Hawaiian Hauling Service, Ltd. ***and*** **Joseph R. Richardson.** Case 37–CA–988

July 30, 1975

DECISION AND ORDER

On January 21, 1975, Administrative Law Judge James S. Jenson issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

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, and conclusions of the Administrative Law Judge only to the extent consistent herewith.

1. The complaint alleges that Respondent unlawfully discharged Joseph R. Richardson. The Administrative Law Judge defers to an arbitral decision upholding the discharge since in his opinion that decision meets the *Spielberg* standards.[1]

The General Counsel excepts, contending that the Board should not defer to the arbitrator's award inasmuch as it is repugnant to the policies of the Act. We agree with the General Counsel.

There is no controversy as to the relevant facts. Richardson had been in Respondent's employ for 22 years. He had been the Teamsters Local 996 steward for the past 14 years. In early October 1973, Richardson received two warning letters from Respondent, one regarding a leave of absence he had taken beginning August 8, 1973, and the other regarding certain pornographic pictures he had placed under the glass on his desk in January 1972 and May 1973 and which had remained there until Respondent's vice president and general manager, Kelly Rogers, ordered them removed on October 3, 1973. On October 15, 1973, Richardson and the union business representative, Harold DeCosta, had a meeting with Rogers and Respondent's supervisor, Abel Medina, concerning the warning letters. DeCosta informed Rogers and Medina that the Union wanted the warning letters removed from Richardson's file. Rogers declined to do so. DeCosta asked Rogers if he had ever seen the pictures before. Rogers denied that he had. Richardson then called Rogers a liar. Rogers admittedly terminated Richardson for doing so.[2]

The Union grieved the discharge to arbitration. During the arbitration, Respondent contended that Richardson's conduct at the October 15 meeting, viewed against his work record, justified the discharge. Thus, Respondent's brief to the arbitrator states:

> The accusations of the Grievant during the October 15th meeting were as Rogers put it, "The straw that broke the camel's back," and the *Grievant would not have been fired had he not made these statements.* But, the Grievant's entire work record precipitated the final decision. [Emphasis supplied.]

The Union contended that Richardson's conduct at the October 15 meeting was protected by Section 7 of the Act and cannot be made the basis for discharge. On February 26, 1974, the arbitrator issued an unexplained award[3] in which he simply stated that based upon the evidence adduced at the hearing it was his decision "that the discharge in question was proper." Accordingly, he denied the grievance.

Richardson admittedly would not have been discharged but for his actions in questioning Rogers' veracity at the October 15 meeting. The arbitrator found that his discharge in that circumstance was justified. The effect of such an award is to substantially dilute an employee's right to fully present his case during grievance and arbitration proceedings as the employer's equal. The award is therefore repugnant to the policies of the Act. We will not defer to such an award.[4]

The applicable standard governing employer conduct when dealing with employees during collective bargaining was set forth long ago in *The Bettcher Manufacturing Corporation,* 76 NLRB 526, 527 (1948). There the Board stated:

> 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 negotiators 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*

[1] *Spielberg Manufacturing Company,* 112 NLRB 1080 (1955).

[2] Rogers testified:

> Q. (By Respondent's counsel, Richard F. Liebman) Can you tell us now, what was the reason, the actual reason that you had for discharging Mr. Richardson?
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> A. (Mr. Rogers) I felt we had been extremely lenient. The sequence of events, I thought we had already gone overboard. I had gone as far as I could in my job in dealing with the situation; and I felt the man had been given every possibility. Bear in mind I had not even suspended him for the pornography or anything, strictly a warning letter. Not even a day's suspension. Then to sit in front of a supervisor of mine and fabricate a story, calling me a liar, I felt was just absolutely the last straw; there was no way in good conscience I could tolerate that without terminating this man.

[3] The issuance of an unexplained award was in accordance with the agreement of the parties as to the procedure to be followed at the arbitration hearing.

[4] *Spielberg Mfg Co., supra.*

> *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 or retaliation), or employees would hesitate ever to participate personally in bargaining negotiations, leaving such matters entirely to their representatives. [Emphasis supplied.]

That principle has since been uniformly followed by the Board.[5] One case in particular is worthy of note, *Crown Central Petroleum Corporation,* 177 NLRB 322 (1969), enfd. 430 F.2d 724 (C.A. 5, 1970). There, the Board, in a factual situation strikingly parallel to the instant case, found that an employer's discipline of an employee for calling an employer representative a liar during a grievance meeting was unlawful, the conduct of the employee being protected.

We recognize, of course, that an employee may engage in conduct during a grievance meeting which is so opprobrious as to be unprotected. We also recognize that in some cases there may be reasonable disagreement as to whether or not that point is reached. In such cases, we will not refuse to defer to an arbitrator's award simply because we would have reached a different result. This is not such a case.

The award here strikes at the very foundation of the grievance and arbitration mechanism. Richardson's grievance as to the warning letter on pornography was based on the premise that Respondent's general manager, Rogers, had condoned his conduct. When Rogers asserted that he had not seen the material on Richardson's desk, Richardson could only meaningfully pursue the grievance by establishing that Rogers was lying. It is true that Richardson could have been more moderate in his language while asserting this position. The lack of this diplomacy does not render conduct unprotected. Any attempt to dictate the exact language to be used in the collective-bargaining atmosphere can only have the effect of stifling that bargaining. Moreover, Richardson's statements would still have amounted to essentially the same thing. Richardson was asserting that Rogers was lying. In any case it was not the use of the term "liar" that upset Rogers, but Rogers' claim that Richardson was fabricating a story. Richardson had to either accept Rogers' version of the facts or face discharge. Thus, the only way Richardson could avoid discharge in this circumstance was to withdraw the grievance or to pursue it in a meaningless way. Precluding a union from calling into question the credibility of management witnesses and requiring it to accept management's factual assertions would so heavily weigh the mechanism in the employer's favor as to render it ineffective as an instrument to satisfactorily resolve grievances.[6] The grievance and arbitration mechanism is a vital cog in the machinery for the resolution of industrial disputes. An arbitrator's award which tends to destroy the effectiveness of that mechanism, as the arbitrator's award here does, is clearly repugnant to the policies of the Act.

2. As to the merits, Richardson admittedly would not have been discharged except for his remarks on his own behalf during the grievance meeting. As noted above, remarks of this nature during a grievance meeting are protected. While Respondent's discharge of Richardson for his protected conduct during the collective-bargaining process itself may have been inherently discriminatory,[7] we find it unnecessary to resolve that issue, for we find that in any event such discharge constitutes interference, restraint, and coercion with respect to Section 7 rights. Respondent has thus violated Section 8(a)(1) of the Act.

Remedy

Having found that Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist therefrom and take certain affirmative action in order to effectuate the policies of the Act.

Having found that Respondent unlawfully discharged employee Joseph R. Richardson, we shall order that Respondent offer him immediate and full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges and to make him whole for any loss of pay suffered as a result of his unlawful discharge, with backpay computed as prescribed in *F. W. Woolworth Company,* 90 NLRB 289 (1950), with interest at 6 percent annum as provided in *Isis*

[5] See, e.g., *Huttig Sash & Door Company, Inc*, 154 NLRB 1567 (1965), *Thor Power Tool Company,* 148 NLRB 1379 (1964).

[6] Respondent contends that Richardson, acting as a union steward, representing himself, was guilty of bad-faith bargaining in violation of Sec 8(b)(3) when he, according to Respondent, fabricated the claim that Rogers had seen the pornographic material and, therefore, that Richardson lost his protected status. This argument assumes that the truth lies with Rogers' version Yet that is the very question which the grievance and arbitration is designed to resolve. Respondent cannot be permitted to short-circuit the inquiry in this manner. Moreover, Respondent's position would enable it to take the "master-servant" relationship into the grievance meeting. The relationship at a grievance meeting is not a "master-servant" relationship but a relationship between company advocates on one side and union advocates on the other side, engaged as equal opposing parties in litigation. *Crown Central Petroleum, supra* To permit an employer to exercise the power of discharge, where the union has no parallel method of retaliation, solely on the basis that a steward in the employer's view is not telling the truth, would destroy that essential relationship

[7] See *N.L R B* v *Great Dane Trailers, Inc.,* 388 U.S. 26 (1967).

Plumbing & Heating Co., 138 NLRB 716 (1962).

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Hawaiian Hauling Service, Ltd., Honolulu, Hawaii, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging or disciplining employees because of their protected participation in grievance meetings.

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

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

(a) Offer Joseph R. Richardson immediate and full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges.

(b) Make Joseph R. Richardson whole for any loss of pay he may have suffered as a result of his unlawful discharge in the manner set forth in the Remedy section of this Decision and Order.

(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 other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its place of business of Honolulu, Hawaii, copies of the attached notice marked "Appendix." [8] Copies of said notice, on forms provided by the Regional Director for Region 20, after being duly signed by the Respondent's representative, shall be posted by the 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 the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

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

MEMBERS KENNEDY AND PENELLO, dissenting:

Unlike our colleagues, we would adopt the decision of the Administrative Law Judge to defer to the arbitration award herein. The issues in this case were fully presented before the arbitrator, the parties agreed to be bound to arbitration, the proceedings were fair and regular, and the result reached is not clearly repugnant to the purposes and policies of the Act.

Joseph Richardson had received warnings for taking a leave of absence and for displaying pornographic pictures on his desk. He grieved the warnings. At a grievance meeting, he contended that General Manager Rogers had condoned his display of pictures. When Rogers said he had not previously seen the pictures, Richardson called him a liar. Richardson was thereupon discharged. At the arbitration hearing on Richardson's discharge, Respondent contended that Richardson's conduct at the grievance meeting was protected activity.

The issue before the arbitrator was not whether Richardson was discharged for pursuing his grievance but involved his conduct at the grievance meeting and whether that conduct was so unwarranted as to cross the line of protected grievance activity. In upholding the discharge, the arbitrator in effect found that Richardson had crossed the line. The majority, although paying lip service to *Spielberg,* is substituting its factual judgment for that of the arbitrator and finding that Richardson's conduct fell on the other side of the line. Yet in so doing the majority ignores for the most part Richardson's work record, the manner in which Richardson called the manager a liar, and the contention that Richardson's grievance defense was wholly fabricated and frivolous. This case does not involve an arbitral award which makes a legal conclusion wholly at odds with the Act, but involves a determination of fact. Thus, in our view, the majority is unwarranted in concluding that the arbitral award reached a result which is clearly repugnant to the policies and purposes of the Act.

[8] 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."

APPENDIX

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

After a hearing in which both sides had the opportunity to present their evidence, the National Labor Relations Board has found that we violated the law and has ordered us to post this notice. We intend to carry out the Order of the Board or the judgment of any court, and to abide by the following:

The Act gives all employees these rights:

To organize themselves
To form, join, or help unions
To bargain collectively through representatives of their choosing
To act together for collective bargaining or other mutual aid and/or protection
To refuse to do any or all of these things.

WE WILL NOT do anything that interferes with or restrains or coerces employees with respect to these rights.

WE WILL NOT discharge or discipline employees because of their participation in grievance meetings.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them in Section 7 of the National Labor Relations Act.

WE WILL offer Joseph R. Richardson immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and WE WILL make him whole for any loss of earnings he has suffered.

HAWAIIAN HAULING SERVICE, LTD.

DECISION

STATEMENT OF THE CASE

JAMES S. JENSON, Administrative Law Judge: This case was heard before me in Honolulu, Hawaii, on August 29 and 30, 1974. The complaint, which issued on July 24, 1974, pursuant to a charge filed on April 3, 1974, alleges a violation of Section 8(a)(3) and (1) of the Act. Specifically, the charge alleges that on or about October 15, 1973, Respondent discharged Joseph R. Richardson because of his activities as a union steward and/or because of his other activities on behalf of the Union. Respondent denies Richardson was terminated for the reasons alleged and contends he was discharged for unprotected activities and that the Board should defer to an arbitration award affirming the discharge rendered pursuant to the grievance and arbitration procedures provided in the collective-bargaining agreement between Respondent and Hawaii Teamsters and Allied Workers, Local 996.

All parties were given full opportunity to appear, to introduce evidence, examine and cross-examine witnesses, to argue orally, and to file briefs. Briefs and supplemental case citations were filed by both the Respondent and the General Counsel and have been carefully considered.

Upon the entire record [1] in the case, and from my observation of the witnesses and their demeanor, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Hawaiian Hauling Service, Ltd., herein called Respondent, a Hawaii corporation, is engaged in general trucking, moving, and warehousing operations. During the past year Respondent performed services valued in excess of $50,000 for several Hawaii firms, each of which made purchases or sales of goods and supplies from outside the State of Hawaii in excess of $50,000 annually. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Hawaii Teamsters and Allied Workers, Local 996, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

For a number of years Respondent and Hawaii Teamsters and Allied Workers, Local 996, have been parties to collective-bargaining agreements covering Respondent's trucking, warehouse, and clerical employees.[2] Section 12 of the contract provides, in substance, that all controversies between the Union and Respondent will be settled in accordance with the disputes procedures provided for therein. In the event a dispute is not adjusted by step 3 of the disputes procedure, the matter is submitted to a citywide board of adjustment comprised of two representatives designated by the employers in the industry and two by the Union. If the committee is unable to reach a majority decision within 5 days, the grievance may then be submitted to an arbitrator who shall hold a hearing and give a decision within 10 working days. The contract contains a panel of three arbitrators. Each party may strike one arbitrator from the list, and the remaining arbitrator hears and decides the case. The agreement further provides that the decision of the arbitrator "shall be final and binding upon the parties." Section 13 of the contract, entitled "Discharge and Suspension," provides that the Employer may discharge or discipline an employee for, *inter alia,* violation of the Employer's rules or safety regulations, and that the employee shall have the right to protest any discharge, suspension, or warning notice in writing within 10 days, in which case the protest shall be referred immediately to the citywide board of adjustment for determination in accordance with the disputes procedure in section 12. As noted above, if the citywide board of adjustment is unable to reach a decision, the matter may be submitted to an arbitrator.

Kelly Rogers was Respondent's vice president and general manager at all times material herein. Gary Lee and Abel Medina were two of Respondent's supervisors. An-

[1] Certain errors in the transcript are hereby noted and corrected.
[2] Approximately 130 to 150 in number.

thony Troche and Harold DeCosta were business representatives of Teamsters Local 996, Troche servicing the contract from June 1970 to March 1, 1973, and DeCosta thereafter. Joseph R. Richardson, the Charging Party, commenced working for Respondent in 1952 and was terminated on October 15, 1973. Richardson was one of three shop stewards, having served as shop steward for the 14 years immediately preceding his termination. He was also a member of the Union's executive board.

B. *Richardson's Activities as a Shop Steward*

The General Counsel contends, apparently, that a contributing factor in Richardson's termination was that he "actively supported employee interests in their relations with management." To support this theory the General Counsel elicited testimony from Troche, DeCosta, and Richardson regarding a number of "complaints," discussed below, which were made to Respondent on behalf of the employees. Sometime in 1972, Troche and Richardson met with Rogers to protest the suspension of Manuel DeLa-Santos because he had violated a house rule by failing to notify the Employer that he would be absent.[3] DeLaSantos was reinstated. Richardson testified that in "1969 or 1971, I am not too sure," employee Zack Kahoa reported to him that he was not receiving the correct rate of pay. Kahoa had apparently returned to Respondent's employ after 2 years in the army and was working at a lesser rate of pay than his former job had called for. Richardson talked to Rogers who made arrangements for Kahoa to receive the correct rate of pay. There was no indication that the meeting was other than amicable. In the summer of 1972, employee Rodney Hoodnick was suspended because he failed to call in and report that he would be late for work. Richardson talked to either Supervisor Medina or Lee and the suspension was rescinded. Also in the summer of 1972, Richardson complained to Warehouse Supervisor Salong of the fact that a warehouseman was driving a truck. After learning there were no drivers around and that it was an emergency, Richardson "gave him permission to use the warehouseman to drive the truck, to help them out, because they were stuck," and told Salong that "at least, you should call Abel Medina, and Abel calls me and asks my permission if it is all right for a warehouseman to drive a truck." Sometime in mid-1972, employee Lawrence Souza contacted Richardson because he wanted to transfer from the household division to the terminal division. Richardson talked to Rogers: "I told Kelly Rogers that Souza approached me and told me that he never wanted to be household. Kelly said, 'Well, if I am not mistaken, he signed a paper, and if he signed a paper, he is going to have to stay at household.' I said, 'According to Souza, he said he did not sign no paper.' So, Kelly said, 'I am sorry, but he signed the paper. He is going to stay in household.' So, I told him, 'Okay. When I see Souza, I will tell Souza, and I will tell Souza to come up and talk to you.' So, I did. After I got through talking to Kelly Rogers, I went back to my regular job. Four o'clock, or a quarter after three, Souza came back. And I jumped on Souza. I said, 'Gee, you tried to make me look bad. I talked to Kelly Rogers, and you signed the paper, and I am up there talking to Kelly Rogers, about you did not sign no paper.' And he said, 'No, I did not sign it.' I said, 'You go up now and talk to Kelly Rogers.' So, Lawrence Souza did." A couple of months later Souza was transferred back to the terminal. In June 1972, employee Sam Tai complained to Richardson that he was going to have to work on a holiday, Kamehameha Day, Richardson asked Richard Shigemitsu, who was in charge of the household department, why Tai had to work that day, and that if he did the Company would have to pay him time-and-a-half rate in addition to holiday pay. Shigemitsu disagreed, so Richardson called Troche and together they went to see Rogers. While the details of the conversation are vague, it appears that Troche acted as the spokesman on Tai's behalf, that he and Rogers had an argument, that Richardson called Rogers a liar, and that Rogers responded, "Don't call me a liar." The matter was resolved to the Union's satisfaction. Also in 1972, Richardson called Troche and complained the Employer was attempting to deny holiday pay to certain employees. The testimony reveals that the only conversation with Respondent regarding this matter was between Rogers and Troche.[4] Troche testified that he and Richardson talked to Rogers sometime in 1972 protesting a reduction in pay for employee Clinton Yoshikawa and that during the conversation Rogers accused Richardson of being a "shit disturber" by "stirring up the men"; that Richardson called Rogers a liar; and that the matter was resolved to the Union's satisfaction. He testified that after the grievance was completed and Richardson had left, that Rogers remarked that Richardson had a lot of control over the men and was stirring them up and "God. Look at my desk. Full of papers and grievances. Christ, this guy is coming in with grievances. I don't know how many more grievances he is going to file." [5] Troche testified that on another occasion Richardson called him because several employees had complained that their paychecks were short. Troche told Richardson to contact David Sensano, Respondent's bookkeeper and accountant, and find out why. Apparently Richardson did so and reported back that the checks were in fact short. Troche then called Rogers who said that he would look into the matter and take care of it and that it wouldn't occur any more. After it happened several more times, Rogers complained ". . . that the steward had gone in and raised hell with David Sensano." Troche responded that "if Sensano gave him a smart answer, he is going to get smart right back with him." The parties stipulated that

[3] Troche, DeCosta, and Richardson testified in terms of "filing grievances." Troche testified at one point that perhaps 10 grievances were written, which comprised 2 to 5 percent of the total number grievances. He then admitted his estimate was too high and could only recall one grievance which was possibly written, that involving a holiday in 1972.

[4] Troche thought he had filed a written grievance over the matter, but, as was the testimony concerning all of the complaints, was quite vague.

[5] As noted in fn. 3, while Troche testified at one point that 10 written grievances had been filed over an approximate 2-year period, and that 2 to 5 percent of the total number of grievances had been in writing, he eventually reduced his estimate of written grievances to one. I conclude therefore that Rogers would not have complained that his desk was "full of papers and grievances," and discredit Troche's testimony regarding this conversation. As will be seen hereafter, further of Troche's testimony convinces me that he did not testify truthfully at all times.

Richardson voiced a complaint to Respondent's management regarding a suspension of William Cahill and that "the matter was resolved."

DeCosta testified there was a continual problem with the Respondent hiring extra help through an outside employment agency instead of calling the union hall for employees, and that he met with Rogers "quite a few" times. Richardson was present at "a few, a couple . . . ."

The General Counsel contends in his brief that Richardson "actively participated in opposing any derogation in the Teamster 996 contract and bargaining unit by any proposed merger of Respondent's bargaining unit with the Oahu Transport bargaining unit represented by the International Longshoremen and Warehousemen's Union." In support of this contention the General Counsel refers in his brief to pages in the transcript wherein Troche testified that Richardson called and reported that "the Big Five was meeting this morning in Mr. Rogers' office" and that he felt Troche should know about it.[6] It appears Troche thought the meeting concerned a merger of the two companies. Troche therefore went to the meeting uninvited, and after learning the meeting was not for that purpose, he left. There is no evidence that Richardson's name was even mentioned or that Respondent was aware that Richardson later contacted the unit employees and encouraged them to vote for Teamsters Local 996 in the event a merger of the two companies took place.

The General Counsel contends Richardson "persistently complained about the safety of the truck beds of flat bed trailers, and caused management to promise to remedy the defects." Richardson testified that he first approached Supervisor Lee, and then Supervisor Medina, about the fact the flat beds on the trailers were in bad repair and that someone might get hurt, and that after nothing was done he approached Rogers about the matter. Richardson testified as follows regarding his meeting with Rogers: "I told Kelly that the trailer bed is pretty bad and I said, 'I talked to Gary and talked to Abel Medina. And they said something was going to do something about it.' Then Kelly Rogers explained to me, 'Joe, you know, the company is pretty bad shape, that we can't fix it all at one time,' he said, 'But I can promise you that I will fix it, but not all one time. Maybe 1 month or 2 months we will fix one or two. I will get it all in shape.' I said, 'that is good enough for me.' "

The General Counsel also refers to two incidents regarding Jet Valet, another company affiliated with Respondent, as evidence that Richardson actively supported employee interests in their relations with management. Apparently the employees of Jet Valet didn't have a shop steward. Richardson learned of two employee problems at Jet Valet and reported them to DeCosta. One of the problems, regarding scheduling, was resolved to the Union's satisfaction by DeCosta, Richardson, and an official of Jet Valet. The other problem involved an employee's suspension and was resolved against the employee after discussions between DeCosta, Richardson, and Rogers.

The General Counsel also contends Richardson "participated in complaining to management and the PUC that the terminal was unsafe because of congestion of freight and vehicles and several safety hazards including rear mirrors and defective brakes." In support of this allegation the General Counsel makes reference to DeCosta's testimony that he voiced complaints to Rogers that "the terminal was too stacked, there was not room enough for people to move around[7] and . . . problems of the vehicles . . . a cracked rear vision mirror, and various safety features as to the brakes, that I have complaints from the drivers . . . and . . . I did say I was going to the PUC . . . if there was not anything done about it."

The evidence supporting the General Counsel's contention that Richardson "complained that Oahu Transport employees were performing Hawaiian Hauling unit work, and caused management to stop such assignments" is that at some unkown time Richardson heard that an Oahu Transport truck was pulling one of Respondent's containers, and he asked Supervisor Lee "How come?" Lee replied, "Well, it was only for that day. The container was supposed to go out." Richardson replied, "Well, I guess, you know, don't let that happen," and Lee responded, "No, this is it."

The General Counsel also notes that Richardson "protested other disciplinary and safety matters involving employee Bright, accidents, seniority and overtime," and makes reference to the following testimony by DeCosta in support thereof:

> Q. During the period you were business agent and Richardson was the steward, did you have occasion to present any grievances?
>
> A. I think there is a distinction here. I followed up on disciplinary actions that was handed out to employees. I responded to the disciplinary actions quite a bit. We had disciplinary actions on accidents concerning a few people. We had a termination case on Mr. Bright, that I responded to. The grievances I filed were mostly verbally. These grievances concerned seniority problems or overtime, quite a bit.
>
> Q. How did you learn about these problems?
>
> A. Through Mr. Richardson.

The record shows there were three union shop stewards at Respondent's premises, Richardson, Kaeo, and Kalua. Excepting Richardson's termination, all grievances, except possibly one,[8] were settled between the parties to everyone's satisfaction at the first stage of the contractual disputes procedure, and no unfair labor practices were ever filed by either Respondent or the Union. Richardson testified on cross-examination that he had a good relationship with Rogers; that he was able to settle all grievances with Rogers on a friendly basis; that when Rogers came with Respondent in 1971, Respondent had been losing money and Rogers had put it on a paying basis and had thanked him in 1972 for his cooperation with the Union; and that he didn't have any dispute with Rogers in 1973 except for his discharge. DeCosta testified at the arbitration hearing that Respondent had a "smooth running shop on labor management relations," and that there had been an "open-

[6] Respondent and Oahu Transport are both subsidiaries of Castle and Cooke.

[7] Which DeCosta had learned from Richardson.

[8] Troche *thought* a written grievance had been filed regarding holiday pay

door policy. I could go in and talk to them about the problems." [9]

C. *Richardson's Other Activities*

1. Leave of absence

In early 1972, Richardson requested a leave of absence to attend the Golden Gloves tournament on the mainland. While Rogers expressed a reluctance to approve the leave, he did approve it since Richardson had already made arrangements and management had permitted it in the past. Rogers advised him, however, that this was the last time, and shortly thereafter posted a notice on the bulletin board to the effect that no more leaves of absence would be granted anyone unless it was of an emergency nature.

A few days prior to August 1, 1973, Richardson requested Supervisor Lee for a leave of absence so that he could work on a movie job on the island of Kauai. Richardson's reason for asking permission of Lee in place of Terminal Superintendent Medina was that he "did not see Abel Medina down on the floor around the terminal." [10] Lee failed to mention the leave of absence to Rogers, who, after noticing Richardson's absence from the floor of the terminal for several days, called Medina to see if Richardson was sick. Medina advised him that Richardson was on leave of absence and that Lee was supposed to have talked to Rogers about it. Rogers then talked to Lee and learned that Lee had indeed authorized the leave even though it was not his responsibility. Lee represented that Richardson would be gone about a month. Because of Lee's action, Rogers put him on probation and advised Lee that he might be terminated. Shortly after Labor Day (September 3) Rogers talked to Lee again and learned that Richardson had been home during the Labor Day weekend and that he might be gone another month. Rogers discussed the matter with DeCosta and expressed disappointment that Richardson had made the leave request of Lee instead of Medina. DeCosta replied that Richardson had informed him that he had "cleared it directly with" Rogers.[11] Rogers responded with the opinion that Richardson had not discussed it with him because Richardson knew that Rogers would not grant the leave of absence. Rogers asked DeCosta to contact Richardson and get him back on the job as soon as possible.[12]

On October 3, after Richardson had been away from his job over 2 months, Rogers wrote him the following letter:

> Dear Joe:
>
> We must inform you that your absence from work and the manner in which it was handled has placed the management of this company in an extremely embarrassing position with the employees of this company.
>
> We understand that you requested that Gary Lee grant you a leave of absence of approximately one month so that you could work full time on an outside job as a truck driver for some motion picture company. We are puzzled as to why you did not request this from your direct supervisor Abel Medina, Terminal Superintendent, as you have pertaining to your other requests in the past. You know very well that he is your direct supervisor and not Gary Lee.
>
> Several days had passed when we noticed you missing from work and after asking questions we then learned from Gary Lee that he had on his own, contrary to company policy, granted you the leave of absence. You know very well that had I been aware of this and the reasons involved, I would not have under any conditions granted you this leave of absence. We have just recently rejected the request of another employee to attend a three-day religious convention right here in Honolulu. The list of special favors granted to you by this company over the years is very, very long. This recent action of yours has greatly damaged the wonderful esprit de corps that we have developed these past two years among all of our employees, bargaining and non-bargaining. Both you and Gary Lee have shocked and disappointed us and serious consideration was given concerning the possibility of terminating you both.
>
> Your last day of work was August 1, 1973 and it is now October 3, 1973. This is to officially advise you that if you haven't reported to work on or before Monday, October 15, 1973, you will be terminated.
>
> We have checked with all of our management people and no one is aware of your exact address except that it is believed that you are on the island of Kauai. Therefore, we are sending this letter to your home address in hopes that it will be forwarded to you. In addition, by copy of this letter we are asking the Teamsters Union if they know your contact address and if so if they will be so kind as to forward a copy of this letter to you.

A copy was forwarded to the Union. Later in the day, Rogers added the following longhand postscript at the bottom: "Abel Medina has another letter to personally hand to you, which concerns another matter."

2. The pictures

Also on October 3, Rogers decided to remove and store one of the two desks located at the back of the terminal. One of the desks was used by Richardson and the other was a spare. Whe he inspected the desks, Rogers found displayed under the glass on Richardson's desk eight photographs which he termed as "hard-core pornography pho-

[9] It does not appear from the briefs and reply briefs to the arbitrator that evidence regarding Richardson's role as a shop steward in processing "grievances" or complaints was presented to the arbitrator. In *Electronic Reproduction Service Corporation*, 213 NLRB 758 (1974), the Board indicated its disapproval of "piecemeal litigation in which a party may well prefer to have 'two bites of the apple,' trying part of the discharge case before the arbitrator but holding back evidence material to its claim so as to be able to pursue the matter in yet another proceeding before this Board."

[10] He had requested leaves of absence from Medina on two occasions earlier in 1973.

[11] This testimony was not refuted by DeCosta.

[12] Rogers testified that he had turned down the request of other employees for leaves of absence to work on the same job.

tographs." [13] He returned to his desk, called Medina, and told him that he had never seen such "garbage" and that Medina was to remove the pictures, place them in an envelope, and return them to Rogers.[14] On the same day, Rogers wrote Richardson a second letter, which reads:

> Dear Joe:
>
> You have in our opinion violated Section 2 of our Company House Rules and Regulations. Section 2 concerns personal conduct which violates common decency or morality. You have also in our opinion violated Section 12 of our Company House Rules and Regulations which concerns the using of company equipment and or property for purposes other than company business without permission.
>
> We were absolutely shocked to find on display on the top of your desk several hard core pornography photographs of sexual orgies. This garbage has been removed from your desk after being dated and witnessed and is now under lock and key. As a working foreman and a shop steward who is supposed to set an example for the other workers, you have shocked us beyond comprehension.
>
> We believe that the Union would agree with us that this action of yours is sufficient cause for immediate termination. We have spent endless hours in deep concern and meditation concerning you personally and your problems and after much thought have decided to give you one more chance; but you must be aware that this is your final warning. We strongly recommend that you confer with your supervisor, Abel Medina, concerning your personal relationship with this company and your fellow employees. Also, during your long absence there have been many changes within our organization and it would behoove you to get on board.

The following letter, containing copies of the two October 3 letters to Richardson, was sent to the Union:

> Gentlemen:
>
> To say the least, we are completely disappointed with Joe Richardson as a working foreman and as a shop steward. We had considered several actions, including
>
> (1) Outright termination
> (2) Demotion
> (3) Requesting the Union to replace him as shop steward.[15]
>
> As you can see, we have been extremely lenient with him but must advise you that this is the end of the leniency shown to him. He has totally embarrassed us with *ALL* of our employees.
>
> Sincerely,
>
> HAWAIIAN HAULING SERVICE, LTD.
>
> Kelly Rogers
> Vice President & General Manager
>
> KR/au
>
> P.S. We have not mailed directly to Joe Richardson the warning letter concerning the hard core pornography photographs. Mr. Abel Medina, our Terminal Superintendent, will hand this letter personally to Joe if and when he returns and we are sending a copy of this letter to your office. This is a sensitive matter and out of respect for Joe's wife and children, we don't want to take the chance of someone else besides Joe opening the envelope.
>
> K. R.

A few days later, Rogers talked to DeCosta who guaranteed that Richardson would be back to work by October 15 and possibly by October 10. On Friday, October 12, Rogers instructed Medina and Sensano to go to Richardson's home, and if Richardson was there to be sure he read the two letters and understood he was to report to work. In the event Richardson was not there, they were to ask Mrs. Richardson to read the "leave of absence" letter, but under no circumstances was she to be given the letter regarding the pictures. The letters were apparently delivered to Richardson by Medina in this fashion. About 3 o'clock that afternoon, Richardson came to the warehouse. After ascertaining that Richardson had read the two letters, Rogers instructed Medina to discuss them with Richardson and to advise him of the changes that had been made in the Company since he had been gone. As Richardson wanted to talk to Rogers, arrangements were made to meet at 3:45. Instead of meeting, however, Richardson went to the union

[13] Richardson had placed three of the pictures under the glass on his desk in January 1972, and added the other five in May 1973. Of the eight, one is of the "Playboy" centerfold type, and the others depict people engaged in a variety of sex acts. Rogers denied he had seen any of the pictures prior to October 3, 1973. Richardson, on the other hand, testified that Rogers had seen the first three pictures around January or February 1972. He later changed his testimony to say that Rogers had seen them in January or February 1973. Troche testified that on an occasion when he had been to the warehouse to discuss a problem, that he, Rogers, and Medina walked to the rear of the warehouse where he stopped to get a drink of water at a water fountain located only 4 or 5 feet from Richardson's desk, and that he observed Rogers looking at the pictures on Richardson's desk. Both Rogers and Medina denied the incident, and the evidence shows convincingly that the water cooler was not 4 or 5 feet from Richardson's desk, but was in fact approximately 90 feet away. Neither Troche, Torres, nor English, all of whom the General Counsel called as witnesses in an attempt to show that Rogers had seen the pictures prior to October 1973, testified at the arbitration hearing (see reference to *Electronic Reproduction Service Corp.*, at fn. 9). I discredit Torres' testimony that Rogers had been at Richardson's desk in July or August 1973 while he and Richardson were eating lunch. Not only did Rogers deny being there, but Richardson failed to testify to such an event. I find it hard to believe that Richardson would have forgotten the incident, if it in fact happened, since it was so close to the time of his termination. Accordingly, I do not credit Torres' testimony. English also testified he had seen Rogers in the area of Richardson's desk. His testimony, however, was vague and confusing and not worthy of belief. Both Rogers and Medina testified that Richardson's desk was located in an area where some customer transactions occur, and that women and children are occasionally in the area.

[14] Rogers testified without contradiction that, in September or October 1972, he had found a 6- by 6-foot piece of plywood in a customer area, containing "probably a dozen" "Playboy" magazine pictures, and had ordered that they be taken down "and destroyed in the next 5 minutes."

[15] Sec. 15 of the collective-bargaining contract, entitled "Stewards," states in pertinent part: "The Union agrees that before designating a shop steward it will discuss his appointment with the Employer and will not appoint or continue as a shop steward any employee whom the Employer shows to be unacceptable because of irresponsibility, incompetency in his work, or any other good cause."

hall "to pay the Union 10 percent for the job the Union gave him on the other island." He returned about 5 p.m. and advised Medina that he had been "down to the Union" and was not going to meet with Rogers.

D. *The Termination*

On Monday morning, October 15, Richardson reported for work. Shortly before 8 o'clock, DeCosta came to the warehouse and told Richardson that he was going to talk to Rogers about the letter he had received regarding the "pornographic material," and wanted Richardson to accompany him. When they arrived at Richardson's office and DeCosta informed Rogers that he wanted to talk about Richardson, Rogers suggested that he and DeCosta first talk alone. DeCosta stated he wanted Richardson present, so Rogers called for Medina to come in and listen. DeCosta led off the meeting by stating that he wanted the Company to remove the warning letters from Richardson's file,[16] which Rogers declined to do. While there is some dispute between the witnesses as to exactly what was said after that, it is clear that DeCosta asked Rogers if he had ever seen the pictures before, that Rogers denied that he had, that Richardson disputed the fact and called Rogers a liar, and that Rogers terminated Richardson. Rogers admitted that he would not have terminated Richardson had the latter not called him a liar.[17] After learning that Rogers would not change his mind, DeCosta stated the Union would procede under the grievance procedure. The discharge was confirmed by letter the same day.

E. *The Arbitration*

On October 19, 1973, the Union requested, in accordance with the collective-bargaining contract, that the citywide board of adjustment be convened to hear the grievance over Richardson's termination. As the citywide board of adjustment failed to reach a majority decision, on November 5, DeCosta requested "an informal hearing for the arbitration of Mr. Joe Richardson's termination for violation of Company's house rule #2.[18] Let it be known that the Teamsters Union, Local 996, hereby strikes Mr. Stuart Cowan from the list of three (3) eligible and agreed upon arbitrators."[19]

The arbitration was held on January 16 and 17, 1974. The parties entered into the following stipulations with respect to the arbitration proceedings: 1. The Respondent and Teamsters Local 996 agreed that an informal arbitration would be conducted before C. F. Damon, Jr., Esq.,[20] to resolve a grievance filed on behalf of Richardson to grieve his discharge from Respondent on October 15, 1973. 2. That the subject grievance and all issues relating thereto were properly before the arbitrator in accordance with the provisions of the current collective-bargaining agreement between the parties, and the parties agreed to be bound by his decision, excluding any statutory remedies available. 3. That all parties received adequate notice of the time and place of the arbitration hearing, and all parties were present and represented by their respective counsel. Counsel for the Union was not a practicing member of the bar. 4. That all parties were given and exercised full opportunity to present any evidence and arguments in support of their respective positions at the hearing. 5. That Richardson and DeCosta testified in support of the subject grievance; and Rogers and Medina testified in support of Respondent's decision to discharge Richardson. 6. That John R. Desha II represented the Union at the hearing; and that Richard F. Liebman represented Respondent. 7. That all parties agreed that the arbitrator would issue a decision, that such decision would only contain his conclusions, and would not contain any comments on the evidence, and that a formal transcript was not requested or made of the testimony and arguments presented at the hearing.

The Respondent and Union each filed a brief and a reply brief with the arbitrator in support of their respective positions. The Employer's brief stated the issues to be: A. What was the basis for the decision to discharge the grievant? B. Did the grievant commit the acts for which he was discharged? C. Was discharge the appropriate penalty? D. Was the grievant acting in the capacity of an independent union steward during the meeting on October 15, 1973, and was this meeting a grievance meeting; were these alleged facts communicated to the Employer; and, would these alleged facts have immunized the grievant from any disciplinary action for his misconduct during that meeting?

The Union's brief stated the issues as: 1. Was the meeting on October 15, 1973, a "grievance meeting" within the meaning of that term and which employers and unions generally accept? 2. Was the conduct of employee in calling his employer, Kelly Rogers, a "liar" at the October 15, 1973, meeting, conduct which is afforded the protection granted by Section 7 of the National Labor Relations Act and which cannot be made the basis for discharge? 3. Can the Employer now raise past conduct, for which warning letters had been sent to employee and placed in his work records, as a basis for discharge?

The briefs and reply briefs of both of the parties recite their respective versions of the testimony and cite and

[16] Richardson testified that DeCosta stated he was there to have the pictures removed from the file.

[17] Rogers testified as follows:

> I felt that we have been extremely lenient. The sequence of events, I thought that we had really gone overboard. I had gone as far as I could in my job in dealing with the situation; and I felt the man had been given every possibility. Bear in mind I had not even suspended him for the pornography or anything, strictly a warning letter. Not even a day's suspension. Then to sit in front of a supervisor of mine and fabricate a story, calling me a liar, I felt was just absolutely the last straw, there was no way in good conscience I could tolerate that without terminating this man.

[18] The house rules provide in pertinent part: The following offenses will subject an employee to disciplinary action or discharge: 1 Insubordination or failure or refusal to obey instructions or to perform work as required or assigned. 2. Conduct which violates common decency or morality. 12. Using company equipment and/or property for purposes other than company business without permission.

[19] Sec 12 6 of the contract provides. "Stuart Cowan, Ted Tsukiyama and Frank Damon are hereby appointed as a panel of arbitrators. One (1) arbitrator shall be chosen as follows· Each party may strike one (1) name from the panel and the remaining arbitrator shall serve in the case."

[20] Damon is an attorney in Honolulu

quote extensively from a number of Board and court decisions, including *Crown Central Petroleum Corporation,* 177 NLRB 322 (1969), enfd. 430 F.2d 724 (C.A. 5, 1970), upon which the General Counsel principally relies in contending the decision of arbitrator Damon is repugnant to the policies of the Act. In addition, the employer's brief refers to several published arbitration decisions which the Union analyzed in its reply brief.

On February 26, 1974, the arbitrator issued the following:

AWARD

> This is an informal arbitration under Section 12 of the collective-bargaining agreement between the parties dated June 4, 1973.
>
> Based upon the evidence adduced at the hearing, it is the decision of the arbitrator that the discharge in question was proper. Accordingly, the grievance is denied and the action of the Employer is sustained.

F. *Contention of the Parties*

The General Counsel contends that Richardson was "discharged for his record of militancy as a steward" and that the case "is squarly [sic] and incontrovertibly governed by the leading case of *Crown Central Petroleum Corporation* . . . ." In contending the Board should not defer to the arbitrator's decision, the General Counsel calls attention to the fact no transcript of the arbitration proceedings was made and that "the arbitrator did not render an explicated decision." He claims "the Board has long held that in the absence of a showing that the arbitrator considered the statutory issue and correctly, the Board may not defer to the arbitrator's decision," and "in any event, the arbitrator's decision herein plainly is repugnant."

The Respondent contends the evidence shows that Respondent, in discharging Richardson, did not violate the Act; that the issue of whether or not Richardson's discharge was in violation of the Act was in fact presented to the arbitrator as evidenced by the briefs and reply briefs submitted to arbitrator by the respective parties, and that the Board should defer to the arbitrator's award upholding the discharge action.

G. *Conclusions*

The central issue herein is whether the Board should defer to the arbitrator's award rendered in accordance with the grievance-arbitration procedures established by the parties in the contract, or whether the award should be rejected for failure to meet the *Spielberg* requirements.[21]

The General Counsel does not claim that Richardson was inadequately represented, that the arbitration proceedings were not fair and regular, nor that the parties had not agreed to be bound. His argument that the lack of a transcript prevents me from ascertaining the evidence before the arbitrator, whether he considered the unfair labor practice issue, and if so, whether he utilized the proper standard of law in so considering the matter, is unpersuasive. As stated by the trial examiner in *W. R. Grace and Co.,* 179 NLRB 500, 505 (1969), "to adopt the view that a transcript of an arbitration proceeding is a *sine qua non* to Board deferral . . . would impose an unnecessary requirement on the parties and derogate from the full encouragement of the private settlement of disputes by adding a burdensome expense to the agreeed-on method of settlement. This is a very real consideration, as is demonstrated by the fact that in the vast majority of arbitration proceedings, no transcript is made." The parties to the arbitration had agreed that a formal transcript would not be made of the testimony and arguments presented at the hearing, and that the arbitrator's decision or award would not contain any comments on the evidence. Furthermore, the General Counsel and Respondent stipulated that the grievance and all issues relating thereto were properly before the arbitrator in accordance with the collective-bargaining contract and agreed to be bound by his decision. Moreover, the briefs and the reply briefs, submitted by Respondent and the Union to the arbitrator following the arbitration hearing, ably and cogently set forth the contending positions, and, from reading them, I have no doubt that the parties presented substantially the same evidence with respect to events leading up to and including the October 15 meeting, as was presented in this hearing, and that the arbitrator was aware and considered the unfair labor practice issue.[22] My function, then, is to determine whether the arbitrator's decision was "clearly repugnant to the purposes and policies of the Act."[23]

In *Spielberg,* the arbitration board found that the company was justified in refusing to reinstate four individuals. The matter was then fully litigated before a Board trial examiner who found that the four employees had been illegally discriminated against in violation of Section 8(a)(1) and (3) of the Act. The Board, in deferring to the arbitration award, stated "This does not mean that the Board would necessarily decide the issue of the alleged strike misconduct as the arbitration panel did. We do not pass upon that issue." Following *Spielberg,* the Board has adhered to the standard that the question of whether an arbitrator's decision is clearly repugnant to the purposes and policies of the Act "is not to be determined on the basis of whether the Board would reach the same result on the record made before an arbitrator."[24]

In essence, the question presented to me is the question presented to the arbitrator. The arbitrator denied the griev-

[21] *Spielberg Manufacturing Company,* 112 NLRB 1080 (1955).

[22] The test is not what the written decision contains, but what the arbitrator considered. *Superior Motor Transportation Co., Inc.,* 200 NLRB 892 (1972); *Terminal Transport Co.,* 185 NLRB 672 (1970). In *Spielberg,* an arbitration board voted two to one and "entered a written decision which merely states that the company was justified in refusing to reinstate the four individuals." While the arbitration board did not set forth the basis for its decision, the Board deferred to the arbitration award.

[23] The Board has long held that where an issue presented in an unfair labor practice proceeding has previously been decided in an arbitration proceeding, the Board will defer to the arbitration award if the proceedings appear to have been fair and regular, all parties had agreed to be bound, and the decision of the arbitration panel is not clearly repugnant to the purposes and policies of the Act.

[24] *Terminal Transport Company, Inc., supra* at 673

ance and sustained the action of the Respondent.[25] Were I to consider only the evidence with respect to events occurring on October 15, it may be that I would disagree with the award of the arbitrator and even conclude that the award was contrary to the holding in *Crown.* But that is not to say that the award is "clearly repugnant" to the Act, or that I would disagree with his award upon all the evidence and arguments which—it is clear from the briefs and reply briefs—were submitted to him.

In these circumstances, I shall defer to the arbitrator's decision since it is my opinion that the arbitral decision meets the *Spielberg* standards, including the requirement that the decision be not clearly repugnant to the purposes and policies of the Act. It is thus unnecessary to decide the substantive merits of the complaint, and accordingly, it should be dismissed. *Electronic Reproduction Service Corporation, supra; Granite City Steel Company,* 211 NLRB 880 (1974); *Superior Motor Transport, supra.*

[Recommended Order omitted from publication.]

[25] The General Counsel contends, however, that *Crown Central Petroleum Corp.,* "squarly [sic] governs the simple issues posed in the case and can result in but one finding—that Richardson was discharged for his protected activity." The Respondent's brief and the Union's reply brief to the arbitrator disclose that both parties presented their views on *Crown Petroleum* to the arbitrator.