Technicolor Government Services, Inc. *and* International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, AFL-CIO. Case 12-CA-11079

24 September 1985

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS DENNIS AND JOHANSEN

On 20 February 1985 Administrative Law Judge Hutton S. Brandon issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed a brief in support of the judge's decision, and the Charging Party filed a brief in answer to Respondent's exceptions and in support of the judge's decision.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions[1] and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Technicolor Government Services, Inc., Kennedy Space Center, Florida, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] The Respondent contends that the conduct of the judge in this proceeding demonstrated bias and prejudice so as to deprive the Company of its right to a fair and impartial hearing. Upon a careful examination of the judge's decision and the entire record, we are satisfied that the contentions of the Respondent in this regard are without merit.

Chairman Dotson finds it unnecessary to pass on the judge's discussion of the obligations of a successor employer.

Johnny L. Mahan, Esq., for the General Counsel.
James J. Loeffler, Esq. (Fullbright & Jaworski), of Houston, Texas, for the Respondent.
Bernard M. Mamet, Esq., of Chicago, Illinois, for the Charging Party.

DECISION

STATEMENT OF THE CASE

HUTTON S. BRANDON, Administrative Law Judge. This case was tried at Cocoa Beach, Florida, on November 8 and 9, 1984.[1] The charge was filed by International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada (the Union) on February 27, and the complaint based on the charge issued on August 15. The complaint alleged that Technicolor Government Services, Inc. (Respondent or the Company) violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act) by discharging its employee Alfred Eugene Matthieu on February 21. The sole issue presented is whether the conduct for which Matthieu was discharged constituted, in the peculiar circumstances of this case, "concerted activities for the purpose of collective bargaining or other mutual aid or protection" within the meaning of Section 7 of the Act. I find that it did.

On the entire record,[2] including my observation of the demeanor of the witnesses, and after consideration of the briefs filed by the General Counsel, Respondent, and the Union, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a corporation with an office and place of business located at Kennedy Space Center, Florida, where it is engaged in the business of providing photographic and optical services for the United States Air Force at the Air Force Eastern Test Range Facility. During the 12-month period prior to the issuance of the complaint herein, Respondent performed services valued in excess of $50,000 for the United States Air Force. The complaint alleges, Respondent's answer admits, and I find that Respondent has been at all material times an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The complaint further alleges that the Union is a labor organization within the meaning of Section 2(5) of the Act. Respondent's answer admits the allegation, and I therefore find the allegation established.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Material Facts*

In the performance of its photographic services pursuant to a contract with the Air Force, Respondent employs about 152 employees at several sites at or near Kennedy Space Center. These sites are spread over a distance in excess of 30 miles not including outlying tracking sites where employees from time to time are utilized. Respondent has for many years recognized two separate locals of the Union as representative of its employees, Locals 666 and 780. A single collective-bargaining agreement is administered by both Unions with each Union utilizing its own stewards based on work jurisdiction. The latest collective-bargaining agreement between Respondent and the locals is effective from February 15, 1982, through February 14, 1985. The Union has designated a number of stewards, including the alleged discriminatee herein, Matthieu, to assist in administering the bargaining agreement and handling grievances arising thereunder.

[1] All dates are in 1984 unless otherwise stated.

[2] Respondent's unopposed motion to correct the transcript dated December 27, 1984, is granted and received in evidence as R. Exh. 8.

In connection with the functions of the union stewards on the job, the bargaining agreement contains the following provision at section 16.4 which Respondent at hearing indicated would be relied on in its defense in this case:

> The Stewards' union activities on Company time shall fall within the scope of the following functions:
>
> (A) To consult with an employee regarding the presentation of a request, complaint, or grievance which the employee desires him to present.
>
> (B) To investigate a complaint or grievance of record after presentation to the appropriate supervisor.
>
> (C) To present a request, complaint, or grievance to an employee's immediate supervisor in an attempt to settle the matter for the employee or group of employees who may be similarly affected.
>
> (D) To meet by appointment with an appropriate supervisor or other designated representative of the Company, when necessary to adjust grievances in accordance with the grievance procedure of this agreement. The Company and the Union are in agreement that the minimum amount of time should be spent in the performance of these duties.

And section 16.5 provides:

> The steward before leaving his work station to perform any of his functions herein set forth shall request permission from his immediate supervisor and state the union business he desires to conduct on Company time. Such permission shall be immediately granted unless it should substantially interfere with operations. He shall report to his supervisor upon completing each mission.

By all record accounts, Respondent and the Union have enjoyed a good bargaining relationship for about 20 years, and it appears that neither had filed charges with the Board against the other prior to the charge which serves as the predicate for the litigation herein. This relationship has endured notwithstanding the fact that Respondent, pursuant to the Service Contract Act, 41 U.S.C. § 351, as amended, must undergo recompetition every 3 to 5 years in order to retain its contract with the Air Force for the services it provides. The recompetition is initiated by a Government issued "request for proposals" which, in effect, solicits proposals from contractors (including Respondent) for bids for future performance of Respondent's work. Respondent was scheduled to undergo recompetition in 1984, and it is within the context of this recompetition that the alleged unfair labor practice herein arises.

In contemplation of the upcoming recompetition and desirous of obtaining some concessions from the Union which could give Respondent a better position in such recompetition, Respondent's vice president and general manager Harry Van Riper on February 21 telephoned Andrew Younger, a representative of the Union and a business manager for Local 780, to discuss a meeting for the purpose of early negotiation of the collective-bargaining agreement. There is little dispute between these two men about what transpired in this telephone conversation or others between them on the same day. According to Van Riper who testified for Respondent, the first call was around 8:15 a.m. After agreeing on a meeting date, the conversation turned to a newspaper ad by Pan American for employees in certain skills indicating that that the company was going to compete against Respondent in the "recompetition." Younger responded that that reminded him that he had to get employment applications out to his members (Respondent's employees) to be completed and delivered to the bidders. Van Riper protested that that would help his competitors, but Younger replied that they had to do this since a competitor, if awarded the contract, would not consider hiring the union people if they had no applications in. Van Riper protested that it would give a competitor an advantage by being able to satisfy the Government which was interested in continuity that the competitor would be able to continue contract work with the incumbent's employees. Younger, who was in a hurry to conclude the conversation in view of a scheduled out-of-town appointment, attempted to placate Van Riper by telling him that Younger would discuss the matter with Bernard Mamet, the Union's counsel, and then would discuss it further with Van Riper. The conversation ended.

Van Riper was nevertheless not placated and a few minutes later called Younger back and told him he did not think the completion of employees' applications for competitors was a good idea. Younger responded that he would guarantee that nothing would be done with the applications and that they would not be turned in to competitors until they talked further.

Around noon the same day, Van Riper telephonically talked with his superior, Respondent's president, about the Union's securing employee applications for competitors. The president shared Van Riper's view that such applications were not in the best interests of Respondent, and suggested to Van Riper that he call Mamet. Van Riper testified he telephoned Mamet around 1 p.m., advised him of the conversation with Younger, and objected to the Union's collection of employee applications for competitors. Mamet explained there were some gray legal areas involved in these matters,[3] and referred to the

[3] As further explained in its brief, the Union, by having its members sign applications for employment by Respondent's competitors, was seeking not only to ensure continued employment for its members should Respondent be unsuccessful in the recompetition but also to increase the chances of union recognition by any successful bidder. Further, if a successor to Respondent had the applications of all Respondent's employees in hand, it would be more difficult for the successor to set the initial terms of employment of these employees without first bargaining with the Union. In this regard, the Union had recently been involved in successful litigation before a Board administrative law judge in a case having to do with another contractor at the Kennedy Space Center and the contractor's attempt to unilaterally set initial terms and conditions of employment in the face of employment applications by a majority of a predecessor's employees. See *E G & G Florida, Inc*, JD-218-84 (1984) Van Riper admitted in his testimony that Mamet in explaining the Union's position on the applications alluded to both the *E G & G* case and *Boeing Co v. Machinists*, 351 F.Supp 813 (D C M D 1972), affd 504 F 2d 307 (5th Cir 1974), which had to do with recognition and bargaining obligations of a

Continued

Union's desire not to put its "eggs all in one basket." Van Riper conceded that Mamet stated that the Union was not interested in severing any relationships with Respondent. The conversation concluded, according to Van Riper, with Mamet's assertion that he would talk to Younger about the matter.

In the meantime, Younger, who had learned around February 10 of the recompetition and who had ascertained that RCA, Pan American, Dyna Electronics, Raytheon, and E G & G were possible bidders on Respondent's contract, directed his secretary to have the employment applications of Raytheon, received by him on February 18, delivered to the Union's stewards on Respondent's job with instructions for the stewards to distribute the applications to Respondent's employees for completion and return to the Union. The instructions to the secretary were carried out the morning of February 21, with the applications distributed to the stewards through Respondent's interfacility mail. It is undisputed that Younger in his conversation with Van Riper on that morning did not tell Van Riper that this was going to be done.[4]

Younger, in his testimony for the Charging Party, related that it was his practice to closely follow the recompetition procedures. On learning of requests for proposals, he arranges to attend and does attend bidders' conferences where he advises the bidders of the fact that a job is "union" and distributes to bidders copies of the Union's contracts. He also obtains employment application forms from prospective bidders as he did herein, has them completed by incumbent employees, and returns them to the bidder. All actions in this regard are designed to cause or encourage the prospective bidder to make an early commitment that the bidder will hire a majority of the incumbent's employees if his bid is successful.

Van Riper testified that around 2:15 p.m. on February 21, he was advised by Respondent's motion picture supervisor Ed Graf that Graf had picked up some mail and packages at a mail drop and a large unsealed envelope addressed to Local 780 Steward Zan Burton at the motion picture lab had fallen open revealing a number of Raytheon applications. Graf asked for instructions and Van Riper told him to go ahead and deliver the envelope sealed to Burton but to tell Burton that if he or any other steward or anybody else distributes "competitor employer applications, they are going to be fired." That Graf followed such instructions was evidenced by a telephone call from Burton to Van Riper about 15 minutes later in which Burton stated he had gotten Van Riper's message loud and clear and that as a manager Van Riper "didn't have much choice." Van Riper further testified that about this same time he telephoned Larry Lovett, chief steward for Local 666, and gave Lovett the same message given Burton. He likewise telephoned Supervisor Jake McCombs and conveyed the identical message.

B. *The Discharge of Matthieu*

Matthieu had been employed by Respondent for approximately 20 years at the time of his discharge on February 21, and was second on Respondent's employee seniority list. He worked as photo repair technician in building 44410 under the supervision of Paul Douglas, an assistant supervisor at the time. Respondent conceded herein that Matthieu was a good employee and that Respondent found no fault with Matthieu's work.

Matthieu was a member of Local 780, was a steward for the Union in building 44410 at the time of his discharge, and was responsible for administering the bargaining agreement for an employee group in the building. According to Matthieu's testimony, he had not prior to his discharge encountered any difficulty from Respondent in connection with the performance of his duties as a steward. Respondent, through counsel at the hearing, conceded that Matthieu had engendered no animosity from Respondent in the performance of his steward duties prior to February 21.

It is undisputed that around 9:30 a.m. on February 21, Matthieu received a telephone call at his place of work from Younger's secretary telling him that she was sending him employment applications to be distributed to the membership. She asked that he pass them out to the people in his building with instructions that they be completed and returned as soon as possible. A short time thereafter, Matthieu received approximately 20 blank Raytheon applications in the interfacility mail. According to the uncontradicted and credible testimony of Matthieu, there were some additional employees working at the limited space at his workbench that day, and all the repairmen could not work at the bench at the same time. Thus, at times between 9:50 and 10:30 a.m. when bench space was not available to him, Matthieu went to other portions of the building to distribute Raytheon applications telling employees to complete them and return them to him as soon as possible. While he had not asked for or otherwise obtained supervisory permission for the application distribution, Matthieu made no attempt to hide what he was doing from his superiors. In fact, Matthieu gave an application to employee Shirlene Turbyville while within sight of Supervisor Douglas who admittedly saw the transaction but was unaware of the nature of it.

Turbyville testified for Respondent relating that shortly after Matthieu left her, and thinking that it might be improper for her to have the Raytheon application, she approached Douglas and asked him if it was all right to have it. According to Douglas' uncontradicted and credible testimony, he told Turbyville he had not seen it done before and he would check with upper management on the matter. Sometime after lunch, he inquired of his superior, Field Operations Manager P. C. Bamforth, about the matter. According to Van Riper's testimony, Bamforth advised him around 3:15 p.m. that Matthieu had been handing out applications for Raytheon. Van Riper directed that Matthieu be sent to his office.

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successor employer in the absence of hiring a majority of a predecessor's employees Van Riper further admitted that he was personally familiar with the *E G & G* case since he had attended portions of the hearing before the judge in that case in December 1983

[4] Contrary to assertions in Respondent's brief, there is no evidence to establish that Younger purposely did not tell Van Riper that this was going to be done

Matthieu testified he received the message to report to Van Riper s office about 3 20 p m Only 10 minutes earli er Matthieu had received a telephone call from Mike Hackbarth union steward for Local 780 in the still pic ture lab who told Matthieu of a call from Burton relay ing Van Riper s discharge message

It was Matthieu s testimony that when he went into Van Riper s office Van Riper in the presence of Oper ations Manager Ed Bowker said Gene what is this I hear that you are passing out applications in mass? Matthieu replied that he did not know what he meant by mass but admitted that he had distributed applications to the employees of Respondent for whom Matthieu was steward Van Riper angrily responded that he talked to Younger and Mamet and they were not going to start this crap He thereupon directed that Matthieu be fired Matthieu protested that he did not know anything about a rule about the applications until around 3 10 p m and he had passed out the applications that morning Van Riper responded that maybe next time Matthieu would think Matthieu related that Van Riper did not state an exact reason for the discharge but Matthieu was subsequently given a letter stating he was terminated for cause

Van Riper s testimony is similar but not identical to that of Matthieu regarding the discharge interview However Van Riper s testimony suggests that he an nounced Matthieu s discharge before ascertaining that Matthieu had distributed the applications on worktime According to Van Riper after announcing the discharge decision he told Matthieu that he could not stop Matth ieu from taking applications on his own time if competi tors open up offices or have off premise facilities for taking applications but he could stop Matthieu from doing it on my time

C *Arguments of the Parties*

The General Counsel takes the position that because Matthieu was following union instructions his activity was concerted and meets the test supplied by the Board in *Meyers Industries* 268 NLRB 493 (1984) requiring that to be concerted an activity must be engaged in by a representative on behalf of a group or engaged in with or on the authority of other employees Moreover the activity was protected under the Act because it was in the legitimate interests of the Union and employees to preserve their jobs In support of this proposition the General Counsel relies substantially on *Boeing Airplane Co* 110 NLRB 147 (1954) enf denied 238 F 2d 188 (9th Cir 1956) Further in taking this position the General Counsel notes that the Supreme Court stated in *NLRB v Eastex Inc* 347 U S 556 565 (1977) employees do not lose their protection under the mutual aid or protec tion clause when they seek to improve their lot as em ployees through channels outside the immediate employ ee employer relationship Although conceding that Matthieu s actions may not have been in Respondent s best interests such actions were not disloyal in the sense of constituting a direct attack intended to destroy Re spondent s business the General Counsel contends Pro ceeding from the premise that Matthieu s action was oth erwise protected the General Counsel argues that Matthieu did not lose that protection simply because the activity in issue took place on worktime In making this argument the General Counsel relies on the absence of any rules by Respondent against distribution or solicita tion on worktime and evidence that Respondent had pre viously allowed certain distributions and solicitations on worktime Moreover the General Counsel points out that Respondent only formulated its rule against the ap plication distribution after Matthieu had passed them out and then applied it retroactively to accomplish Matth ieu s discharge

The Union s position in its brief generally follows that of the General Counsel More specifically in relation to the protected activity issue the Union claims that its in terests in the application distribution were not inimical to that of Respondent On the contrary it asserts that its in terests lay in having Respondent retain its contract with the Government for only if this occurred could the Union be assured that the employees would retain their benefits under the collective bargaining agreement with Respondent A successor could not be compelled to hire Respondent s employees or to assume Respondent s col lective bargaining agreement [5] While a successor em ployer under the Service Contract Act supra could not change the employees wage rates paid by the predeces sor the employees risked the loss of other important contractual benefits such as seniority Further at risk was the substitution of Respondent with another employ er whose relationship with the Union might not be as cordial as that enjoyed by the Union and Respondent during past years

Along the same line and in further argument that the Union s action with respect to the applications was not antagonistic to Respondent s position the Union con tends that competitors received no special edge or bene fits against Respondent by virtue of the applications and claims that the applications gave the competitors far less information than that received by them through the open book Government bidding procedure In short it is contended that Respondent incurred no harm by the Union s action herein as carried out by Matthieu and Matthieu therefore should not berobbed of the protec tion of the Act

Respondent predictably argues that Matthieu s conduct was not in any respect protected and rather charac terizes such conduct at various points in its brief as rep rehensible harmful injurious disloyal indefensible and detrimental In asserting this defense Respondent claims that Van Riper had reasonable and sincere fears that the competitor applications would adversely affect Respond ent s ability to perform its contract with the Government before during and after the competitive bidding process Thus for example, the applications would allow a com petitor to entice Respondent s highly skilled employees away through lucrative employment offers at other loca tions even if the competitor was unsuccessful in the con tract bidding process Further it could put a competitor in a better position to assuage a Government concern about operation continuity subsequent to the competition

[5] See *NLRB v Burns Security Services* 406 U S 272 (1972)

by allowing the competitor to claim it had employee applications and would hire incumbent employees. Respondent argues finally in this regard that the employment applications would provide advantageous information to a competitor about Respondent's operations relative to manning and job content which would enhance the competitor's ability to better formulate technical aspects of its bid.

Contrary to its apparent position taken at the hearing, Respondent in its brief expressly disavowed any defensive reliance on section 16.4 and 16.5 of the bargaining agreement, supra, concluding that the agreement seems to apply only when a steward leaves his work station to investigate an employee complaint or handle a grievance. But in response to evidence presented by the General Counsel regarding Respondent's toleration of other worktime union activity and distributions, Respondent contends that any such activity was isolated, infrequent, and de minimis and that, in any event, such activity fell into a different category than Matthieu's which was harmful and injurious to Respondent.

Respondent takes the position that Matthieu's discharge resulted from the fact that the activity took place on worktime. Nevertheless, Respondent relying on the court's decision in *Boeing Airplane Co.*, supra, contends that even if Matthieu's activity had not taken place on worktime, it still would have been unprotected under the Act. Moreover, citing *NLRB v. General Indicator Corp.*, 707 F.2d 279 (7th Cir. 1983), Respondent contends the absence of a work rule specifically prohibiting Matthieu's conduct does not serve to preclude the legality of the discharge here since Matthieu's activity was deemed injurious to Respondent. Lastly, based on its view of the evidence, Respondent asserts that the General Counsel has failed to establish a prima facie case, and renewed in its brief its motion, initially made and denied at the hearing, that the complaint herein be dismissed.

Conclusions

In light of the long and generally cordial relationship between the parties herein, it is unfortunate that they find themselves involved in the instant litigation. And even more unfortunate is the situation of Matthieu in view of his long and admittedly good service to Respondent. Calmer and less precipitous action by Van Riper and better communication between the parties would in all likelihood have avoided the necessity for this litigation and promoted the continuation of a harmonious relationship.[6] However, the precipitous nature of Respondent's discharge of Matthieu does not serve to resolve the issue presented for precipitous action is relevant only in establishing a pretextual basis for a discharge. Pretext is not an issue here for Respondent admits the basis of the discharge and no dual motivation was involved. Outside the context of pretext considerations, the harshness of Respondent's disciplinary action is not a matter for Board concern assuming that the imposition of some degree of discipline is appropriate and not unlawful. See, e.g., *Terry Poultry Co.*, 109 NLRB 1097 (1954).

Addressing the merits of the case, and contrary to a suggestion in Respondent's brief that Matthieu's action did not constitute concerted activity because many employees and stewards did not know the purpose of the competitor applications, I have little trouble concluding that Matthieu was engaged in union and concerted activity. Matthieu was acting as a union steward pursuant to instructions of the Union and consistent with the Union's belief that the completion of the applications was in the best interests of the employees represented. A union has a duty to employees it represents to assist them in matters related to job security. Clearly, as a steward, Matthieu was acting as a representative of a group within the test for concerted activity set forth in *Meyers*, supra. Further, in accordance with the *Meyers* test, Matthieu was acting on authority of the bargaining representative and, therefore, was acting pursuant to authority of "other employees." And there can be no dispute that Van Riper was aware of the concerted nature of Matthieu's conduct, for he knew Matthieu was acting in his stewardship capacity and, based on Younger's and Mamet's remarks to him, he knew that the Union intended to have employees complete the competitor applications in order to insure to the greatest extent possible the employees' job security.

The issue of whether Matthieu's activity, even if concerted, was protected under the Act is more tedious and less easily resolved. Citation of authority is unnecessary to confirm that not all employee concerted activity is protected under the Act. As the Board said long ago in *Underwood Machinery Co.*, 74 NLRB 641 at 646 (1974), "We have never interpreted the Act to mean that it is unlawful for an employer to discipline an employee for any form of union or concerted activity, no matter how indefensible." Employees who engage in certain activity even though concerted but designed to injure their employer's business have been found to be without the protection of the Act. *NLRB v. Electrical Workers IBEW Local 1229 (Jefferson Broadcasting)*, 346 U.S. 464 (1953), affg. 94 NLRB 1507 (1951). The loss of protection is not inconsistent with but, rather, grows out of the purposes of the Act which "seeks to strengthen, rather than to weaken, that cooperation, continuity of service and cordial contractual relation between employer and employee that is born of loyalty to their common enterprise." *Jefferson Standard*, supra at 472. Thus, an employer may lawfully impose discipline for concerted employee activity which is disruptive or which impairs the maintenance of discipline generally. See *NLRB v. Blue Bell, Inc.*, 219 F.2d 796, 798 (5th Cir. 1955). See also *Southwestern Bell Telephone Co.*, 200 NLRB 667 (1972). Disrespectful epipthets directed at employers even though uttered in the context of concerted activity have been found unprotected. *Maryland Drydock Co. v. NLRB*, 183 F.2d 538 (4th Cir. 1955). And defamation by employees of an employer's product has likewise been found unprotected. *Texaco, Inc.*, 189 NLRB 343 (1971). Conduct which is considered "disloyal" to the employer may also serve to

[6] That the discharge of Matthieu adversely impacted on the bargaining relationship is demonstrated by the subsequent failure of the parties to undertake serious negotiations on Van Riper's early contract reopening request.

remove the Act's protection. *Jefferson Standard*, supra. It is axiomatic, however, that not every form of concerted activity loses protection under the Act simply because it may have an ultimate detrimental impact upon an employer. As the General Counsel's brief points out, an employee's primary strike activity is normally regarded as protected notwithstanding the fact that its purpose is to cause an employer economic harm.

Whether an activity is protected must turn on the peculiar facts in a given case, and protection may not be stripped from employees simply because their activity may include public criticism of an employer. *Misercordia Hospital Medical Center v. NLRB*, 623 F.2d 808 (2d Cir. 1980). Such conduct and the "disloyalty" inherent in it must be considered in the context of whether it was necessary to legitimate employee ends. See *Jefferson Standard*, supra.

Research reveals no cases precisely on point with the facts in the instant case. Both sides in this case cited *Boeing Airplane Co.*, supra. In that case, a Boeing employee was discharged for involvement with the union, following the failure of the union and Boeing to agree to terms on a new bargaining agreement and as a substitute for strike action, in establishing a Manpower Availability Conference designed to bring together various employers and engineer employees of Boeing for the purpose of securing other employment for such employees and enhancing the union's position in bargaining with Boeing. On these facts, the General Counsel issued a complaint alleging that the discharge was unlawful inasmuch as the employee's conduct was protected under the Act. The Board held that the employee and union's action in connection with the Conference presented only a conditional threat that some of the company's employees might resign if the company did not meet the union's bargaining demands and as such the activity was protected. In so holding, the Board distinguished *Jefferson Standard*, supra, on the premise that the conduct there found unprotected involved a direct attack upon the employer and its business unrelated to any term or condition of employment between the union and the employer. The Board rejected any contention that the conduct of the employee in *Boeing* was "indefensible" but rather concluded that it was directed toward the legitimate and protected ends of collectively broadening the employees' opportunity for employment and lessening their dependence on Boeing for employment. 110 NLRB at 151. Two Board members dissented. The Court of Appeals for the Ninth Circuit declined to enforce the Board's order in *Boeing* finding that even if the employee's actions were concerted under the Act, "the whole combination to destroy or damage the business of the employer would seem collectively disloyal and illegal." 238 F.2d at 193. In short, the court, adopting the view of the dissenting Board Members, viewed the union's action and that of the employee as having "the purpose of causing the permanent severance of the employment relationship," and that in light of that purpose such action was disloyal and unprotected.

The nature of the Union's activity and, to that extent, Matthieu's in the instant case is akin to that of the union in *Boeing*, i.e., the activity looked toward employment of the employees by another employer. Yet, the purpose of the activity in each case is starkly different. Thus, in *Boeing*, the union's activity involved was aggressive, disruptive, and damaging to the company's business. It was designed to achieve these ends in order to enhance the union's position at the bargaining table. By contrast, the Union's action in distributing the competitor applications in the instant case was purely defensive. In fact, employment through the applications, in the Union's contemplation, was to be conditioned upon Respondent's failure to succeed itself in the recompetition. Moreover, the mere fact that concerted activity looks toward employment by another employer does not rob such activity of protection. In *QIC Corp.*, 212 NLRB 63 (1974), the Board adopted the decision of the administrative law judge that a group of employees filing applications with a competitor employer did not constitute "disloyalty" within the meaning of any decided cases so as to make such conduct unprotected under Section 7 of the Act.

In all respects the Union's interest here was in the continued employment of the employees by Respondent, not the displacement of Respondent. And only if Respondent was successful in the recompetition process could the Union be assured that all its employees-members would retain their employment. That the Union was desirous of Respondent's success in rebidding is evidenced by the Union's willingness to an early reopening of bargaining agreement negotiations at Respondent's request, which negotiations, if successful, might serve to give Respondent an "edge" in maintaining its Government contract. Moreover, if those negotiations were successful (and in view of the amicable bargaining history between the parties, there is no reason to believe they would have been unsuccessful) they would have served to further solidify the interests of the Union in Respondent's continuation with the Government contract. As suggested by the Union's counsel at the hearing, an established and amicable bargaining relationship, even if imperfect, is generally to be preferred over the vicissitudes attendant to the creation of a bargaining relationship with an employer of unknown character. The Union's willingness as related by Younger to Van Riper on the morning of February 21, to withhold delivery of the completed applications to any competitor until the two had gotten together to discuss the matter also reveals that the Union was not determined to have Respondent replaced.

Nor, contrary to arguments of Respondent, does it appear that submisson of employment applications of Respondent's employees to competitors posed such an obvious and substantial threat to Respondent's business as to reveal unprotected motivations in the Union's action. As both Younger and Van Riper testified, there competition procedure is an open one with prospective bidders supplied with a substantial amount of information about the job requirements. The existence of union contracts and employee wages and fringes are made known. All equipment utilized under the contract is owned by the Government and is listed for the competitors with any questions concerning the equipment or other pertinent matters answered by the Government. Prospective bidders are even given a full tour of the facility. Accordingly, it

appears that competitors would learn little additional significant information from applications submitted by Respondent's employees. And since the applications were to be submitted to the competitors with utilization conditional upon the competitors being successful, any risk to Respondent that a competitor might siphon off Respondent's skilled employees for employment at other locations in the absence of an unsuccessful bid appears remote and purely speculative. Moreover, the Union had "guaranteed" Van Riper that the applications would not be surrendered to a competitor until Respondent had been given an opportunity to discuss the matter and voice objections. Under these circumstances, there was no threat of immediate harm to Respondent. I conclude Respondent has not demonstrated that the Union's action with respect to the competitor employee applications would result in actual harm to Respondent, or that such action would even pose a reasonable threat of harm, economic or otherwise.

Considering the foregoing, I find that the Union's motivation in its actions, and consequently Matthieu's since he had no motivation apart from the Union's, was not malicious or in any way calculated to undermine Respondent's recompetition position. Indeed, if the Union were inclined to undermine Respondent's position, it did not need competitor employment applications to do so. Knowing Respondent's operations, employee classifications, job content, and description, the Union could have supplied a competitor with such information to the extent it was not common knowledge, so the reliance on employment applications for such information would have been completely unnecessary. And it is clear in any event that the distribution of the applications here did not constitute a solicitation to quit nor was the distribution accompanied by a solicitation to quit which would remove the Act's protection.[7] In sum, in the absence of malicious intent, I conclude that Matthieu's conduct herein did not lose protection under the Act as indefensibly disloyal.

There remains the issue of whether Matthieu's conduct was nevertheless unprotected because it took place during worktime or breached a legitimate workrule. On a factual basis I am compelled to conclude that Respondent was not concerned about the time of Matthieu's distribution as opposed to the fact of such distribution. Thus, Van Riper's threat related to Graf around 2:15 p.m. for relay to Zan Burton was that if Burton "or any other steward or anybody distributes other competitor employee applications, they are going to be fired. And Van Riper testified that he told union steward Lovett that if any of his people handed out applications for competitors they would be fired. In neither instance did Van Riper limit his threat to distributions on worktime. This coupled with Van Riper's own testimony indicating that he announced the discharge of Matthieu before ascertaining that the distribution occurred on worktime, warrants the conclusion here reached that the time of distribution was immaterial to Van Riper and that Matthieu would have been discharged even if the distributions took place on nonworktime.[8] It follows that if Matthieu's conduct was otherwise protected, and I have found above that it was, the discharge was violative of Section 8(a)(1) and (3) of the Act as alleged by the General Counsel. I so conclude.

I would reach this same result even if I were to find that the discharge was based on the fact that Matthieu's distribution of the applications took place on worktime. This is because Respondent admittedly had no rules in effect specifically barring distributions or solicitations on worktime. The only rule Respondent had was the one imposed by Van Riper after the fact of Matthieu's distribution of the applications. In addition, evidence was presented herein that reveals, and I conclude, that Respondent followed a rather relaxed policy regarding union distributions on worktime.[9] Under these circumstances, and since Respondent does not now rely on section 16.4 and 16.5 of the bargaining agreement as a defense herein, it must be concluded, and I so conclude, that Matthieu was breaking no announced employer rule at the time he was engaged in the distribution of the applications. Accordingly, his activity cannot, therefore, be found to be unprotected due to breach of a reasonable employer rule barring such activity.

As stated by the court in *Caterpillar Tractor Co. v. NLRB*, 230 F.2d 357, 358 (7th Cir. 1956):

> [T]he protective mantle of Section 7 [of the Act] is tempered by the employer's right to exact a day's work for a day's pay and to maintain discipline, and does not reach activities which inherently carry with them a tendency toward, or likelihood of, disturbing efficient operation of the employer's business.

Thus, even in the absence of an announced rule against the specific conduct here involved or against employee distributions and solicitations generally on worktime, an employer is free to take remedial action in order to maintain discipline, production, and efficient operations. However, in such cases, it is not enough to show that the union activities of the employee disciplined took place on worktime. Rather, the employer must show that the employee's activities were actually disruptive or tended to interfere with efficient operations. Cf. *Green-*

[7] In this respect, the case is distinguishable from the Board's decision in *Clinton Corn Processing Co.*, 194 NLRB 184 (1971), where such solicitation was found to be unprotected

[8] Substantially for these same reasons I credit Matthieu where his testimony contradicts that of Van Riper concerning the discharge interview Moreover, Matthieu, who impressed me as a candid witness with a vivid recall of the discharge interview, attributed no comment to Van Riper inquiring about, or demonstrating concern for, whether the distribution took place on worktime

[9] In reaching this conclusion I find it unnecessary to outline all the evidence regarding such distributions and solicitations presented in testimony of witnesses for the General Counsel, some of which was contradicted by Respondent's witnesses I am not persuaded that the distributions and solicitations related by the General Counsel's witnesses were as widespread or frequent as they would have me believe Nevertheless, that some instances of union distributions took place on worktime was conceded by Respondent's supervisors Jake McCombs, Jim Collins, and Paul Douglas, even though such activity was claimed to be sporadic and infrequent Douglas candidly admitted that he knew union dues were collected by stewards on worktime and receipts distributed No disciplinary action was ever taken

tree Electronics Corp., 176 NLRB 917, 919 (1969). For several reasons, I am not satisfied that Respondent has here shown Matthieu's actions disrupted, or tended to disrupt, his own or the work of other employees. First, Van Riper conducted no inquiry into whether Matthieu had interfered with his own work or that of other employees before he decided on and effectuated Matthieu's discharge. This was in keeping with his announcement that *any* employee distribution of competitor applications would result in discharge. Second, Matthieu's uncontradicted and otherwise credible testimony was that he distributed the applications only during the time he did not have access to the test bench where he could perform his work. Thus, the distributions did not interfere with his own work. Third, there was no evidence that he actually interfered with the work of other employees. Although the record shows that Turbyville questioned Supervisor Douglas about the propriety of the application given her by Matthieu, there was no indication that their receipt of the application or her inquiry of Douglas was disruptive of her work. Her work station was adjacent to or near that of Douglas. Fourth, Douglas evidenced no concern about whether Matthieu's conduct was disruptive. That Matthieu's action was not disruptive or obviously inappropriate is revealed by Douglas' inability to give Turbyville an immediate response about the propriety of Matthieu's conduct.

In summary, I conclude that the General Counsel has established by a preponderance of the evidence that Matthieu was engaged in union and protected concerted activity under the Act, and that such activity under the peculiar circumstances of this case did not lose its protection as being so disloyal to Respondent as to be indefensible. Accordingly, and because Respondent has not established that Matthieu breached any employee rules of conduct justifying his removal from the Act's protection or that Matthieu's discharge was otherwise necessary to maintain discipline and prevent disruptions to its orderly operations, I conclude Respondent violated Section 8(a)(3) and (1) of the Act as alleged in discharging Matthieu. It follows from this conclusion that Respondent's motion to dismiss the complaint renewed in its brief lacks merit and must be denied.[10]

CONCLUSIONS OF LAW

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

2. The Union, International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. By discriminatorily discharging Alfred Eugene Matthieu on February 21, 1984, Respondent engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find it necessary to order it to cease and desist and to take certain affirmative action designed to effectuate the purposes of the Act.

Having found that Respondent discriminatorily discharged Alfred Eugene Matthieu, it will be recommended that Respondent be ordered to reinstate Matthieu and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of his discharge to the date of a proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *Florida Steel Corp.*, 231 NLRB 651 (1977).[11] Consistent with the Board's decision in *Sterling Sugars*, 261 NLRB 472 (1982), it will also be recommended that Respondent be required to expunge from its files any reference to the discharge of Alfred Eugene Matthieu and notify him in writing that this has been done and that evidence of the unlawful discharge will not be used for future personnel action against him.

The Union's request in its brief for an award of its costs and expenses against Respondent based on Board principles expressed in *Autoprod, Inc.*, 265 NLRB 331 (1982), and *Tiidee Products*, 194 NLRB 1234 (1972), is denied. Respondent's position in this case was not so frivolous as to warrant a *Tiidee*-type award nor has Respondent displayed a long history of intransigence and violations of the Act so as to justify an award under *Autoprod.*

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[12]

ORDER

The Respondent, Technicolor Government Services, Inc., Kennedy Space Center, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for involvement in activity on behalf of International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, AFL-CIO or any other labor organization.

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

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

(a) Offer Alfred Eugene Matthieu immediate and full reinstatement to his former job or, if that job no longer

[10] Although mooted by this result, Respondent's request in its brief for reimbursement for costs and attorney's fees would in any event have to be denied as untimely for not having been filed in accordance with the provisions of the Equal Access to Justice Act, 5 U.S.C. § 504 and Sec. 102.143 of the Board's Rules and Regulations.

[11] See generally *Isis Plumbing Co*, 138 NLRB 716, 716-721 (1962)

[12] If no exceptions are filed as provided by Sec 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

exists to a substantially equivalent position without prej udice to his seniority or any other rights or privileges previously enjoyed and make him whole for any loss of earnings and other benefits suffered as a result of the dis crimination against him in the manner set forth in the remedy section of this decision

(b) Remove from its files any reference to the unlawful discharge of Alfred Eugene Matthieu and notify him in writing that this has been done and that the discharge will not be used against him in any way

(c) Preserve and on request make available to the Board or its agents for examination and copying all pay roll records social security payment records timecards personnel records and reports and all other records nec essary to analyze the amount of backpay due under the terms of this Order

(d) Post at its facilities at Kennedy Space Center Flor ida copies of the attached notice marked Appendix [13] Copies of the notice on forms provided by the Regional Director for Region 12 after being duly signed by Re spondent s authorized representative shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted Reasonable steps shall be taken by Respondent to ensure that the notices are not altered defaced or cov ered by any other material

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Re spondent has taken to comply

[13] If this Order is enforced by a Judgment of a United States Court of Appeals the words in the notice reading Posted by Order of the Na tional Labor Relations Board shall read Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the Nation al Labor Relations Board

APPENDIX

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

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

Section 7 of the Act gives employees these rights

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

WE WILL NOT discharge or otherwise discriminate against any of you for involvement in activities on behalf of International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada AFL-CIO or any other labor organi zation

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

WE WILL offer Alfred Eugene Matthieu immediate and full reinstatement to his former job or if that job no longer exists to a substantially equivalent position with out prejudice to his seniority or other rights and privi leges previously enjoyed and WE WILL make him whole for any loss of earnings and other benefits resulting from his discharge less any net interim earnings plus interest

WE WILL notify Alfred Eugene Matthieu that we have removed from our files any reference to his discharge and that the discharge will not be used against him in any way

TECHNICOLOR GOVERNMENT SERVICES INC