

Medite of New Mexico, Inc. and Benny Coca and William Cordova and George Montoya. Cases 28-CA-11281-6, 28-CA-11281-7, and 28-CA-11281-19

March 6, 1995

SUPPLEMENTAL DECISION AND ORDER

CHAIRMAN GOULD AND MEMBERS STEPHENS AND TRUESDALE

On September 15, 1994, the Board issued a Decision and Order in these cases, severing the cases from the original proceeding and remanding the cases to Administrative Law Judge George Christensen for the purpose of determining (1) whether W. Cordova effectively terminated his employment relationship with the Respondent; and (2) whether the record shows that B. Coca and G. Montoya did not engage in the alleged strike misconduct, or if they did engage in the misconduct, whether the misconduct was serious enough to coerce or intimidate employees in the exercise of their Section 7 rights.¹

On December 6, 1994, the administrative law judge issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief, and the Charging Parties filed cross-exceptions with a supporting brief and filed an answering brief to the Respondent's exceptions.

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

The Board has considered the judge's supplemental decision and the record in light of the exceptions, cross-exceptions, and briefs and has decided to affirm the judge's rulings, findings,² and conclusions and to adopt the recommended Order.

We agree with the judge that the Respondent failed to present unequivocal evidence that Cordova intended to sever his employment relationship with the Respondent when Cordova sought and obtained his money from the 401(k) plan. In adopting the judge's findings regarding this issue, we emphasize that: Cordova initiated the call to Debbie Alexander of the Respondent's personnel office *only* because he wanted his 401(k) money; Cordova's letter of resignation was sent at Alexander's direction because it was the only way that Cordova could obtain his funds; and there is no evidence that Cordova spoke with anyone in the Respondent's personnel office about his employment sta-

tus except Alexander, who was responsible for administering the Respondent's 401(k) plan vis-a-vis the employees. We also note that there is no evidence that Cordova told Alexander, at the time he requested his funds, that he had obtained another job. In these circumstances, as in *Augusta Bakery*³ and *Rose Printing*,⁴ we find that Cordova's letter of resignation did not evince his intent to permanently abandon his job.⁵

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Medite of New Mexico, Inc., Las Vegas, New Mexico, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

³ 298 NLRB 58 (1990), enfd. 957 F.2d 1467 (7th Cir. 1992).

⁴ 289 NLRB 252 (1988).

⁵ To the extent that the Board's decision in *Beverage-Air*, 185 NLRB 168 (1970), could be read to hold that an employee's resignation from employment in order to withdraw profit-sharing or similar funds establishes an unequivocal intent to sever permanently the employee's relationship with the employer, we find that any such implication has been effectively overruled by the Board's decisions in *Rose Printing*, supra, and *Augusta Bakery*, supra.

SUPPLEMENTAL DECISION

GEORGE CHRISTENSEN, Administrative Law Judge. On May 1, 1993, I issued a decision in the subject case. On September 15, 1994, after review of my decision, the National Labor Relations Board (Board) issued an order that: "Cases 28-CA-11281-6, 28-CA-11281-7 and 28-CA-11281-19 are severed . . . and are remanded . . . for the limited purpose of determining (1) whether W. Cordova effectively terminated his employment relationship with the Respondent; and (2) whether the record shows that B. Coca and G. Montoya did not engage in the alleged strike misconduct or, if they did engage in the misconduct, whether the misconduct was serious enough to coerce or intimidate employees in the exercise of their Section 7 rights. In making these latter determinations, we direct the judge to rely only on evidence and testimony that is untainted by the failure to sequester witnesses during testimony regarding common events" and further ordered "that the judge shall prepare and serve on the parties a Supplemental Decision setting forth the above determinations including credibility resolutions, findings of fact, conclusions of law and a recommended order."

Based on my review of the entire record, observation of the witnesses, review of the briefs of the General Counsel, the Charging Party, and the Respondent and pursuant to the Board's directions, I enter the following

FINDINGS OF FACT (CORDOVA)

William Cordova was employed by the Respondent in August 1984 and held a variety of jobs between 1984 and June 11, 1990, when he joined the strike. Between 1984 and 1990, he worked as a laborer, utility trainee, cleaner operator, rip chain, rip saw forklift operator, cutoff saw forklift operator,

¹ 314 NLRB 1145 (1994).

² The Charging Parties have 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 judge's findings.

bander operator, and shuffler operator, at rates ranging from \$6 to \$8.09 per hour.

Following the Union's decertification and abandonment of further strike activities in November 1990, Cordova submitted a written, unconditional offer to return to work to the Respondent.

He has never been offered reinstatement at any time since the Respondent's receipt of his offer.

The Respondent advanced, as an affirmative defense, the contention Cordova abandoned his employment by Medite following the submission of his offer and is not entitled to reinstatement.

In support of that position, the Respondent called Personnel Director Stone¹ to the stand. Crediting Stone's testimony and an exhibit sponsored by Stone (recited below), I find:

1. During Cordova's employment prior to the strike, the Respondent entered into a contract with W.M. Benefits Group wherein W.M. assumed the role of trustee for the purpose of receiving funds pursuant to a 401(k) plan, investing those funds, and paying out those funds to the Respondent's employees upon death, retirement, or termination of employment in accordance with the plan's provisions.

2. Under certain provisions of the plan, employees were permitted to withdraw their contributions from their plan account prior to death, retirement, or termination of employment; however, prior to death or retirement, they were barred from withdrawing the remaining funds credited to their plan account unless their employment terminated. In administering the plan, if an employee requested the withdrawal of all moneys credited to his or her plan account prior to retirement or death and held employee status, the employee was required to submit a written resignation of employment before his or her request would be honored.

3. Debbie Alexander of the Respondent's personnel department was charged with the responsibility of administering the fund accounts vis-a-vis the Respondent's employees.²

4. Alexander, pursuant to her instructions, required any employee who sought to close out his account in the plan by obtaining all the moneys credited to the employee's plan account, to submit a written resignation before she would process such a request.

5. On July 12, 1991, Cordova sent the following communication to Alexander:

To whom it may concern:

I'm requesting my name to be withdrawn from Medite's waiting list for employment.

I no longer wish to have any affiliation with this company.

Please release the remainder of my investment money in the 401(k) plan.

William N. Cordova #3057
Social Security #525-88-1963

6. Though the Respondent could have recalled Cordova despite its receipt of that communication, the Respondent de-

¹ Findings have been entered in the underlying decision that at all pertinent times Stone was a supervisor and agent of the Respondent acting on its behalf within the meaning of Sec. 2 of the Act.

² I find at times pertinent Alexander was an agent of the Respondent acting on its behalf within the meaning of Sec. 2 of the Act.

cided to and treated the communication as an abandonment by Cordova of his employee status and refrained from offering Cordova reinstatement to any position thereafter (he had not been offered reinstatement at any prior time, as well).

When the Respondent completed its presentation of evidence, the General Counsel called Cordova to the stand. Crediting Cordova's testimony, I find:

1. Cordova stayed out on strike throughout the course of the strike.

2. During 1990, while on strike, he withdrew funds he contributed to and which were credited to his plan account.

3. In 1991, he contacted Alexander and expressed a desire to withdraw whatever funds remained to his credit in his plan account. Alexander informed him he would have to send in a written resignation before she would process his request.

4. In response, he sent her the communication described above and subsequently received the funds.

5. He sent that communication because "That was the only way could get the remainder of my 401(k) money out."

6. He had no other reason for sending the communication.

7. He was prepared to go back to work at Medite if he was offered reinstatement.

8. He wrote the communication himself.

9. He used the language "I no longer wish to have any affiliation with this company" because he thought that was the language the Company required before it would give him his money.

10. He was employed by the state hospital the day before he sent his July 11, 1991 communication to Alexander and has remained in that employment since that time.

11. He did not intend to sever any future relationship with Medite by sending Medite his July 12, 1991 communication.

12. To the contrary, he would have liked to return to work at Medite because "the difference from the rate of pay from what I'm making now and what I started is only a dollar difference from minimum wage."

Analysis and Conclusions (Cordova)

As the Board noted in the *Augusta Bakery* case,³

[T]o establish an abandonment of employment sufficient to relieve the employer of its reinstatement obligations the employer must present "unequivocal evidence of intent to permanently sever (the striker's) employment relationship."

and went on to hold the striking employees in that case did not abandon their statutory right as employees to reinstatement by tendering applications for receipt of their pension benefits and receiving them during a strike.

In similar fashion, in *Rose Printing Co.*, 289 NLRB 252 (1988), the Board held strikers who executed statements of resignation to obtain retirement contributions did not abandon their employment so as to relieve the struck employer of its reinstatement obligations. In that case, as here, striker testimony they tendered their resignations as the only way they could obtain the contributions and that they did not intend to quit their employment by such tender was credited and held controlling. Also see *MCC Pacific Valves*, 244 NLRB 931 (1979), to the same effect with respect to a per-

³ 298 NLRB 58, 59 (1990), *enfd.* 957 F.2d 1467 (7th Cir. 1992).

sonnel clerk demand a striker sign a voluntary quit form as a condition for his receipt of accrued vacation pay, and *S & M Mfg.*, 165 NLRB 663 (1967), with respect to a resignation submitted to comply with a demand by a new employer.

As the Board noted in *Goodman Investment Co.*, 292 NLRB 340 (1989), where the administrative law judge has credited an employee's testimony his letter of resignation did not reflect his real motive for resigning and that he would return to his old job if it was offered, reinstatement was warranted.

Cordova's securing of a job a year after he went on strike and the day after he tendered his July 12, 1992 communication to Alexander does not establish he intended to abandon his employee status with Medite and his statutory right to reinstatement by submitting the communication. A striker's securing of other employment after engaging in a prolonged strike and prior to receiving any reinstatement offer does not establish his abandonment of his interest in reinstatement (*Rose Printing Co.*, 304 NLRB 1076 (1191)), particularly in view of Cordova's credited testimony he was earning far less at his new job than the wages he earned while employed at Medite, a major if not the major industrial employer in the Las Vegas, New Mexico area, and his credited testimony he did not intend to abandon his employee status and reinstatement rights at Medite to one of the many higher paying jobs he had demonstrated an ability to perform, jobs which paid far more than the job he took after a year without work at far less pay and opportunity for advancement.

On the basis of the foregoing, I find and conclude the Respondent failed to present unequivocal evidence Cordova intended to sever his employment relationship with the Respondent when he sought and obtained the moneys to his credit in the 401(k) plan but, to the contrary, Cordova did not intend to sever that relationship when he sought and obtained those moneys.

CONCLUSIONS OF LAW (CORDOVA)

1. Cordova did not effectively terminate his employment relationship with Medite by complying with Alexander's demand of a written resignation as a condition precedent to receiving the balance of the moneys to his credit in Medite's 401(k) plan;

2. By failing and refusing to offer William Cordova the opportunity to bid on job vacancies following his unconditional offer to return to work without establishing any legitimate business justification therefor, the Respondent violated Section 8(a)(1) and (3) of the National Labor Relations Act.

3. The aforesaid unfair labor practice affected and affects interstate commerce as defined in the Act.

THE REMEDY (CORDOVA)

Having found the Respondent engaged in unfair labor practices, I recommend the Respondent be directed to cease and desist therefrom and to take affirmative action designed to effectuate the purposes of the Act.

Having found the Respondent violated the Act by failing and refusing to offer William Cordova the opportunity to bid on job vacancies following its receipt of his unconditional offer to return to work, I recommend the Respondent be directed to offer reinstatement to William Cordova if, at the compliance stage of this proceeding, it is determined that

Cordova was denied reinstatement as a consequence of the Respondent's failure and refusal to give him an opportunity to bid on job vacancies, and made whole for any loss of pay and benefits he may have suffered by virtue of the Respondent's discrimination against him, such payment to be made in accordance with *F. W. Woolworth & Co.*, 90 NLRB 289 (1950), with interest computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁴

ORDER (CORDOVA)

The Respondent, Medite of New Mexico, Inc., Las Vegas, New Mexico, its officers, agents, successors, and assigns, shall

1. Cease and desist from failing and refusing to offer reinstatement to William Cordova if, at the compliance stage of this proceeding, it is determined William Cordova has been denied reinstatement as a consequence of the Respondent's failure to offer him an opportunity to bid on job vacancies following the Respondent's receipt of his unconditional offer to return to work.

2. Offer William Cordova immediate reinstatement if, at the compliance stage of this proceeding, it is determined Cordova has been denied reinstatement as a consequence of the Respondent's failure to offer him an opportunity to bid on job vacancies following the Respondent's receipt of his unconditional offer to return to work.

3. Make William Cordova whole for any loss in wages and benefits he suffered if, at the compliance stage of this proceeding, it is determined Cordova has been denied reinstatement as a consequence of the Respondent's failure to offer him an opportunity to bid on job vacancies following the Respondent's receipt of his unconditional offer to return to work, in the manner set out in the remedy section of this decision.

FINDINGS OF FACT (COCA AND MONTOYA)

Benny Coca was employed by the Respondent in July 1984 and held a variety of jobs between 1984 and June 11, 1990, when he joined the strike. Between 1984 and 1990, he worked as a welder, log loader, laborer, wood storage front end operator, maintenance millwright, and millwright 3, at rates ranging from \$6.75 to \$9 per hour.

George Montoya was employed by the Respondent in May 1983 and held two jobs between that date and the date he joined the strike, June 11, 1990. He worked as a welder between May 1983 and March 1984 and worked as a millwright between March 1984 and June 11, 1990.

Following the Union's November 15, 1990 decertification and abandonment of further strike activities, both Coca and Montoya submitted unconditional, written offers to return to work to the Respondent.

Neither was offered reinstatement at any time thereafter.

The Respondent advanced the affirmative defense it was and is justified in denying strikers Coca and Montoya rein-

⁴If no exceptions are filed as provided by Sec. 102.46 of the Boards 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.

statement because they engaged in serious misconduct during the strike.

The Respondent cited the following alleged misconduct as grounds for denying reinstatement to Coca and Montoya:

1. Their alleged assault and battery of nonstriker Joe Mascarenas on June 20, 1990, at the picket line.
2. Coca's allegedly being under the influence of alcohol on June 20, 1990, at the time of the alleged assault.
3. Montoya's alleged threatening and attempted assault of nonstriker Dominguez as Dominguez approached the Medite plant in his auto to go to work on July 10, 1990.
4. Coca's and Montoya's alleged cursing of nonstriker Dominguez and Montoya's threatening Dominguez with bodily harm while in Montoya's vehicle, alongside Dominguez' vehicle, on July 11, 1990.
5. Their alleged shouting of obscenities at Foreman Mike Griego while in a vehicle alongside Griego's vehicle on July 11, 1990.

These contentions shall be addressed seriatim.

1. The alleged June 20, 1990 assault

In support of the contention Coca and Montoya engaged in serious misconduct by committing an assault upon a nonstriker at the picket line on June 20, 1990, the Respondent called Joe Alexander, Joe Mascarenas, and Ray Cordova to the stand.

Alexander testified he was employed as Medite's maintenance superintendent.

Alexander testified he, nonstriker Joe Mascarenas, an electrician, and nonstriker Don Washburn left the plant in separate vehicles at about 7:30 p.m. on June 20, 1990, with Mascarenas in the lead, followed by Alexander and Washburn.

He testified as the three vehicles exited the plant driveway and proceeded down the street, pickets at the plant exit and along the sides of the street (about 20-30) were yelling at Mascarenas, including Coca and Montoya; the pickets were crossing back and forth in the street in front of the vehicles, forcing them to move slowly; about 20 to 30 yards from the plant exit, Mascarenas came to a stop, alighted from his vehicle, and took several steps away from his vehicle towards the pickets yelling at him as the pickets moved towards Mascarenas.

Alexander testified he was still in his vehicle, behind the wheel, observing the foregoing and saw Coca, as Mascarenas came face to face with him, strike Mascarenas in the mouth, saw Mascarenas strike Coca in the face, saw Coca fall back,⁵ saw Coca kick Mascarenas as he fell back, and saw striker Leyba come alongside Mascarenas and strike Mascarenas as strikers reached the scene.

Alexander testified he had left his vehicle by that time and, with the help of striker/picket Dan Hearn, separated the combatants, escorted Mascarenas back to his vehicle, instructed Mascarenas to leave, and Mascarenas complied with that instruction. He also stated the whole fracas could have been avoided if Mascarenas had stayed in his vehicle and proceeded forward.

Mascarenas testified Montoya (who was carrying a picket sign at the plant exit) addressed curses and epithets at him

⁵Mascarenas testified he is 6-feet tall and weighs 230 pounds; Coca appears to be about 5 feet 5 inches tall and about 140 pounds.

as he drove out the exit; the pickets lining both sides of the street as he proceeded continued to curse him, calling him a scab and derogatory terms, including Coca. He stated many pickets were crossing the street in front of his vehicle, forcing him to stop; that he left his vehicle and approached the pickets to talk his way through; the pickets came towards him as he approached them, he was faced by Coca, Coca called him a name and told him to bring it on, kicked him in the leg, and he struck Coca in return; other pickets attacked him, including Leyba, who struck him from his side, in the eye and Montoya, who struck him from the other side and invited him to meet him at the park later, as Alexander and Hearn were separating the combatants and escorting Mascarenas back to his vehicle.

Ray Cordova testified he was on guard duty at the plant exit at the time Mascarenas, Alexander and Washburn came through the plant exit, saw the melee taking place, saw Art Tafoya and Coca hit Mascarenas, and utilized a video camera for about 15 seconds to tape the incident.⁶

Called in rebuttal following the foregoing, Coca testified after Mascarenas left his vehicle, he crossed the street and pushed Coca's wife; when Coca confronted him, he knocked Coca down; he neither hit nor kicked Mascarenas; and as other pickets helped him to his feet, Alexander intervened and escorted Mascarenas back to his vehicle.

Called in rebuttal, Montoya testified he was carrying a picket sign at the plant exit as Mascarenas, came through; conceded he called Mascarenas a scab and cursed him as he passed through; that he saw Mascarenas stop his vehicle about 20 yards down the street after leaving the exit, leave his vehicle and approach pickets lining the street; he ran to the scene as Alexander was attempting to break up the melee and escort Mascarenas back to his vehicle; and denied striking Mascarenas.

I do not credit Coca's testimony Mascarenas pushed his wife, nor his denial he kicked Mascarenas. Mascarenas would have had to cross the street from the lane he was in when he stopped and alighted from his vehicle to push Coca's wife and the testimony of all others established as Mascarenas left his vehicle and stroke towards the pickets, the pickets moved towards him. Nor do I credit Alexander's testimony the first blow in the Coca-Mascarenas encounter was Coca's striking Mascarenas in the mouth, since Mascarenas failed to support that testimony, stating the only blow he received from Coca was a kick to the leg. Finally, I do not credit Mascarenas' testimony he only stopped and alighted from his vehicle to try to talk his way through, and his testimony Coca kicked him before he knocked Coca down, crediting the testimony of Carmen Tafoya that Mascarenas appeared angry and belligerent as he approached Coca and Alexander's testimony Mascarenas could have kept going and avoided the fracas and that Coca kicked Mascarenas as he was collapsing following Mascarenas' blow to his face. I do not credit Ray Cordova's testimony in respect to what he saw, his testimony was unreliable.

I therefore find and conclude Montoya, Coca, and other pickets yelled at Mascarenas as he left the plant exit and proceeded down the street, calling him a scab, cursing him, and

⁶Mascarenas, however, unequivocally testified Tafoya did not strike him at any time and the tape was too indistinct to identify the participants in the incident.

addressing other unprintable epithets at him; angered by the curses, etc., Mascarenas stopped and alighted from his vehicle, approached the pickets in a belligerent manner;⁷ was met face to face by Coca, whom he had identified as one of those cursing him, was invited by Coca to bring it on, and responded by striking Coca and knocking him to the ground, with Coca kicking him as he went down, followed by a general melee during which Leyba and other pickets, including Montoya, struck Mascarenas before Alexander and a picket intervened, broke up the altercation, and escorted Mascarenas back to his vehicle.

2. Alleged alcoholic influence (Coca)

As an additional ground for refusing to reinstate Coca, the Respondent alleged Coca engaged in serious misconduct by being under the influence of alcohol at the time of his alleged assault of Mascarenas.

Mascarenas testified Coca had a bottle of beer in his hand, which he threw away before their encounter. He also testified he saw two coolers alongside the street. He conceded he did not know their contents.

On the basis of the foregoing, I find the Respondent failed to establish Coca was under the influence of alcohol while on the picket line on June 20, 1990.

3. The alleged July 10, 1990 threat and attempted assault (Montoya)

As an additional ground for refusing to reinstate Montoya, the Respondent relied on his alleged serious misconduct during the strike (on July 10, 1990) of threatening and attempting to assault nonstriker Mark Dominguez.

Mark Dominguez testified he was hired by Medite during the strike and at about 11:30 to 11:40 p.m. on July 10, 1990, while proceeding down the street in his vehicle shortly before reaching the plant entrance, Montoya stepped into the street swinging a long-handled ax and said "I'll kill you," causing him to swerve to the left before reaching the plant entrance.

Montoya testified the pickets had an ax which they used to chop wood for their barbecues but denied he committed the act or uttered the statement attributed to him by Dominguez.

Dominguez impressed me as a credible witness and I credit his testimony.

I therefore find on July 10, 1990, Montoya swung an ax at Dominguez' vehicle and threatened to kill Dominguez as he was approaching the plant in the vehicle.

4. The alleged cursing and threatening of nonstriker Dominguez on July 11, 1990 (Coca and Montoya)

As an additional ground for refusing to reinstate Coca and Montoya, the Respondent alleged the two engaged in serious misconduct on July 11, 1990, by cursing and threatening nonstriker Dominguez with bodily harm.

⁷Crediting both Carmen Tafoya's testimony and other evidence establishing another physical encounter was avoided only a few days later when a policeman at the scene ordered Mascarenas to get back in his vehicle and proceed when he responded to yells from pickets by stopping and alighting from his vehicle and proceeding towards the pickets.

Mark Dominguez testified he was cruising in his auto, accompanied by a friend, at about 3:30 to 4 p.m. on Grand Avenue, in the inside lane; a vehicle came alongside his auto in the outside lane driven by Montoya and occupied by Coca and Art Tafoya; the three called him a scab and cursed him; Montoya demanded that he pull over or he would get him later; he increased his speed, outdistanced the Montoya vehicle as it followed him and Montoya abandoned the chase.

Both Montoya and Coca testified Montoya was driving and Coca was a passenger in Montoya's vehicle at the date, time, and place identified by Dominguez; Montoya pulled alongside Dominguez' vehicle and the two called him a scab and cursed him; and that Dominguez increased his speed and departed. The two denied Tafoya was in the vehicle. I credited Tafoya's denial he was in the vehicle in my underlying decision, again credit that denial, and find Dominguez was mistaken in identifying Tafoya as present in the Montoya vehicle.

As noted above, Dominguez impressed me as a credible witness and I credit his testimony Montoya demanded he pull over and threatened to get him later when he did not comply with that demand.

5. The alleged July 11, 1990 cursing of Foreman Griego (Coca and Montoya)

As another ground for denying reinstatement to Coca and Montoya, the Respondent cited Coca's and Montoya's alleged misconduct of cursing Foreman Griego from Montoya's vehicle on July 11, 1990.

Griego testified he has been shipping foreman at the plant for several years; as he left the plant in his van on July 10, 1990, after finishing his work shift, a vehicle driven by Montoya with Coca sitting alongside Montoya came abreast of his vehicle; Coca called him a scab and addressed other epithets to him; Montoya did not speak; he ignored Coca and continued on his way.

Montoya and Coca denied the incident occurred.

I credit Griego's testimony and find Coca on July 11, 1990, called foreman Griego a scab and cursed him.

Analysis and Conclusions (Coca and Montoya)

I have entered findings during the strike, striker Coca:

1. Shouted scab and other epithets at nonstriker Mascarenas and kicked Mascarenas as Mascarenas knocked him down.

2. Called nonstriker Dominguez and Foreman Griego scabs and cursed both of them.

I have also entered findings during the strike, striker Montoya:

1. Hit nonstriker Mascarenas without provocation.

2. Swung an ax at nonstriker Dominguez' vehicle and threatened to kill him.

3. Threatened to "get" Dominguez later if Dominguez did not pull over, while driving alongside Dominguez' vehicle.

4. Engaged in name-calling of Dominguez and Foreman Griego.

In 1984, the Board adopted a test devised by the Third Circuit Court of Appeals to determine whether misconduct during the strike by a striker/employee justified his employ-

er's refusal to offer him reinstatement following his unconditional offer to return to work.⁸

The Board ruled an employer may refuse to reinstate a striking employee when the employee's conduct during the strike "Under the circumstances existing may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act," quoting the italicized language from the Third Circuit Court decision (*NLRB v. W.C. McQuaide*, 552 F.2d 519, 527 (1979), enfg. in part 220 NLRB 593 (1975)).

In so doing, the Board bowed to decisions in other circuits reversing a line of cases holding a striker's threats addressed to a nonstriker during a strike, where unaccompanied by violence or physical gesture, was not sufficiently serious misconduct to warrant refusing reinstatement to the striker.

McQuaide, however, reiterated and approved the Board doctrine "that the use of epithets, vulgar words or profanity does not deprive a striker of the protection of the Act" (emphasis added), citing cases.⁹

To similar effect, *Georgia Kraft Co. v. NLRB*, 696 F.2d 931, 939-940 (11th Cir. 1983), holding a striker's addressing of lewd and insulting language to a supervisor crossing a picket line insufficient misconduct to warrant denying the striker reinstatement; that name calling was privileged under the free speech provisions of the Act (Sec. 8(c)); also see *MGM Grand Hotel*, 275 NLRB 1015 (1985), and *Refuse Compactor Service*, 311 NLRB 12 (1993).

On the basis of the foregoing, I find the namecalling addressed by strikers Coca and Montoya to nonstrikers Mascarenas, Dominguez, and Griego insufficient basis for the Respondent's failure and refusal to offer them reinstatement.

With respect to Coca's altercation with Mascarenas, I also find and conclude Coca's kicking Mascarenas as he was knocked down by Mascarenas is also insufficient grounds for denying Coca reinstatement. Mascarenas provoked the incident by leaving his vehicle when there was no need to do so and approaching Coca in an angry and belligerent manner, after Coca had called him names; a much bigger man, he struck Coca in the face and knocked him down, and Coca's kicking him inflicted much less injury, if any, than that suffered by Coca. As the Board observed in *Ornamental Iron Work Co.*, 295 NLRB 473 (1989), a striker does not engage in misconduct precluding reinstatement when involved in a fight provoked by his opponent. Also see *Franzia Brothers Winery*, 290 NLRB 927 (1988).

With respect to Montoya, however, the Board has held a striker forfeits his protection under the Act and may be denied reinstatement by his employer when he threatens a nonstriker with personal harm and tells a nonstriker to pull over, he has something for him (*Land Air Delivery*, 286 NLRB 1131 (1987)); when a striker threatens to kill a nonstriker (*Axelsson, Inc.*, 285 NLRB 862 (1987)); when a striker threatens to "get" a nonstriker (*Roto Rooter*, 283 NLRB 771 (1987)); when a striker hits a nonstriker without provocation (*Bingham-Willamette Co.*, 279 NLRB 270 (1986)); *Keco Industries*, 176 NLRB 1469 (1985); and *United States Gypsum*, 284 NLRB 4 (1987)); and when a striker holds a bat in a threatening manner when confronting a nonstriker and threat-

ens to kill a nonstriker (*Gem Urethane Corp.*, 284 NLRB 1349 (1987)).

Montoya engaged in a number of the acts just described during the course of the strike, i.e., striking Mascarenas without provocation, telling Dominguez he would get him later if he did not pull over, and swinging an ax at Dominguez' vehicle and threatening to kill him.

I find and conclude by engaging in those acts Montoya forfeited his protection under the Act and the Respondent was entitled to deny him reinstatement therefor.

CONCLUSIONS OF LAW (COCA AND MONTOYA)

1. Coca's misconduct during the strike was insufficient grounds for the Respondent's refusal to reinstate him following the Respondent's receipt of his unconditional offer to return to work.

2. Montoya's misconduct during the strike was sufficient grounds for the Respondent's refusal to reinstate him following the Respondent's receipt of his unconditional offer to return to work.

3. By failing and refusing to offer Coca the opportunity to bid on job vacancies following his unconditional offer to return to work without establishing any legitimate business justification therefor, the Respondent violated Section 8(a)(1) and (3) of the Act.

4. The Respondent did not violate the Act by failing and refusing to offer Montoya the opportunity to bid on job vacancies following his unconditional offer to return to work.

5. The aforementioned unfair labor practice affected and affects interstate commerce as defined in the Act.

THE REMEDY (COCA)

Having found the Respondent engaged in unfair labor practices, I recommend the Respondent be directed to cease and desist therefrom and to take affirmative action designed to effectuate the policies of the Act.

Having found the Respondent violated the Act by failing and refusing to offer Coca the opportunity to bid on job vacancies following its receipt of his unconditional offer to return to work, I recommend the Respondent be directed to offer reinstatement to Coca if, at the compliance stage of this proceeding, it is determined that Coca was denied reinstatement as a consequence of the Respondent's failure and refusal to give him an opportunity to bid on job vacancies, and made whole for any loss of pay and benefits he may have suffered by virtue of the Respondent's discrimination against him, such payment to be made in accordance with *F. W. Woolworth & Co.*, 90 NLRB 289 (1950), with interest computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁰

⁸ *Clear Pine Mouldings*, 268 NLRB 1044 (1984).

⁹ *McQuaide*, supra at 523.

¹⁰ If no exceptions are filed as provided by Sec. 102.46 of the Boards 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 (COCA)

The Respondent, Medite of New Mexico, Inc., Las Vegas, New Mexico, its officers, agents, successors, and assigns, shall

1. Cease and desist from failing and refusing to offer reinstatement to Benny Coca if, at the compliance stage of this proceeding, it is determined Benny Coca has been denied reinstatement as a consequence of the Respondent's failure to offer him an opportunity to bid on job vacancies following the Respondent's receipt of his unconditional offer to return to work.

2. Offer Benny Coca immediate reinstatement if, at the compliance stage of this proceeding, it is determined Benny Coca has been denied reinstatement as a consequence of the Respondent's failure to offer him an opportunity to bid on job vacancies following the Respondent's receipt of his unconditional offer to return to work.

3. Make Benny Coca whole for any loss in wages and benefits in the manner set out in the remedy section of this decision if, at the compliance stage of this proceeding, it is determined Benny Coca has been denied reinstatement as a consequence of the Respondent's failure to offer him an opportunity to bid on job vacancies following the Respondent's receipt of his unconditional offer to return to work.

ORDER (MONTROYA)

It is ordered that the complaint issued in Case 28-CA-11281-19 be, and it is, dismissed.

ORDER (CORDOVA, COCA, AND MONTROYA)

The Respondent, Medite of New Mexico, Inc., Las Vegas, New Mexico, its officers, agents, successors, and assigns, are directed to notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.