Atlantic Steel Company *and* Kenneth Chastain. Case 10-CA-13634

September 28, 1979

DECISION AND ORDER

BY MEMBERS PENELLO, MURPHY, AND TRUESDALE

On December 15, 1978, Administrative Law Judge Walter H. Maloney, Jr., issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the Charging Party 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 of the Administrative Law Judge, and to adopt his findings and conclusions only to the extent consistent herewith.

Although an arbitrator had previously upheld the discharge of Kenneth Chastain for calling his supervisor a "lying s.o.b.," the Administrative Law Judge found that the arbitrator confined his decision to legal issues arising under the contract and failed to consider whether the conduct amounted to an unfair labor practice. The Administrative Law Judge found that Respondent violated Section 8(a)(1) and (3) of the Act by discharging Chastain because, at the time Chastain made the remark, he was discussing a grievance and therefore was engaged in protected concerted activity. Respondent maintains that Chastain was discharged for insubordination, and that the Board, under its *Spielberg* doctrine,[1] should defer to the arbitrator's award which upheld the lawfulness of the discharge. We agree with Respondent.

The facts, as found by the arbitrator, are relatively simple.[2]

Around 2 p.m. on November 3, 1977, employee Kenneth Chastain, during his regular work shift, approached his foreman in the production area, and asked him a question about assignment of overtime by seniority. Chastain was concerned that a probationary employee had worked overtime. Shortly thereafter, the foreman returned with an answer, also stating that he had asked all of the crew to take the overtime. Based on the testimony of four witnesses—two employees, the foreman, and Chastain—the arbitrator found that, as the foreman was walking away from the area, Chastain turned to another employee and either called the foreman a "lying son of a bitch" or stated that the foreman had told a "m— f— lie" (or was a "m— f— liar") as to whether he had asked the entire crew to work overtime. The foreman heard his statement and told Chastain to go to the office. Chastain was suspended pending discharge and thereafter terminated.

At the arbitration hearing, Chastain claimed that the foreman had been harassing him for circulating a petition concerning benefits, and that the discharge was part of that harassment. Other claimed harassment was the foreman's complaint that he was spending too long in the bathroom, and that the foreman had poked him in the chest with a finger, insisted that he wear his hardhat, and objected to his rejection of certain of Respondent's products as defective.[3] The foreman denied all of these claims except the complaint about his going to the bathroom too frequently. In any event, the arbitrator found that Chastain had not been disciplined for any of these incidents, and that Respondent did not rely on them as grounds for the discharge.

The arbitrator also noted, as conceded by both Respondent and the Union, that Chastain was discharged on the basis of his entire record, and not solely because of the incident with the foreman. In the preceding 3 years, Chastain had been suspended twice and given two warning letters. The first suspension, for poor work performance which curtailed production, was grieved but not taken to arbitration. The second suspension—which occurred only 10 months before the final incident—was for cursing in the presence of female clerks in violation of a supervisor's directive not to use such language. This suspension was grieved and taken to arbitration, whereupon the same arbitrator who issued the instant decision upheld the suspension but reduced it from 2 days to 1 day. The arbitrator also observed in the present proceeding that Chastain had a poor attendance record—32 instances of tardiness, 1 of which concerned his leaving early with no apparent excuse, and 7 unexcused absences.

Based on all of the above, the arbitrator concluded that Respondent had good cause for the discharge. He found that Chastain had properly questioned the foreman about overtime, and that the foreman had acted promptly to answer the question. The arbitrator, concluding that Chastain's obscene reaction to the supervisor was unwarranted insubordination, noted that:

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

[2] We defer to the arbitrator's factual findings for the reasons stated in *The Kansas City Star Company*, 236 NLRB 866 (1978), to wit: (1) The findings are consistent with the record evidence; (2) there are no irregularities in the proceedings; and (3) there are no facial errors in the factual findings.

We note, as discussed *infra*, that there is a factual parrallel between the contractual and unfair labor practice questions which makes the arbitrator's factual findings controlling for purposes of resolving the unfair labor practice. Indeed, the arbitrator's decision implicity resolved the unfair labor practice, and we defer to this resolution.

[3] Chastain filed five grievances claiming harassment.

> If Mitchell [the foreman] was in error in stating the entire crew had been offered the overtime, a grievance was the proper way to correct the mistake. But the use of insulting, obloquous [sic] language to other employees about their supervisor in the hearing of the supervisor cannot be regarded as "mere disrespect." On the contrary it shows a willful disregard for constituted industrial authority, a challenge to the dignity and character of the foreman, [and] a derrogation [sic] of the authority necessary to direct the working forces. Under any definition, this, in the setting it was found, constitutes insubordination.

Furthermore, the arbitrator found that any alleged harassment by Respondent played no role in the decision to discharge, since these alleged incidents were not "a causitive [sic] factor for Grievant's utterance concerning Mitchell. Grievant's language was a reaction to information supplied by Mitchell at Grievant's request. In this there was obviously disagreement, but not provocation." He also found that, while a supervisor once cursed an employee without being disciplined, that single event did not constitute a practice which would justify Chastain's language "in the circumstances where it was uttered." Finally, the arbitrator concluded that the discharge was warranted because Respondent did not discharge Chastain because of one insubordinate act. Rather, the discharge was part of a pattern of progressive discipline by Respondent, which included a prior suspension for a similar act.

Applying the analytical framework of the majority in *The Kansas City Star Company, supra,* the Administrative Law Judge refused to defer to the arbitrator's decision. He stated two reasons for refusing to defer: (1) The arbitrator had not decided the underlying unfair labor practice, and (2), alternatively, the arbitrator's conclusion, based on the facts found by the arbitrator, was not consistent with Board law.

We do not agree with the Administrative Law Judge. Rather, applying *Kansas City Star* and other *Spielberg* precedent to this case, we find that the Board should defer to the arbitrator's decision. In *Raytheon Company,*[4] cited in *Kansas City Star* and here by the Administrative Law Judge, the Board added the requirement to *Spielberg* that, in order for the Board to defer, the arbitrator must have considered the unfair labor practice in his decision. Since that time, there has been little discussion by the Board as to what this requirement means. Must the arbitrator actually discuss the unfair labor practice, or is it sufficient that he or she considered all of the evidence relevant to the unfair labor practice in determining whether the discharge was lawful under the contract? A review of the decisions shows that, while it may be preferable for the arbitrator to pass on the unfair labor practice directly, the Board generally has not required that he or she do so. Rather, it is necessary only that the arbitrator has considered all of the evidence relevant to the unfair labor practice in reaching his or her decision. For example, in *Raytheon, supra,* the Board refused to defer to an arbitrator's decision because "the arbitrator did not, and was advised that he could not, even consider evidence that protected concerted and union activities were possible causes for the discharges."[5] Accordingly, the record which was developed before an arbitrator was inadequate for resolving the unfair labor practice.

Similarly, in *Clara Barton Terrace Convalescent Center, a Division of National Health Enterprises-Delfern, Inc.,*[6] also relied on here by the Administrative Law Judge, the Board, with Members Penello and Walther dissenting, refused to defer because the arbitrator had not considered the unfair labor practice issue either explicitly *or* implicitly. Even assuming an "implicit" resolution of the alleged unfair labor practice, that "implicit decision necessarily conflicted with the Act's protection."[7] Thus, while refusing to defer in that instance, the Board recognized that the *Spielberg* doctrine could be satisfied where the arbitrator's decision *implicitly* resolved the unfair labor practice.

More recently, in *Kansas City Star, supra,* the Board, with Chairman Fanning and Member Jenkins dissenting, deferred to the findings of the arbitrator in resolving the legality of the discharge of several strikers and the subsequent rescission of the collective-bargaining agreement. On the first issue, the arbitrator not only made all of the factual findings necessary to deciding the legality of the discharges, but he also decided that the discharges did not violate the Act. On the second issue, however, he made the requisite factual findings, but he did not determine the legality of rescission under the Act. The Board nevertheless deferred to his findings with respect to *both* issues. This was because the findings were both complete and comprehensive and factually parallel to the unfair labor practice question.

In the instant case, the arbitrator's findings are also complete and comprehensive[8] and factually parallel to the alleged unfair labor practice. Thus, with re-

[4] 140 NLRB 833 (1963), enforcement denied 326 F.2d 471 (1st Cir. 1964).

[5] 140 NLRB at 886.

[6] 225 NLRB 1028 (1976).

[7] 225 NLRB at 1029.

[8] This factor distinguishes this case from *Electronic Reproduction Service Corporation; Madison Square Offset Company, Inc., and Xerographic Reproduction Center, Inc.,* 213 NLRB 758 (1974), where the Board deferred to the arbitrator's decision, even though he had not considered evidence that the employee had been discharged for union activity. That Decision, however, was effectively overruled in *Max Factor & Co.,* 239 NLRB 804 (1978), where Member Murphy expressed her disagreement with it. Chairman Fanning and Member Jenkins dissented in the original Decision.

spect to the confrontation between the supervisor and Chastain, the arbitrator considered the testimony of both participants, as well as three employees who observed the events.[9] On the basis of all of their testimony, he made a factual determination of what occurred.[10] As part of his findings, he concluded that Chastain could formally grieve his complaint about overtime, but that his questions in that regard did not justify his statements about the supervisor.

In concluding that Chastain's statements were unjustified, the arbitrator also considered Chastain's allegation that he was discharged as part of a pattern of harassment for having circulated a petition concerning benefits. He rejected this claim and found that Chastain was discharged on the basis of his entire disciplinary record, including the uttering of the obscenities about the supervisor, and not as part of any campaign of harassment. We are satisfied that the arbitrator thoroughly considered all of the evidence and made factual findings that are clearly supported by the evidence. Accordingly, we defer to his factual findings.[11]

We also disagree with the Administrative Law Judge's conclusion that deferral was not warranted because the arbitrator's conclusion was repugnant to the Act. The Administrative Law Judge stated:

> Without in any way disturbing the arbitrator's credibility findings or his factual analysis, it is clear from facts he found that this Respondent had invaded Chastain's rights under Section 7 of the Act.

According to the Administrative Law Judge, Chastain's questions about overtime constituted a grievance and protected concerted activity. Therefore, when Chastain used the term "lying son of a bitch," or "m— f— lie" (or "liar"), the Administrative Law Judge reasoned that this conduct, as a part of the *res gestae* of the grievance, was also protected. As support for this conclusion, he relied on two lines of precedent. The first group of cases[12] dealt with formal grievances or negotiating sessions which were conducted away from the production area. There, in the heat of discussion, an employee uttered an obscenity or used extremely strong language. In that context, the employee's conduct was found to be protected as part of the *res gestae*. Under the other line of precedent, represented by *Merlyn Bunney and Clarence Bunney, partners, d/b/a Bunney Bros. Construction Company*,[13] and *Interboro Contractors, Inc.*,[14] the Board concluded that an individual employee's complaint under the contract about working conditions constituted protected concerted activity. The employee in question, however, made no obscene or insulting statement.

The Administrative Law Judge cited no decisions, however, and we know of none, where the Board has held that an employee's use of obscenity to a supervisor on the production floor, following a question concerning working conditions, is protected as would be a spontaneous outburst during the heat of a formal grievance proceeding or in contract negotiations. To the contrary, the Board and the courts have recognized (as did the Administrative Law Judge in passing) that even an employee who is engaged in concerted protected activity can, by opprobrious conduct, lose the protection of the Act.[15]

The decision as to whether the employee has crossed that line depends on several factors: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice.

To reach a decision, the Board or an arbitrator must carefully balance these various factors.

Here the arbitrator considered the factors which the Board considers, and concluded that the employee's discharge was warranted and based on reasons not repugnant to the Act.[16] He noted that the incident

[9] These employees testified on behalf of the Union. Only one of them testified at the hearing before the Administrative Law Judge.

[10] Contrary to the Administrative Law Judge, the arbitrator's findings were not based on a crediting of the testimony of the supervisor. While Respondent urged the arbitrator to credit the supervisor, the arbitrator made his factual findings on the basis of the corroborated testimony of all of the witnesses.

[11] We specifically repudiate our concurring colleague's misinterpretation of our opinion herein. Contrary to his statement, we neither agree nor disagree with the arbitrator's determination—our sole consideration is whether the arbitrator passed on all relevant aspects of the matter now before us and reached a conclusion which is not repugnant to the Act, in accord with *The Kansas City Star Company, supra*.

[12] The cases cited by the Administrative Law Judge were *Thor Power Tool Company*, 148 NLRB 1379 (1964), enfd. 351 F.2d 584 (7th Cir. 1965) (grievance meeting in employer's office); and *Crown Central Petroleum Corporation* v. *N.L.R.B.*, 430 F.2d 724 (5th Cir. 1970) (grievance proceeding). He also cited *N.L.R.B.* v. *Cement Transport, Inc.*, 490 F.2d 1024 (6th Cir. 1974). In that case the court held that an employee's use of obscenity during an organizational campaign was protected. That situation is very different from the one herein.

[13] 139 NLRB 1516 (1962).

[14] 157 NLRB 1295 (1965).

[15] *Hawaiian Hauling Service, Ltd.*, 219 NLRB 765, 766 (1975).

[16] By contrast, in *Sea-Land Service, Inc.*, 240 NLRB 1146 (1979) (Member Penello dissented), Member Truesdale concurred with Chairman Fanning and Member Jenkins in finding that the arbitrator's decision on an issue similar to that presented here was repugnant to the Act. In *Sea-Land*, an employee had filed a grievance following a reprimand for his work, and then the employer disciplined him in writing for having filed the grievance. The employee was presented with the discipline letter at a meeting with the supervisors over the grievance. When the employee saw the letter, he stated:

> . . . [T]he company must be crazy if they think that they can give [me] instructions like this. [I] can stand on the highest mountain shouting anything [I] want to about the President of the United States . . . . [I] could say anything [I] wanted to anybody anytime [I] wanted to, and, Kay Miller, you must be out of your f— mind if you think you can change me.

He was summarily discharged for that outburst, and his discharge was upheld by an arbitrator. Member Truesdale refused to defer in that instance because the outburst occurred away from the production floor, it concerned a formal grievance, and, most significantly, the outburst was provoked, as

occurred on the production floor during working time (not at a grievance meeting), that the employee's question about overtime expressed legitimate concern which could be grieved, and that the supervisor had investigated and answered his question promptly; but, nevertheless, the employee had reacted in an obscene fashion without provocation and in a work setting where such conduct was not normally tolerated. He further considered the employee's past record and concluded that, considered together, this record established a reasonable basis for the discharge.[17]

We find nothing in the arbitrator's decision that is repugnant to the Act. Indeed, a contrary result in this case would mean that any employee's offhand complaint would be protected activity which would shield any obscene insubordination short of physical violence. That result would not be consistent with the Act. Accordingly, we conclude that it will effectuate the purposes of the Act to give conclusive effect to the grievance award, and, on that basis, we shall dismiss the complaint in its entirety.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the complaint herein be, and it hereby is, dismissed in its entirety.

MEMBER PENELLO, concurring:

For somewhat different reasons than my colleagues, I agree that this case should be deferred to the arbitration award which found that grievant Chastain had been discharged for cause; i.e., insubordination. The question before the arbitrator was essentially the same as the unfair labor practice issue herein; i.e., whether Chastain's conduct was so opprobrious as to make Chastain unfit for further employment. The arbitrator found that it was:

> But the use of insulting obloquous [sic] language ["m— f— liar" or "lying son-of-a-bitch"] to other employees about their supervisor in the hearing of the supervisor cannot be regarded as "mere disrespect." On the contrary it shows a willful disregard for constituted industrial authority, a challenge to the dignity and character of the foreman, a derrogation [sic] of the authority necessary to direct the working forces.

The arbitrator found that Chastain was discharged because he cursed his supervisor and that, under the circumstances, Chastain had thereby crossed the line separating acceptable from unacceptable behavior. On this basis, and this basis alone, I find that the arbitrator's award is not clearly repugnant to the purposes and policies of the Act. As the other *Spielberg* standards are not at issue, I would accordingly defer to the award. In my opinion, further consideration or analysis is neither necessary nor warranted. See my dissents in *Hawaiin Hauling Service, Ltd.*, 219 NLRB 765, 767 (1975); *Clara Barton Terrace Convalescent Center*, 225 NLRB 1028, 1029 (1976); *Ad Art, Incorporated*, 238 NLRB 1124 (1978); and *Sea-Land Service, Inc.*, 240 NLRB 1146 (1979).

My colleagues go to some length to distinguish the instant case from those cited above. Yet each case involves an arbitration award which found that the grievant had cursed a management official under circumstances in which such behavior was unacceptable. Of course there are differences in the cases, but they are differences of degree rather than kind. The only real distinction my colleagues have made is that they believe the arbitrator herein has made the right decision—that his award fully squares with Board precedent, that he applied the precise determinants of what is unacceptable behavior, and, ultimately, that his award reached a result with which they agree. My colleagues' standard for deferral is, thus, whether the award is in accord with the Act and Board precedent rather than the *Spielberg* standard of whether the award is clearly repugnant to the Act or wholly at odds with Board precedent. My colleagues' mistake, I believe, is that they first look to the unfair labor practice complaint and hearing rather than to the arbitration award. In my view, my colleagues have not "deferred" to the arbitrator's award but have "adopted" it as if the arbitrator were some sort of unofficial administrative law judge. Deferral under such a standard furthers neither the aim nor the efficient administration of the Act but encourages full litigation before the Board of deferrable disputes. Strict attention to *Spielberg* standards would, however, further the purposes of the Act by encouraging the reliance on collective-bargaining and its correlative offspring, grievance arbitration. Accordingly, I would *defer* to the arbitration award herein and dismiss the complaint in its entirety.

DECISION

A. *Statement of the Case*

WALTER H. MALONEY, JR., Administrative Law Judge. This case came on to be heard before the undersigned in Atlanta, Georgia, upon an unfair labor practice complaint,[1] issued by the Regional Director for Region 10, which al-

found by the arbitrator, by the employer's own unfair labor practice—disciplining the employee for filing a grievance. Thus, in his view, the arbitrator's result was not consistent with Board law.

[17] Member Murphy did not participate in *Sea-Land Service, Inc., supra*, and finds it unnecessary to express a position on that holding at this time.

[1] The principal docket entries in this case are as follows: Charge filed herein by Kenneth Chastain, an individual, against Respondent on May 2, *(Continued)*

leges that the Respondent, Atlantic Steel Company,[2] violated Section 8(a)(1) and (3) of the Act. More particularly, the complaint alleges that Respondent discharged Charging Party Kenneth Chastain because Chastain was engaging in concerted, protected activities and in union activities. Respondent maintains that Chastain was discharged for cursing a supervisor and that the Board, under its *Spielberg* doctrine[3], should defer to an arbitrator's award which upheld the discharge. Upon these contentions the issues herein were drawn.[4]

B. *The Unfair Labor Practices Alleged*

For many years Respondent has operated a steel fabricating plant in Atlanta, Georgia. It employs between 1,050 and 1,125 employees in its production and maintenance unit. For more than 30 years, Respondent has maintained a collective-bargaining relationship in this unit with Local 2401 of the United Steelworkers of America. Its most recent contract with the Union became effective on August 1, 1977, for 3 years. At the same time that the parties concluded a collective-bargaining agreement of general application, they also conclude a supplemental unemployment benefit plan agreement governing the same bargaining unit for the same period of time.

Respondent has maintained a supplemental unemployment benefit plan (SUB) for its unit employees, in accordance with which it was formerly obligated to contribute an amount equal to 5 cents per hour per employee up to a stated ceiling. When unit employees were laid off, the Company supplemented their unemployment compensation checks from this fund. In the winter of 1976-77, the fund went dry because of a large number of layoffs and a substantial number of short work weeks due to cold weather. As a result, Respondent posted a notice at the plant in January or February advising employees of the condition of the fund. It also discussed the problem with Union officials. The SUB fund was the subject of negotiations in the summer of 1977, in the course of which the Company agreed to an 8-cent-per-hour per employee contribution and a higher fund limitation.

Kenneth Chastain, the Charging Party in this case, started to work for the Respondent in 1973. At the time of his discharge on November 4, 1977, he was employed as a galvanizer helper in the Mill Galvanizing Department. His immediate foreman was Ruzzie Mitchell, who is familiarly known as "Rev." I credit Chastain's testimony that, in the fall of 1977, he and other employees in the Mill Galvanizing Department were unhappy about the operation of the fund, so Chastain circulated a petition at the plant, directed toward the Union, asking the Union to discuss the SUB fund problem at a union meeting. He collected about thirty signatures on the petition. I also find that his foreman, Mitchell, was aware that Chastain was circulating this petition.[5]

Chastain asserts that, during this same period of time, he was having difficulty with Mitchell, a difficulty he attributes to Mitchell's resentment of his effort in circulating a petition. Specifically, Chastain complains that Mitchell poked him in the chest while speaking to him and later bumped into him deliberately. He testified that Mitchell followed him and his Shop Steward Joe R. Garrett to the bathroom and criticized them for spending excessive amounts of time therein. Chastain also complains that Mitchell required him to place an inspection tag on a roll of fence which Chastain felt was defective, thereby making Chastain liable for a possible conduct memorandum (written reprimand) in the event that the purchaser of the fence returned it as defective. On November 2, the day before the incident which triggered his discharge, Chastain filed a grievance against Mitchell for harassment.

For its part, Respondent was less than enchanted with Chastain. During his 4-1/2 year tenure, he received disciplinary warnings for absenteeism and slowness on the job. He was also given a layoff for refusing to follow his foreman's orders respecting the use of a sledge hammer to knock certain angles in line, and another layoff for cursing in the presence of female office employees. This latter incident was taken to arbitration, at which the arbitrator upheld the Company's action while reducing the layoff from 2 days to 1 day.

On November 3, Chastain learned that a probationary employee named Cook had been given overtime by Mitchell while others, including himself, who worked under Mitchell's supervision and who had greater seniority, had been bypassed. Chastain felt that this assignment was a contract violation[6] and complained to Mitchell about his

1978; complaint issued on May 23, 1978; Respondent's answer filed on May 31, 1978; hearing held in Atlanta, Georgia, on October 17, 1978; briefs filed by the Charging Party and Respondent with the undersigned on or before November 13, 1978.

[2] Respondent admits, and I find, that it is a corporation which maintains an office and factory in Atlanta, Georgia, where it is engaged in the manufacturing of chain link fence and other steel products. During the preceeding calendar year, Respondent has shipped from its Atlanta, Georgia, place of business directly to points and places outside the State of Georgia goods and merchandise valued in excess of $50,000. Accordingly, Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Local 2401, United Steelworkers of America, AFL-CIO, is a labor organization within the meaning of Sec. 2(5) of the Act.

[3] *Spielberg Manufacturing Company*, 112 NLRB 1080.

[4] The transcript herein is hereby corrected.

[5] Mitchell was an unreliable and evasive witness. He denied at the hearing in this case that he knew Chastain was circulating a petition. He even denied knowing that the fund had run dry or that any problem had arisen concerning it. Respondent's witness Ronald J. Dervales, when pressed, admitted that Mitchell had stated at an earlier arbitration hearing that, in fact, he had been aware that Chastain had been circulating a petition on a clipboard.

[6] The contract provision relating to incidental overtime states:

> The procedure for filling day-to-day temporary vacancies involving overtime is established in accordance with the provisions of Section 6.7 of the Collectively Bargained Contract, and is applicable to the following departments and occupations where specified:
>
> • • • • •
>
> Mill Galvanizer
>
> 1. Sequence to be followed when there is an operating turn immediately preceding the turn on which the vacancy exists:
>
> (a) By an Employee performing the assignment on the turn immediately preceding the turn on which the vacancy exists.
>
> (b) By a qualified Employee from the turn immediately preceding the turn on which the vacancy exists, in the order of descending Occupational Seniority, starting with the occupation next below the vacancy. Such Employee doubling over with double on the occupation he worked the preceding turn, and the Employee scheduled to work that occupa-

loss of overtime and the assignment of overtime without regard to seniority. Mitchell said he would check up on the matter and get back to Chastain. Mitchell went to the office and spoke with Alton Beck, another foreman, and returned a few minutes later to the spot where Chastain was working. Two other employees, Shop Steward Garrett and Robert Dougherty, were also working in the same vicinity. I credit Chastain that Mitchell replied to Chastain's complaint by telling him that in fact Mitchell had asked Chastain to work overtime. Chastain denied this assertion and asked Mitchell if he had also asked all the other employees to work overtime. Mitchell replied that he had done so. Dougherty and Garrett denied Mitchell's assertion, whereupon Mitchell threw up his hands, turned, and walked away. When Mitchell had walked about 15 feet from where these employees were working, Chastain spoke to Garrett, asked if he had "gotten . . . down" what Mitchell had said, and asked Garrett if he had "heard that lying s.o.b.?"[7] Mitchell turned around and ordered Chastain to come to the office with him. Chastain insisted on being accompanied to the office by a union representative, so Mitchell agreed to permit Garrett to be present. At the office, Mitchell called a security guard. When the guard arrived, he told the guard that he was suspending Chastain, subject to discharge, for calling him "a lying s.o.b." and asked the guard to remove Chastain from the premises. The guard complied with the request.

Mitchell made a written notation of the incident in Chastain's personnel file and also reported it orally to his immediate superior, Bruce Davis, the superintendent of warehousing and shipping. On the following day, a meeting took place between Davis, Personnel Director Dervales, and Mill Superintendent Robert Mills. They reviewed the incident in question, as well as Chastain's personnel record, and thereafter they decided to discharge Chastain. Dervales testified that the decision was somewhat difficult since the Company had never before discharged an employee for cursing.[8] The Union filed a grievance over the discharge and took the matter to arbitration before James P. Whyte, a professor of law at William and Mary Law School and one of the two regular arbitrators who hear cases arising under the contract between Respondent and the Union. On January 6, 1978, Professor Whyte rendered an award upholding the discharge of Chastain. The award was based on the contract rather than upon the provisions of the Act. Professor Whyte stated that the case before him turned upon the credibility of witnesses who told divergent stories concerning the events which precipitated the discharge. He preferred Mitchell's version, found that Mitchell's recitation of the facts spelled out a case of insubordination, and decided that the Company was justified in attaching the penalty of discharge to the infraction of the contract so found because of Chastain's history of misconduct as an employee.

tion will "push up" if qualified, as will qualified Employees above him until the vacancy is filled.

(c) By an Employee qualified to perform the assignment.

[7] Chastain denies using the epithet "s.o.b." I credit Mitchell to the effect that Chastain did use that term.

[8] Unlike the arbitrator, I take it as well established that the use of profane and obscene language is commonplace among supervisors and employees alike at Respodent's plant, as indeed it is in almost any industrial setting.

C. *Analysis and Conclusions*

Normally remarks made by employees during the course of a grievance meeting or collective bargaining constitute protected activity, even though they may include profane or disrespectful language. The reason for this rule was set out by the Fifth Circuit in *Crown Central Petroleum Corporation* v. *N.L.R.B.*, 430 F.2d. 724, 731 (1970):

> It has been repeatedly observed that passions run high in labor disputes and that epithets and accusations are commonplace. 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. . . .
>
> . . . a grievance proceeding is not an audience, conditionally granted by a master to his servants, but a meeting of equals—advocates of their respective positions. . . .
>
> We seek neither to rank improprieties or epithets, nor to unnecessarily generalize for a class of cases peculiarly tied to their facts. However, within the confines of a grievance meeting, it would require severe conduct indeed to convince us that the interest of fair give and take between equal parties to bargaining could be justifiably submerged.

There is an exception to this rule for statements which are so opprobrious as to make the employee unfit for further service. In a plant where obscenity and profanity of speech are commonplace, this exception could hardly apply to Chastain's statement to Garrett about Mitchell. The fact that an employee's language is inaccurate or questions the veracity of an employer does not remove the protective mantle of Section 7 of the Act. *Walls Manufacturing Company, Inc.* v. *N.L.R.B.*, 321 F.2d 753 (D.C. Cir. 1963). Thus, calling an employer a damned liar,[9] an s.o.b.,[10] or a horse's ass[11] during a grievance discussion have been held not to be so outrageous as to destroy an employee's protection under Section 7. The Board and the courts have gone so far as to hold that strong language about an employer, uttered by an employee to other employees during the course of an organizing effort, is entitled to similar recognition and protection. *N.L.R.B.* v. *Cement Transport Co., supra.* A complaint made by an employee to a union representative for the purpose of enforcing the provisions of an existing collective bargaining agreement amounts to a grievance in the course of which statements made by the employee are entitled to statutory protection in the absence of outrageous or opprobrious language. There is no requirement that the remarks be uttered during a formal meeting, held pursuant to contract provisions, before the conditional immunity outlined above comes into play. *Interboro Contractors, Inc.*, 157 NLRB 1295 (1966); *Bunney Brothers Construction Company*, 139 NLRB 1516 (1962).

The context of the remarks for which Chastain was discharged was Mitchell's asserted misapplication or violation

[9] *Crown Central Petroleum Corp., supra.*

[10] *N.L.R.B.* v. *Cement Transport Company*, 490 F.2d 1024 (6th Cir. 1974).

[11] *Thor Power Tool Company*, 148 NLRB 1379 (1964), enfd. 351 F.2d 584 (7th Cir. 1965).

of the contract (and related written understandings) concerning manner in which overtime must be assigned. Thus, his initial remarks to Mitchell were a grievance in the generic sense of the word. On two occasions, Mitchell had assigned overtime to the least senior employee in a fourteen-member crew. Chastain, among others, was unhappy about this action.[12] When Chastain expressed his opinion that this was contract violation, Mitchell gave him a response which he found unsatisfactory, whereupon Chastain turned to his shop steward and suggested that Garrett make a note of Mitchell's reply, namely Mitchell's claim that he had offered overtime to the other members of his crew before offering it to a probationary employee. This request could have no other meaning than a suggestion to Garrett to institute a formal written grievance against Mitchell. In the course of this coversation, Chastain called Mitchell a lying s.o.b. While this expression of contempt was uttered on the floor of the plant rather than in a company office or across the table at a formally convened and structured grievance meeting, it was certainly made to express disagreement concerning a possible contract violation and as the first step in preparing to take further action to enforce the contract. Under a long line of Board and court cases cited above, Chastain was engaged in protected, concerted activity when he made the statements concerning Mitchell, and such remarks are part of the *res gestae* of this activity. Accordingly, when Respondent discharged Chastain for uttering these remarks, he violated Section 8(a)(1) and (3) of the Act.[13]

1. The deferral to arbitration

The Board has long maintained a rule that it will defer to the award of an arbitrator which arises from proceedings which are fair and regular and in which all parties have agreed to be bound by the decision, if the decision of the arbitrator is not clearly repugnant to the purposes and policies of the Act. *Spielberg Manufacturing Co., Inc., supra.* The procedural approach used by the Board in determining whether or not to defer to an award was recently explicated in Member Truesdale's concurring opinion in *The Kansas City Star Company*, 236 NLRB 866, 869 (1978).

> On the other hand, the majority's approach—used in part by my dissenting colleagues—preserves the purpose and doctrine of *Spielberg*. The majority reviews the record evidence, sees no irregularities in the proceedings and no facial errors in the arbitrator's legal conclusion to see if, on the facts he has found, it is consistent with Board law. Finding that it is, and that the arbitrator has actually considered Board law in ruling on all of the discharges—including Ellis—the majority defers to the arbitrator's decision. This approach is more consistent not only with past *Spielberg* decisions, but also with the strong labor policy which favors voluntary arbitration.

The question arising here is whether Professor Whyte's decision of January 6, 1978, is repugnant to the purposes and policies of the Act because it does not address or resolve the unfair labor practice which is at issue in this case.[14]

Beginning with *Monsanto Chemical Company*, 130 NLRB 1079 (1961), the Board has refused to defer to arbitration awards when the decision of the arbitrator fails to address and resolve the unfair labor practice allegation which is at issue before the Board. In *Raytheon Company*, 140 NLRB 883 (1963), the arbitrator addressed himself exclusively to the contract issue presented to him by the grievant and took no evidence which would permit him to evaluate the presence or absence of an unfair labor practice. The Board refused to accept his award as dispositive because he failed to undertake a resolution of the unfair labor practice which had been alleged in the Board case. Other and later cases, involving both discharges and various aspects of the statutory duty to bargain in good faith, have adopted the same rationale. *Clara Barton Terrace Convalescent Center*, 225 NLRB 1028 (1976); *Ryder Technical Institute*, 199 NLRB 570 (1972); *The Kroger Company*, 226 NLRB 512 (1976); *Alfred M. Lewis, Inc.*, 229 NLRB 757 (1977).

Where the Board has improperly deferred to arbitration awards, the courts have intervened to require it to perform its statutory duty. Thus, in *Banyard* v. *N.L.R.B.*, 505 F.2d 342 (1974), the D.C. Circuit remanded a case to the Board for determination on the merits as to whether an employee's refusal to work was protected under Section 502 of the Act, because the arbitrator failed to do so and the Board had refused to inquire into the merits of the award. In *Stephenson* v. *N.L.R.B.*, 550 F.2d 535 (1977), the Ninth Circuit remanded a case to the Board for a determination on the merits because the Board had improperly deferred to an arbitration award which was vague on the issue of whether the arbitrator had decided the unfair labor practice claim, and because "the record is bare as to whether the arbitration panel was willing or able to consider the unfair labor practice charge." 550 F.2d at 546.

If we apply Board Member Truesdale's procedural approach to the arbitration award at hand, we find that most of the evidence presented in this case was also presented to the arbitrator. We also find that the arbitrator confined his decision to legal issues arising under the contract and failed to mention, even in passing, the legal issue as to whether the facts found amounted to an unfair labor practice. Without in any way disturbing the arbitrator's credibility findings or his factual analysis, it is clear from facts he found that this

[12] In deciding this case, I intimate no opinion as to whether Chastain or Mitchell was correct concerning the merits of the dispute over the proper manner of assigning overtime.

[13] Normally, where an employee who holds no union office is discharged under these circumstances, the violation is regarded as an infringement of Sec. 8(a)(1). Where, as here, the employee is seeking to enforce the terms of a union-negotiated contract, the discharge amounts to an 8(a)(3) violation as well.

[14] The General Counsel does not argue that the arbitration proceedings were attended by any procedural irregularities. It appears from the record that Chastain requested permission of the Union to permit his own personal attorney to appear at the arbitration hearing and that the Union denied him such permission. It further appears that Chastain rejected the services of the Union's regularly retained counsel and preferred that his case be presented by the Union's business agent rather that the Union's lawyer. The denial of the right to be represented by an attorney of one's own choice, where the expense of retaining the attorney is borne by the grievant, is a serious procedural irregularity. However, it does not appear that either Respondent or the arbitrator was responsible for preventing the appearance of Chastain's lawyer, and it would be unfair to set aside an award in Respondent's favor because of something which the Union did.

Respondent had invaded Chastain's rights under Section 7 of the Act. However, the arbitrator failed to arrive at this conclusion. The Board cannot deprive employees of statutory rights by depriving them of a forum in which to redress those rights. If an arbitrator's award is to merit deference, it must own up to standards of employer conduct laid down by Congress and applied by the Board and the courts. When an award fails to meet such standards, it is repugnant to the purposes and policies of the Act. Even though it may be in consonance with the terms of a collective bargaining agreement, it cannot serve as a barrier preventing the Board from performing its statutory duty.

Upon the foregoing findings of fact, and upon the entire record herein considered as a whole, I make the following:

CONCLUSIONS OF LAW

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

2. Local 2401, United Steelworkers of America, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By discharging Kenneth Chastain because he engaged in concerted, protected activities and in union activities, Respondent herein violated Section 8(a)(1) and (3) of the Act.

4. The unfair labor practices recited above in Conclusion of Law 3 have a close, intimate, and substantial effect on the free flow of commerce within the meaning of Section 2(6) and 2(7) of the Act.

THE REMEDY

Having found that Respondent has committed certain unfair labor practices, I will recommend that it be ordered to cease and desist therefrom and to take other actions designed to effectuate the purposes and policies of the Act. As a discharge for engaging in union activities and in concerted protected activities goes to the heart of the Act, I will recommend that the Board issue a so-called broad 8(a)(1) order designed to suppress any and all violations of that section of the Act. *J. C. Penney Co., Inc.*, 172 NLRB 1270, fn. 1 (1968). The recommended order will also provide that the Respondent be required to reinstate Kenneth Chastain to his former or substantially equivalent employment and to make him whole for any loss of earnings which he may have suffered by reason of the action it took, in accordance with the *Woolworth*[15] formula, with interest thereon computed in accordance with the adjusted prime rate used by the Internal Revenue Service for tax payments. *Florida Steel Corporation*, 231 NLRB 651 (1977); *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962). I will also recommend that the Respondent be required to post a notice, advising its employees of their rights and of the remedy in this case.

[Recommended Order omitted from publication.]

[15] *F. W. Woolworth Company*, 90 NLRB 289 (1950).