

**Nor-Cal Beverage Company, Inc. and Warehousemen's Union Local 17, International Longshore and Warehouse Union, AFL-CIO.** Case 20-CA-28556

January 31, 2000

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

On February 12, 1999, Administrative Law Judge Jay R. Pollack issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed a brief in opposition.

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, and conclusions only to the extent consistent with this Decision and Order.

For the reasons set forth below, we reverse the judge's dismissal of the complaint allegations and find that the Respondent violated Section 8(a)(3) and (1) by issuing a warning notice to employee Tom Gould for calling another employee a "scab."

The Respondent operates facilities at several locations, including West Sacramento and Stockton, California. At all times relevant, the Respondent's West Sacramento transportation and warehouse employees were represented by the Nor-Cal Employees Union (the Nor-Cal Union). The employees at the Stockton facility were represented by a local of the International Brotherhood of Teamsters.

In early 1998,<sup>1</sup> International Longshore and Warehouse Union Local 17 (ILWU) unsuccessfully attempted to replace the Nor-Cal Union as the bargaining representative for the West Sacramento employees. Tom Gould, a driver at that facility, was one of the leaders of the ILWU campaign. At the time of the election, which was held in March, Gould had 12 years' seniority at Nor-Cal and had never received a warning for misconduct.

On or about May 18, 2 months after the election, the Stockton drivers represented by the Teamsters voted to strike. The following day, the Teamsters set up a picket line at the Stockton facility. In response, Mike Wood, the Respondent's West Sacramento transportation manager, informed the West Sacramento drivers that they would be required to cross the picket line. The drivers, including Gould and another driver named Chris Dugan, then discussed the situation among themselves. In these conversations Gould expressed support for the strikers, while Dugan criticized them and indicated that he looked forward to crossing the picket line. At one point Dugan also indicated that he considered crossing the picket line to be part of his job. In response to that remark, Gould said

something to the effect of "Oh, that's bullshit," and the conversation ended. Either during that conversation or shortly afterward, Gould and Dugan had another exchange in which Gould either said that Dugan was a "scab" or indicated that he would be a "scab" if he crossed the picket line.

Later that day, while they were both driving trucks on the road, Gould and Dugan had another conversation—initiated by Dugan—over their two-way radios on the subject of the Teamsters strike. Gould indicated that he thought Dugan ought to "have a problem" with crossing the Stockton picket line, but Dugan again indicated that he looked forward to doing so.

At the start of work the following morning, Dugan, another driver named Greg Reyes, and Gould converged on the timeclock to punch in at the same time. Gould said, "Oh, here's the company's favorite scabs," or made a similar remark containing the word "scab." Neither Dugan nor Reyes responded to the comment. Shortly afterward, however, Dugan told Transportation Manager Wood that Gould had called him a scab. Dugan did not indicate to Wood that he had felt physically threatened by Gould on either occasion when Gould used the term.<sup>2</sup> Wood reported what Dugan had told him to Lisa LaCross, the Respondent's human resources director, and at her instruction Wood questioned Reyes, who confirmed that Gould had applied the word "scab" to Dugan and Reyes.

LaCross and Wood then decided to give Gould a written warning, which Gould received shortly afterward. The warning notice characterized Gould's offense as "harassment to fellow employee" and stated that "[c]ontinues [sic] harassment will result in suspension including up to termination." The Respondent contends that the warning notice was justified under its written no-harassment policy.<sup>3</sup>

The judge found that calling a fellow employee a "scab" was not, in itself, protected conduct under the Act, as the General Counsel had contended. In the judge's view, the authorities cited on this point by the

<sup>2</sup> At the hearing, Gould testified without contradiction that he used the word "scab" in a "non-threatening" manner, and Dugan admitted that he did not feel that he was "about to get into a fight" on either occasion when Gould called him a scab. Although Gould testified at one point that he had used the word "scab" "two or three" times in conversation with Dugan, his and Dugan's own testimony specify only two such occasions.

<sup>3</sup> The Respondent's antiharassment policy states:

Nor-Cal Beverage Co. has zero tolerance for harassment. Based [sic] upon race, color, religion, sexual preference, national origin, marital status, physical disability, age or any other protected status categories and conditions. If you believe that you are involved in any type of harassment by a co-worker, customer, or management employee you should report this to your supervisor or the Human Resources Director immediately. If it is determined that harassment has occurred, appropriate discipline will be imposed. Our work place is for work and it is our goal to provide a work place free from tension caused by harassment.

<sup>1</sup> All dates are in 1998.

General Counsel, including *Linn v. Plant Guard Workers Local 114*, 383 U.S. 53 (1966), *Letter Carriers v. Austin*, 418 U.S. 264 (1974), *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945), and *Escanaba Paper Co.*, 314 NLRB 732 (1994), enfd. 73 F.3d 74 (6th Cir. 1996), protect only the wearing of union insignia and hold that “an employee engaged in Section 7 activity, such as organizing or striking, does not lose the protection of the Act by using the word ‘scab’ or other language which might be offensive in another context.” In the judge’s view, these authorities “do not establish the right of an employee to call another employee a ‘scab’ or any other name [and] do not establish the right of employees to confront fellow employees at work.”

The judge acknowledged that Gould might have been engaged in protected activity when discussing the Teamsters strike, but observed that Dugan was similarly protected and implicitly equated Gould’s use of the word “scab” with harassment and disruption of the workplace. In addition, the judge found that Wood “took what he believed were reasonable precautions under the anti-harassment policy to prevent a physical confrontation between the two employees.”

The judge also found that the General Counsel failed to establish that the Respondent’s action in issuing the warning notice was motivated by Gould’s previous ILWU activities, under the test established in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

For the following reasons, we disagree with the judge and find that the Respondent violated Section 8(a)(3) and (1) of the Act in issuing the warning notice to Gould.

The critical flaw in the judge’s analysis is that he failed to give any weight to the context in which Gould used the term “scab.” In both of the conversations between Gould and Dugan in which Gould used the word “scab,” Gould was attempting to engender support among his fellow employees for the Teamsters strike and to induce them to honor the Teamsters picket line. It is well established, and we find, that such attempts constitute union activity protected under Section 7 of the Act. *Signal Oil & Gas Co.*, 160 NLRB 644, 649 (1966), enfd. 390 F.2d 338 (9th Cir. 1968); *Coors Container Co.*, 238 NLRB 1312, 1319–1320 (1978), enfd. 628 F.2d 1283 (10th Cir. 1980).<sup>4</sup>

In light of this finding, the issue is not, as the judge characterized it, whether the use of the word “scab” is protected under the Act, but rather whether Gould’s use of the word “scab” in the course of his protected activity removed him from the Act’s protection.

In *Linn*, as the judge noted, the Supreme Court endorsed the Board’s expansive definition of protected Sec-

tion 7 activity with respect to free expression. The Court noted with approval that the Board has allowed “wide latitude to the competing parties,” and that “the Board has concluded that epithets such as ‘scab’ . . . are commonplace in these struggles and [are] not so indefensible as to remove them from the protection of Section 7.” 383 U.S. at 60–61 (emphasis added). In *Letter Carriers v. Austin*, the Court reaffirmed that although “the word [‘scab’] is most often used as an insult or epithet . . . federal law gives a union license to use intemperate, abusive, or insulting language without fear of restraint or penalty if it believes such rhetoric to be an effective means to make its point. Indeed . . . [the] use of this particular epithet is common parlance in labor disputes.” 418 U.S. at 283. See also *Dreis & Krump Mfg. Co.*, 544 F.2d 320 (7th Cir. 1976); *NLRB v. Thor Power Tool Co.*, 351 F.2d 584, 587 (7th Cir. 1965).

Here, Gould’s use of the word “scab” was used in conversations with a fellow employee and was unaccompanied by any threat or physical gestures or contact. In these circumstances, and in light of the precedent cited above, we find that Gould’s use of the word “scab” does not, in and of itself, deprive him of the protection of the Act. It follows therefore that the Respondent could not lawfully discipline Gould for use of that word and that the warning notice violated Section 8(a)(3) and (1) of the Act.<sup>5</sup>

We further find, contrary to the judge, that the *Wright Line* analysis is not appropriately applied in this case. *Neff-Perkins Co.*, 315 NLRB 1229 fn. 2 (1994); *Mast Advertising & Publishing*, 304 NLRB 819 (1991). The *Wright Line* analysis is appropriately used in resolving cases alleging violations which turn on motivation. Specifically, the analysis is used in dual motive situations, first to determine whether the employee’s union or other protected activity was a motivating factor in the respondent’s discipline of the employee and then to determine whether the respondent would have taken the same action even in the absence of such activity. Here, however, the causal connection between Gould’s protected activity, during the course of which he used the word “scab,” and the warning notice is undisputed. The only issue is whether that activity lost its protection under the Act because he used the word “scab.” Once that is decided in

<sup>4</sup> Contrary to the judge’s analysis, the fact that Dugan was also engaged in protected activity in expressing his opposition to the Teamsters strike in no way diminishes or affects the protection afforded to Gould’s activities by the Act.

<sup>5</sup> We disagree with our dissenting colleague’s suggestion that Gould’s use of the word “scab” can properly be likened to throwing a rock at employee Dugan in the context of their exchanges about picket-line crossing. While we agree with our colleague that employees enjoy Sec. 7 rights both to engage in and refrain from supporting a union, we fail to see how an employer’s punishment of an employee’s exercise of either right can be justified by an assertion that language used by the employee in the course of exercising that right, although nonthreatening, was viewed as “harassment” by another employee who disagreed with him. The point is that the Act prohibits an employer from punishing an employee’s expression of either prounion or antiunion views unless they are manifested in a manner that exceeds the protection of the Act; and, as explained above, that is not the case here.

the negative, the inquiry ends. Given the nexus between Gould's use of the word "scab" and his protected activity, the Respondent can rely on no independent motive to legitimate Gould's discharge. Thus, the judge erroneously considered evidence of the Respondent's prior application of its no-harassment policy.<sup>6</sup>

The judge similarly erred in giving weight to the General Counsel's failure to establish a nexus between Gould's warning notice and his prior activities in support of the ILWU. In light of the undisputed nexus between the warning notice and his union activities in support of the Teamsters, the presence or absence of an additional nexus between the warning notice and Gould's activities on behalf of the ILWU does not affect our decision in this case.

In sum, we find that Gould, in his conversations with Dugan, was engaged in union activity protected under the Act, that Gould did not lose the protection of the Act by use of the word "scab" in the course of those conversations, and that the Respondent issued a warning notice to Gould because of his union activity. Accordingly, we find that the Respondent's issuance of the warning notice to Gould violated Section 8(a)(3) and (1) of the Act.

#### ORDER

The National Labor Relations Board orders that the Respondent, Nor-Cal Beverage Company, Inc., West Sacramento, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Issuing a warning notice against any employee under its no-harassment policy for his support of the International Brotherhood of Teamsters or any other labor organization.

(b) 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, remove from its files any reference to the unlawful warning notice previously issued to employee Tom Gould, and within 3 days thereafter notify him in writing that this has been done and that the previous issuance of the warning notice will not be used against him in any way.

(b) Within 14 days after service by the Region, post at its West Sacramento facility copies of the attached notice

<sup>6</sup> In any event, we note that the four cited instances in which the Respondent previously applied its no-harassment policy are distinguishable from the instant case. Specifically, in those previous instances, the harassment involved a member of a class protected under title VII, and the harassment was directly related to that member's class. Further, there was uncontradicted testimony that the Respondent's employees are generally not disciplined for using offensive words toward each other.

marked "Appendix."<sup>7</sup> Copies of the notice, on forms provided by the Regional Director for Region 20, 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 May 21, 1998.

(c) 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.

MEMBER HURTGEN, dissenting.

Contrary to my colleagues, I would affirm the judge's dismissal of the complaint. I find no violation of the Act in the Respondent's issuance of a warning to employee Tom Gould for his conduct.

As fully recounted by the judge and my colleagues, the Respondent issued a warning to Gould after he had two confrontations with fellow employee Chris Dugan. In those confrontations, Gould referred to Dugan as a "scab." Further, in the latter confrontation, Gould also referred to another employee as a "scab." Dugan complained to management about the incident.

I assume *arguendo* that Gould was engaged in protected activity in speaking to Dugan. That is, Gould was arguing to Dugan that Dugan should honor a picket line at another of Respondent's facilities.

However, Respondent did not discipline Gould for that activity. According to my colleagues, Respondent disciplined Gould for use of the word "scab." That is, absent that use of the word, Gould would not have been disciplined.

As noted above, I have assumed *arguendo* that the word "scab" was used in the context of Section 7 activity. However, the fact that conduct occurs in the context of Section 7 activity does not immunize the conduct from discipline. For example, a rock thrown from a picket line does not immunize the rock-thrower from discipline. The issue is one of balancing the Section 7 context in which the conduct occurs against the Employer's interest in protecting against the conduct.

<sup>7</sup> 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."

In striking that balance, I note that, in the present-day U.S. workplace, we have rightfully become sensitive to the need to protect employees from harassment. We have done so to protect the interests of employees and to guard against the growing menace of workplace violence that can be engendered by such harassment.

Respondent here has a policy reflecting these societal interests.<sup>8</sup> Clearly, Gould's conduct offended that policy. Dugan was exercising his Section 7 right to refrain from union activity. In the words of Respondent's policy, Dugan fell within a "protected status category." He was harassed for having done so, and he complained to management. Thus, the issue in this case is whether the National Labor Relations Act (the NLRA) forbids Respondent from exercising a lawful policy that reflects a societal need. In my judgment, the NLRA does not do so. Phrased differently, the NLRA does not require Respondent to stand idly by when an employee complains about harassment.

The cases cited by my colleagues, *Linn* and *Letter Carriers*, do not require a different result. Those cases do not involve an employer's antiharassment policy. The issue in those cases is whether, and to what extent, speech that is used in the context of a labor dispute can be attacked as libelous. The Supreme Court held that, in the interests of free expression, the libel action would have to be based on a showing of malice. That is, the Government (acting through its courts) cannot interfere with speech, unless that speech is malicious. By contrast, the instant case involves a private employer, acting under a legitimate antiharassment policy, who issues a warning to protect his workplace and his employees. In my view, an employer is privileged to act in this fashion. And, contrary to my colleagues, I do not think that the employer must withhold corrective action until the harassment escalates into physical violence.

Based on all of the above, I dissent.

APPENDIX

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

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

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection

<sup>8</sup> See fn. 3 of majority opinion for the text of that policy.

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

WE WILL NOT issue a warning notice against any employee under our no-harassment policy for his support of the International Brotherhood of Teamsters or any other labor organization.

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, remove from our files any reference to the unlawful warning notice issued to Tom Gould on May 21, 1998, and WE WILL, within 3 days thereafter, notify him in writing that this has been done, and that the warning notice has been withdrawn and will not be used against him in any way.

NOR-CAL BEVERAGE COMPANY, INC.

*Jill H. Coffman, Esq.*, for the General Counsel.  
*Dennis Murphy, Esq. (Murphy, Austin, Adams & Schoenfeld)*,  
of Sacramento, California, for the Respondent-Employer.

DECISION

STATEMENT OF THE CASE

JAY R. POLLACK, Administrative Law Judge. I heard this case in trial at Sacramento, California, on March 24 and 25, 1998. On June 30, 1998, Warehousemen's Union Local 17, International Longshore and Warehouse Union, AFL-CIO (the ILWU) filed the charge in Case 20-CA-28556 alleging that Nor-Cal Beverage Company, Inc. (Respondent or the Employer) committed certain violations of Section 8(a)(3) and (1) of the National Labor Relations Act (the Act). On September 30, 1998, the ILWU filed the first amended charge. On September 30, 1998, the Regional Director for Region 20 of the National Labor Relations Board issued a complaint and notice of hearing against Respondent alleging that Respondent violated Section 8(a)(3) and (1) of the Act. On October 30, 1998, the Regional Director issued an amended complaint. Respondent filed timely answers to the complaints, denying all wrongdoing.

All parties have been afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. On the entire record, from my observation of the demeanor of the witnesses,<sup>1</sup> and having considered the posthearing briefs of the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a corporation with offices and a principal place of business located in West Sacramento, California,

<sup>1</sup> The credibility resolutions here have been derived from a review of the entire testimonial record and exhibits, with due regard for the logic of probability, the demeanor of the witnesses, and the teachings of *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). As to those witnesses testifying in contradiction to the findings herein, their testimony has been discredited, either as having been in conflict with credited documentary or testimonial evidence or because it was in and of itself incredible and unworthy of belief.

where it is engaged in the manufacture and distribution of soft drinks and bottled water. Respondent has a manufacturing, bottling and canning facility at West Sacramento; and it has distribution and sales facilities in West Sacramento, Vacaville, Merced, Stockton, Loomis, Diamond Springs, and South Lake Tahoe. During the 12 months ending December 31, 1997, Respondent sold and shipped products valued in excess of \$50,000 directly to customers located outside the State of California. Accordingly, Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Respondent admits and I find that the ILWU is a labor organization within the meaning of Section 2(5) of the Act.

## II. THE ALLEGED UNFAIR LABOR PRACTICES

### A. Background and Issues

As stated above, Respondent has a manufacturing, bottling, and canning facility at West Sacramento; and it has distribution and sales facilities in West Sacramento, Vacaville, Merced, Stockton, Loomis, Diamond Springs, and South Lake Tahoe. With the exception of the Stockton and Merced facilities, Respondent's transportation and warehouse employees have been represented by the Nor-Cal Employee's Union (the Nor-Cal Union) for about 40 years. The employees at the Stockton facility were represented by a local of the Teamsters Union for about 35 years. The employees at the Merced facility were not represented by any union.

During January 1998, the ILWU filed a representation petition with the Board seeking to represent Respondent's transportation and warehouse employees at the Employer's West Sacramento, Vacaville, Diamond Springs, Loomis, and South Lake Tahoe facilities. A representation election was held on March 10 and 11, 1998. A majority of the employees voted for the Nor-Cal Union and subsequently the Nor-Cal Union was certified as the exclusive bargaining representative of the transportation and warehouse employees at the five locations listed above. It is undisputed that Respondent's management considered the election results as a "win" for the company.

Employee Tom Gould, a transportation driver at the West Sacramento facility, had been active in the ILWU's organizing campaign and had acted as an observer for the ILWU at the Board-conducted election. The General Counsel alleges that Respondent issued a disciplinary warning to Gould in retaliation for his union activities. The General Counsel also alleges that Respondent's discipline of Gould independently violates Section 8(a)(1) of the Act because the Employer disciplined Gould for calling another employee a "scab" (conduct which the General Counsel alleges is protected by the Act).

On March 11, Gould was present as an observer for the ILWU when the representation election ballots were counted. Gould testified that after the tally of ballots, Respondent's co-owner, Roy Grant Deary, said in a low voice the words "fucking assholes," as Gould, employee Timothy Johnsen, and Jerry Martin, ILWU representative, were walking out of the building. Grant Deary denied making such a statement. The General Counsel offered the testimony of Johnsen and Martin corroborating Gould's testimony. Respondent offered the testimony of four other witnesses who did not hear the remark. I credit Gould's testimony because on the very next workday Gould reported the comment to his supervisor, Mike Wood.

After Gould reported Grant Deary's remark to him, Wood reported his conversation with Gould to Lisa LaCross, Respon-

dent's human resources manager. LaCross told Wood that Wood should document Gould's complaint in accordance with Respondent's antiharassment policy.<sup>2</sup> Wood wrote out a form and submitted it to LaCross. Gould did not want to pursue the matter any further and Grant Deary, apparently denied making the remark.<sup>3</sup> LaCross, therefore, dropped the matter.

On or about May 18, Respondent's employees represented by the Teamsters Union at the Stockton facility voted to go on strike against Respondent. On May 19, the Teamsters Union set up a picket line at Respondent's Stockton facility. Wood assigned transportation drivers, in reverse order of seniority, from the West Sacramento facility, to make trips to the Stockton facility. These assignments caused the drivers to cross the Teamsters Union's picket line.

The Teamsters Union's strike was a subject of discussion among the drivers in West Sacramento. Chris Dugan, the first employee assigned to drive to the Stockton facility, expressed opposition to the strike. Gould expressed sympathy for the striking employees. On May 19, Gould called Dugan a "scab" because Dugan expressed a strong desire to cross the picket line. At that time neither Dugan or any other employee had crossed the Teamsters picket line. On May 20, as Dugan was preparing his trailer to go out on his route, Gould asked Dugan whether Dugan was going to cross the picket line. Dugan answered that he was going to do so because that was his job. Gould answered, "Oh, that's bullshit." That same morning, while both drivers while driving on the highway, they spoke on their radios. Dugan tried to explain his position regarding the strike and picket line but Gould shut off his radio and refused to talk to Dugan. At the end of the day, Dugan asked Gould if Gould was angry and Gould answered, "yes" and walked away. Gould called Dugan a scab again that day.

On the following day, May 21, as Dugan and employee Greg Reyes were clocking in for work, Gould stated, "Oh, here's the company's favorite scabs." That same day, Dugan informed Supervisor Wood that Gould had called him a scab on several occasions and that he was going to tell Gould to "knock it off and just leave [Dugan] alone and not harass [Dugan] anymore." Wood told Dugan not to do anything and that Wood would take care of the matter.

Wood reported Dugan's complaint to LaCross, the human resources manager. LaCross told Wood to investigate the matter. Wood reported back that Reyes said that Gould had called him and Dugan scabs. Further, Gould admitted to Wood that he had called the two employees scabs, although Gould stated that he used the word "scab" in a joking manner. Wood told Gould that tensions were high and that Dugan had not considered the remarks to have been made in a joking manner. LaCross prepared a written warning slip and had Wood issue the

<sup>2</sup> Respondent's rule states:

Nor-Cal Beverage Co., has zero tolerance for harassment. Based upon race, color, religion, sexual preference, national origin, marital status, physical disability, age or any other protected status categories and conditions. If you believe that you are involved in any type of harassment by a co-worker, customer or management employee you should report this to your supervisor or the Human Resources Director immediately. If it is determined that harassment has occurred, appropriate discipline will be imposed. Our work place is for work and it is our goal to provide a work place free from tension caused by harassment.

<sup>3</sup> I need not and do not credit Gould's testimony that Wood implied that Respondent would retaliate against Gould's union activities.

warning to Gould on May 21. Wood credibly testified that he gave Gould a warning so that the conflict between Gould and Dugan did not rise to a fight or violence. Wood testified that he gave a written warning rather than an oral warning in order to impress on Gould the seriousness of the matter.<sup>4</sup> After the written warning, there were no further incidents between the two employees.<sup>5</sup> Gould also drove through the Teamsters picket line when he was given a Stockton assignment.

### B. Conclusions

#### 1. The 8(a)(3) allegation

In *Wright Line*, 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board announced the following causation test in all cases alleging violations of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation. First, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. On such a showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. The United States Supreme Court approved and adopted the Board's *Wright Line* test in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399-403 (1983). In *Manno Electric*, 321 NLRB 278, 280 at fn. 12 (1996), the Board restated the test as follows: The General Counsel has the burden to persuade that antiunion sentiment was a substantial or motivating factor in the challenged employer decision. The burden of persuasion then shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employees had not engaged in protected activity.

For the following reasons, I find that General Counsel has not even made a prima facie showing that Respondent issued the warning to Gould because of his union activities in violation of Section 8(a)(3). The General Counsel has established that Respondent, through its supervisors had knowledge of Gould's union activities. On March 10 and 11, Gould acted as an observer for the Union. On March 11, Grant Deary muttered a curse as Gould, another ILWU observer and an ILWU representative left the election area. However, the Employer did take Gould's complaint about Grant Deary seriously, even though Grant Deary was a co-owner of the Company. LaCross, the human resources manager, directed that Gould's complaint be written up and investigated under the Employer's anti-harassment policy. Respondent dropped the matter only after Gould told Wood, his supervisor, that Gould did not wish to pursue the matter.

The timing of the warning does not lend itself to an inference that the warning was based on activities related to the ILWU campaign. The election was over 2 months prior to the warning. Respondent was pleased with the election results. In May, the only labor dispute involving employees of Respondent was at the Stockton facility. Respondent was concerned with the labor dispute involving the Teamsters Union's strike at the Stockton facility. Although there is no evidence that any West Sacramento employee refused to cross the picket line at Stock-

<sup>4</sup> I do not credit Gould's testimony that Wood threatened to discharge Gould if Dugan felt harassed by any further comments from Gould.

<sup>5</sup> Gould's union representative was present when Wood gave Gould the written warning.

ton, it is undisputed that employee Chris Dugan reported to Wood that Gould had called him a scab on more than one occasion. Wood told Dugan *not* to discuss the matter with Gould and that Wood would take care of the matter. Wood spoke to Reyes and Gould. Employee Reyes confirmed Dugan's remarks and Gould did not deny doing so. LaCross and Wood acted swiftly and decisively. Following Respondent's policy against harassment, Wood issued a written warning as a precautionary measure. He didn't want a physical confrontation between Gould and Dugan and he wanted to show that he was serious.

The evidence shows that Respondent has maintained its anti-harassment policy and has enforced that policy in the past. The evidence revealed that within the prior year, LaCross had enforced the antiharassment policy on four occasions. Gould's complaint following the representation election further shows how seriously Respondent treated its antiharassment policy. LaCross had an oral complaint against a co-owner of the Company, filed by a pro-ILWU employee, reduced to writing and investigated by the supervisor.

In sum, I find that the written warning given to Gould was motivated by Dugan's complaint that Gould had called him a "scab" and not by Gould's union activities. There is simply no evidence to support the argument that Respondent's justification for the warning was a pretext. The more difficult question, is whether Gould was engaged in activities protected by Section 7 of the Act when he called Dugan and Reyes scabs.

#### 2. The use of the term "scab"

The General Counsel contends that the use of the term "scab" is protected by Section 7 of the Act. In support of this argument the General Counsel cites the following excerpt from *Linn v. Plant Guard Workers Local 114*, 383 U.S. 53, 58 (1966):

Labor disputes are ordinarily heated affairs: the language that is commonplace there might well be deemed actionable per se in some state jurisdictions. Indeed, representation elections are frequently characterized by bitter and extreme charges, countercharges, unfounded rumors, vituperations, personal accusations, misrepresentations, and distortions. Both labor and management often speak bluntly and recklessly, embellishing their respective positions with imprecatory language.

The Supreme Court went on to state at pages 60-61:

We note that the Board has given frequent consideration to the type of statements circulated during labor controversies, and that it has allowed wide latitude to the competing parties . . . Likewise, in a number of cases, the Board has concluded that such epithets such as "scab," "unfair," and "liar" are commonplace in these struggles and are not so indefensible as to remove them from the protection of Section 7, even though the statements are erroneous and defame one of the parties to the dispute.

In a later case, *Letter Carriers v. Austin*, 418 U.S. 264 (1974), the Supreme Court held that the protection of free speech is not limited to representation campaigns. "Whether the goal is merely to strengthen or preserve the union's majority, or is to achieve 100% employee membership . . . these organizing efforts are equally entitled to the protection of Section 7 and Section 1."

The General Counsel also cites *Escanaba Paper Co.*, 314 NLRB 732 (1994), involving an employer's attempt to ban union insignia encouraging solidarity with respect to the employer's bargaining tactics. In *Escanaba*, the employer argued that the employees' messages contributed to a hostile atmosphere in the plant between management and the employees. The Board rejected the employer's defense as "unsupported subjective impressions." The Board concluded that as a practical matter the employer did not prove that the union insignia "hindered production, caused disciplinary problems in the plant, or had any other consequences that would constitute special circumstances under settled precedent." 314 NLRB at 734-735.

These cases cited by the General Counsel do not establish that an employee calling another employee a scab is engaged in activity protected by the Act. Rather, these cases hold that an employee engaged in section 7 activity, such as organizing or striking, does not lose the protection of the Act by using the word "scab" or other language which might be offensive in another context. The cases protecting the wearing of union insignia do not establish a right of an employee to call another employee a "scab" or any other name. Rather, these cases establish the right of employees to wear union insignia at work absent special circumstances that outweigh the employees Section 7 rights. See, e.g., *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945). They do not establish the right of employees to confront fellow employees at work.

Here, if Gould was engaged in protected activity by voicing his support of the Teamsters strike, Dugan was equally engaged in protected activity by voicing his contrary opinion. However, under Respondent's established policy against harassment, designed to prevent violence in the workplace, neither employee was entitled to harass the other. Neither employee was entitled to disrupt the workplace. Here, based on Dugan's complaint, corroboration by Reyes and an admission by Gould, Wood took what he believed were reasonable precautions under the antiharassment policy to prevent a physical confrontation between the two employees.

Wood issued a warning to Gould but not to Dugan. However, I find nothing unlawful in that decision. Based on what he learned from Dugan and Reyes, Wood believed that Gould was the instigator of the dispute. Wood found nothing contrary to that conclusion in his discussion with Gould. I do not find any unlawful discrimination in Wood's treatment of the matter.

#### CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The ILWU is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent did not violate Section 8(a)(3) and (1) of the Act as alleged in the complaint.

[Recommended Order for dismissal omitted from publication.]