

**Local 1-2, Utility Workers Union of America,
AFL-CIO (Consolidated Edison of New York)
and Thomas Moran. Case 2-CB-13637**

November 3, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND RAUDABAUGH

On June 30, 1992, Administrative Law Judge Eleanor MacDonald issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel resubmitted its brief to the judge.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions² only to the extent consistent with this Decision and Order and to adopt the recommended Order as modified.

The judge found that the Respondent violated Section 8(b)(1)(A) of the Act when its business agent,

¹ 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. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent has requested that the record be reopened so that the Respondent can establish the index number of the alleged libel lawsuit, the date the lawsuit was filed, that all the named defendants to the lawsuit were properly served, and that proceedings have been held in the lawsuit. We deny this request because the proffered evidence is neither "newly discovered" nor "previously unavailable," and, in any event, it would not affect the result in the instant case.

We find it unnecessary to rely on the judge's discussion at fn. 7 of her decision regarding the meaning of Moran's statement to Dory that if Dory was selling wolf tickets Moran would buy them and they would go out on the street. We note that even if this statement is given the meaning ascribed to it by the Respondent, it does not affect the result in this case. We also find it unnecessary to rely on the judge's discussion of whether the Respondent's attorney, Geller, knew of the complaint in the instant case when he prepared the libel lawsuit for Business Manager Goodman.

² In adopting the judge's finding that the Respondent violated Sec. 8(b)(1)(A) of the Act through Business Manager John Goodman's conduct, we rely on the judge's finding that Goodman threatened to sue the dissidents in connection with their protected activity; thus, we find it unnecessary to rely on the judge's discussion regarding whether Goodman had actually filed a libel lawsuit because this issue would not affect the result in this case. Contrary to our dissenting colleague, we find *Postal Service*, 275 NLRB 360 (1985), distinguishable. In *Postal Service*, a temporary, low-level supervisor privately threatened suit against the union because it filed grievances claiming that she, in her individual capacity, received preferential treatment. By contrast, in the instant case, the Respondent, through its agent Goodman, threatened to sue employees because they had criticized official conduct of Goodman as an agent of the Respondent and because they had secured a court order against the Respondent. Under these facts, we find this case governed by *Carborundum Materials Corp.*, 286 NLRB 1321 (1987), rather than *Postal Service*, and agree with the judge that the Respondent's threat violated Sec. 8(b)(1)(A).

William Dory, threatened two union dissidents with physical violence. For the following reasons, we disagree with the judge, and instead dismiss this portion of the complaint.

The Respondent Union and the Employer have been parties to successive collective-bargaining agreements. In August 1990, new Union Local 1-2 officers were elected. This new administration consisted of John Walsh, president; John Goodman, business manager; and Phil Varicchio, assistant business manager.

Some union members who had been active with the former local administration formed a dissident group and published a newsletter called "Members' Voices," which criticized the new administration. The dissidents also had asked to see some local books and records, and wanted some proposed bylaws that they had advanced to be read at a local meeting. When the Local refused to cooperate on these matters, the dissidents brought an action in district court. Pursuant to the district court judge's temporary restraining order, it was arranged for the dissident group to inspect the requested records at the local office on March 7, 1991,³ and for the dissident-supported bylaw proposals to be read at the March 7 local meeting.

On March 7, as dissidents Cirignano and Moran reviewed the requested records in a small conference room in the Local's office, a dispute arose over the dissidents' request for photocopies of some of the records.⁴ Moran left the room to telephone the dissidents' attorney, Arthur Schwartz, and Cirignano continued to read the records. Dory, a union business agent, then came toward the conference room and began yelling about democracy and looking at the records. When Cirignano remarked that the judge had ruled in the dissidents' favor, Dory got "frenzied" and cursed Schwartz. At this point Walsh, president of the Local, started to pull Dory away, telling him to take it easy. As Moran walked towards the group, he could hear Dory shouting obscenities. Moran told Dory to take it easy, remarking that he and Cirignano were there to do a job and not to take verbal abuse. Cirignano testified that Dory replied, "I'll give you verbal abuse. I'll give you physical abuse. I'll take you both outside and kick both your asses." Moran testified that Dory threatened Cirignano that Dory would kick his ass, and then Dory told Moran, "I'm telling you right here and now I am going to kick your ass too." A few other local officials arrived, including Assistant Business Manager Phil Varicchio, and saw to it that Dory left the area. Further, according to Moran, whose testimony concerning this incident was credited by the judge, both Varicchio and Local Union Presi-

³ All dates are in 1991 unless otherwise noted.

⁴ Although the judge's order had specified that the Local was to permit copying of the records, the Local's attorney interpreted that to mean hand copying only.

dent Walsh “reassured” Moran that Dory “wouldn’t bother [them] the rest of the time,” and Varicchio stated that Moran need not “worry about it. We’ll take care of Mr. Dory.”

The judge found that by publishing their views in “Members’ Voice,” by instituting an action in district court concerning the conduct of union meetings and the inspection of union records, and by inspecting union records, Moran and Cirignano were engaging in protected, concerted activity. She further found, based on the credited testimony of Moran and Cirignano, that Dory, a business agent and an admitted agent of the Union, told Moran and Cirignano that he would kick their asses. She stated that Dory made this threat because Moran and Cirignano were parties to the district court proceeding, had inspected the union records, and had participated in the publication of a newsletter which criticized the Local’s administration. Thus, the judge concluded that Dory’s threat of physical violence violated Section 8(b)(1)(A) of the Act.

Contrary to the judge, we find that under the circumstances here, Dory’s conduct did not rise to the level of an 8(b)(1)(A) violation. Even assuming *arguendo* that the “kick both your asses” remark can reasonably be construed as a threat of physical violence, the two dissidents had no reason, given the actions of other union officers present, to view this as a threat on behalf of the Respondent. Local President Walsh was pulling Dory away as this comment was made, and other local officials quickly arrived and saw to it that Dory left the area, and also assured Moran that Dory would not bother them any more. Thus, the actions of the other local officials who were present directly countered Dory’s remarks, and Moran and Cirignano could not have reasonably believed that Dory’s remarks represented the attitude of the Union.⁵ Having examined all the circumstances here, we believe that Dory’s conduct was insufficient to constitute an 8(b)(1)(A) violation.⁶ Accordingly, we reverse the

⁵ We find unpersuasive Member Raudabaugh’s argument that there is a violation here because the two affected employees might believe that Dory would carry out his threats in the future when he was away from the other agents of the Respondent. Were we to accept this logic, we would have to disavow the test set out in *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978), for effective repudiation of coercive conduct, since it could always be argued that even if a union or employer met the *Passavant* standard, coercive conduct might be repeated by the original actor.

⁶ Contrary to his colleagues, Member Raudabaugh would adopt the judge’s findings that the Respondent violated Sec. 8(b)(1)(A). The Respondent’s business agent, Dory, clearly threatened the employees. He said: “I’ll give you verbal abuse. I’ll give you physical abuse. I’ll take you both outside and kick both your asses.” These words were not mere verbal taunts. They explicitly threatened physical abuse. Further, the fact that Dory’s colleagues were able to pull Dory away does not warrant a contrary result. Dory is a business agent of the Respondent and is likely to have further contacts with the threatened employees. If the contacts occur outside the presence of Dory’s colleagues, the employees would have no assurance that

judge’s finding that Dory’s threat of physical violence violated the Act, and instead we dismiss this portion of the complaint.⁷

AMENDED CONCLUSION OF LAW

By threatening employees with a lawsuit because they engaged in protected, concerted activities, the Respondent violated Section 8(b)(1)(A) of the Act.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Local 1–2, Utility Workers Union of America, AFL–CIO, New York, New York, its officers, agents, and representatives, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(a).

“(a) Threatening employees with the filing of a lawsuit because they engage in protected, concerted activities.”

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

APPENDIX

NOTICE TO EMPLOYEES AND 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.

Section 7 of the Act gives employees these rights.

Dory, unrestrained by others, will not resort to the physical violence that he threatened. My colleagues refer to *Passavant*. It is clear that, under the standards of that case, the Respondent’s officials did not effectively remedy Dory’s misconduct. The Respondent’s representatives told the threatened employees that Dory would not bother them “the rest of the time” and that they could therefore “resume looking at the records.” The judge correctly interpreted this testimony to mean that Dory “would not bother them any more *that day*,” i.e., the time period for looking at the records (the judge’s decision at sec. II.B, last sentence of the first par. (emphasis added)). Clearly, under *Passavant* standards, this was not an unambiguous repudiation of Dory’s misconduct and was even less an assurance of protection in the future.

⁷ Contrary to his colleagues, Member Devaney would also reverse the judge’s conclusion that the Respondent violated Sec. 8(b)(1)(A) of the Act when the Union’s business manager, John Goodman, threatened to sue Moran and Cirignano for printing an article that was critical of him in the dissidents’ newsletter and for obtaining a court injunction against the Union. Member Devaney finds that the remarks “concerned the filing of a civil lawsuit on [Goodman’s] own personal behalf and cannot be construed to involve any threatened retaliation by the Respondent,” *Postal Service*, supra at 361 (1985); cf. *Carborundum Materials Corp.*, supra, and that under the circumstances of this case, Goodman’s statements did not rise to the level of an 8(b)(1)(A) violation.

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 threaten you with the filing of lawsuits because you engage in protected, concerted activities.

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.

LOCAL 1-2, UTILITY WORKERS OF
 AMERICA, AFL-CIO

Mindy E. Landow, Esq., for the General Counsel.
Kevin G. Jenkins, Esq., of New York, New York, for the Respondent.
Arthur Z. Schwartz, Esq. (Lewis, Greenwald, Kennedy, Lewis, Clifton & Schwartz), of New York, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ELEANOR MACDONALD, Administrative Law Judge. This case was tried in New York, New York, on January 21 and 22, 1992. The complaint alleges that Respondent, in violation of Section 8(b)(1)(A) of the Act, threatened employees with physical harm and with the filing of a lawsuit because they engaged in protected concerted activities. Respondent denies the material allegations of the complaint.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel in February 1992, and by the Respondent in March 1992, I make the following¹

FINDINGS OF FACT

I. JURISDICTION

The Employer, Consolidated Edison of New York, is a New York corporation with its principal office in New York, New York, where it is engaged in the operation of a public utility providing gas and electric power in the New York metropolitan area. Respondent admits, and I find, that the Employer is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Respondent is a labor organization within the meaning of Section 2(5) of the Act.

¹The record is corrected so that at p. 39, L. 4, the comment is shown as being made by the administrative law judge; at p. 82, L. 22, the correct phrase is "now that you have won the appeals case."

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

The Employer and the Union have been parties to successive collective-bargaining agreements the latest of which has a term from June 25, 1989, to June 24, 1992, for an appropriate unit consisting of:

All full-time and regular part-time employees excluding temporary employees, and guards, and supervisors as defined in the Act.

There is no dispute that at all times material to the instant case, the Union has been the exclusive representative of the employees in the appropriate unit set forth above within the meaning of Section 9(a) of the Act.

In August 1990, a union local election was held which resulted in a change in the officers of the Local. The new administration of the Local was headed by President John Walsh, Business Manager John Goodman, and Assistant Business Manager Phil Varicchio. Some of the union members who had been active with the former local union administration formed a dissident group and published a newsletter called "Members' Voice." The articles in the newsletter were critical of the new union administration. In the second issue of "Members' Voice" dated January 1991, but actually distributed in early March 1991, an article accused the new local union administration of raiding the union strike fund in order to further the political aspirations of Goodman. The article asked the question, "Why is Goodman stealing money from our Defense Fund?"²

In addition to publishing a newsletter, the dissidents asked to see some local union books and records and, when these were not made available for their inspection, the dissidents brought an action in district court. Another controversy developed over the scheduling and conduct of local union meetings and the reading of some proposed bylaws advanced by the dissident group. The bylaw dispute also found its way to the district court. Two of the dissident group named as plaintiffs in the action pending in district court were Thomas Moran and Ron Cirignano.³ After Judge David N. Edelstein issued a temporary restraining order on March 5, 1991, Arthur Z. Schwartz, Esq., counsel for the dissident group, arranged for Moran and Cirignano to go to the union office on March 7, 1991, to inspect the records pursuant to the Order of Judge Edelstein. That day was also the day for the next union meeting. Judge Edelstein's order provided that at this meetings the dissident supported bylaw proposals were to be

²The article did not imply that Goodman had taken any union funds for his personal use. Rather the newsletter stated that an illegal loan had been made from the strike fund to the general fund in order that the Union could pay dues to the national union and thus have the right to send delegates to the national union convention. The "Members' Voice" stated that Goodman intended to run for office at this convention.

³Moran has been a member of the Union for 26 years and has held various elective offices in the Local. Before the August 1990 election, Moran had been health and safety director. Cirignano had been a shop steward and chairman of the shop stewards before the new local administration was elected.

read and that no other business was permitted to be conducted.

B. The Events of March 7, 1991

Ron Cirignano and Thomas Moran testified that they went to the union office at about 11:55 on March 7. After a wait of 30 to 45 minutes during which they sat in the reception area, John Walsh, president of the Union, escorted them to a small conference room in the back of the union office where they were to sit and review the records specified in the TRO. After Moran and Cirignano told Walsh which records they wanted to read, Walsh left and then returned with the documents. He was accompanied by Peter Sagonas, secretary-treasurer of the Union. While the two men reviewed the records, Sagonas remained in the room with them.⁴ After a while, a dispute arose over the dissidents' request for photocopies of some of the union records. Sagonas brought Kevin B. Jenkins, Esq., counsel to the Union, into the conference room. Although Judge Edelstein's Order had specified that the Union was to permit copying of its records, Jenkins took the position that this meant hand copying only. When the dispute could not be resolved, Moran left the room to telephone Schwartz from a cubicle about 15 feet from the small conference room, while Cirignano continued to read the records in the presence of Sagonas.⁵ As Cirignano sat reading, he noticed that William Dory, a business agent for the Union, was walking down the hall toward the conference room. When Dory got close to the room, he began yelling about democracy and looking at records. Dory was red in the face, according to Cirignano, and when Cirignano remarked that the Judge had ruled in his favor, Dory got "frenzied" and cursed Schwartz.⁶ At this point, John Walsh, president of the Union, came towards the room and pulled Dory away, telling him to take it easy. Moran, who had ended his telephone call walked toward the group; he could hear Dory shouting obscenities. When his path crossed that of Dory in the hall, Moran told Dory to take it easy, remarking that he and Cirignano were there to do a job and not to take verbal abuse. Cirignano testified that Dory replied, "I'll give you verbal abuse. I'll give you physical abuse. I'll take you both outside and kick both your asses." Moran testified that he heard Dory threaten Cirignano that he would "kick his ass" and that Dory also told him, "I'm telling you right here and now I am going to kick your ass too."⁷ A few of the other

⁴The record does not make clear what Walsh did during all of this time.

⁵This was the first of several telephone calls Moran made to Schwartz that day in an effort to resolve the problem related to the copying of union records.

⁶Moran testified that while he was talking to Schwartz on the telephone he heard loud noises from the back of the office; he looked out of the door and saw Dory and Walsh in the doorway of the small conference room. Schwartz testified that while he was speaking to Moran on the telephone he could hear loud noises in the background.

⁷Contrary to the assertion in the brief filed by Respondent, Moran did not admit that he offered to settle the dispute out on the street. Respondent's brief states that Moran told Dory that together they would sell "wolf" tickets and go out on the street. I note that Respondent's brief misquotes the record and that the misquote is of such a nature as to distort the testimony. In any event, I interpret Moran's testimony to mean that he told Dory he was acting like a wolf and that such behavior was more appropriate for the streets.

union officials were walking toward the commotion including Phil Varicchio and Joseph A. Papa. They saw to it that Dory left the area near the conference room. Walsh and Varicchio assured Moran that Dory would not bother them any more that day.

Varicchio testified that he heard a commotion and loud voices but that he could not see what was happening because there were people in the hall: he denied physically restraining Dory. Papa stated that he saw Dory and Moran shouting and that he told Dory to go back to his desk. Dory testified that he believed that Moran and Cirignano were in the office to copy material to use for their own purposes in leaflets.⁸ When he saw Cirignano in the small conference room, he asked him if this is what he meant by union democracy, that only a select few get to see the records.⁹ According to Dory, this is the only remark he made to Cirignano; Cirignano did not reply. As Dory was on his way back to his desk with Walsh, he encountered Moran in the hall. Moran said they were not in the office to get abused. Dory replied that Moran was fortunate the membership was not abusing him and a heated conversation ensued. According to Dory, Moran said "We can take it outside later." Dory could not recall if he responded and he could not recall anything else that was said. He recalled only that Moran said they should take their dispute outside. According to Dory, Walsh and Sagonas were present during this exchange. Neither Walsh nor Sagonas testified herein.

Since neither Papa nor Varicchio testified as to anything specific that was said during the exchange involving Dory and since neither Walsh nor Sagonas testified in this proceeding, my determination must rest on an evaluation of the testimony about the incident as given by Moran and Cirignano as opposed to the version given by Dory. Both Moran and Cirignano testified in detail about the alleged threat made by Dory. Although their versions are similar in essential points they are not exactly the same, and this leads me to believe that the two were testifying without any collusion but instead gave as accurate an account as they could based on their recollections. I do not expect their recollections to be exact given the unpleasant and confused nature of the events they were testifying to. Based on my reading of the record and on my observations of their demeanors, I conclude that their testimony had the ring of truth. In contrast, Dory claimed not to remember most of what was said; he only recalled that Moran challenged him to take this dispute outside. Further, the two union officials who testified did not recall anything specific that was said and the two union officials who were present throughout the incident did

Moran immediately followed this up with the statement that, "We are not here for that. We are here to take a look at the records."

⁸By the terms "leaflets" Dory apparently meant the dissident newsletter, "Members' Voice."

⁹Dory claimed that he did not know that Judge Edelstein had issued an order requiring the Union to permit examination of its records by the dissidents. I find this claim incredible and I do not credit this testimony. The testimony of all the witnesses convinces me that all the union officials present that day knew that Moran and Cirignano were there to inspect records pursuant to a court order. In fact, if Dory had not known the circumstances there would have been no occasion for him to taunt Cirignano about reviewing the records. Further, Papa testified that it was common knowledge in the union office that day that Moran and Cirignano were present pursuant to a judicial mandate.

not testify at all. Based on the foregoing, I credit the testimony of Moran and Cirignano that Dory threatened to kick their asses. This was a threat of physical violence made because Moran and Cirignano were parties to a suit that had forced the Union to open its records to them and because Dory believed that the two would use the information they gained from the records in order to print derogatory information in the "Members' Voice."

While Moran and Cirignano continued going through the records, Business Manager Goodman came to look into the room several times. Cirignano testified that on one occasion when Goodman came to the conference room, Moran greeted him and Goodman said, "you shouldn't have written what you wrote about me in those newsletters Tom. . . . I was thinking of suing and now that you have won the appeals case I'm going to sue."¹⁰ Moran testified that Goodman said, "since you got the injunction and there is no Union meeting tonight I was debating whether to sue you guys or not but right now I'm going to sue you." Moran recalled that at a union meeting in December 1990, Goodman had asked him why Moran was fighting him on everything. Moran replied that they were trying to do the right thing. Goodman then said, "If this keeps up sooner or later we're going to have to meet in Court and I'm going to end up suing you." Schwartz recalled that on March 7, 1991, when Moran called him a second time to arrange for copying of the union records, Moran told him that Goodman was saying that now that the dissidents had obtained a TRO he would sue Moran for libel.

Goodman testified that he said to Moran, "I'm surprised at you. We know each other a long time and I'm surprised that you're going along with these lies stating that I stole money." Moran replied that it was politics and that if the dissidents were wrong they would apologize. According to Goodman, he told Moran not to apologize because he had a lawsuit and was going to sue Moran. Then Cirignano accused Goodman of suing them because they were dissidents. Goodman answered that he would never sue a dissident and that he was bringing a lawsuit because he had been accused of stealing.

After Goodman had left the conference room following the exchange about the article in "Members' Voice" and the threatened lawsuit, Moran told Sagonas that he did not want anyone else to bother him or Cirignano. He asked Sagonas to go get Goodman; when Goodman came back to the room, Moran repeated his wish not to be bothered further and Goodman assured Moran and Cirignano that no one else would come bother them.

Upon being questioned about the institution of the libel suit, Goodman testified that when he read the article that discussed the strike fund money he instructed Irwin Geller, Esq., to sue the people who had accused him of stealing.¹¹ It is not clear what the status of the purported lawsuit for libel is at the present time. Respondent introduced into evidence a Summons signed by Geller on September 4, 1991, accompanied by a complaint verified by Goodman on the same date. The Summons names as plaintiffs Goodman and

two other individuals who are also officials of the Respondent.¹² All three are asserted to have been libelled by issues of the "Members' Voice." Neither the Summons nor the complaint bear an index number and there is no indication that any proceeding was actually filed in a state court. There is no evidence that any of the named defendants, all of whom are dissidents affiliated with "Members' Voice," were properly served. In order to explain why it took until September 1991 to prepare the lawsuit, Geller testified that he was too busy and that he was sick in his legs from January until September 1991; consequently he was unable to prepare the lawsuit any earlier than that.¹³

In light of the fact that the instant complaint was dated August 28, 1991, and that the summons was signed by Geller on September 4, 1991, Geller was asked if he knew of the complaint when he prepared the libel suit. Geller testified that he did not hear of the instant complaint until several weeks or a month after it issued. I do not credit this testimony. Geller was very much involved in all the litigation pertaining to the union records and the union meeting on March 7, 1991. Indeed, he was personally named in the TRO signed by Judge Edelstein on March 5, 1991, and he testified that he spoke to Schwartz on March 7 while the controversy about copying the records was raging in the union office. Geller recalled that Schwartz cautioned him that he might personally be held in contempt by the district court. It is inconceivable that Geller would not have been advised immediately when the instant complaint issued concerning the very lawsuit that he was busily putting into final form. Indeed, my observation of Geller as he testified was that he identified very closely with the current officers of the Union and with their position both in the instant matter and the matters pending in the district court. He seemed quite partisan to me. I believe that when the Union received the instant complaint naming Goodman as an officer who committed an unfair labor practice involving the dissidents, Goodman would not have failed to communicate that fact to Geller who was by his own account making final corrections to a million dollar lawsuit against the dissidents on Goodman's behalf.

C. Discussion and Conclusions

It is well established, and Respondent does not contend otherwise, that employees have the right to participate fully and freely in the affairs of their Union. *Carpenters Local 22 (Graziano Construction)*, 195 NLRB 1, 2 (1972). This includes the right to question the actions of the leadership, *Operating Engineers Local 400 (Hilde Construction)*, 225 NLRB 596, 601 (1976), and the publication of a dissident newspaper critical of the leadership, *Operating Engineers Local 139 (AGC) of Wisconsin*, 273 NLRB 992, 998 (1984), enf. F.2d 985, 989 (7th Cir. 1986). By publishing their views in "Members' Voice," by instituting an action in dis-

¹² The named plaintiffs ask for damages in multiples of \$1 million for their various causes of action.

¹³ According to Geller, he began to prepare the lawsuit in January when the first issue of "Members' Voice" allegedly libeled Michael Ivancich, a union official. The summons incorrectly states that the issue of "Members' Voice" which mentions Goodman and the strike fund was circulated in late January 1991. The witnesses herein agree that it was published in March 1991.

¹⁰ The appeals case was actually a refusal by the Second Circuit to entertain an appeal from the TRO.

¹¹ Since September 1990, Geller has been one of the two general counsels of the Union.

strict court concerning the conduct of union meetings and the inspection of union records and by inspecting the union records, Moran and Cirignano were engaging in protected, concerted activity.

As discussed fully above, I credit the testimony of Moran and Cirignano and I find that Dory, a business agent and an admitted agent of the Union, told Moran and Cirignano that he would kick their asses. Dory made this threat because Moran and Cirignano were parties to the proceeding that led to the TRO and the inspection of the union records and because Moran and Cirignano inspected the records and, Dory believed, participated in the publication of "Members' Voice" which was critical of the Local Union's administration. This threat of physical violence constituted a violation of Section 8(b)(1)(A) of the Act. *Telephone Answering Service Local 780 (Federated Communications)*, 276 NLRB 507, 510 (1985).

Respondent urges that Dory's conduct should be excused because union officials immediately intervened and told Dory to return to his desk. Further, union officials assured Moran that he would be left alone. The Board has held that "under certain circumstances a [Respondent] may relieve himself of liability for unlawful conduct by repudiating the conduct. To be effective, however, such repudiation must be 'timely,' 'unambiguous,' 'specific in nature to the coercive conduct,' and 'free from other proscribed illegal conduct.'" *Passavant Memorial Hospital*, 237 NLRB 138 (1978). It is evident that Respondent herein has not repudiated Dory's conduct in threatening to kick the asses of Moran and Cirignano. First, the Union does not acknowledge that Dory threatened the two dissidents with physical violence. Indeed, the Union's brief maintains that Moran initiated references to violence. Further, the testimony does not establish that on March 7, 1991, any union official articulated a repudiation that was specific in nature to the coercive conduct. Thus, no union official told Moran and Cirignano that Dory had been wrong to threaten them and that the Union repudiated any references to physical violence against dissidents. See discussion in *Douglas Division*, 228 NLRB 1016, 1024 (1977). All of the union comments were ambiguous; Walsh and Varicchio merely told Moran and Cirignano that Dory would not bother them any more that day. Even after this half-hearted assurance, however, Moran and Cirignano were not left in peace to inspect the records pursuant to the Order of the district court. Soon, Goodman came to confront them and it was only after Moran asked for specific assurances, that Goodman said no one else would come to bother them. It is clear that after Dory's coercive conduct occurred, the union officials had not passed the word that Moran and Cirignano were to be left undisturbed.

Goodman is an admitted agent of the Union. I credit Moran and Cirignano that Goodman told them, in substance, that now that they had won an order affecting the conduct of the union meeting on the evening of March 7, 1991, he had decided to sue them for printing the article critical of him in "Members' Voice." I also credit Moran that earlier Goodman had told him that if the dissidents kept it up Goodman would end up suing Moran. It is clear to me from my observation of the witnesses that Goodman was upset about the allegations printed in "Members' Voice" and that he was upset that the court had issued an injunction directing the order of business at the union meeting. There can be no

dispute that the dissidents' actions in making allegations about Union finances in the "Members' Voice" and in securing the TRO constituted protected activity under the Act.¹⁴ I find that Respondent violated Section 8(b)(1)(A) of the Act when Goodman, an admitted agent of the Local Union, threatened to sue Moran and Cirignano.

Respondent urges that *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983), is relevant to the instant case. I disagree. In *Bill Johnson's*, the Board enjoined a state court lawsuit filed for a retaliatory motive against an employee engaged in union activity. The Supreme Court held that the state lawsuit could not be enjoined unless it was filed for a retaliatory motive and also lacked a reasonable basis in fact and law. The Court instructed that if the state plaintiff could show that "material factual or legal issues exist, the Board must await the results of the state-court adjudication with respect to the merits of the state suit. . . . In short, then, although it is an unfair labor practice to prosecute an unmeritorious lawsuit for a retaliatory purpose, the offense is not enjoined unless the suit lacks a reasonable basis." 461 U.S. at 749. Here, there is no request for an injunction. All that is alleged is that Goodman threatened to sue the dissidents in connection with their protected activity. Indeed, the record herein does not establish that Goodman has actually filed a lawsuit. It would be improper to withhold a finding in this case based on *Bill Johnson's*. Goodman might never file his lawsuit and thus he could avoid any state court adjudication on the merits, including any liability that he might incur by filing a possibly frivolous claim; however, Moran and Cirignano would still be under the threat of a lawsuit in retaliation for their dissident activities.

CONCLUSION OF LAW

By threatening employees with physical violence and with a lawsuit because they engaged in protected, concerted activities, Respondent violated Section 8(b)(1)(A) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁵

ORDER

The Respondent, Utility Workers of America, Local 1-2, New York, New York, its officers, agents, and representatives, shall

1. Cease and desist from

¹⁴ Respondent has not shown that the statements in the "Members' Voice" had lost the protection of the Act. *Phoenix Newspapers*, 294 NLRB 47, 50 (1989). See generally *Linn v. Plant Guards*, 383 U.S. 53 (1966).

¹⁵ 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.

(a) Threatening employees with physical violence and with the filing of a lawsuit because they engage in protected, concerted activities.

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

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

(a) Post at its union office in New York, New York, copies of the attached notice marked "Appendix."¹⁶ Copies of

¹⁶If 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."

the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees and 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.

(b) Sign and return to the Regional Director sufficient copies of the notice for posting by Consolidated Edison of New York, if willing, at all places where notices to employees are customarily posted.

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