Artley, Incorporated *and* Dominick C. Durso. Case 22-CA-10282

March 11, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND ZIMMERMAN

On September 22, 1981, Administrative Law Judge Robert T. Snyder issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge, except as modified below, and to adopt his recommended Order.

The Administrative Law Judge found, and we agree, that Respondent issued a letter of warning to Dominick C. Durso and discharged him because of his activities as a union steward on behalf of Local 821, United Brotherhood of Carpenters and Joiners of America, in violation of Section 8(a)(3) and (1) of the Act.

While we agree with the Administrative Law Judge that Respondent violated Section 8(a)(3) and (1) by discharging Durso, we find it unnecessary to rule upon or adopt the Administrative Law Judge's rationale for and finding of an independent 8(a)(1) violation.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Artley, Incorporated, Newark, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

APPENDIX

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

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT issue written warnings or discharge any of you for supporting Local 821, United Brotherhood of Carpenters and Joiners of America, or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights under Section 7 of the Act.

WE WILL rescind and expunge from all personnel records and files, and any other records, all copies of the written warning issued to Dominick C. Durso on August 4, 1980.

WE WILL offer to Dominick C. Durso immediate and full reinstatement to his former job or, if his job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed and WE WILL reimburse him for the pay or other benefits he lost as a result of our discriminatory action, plus interest.

ARTLEY, INCORPORATED

DECISION

STATEMENT OF THE CASE

ROBERT T. SNYDER, Administrative Law Judge: This case was heard in Newark, New Jersey, on May 28, 1981. The complaint, which issued on October 31, 1980, alleges that Artley, Incorporated, herein Respondent or Employer, on or about August 4, 1980, warned its employee, Dominick C. Durso, that he would be discharged if his attitude did not change, and then, on or about August 21, 1980, discharged Durso, and since said date has failed and refused to reinstate him because Durso joined or assisted Local 821, United Brotherhood of Carpenters and Joiners of America, herein called the Union or Local 821, or engaged in other concerted activities

[1] The Administrative Law Judge correctly concluded that both the written warning of August 4, 1980, as well as the discharge of August 21, 1980, of employee Dominick C. Durso violated Sec. 8(a)(3) and (1) of the Act. Consistent therewith, the Administrative Law Judge included in the recommended remedy and recommended Order that the written warning be rescinded and expunged from all personnel records and files, and any other records. However, the Administrative Law Judge omitted from the recommended notice to employees language consistent with his Conclusions of Law, recommended remedy, and recommended Order. Consistent with the General Counsel's request, we are hereby conforming the notice to employees to the recommended Order.

Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

for the purpose of collective bargaining or mutual aid or protection, in violation of Section 8(a)(1) and (3) of the Act. By answer dated November 10, 1980, Respondent denied the allegations of the complaint.

Upon the entire record, including my observation of the demeanor of the witnesses and after careful consideration of the briefs filed by Respondent and General Counsel, I make the following:

FINDINGS OF FACT

I. JURISDICTION

The Employer, a New Jersey corporation, is engaged in the manufacture, sale, and distribution of exhibit and display materials and related products at its principal office and place of business located in Newark, New Jersey, herein called the Newark facility, where it annually manufactures, sells, and distributes goods valued in excess of $50,000, of which products valued in excess of $50,000 were furnished directly to other enterprises including, *inter alia*, Purolator, Inc., New Jersey Bell Telephone Company, and Johnson & Johnson Baby Products Company, all located in the State of New Jersey, each of which other enterprises is directly engaged in interstate commerce. The Employer 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.

II. LABOR ORGANIZATION STATUS

The complaint alleges, Respondent admits, and I find that Local 821 is a labor organization within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

The Charging Party, Dominick C. Durso, herein called Durso, was employed by Respondent for 16 consecutive years until his discharge, effective August 21, 1980.[1] Except for an 8-year period from 1968 to 1976, during which time Durso was employed on salary as a carpenter foreman, he worked as a carpenter, preparing exhibits and other display materials produced by the Employer out of a carpentry shop located on the ground floor of the Employer's two-story plus basement Newark facility.

Respondent has had longstanding collective-bargaining relationships to the present with a number of unions. The sign writers union has represented the spray painters and display artists for at least 33 to 34 years. Local 821 has represented the Employer's carpenters since 1954. Respondent also deals with an electrical union with respect to one or more electricians it employs.

Although employing helpers and warehousemen for some years to help prepare exhibits for shipment and load and unload trucks, it was not until 1978, during the third year of a 3-year collective-bargaining agreement dating from 1976, that they were incorporated into the bargaining unit by voluntary agreement of the parties. Thereafter, and for the first time in the parties' successor and current agreement running from August 1, 1979, until July 31, 1982, a wage scale was included for the classification of helpers-warehousemen. The Employer presently employs all told 22 employees, 18 of whom are employed in the three bargaining units. At the time of his discharge, Durso was one of only two carpenters employed in the unit represented by Local 821.

Aside from the carpenters and helpers-warehousemen, Respondent for some years employed a man who supervised the setting up of Bell Telephone exhibits and coordinated the show schedule at various locations in the State of New Jersey. He was not covered by the Local 821 agreements. Then, in early 1980, Bell asked Respondent to supply another employee to be responsible for checking the various phone centers to insure the exhibits there were in good repair. Following the employment of the second outside employee directly assigned to Bell Telephone displays, both were incorporated into the bargaining unit represented by Local 821 under circumstances to be described, *infra*.

Prior to 1976, the Union had never had a shop steward designated to represent the unit employees on Respondent's payroll. That August (probably in conjunction with the successor agreement then taking effect), Durso was designated by Local 821 to be the shop steward and he continued as the sole occupant of that union position until his discharge.

During the negotiations held in 1979 for the current agreement which began a week before expiration of the old agreement, an impasse was reached over such matters as the length of the contract—the Union wanted 2 years and the Employer 3—and a cost-of-living increase added to a proposed 10-percent salary increase each year which the Union sought over Employer opposition. The Union called a strike—the first one called by any union in Respondent's history, which extends back over 50 years. The Union had also sought a pay scale and benefits for the new classification of helpers-warehousemen to be added to the agreement. The strike lasted 7 or 8 days. During this period, a Federal mediator assisted the parties in arriving at an agreement. Durso attended five mediation sessions held over this time. As testified by Durso, during the strike, at a meeting held before the mediator, and attended by Stanley Roll, the union delegate, all seven unit employees, and Howard Feld and Morton Skoler, Respondent's vice president and president, respectively, Durso participated in raising for the first time a complaint that the Employer had failed to comply with a provision which had been part of the agreement for many years and which required the Employer to pay premium wages for work done outside the shop and any construction work done in the shop.[2] As Durso explained, "Well, we were bargaining over better health conditions and why we don't get paid for outside wages when we go out." At the time, in spite of the con-

[1] All dates hereinafter are in 1980, unless otherwise noted.

[2] Art. 2, "Wages," after setting forth the minimum wage rates for all journeymen, bench hands, cabinet makers, machine hands, and other experienced workers, states, "The established Union Rate, Hours and Conditions of Journeymen, Leadmen and Carpenters on work done outside of shop or shops and any construction work done in shop, such as additions shall be done and paid for under outside rates and hours." The provision was continued in the 1979-82 agreement.

tract language, Feld and Skoler took the position they would not pay outside wages when the men went out. Feld denied that Durso or the Union brought up outside pay during negotiations, although readily admitted that such pay was raised by Durso a number of times following negotiations. Concerning health conditions, Durso also raised during the strike a health issue regarding proper ventilation, particularly for the carpenters, in the shop.[3] Respondent's witness Feld agreed that the Employer reached an understanding during the strike to install a ventilation system for the carpentry shop and spray painting room to remove noxious odors, wood dust, and chips through a series of ducts and exhaust fans into an external hopper.[4]

In light of subsequent events which transpired concerning the unit employees' demand for outside premium pay and in accordance with my conclusions, to be discussed *infra*, concerning the credibility of the sole witnesses, Durso and Feld, I find that Durso did join in raising the premium pay issue during the strike.

The strike concluded and the current agreement was executed with the Union relinquishing its demands for a 2-year term and added cost-of-living provision. Respondent did agree to, and the contract contains, a separate salary provision for the helpers-warehousemen.

Two to 3 months after the new contract was signed in early September 1979, the unit employees decided not to perform any work outside the shop until their claim of extra pay for such work was resolved. At a meeting held on that occasion between all the union members and Feld and Skoler, when Feld asked why the men were not going out, Durso replied, "We're not going out if we're not getting outside wages." Nothing further happened until a few months after that meeting when Feld approached Durso, and said you have to have someone going out to which Durso replied, "Howard, we agreed not to go out." Feld then informed Durso that the Employer was willing to pay 40 percent above their normal rate in order to have the work performed. Durso said he would have to speak to the members. Durso did so, got their approval, and returned to Feld who by this time had learned Skoler would not go more than 25 percent and told this to Durso. On Durso's poll of the men this time, they rejected 25 percent, and Durso then informed Feld that he would have to compromise by coming up a little higher to 30 percent. When Feld agreed, Durso got the employees' agreement, and the figure was set at 30 percent above their normal wage as the outside rate.[5]

Feld disputed Durso's report of the manner by which the outside figure was established. According to Feld, shortly after the strike ended and the current contract terms were settled, he sent two men out to set up a display for Bell Telephone after learning from them they would do so. Upon their return the next morning, Durso told him he was supposed to pay these men at an outside rate, which is 130 percent of their normal rate. Feld first checked with Skoler who was not aware of it and then called Rolls who said the clause did not pertain to Respondent's shop. At a subsequent meeting in the shop attended by Rolls and all the men, Rolls again stated the Company did not have to pay the additional 30 percent, and if no one in the Union would perform the work the Employer could pick up anybody and send them on the job. Feld stated he was reluctant to take any man, he wanted to settle the dispute at a reasonable cost to the Company, and so he went over to Dominick (Durso) and asked what money would settle this thing. After Durso demanded 40 percent, and Feld countered with 25 percent they settled at 30 percent, with Durso stated, "Well, we'll go for the thirty percent."

I credit Durso's version. Feld's version implies, but does not make explicit, that there had been a refusal by the workers to perform outside work without premium pay, evidence of a lack of candor on Feld's part, which I conclude characterizes other aspects of his testimony. In all likelihood, the matter only came to a head after a refusal to perform the work, which placed the Employer under considerable pressure to resolve the dispute involving a claim of a specific contract benefit. Also, it seems strange that under Feld's version, Durso's claim of 130 percent appears to be made up out of whole cloth without any antecedents. Stranger still is the fact that the dispute which led to a concerted refusal to perform work involved, according to Feld, a payout of considerally less than $1,000 a year. Further, inasmuch as Feld admits he approached Durso to settle the matter even though he placed at the meeting Rolls, the union agent with whom he readily communicated over shop problems, I find that Rolls did not come to the shop on this occasion, but rather that Feld purposely attempted here to minimize Durso's role in leading the concerted action by the men, another gambit which also characterized other facts of his testimony.[6]

Early in the spring of 1980, Respondent hired the second employee to work exclusively in maintaining Bell Telephone phone center displays. At this time, Durso approached Morton Skoler and said "Mort, you know we have to get Bob and Gene [the names of the two workers] in the union now." Skoler replied, "Dominick, they only change light bulbs and just deliver things." Durso replied, "Morton, you know they set up jobs." Nothing more was said at the time.

[3] The current agreement contains a provision, art. 13, entitled "Working Conditions" which reads, "The Employer will have working conditions that are reasonable and mutually acceptable to the employees, especially referring to matters pertaining to safety, sanitary conditions, lockers, heat, and other working conditions. In the event of a dispute regarding such matters, it will be settled as provided herein." Under art. 14, disputes are to be settled between the parties and, if unable to do so, by means of binding arbitration. The parties have never utilized the arbitration clause to settle any dispute.

[4] The record is unclear as to whether the system was ever installed, Durso testifying that only a ventilation fan and a shield to catch saw dust placed on back of the big saw were ever provided, and Feld asserting that although the Company might have been lax in the actual installation, Respondent had gotten the parts, the metal duct work, and special fan, and it was finally installed by Durso himself. I credit Durso that only a fan was ever installed, which fell far short of the specifications for the ventilating-hopper system which Durso and Feld had agreed to.

[5] Feld had indicated to Durso that since Respondent's exhibits are displayed in different counties, a straight percentage figure was easier to work with than setting a different established union rate in each county.

[6] For example, during the hearing, Feld denied he was aware of Durso's official union position.

B. *The Sequence of Events Which Ultimately Led to Durso's Discharge*

Respondent's Newark facility closed for a summer vacation period the first 2 weeks in July. Durso took his own vacation to coincide, from the last week in June to July 14. During the period the facility was closed, Respondent cinderblocked a number of window openings, among them the only opening in the carpentry shop on the main floor. This window had been loosely covered for some time with boards, but not being fully closed, it had allowed some outside air to circulate in the shop. Respondent had taken this step to conserve energy and minimize heat lost during the winter. Neither Durso nor the Union had been informed of this event.

On Durso's return to work on July 14,[7] there was a heat wave,[8] with daily temperatures up to 100 degrees Fahrenheit, which continued into the following weeks. Durso went to work under these uncomfortable conditions.

The following Monday, July 21, just before lunchtime, Feld came to Durso's bench and told him that Pete Tyler, an employee and union member, was due back that day, had not come to work, and would have to be let go. Durso testified that he responded that Feld could not do that, that Tyler had to be given two verbal warnings and a written statement that he was terminated. Durso also noted that Tyler had emphysema, that it was 105 degrees outside and 97 degrees inside, since Tyler could not breathe in normal weather how did Feld expect him to breathe there now and that is the reason he's out. Tyler was not discharged after this conversation. During this same conversation Durso reminded Feld that while they were on strike he agreed to put ventilating systems and hopper systems in the building and they had not been put in. Feld responded, "if you were any kind of a shop steward you should have come in 30 days after to demand this." The conversation also included reference to supplying a fan to circulate the air to help overcome the extreme heat in the shop. Durso acknowledges being supplied a fan, but that in spite of the fan, he felt compelled to leave work that day early and punched out at 3 p.m., informing Feld that he was leaving because it was unbearable in the carpentry shop.

Feld's testimony differs considerably. He places the difference about summer work hours as having been raised by Durso on July 21, and that after rejecting the 1/2-hour proposed change (dictated, according to Feld, by fixed trucking schedules) Durso became incensed, and, although having earlier readily agreed to support Feld's effort to fire Tyler (who, according to Feld had a record of extreme absenteeism although he was a fairly good worker), he now told Feld he couldn't fire Tyler, he had emphysema, and also said, "unless I get fans here, I'll leave at 3:00." I do not credit Feld. Feld did not specifically deny the comment about Durso's failing as shop steward. His characterization of Durso's position on Tyler, as being dictated solely by pique and rather unprincipled, appears to be completely out of character for Durso and at odds with his admitted constantly firm union positions favoring enlargement of the unit, premium pay for outside work, prompt payment of contractual benefits, and holding Respondent to its commitment to supply adequate ventilation. Furthermore, it was logical for the men to seek a change in hours at the beginning of the summer and not in the middle of it.

By July 23 or 24, Durso had convinced Feld, after checking with Skoler, to reinstall a window where the preexisting opening had been blocked up in the carpentry shop and to use for this purpose a window which was then in storage at the facility. When Durso noted that a frame for the window would be necessary, Feld asked Durso to build one and Durso agreed. The earliest Respondent could get the masons to return to break out the cinderblocks was the following Thursday, July 31. On July 31, the masons returned, the opening was created and Durso made up the frame and assisted in the installation of the window. He later explained that although of similar complexity to some of the more intricate work involved in constructing displays, making up the frame involved selecting the better grade of wood from stock, cutting, dressing, grooving, and fitting 12 separate pieces together, making up inside and outside casings, fitting it in place from the outside, caulking and nailing the inside casings in place—a substantial piece of work, unusual in the display trade. The next day, Friday, August 1, Durso came up to Feld in the parking lot at 8:30 a.m. and told him, "Howard, I'm putting in five hours outside wages." Feld did not reply. When Durso said, "You're not answering me," Feld said, "If the contract states it, take advantage of it."[9] That completed the conversation.

After learning that Durso was making this claim, either from his bookkeeper or from Durso himself, Feld immediately contacted Roll, the union delegate, explained that he had tried to accommodate Durso by putting this frame in the window and the whole thing was backfiring. He told Rolls he did not think Durso was entitled to this outside rate[10] and he would pay it if Rolls confirmed it. Feld testified Rolls told him not to pay Durso because he was not entitled to it.

Later the same day, according to Durso, Feld came up to him in the carpentry shop where he was working alone and asked if Durso called himself a carpenter when he took 5 hours to make that frame. Durso further testified that Feld next said, "When I don't see your car in the parking lot you make me happy," to which Durso replied, "The feeling is mutual." Feld responded, "sure, when you don't see my car in the parking lot, that means

[7] Upon his return, he learned that Respondent had agreed to Bob and Gene's inclusion in the unit and they were taken into the Union. When Durso told Skoler after July 14 that Bob and Gene were complaining that they were not getting time-and-a-half pay for overtime outside work, Skoler did not respond but the moneys were paid.

[8] Just before his vacation in June, Durso testified he had asked Feld to change the work hours for the summer, from 8:30 a.m. to 5 p.m., to 7 a.m. to 3:30 p.m. When Feld reported that he could only agree to move the starting time back one half an hour, to 8 a.m., after checking with the men, Durso told him it doesn't pay and the hours were not changed.

[9] Feld admitted, under direct examination, that after he had learned from his bookkeeper that Durso had made a claim for 5 hours outside wages, he was getting his car in the parking lot, presumably at the end of the day, when he made the statement Durso attributed to him.

[10] The total premium amount involved, at Durso's then contractual rate, before August 1, of $8.43 per hour, was $12.65 for the 5 hours claimed.

your not working." Durso responded, "How can I do any work if you're gone; no one gives me any work," to which Feld replied, "I'm the boss; I can have you stand there for two days and not do anything . . . when you were sick . . . and when your son was out. . . ."[11] At this point Durso jumped up and said, "How come you're always—you and Mort are always harassing my son and I," whereupon Feld walked away.

Following this exchange, on August 4, Durso received a letter of warning from Feld, a copy of which was forwarded to Rolls, which reads as follows:

> Please be advised that the daily confrontations between you and Artley Inc. can no longer be tolerated.
>
> Your statement "that the reason for continuing your work relationship with Artley Inc. is to make us miserable and that you derive great pleasure in the misery you inflick" [sic] is beyond comprehension.
>
> Artley Inc. cannot continue it [sic] it's employ a person with the attitude such as your's. Therefore, be advised that, if in two weeks time, Artley Inc. does not see a change in your work relationship; your employment with Artley Inc. will be terminated.

Durso denied making the statements attributed to him in the second paragraph, although he did not so inform Feld. He did deny the statements privately to Russ McNair, the union president, who attended a later meeting with Feld after Durso protested the letter to Rolls.

Feld's account of his discussion with Durso in the carpentry shop on August 1 varies in a number of significant respects from Durso's. According to Feld, after calling Rolls and learning the Union's position, he went back to Durso, did not tell him that he was not paying it to him, but rather, in agreement with Durso's account, questioned how in good conscience he could charge 5 hours time for the job. Durso maintained it took 5 hours. At this point the versions vary. Feld claims that he then accused Durso of shafting him, that he, Feld, went out of his way to accommodate Durso but now Durso was shafting him, to which Durso replied, "Well, somehow I have to make up for the money that I lost when I left three o'clock that afternoon the previous week." When the conversation continued on the nature of the work performed over 5 hours, Durso is alleged to have said it included the time he had to wait around while the masons cleaned up or while they finished. When Feld then questioned if he just sat on his bench and did absolutely nothing, Durso agreed. Durso then reduced the claim from 5 to 3 hours and added that he could have charged outside pay for the time he panelled Feld's office and did other things around the building. Feld told him that he had been given such jobs to keep the employees on during the summertime at a fantastic amount of money, and that other exhibit houses around the country, specifically in the metropolitan area, lay off about 90 percent of their help during those months. Durso then replied, "Well, if you're not happy to work with us, send us home." Feld left, and told the bookkeeper that under no circumstances was Durso to be paid his claim.

Feld next asserts, "later in the day, I was quite upset about it, and I went back to him and said, 'Look, apparently you're very unhappy here. I can't believe you can be happy and do the things you're doing. It seems to me like you're just trying to invent things just to cause some sort of a confrontation.'" And his reply was, "I'm happy, but I'm making you miserable." Feld concludes that he left and was extremely upset and emotional about it, but that he waited a while before acting.

Feld next telephoned Rolls, explained what had happened, voiced his opinion that he could not in good conscience pay a man and have him come back and tell me that he's making me miserable and that he's happy about it. Rolls told Feld not to act hastily, write Durso a letter and give him an opportunity to straighten things out. The letter of August 4 followed.

I am unable to credit Feld's version of the conversations. It is important to note that Feld approached Durso, claiming he came back to Durso twice the same afternoon in a confrontational manner. Even though Feld had knowledge of the Union's position on Durso's claim he failed to disclose this to Durso, but instead pressed Durso on the time claimed and not the merits of the claim under the contract, demonstrating a lack of candor and a provocative disposition. Further, in Feld's own words, it was he who made the first accusations and taunts against Durso, which is consistent with the nature if not the exact words, of the car in the parking lot comment which Durso attributes to Feld. In view of Feld's repeated use of the concept of "accommodation" it is entirely reasonable to conclude, and I do, that Feld had reference here not only to the accommodation of arranging for installation of a window in the carpentry shop but also to the payments to Durso during his leave to care for his son and because of his injury, a form of patronizing which triggered Durso's negative reaction. Significantly, at no point does Feld in his version attribute to Durso the language quoted in his August 4 warning letter, even though the quoted statement forms the basis for its stated conclusion that it illustrates an attitude which the Employer can no longer tolerate. It is also incredible that Feld did not know that Durso was a union shop steward. While acknowledging that whenever the business agent came in he spoke directly to Durso rather than to anybody else, he denied that Durso ever identified his union position or that he was aware even if Durso held one. This testimony on direct examination conflicts sharply with Feld's later statement on cross-examination. When asked if he would agree that Durso was active in the negotiations with the mediator, he responded, "Well, he was shop steward; so I would imagine so." It was also Feld himself who negotiated directly with Durso, as representative of the union employees, the settlement of the contract claim for outside wages and it

[11] According to Durso, in 1976 his son suffered an emotional collapse, as a result of which Durso took 2 weeks leave without asking for pay but for which he was later paid by the Company. Durso testified without dispute that at that time in 1976 President Skoler said, "Dominick is not good for the Company anymore. He thinks more of his son than he does of the Company." Durso also collected compensation for an injury to his knee.

was Feld to whom Durso complained about the failure to pay overtime to the two outside employees. It was also Durso to whom Feld went when he said he wanted to fire Tyler. It is clear that Feld became so indignant and upset at Durso's presentation of a claim for premium pay on work authorized at extra employer expense to improve ventilation in the shop in particular for Durso's benefit that he failed to control his anger and provoked Durso into his own reaction which was then seized on by Feld to place Durso's job at risk. Durso's own testimony appears to me to be straightforward, noncalculating, and fully explainable given the above-described circumstances. Durso also stood up well under a probing cross-examination during which he described the work involved in preparing and constructing the window frame.

By August 7, the Union had contacted Feld to arrange a meeting based on Durso's protest to the Union. The meeting was delayed because of Rolls' hospitalization and Durso's absences also due to illness. On August 19, Russ McNair, Local 821 president, came to the Newark facility. McNair first talked with Feld and Skoler alone, urging them not to terminate Durso, pointing out his lengthy service with the Employer. Skoler and Feld were noncommittal but Feld testified he felt at the time he would not terminate Durso. McNair then suggested Durso be invited in to discuss the matter. Durso then joined the others in a conference room. McNair asked Durso to explain what happened. Durso then spoke about the installation work and asked McNair why he could not get outside wages for putting a window in. McNair replied that the clause in question did not pertain to putting windows in, that is only for putting up partitions. Durso then said, "All right, forget the outside wages, but how come I'm always harassed, myself and my son." With this statement, Feld jumped up and said his attitude has not changed, he can leave now and I will pay him until 5 p.m. or he can work until the end of the week. Durso later received approval to finish out the week, and was terminated effective Thursday, August 21. The following day, August 20, Feld wrote Durso confirming this arrangement and adding "a difficult work relationship exists, as was determined at the meeting held by the concerned parties and Mr. McNair of Local 821 on Tuesday, August 19, 1980. Therefore it is in the best interest of all parties concerned, that the relationship come to a conclusion."

C. *Analysis and Conclusions*

The central question posed is whether Durso's union activity was a motivating factor in Respondent's decision to first issue him a written warning and then to fire him.[12]

While Respondent's history of labor relations appears to have been generally uneventful, there is little question that the first strike in the Employer's experience, in 1979, was a sobering experience for Respondent, which even after its settlement left unresolved certain lingering issues, one of which had presumably been settled orally without inclusion in the contract *in haec verba*. On these matters, Durso had been principal or participating spokesman, and, after the return to work, took the lead in pressing Respondent for compliance with the outside wage demand as well as with the agreement to install a ventilation-hopper system. In connection with the outside wage issue, shortly after the strike settlement, Respondent's management quickly learned that there was a divergence between the position of the Union and that of the unit employees, with Durso, as shop steward, acting as leader for the more militant position taken by the employees. After Feld contacted Rolls and obtained his agreement to the Employer's interpretation of the contract clause, at a subsequent meeting at the shop attended by Rolls, Durso and the employees made clear their firm stand for payment of the outside wage rate.

Respondent makes much of the fact that on the outside wage issue, as well as certain others, Feld and Durso eventually resolved the matters amicably, without rancor. Yet, it took a concerted refusal to perform outside work for Respondent to offer any concession with respect to premium pay. Durso's ability to lead, to represent the men, and to control his forces on the ultimate 30-percent compromise is well documented on the record and has been earlier described.[13] As to the ventilation system, the credited testimony shows that Respondent never fulfilled its commitment in spite of the bearing that system had on the safety, sanitary, and working conditions in the shop and the fact that agreement had been reached during the strike in accordance with article 13 of the agreement. Respondent does not indicate what its position would have been on the issue of premium pay, the inclusion of the two outside workers in the unit, its intent to fire Tyler, and Durso's demand for relief from the blocking up of the only opening in the wall of the carpentry shop if Durso, as steward, had not pressed these matters or had not rejected Respondent's proposed firing of Tyler. Each of these incidents demonstrated not only Durso's strengths as union advocate but also presented him as a plain speaker who quickly makes his point without much concern for the social niceties. Thus, his comment to Skoler that Skoler knew the outside men, Bob and Gene, set up jobs after Skoler sought to minimize their work role, got right to the point without equivocation. Durso acted in similar fashion when he disputed the Employer's right to fire Tyler without providing him with the requisite notices and given the condition of his health as aggravated by the extreme heat in the shop.

That Respondent felt some resentment at Durso's conduct, even before his own claim for outside wages was made, is apparent in Feld's response to Durso's July 21 continuing demand for the ventilating system that if he

[12] Such a showing is required in order for the General Counsel to establish a *prima facie* case for violation of Sec. 8(a)(3) under *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980).

[13] Durso's persistence in maintaining militant union positions and Respondent's reactions to that conduct even outside the 6-month 10(b) period are admissible as background evidence both of the growth in Respondent's attitude of hostility toward Durso and to shed light on the motive for Respondent's conduct in ultimately warning and firing Durso. *Crystal Springs Shirt Corporation*, 229 NLRB 4 (1977); *Local 613 of the International Brotherhood of Electrical Workers, AFL-CIO (M.H.E. Contracting, Inc.)*, 227 NLRB 1954 (1977).

had been any kind of a shop steward he should have come in with the demand within 30 days of the agreement. Respondent's animus is also apparent in Feld's reaction to the kind of militancy Durso displayed when pressing work demands. It is clear that Feld was not accustomed to such contentiousness based on his past and present dealings with the more yielding union delegate Rolls. As Feld learned by August 1, the "accommodation" of installing a window in place of the blocked up wall was not sufficient to mollify Durso. Neither was the fact that apparently Respondent had made every effort in the past to keep its work force, including carpenters, regularly employed over the slow summer period. After receiving Durso's claim, and learning that the union delegate would not support it, Feld's hostility toward Durso rose to the surface. This hostility readily explains Feld's approach to Durso later in the day when, rather than indicating that Durso's demand did not have the delegate's support, he kept that inportant information to himself and rather forced the subsidiary question of the time involved and was biting and sarcastic in his remarks. There is evident hostility in the statement that Feld is happy when he doesn't see Durso's car in the parking lot. Durso's response led Feld to acknowledge that the Employer unilaterally determined whether an employee would be assigned any work at all. When Feld next referred to the past accommodations, even superior treatment, accorded Durso on the occasion of his paid leave of absence to care for his son—an accommodation as to which Skoler had expressed resentment even at the time it was made—in the context of Durso's premium wage claim, Respondent's vice president was exhibiting a state of mind which quickly added another level to his rising resentment when Durso not only refused to acknowledge Respondent's condescending manner but expressed outrage at such behavior under the circumstances.[14] Feld's response was to walk away, discuss the matter further with Rolls, and after having his own views reinforced, issuing the letter of warning.

The letter makes immediate reference to daily confrontations, the record facts relating to which were all intimately related to Durso's dispute-handling functions as shop steward. The very last confrontation, for which Feld himself was responsible, arose out of Durso's grievance claim for premium pay. The letter continues with a quote attributed to Durso which is at variance with Feld's own version of the incident, and concludes with a warning of discharge if Durso did not change his attitude. I can draw no other conclusion than that Durso's attitude was in reality the manner and comportment Durso exhibited in representing the unit employees, including himself, on each of the dispute presentations he made relating to their terms and conditions of employment which arose during and following the 1979 strike and up to August 1980.

> As an employee representative he was entitled to deal with management representatives as an equal and express his views openly at the bargaining session.[15] He was not subject to discipline in his employment relationship because his manner and behavior when he appeared as employee representative did not comport with Respondent's standards of propriety. [*Alfa Leisure, Inc.*, 251 NLRB 691 (1980).]

Respondent thus discriminated against Durso when it issued the warning letter, and when it subsequently discharged him for exhibiting the same attitude on the occasion of the grievance meeting at which he protested the warning. General Counsel has established on the record that Durso's union activity was, indeed, a motivating factor in Respondent's decisions, and further, Respondent, in its defense has failed to demonstrate that it would have warned and terminated Durso even absent the protected activity. Thus, General Counsel has established by a preponderance of the evidence Respondent's violation of Section 8(a)(3)[16] and, derivatively, (1) of the Act.

A second issue presented is whether Respondent's warning and discharge constituted violations of Section 8(a)(1) in the absence of proof of antiunion motivation.

Assuming, *arguendo*, that the record ultimately fails to sustain my finding that sufficient antiunion animosity has been demonstrated, it is clear that Respondent's action, taken against Durso growing out of Durso's grievance presentation, has violated 8(a)(1) of the Act. Even though Respondent can be found to have acted in good faith, so long as the tendency of the Employer's conduct is to interfere with the rights of its employees protected by Section 7 of the Act, without regard to motive, Respondent has violated Section 8(a)(1). As Durso was engaged in prosecuting a grievance for premium pay, a fundamental aspect of collective bargaining, his conduct was protected, and Respondent's warning and subsequent discharge interfered with the exercise of that right.[17]

Respondent nonetheless contends that General Counsel has waived any claim that the discharge independently violated Section 8(a)(1) by virtue of an interchange among counsel and the presiding Administrative Law Judge at the outset of the hearing. There is inadequate warrant for Respondent's position. First, the waiver, as all waivers, must be established by clear and convincing proof.[18] The complaint clearly encompasses an 8(a)(1) allegation grounded on Durso's protected concerted activity. Second, Respondent's request was that General Counsel indicate whether the 8(a)(1) charge was derivative or a separate substantive charge, an ambiguous request which failed to pinpoint Respondent's true concern as to whether it was alleged that the *discharge* indepen-

[14] Recall that when Durso repeated his expression of outrage at the grievance meeting on August 19, Feld took the occasion to fire Durso on the spot, effective at the end of the workweek.

[15] A grievance presentation, no less than a bargaining session, as Sec. 7 activity warrants the full protection of the Act. *Crown Central Petroleum Corporation* v. *N.L.R.B.*, 430 F.2d 724 (5th Cir. 1970).

[16] *Wean United, Inc.*, 255 NLRB 970 (1981); *Magnetics International, Inc.*, 254 NLRB 520 (1981); *Max Factor & Co.*, 239 NLRB 804 (1978).

[17] See *United States Postal Service*, 250 NLRB 4 (1980); *Schneider's Dairy, Inc.*, 248 NLRB 1093 (1980); *Lane Trenching, Inc.*, 247 NLRB 1341 (1980); *Quality Broadcasting Corp. of San Juan d/b/a WQBS-AM Radio Station "La Gran Cadena,"* 241 NLRB 318, 321 (1979). See also *Joseph West, d/b/a West Meat Company*, 244 NLRB 828 (1979).

[18] Waivers of statutory rights will not be lightly inferred and must be shown by "clear and unmistakable" language. *Gary-Hobart Water Corporation* v. *N.L.R.B.*, 511 F.2d 284 (7th Cir. 1975), enfg. 210 NLRB 742 (1974).

dently violated Section 8(a)(1). General Counsel responded that "there is no claim of independent 8(a)(1), as I believe the complaint makes clear." The complaint does *not* allege any particular conduct as violative only of Section 8(a)(1). General Counsel may have thus understood Respondent counsel's request as seeking to learn whether, apart from the warning or discharge, any 8(a)(1) violation had been alleged. I am unable, on this exchange to conclude that the proofs establish convincingly, that General Counsel knowingly removed from the theories it has advanced, a claim that the warning and discharge constitute violations of Section 8(a)(1), apart from whether they violated Section 8(a)(3).[19]

Finally, as the 8(a)(1) aspect of this proceeding required no evidence other than that presented on the 8(a)(3) allegation, and as the matter did not go beyond the scope of the complaint and was presented and briefed by the parties, I conclude the issue was fully litigated under the principle established by such cases as *Monroe Feed Store*, 112 NLRB 1336 (1955). Thus, the theory that Respondent's conduct in warning and discharging Durso independently violated Section 8(a)(1) is fully before me and I will recommend that Respondent be found to have engaged in that violation.

Respondent argues that Durso's statements made on August 1, which formed the basis of Feld's August 4 letter, are not protected because it was made in the aftermath of Durso's claim for pay. Unlike the facts in *Container Corporation of America*, 255 NLRB 1404 (1981), which Respondent cites, in support, in its brief, Durso was not extending a grievance discussion beyond the time alloted for it nor was he refusing to obey a back-to-work order. To the contrary, it was Feld who visited Durso at his workplace to renew a brief grievance discussion which had concluded earlier in the day, and to bait Durso as a consequence of Feld's own rising sense of anger. It was in this setting that Durso echoed Feld's own expression of satisfaction at being able to avoid dealing with the other. While the discussion on August 1 took place at the workplace, Feld and Durso were alone, Durso did not refuse to perform any work duties and Durso's conduct did not interfere with job performance or morale of other employees, did not undermine Feld's authority in the shop, or expose Feld to any harm.[20]

Respondent also contends that Durso presented a knowingly false claim which warranted the discipline Durso received. There is no evidence to support this assertion. The clause itself provides that the established union rate is to be applied to ". . .any construction work done in shop." Respondent's agreement to pay the premium rate for work performed outside the facility did not resolve Durso's claim nor foreclose such pay for the work Durso performed. Even Feld initially was unaware of the invalidity of the claim, and invited Durso's filing, and a meeting had to be convened before all parties became convinced that inside construction work was limited to installing partitions. McNair's position on the matter effectively forestalled further pursuit of the grievance, yet the record fails to reveal whether the Union's interpretation was reasonably based on shop practice, although such a conclusion is likely. In any event, Durso's claim was not unreasonable given his regular duties, the special work on the window, the contract language involved, and the prior settlement. Even though the claim probably lacked merit, there is every basis for concluding, as I do, that Durso asserted the claim in good faith without forfeiting the protections of the Act.[21]

Neither was Durso's rejoinder under all the circumstances so extreme, even if Feld's testimonial version is to be believed, so as to remove the employee from the Act's protections. Even under Feld's version, it was not until he had returned to Durso's bench for the second time within a few hours in the same day, and goaded Durso by references to Durso's inventing claims to cause a confrontation, that Durso uttered the forbidden language, expressing happiness at making Feld miserable. I have little problem in concluding that Durso's response was provoked by Feld's confrontational manner and this is excusable. This particular confrontation, if believed, is intimately related and cannot be separated from Durso's initial assertion of the wage claim. Feld's introductory accusations and Durso's response was a continuation of an earlier grievance discussion, and were pertinent to Durso's claim, albeit having evolved into a questioning of Durso's good faith. As the court so aptly noted in *Crown Central*,[22] "Grievance meetings arising out of disputes between employer and employee are not calculated to create an aura of total peace and tranquility where compliments are lavishly exchanged." And as the Board stated, much earlier, in *The Bettcher Manufacturing Corporation*,[23] quoted with approval by the court in *Crown Central*:

> A frank, and not always complimentary, exchange of views must be expected and permitted the negotiators if collective bargaining is to be natural rather than stilted. The negotiations must be free not only to put forth demands and counterdemands, but also to debate and challenge the statements of one another without censorship, *even if, in the course of debate, the veracity of one of the participants occasionally is brought into question*. If an employer were free to discharge an individual employee because he resented a statement made by that employee during a bargaining conference, either one of two undesirable results would follow: collective bargaining would cease to be between equals (an employee having no parallel method of retaliation), or employees would hestitate ever to participate personally in bargaining negotiations, leaving such matters entirely to their representatives.

[19] Cf. *Iron Workers Local 118, International Association of Bridge and Structural Ironworkers, AFL-CIO (Pittsburgh Des Moines Steel Company)*, 257 NLRB 564 (1981); *Keller-Crescent Company, a Division of Mosler*, 217 NLRB 685, 687, 690 (1975), enforcement denied *N.L.R.B. v. Keller Crescent Company, a division of Mosler*, 538 F.2d 1291 (7th Cir. 1976).

[20] Cf. *Court Square Press, Inc.*, 235 NLRB 106 (1978); *Berns Wholesale Sporting Goods Co.*, 188 NLRB 373 (1971).

[21] *OMC Stern Drive, a Division of Outboard Marine Corporation*, 253 NLRB 486, fn. 2 (1980); *The Singer Company, Climate Control Division*, 198 NLRB 870, fn. 5 (1972).

[22] *Supra* at 731.

[23] 76 NLRB 526 (1948).

Respondent nonetheless contends that Durso's language was so offensive as to be beyond the pale, citing and quoting from *Atlantic Steel Company*, 245 NLRB 814 (1979), and *Philo Lumber Company*, 229 NLRB 210 (1977). Both cases are distinguishable. There, the offensive remarks were expressions of obscenity uttered on the plant floor where the employer's authority was undermined and the remarks were responses to a valid work order or reprimand. Unlike the facts in the instant proceeding, the employers there did not instigate the confrontation, the employers did not provoke by first evidencing hostile behavior, nor did the opprobrious conduct arise in the context or under the *res gestae* of a grievance presentation. Applying the several factors discussed in *Atlantic Steel* on which the Board relies in determining whether an employee's activity can cross over the line which separates protected from unprotected, neither the place (nor setting) of the discussion, its subject matter, the nature of the employee's outburst, nor the nature of the employer's provocation (as found, evidencing discriminatory motivation toward Durso) in the case *sub judice* warrant the conclusion that Durso's remarks should deprive him of the Act's protection.

Respondent also urges that inasmuch as Durso was asserting a wage claim for himself he was not thereby engaging in protected concerted activity. Respondent notes that the Third Circuit Court of Appeals, the circuit within which this proceeding is pending, rejects the doctrine of *N.L.R.B.* v. *Interboro Contractors, Inc.*, 388 F.2d 495, 500 (2d Cir. 1967), that "activities involving attempts to enforce the provisions of a collective bargaining agreement may be deemed to be for concerted purposes even in the absence of . . . interest (on the part of) fellow employees." In *N.L.R.B.* v. *Northern Metal Company*, 440 F.2d 881 (3d Cir. 1971), the court refused to enforce a Board order arising from a decision in which the Board had found that the company's discharge of a probationary employee for asserting a claim for holiday pay was motivated by the employee's presenting a grievance within the framework of the collective-bargaining agreement, thus affecting the rights of all unit employees.[24]

I am dutybound to apply this established Board precedent, notwithstanding contrary views of a circuit court of appeals, where, as here, the Board has adhered to this principle and the Supreme Court has not reversed.[25] It also appears that Durso's activity may even meet the more limited Third Circuit interpretation, or at any rate the gloss which the Second Circuit has placed on the doctrine that requires for an attempt to enforce an agreement to be protected, the employees have a reasonable basis for believing that their understanding of the terms was the understanding that had been agreed upon.

Unlike *Northern Metal Co.*, Durso's claim was grounded upon a precise clause and language of the agreement. Furthermore, the claim had its antecedents in a group demand asserted at the last negotiations which was not resolved until a concerted refusal to perform outside work. While the refusal was related directly to work performed outside the shop, there is no evidence that any of the unit employees had rejected or would reject benefits under the portion of the clause providing special benefits for construction work done in the shop. At least Durso's fellow carpenters, and even other employees, could well benefit from Durso's interpretation whenever construction work not related to normal display erection was assigned to them. Durso's standing as steward lends weight to the conclusion that the interpretation Durso sought had an impact on other employees and was of common interest and concern.[26] Also, in contrast with the usual fact pattern represented by *Northern Metal Co.* Durso's wage claim was the culminating grievance of a series of claims and adversary positions he had taken as shop steward under the contract which aroused the increasing ire of the Employer. Thus, reliance solely on the protected concerted nature of the final claim Durso asserted would be misplaced. Finally, as noted earlier, Durso had a reasonable basis for believing that the framing and installation of the window constituted construction work in the shop under the language of the clause, particularly in the absence of any prior application of the clause to the Newark facility under the agreement. Thus, the *N.L.R.B.* v. *John Langenbacher Co., Inc.*, 398 F.2d 459 (2d Cir. 1968), reading of the *Interboro* doctrine would seem to have been met here.

Conclusions of Law

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

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By issuing a warning letter on August 4, 1980, and by discharging employee Dominick C. Durso on August 21, 1980, Respondent violated Section 8(a)(3) and (1) of the Act.

The Remedy

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom, and take certain affirmative action designed to effectuate the policies of the Act. Having found that Respondent discharged Dominick C. Durso in violation of Section 8(a)(3) and (1) of the Act, I recommend that Respondent be ordered to reinstate him to his former position or, if no longer available, to a substantially equivalent position, without prejudice to his seniority and other rights and privileges, and make him whole for any loss of earning or other monetary loss he may have suffered as a result of the discrimination against him, less interim earnings, if any. The backpay shall be computed in the manner set forth in *F. W. Wool-*

[24] The Board has continued to hold that a contractual claim is "concerted" even if a single employee acts alone, since the test is ". . . whether his complaint or objective is a matter of common interest and concern to his fellow employee." *The United Credit Bureau of America, Inc.*, 242 NLRB 921, 925 (1979). Accord *Schneider's Dairy, Inc.*, *supra*, and cases cited in fn. 5. Even where a steward acts on his own behalf the activity has been found to be concerted. *Albertsons, Inc.*, 252 NLRB 529 (1980); *Magnetics International Inc.*, *supra*.

[25] *Iowa Beef Packers, Inc.*, 144 NLRB 615, 616 (1963).

[26] It is noted that Durso's fight for outside pay did not benefit him personally, as he rarely, if ever, worked off premises.

worth Company, 90 NLRB 289 (1950), with interest to be computed in the manner described in *Florida Steel Corporation*, 231 NLRB 651 (1977). See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962), enforcement denied on other grounds 332 F.2d 913 (9th Cir. 1963).

I shall also recommend that Respondent rescind and expunge from all personnel records and files, and any other records, all copies of the written warning issued to Dominick C. Durso on August 4, 1980.

Upon the basis of the foregoing findings of fact, conclusions of law, and the entire record in this proceeding, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[27]

The Respondent, Artley, Incorporated, Newark, New Jersey, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Issuing written warnings, discharging, or otherwise discriminating against employees in regard to their hire, tenure of employment, or other terms and conditions of employment in order to discourage membership in or assistance to Local 821, United Brotherhood of Carpenters and Joiners of America, or any other labor organization.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights to self-organization, to form, join, or assist Local 821, United Brotherhood of Carpenters and Joiners of America, or any other labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities.

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

(a) Offer to Dominick C. Durso immediate and full reinstatement to his former job or, if his job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges, and make him whole in the manner set forth in the Remedy.

(b) Rescind and expunge from all personnel records and files, and any other records, all copies of the written warning issued to Dominick C. Durso on August 4, 1980.

(c) Preserve and, upon 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 records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Newark, New Jersey, facility copies of the attached notice marked "Appendix."[28] Copies of the notice, on forms provided by the Regional Director for Region 22, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 22, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

[27] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[28] In the event that 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."