

New York Telephone Company and International Brotherhood of Electrical Workers, Local 2213, AFL-CIO. Cases 3-CA-15248 and 3-CA-15360

August 22, 1991

DECISION AND ORDER

BY MEMBERS CRACRAFT, OVIATT, AND RAUDABAUGH

On February 21, 1991, Administrative Law Judge Martin J. Linsky 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,¹ and conclusions and to adopt the recommended Order as modified.²

1. The judge found that the Respondent violated Section 8(a)(1) of the Act by enforcing a no-distribution rule in a discriminatory fashion, by permitting solicitation and distribution for a variety of beneficial causes while prohibiting distribution of union literature, pins, and stickers by Union Steward Jacqueline McLaughlin. In its exceptions, the Respondent contends that it did not discriminate against distributions by the Union. Instead, according to the Respondent, it allowed the Union to circulate single pieces of paper among employees, just as it did with charitable solicitations; the only union distribution it prohibited was "bulk distribution" of union literature (i.e., leaving copies on the desk of each employee), which it also prohibited in the case of charitable materials. The Respondent also argues that it is not unlawful, in any event, for an employer to allow charitable solicitations and distributions on a sporadic basis, as an exception to an otherwise valid solicitation and distribution policy.

Neither of the Respondent's arguments is borne out by the facts. First, contrary to the Respondent, the record establishes that the "bulk distribution" of such items as Girl Scout cookies, fruit, and candy was routinely permitted at the Poughkeepsie facility. Several witnesses, including two of the Respondent's supervisors, testified that employees and supervisors left such comestibles on individuals' desks before working

¹The Respondent has implicitly 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.

²We shall add to the Order the requirement, inadvertently omitted by the judge, that the Respondent maintain records necessary to the computation of backpay for discriminatee Jacqueline McLaughlin.

hours, just as McLaughlin was attempting to do with her union materials.³

Second, the Respondent's portrayal of charitable solicitations as taking place only infrequently is belied by the testimony of its own supervisors. That testimony establishes that, although such solicitations happened more frequently in some periods than in others, they were an ongoing feature of life at the Poughkeepsie facility, occurring on an average of twice a month (Linda Rinker) or three times a month (Laura Smith). Another supervisor, Patricia Moyer, testified that beneficial distributions could take place as often as five times in a month, and that a hiatus of several months could then ensue. Whatever the precise frequency with which the Respondent allowed such distributions to be made, the record establishes that it was extensive and significant. We agree with the judge that, having adopted a policy of permitting such solicitations and distributions to that extent, the Respondent could not lawfully deny the Union the same privilege.⁴

2. The judge found that the Respondent violated Section 8(a)(5) and (1) by unilaterally, and without bargaining with the Union, promulgating a rule requiring the Union to obtain the Respondent's permission in advance to hold union meetings in the employees' lounge. The Respondent excepts, contending that obtaining permission in advance was a longstanding requirement; that any rule change was made more than 6 months before the charges were filed, and is thus immune from attack under Section 10(b);⁵ and that access to the lounge was not a term or condition of employment that comes within the category of mandatory subjects of bargaining. We find no merit in those exceptions.

Contrary to the Respondent, the credited testimony establishes that the Union had, for several years, held meetings in the employees' lounge without being required to obtain permission in advance.⁶ The judge found that the first time the Union was apprised of the need to obtain permission to use the lounge was in January 1989, when Supervisor Theresa Murphy so informed Steward McLaughlin.⁷ The judge also found,

³Moreover, although the Respondent's distribution policy allows distributions only during nonworking time, Supervisor Murphy (the individual who instructed McLaughlin not to distribute union materials) admitted that the circulation of materials for charitable purposes took place, at least in part, during working time.

⁴See, e.g., *Imco Container Co.*, 208 NLRB 874, 878-879 (1974); *Restaurant Corp. of America v. NLRB*, 827 F.2d 799 (D.C. Cir. 1987).

⁵Sec. 10(b) provides, in relevant part, that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made[.]" The charge in Case 3-CA-15248 was filed and served on October 26, 1989.

⁶The meetings were not held during working time, and were not shown to have interfered with the Respondent's operations.

⁷In its exceptions, the Respondent correctly states that the judge confused Murphy's testimony about two other encounters with McLaughlin. She testified that she told McLaughlin in August 1988 that the Union had to get permission to use the employees' lounge. McLaughlin testified that she did not

Continued

however, that McLaughlin continued to hold union meetings in the lounge between January and July 1989 without first obtaining permission.⁸ This was consistent with the past practice of McLaughlin and her predecessor. Although Respondent apparently knew about the meetings held between January and July, it made no effort to stop them or to censure McLaughlin.

On July 7, 1989, Murphy told McLaughlin that she needed prior permission to hold union meetings in the lounge. McLaughlin asked Murphy to get her a copy of the written policy requiring permission to use the lounge, but never received anything in writing.⁹ McLaughlin attempted on July 21 to hold a union meeting in the lounge before working hours, but was prevented from doing so by Murphy because she had not obtained permission.¹⁰ On July 24, Rinker informed McLaughlin that, effective immediately, she had to have permission to hold union meetings in the lounge.

We agree with the judge that the Respondent unlawfully changed its established practice by requiring the Union to obtain advance permission to hold meetings in the employees' lounge,¹¹ and that Section 10(b) is not a bar to our finding a violation. We do so because we find, on the basis of the record summarized above, that the Respondent did not effectively change its longstanding policy of allowing the Union to use the lounge for meetings without obtaining permission until July 1989. Thus, although Murphy, a firstline supervisor, had informed McLaughlin (no later than January 1989) that permission to use the lounge was required, the Respondent apparently condoned McLaughlin's holding meetings without permission for several months, and failed to respond to McLaughlin's request that it document the existence of the permission requirement. Even Rinker, on July 24, indicated that *effective immediately*, McLaughlin would have to obtain

recall this alleged incident. Murphy also testified about an incident in early July 1989, perhaps on July 7, when she observed McLaughlin in the lounge after work and asked if a union meeting was taking place. McLaughlin confirmed this occurrence. The judge erroneously attributed the details of the latter incident to August 1988 and thereby omitted any reference to Murphy's actual testimony about her alleged encounter with McLaughlin on that date. Even assuming that the August 1988 incident transpired as related by Murphy, however, our findings and conclusions would remain the same, for the reasons discussed below.

⁸Indeed, McLaughlin testified that in January 1989, after Murphy told her she had to get permission to use the lounge for union meetings, she advised Murphy that she intended to continue holding meetings in the lounge at the same time every month, and that Murphy said nothing in response.

⁹On cross-examination, McLaughlin was asked if she refused to accept the word of a supervisor that a purported company policy actually existed unless she saw the policy in writing. McLaughlin responded that she did not always accept supervisors' representations concerning such matters because often such purported company "policies" actually did not exist.

¹⁰McLaughlin was later suspended for 3 days as a result of this episode. We adopt the judge's finding that her suspension violated Sec. 8(a)(3) and (1).

¹¹We reject the Respondent's contention that the Union's access to the lounge for the purpose of holding meetings was not a term or condition of employment, and hence was not a mandatory subject of collective bargaining. See, e.g., *BASF Wyandotte Corp.*, 274 NLRB 978 (1985), enf. 798 F.2d 849 (5th Cir. 1986).

permission to use the lounge for union meetings. It may be, of course, that the Respondent actually initiated the new permission policy by January 1989 (or even earlier), but its subsequent behavior persuades us that that was not the case.¹² We find, therefore, that the Respondent has failed to demonstrate that the change in policy concerning the Union's use of the lounge occurred more than 6 months before the charge was filed in October 1989,¹³ and thus that its Section 10(b) defense is without merit.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, New York Telephone Company, Poughkeepsie, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 2(e) and reletter the subsequent paragraphs.

"(e) 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."

¹²Assuming, arguendo, that the Respondent had promulgated the new permission policy as early as August 1988, the record establishes that the policy was honored almost exclusively in the breach. Having allowed its policy to slip into desuetude in this fashion, the Respondent could not lawfully revive it without bargaining with the Union. See, e.g., *Burns Electronic Security Services*, 245 NLRB 742, 764-765 (1979), enf. denied on other grounds and remanded 624 F.2d 403 (2d Cir. 1980), reversed on other grounds 256 NLRB 860 (1981).

¹³We do not wish to imply that an employer's rule changes must be in writing to be effective, or that employees are privileged to ignore supervisors' instructions based on unwritten plant rules. We simply find, on the basis of all the circumstances of this case, that the Respondent did not demonstrate that it actually changed its policy regarding the Union's access to the lounge until July 1989.

Member Oviatt, like his colleagues, is unpersuaded that, on this record, the Respondent's new policy of requiring advance permission to use the employee lounge for union meetings was actually implemented and clearly communicated to the Union before July 1989. Had that implementation and communication taken place in January 1989 or earlier, as the Respondent contends, Member Oviatt would find this allegation of the complaint barred by Sec. 10(b).

Alfred M. Norek, Esq., for the General Counsel.
Lon Bennett, Esq., Steve Martin Esq., and Saul Scheier, Esq.,
of New York, New York, for the Respondent.
Mairead E. Connor, Esq., of Syracuse, New York, for the
Charging Party.

DECISION

STATEMENT OF THE CASE

MARTIN J. LINSKY, Administrative Law Judge. On October 26, 1989, International Brotherhood of Electrical Workers IBEW Local 2213 (Union or Charging Party) filed the charge in 3-CA-15248 and on December 20, 1989, and Feb-

ruary 28, 1990, filed the charge and amended charge in 3-CA-15360.

On February 12, 1990, the National Labor Relations Board, by the Regional Director for Region 3, issued an amended consolidated Complaint, which was further amended by the Regional Director for Region 3 on April 9 and 25, 1990.

The amended consolidated complaint alleges that the New York Telephone Company (Respondent) violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act) by unlawfully prohibiting employee distribution of union buttons and stickers, by unlawfully refusing to permit the posting of notices of union meeting without prior approval, by unlawfully denying unit employees use of the employee lounge for union meetings, and by unlawfully suspending for 3 days union steward and employee Jacqueline McLaughlin.

Respondent denies that it violated the Act in any way.

A hearing was held before me in Albany, New York, on May 2 and 3, 1990.

On the entire record in this case, to include posthearing briefs submitted by the General Counsel, Respondent, and Charging Party, and on my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, New York Telephone Company, is, and has been at all times material, a corporation duly organized under, and existing by virtue of, the laws of the State of New York.

At all times material, Respondent has maintained its principal office and place of business at 1095 Avenue of the Americas, in the city of New York, and the State of New York, and various offices and facilities located throughout the State of New York, including a Residence Service Center located at 412 Main Street in the city of Poughkeepsie, and the State of New York, (Poughkeepsie RSC) and is, and has been at all times material, engaged at the offices and facilities in the business of providing and installing local and long-distance telephone communications and related services in the State of New York.

Annually, in the course and conduct of its operations within the State of New York, Respondent derives gross revenues in excess of \$1 million and during the same period of time purchases and receives goods and materials valued in excess of \$50,000 which are shipped to it within the State of New York directly from points outside the State of New York.

Respondent admits, and I find, that it 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. THE LABOR ORGANIZATION INVOLVED

The Union, IBEW Local 2213, is and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Overview

The Union represents a unit of business representatives at the Poughkeepsie, New York, Resident Service Center (RSC) in addition to employees at other locations. A collective-bargaining agreement was in effect. Negotiations for a new contract were to begin in June 1989.

The collective-bargaining agreement was silent on the issues of distribution of union buttons and stickers in the work place, posting of notices of union meetings on the back door of the Poughkeepsie RSC, and whether the Union needed prior approval to use the employee lounge for union meetings.

In early May 1989 Union Steward Jacqueline McLaughlin was prohibited from distributing union buttons and stickers in the work area at the Poughkeepsie RSC. In July 1989 McLaughlin was told she could no longer post notices of union meetings on the back door of the Poughkeepsie RSC. On three occasions in July 1989 McLaughlin was told that the Union needed prior approval from management before it could hold union meetings in the employee lounge.

Between August 4 and December 3, 1989, the employees were on strike. The parties agreed to a successor collective-bargaining agreement effective December 4, 1989. On December 4, 1989, the striking employees returned to work and Jacqueline McLaughlin, who had been out on strike, was suspended for 3 days without pay for insubordination toward management growing out of an incident on July 21, 1989, concerning use of the employee lounge for a union meeting.

B. Prohibiting the Distribution of Union Buttons and Stickers

The normal working hours at the Poughkeepsie RSC were 8:30 a.m. to 5 p.m. The facility opens, however, between 7 and 7:30 a.m. and employees can come into the facility at that hour. One day in early May 1989 before 8:30 a.m. Union Steward Jacqueline McLaughlin, in anticipation of the upcoming negotiations, was placing union buttons and stickers on the desks of the unit employees in the work area. The stickers were not stuck to the desks but the unit employees could peel and stick them on clothing, to avoid putting holes in their clothing if they chose to wear a union button. She was observed doing so by Manager Terry Murphy. Murphy told McLaughlin she was not to place union buttons and stickers on the reps' desks in the work area.

McLaughlin credibly testified that she had been doing so, i.e., placing buttons and other items on employees' desks in the work area, since 1985 when she became a union steward and that it had been done for the entire 19 years she had worked at the Poughkeepsie RSC. Former Steward Donna Smith credibly corroborated McLaughlin on this point. McLaughlin did it openly and before the workday started and was sure that over the years management and specifically Terry Murphy had seen her doing it. She specifically remembers making similar distributions in February and March 1989. Several management officials, i.e., Manager Terry Murphy, Manager Laura Smith, and Manager Pat Moyer, however, testified they never saw her distribute any literature, etc., on the desks of the unit employees. I believe

all the witnesses on this issue. It seems that McLaughlin's distribution of union material before the workday began was so lacking in disruptive effect that management did not even know she was doing it even though she did it openly.

There was overwhelming evidence from both witnesses for the General Counsel, i.e., Jacqueline McLaughlin, Eileen Connolly, and Donna Smith, and witnesses for the Respondent, i.e., Terry Murphy, Linda Rinker, Laura Smith, and Pat Moyer that all manner of nonunion solicitation and distribution for schools, churches, girl scouts, little league, etc., occurred in the work area with management's blessing.

It is hornbook law that a no-distribution policy cannot be discriminatorily maintained or enforced, i.e., you cannot have a ban on union distributions and no ban on other employee distributions. Likewise, an employer may not impose a ban only on union distribution but permit virtually all other distributions by its employees to take place. See generally *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945).

Respondent's Labor Relations Staff Director Robert Eberle, who did not work at the Poughkeepsie RSC, testified that Respondent did have a policy that employees may not distribute pamphlets, handbills or literature in working areas at any time. This policy was in writing and posted in the Poughkeepsie RSC. However, it was posted in such an out of the way area that Respondent's own witnesses, Manager Terry Murphy, Operating Manager Linda Rinker, Manager Laura Smith, and Manager Pat Moyer, all of whom work or had worked at the Poughkeepsie RSC could not testify where the "no-distribution in work areas" notice was posted in the facility.

In any event there was disparate enforcement of the no-distribution rule. This is a violation of Section 8(a)(1) of the Act. *Harrah's Marina Hotel & Casino*, 296 NLRB 1116 (1989). The remedy for this violation of the Act is to cease discriminatorily enforcing or imposing a nondistribution rule.

C. Refusal to Permit Posting of Notices of Union Meetings on Back Door of Poughkeepsie RSC

On July 7, 1989, Manager Terry Murphy told Union Steward Jacqueline McLaughlin that she could not hold union meetings in the employee lounge without getting prior approval from management to do so and she could no longer post notices of union meetings on the back door of the Poughkeepsie RSC.

McLaughlin credibly testified that since she became a union steward in 1985 she had posted notices of union meetings on the inside of the back door of the RSC without any complaints from management. The union meetings were usually scheduled in the employee lounge on a Friday morning before work. McLaughlin would post a notice on the inside of the back door which led to the employee parking lot the night before the meeting reminding employees to come in early the next day for a union meeting. The employees would be in a position to see the reminder as they exited the building to go to the parking lot and then home or elsewhere. The following morning McLaughlin would remove the notice. McLaughlin testified that other notices (announcing retirements and open houses) were also posted on the inside of the back door.

There was no corroboration of McLaughlin's testimony that notices other than union meeting notices were ever posted on the back door. If any such notices, other than union

meeting notices, were posted I'm inclined to believe it was only rarely. The issue is whether Respondent could lawfully prohibit the posting of any notices on the back door.

Terry Murphy credibly testified that Respondent was trying to upgrade and beautify the facility. As part of this beautification effort the back door was painted. It would appear reasonable, since the Union had other alternatives to let its members know about union meetings, for Respondent to promulgate a rule that no notices of any kind can be posted on the back door. Respondent cannot, of course, permit the posting of some notices on the back door but no union posting.

Since the record reflects that no posting—union related or otherwise—were permitted on the back door I find that the Act was not violated. The "right" to post a notice on a door is, in the context of this case, de minimus since the unit employees had a bulletin board, all worked in the same area and passed notices of meetings to one another at the work place. This is not the kind of change requiring notice and opportunity to bargain. See *Peerless Food Products*, 236 NLRB 161 (1978). The change here is insubstantial and insignificant.

D. Requirement for Prior Permission to use Employee Lounge for Union Meetings

It is alleged that Respondent violated the Act on July 7, 21, and 24, 1989, when it denied unit employees the use of the employee lounge for the purpose of holding union meetings unless the unit employees obtained prior approval, contrary to the established past practice.

The employee lounge is on the second floor of the Poughkeepsie RSC. The lounge had a television set, several tables, chairs, and a couch. The RSC opens between 7 and 7:30 a.m. Employees are free to use the lounge to have coffee, chat, etc., until work starts at 8:30 a.m.

The union steward prior to Jacqueline McLaughlin was Donna Smith, who served in that capacity from 1982 to 1985. Smith credibly testified that when she scheduled union meetings in the employee lounge there was no requirement to get prior permission to do so. McLaughlin testified likewise until January 1989 when Manager Terry Murphy told her that she needed permission to hold union meetings in the lounge. At one time in August 1988 Terry Murphy saw Jacqueline McLaughlin in the lounge after work and asked if a union meeting was going on. This is not Respondent telling the Union that permission was needed to use the lounge. McLaughlin did not even remember the incident. Therefore, I find that the first time Respondent told the Union that prior approval from management was necessary before the Union could hold a meeting in the employee lounge was in January 1989.

There was no requirement in writing that permission was needed for anyone to use the employee lounge for a meeting. In fact at one point prior to being disciplined McLaughlin asked Murphy for something in writing and was never given anything nor was anything in writing introduced at the hearing. Respondent maintains that permission would obviously be required to hold a meeting in the employee lounge in order to avoid conflicts. McLaughlin conceded that a conflict was possible, i.e., two groups wanting to use the lounge at the same time. However, there were other key rooms to use, e.g., two conference rooms for which a key was needed and

McLaughlin had in the past asked permission to use the conference room and was granted permission.

The employee lounge was different from the conference room because it was left open and all employees were free to use it. The Union held its meetings before work started. Respondent conceded that permission was not needed for several employees to gather to discuss politics or the weather, therefore, one could argue no permission should be needed for employees to gather to have a union meeting. There is no evidence that the employees' use of the lounge for union meetings prior to the start of the workday interfered in any way with the use of the lounge by others.

McLaughlin did not file a grievance when Murphy told her in January 1989 that prior permission was needed to have a union meeting on the grounds that this was a unlawful unilateral change or for any other reason. In July 1989 McLaughlin was again told by Murphy no meetings in the lounge without prior approval. The charge was filed within 6 months of July 1989 but not within 6 months of the January 1989 statement on the matter to McLaughlin by Murphy. I see no 10(b) problem, however, because the July 1989 incidents are separate violations and because I believe McLaughlin that she continued to have union meetings between January and July 1989 in the employee lounge without getting approval and management said nothing.

The requirement for the Union to get permission to use the employee lounge for union meetings (attended by unit employees only) was a unilateral change to a past practice that had existed for many years.

There is no evidence that these union meetings were causing a problem at the facility. If Respondent wanted to change the past practice of not requiring advance permission to use the lounge it should have proposed the change to the Union and they could have negotiated about the matter. Respondent's failure to give prior notice and opportunity to bargain about the matter to the Union prior to the unilateral change violates Section 8(a)(1) and (5) of the Act.

Several of Respondent's officials, i.e., Operations Manager Linda Rinker, Manager Terry Murphy, Manager Laura Smith, and Manager Pat Moyer testified that prior permission was needed to use the lounge but I do not credit their testimony on this point. It seems to me that these witnesses were merely assuming permission was needed because it made some sense to them to require permission such that two or more groups did not show up to use the lounge at the same time. Clearly permission would be needed for a group of "outsiders," i.e., people who did not work in the building, to use the lounge.

Laura Smith claims that Jacqueline McLaughlin once asked permission to use the lounge. I believe Smith is mistaken and McLaughlin probably asked to use the conference room for which she would need a key.

E. Three-Day Supervision of Jacqueline McLaughlin

As noted above Terry Murphy told Jacqueline McLaughlin in January 1989 that she needed prior permission to hold union meetings in the employee lounge. In early July 1989 Murphy again told McLaughlin that prior permission was needed to hold a union meeting. McLaughlin was not told that permission was needed immediately before, at least 1 day before, etc., the scheduled meeting. In other words how

much prior to the meeting was permission needed was never made clear.

Suffice it to say since I credit Jacqueline McLaughlin and Donna Smith that prior permission had not been required prior to January 1989 I find this unilateral change to be a violation of Section 8(a)(1) and (5) of the Act.

McLaughlin scheduled a union meeting from July 21, 1989, in the employee lounge for 8 a.m. The workday did not start until 8:30 a.m. She had not sought nor received prior permission to hold the meeting. The chain of command at the RSC was that McLaughlin reported to Manager Terry Murphy who reported to Operations Manager Linda Rinker who reported to District Manager Mary Jane Johnston.

I credit McLaughlin's version of what happened on the morning of July 21, 1989. McLaughlin was corroborated in all respects by Eileen Connolly, who is still an employee at the RSC. Indeed Terry Murphy's testimony supports the version of events as testified to by McLaughlin and Connolly except that McLaughlin and Connolly testify that McLaughlin did not raise her voice and Terry Murphy claims that McLaughlin did raise her voice and was very loud in speaking to Murphy. I credit McLaughlin and Connolly on this point over Murphy.

McLaughlin credibly testified as follows concerning her encounter with Murphy on the morning of July 21, 1989:

A. Well, I had gone upstairs and as I was going into the lounge, Terry stopped me and she said to me, "Have you—did you speak to Linda Rinker or Mary Jane Johnston and get permission to use the lounge?" And I said, "No, I did not." And then they said to me, "Did you ask Laura Smith," who is another supervisor, "to use the lounge?" And I said, "No, I did not." And she said, "Then you cannot use the lounge to hold a union meeting because you have not asked for permission."

I then said to her, "Terry, do you realize you are violating my rights under the National Labor Relations Act?" She said, "All I know is that it is a company policy and that you have to get permission to use the lounge." And I said, "They have never had to get it before. I did not receive anything from Bob Eberle and, no, I did not ask for anyone to use the lounge." I said, "I have no problem. I will take my people and go outside."

And with that I took the people and I went outside to the parking lot.

Q. Did she say anything else?

A. She also said to me during the course of this conversation, she said it to me—there were people coming through the hallway and she motioned them to come on through. And one of them was Eileen Connolly. And I said, "No, Eileen. I don't want you to go anywhere. I want you to stand here and listen." And Terry and I continued the conversation.

And then she said to me during the course of this conversation, she said to me to the effect that "You are running a circus. If you need witnesses, I will get witnesses, too." I said, "Terry, I have no problem with that. If you want to go get management people to come up here and stand with you, I don't have any problem." She then told me, she said, "Well, I want to see you downstairs." And I said, "Are you going to pay me?"

And she said, "No, I am not." And I said, "Well, I have a union meeting to conduct and I'll report to work at 8:30. I will see you at 8:30 and we will discuss it then."

She walked away from me saying something about, "You are running a circus and why don't you just grow up." And I said to her, "Excuse me, Terry, did you just tell me to grow up?" And she walked away muttering. And with that I told the people let's go, we'll go out in the parking lot, and with that we went outside and went to the parking lot.

Q. July 21st you were planning to hold a union meeting?

A. Yes, I was.

Q. You were planning to hold this where?

A. In the lounge.

Q. So that the meeting took place where?

A. The meeting took place in the parking lot outside of the building.

Q. So I understand, your starting time is what time?

A. At 8:30 in the morning.

Q. So, Murphy asked to speak with you?

A. It was about two minutes of 8, maybe two minutes after that.

Q. And your reply to that was?

A. "Are you going to pay me for overtime?" And she said no. And I said, "Well, I have a union meeting to conduct and I will see you at 8:30."

Q. Why did you ask her if she would pay you overtime?

A. Because prior to this time, whenever the union had been involved with anything with management after work hours, we would be paid overtime, we would be compensated for the time that we were there. There have been times when we would—we held discussions and the discussions were scheduled for the end of the day or the slower part of day whenever possible, and sometimes these discussions would run over to after 5:00, okay, and we would be compensated for the time.

Q. To your knowledge, including your knowledge as a steward, was there any practice of requiring employees to meet prior to the start of their scheduled hours in a nonpaid basis with management?

A. Not to my knowledge, no." (Tr. at 49–52.)

Evidence at the hearing reflects that if an employee met with management at hours other than the 8:30 a.m. to 5 p.m. workday the employee was paid overtime. Accordingly, it was not insubordination for McLaughlin to ask Murphy if she would be paid if she met with Murphy before the start of the workday.

Murphy did not meet with McLaughlin on July 21, 1989, during the workday. On the next workday, Monday, July 24, 1989, McLaughlin was called into a meeting with Manager Terry Murphy and her superior, Operations Manager Linda Rinker, and was told by Rinker that prior permission was needed for unit employees to hold union meetings in the employee lounge and that no union notices could be posted on the back door of the facility. Nothing was said at this meeting about McLaughlin being disciplined in any way for the events of July 21, 1989.

McLaughlin worked on July 24, 25, 26, 27, 28, 31 and August 1, 2, and 3 and nothing was said to her about her

being disciplined for the events of July 21, 1989. On August 4, 1989, the unit employees, including McLaughlin, went on strike. The Union and Respondent reached agreement on a new collective-bargaining agreement effective December 4, 1989. The employees returned to work on December 4, 1989. On December 4 McLaughlin was suspended for 3 days without pay for insubordination toward Terry Murphy on July 21, 1989.

Was this 3-day suspension lawful or unlawful under the Act. I conclude it was unlawful. McLaughlin was not insubordinate toward Murphy. She did not fail to recognize or accept the authority of her superior Terry Murphy. She did not hold the union meeting in the lounge but went outside. She did not insult Murphy. The new rule requiring prior permission to hold union meetings in the lounge was itself a violation of the Act. There was no showing whatsoever that Respondent was in any way adversely impacted by the unit employees meeting in the lounge before the start of the work day.

The decision to suspend McLaughlin was made by Operations Manager Linda Rinker and District Manager Mary Jane Johnston. The decision was made in July but on the advice of Bob Eberle, staff director for labor relations, no action was taken until after the strike because Eberle did not want the disciplining of a union steward to adversely impact on the negotiations for a new contract.

Because of the reason for Respondent's delay in the imposition of punishment I do not find condonation in this case, i.e., that by its inaction, Respondent forgave the alleged misconduct of McLaughlin.

There was a legitimate dispute between Respondent and the Union regarding whether or not the requirement to get prior permission to the lounge for union meetings was a unilateral change in violation of the Act. In early July 1989 McLaughlin had asked to see the rule in writing and nothing had been given to her. Under these circumstances and since McLaughlin was not loud or disrespectful to Murphy I find that the disciplining of McLaughlin was in violation of Section 8(a)(1) and (3) of the Act. She was disciplined for engaging in protected concerted activity, i.e., she was holding a union meeting and she was disputing, in her capacity as steward, the requirement that she needed prior permission to use the lounge before the workday started. McLaughlin was not loud or abusive to Murphy and did not hold the meeting in the lounge when Murphy told her not to.

Considering all the circumstances the suspension of McLaughlin, who had in 19 years of service never been disciplined, violates Section 8(a)(1) and (3) of the Act. See *C. W. Sweeney & Co.*, 258 NLRB 721 (1981).

Even if it was clear that McLaughlin had to get prior permission to use the employee lounge for a union meeting before the workday started involving only unit employees applying the analysis of *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), I would nevertheless conclude that she was disciplined because of her protected concerted activity and not because she failed to secure prior permission to hold the meeting.

The remedy for this violation is to reimburse McLaughlin for lost pay and expunge the suspension from her file.

CONCLUSIONS OF LAW

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

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By enforcing a no distribution rule in a discriminatory manner against the Union Respondent violated Section 8(a)(1) of the Act.

4. When Respondent unilaterally imposed a new rule requiring the Union to secure prior permission before holding union meetings in the employee lounge without giving prior notice and opportunity to bargain about the new rule to the Union, it violated Section 8(a)(1) and (5) of the Act.

5. By suspending Union Steward Jacqueline McLaughlin for 3 days because she engaged in protected concerted activity Respondent violated Section 8(a)(1) and (3) of the Act.

6. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹

ORDER

The Respondent, New York Telephone Company, Poughkeepsie, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discriminatorily enforcing a no-distribution rule against the Union.

(b) Changing unilaterally and without giving prior notice and opportunity to bargain to the Union the procedure for union meetings in the employee lounge.

(c) Suspending union stewards for engaging in protected concerted activity.

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

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

(a) Uniformly enforce any rule regarding no distribution of literature in the work area.

(b) Rescind the requirement that the Union needs prior permission to use the employee lounge for union meetings and if a change requiring prior permission is sought give prior notice and opportunity to the Union to bargain concerning any change.

(c) Make Jacqueline McLaughlin whole for the loss of pay and other benefits suffered by her as a result of her unlawful suspension. Backpay with interest to be computed in the manner set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(d) Remove from its files any reference to the suspension of Jacqueline McLaughlin and notify her in writing that this has been done and that evidence of her unlawful suspension will not be used as a basis for future personnel action against her.

¹ 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.

(e) Post at its facility in Poughkeepsie, New York, copies of the attached notice marked "Appendix."² Copies of the notice, on forms provided by the Regional Director for Region 3, 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 employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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

² 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

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

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT maintain a no distribution rule in the work area which discriminates against the Union,

WE WILL NOT change the procedures regarding unit employees use of the employee lounge for union meetings without giving prior notice and opportunity to bargain to the Union.

WE WILL NOT suspend employees because they engage in protected concerted activity.

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

WE WILL make Jacqueline McLaughlin whole for any loss of pay or benefits she suffered because of the discrimination against her plus interest.

WE WILL remove from our files any reference to the suspension of Jacqueline McLaughlin and notify her in writing that this has been done and that evidence of her unlawful suspension will not be used as a basis for future personnel action against her.

NEW YORK TELEPHONE COMPANY