has filed a charge against us with the members' consideration of that employee's request that a grievance be carried to arbitration.

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.

OIL, CHEMICAL AND ATOMIC WORKERS  
INTERNATIONAL UNION LOCAL NO. 5-  
114, AFL-CIO

*Stephen E. Wamser, Esq.*, for the General Counsel.  
*John W. McKendree, Esq.*, of Denver, Colorado, for the Respondent.

SUPPLEMENTAL DECISION

STEVEN M. CHARNO, Administrative Law Judge. By Decision and Order entered June 15, 1989, 295 NLRB 472, the Board held that Respondent's disparate treatment of Ronald A. Moody with respect to his grievance was arbitrary and discriminatory, inherently destructive of important employee rights and violative of Section 8(b)(1)(A) of the National Labor Relations Act (Act). The Board further held that certain statements made by Respondent's officers to Moody also violated Section 8(b)(1)(A) of the Act. The Board found that Moody's grievance, which arose out of his suspension by Colgate-Palmolive Company (Employer), was not clearly frivolous. This finding was based in part on Moody's testimony that his alleged offense of fighting was an act of self-defense and on the Employer's policy of assessing penalties for fighting only after evaluating all of the circumstances surrounding an incident.

In its Decision and Order, the Board remanded the case to me and directed me to permit Respondent to elect whether to present evidence on the merits of Moody's grievance before me or at the compliance stage of this proceeding. In response to my Order of June 26, 1989, Respondent elected on July 7, 1989, to present such evidence at a reopened hearing before me. That hearing was held in Mission, Kansas, on October 12 and 13, 1989. Briefs were submitted by the General Counsel and Respondent under extended due date of December 5, 1989.

FINDINGS OF FACT

A. *The Grievance*

On November 4, 1986,<sup>1</sup> Moody and Garrett Buckley, one of Moody's coworkers, were involved in a fist fight during working hours at the Employer's Osage warehouse. At all times thereafter, Moody maintained that he had merely defended himself against Buckley's unprovoked aggression.<sup>2</sup> At a meeting between the combatants and representatives of Respondent and the Employer on the day of the fight, Moody

<sup>1</sup> All dates are 1986, unless otherwise indicated.

<sup>2</sup> Moody's testimony to this effect is consistent with contemporaneous statements which he submitted to Respondent's membership and the Employer. The fact that Moody consistently maintained that he was acting in self-defense was also corroborated by Respondent's steward, Linda Plesa, and the Employer's supervisor of labor and employee relations, Brent Peterson.

portrayed Buckley as the aggressor and Buckley admitted that Moody's account was "basically" correct.<sup>3</sup>

It is uncontested that the Employer has no automatic rule concerning the discipline to be meted out to each of the participants in a fight. Rather, it was the Employer's policy to examine all the circumstances surrounding a fight, including the identity of the initiator, before imposing discipline on one or both of the employees.<sup>4</sup>

The Employer's investigation of the incident uncovered only one individual other than the combatants who stated that he was present at the beginning of the fight,<sup>5</sup> and that individual informed the Employer that Moody and Buckley engaged in combat simultaneously.<sup>6</sup> Because it believed that Moody might have avoided the encounter by flight, the Employer "concluded that both Moody and Buckley were mutual combatants"<sup>7</sup> and assigned the same punishment to each of them.<sup>8</sup>

Moody grieved his punishment, and Respondent's handling of that grievance was found by the Board to be violative of the Act as set forth above.

B. *Discussion*

This case was remanded in order to allow Respondent to attempt to demonstrate that Moody's grievance lacks merit within the meaning of *Rubber Workers Local 250 (Mack-Wayne)*, 290 NLRB 817 (1988).<sup>9</sup> In that case, the Board held that a union may offer proof that its discriminatory conduct did not injure a grievant by establishing that the grievance was not meritorious. Citing *Teamsters Local 705 (Associated Transport)*, 209 NLRB 292 (1974); and *Security Personnel (Church Charity Foundation)*, 267 NLRB 974 (1983), General Counsel argues that Respondent must prove that "there is no way a grievant could prevail in arbitration" in order to establish that Moody's grievance lacks merit. Review of the cited authorities convinces me that General Counsel's argument is sound.

Given the findings set out above and the speculative nature of the Employer's rationale that Moody could have ended the incident by retreating, I find it impossible to conclude that an arbitrator would necessarily have found that Moody was a mutual combatant who deserved the same punishment im-

<sup>3</sup> Respondent's steward, Plesa, credibly so testified. Peterson testified that, at a subsequent meeting, Buckley was not in complete agreement with every aspect of Moody's account of the altercation. Peterson's testimony on this point was exceptionally tentative, vague, and unsure, and he was unable to identify which portions of Moody's account had been questioned by Buckley. Accordingly, there is insufficient evidence to conclude that Buckley recanted his earlier admission that he was the aggressor.

<sup>4</sup> Peterson so testified.

<sup>5</sup> During the investigation, one of the combatants' fellow employees Terry Brunson stated that he did not see who started the fight. At the hearing on remand, Brunson reversed himself and stated that the combatants came together simultaneously. Based on my observation of Brunson's demeanor while on the stand and in the hearing room, I find that he did not observe the beginning of the fight and that his testimony to the contrary was untrue.

<sup>6</sup> Peterson credibly so testified. Ken Bratton, the individual in question, was in prison at the time of the hearing and did not testify. I find the hearsay rendition of Bratton's account to be less credible than Buckley's admission to the contrary.

<sup>7</sup> Union's brief to the administrative law judge on remand (R. Br. at 7).

<sup>8</sup> Peterson so testified.

<sup>9</sup> The issue now before me is not how Respondent acted with respect to Moody or why it did so. Accordingly, this Decision will not address Respondent's extensive attempts to relitigate the question of whether its conduct was arbitrary and discriminatory. See R. Br. at 15-16, 26-30, and 33-34.

posed on Buckley.<sup>10</sup> Accordingly, I conclude that Respondent has not met its burden of proof.

#### CONCLUSIONS OF LAW

1. Respondent is a labor organization within the meaning of Section 2(5) of the Act.

2. Respondent has violated Section 8(b)(1)(A) of the Act as set forth in the Board's Decision and Order Remanding, 295 NLRB 742 (1989).

3. Respondent has not met its burden of proving that Moody's grievance was not meritorious within the meaning of *Rubber Workers Local 250 (Mack-Wayne)*, 290 NLRB 817 (1988).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>11</sup>

#### ORDER

The Respondent, Oil, Chemical and Atomic Workers International Union Local No. 5-114, AFL-CIO, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Making statements indicating that Respondent intended to treat employees disparately with regard to workplace grievances because of their nonunion status.

(b) Refusing to allow any employee represented by it to attend a meeting of its members in order to seek their vote to arbitrate the employee's grievance.

<sup>10</sup> Because this finding turns on the factual issue of whether Buckley was the aggressor, Respondent's reliance on the principles set forth in *Hardesty v. Essex Group*, 550 F. Supp. 752 (D. Ind. 1982), is misplaced. Similarly, questions of whether Moody was a "full combatant" once the fight had begun and whether Buckley was injured are immaterial to the determinative issue of who started the fight.

<sup>11</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.

(c) Coupling the announcement that an employee has filed a charge against it with its members' consideration of that employee's request that a grievance be carried to arbitration.

(d) In any like or related manner restraining or coercing employees in the exercise of their right to engage in or refrain from engaging in the activities guaranteed by Section 7 of the Act.

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

(a) Post at its business offices, meeting halls, and all other places where notices to its members and other employees in the bargaining unit are customarily posted, copies of the attached notice marked "Appendix."<sup>12</sup> Copies of the notice, on forms provided by the Regional Director for Region 17, after being signed by Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Request that Colgate-Palmolive Company rescind the 3-month suspension issued to Ronald A. Moody and, if it refuses to do so promptly, ask it to consider a grievance over his suspension and thereafter pursue that grievance in good faith with all due diligence including, if possible, taking the grievance to arbitration and permitting Moody to be represented by his own counsel at such arbitration with Respondent paying the reasonable attorney fees of such counsel.

(c) If unsuccessful in resuming processing of the grievance, make Moody whole, with interest, for any loss of earnings he may have suffered as a result of his suspension by Colgate-Palmolive Company.

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

<sup>12</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."