

Iplli, Inc. and Local 25, International Brotherhood of Electrical Workers, AFL-CIO. Cases 29-CA-18328 and 29-CA-18510

June 13, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING
AND COHEN

On July 7, 1995, Administrative Law Judge Raymond P. Green issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order as modified and set forth in full below.²

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Iplli, Inc., Bohemia, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for joining or supporting Local 25, International Brotherhood of Electrical Workers, AFL-CIO, or any other union.

(b) Threatening employees with plant closure or with the loss of jobs because they support or join Local 25, International Brotherhood of Electrical Workers, AFL-CIO.

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.

In affirming the judge's finding that the Respondent violated Sec. 8(a)(3) and (1) by discharging John Martyn, we do not rely on the judge's irrelevant discussion in sec. II of his decision of the goals of the Union's salting program. We also do not rely on fn. 2 and App. A, which we strike because they are not part of the record.

In addition to the cases cited by the judge, we note that the Board's position with respect to the employment status of employee participants in the Union's salting program is also set forth in *Town & Country Electric*, 309 NLRB 1250 (1992), enf. denied 34 F.3d 625 (8th Cir. 1994), enf. 116 S.Ct. 450 (1995).

² We shall modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

(c) In any like or related manner interfering with, 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) Within 14 days from the date of this Order, offer John Martyn full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make John Martyn whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter notify the employee in writing that this has been done and that the discharge will not be used against him in any way.

(d) Preserve and, within 14 days of a 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.

(e) Within 14 days after service by the Region, post at its offices and meeting halls copies of the attached notice marked "Appendix B."³ Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 31, 1994.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

³ 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 B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

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

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge or otherwise discriminate against any of you for joining or supporting Local 25, International Brotherhood of Electrical Workers, AFL-CIO, or any other union.

WE WILL NOT threaten employees with plant closure or with the loss of jobs because they support or join Local 25, International Brotherhood of Electrical Workers, AFL-CIO.

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

WE WILL, within 14 days from the date of the Board's Order, offer John Martyn full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make John Martyn whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of John Martyn, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

IPLLI, INC.

Diane Lee, Esq., for the General Counsel.
Cynthia Licul, Esq., for the Respondent.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. This case was tried in Brooklyn, New York, on May 5 and 22, 1995.

The charge in Case 29-CA-18328 was filed on June 17, 1994, and the charge in Case 29-CA-18510 was filed on September 6, 1994. A consolidated complaint was issued by the Regional Director of Region 29 on October 25, 1994. In substance, the complaint, as amended at the hearing, alleged:

1. That on May 11, 1994, the Respondent by its owner, Brian McAuliff (a) threatened to close the plant; (b) told employees that the Company would lose work if the Union succeeded in representing its employees; and (c) told employees that it would stop bidding for jobs if the employees joined or supported the Union.

2. That on May 19, 1994, the Respondent, by Brian McAuliff, told employees that if the Union succeeded in its attempt to represent its employees, their jobs would not be guaranteed.

3. That on May 19, 1994, the Respondent by its foreman, Lani Bohne, threatened employees with plant closure if the Union succeeded in its attempt to represent them.

4. That on May 20, 1994, the Respondent transferred John Martyn from one jobsite to another for discriminatory reasons.

5. That on June 1 and 2, 1994, the Respondent refused to assign overtime work to Martyn for discriminatory reasons.

6. That on June 10, 1994, the Respondent discharged Martyn because of his membership and activities on behalf of the Union.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following

FINDINGS OF FACT

I. JURISDICTION

It is admitted that the Employer is a New York corporation engaged in the business of providing electrical contracting services in the building and construction industry. It also is admitted that during the past year it performed services valued in excess of \$50,000 for enterprises located in the State of New York, which in turn, meet the Board's direct inflow or outflow standard for asserting jurisdiction. Based on the above, I find that the Employer meets the Board's indirect outflow standard for asserting jurisdiction and that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent denied that Local 25, IBEW was a labor organization within the meaning of the Act. Andrew Bub, who is the financial secretary of Local 25, testified that the Union is an organization which represents employees for the purpose of collective bargaining. He testified that employees participate in the affairs of the Union by way of elections etc. Offered into evidence was the constitution of the International Brotherhood of Electrical Workers and the bylaws of Local 25. Also placed into evidence was a current collective-bargaining agreement between Local 25 and the Long Island Chapter, National Electrical Contractors Association, Inc. and a certification by the National Labor Relations Board (the Board), certifying Local 25 as the exclusive collective-bargaining representative of the employees of Mr. Electric Service Co., Inc. Based on the above, I conclude that Local 25, IBEW is a labor organization within the meaning of Section 2(5) of the Act. *Alto Plastics Mfg. Corp.*, 136 NLRB 850, 851-852 (1962).

II. ALLEGED UNFAIR LABOR PRACTICES

John Martyn obtained his job by visiting the jobsite and speaking first with the general contractor who referred him to Brian McAuliff, the owner of Iplli. In his interview with McAuliff, Martyn said that he had just arrived from Texas where he had worked as an electrician for an electrical contractor called Ocean Electrical Construction Inc. Martyn was hired and unbeknownst to McAuliff, Martyn's description of his time employed at Ocean was false. Martyn states that during the interview, McAuliff said that there were union shops and nonunion shops and that there was no way that he was going to become a union shop. Needless to say, Martyn did not disclose that he was a member of Local 25.

Martyn explained that he sought the job at Iplli under the Union's salting program, where as a member of Local 25, he agreed to try to obtain employment at nonunion contractors and if employed, attempt to organize the employees of the company. He states that he falsely listed his employment at Ocean because he felt that if he listed his most recent employers, this would tip off the Company that he was a member of Local 25 and preclude him from being hired.

It should be noted that the International Brotherhood of Electrical Workers has had for some years a nationwide program called the "Salting Program," which was designed as a response to the increasing use of nonunion contractors on construction projects. The IBEW salting program was described to me in four previous cases, one of which is still pending decision, and the other three being *Sullivan Electric Company*, JD(NY)-04-95, *Consolidated Electrical Service Inc.*, JD(NY)-11-95 (neither of which were appealed to the Board), and *Belfance Electric, Inc.*, JD(NY)-55-95, which issued on June 22, 1995. Bub, the Union's financial secretary, testified that Local 25 participates in this program and acknowledged use of the IBEW's salting manual. I am therefore taking official notice of it and including excerpts from that document as Appendix A. However, unlike other IBEW locals, it is not clear in this particular case whether Local 25 had passed a resolution requiring its members, if employed under the salting program, to leave their employers immediately on union notification.¹

In *Sullivan Electric Company* and *Consolidated Electrical Service Inc.*, I stated that I thought that the goals of the salting program included the following goals which could be separate or overlapping depending on local circumstance.

1. To put union members on a jobsite so as to enable the Union to organize the Company's employees in order to gain recognition either voluntarily or through a Board election.
2. To get union people on the job and create enough trouble by way of strikes, lawsuits, unfair labor practice charges and general tumult, so that the nonunion contractor walks away from the job.
3. If number 2 does not work, to create enough problems for the employer by way of unfair labor practice charges, Davis Bacon, OSHA, or legal allegations requiring legal services so that even if the employer does

¹ In the brief filed on behalf of Local 25 by Michael D. Lucas, the executive assistant to the IBEW's international president, he indicates that it is likely that Local 25 has passed such a resolution in accordance with the suggested format of the International Union.

not walk away from the job, he will be reluctant to bid for similar work in the local area ever again.

In the present case, the evidence indicates that Local 25's goal in having Martyn obtain employment at Iplli was to have him try to organize the employees of the Company while he worked there and ultimately to attempt to gain union recognition.

Martyn was hired and began to work on December 6, 1993. He initially was paid \$14.50 but eventually his wages were raised to \$16 per hour which is the same rate of pay as that of Lani Bohne, whom the General Counsel claims is a supervisor. Initially, Martyn was assigned to work at a jobsite at 115 Orville Drive, Bohemia, New York, and thereafter on December 23, 1993, was transferred to another site at 105 Orville Drive where he spent most of his time until transferred on May 24, 1994.

It should be noted that the Company is a very small electrical contractor, employing about 8 to 10 employees whom it tries to shift from job to job as needed. Of this group, there were four to five people who could be categorized as journeymen electricians and about four people who would be categorized as helpers or apprentices. As explained by McAuliff, his Company being small, he bids for small jobs and competes only against other nonunion electrical contractors. McAuliff testified that because of the small size of his work force, he is the only person who supervises employees, albeit the first electrician assigned to a new job will be "in charge" of that job and act as a kind of foreman.

There is no dispute that Martyn did his job and did it well without complaint by either McAuliff or Iplli's customers. It also appears that Martyn did not begin to engage in any union activity until May 1994.

Martyn testified that on May 11, 1994, during a conversation he had with McAuliff about a raise, he mentioned that he had been contacted by a union representative about organizing. He states that McAuliff responded by stating that he would close the shop before going union. He also states that McAuliff said that if the men got together and formed a union he would no longer bid for work and that his customer, Nature's Bounty, would take the work away from Iplli and do the work itself.

Martyn testified that after May 11, 1994, he spoke to the other employees about the Union and invited them to meet with Bub on May 18 after work. When no one showed up, Bub and Martyn figured that Martyn's cover had been blown and they decided to fax a letter to McAuliff, announcing that Martyn was there to organize for the Union.

Martyn states that during a meeting on May 19, 1994, McAuliff announced, after discussing OSHA matters, that Martyn was going to be trying to organize the employees into the IBEW and that although he was not happy, this was Martyn's right. He states that McAuliff said that Iplli's customers were nonunion and that if the employees chose to be represented, it would contaminate a union free environment. According to Martyn, McAuliff said that Iplli bid against other nonunion contractors, and that these jobs were not guaranteed because financially, a union shop could not compete against a nonunion shop. Martyn testified that McAuliff stated that if the job went union, "you're not guaranteed these jobs," and that he pulled out and read from a newspaper article describing an IBEW member who had been out

of work since 1991. Martyn further testified that after the meeting, he spoke to McAuliff and told him that he intended to do a good job at work but that he also intended to organize the other employees during his off hours. He states that McAuliff repeated that he was not happy.

According to Martyn, on May 20, 1994, he had a conversation with Lani Bohne who said that McAuliff would have to close down the shop because he could not financially afford to go union.

McAuliff testified that at the December 3 job interview, Martyn asked if Ippli was a union shop and that he told Martyn that it was not and that he was not interested in becoming a union shop because his was a small Company. McAuliff states that on May 19, 1994 (and on several other occasions as well), he told employees that his was a small shop primarily engaged in renovation work and that in his opinion, he would have a hard time surviving as a union company if he had to bid against nonunion contractors because his labor rates would be almost double what theirs were. He states that this was a stock answer he gave to employees about what would happen if his Company went union. He also states that he simply was expressing his personal opinion.

Lani Bohne, who testified in this case, did not deny the remarks that were attributed to him by Martyn on May 20. The Company argues, however, that Bohne is nothing more than an electrician, who at best, has been designated from time to time as a lead person. As noted above, Bohne's wage rate was no higher than Martyn's and there was little or no evidence that he had any of the authorities or powers which are enumerated in Section 2(11) of the Act.

As noted above, on May 20, 1994, Martyn was transferred to a new job for a new customer. Although, the complaint asserts that this transfer was discriminatorily motivated, the evidence does not support such an allegation. In essence, the job at which Martyn had been assigned, was almost completed. Instead of keeping Martyn at this jobsite to work by himself, the Company put Bohne there to do the "clean up" work and assigned most of its people, including Martyn, to work for the new customer at the new job that was just beginning. This new job was less than a mile away from the old job and Martyn did not suffer any diminution in his wages or benefits. And if the Company wanted to keep Martyn from engaging in union activity, it would have made far more sense to keep him isolated at the old job and not move him to the new job where the other employees were congregated.

Martyn claims that on June 1, 1994, he was told by Lani Bohne that he could not work overtime that day but that when he went home, he saw that other employees remained at work. He did, however, work overtime on Saturday, June 4. The Company asserts that it did not deny any overtime to Martyn during the week in question and the payroll records tend to support the Company's view. Thus, during the week ending June 7, 1994, whereas Martyn worked 5.5-overtime hours, two employees worked respectively, 6- and 12-overtime hours and five employees worked 5 or fewer overtime hours.

On June 10, 1994, Martyn was fired and was told that the reason for his termination was because he falsified the employment application that he had submitted back on December 3, 1993.

McAuliff testified that sometime after he received the union fax, he found out from someone, that Martyn did not just come from Texas. He states that he called information in Texas and found that there was no listing for Ocean Electrical Construction Inc. and that when he contacted the Texas Secretary of State, he was advised orally (and on June 6, 1994, by fax), that this company had ceased to exist in February 1984.

McAuliff states that he decided to discharge Martyn based on the false application because he felt that if he lied there, he could not trust Martyn when he was out in the field doing his work. (For example, the employer basically takes the word of employees as to their hours of work as there is no check in or time clock system.)

McAuliff asserted that he similarly discharged another employee, Jamie Temboro, for giving false information on his job application. However, that situation was somewhat different, in that Temboro, who apparently had listed on his application that he had done electrical work for an electrical contractor, admitted during his time of employment at Ippli that he really had not done electrical work there, and this confirmed McAuliff's observation that Temboro was incompetent as an electrician.

Thus unlike the situation with Temboro, there was no issue as to the ability of Martyn to do the work and there was no reason to believe that he was unqualified for his job.

Analysis

There is no doubt in my mind that but for Martyn's union activities, he would have retained his employment at Ippli. Considering the timing of his discharge in relation to his announced intention to try to organize the other employees, this by itself constitutes strong prima facie evidence that the Company was motivated by Martyn's union activity. Moreover, evidence of such motivation is also derived from statements made by McAuliff indicating his unhappiness with the fact that Martyn announced his intention to engage in such activity. Cf. *Best Plumbing Supply*, 310 NLRB 143 (1993).

Under *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 622 F.2d 899 (1st Cir. 1981), *cert. denied* 495 U.S. 989 (1982), once the General Counsel has established a prima facie showing of unlawful motivation, the burden is shifted to the respondent to establish that it would have laid off or discharged the employee for good cause despite his or her union or protected activities.

The Respondent contends that the sole reason it discharged Martyn was because he gave false information on his job application. This is, in fact, the case as Martyn did so on the (probably correct) assumption that if he listed New York union contractors as his prior employers, he would not have been offered employment at Ippli. In any event, the Respondent asserts that the discharge of Martyn was consistent with its prior practice of terminating other people who had falsified their job applications; giving the example of Temboro. Nevertheless, that example is not convincing as Temboro's discharge resulted from the fact that despite his listing of a prior electrical contractor as an employer, he demonstrably was unable to perform the work required of him by Ippli. It seems to me that Temboro more likely was discharged, not because he gave false information on his job application, but rather because he falsely claimed that he could perform work that he could not.

There is an issue as to whether a person who obtains employment under the Union's salting program, should be considered an employee for purposes of Section 2(3) and/or Section 8(a)(3) of the Act. Thus, in *Town & Country Electric v. NLRB*, 34 F.3d 625 (8th Cir. 1994), the court held that employee-members of a union who were sent to apply for work at a nonunion contractor were not employees within the meaning of the Act and therefore could be refused employment. In that case, the court held inter alia that employees who obtained employment under the IBEW's salting program were not entitled to the protection of the Act, in large measure, because of the union's enactment of a resolution allowing its members to accept employment at a nonunion employer only on condition that they engage in organizing activity and that they quit their employment immediately on union notification. In that case, the court held that where such a resolution exists, the union's control over the "putative" employment relationship (which control would exist despite the absence of a collective-bargaining relationship), would be "inimical to, and inconsistent with, the employer-employee relationship."

The Board's position on this issue is set forth in cases such as *Wilmar Electric Service v. NLRB*, 968 F.2d 1327 (D.C. Cir. 1992); and *Bay Control Services*, 315 NLRB 30 (1994). In those cases the Board has held that such employees are entitled to statutory protection and that when discharged because they engaged in union activity, they are entitled to reinstatement and back pay.²

Inasmuch as I am bound by Board precedent, I conclude that the discharge of Martyn violated Section 8(a)(1) and (3) of the Act.³

In addition to the discharge, the complaint alleges that for discriminatory reasons, the Respondent, on May 20, 1994, transferred him from one job to another and that on June 1 and 2, 1994, the Respondent refused to assign him overtime work. I do not think that either of these allegations have merit.

With respect to the transfer, the evidence shows that the job he was working on at the time was just about completed and that a new job for a new customer was just beginning. As was the Company's custom, it put almost all of its small work force at the new job to impress the customer and left the clean up work for Bohne which was his specialty.

²For a description of the salting programs of the IBEW and the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers (IBB), see the *Journal of Labor Research* Volume XIV, Number 4, Fall 1993 authored by Herbert R. Northrup of The Wharton School, University of Pennsylvania. See also an article by Michael J. Bartlett, Beth C. Wolffe, and Gretchen M. White in the May 1994 Labor Law Journal. "*Sunland Construction Company: Are union organizers necessarily bona fide applicants?*"

³The Union's brief argues correctly that I am bound by the Board's view of the law and not by the contrary opinion of the Eighth Circuit Court of Appeals. Nevertheless, the Union's brief discusses the history of its salting program and the reasons that the International has suggested certain language for salting resolutions to be adopted by its locals. The brief also sets forth the Union's legal theory as to the consequences under the NLRA of its salting resolutions and their impact on the relationship between the Union, its members, and any employers who employ such members. Although I found the discussion interesting, I shall leave consideration of this legal issue to a higher authority.

By the same token, I do not think that the General Counsel has established that Martyn was discriminatorily treated vis-a-vis overtime. In essence, the claim is that on June 1 and 2, 1994, Martyn was told that he could not work overtime whereas he saw that other employees remained at the site after he left. Nevertheless, the payroll records show that Martyn did not suffer a loss of overtime during the week in question in comparison to most of the other employees who worked at this particular job site. Thus, during the week ending June 7, 1994, Martyn worked 5.5-overtime hours, two employees worked respectively, 6- and 12-overtime hours, and five employees worked 5 or fewer overtime hours.

Finally, the complaint alleges that the Respondent by Brian McAuliff and Lani Bohne, made statements to employees that were violative of Section 8(a)(1) of the Act.⁴

The testimony of Martyn and McAuliff regarding their conversations on May 11 and 19 present an intriguing factual and legal issue. Although their testimony obviously covers the same transaction, their recollections are somewhat different. Martyn asserts that McAuliff explicitly stated, among other things, that the Company would close if the Union organized the employees. McAuliff, on the hand, asserts that he simply presented his opinion that unionization would lead to higher costs for his Company; that he would therefore be unable to compete for business against other nonunion contractors; that his customers were nonunion contractors who might do the work themselves; and that no one could guarantee employees their jobs.

In circumstances like this, particularly where the record presents a one-on-one situation, it is often difficult to know if the employee/listener is accurately recalling a statement actually made or is truthfully testifying to his interpretation of remarks, which when heard, are simplified to mean that the employer intends to close the shop. By the same token, one wonders whether the employer in his recollection of what was said, truthfully remembers what, in hindsight, he should have said, rather than what he said in actuality.

Compounding the problem of perception and recollection, is the legal issue as to whether certain types of statements constitute illegal threats of closure and/or discharge or simply constitute permissible predictions of economic consequences.

In the present case, I am inclined to believe that McAuliff's version more likely represents what he said to Martyn and other employees. That being said, I also am of the opinion that such remarks constituted and were understood to be threats of reprisal, even if he did not subjectively intend them to be so.

In *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 615 (1969), the Supreme Court stated:

[A]n employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a "threat of reprisal or force or promise of benefit." He may even make a prediction as to the precise effects he believes unionization will have on his company. In such a case, however, the

⁴Inasmuch as I do not think that the General Counsel has established that Bohne was a supervisor within the meaning of Sec. 2(11) of the Act, I shall recommend that the allegation concerning statements attributed to him, be dismissed.

prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control or to the convey a management decision already arrived at to close the plant in case of unionization. If there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion, and as such without the protection of the First Amendment. We therefore agree with the court below that "conveyance of the employer's belief," even though sincere, that unionization will or may result in the closing of the plant is not a statement of fact unless, which is most improbable, the eventuality of closing is capable of proof.

In delineating the boundary between a lawful prediction and an unlawful threat, the Board in *National Micronetics*, 277 NLRB 993, 995 (1985), stated:

The judge concluded that by equating unionization with unprofitability and unprofitability with plant relocation, the Respondent made illegal threats to close the plants and relocate if the Union won the election.

We agree with the judge's conclusion that these statements were illegal threats, but only for the following reasons. As we stated above, an employer may lawfully tell its employees that changed economic conditions due to unionization could cause it to move elsewhere. Thus, where an employer points out specific effects of unionization that might cause it to become unprofitable, such as higher wages or production losses during strikes, it may properly raise the possibility that a loss of jobs could result from unionization. In this case, however, the Respondent did not point to any objective facts that would be likely to change as a result of unionization and cause it to become unprofitable. Instead, the Respondent merely noted that its Kingston plants were already uncompetitive, when compared to its plants in California and Mexico and to its Japanese suppliers, and stated that it could easily relocate these unprofitable plants if the Union won the election. Furthermore, the Respondent made these statements at the end of a long anti-union election campaign during which five of its highest management officials had repeatedly made explicit threats to close the Kingston plants and relocate the work in California if the Union won the election.

Shelby Tissue, 316 NLRB 646 (1995), involved a representation case, wherein the Board overturned an election because the employer repeatedly implied, without objective foundation, that a vote for the union would inevitably lead to plant closure. The Board also noted that the employer stated that the union represented another employer where the work force had gone down from 1200 to 650 and that the remainder would soon be out of jobs. Finding that the employer had no objective evidence that the union had done anything to cause or to exacerbate problems at the other em-

ployer, the Board held that these statements were grounds for setting aside the election.

In *Dominion Engineered Textiles*, 314 NLRB 571 (1994), an employer told employees that the bargaining obligation that would flow from the union's victory could be "devastating" because the union would be "a major distraction" consuming the employer's time and energies that could otherwise be devoted to solving its problems. The Board, with Member Cohen dissenting, held that such statements were grounds for setting aside the election under the rationale of *NLRB v. Gissel Packing Co.*, supra. In dissenting, Member Cohen noted that the employer's statements pointed out (1) that other companies have faced difficult economic conditions; (2) that the union nonetheless took unreasonable bargaining positions vis-a-vis those companies; (3) that as a result those companies were forced to close; (4) that the employer also faced difficult economic conditions, (5) that it could be reasonably anticipated that the union's bargaining posture vis-a-vis the employer would be unchanged; and (6) that if the union took such a bargaining position, the employer might be forced to close.

In *Kawasaki Motors Mfg. Corp.*, 280 NLRB 491 (1986), enfd. 834 F.2d 816 (9th Cir. 1987), the Board concluded that certain statements were not violative of the Act. In that case, the employer's representative spoke of the company's financial and competitive situation and backed up his statements with undisputed objective economic facts which showed the employer's poor financial condition. The Board noted: "The Respondent's officials clearly created the impression that any decision to close the plant would be based on its profitability and competitive status in the world market. Their predictions of possible closure were not based on reasons unrelated to economic necessities."⁵

In my opinion, McAuliff's statements stepped over the boundary because they were premised on an underlying assumption which may or may not have come about. All of McAuliff's predictions about being unable to compete or of being frozen out of work by nonunion customers, is premised on his expressed assertion that if the Union successfully organized his employees, this would *automatically* result in a doubling of his labor costs. Even assuming, that other companies having contracts with Local 25 have higher labor costs, it does not follow that if the Union was to obtain bargaining rights, it would either demand or be able to obtain through negotiations, a contract which would double (or even substantially increase), Ippli's labor costs. Therefore, since McAuliff's predictions were not based on a demonstrable underlying premise (that unionization would necessarily result in substantially higher labor costs), those predictions about loss of work, loss of bids and loss of jobs, overstepped, in my opinion, the bounds of permissible speech and constituted threats of reprisals within the meaning of *NLRB v. Gissel Packing Co.*, supra.

⁵A similar rationale was used in *Crown Cork & Seal Co. v. NLRB*, 36 F.3d 1130 (D.C. Cir. 1994), where the court held that certain statements were permissible when made in the context of the company's actual financial condition and when based on objective considerations.

CONCLUSIONS OF LAW

1. By discharging John Martyn because of his activities on behalf of Local 25, International Brotherhood of Electrical Workers, AFL-CIO, the Company has violated Section 8(a)(1) and (3) of the Act.

2. By threatening employees with plant closure and with the loss of work, the Company, violated Section 8(a)(1) of the Act.

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

The Respondent having discriminatorily discharged an employee, it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

APPENDIX A

The IBEW's salting manual is entitled; "Salting As Protected Activity under the National Labor Relations Act." In pertinent part, this booklet states:

Placing (salting) union members in nonunion jobs for the purpose of organizing is a tactic which has gained a great deal of popularity and respectability . . . in the building and construction industry. We derived the term from the process of "salting" mines in order to artificially enrich them by placing valuable minerals in some of the working places. The organizing potential in non-union bargaining units is likewise artificially enriched by "salting" valuable craftsmen in some of the working places.

Since ULP charges are good only if guilt can be proven, many unscrupulous nonunion employers are able to avoid the consequences of their unlawful actions. For this reason, I have also taught that law-breakers can often be stung by using falsified job applications designed to conceal union employment and/or membership until after an initial cadre of salts have been hired.

Regardless of how it may actually be applied in the real world, by proscribing discrimination or reprisals, the law, in theory, protects job applicants who openly avow their union sympathies, background, or membership. And in certain situations and circumstances, job

applicants are urged to do just that and bring NLRB charges against any employer who violates these proscriptions.

[After describing a covert operation to place salts with a company by a local Business Manager, Mr. Lucas described the goals attained as]:

The addition of several high-priced, non-productive journeymen (attorneys) to . . . payroll;

The exposure of [the employer] to substantial back pay and interest liability plus fringe benefit accruals, if any;

The exposure of [the employer] to its own employees, its customers, and the community as an alleged labor law violator;

The exposure of [the employer] to the publicity and record making aspects of a trial on the issues and a probable conviction;

The eventual placement on the payroll and job of a substantial number of Local 934 member-organizers;

The education of substantial numbers of tradesmen and Local Unions in some of the myriad ramifications of salting.

It is not uncommon to receive calls from local unions that have covertly placed salts and are suddenly at a loss as to how to proceed. The answer is, first to gather needed information and then, when appropriate, to come out into the open.

If the employer is large or is in a hiring mode . . . a time may come when the Local will want to openly send salts to make application, or to submit job applications by cover letter, or even to have applications delivered by a union official.

If the employer is small and seldom hires additional craftsmen, a time may come when the Local will want to expose its covert salts by a letter to the employer with a copy to the NLRB.

The point is that the covert placement of salts or the enlistment of current employees is often only the initial step in a salting program and is only the beginning of the organizing effort in any event.

The employer should be watched closely for the commission of even minor ULPs and evidence, including affidavits, should be carefully accumulated. . . . A time may come when the Local will want to pull its salts and supporters out on a minority ULP strike to encourage the hiring of temporary replacements, set the stage for an unconditional offer to return, and for further actions; (See Union Organization in the Construction Industry, Applying Economic Pressure, Economic and Unfair Labor Practice Strikes, Never Drag Up-Always Strike, Creating the ULP Strike, and ULP Strikes as Harassment; the Orange book).

[Recommended Order omitted from publication.]