

Ogden Allied Eastern States Maintenance Corporation and Allen Saitta

International Union of Operating Engineers, Local 68, AFL-CIO and Allen Saitta. Cases 22-CA-16092 and 22-CB-5957

February 28, 1992

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND
RAUDABAUGH

On March 14, 1990, Administrative Law Judge Howard Edelman issued the attached decision. The General Counsel and the Respondent then filed exceptions and briefs, and both Respondents filed answering briefs to the General Counsel's exceptions.

On October 30, 1990, the Board issued an order vacating the judge's decision and remanding the case to him to rehear de novo the portion of the hearing that reopened on October 5, 1989, and to prepare a decision.

On June 7, 1991, the judge issued the attached supplemental decision. The Respondent Union 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, the supplemental decision, and the record in light of the exceptions and briefs and has decided to affirm the judge's

rulings,¹ findings,² and conclusions and to adopt the judge's recommended Order.³

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and orders that the Respondent Union, International Union of Operating Engineers, Local 68, AFL-CIO, West Caldwell, New Jersey, its officers, agents, and representatives, shall take the action set forth in the recommended Order.

IT IS FURTHER ORDERED that the complaint in Case 22-CA-16092 be dismissed in its entirety.

²In his supplemental decision, the judge reaffirms the findings of fact, conclusions of law, and recommended Order of his March 14, 1990 decision in this same proceeding. However, the judge notes that his ultimate findings and conclusions set forth in his original decision were in no way dependent on fn. 4 of that decision. In adopting the judge's supplemental decision, we find it unnecessary to rely on fn. 4 of his original decision.

³We correct the remedy section of the judge's original decision to provide that interest shall be computed as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), rather than *Florida Steel Corp.*, 231 NLRB 651 (1977).

William Grant, Esq., for the General Counsel.
Joseph R. Fitzpatrick, Esq., for Respondent Ogden.
Albert G. Kroll, Esq., for Respondent Union.

DECISION

STATEMENT OF THE CASE

HOWARD EDELMAN, Administrative Law Judge. This case was tried before me on May 3, July 20 and 21, and October 5, 1989, in Newark, New Jersey.

On February 22, a complaint alleging that International Union of Operating Engineers, Local 68 (Local 68) violated Section 8(b)(1)(A) and (2) of the Act by causing Ogden Allied Eastern States Maintenance Corporation (Ogden) to discharge Allen Saitta, in violation of Section 8(a)(1) and (3) of the Act.

On the entire record, including my observation of the demeanor of the witnesses, and consideration of the posttrial briefs, I make the following

FINDINGS OF FACT

Ogden is a New York State corporation, with an office and place of business in New York, New York, and is engaged in the business of providing maintenance service to various business enterprises, including various Bell Communications Research, Incorporated facilities (Bell), located in New Jersey. Ogden annually derives gross income in excess of \$50,000 from the provision of maintenance services directly to customers located outside the State of New York.

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

Local 68 is a labor organization within the meaning of Section 2(5) of the Act. Local 68 represents the Ogden employees performing maintenance services for Bell in New Jersey. The unit of employees covered and their terms and

¹The Respondent Union has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In his original decision, the judge relied, in part, on Vincent Giblin's office as president of the International Union, in crediting employee Allen Saitta and discrediting the Respondent's witnesses as to Saitta's conduct at his September 14, 1988 meeting with Giblin and other union officers. As part of its credibility exceptions, the Respondent Union correctly argues that, at the time of the September 14 meeting, Giblin was chief executive officer and business manager of Local 68 of the Union, and not president of the International. We find that any error in the judge's findings as to the office Giblin held was insufficient in these circumstances to warrant reversing the credibility resolutions. Thus, Saitta's testimony that Giblin said to Saitta at the Local union hall that Giblin had "all the power in this Union" is not inconsistent with Giblin's position as business manager. The judge's observation that Saitta would have been "too intimidated" by Giblin for Saitta to have acted as described by Giblin and McGuire is not undermined by the judge's error in attributing to Giblin the title of president of the International. As business manager, Giblin could have been just as intimidating.

conditions of employment are set forth in a collective-bargaining agreement between Local 68 and Ogden.

As set forth above, Ogden performs maintenance service for several Bell facilities located in New Jersey, including a facility located in Navesink, New Jersey. The Bell New Jersey facilities maintained by Ogden in New Jersey are supervised by an area manager who is headquartered at Bell's Piscataway, New Jersey facility. At all material times this position was occupied by Al Teixuro, an admitted supervisor.

At the Bell Navesink facility, Ogden employees, approximately 28 maintenance employees, working under various job classifications who provide 24-hour-per-day maintenance services, on a three-shift basis. There are about 10 maintenance employees per shift. These shifts are supervised by shift "working foreman" who report directly to the area manager. The supervisory status of one of these shift foreman, Franz Michot, is in issue. At issue also is the agency status of Michot.

The job classification of "working foreman" is a unit classification, and employees working in such position are required as a condition of employment to be members of Local 68. Nevertheless Michot is the Ogden representative who is in charge of the day-to-day operation of his shift. The area manager visits the Navesink facility a few times each week spending but a few hours at the facility. Michot spends the majority of his time overseeing the job, making sure the jobs are being properly carried out, and doing various paperwork. He spends a minority of his time working with his hands performing maintenance work. Michot assigns the employees their daily work. For the most part such assignment is routine. However, at times such assignments are made on Michot's evaluation of an employee's skill. Michot also prepares employee's shift schedules and maintains payroll records. Michot interviews entry level employees for hire, but the actual decision to hire is made by the area manager. The handling of grievances is the responsibility of the area manager. Discipline of employees is handled by the area manager. Michot would relay any problem requiring discipline to the area manager who would decide what, if any discipline was necessary. Michot would sometimes speak to an employee about minor rule infractions. Michot has no authority to hire, discharge, suspend, promote, lay off, recall, or effectively recommend such action.

Allen Saitta began his employment at Ogden's Navesink facility on November 11, 1985, at the age of 19, right out of high school. He was assigned to an entry level control room position on the afternoon shift. Pursuant to the union-security clause in the collective-bargaining agreement between Ogden and Local 68, Saitta became a member of Local 68. Saitta's father was a longtime union member and Saitta had some knowledge of the organization and functions of unions generally. Sometime in April 1987 Saitta was promoted to the position of maintenance mechanic helper and a few months later in August 1987 was transferred to the day shift. Saitta was pleased with his day-shift transfer because it enabled him to attend night school.

In the summer of 1988 Saitta was transferred back to the afternoon shift. At the same time Bell canceled its contract with Ogden for the control room and maintained it with Bell employees. Rather than lay off the three Ogden employees who had maintained the control room, they were transferred by Bell to the day shift as "temporary" employees. These

employees had less seniority than Saitta. The transfer of Saitta to the afternoon shift interfered with his night school attendance. He resented the fact that he had to work the afternoon shift while less senior employees were working the day shift.

Saitta complained to Local 68 Shop Steward Dave Stanley about his reassignment to the afternoon shift, and demanded his transfer to the day shift based on seniority. Stanley told Saitta there was nothing Local 68 could do about the transfer. It was a Bell decision.

Whether Saitta's position had merit is immaterial to the disposition of this case. There is no question in my mind that Saitta believed his seniority entitled him to work the day shift in the place of one of the temporary employees then working the shift. His complaint to Steward Stanley and subsequent complaints to other Local 68 officials were made in such good-faith belief.

Several days later Saitta again complained to Stanley contending he had a right to work the day shift. He handed Stanley a written grievance to this effect and asked Stanley to sign it. Stanley refused to sign the grievance but agreed to process it.

Stanley attached a note to Saitta's grievance directed to Thomas Giblin, Local 68 president, which indicated that Stanley had heard that Saitta had lost his temper recently and had kicked and punched a refrigerator when he discovered his lunch was missing. Presumably, the note was to indicate that Saitta was in an angry mood over his transfer to the afternoon shift and the failure of Local 68 to arrange for his reassignment to the day shift.

Several days after Saitta filed his grievance he called Local 68 and spoke to Business Representative Steve McGuire. He explained his position to McGuire. McGuire angrily told him that he was just 20 years old and he wanted to change the system, and that he had a long time to wait for anything.¹

Several days following his conversation with McGuire, Saitta called Thomas Giblin, Local 68 president. He asked Giblin for a transfer to another Bell facility maintained by Ogden and complained that Stanley was "sleeping with management," going on fishing trips with management officials, and not representing him properly.

The next day, September 13, when Saitta drove to work he was met by McGuire and Stanley. McGuire asked Saitta if he had called Local 68 and complained to Thomas Giblin that Stanley was "sleeping with management." Saitta acknowledged he had. McGuire grew angry and asked Saitta to prove it. He then told Saitta that Saitta thought he would complain to the International. McGuire grew angrier and yelled at Saitta to be at "the goddamned Union Hall in the morning. I want your ass in the Union Hall in the morning or you're not going to have a job."

McGuire's testimony, which I do not credit, is contrary to that of Saitta. McGuire testified that he went to see Saitta with Stanley because Saitta by contacting Thomas Giblin

¹McGuire denied the above conversation with Saitta. Rather he testified he told Saitta that if he wanted to return to the day shift he could do so as a temporary employee subject to lay off at any time. For reasons set forth in detail belows I find Saitta to be a credible witness. I do not find McGuire's testimony in this case credible. Moreover, because the transfer was affected by Bell rather than Ogden, Local 68 could not have affected such reassignment.

was bypassing McGuire and not following the proper chain of command and internal complaint procedures. McGuire testified when he met Saitta with Stanley he calmly explained to Saitta why his seniority did not allow him the day-shift preference and then questioned why he would accuse Stanley of "sleeping with management." At this point according to McGuire Saitta began screaming and carrying on and in response to this told Saitta to be at the union office the following day and he would schedule a meeting with the "top guy."²

The following morning, September 14, Saitta reported to the Local 68 union hall. He was ushered into an office. Present were Vincent Giblin, president of the International, McGuire, and Stanley. Saitta credibly testified that McGuire told him he was "at the top" now and introduced him to Vincent Giblin. Giblin told him to sit down, that if he lost his temper he would be "carried out of the union hall." Giblin, McGuire, and Stanley are big men, over 6 feet tall, and husky. Giblin had lost some weight as the result of recent surgery. Saitta is about 5 feet 9 inches and about 150 pounds. Giblin handed Saitta the union bylaws and directed him to read a specified paragraph in the bylaws. Saitta read the paragraph. Giblin asked him what the paragraph meant to him. Saitta replied that it meant he Vincent Giblin had total power in the Union. Giblin rose from the chair where he had been seated and screamed in Saitta's face: "that's right, I have all the goddamned power in this Union, you threatened to go to the International, I am the goddamned International. Tommy [Thomas Giblin] works for me. He's the business manager and he wants you out of here. I want you out of here. I want your card. You're out of a job."

Saitta was shaken but asked Vincent Giblin if he could talk to Thomas Giblin. Vincent said okay and took Saitta to an adjoining office, picked up the phone, and then slammed it down and said: "You don't deserve to talk to Tommy, I want your card. Just give it to me now, you're out of here. You don't have a job."

Saitta gave Giblin his union card and Giblin told him to get out of his office. Saitta left.

Giblin and McGuire incredibly testified that when Giblin calmly attempted to explain the Union's chain of command and internal complaint procedures Saitta exploded "to hell

²It is simply not believable to me that given the probable lack of merit to Saitta's grievance, his persistent complaints, his accusations against Stanley, over McGuire's head to contact Thomas Giblin, that McGuire went down to the Bell facility at Navesink to explain to Saitta the appropriate chain of command, and union procedure. Rather, I find it believable, that Saitta's conduct angered McGuire and he went to see Saitta to tell him that he better get in line and stop making accusations, and when Saitta persisted McGuire lost his temper, and threatened to "pull him off the job."

Although Saitta's testimony is at times vague, for example when he testified as to his promotions and transfers from one job and shift to another, and at other times when he testified as to statements not contained in his affidavit, nevertheless I find his testimony, especially concerning the above conversation with McGuire and Stanley and the September 14 meeting at the union hall described below very detailed, descriptive, and logical. It is not the kind of testimony that Saitta would have the inventiveness or imagination to fabricate. I was also impressed with Saitta's demeanor, he testified in a forthright manner and was responsive to questions on both direct and cross-examination. In short, I find Saitta's testimony has a ring of truth.

with this" and vehemently renewed his accusations that Stanley and McGuire were "sleeping with management." Giblin testified that in response he calmly told Saitta that if he did not like the way the Union was run he could turn in his book, whereupon Saitta exploded again and told him "to take the book and shove it up [his] ass, I'm leaving," that he wanted "no part of the union, no part of the job."³

A few minutes after Saitta left the meeting, McGuire called Ogden's area manager, Al Teixuro. Teixuro was not in. McGuire left a message with Teixuro's secretary, Janice Reber, that Saitta would not be going to work or was not going to be working there anymore. When questioned as why McGuire would call Teixuro's office and leave such message he responded, "I just did it. I don't know why. I mean I can't answer your question."

Reber conveyed to both Teixuro and Michot, the foreman in charge of Saitta's shift, McGuire's message that Saitta would no longer be working at Ogden. Michot testified that following his phone conversation with Reber, he understood the message to mean that Saitta had been terminated.

On or about September 22 Saitta returned to the Ogden jobsite at Navesink. He returned his uniform and badge to Michot and told him the Union had taken his book and pulled him from the job. Saitta then asked Michot for a letter to present to unemployment. Michot prepared the following letter:

To whom it may concern:

Allen Saitta was terminated at this job site on 9/14/88 by the Union. The Union pulled his membership card and notified us he no longer works there. This was not with any action of the employer. His work was satisfactory in all aspects.

Franz P. Michot
Allied Foreman

Saitta filed a claim for unemployment with the New Jersey Department of Labor. The investigator handling the claim relied solely on information supplied to him by Saitta. The claim was eventually processed. Ogden did not contest the claim and Saitta was eligible for coverage.

On or about May 3, 1989, during the course of the instant trial, Ogden agreed to a settlement wherein they would reinstate Saitta. After reaching this agreement, Teixuro received a telephone call from a Bell official who informed Teixuro that he heard a rumor that there was a poll taken by Local 68, polling whether employees would strike if Saitta was reinstated. The Bell official told Teixuro he didn't want problems and Ogden better not put Saitta back to work. Local 68

³As set forth above, I was impressed with Saitta's credibility. An examination of his testimony creates a very detailed description of what took place. In view of Saitta's accusations concerning Stanley and McGuire, in view of his prior confrontations with them, it strikes me as believable that Giblin, the president of the International, and a man recovering from surgery would be short tempered with him. It strikes me as unbelievable that a young man 21 years old and slight of build would come down to Local 68's office and in the presence of union officers including the International president, all of whom are big husky men, act in a manner as described by Giblin and McGuire. He would be too intimidated. As set forth above, I conclude Saitta lacked both the imagination and inventiveness to fabricate such logical and descriptive testimony.

Steward Stanley confirmed to Michot that he was conducting such poll. As a result Ogden withdrew its offer of reinstatement. Local 68 Business Representative McQuire denied knowledge of such a poll.

Analysis and Conclusions

The facts of this case establish that on September 13 McGuire threatened Saitta with the loss of his job if he continued with his accusations that Shop Steward Stanley was "sleeping with management." The facts further establish that during the meeting at Local 68's office, Vincent Giblin, International Union president, took away Saitta's Local 68 book and told him his employment at Ogden was over, he was "out of a job." Given the circumstances of Giblin's statements to Saitta and Saitta's familiarity with Local 68's relationship with Ogden and Bell, there is no doubt in my mind that Saitta knew his employment at Ogden was over.⁴

The facts further establish that immediately following Giblin's effective termination of Saitta, McGuire contacted Ogden and informed it through the area manager's secretary who subsequently informed Area Manager Teixuro that Saitta would not be working at Ogden anymore.

There is no evidence that Saitta quit his job. Rather the evidence establishes that Saitta did not return to work because he knew that Local 68 through International President Giblin had effectively terminated his employment.

The Supreme Court has held that union inducement of an employer to discharge a union member for reasons other than failure to pay union dues or fees authorized by a union-shop provision violates Section 8(b)(2). *Radio Officers Union v. NLRB*, 347 U.S. 17 (1954). In *Eldorado Mfg. Corp.*, 249 NLRB 646 (1980), the Board held that a union's conduct in causing the discharge of employees was unlawful when the union's demand that such employees be discharged was motivated by the employee's accusations that the union shop steward failed to perform his duties properly.

Accordingly, I conclude Local 68 by its officers caused the termination of Saitta's employment at Ogden because of his accusations against Shop Steward Stanley and that such conduct was violative of Section 8(b)(1)(A) and (2).

As set forth above, McGuire called Ogden Area Manager Teixuro and notified Teixuro's secretary that Saitta would not be working at Ogden anymore. Teixuro's secretary notified Teixuro and Michot, the working foreman-in-charge of Saitta's shift. McGuire's statement concerning Saitta's status is on its face ambiguous. It could mean Saitta was quitting. It could mean Saitta, for unknown reasons, was unable to work. It could mean anything. In the face of such statement Ogden took no action. It did not list Saitta as a "quit." It did not terminate his employment. Neither Teixuro or any other Ogden official contacted Local 68 to obtain clarification of McGuire's message, nor did they initiate any inde-

⁴ As set forth above, during the course of this trial Ogden had offered Saitta reinstatement. Such offer was withdrawn when Local 68 through Shop Steward Stanley conducted a poll among unit employees indicating the employees would walk out if Saitta was reinstated and Bell management became aware of such poll. Ogden was informed by Bell that in order to keep labor peace Ogden had better nor reemploy Saitta. Such action by Local 68, though not alleged as a violation of Sec. 8(b)(1)(A) and (2) establishes the extent of Local 68's labor control on the job. *Laborers Local 341 v. NLRB*, 564 F.2d 834 (9th Cir. 1977), enf. 223 NLRB 917 (1976).

pendent investigation. There is absolutely no evidence that Ogden was aware of Saitta's accusations concerning Shop Steward Stanley or the events that took place on September 14 at Local 68's office between Saitta, Giblin, McGuire, and Stanley. Local 68 officials did not at any time amplify McGuire's statement concerning Saitta's status.

Although Saitta returned to Ogden a week later to turn in his uniform and badge and request from Michot the letter of termination which Michot executed, there is no evidence Michot notified Ogden representatives of the contents of the letter or supplied them with a copy of the letter. It is clear that Michot is not a supervisor within the meaning of Section 2(11) of the Act. He possesses none of the supervisory criteria set forth in Section 2(11). He is a unit employee working in the unit classification of working foreman, and his terms and conditions of employment are controlled by the collective-bargaining agreement between Local 68 and Ogden. *Bay Area-Los Angeles Express*, 275 NLRB 1063, 1080 (1985). The fact that Michot was the employee "in-charge" of the shift is not sufficient to confer on him supervisory status, absent any statutory supervisory indicia. *Bay Area-Los Angeles Express*, supra. At best Michot is a limited company agent, a "conduit" between Ogden and the day shift consisting of 10 employees. In the absence of any evidence that Ogden was aware of Michot's letter and given Michot's limited responsibilities as an agent is not reasonable to conclude that on the basis of Michot's letter Ogden had terminated Saitta.

Although Ogden became aware of Saitta's claim that he was terminated through his claim with the New Jersey Department of Labor, Division of Unemployment Insurance, Ogden simply did not contest the finding by the New Jersey Unemployment Insurance Division that Saitta was discharged. This in my opinion is insufficient to conclude that Ogden had knowledge of Saitta's effective termination by Local 68 or that it subsequently ratified Local 68's unlawful action.

The Board has long held that an employer does not violate the Act notwithstanding that a request by a union for discharge was improper, unless it can be established that the employer had reasonable cause to believe that the request for discharge was based on reasons other than the failure of the employee to pay the dues and fees required as a condition of employment. *R. H. Macy Co.*, 266 NLRB 858, 868 (1983).

Similarly, the Board recently held in cases involving a hiring hall agreement between a union and employer that it will no longer impose strict liability on employers when a union unlawfully refuses to refer etc., based on a presumed existence of a principal-agent relationship between an employer and union. The Board instead held it would not impose liability on an employer in cases where an employer does not have actual notice, or may not reasonably be charged with notice of a union's discriminatory operation of a referral system. *Wolf Trap Foundation for the Performing Arts*, 287 NLRB 1040 (1988).

It seems clear that an employer's liability in cases where a union demands a discharge or engages in discriminatory conduct affecting the terms and conditions of an employee's employment is predicated on establishing that the employer had knowledge or should reasonably be charged with knowledge. As set forth above I have concluded that Ogden had

no actual knowledge, nor do I find that they could reasonably be charged with knowledge. Accordingly, I conclude Ogden did not violate Section 8(a)(1) and (3) of the Act as alleged.

Counsel for Local 68 contends he was denied due process in that he requested a postponement of this case which had been scheduled for resumption on October 5, 1989, and such motion for postponement was unfairly or improperly denied and such denial prevented Local 68 counsel from being present to represent its client on October 5, the last day of this trial. I have considered counsel for Local 68's contention and for the reasons set forth in detail on pages 297 through 304 of the trial transcript of this case on October 5, 1989, together with Judges Exhibits 1 through 7 and in my Order dated October 1, 1989. I find no merit in counsel's contention.

CONCLUSIONS OF LAW

1. Ogden is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. Local 68 is a labor organization within the meaning of Section 2(5) of the Act.
3. Local 68 violated Section 8(b)(1)(A) and (2) of the Act by unlawfully effecting the discharge of Allen Saitta, an employee from Ogden.
4. Ogden did not violate the Act as alleged.

THE REMEDY

Having found that by engaging in the above-described conduct Local 68 has violated Section 8(b)(1)(A) and (2) of the Act, I shall recommend it cease and desist therefrom and to take certain affirmative actions in order to effectuate the policies of the Act.

It is recommended the Union shall be ordered to make Allen Saitta whole for any loss of pay he may have suffered by reason of the discrimination against him, by payment to him of a sum of money equal to the amount he would normally have earned as wages from the date of his effective termination on September 14, 1989, to the date of his reinstatement. The loss of earnings shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), together with interest as prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977).⁵

The Union shall also be ordered to expunge from its files any reference to Saitta's unlawful termination and shall be required to notify Saittas in writing, of its actions as well as inform him that his unlawful termination shall not be used as a basis for future action against him. Furthermore, the Union shall be required to ask the Employer, Ogden Allied Eastern States Maintenance Corporation, to remove from its files any reference to Saitta's unlawful termination and shall notify Saitta that it has asked his employer to do so. *Sterling Sugars*, 261 NLRB 472 (1982).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁶

⁵ See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

⁶ 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.

ORDER

The Respondent, International Union of Operating Engineers, Local 68, AFL-CIO, West Caldwell, New Jersey, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Causing or attempting to cause Ogden Allied Eastern States Maintenance Corporation to terminate or otherwise discriminate against Allen Saitta or any other employee for reasons other than the failure of such employees to pay periodic dues and initiation fees required as a condition of acquiring or retaining membership in Local 68.

(b) In any like or related manner restraining or coercing employees in the exercise of rights guaranteed them in Section 7 of the Act, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized by Section 8(a)(3) of the Act.

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

(a) Make Allen Saitta whole for any loss of pay he may have suffered as a result of the discrimination against him in the manner set forth in the remedy section of this decision.

(b) Expunge from its records any reference to his unlawful termination and notify him in writing that this has been done and that evidence of his unlawful termination shall not be used as a basis for any future action against him.

(c) Post at its business office, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by Respondent Local 68's representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days 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.

(d) Forward a sufficient number of signed copies of the notice to the Regional Director for Region 22, for posting by the Employer at its place of business, in New Jersey, in places where notices to employees are customarily posted, if the Employer is willing to do so, and ask the Employer to remove any reference to Saitta's unlawful termination from the Employer's files and notify Saitta that it has asked the Employer to do this.

(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.

(f) 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 in Case 22-CA-16092 be dismissed in its entirety.

⁷ 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.

WE WILL NOT cause or attempt to cause Ogden Allied Eastern States Maintenance Corporation to terminate or to otherwise discriminate against Allen Saitta, or any other employee, for reasons other than an employee's failure to pay periodic dues and initiation fees required as a condition of acquiring or retaining membership in International Union of Operating Engineers, Local 68, AFL-CIO.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of the rights guaranteed them in Section 7 of the Act, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment.

WE WILL make Allen Saitta whole for any loss of pay suffered by reason of our discrimination against him, with interest.

WE WILL expunge from our files any reference to the termination of Allen Saitta and notify him in writing that this has been done and that evidence of this unlawful discharge will not be used as a basis for future action against him, and WE WILL ask the Employer to remove any reference to Saitta's unlawful termination from its files and will notify Saitta that we have asked the Employer to do this.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 68, AFL-CIO

William Grant, Esq., for the General Counsel.
Joseph R. Fitzpatrick, Esq., for Respondent Ogden.
Albert G. Kroll, Esq., for Respondent Union.

SUPPLEMENTAL DECISION

HOWARD EDELMAN, Administrative Law Judge. This case was tried before me pursuant to a remand by the Board dated October 30, 1990, which vacated my decision which issued on March 14, 1990. The remand stated as follows:

It is ordered the Administrative Law Judge's Decision is vacated. It is further ordered that Administrative Law Judge Howard Edelman rehear *de novo* that portion of the Hearing initially reopened on October 5, 1989.

Pursuant to the Board's remand the hearing was reopened on February 27, 1991. Representatives for all parties were present, given the opportunity to call witnesses and make objections, and filed posthearing briefs.

Pursuant to a stipulation executed by all parties the parties agreed that:

Pursuant to the Board Order of October 30, 1990, ordering the administrative law judge to rehear *de novo* that portion of the case initially heard on October 5, 1989, and in accordance with the Order, the parties, by and through their respective counsel, stipulate that the record from the October 5,

1989 hearing shall constitute the entire record of the rehearing, subject to: (1) objections by Respondent Union's counsel to questions to witnesses who testified at the October 5, 1989 hearing; (2) cross-examination by Respondent Union of the witnesses who testified at the October 5, 1989 hearing and redirect of the witnesses by Respondent Company, (3) submission of evidence by Respondent Union in rebuttal to the witnesses' direct testimony, and (4) response to rebuttal evidence submitted by Respondent Union.

Pursuant to the remand, counsel for Respondent Union objected on the grounds of heresy, to the following questions put to Al Teixuro, area manager of Respondent Employer, by counsel for the General Counsel. These questions occurred in connection with a conversation Teixuro had with Hank Ariens, a supervisor of Belcor, the corporation which employs Respondent Employer as its maintenance contractor, concerning Respondent Employer's decision to reinstate Saitta:

Question: And isn't it true that the union said, "Did it come to your attention that the union took the position, that if the company did so, they would engage in a strike?"

Question: They did? Answer: They did. I was told that by the Belcor manager, who told me on an emergency call that he had heard a rumor that there is a poll taken by Local 68 to the fact that if Allen [Saitta] went back to work, they'd ask the workers to walk off the job.

A review of the entire record and my March 14, 1990 decision establish that such objected to testimony relates only to footnote 4 of my decision.

I sustained counsel for Respondent Union's objection that such testimony was heresy, if taken to establish that Respondent Union did threaten a walkout by its members working for Respondent Employer if Respondent reinstated Saitta. Of course such testimony would be admissible to establish that based on such rumor, Ariens, a Belcore representative, told Teixuro not to reinstate Saitta because Belcore did not want a disruption of services' which a walkout of Respondent Employer's employees would cause.¹

The credible testimony of Michot, an employee of Respondent Employer and a member of Respondent Union established that Respondent Union Shop Steward Stanley had told Michot that he was taking a poll of Respondent Employer's employees to see if the employees would walk out if Saitta was reinstated.²

Accordingly, I conclude that, notwithstanding counsel for the Union's objections, described above, and my sustaining such objections, the facts and conclusions set forth in footnote 4 of my March 14, 1990 decision are consistent with the testimony of witnesses Teixuro and Michot on October 5, 1990, and on February 27, 1991. Accordingly, such findings and conclusions are affirmed.

¹If I struck the testimony from the record, I was in error. Such testimony would of course be admissible to establish that based on Belcor Manager Ariens' statement, Respondent took certain action.

²Michot testified on February 27, 1991. His testimony was consistent with his credited testimony on October 5, 1990.

Moreover, it is clear that my ultimate findings and conclusions set forth in my March 14, 1990 decision were not in any way dependent on footnote 4 of that decision.

Accordingly, based on a full reconsideration of the entire record in this case, including the posttrial briefs, I reaffirm the findings of fact, conclusions of law, and recommended Order as set forth in my March 14, 1990 decision.