Consumers Power Company *and* Michigan State Utility Workers Council, AFL-CIO. Case 7-CA-20060

13 November 1986

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS JOHANSEN AND STEPHENS

On 14 January 1983 Administrative Law Judge Richard H. Beddow Jr. issued the attached decision. The Respondent filed exceptions and a supporting brief.

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 brief and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.[2]

The judge concluded the Respondent violated Section 8(a)(1) by discharging employee Robert Knight because Knight protested unsafe working conditions. We agree with the judge's conclusion, but only for the following reasons.

Those facts that are fully set forth in the judge's decision are only briefly summarized below. We also take note of certain additional facts which are supported by uncontroverted evidence in the record.

The Respondent provides natural gas and related products to customers in Grand Rapids and other Michigan cities. Robert Knight is one of 10 metermen assigned to the Respondent's Grand Rapids facility. Knight is supervised by Region Meter Services Supervisor Stuart Currie.

The Respondent held weekly meetings with its metermen. Customer violence and other safety issues were frequently discussed at those meetings. Among the incidents discussed was an instance in 1977 or 1978 in which a customer broke employee Ed Podell's arm. Employee Harvey Snyder told those present at the meeting that he was "a little upset." He said he thought he deserved to be protected from those kinds of incidents but now knew he was not. He stated: "[I]t was really the first time I had found out going into a place, being alone, that I do not have protection . . . ."

Employees also learned at these weekly meetings that in 1979 a customer "took a hammer to" an employee's car, and a meterman later was sent to the customer's home with police protection to restore the customer's gas service.

In May 1981[3] a customer telephoned the Respondent and threatened to hit Robert Knight over the head and "throw" him "down the basement." Knight first learned about this incident after returning to the Respondent's facility, and he discussed it at a weekly meeting. Knight then learned that another meterman had been threatened by the same customer, but that the Respondent never noted the customer's records so that other metermen would be forewarned. Knight told Supervisor Currie that a notation should have been made concerning the incident.

According to Currie, when an employee reports he or she has been threatened, Currie files a "property protection form." The threat is then permanently recorded in the Respondent's records so that any later work order for that customer is coded to indicate "threats of violence." Currie indicated, "that way we can protect our people from going into an unsafe condition." Currie testified, however, he could not recall a property protection form being filed while he was supervisor based on violent incidents the metermen reported before 12 June 1981. No other evidence was introduced indicating property protection forms were filed before Currie became a supervisor. According to employee Snyder, employees believed that the Respondent would "prosecute" if a "vehicle is involved." But, "if it involves you, a big part of it, you are on your own."

On 10 June 1981 the Respondent assigned Robert Knight to exchange a broken gas meter at a home on Alba Street in Grand Rapids. When Knight arrived at the address, the customer ordered Knight not to go beyond the sidewalk. After Knight persuaded the customer to allow him to check the numbers on her meter, he explained to her that he was there to change the meter because the glass was broken. The woman then told Knight "the power company said it is supposed to be that way." According to Knight, the woman "had a wide-eyed look and flashing eyes," and he thus concluded "there was something wrong with the woman, either she had been drinking or was high on drugs or crazy or whatever." He then returned to his truck and called his dispatcher, who told

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd 188 F 2d 362 (3d Cir 1951). We have carefully examined the record and find no basis for reversing the findings.

No exceptions were filed to the judge's finding that he should not defer to an arbitrator's decision reducing employee Robert Knight's discharge to a 75-day disciplinary layoff.

[2] We shall modify the recommended Order to conform to our conclusions

[3] All dates are 1981 unless otherwise indicated

Knight to leave the area. As Knight drove away from the customer's home, the customer made a fist and took a swing at the truck. Knight later called the dispatcher and told her that if she sent another meterman to that address, the meterman should have police protection.

That evening, Knight told Supervisor Currie what had happened to him. Currie asked Knight if he "felt threatened in any way." Knight said, "No." Currie then asked Knight if he "in any way receive[d] a threat from this lady." Knight again said, "No."[4] According to Currie, had Knight told him he had been threatened, Currie would have filed a property protection form about the incident.

On 12 June Currie had employee Tom Young dispatched to the Alba Street address initially without police protection. When Young attempted to replace the meter, the customer kicked him. Currie later sent Young back to that address with police protection.

Knight had heard Young dispatched to Alba Street on his truck radio. When Knight returned to the Respondent's Grand Rapids facility that evening, he asked Young if he had police protection when he went to Alba Street that day. Young said he had not been given police protection until after the customer kicked him.

According to Knight, he got "kind of hot under the collar" because his warning had gone unheeded. He told Young, "[C]ome on Tom, we had better go and get supervision in on this before somebody gets killed." Knight and Young then approached Supervisor Currie, who was talking to employee Ed Podell.

Earlier that day, Young had helped revive a child who had been in a motorcycle accident and Young began his discussion with Currie by telling him about this incident. When Young finished, Currie asked Young what happened when he went to replace the broken meter on Alba Street. Knight then interrupted and said, "God damn you, Stuart, why did you send him out there without police protection?" or "[W]hy in the hell didn't you give Tom police protection over on Alba Street[?] . . . Somebody is going to get killed if you don't start getting a little police protection on some of these calls."[5] At approximately this time, Young turned away and began walking toward a sink where he intended to wash blood from his hands.

According to Knight, Currie said, "I'll take care of it," moving his hands in front of Knight as if to gesture or shake a finger in Knight's face.[6] Knight said he reacted by defensively bringing his hands up between himself and Currie with fists clenched. Although Currie claimed Knight struck him, the judge found Knight did not. Podell then stepped between Knight and Currie, pushed Knight back, and said, "[L]et's cool down and take care of this Monday."

The judge found Knight was engaged in concerted activity based on the Board's decision in *Alleluia Cushion Co.*[7] Subsequent to the judge's decision, the Board overruled *Alleluia* in *Meyers Industries*,[8] setting forth a definition of "concerted activities" under which an employee will be found to have acted concertedly when he or she acts "with or on the authority of other employees."[9]

Knight clearly acted "with" Young within the meaning of *Meyers* when the two approached Currie about Young's having been sent to Alba Street without police protection. Knight also acted "on the authority of" Young because Young acquiesced in Knight's suggestion that "we had better go and get supervision in on this before somebody gets killed."

Unlike our dissenting colleague, we do not find significant the fact that Young walked away from Knight's discussion with Currie toward a sink. We do not conclude Young thus intended to repudiate Knight's assertions, nor do we conclude Young intended to indicate that he was not a party to Knight's complaint. What Young intended is subject to a number of interpretations, the most compelling of which is that Young simply intended to wash blood from his hands.

We would not, at any rate, deny Knight the protection of the Act even if Knight had approached Currie alone because we find that Knight's acts are a continuation of his and other employees' concerted activity. We find the metermen acted concertedly when they brought safety complaints to their weekly meeting with the Respondent and discussed with the Respondent how it should have reacted to violent incidents. We note in particular that the metermen, including Knight, suggested specifically that the Respondent should provide them with more protection. Thus, even if Knight had acted alone, his individual complaint would have been a

[4] Knight testified he told Currie to provide police protection to any meterman sent to the Alba Street house. Currie denied Knight told him that, and the judge did not credit one version over the other. We find it unnecessary to resolve this conflict in the testimony.

[5] Currie testified to the first version and Knight to the second. The judge did not credit one version over the other. We find it unnecessary to resolve this conflict in the testimony.

[6] Currie did not testify that he raised his hands in front of Knight's face, but the judge, crediting Knight's testimony, found Currie had done so. We adopt this finding.

[7] 221 NLRB 999 (1975).

[8] 268 NLRB 493 (1984), remanded sub nom *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 106 S.Ct. 313, 352 (1985), reaffirmed 281 NLRB 882 (1986).

[9] 268 NLRB at 497.

continuation of his and his coworkers' earlier concerted complaints at the Respondent's weekly meetings.[10]

We also cannot agree with our dissenting colleague that Currie lacked knowledge of Knight and Young's concert. Although our colleague is correct that Currie was not privy to Knight and Young's conversation before they approached Currie, Currie was aware Knight and Young approached him together. It was then Currie, not Knight or Young, who first mentioned Young's being sent to Alba Street that day and it was Knight, not Young, who responded. Young did not object to Knight's complaints about the Alba Street incident. Accordingly, we find the conclusion inescapable that Currie knew Knight and Young had approached Currie together to discuss what had happened to Young. The Respondent was, at any rate, well aware of Knight's and the other employees' concerted safety complaints at the Respondent's weekly meetings and that Knight's complaint to Currie was a continuation of that activity.

Accordingly, we find Knight was engaged in concerted activity when he approached Currie and that the Respondent knew it. Because we also find Knight acted for the employees' mutual aid or protection, we conclude Section 7 protected Knight when he approached Currie about the fact that Currie sent Young to Alba Street without police protection.

The Respondent contends and our dissenting colleague would find that the Respondent discharged Knight for assaulting his supervisor, not for "complaining about working conditions." The Board has long held, however, that there are certain parameters within which employees may act when engaged in concerted activities. The protections Section 7 affords would be meaningless were we not to take into account the realities of industrial life and the fact that disputes over wages, hours, and working conditions are among the disputes most likely to engender ill feelings and strong responses.[11] Thus, when an employee is discharged for conduct that is part of the res gestae of protected concerted activities, the relevant question is whether the conduct is so egregious as to take it outside the protection of the Act,[12] or of such a character as to render the employee unfit for further service.[13] We do not believe Knight crossed that line.

Knight raised his fists to Currie reflexively, responding to Currie's moving his hands in front of Knight as if to gesture or shake a finger in Knight's face. Knight was admittedly "hot under the collar." Nevertheless, Knight retreated when Podell intervened and, most importantly, as the judge found, never struck a blow.

The Respondent obviously did not regard Knight's similar reaction to his supervisor in January or February so inherently egregious as to warrant his discharge then. We likewise do not find Knight's later conduct so egregious as to lose the protection of the Act now.[14] We also find that his conduct was not of such a character as to render him unfit for further service. Accordingly, we find the Respondent violated Section 8(a)(1) when it discharged Knight.[15]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Consumers Power Company, Grand Rapids, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(a).

"(a) Discharging or laying off its employees for activity protected by Section 7 of the Act."

2. Substitute the attached notice for that of the administrative law judge.

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[10] See *JMC Transport*, 272 NLRB 545 fn 2 (1984), enfd 776 F 2d 612 (6th Cir 1985).

[11] See *Bettcher Mfg Corp*, 76 NLRB 526, 527 (1948), *Ben Pekin Corp.*, 181 NLRB 1025 (1970), enfd. 452 F.2d 205 (7th Cir 1971). In enforcing the Board's order in *Ben Pekin*, the court stated. "'[N]ot every impropriety committed during [Section 7] activity places the employee beyond the protective shield of the Act' and 'the employee's right to engage in concerted activity may permit some leeway for impulsive behavior'" 452 F 2d at 207 (quoting *NLRB v Thor Power Tool Co.*, 351 F 2d 584, 587 (7th Cir 1965))

[12] *Firch Baking Co*, 232 NLRB 772 (1977); *Postal Service*, 250 NLRB 4 fn. 1, 5–6 (1980)

[13] *Bettcher Mfg. Corp*, supra, 76 NLRB at 527

[14] See *E. I duPont & Co*, 263 NLRB 159, 159–160 (1982)

[15] Because we find the Respondent discharged Knight for conduct that was part of the res gestae of his protected activities and not egregious, we find it unnecessary to pass on the judge's findings that the Respondent mechanistically applied its disciplinary policy to retaliate, or otherwise retaliated, against Knight for his safety complaint to Currie See *Postal Service*, supra, 250 NLRB at 6. Because we find it unnecessary to pass on whether the Respondent retaliated against Knight, we find irrelevant the fact that Currie warned Knight in January or February to be "very careful" about raising his fists again.

The Respondent also argues that its disciplinary policy "mandat[es]" discharging Knight. The Respondent's contention is undermined in part by the fact that it did not discharge Knight in January and did not initially discharge him in June It instead agreed to permit Knight to remain in pay status until he could retire, indicating it had substantial discretion in choosing the action it could take against Knight The Respondent's disciplinary policy cannot, at any rate, lawfully "mandat[e]" that Knight be discharged in violation of Sec. 8(a)(1) Cf *Crown Central Petroleum Corp v NLRB*, 430 F 2d 724, 729 (5th Cir 1970) ("the disciplining of employees for insubordination, while certainly the right of management, is not such an inherent management prerogative as to be immune from challenge as a primary violation of § 8(a)(1)")

CHAIRMAN DOTSON, dissenting.

I cannot agree that the Respondent violated Section 8(a)(1) by discharging employee Robert Knight because I find Knight was not acting in concert with any other employee during the incident that gave rise to his discharge, and because the Respondent could not have known Knight had acted concertedly at any other relevant time. I also find that Knight was, at any rate, discharged for assaulting his supervisor, not for any reason prohibited by the Act.

Knight and employee Tom Young approached Supervisor Stuart Currie on 12 June 1981 ostensibly to complain about the fact that Currie had sent Young without police protection to a home at which Knight had earlier been threatened. Young, however, did not participate in Knight's discussion with Currie about the incident. Instead, Young began the conversation by telling Currie about how earlier in the day he had helped revive a child who had been involved in a motorcycle accident. While Knight discussed his complaint with Currie, Young turned away and began walking toward a sink where he intended to wash his hands. Knight alone told Currie, "God damn you, Stuart, why did you send [Young] out there without police protection?" or "[W]hy in the hell didn't you give Tom police protection over on Alba Street[?]" Knight also acted alone when he raised his fist to Currie after Currie said, "I'll take care of it" and moved his hands in front of Knight as if to gesture or shake his finger.

I am not convinced Young acted "with" Knight in complaining to Currie, nor am I convinced Knight acted "on the authority of" Young so as to make Knight's complaint "concerted" within the meaning of Section 7 as the Board defined it in *Meyers Industries*, 268 NLRB 493 (1984), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 106 S.Ct. 313, 352 (1985), reaffirmed 280 NLRB 1024 (1986). Young indicated little or no concern about Knight's complaint. If anything, Young demonstrated that he repudiated Knight's complaint or, at least, that he did not regard himself as party to the discussion.[1]

My colleagues find Knight acted "with" Young within the meaning of *Meyers* when the two approached Currie about Young's having been sent to Alba Street without police protection. There is, however, no way Currie could have known what Young and Knight intended when they approached him. Also, Young began his discussion with Currie by telling him of the incident in which he revived a child, not about what had happened to him on Alba Street.

The majority also finds Knight acted "on the authority" of Young because Young acquiesced in Knight's suggestion to speak to Currie about Knight's complaint. That conversation, however, did not occur in Currie's presence and my colleagues suggest no other way Currie would have learned Young authorized Knight to speak for him. While the majority contends Currie should have known Knight spoke to Young because Knight knew about the incident, the fact that they spoke does not itself suggest that Young authorized Knight to speak on his behalf.

Accordingly, I find that Knight did not act in concert with Young, and that the Respondent could not have known of Knight's concerted activities at any other time.[2]

I would, at any rate, dismiss the complaint on the ground that the Respondent discharged Knight solely for assaulting his supervisor.

The record shows Knight's 12 June 1981 threat to his supervisor was not his first. In January or February 1981 Knight and Currie argued over whether Knight received a work order over his truck radio. During their discussion, Knight turned his back to Currie. Currie touched Knight's shoulder and said: "[N]ow wait a minute friend." Knight then turned to Currie with his fists raised and said: "I am not your friend, don't call me your friend." Currie warned Knight to be "very careful about that kind of action" because "the consequences of that could be very serious."

That Knight was discharged when he again raised his fists to his supervisor on 12 June, just 4 to 5 months later, should therefore have surprised neither Knight nor the Board.

My colleagues do not find that the Respondent retaliated against Knight for his safety complaint, and my review of the record convinces me that they are correct in declining to do so. The record suggests that the Respondent was in fact receptive, not hostile, to safety complaints. It held regular weekly meetings to discuss safety issues and employees regularly raised safety complaints without reprisal. Thus, the only reasonable conclusion is that the Respondent was solely motivated by Knight's second assault on his supervisor in deciding to discharge him. As I do not believe the Act prohibits that decision, I conclude the Respondent did not violate Section 8(a)(1).

[1] See *Ontario Knife Co. v. NLRB*, 637 F 2d 840, 845–846 (2d Cir 1980)

[2] The majority also relies on *JMC Transport*, 272 NLRB 545 (1984), enfd 776 F.2d 612 (6th Cir. 1985). I dissented in that case. Circuit Judge Wellford agreed with my conclusion and dissented from the court's decision to enforce the Board's order.

APPENDIX

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

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

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

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

WE WILL NOT discharge or lay off any of you for activity protected by Section 7 of the Act.

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 Robert Knight immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges 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 him 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.

CONSUMERS POWER COMPANY

Glenn M. Price Esq., for the General Counsel.
Gregory A. Sando Esq., of Jackson, Michigan, for the Respondent.
Floyd Bergstrom, of Grand Rapids, Michigan, for the Charging Party.

DECISION

STATEMENT OF THE CASE

RICHARD H. BEDDOW JR., Administrative Law Judge. This matter was heard in Grand Rapids, Michigan, on October 12, 1982. The proceeding is based on a charge filed November 25, 1981, by Michigan State Utility Workers Council, AFL–CIO. The General Counsel's complaint alleges that Respondent Consumers Power Company of Jackson, Michigan, violated Section 8(a)(1) of the National Labor Relations Act by causing the discipline and 75-day layoff without pay of an employee because he engaged in protected concerted activity by complaining about unsafe working conditions.

At the close of the hearing the General Counsel elected to present oral arguments. Subsequently, a brief was filed by Respondent. On a review of the entire record in this case, and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is engaged in the storage, sale, and distribution of natural gas and related products. It maintains facilities in Grand Rapids, Michigan, as well as other Michigan cities, and annually has gross revenues in excess of $1 million, and receives goods and materials valued in excess of $500,000 from points outside of Michigan. It admits that at all times material it has been an employer engaged in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

The Michigan State Utility Workers Council, AFL–CIO (the Union) is now and has been at all times material a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICE

Robert Knight is 1 of approximately 10 metermen employed in Grand Rapids under the supervision of Meter Services' supervisor, Stuart Currie. Knight's position requires that he go to customer locations and turn on meters, change meters, repair meter sockets, and perform related work.

On the morning of June 10, 1981, Knight was assigned a work order to exchange a broken meter on Alba Street, pursuant to a customer request. On his arrival, the resident first ordered him not to come from the road up her driveway. He told her it was city property. She relented but then refused to let him beyond the sidewalk. He then talked her into letting him look at the meter to see if he had the correct address and he explained it was to change the meter because of broken glass. She then repeated several times that the power company had said it was supposed to be that way. Knight's observation of the women's behavior and appearance led him to believe that something was wrong with her and that she was either "crazy, drunk, or on drugs." As he got into his truck and called his dispatcher, who told him to leave the area, the woman followed him to the truck, made a fist, and took a swing at the truck as he started to leave. He moved down the street, completed his call to the dispatcher, and told the dispatcher that if another service man was sent to that address he should have police protection because the woman was crazy, drunk, or on drugs. Knight testified that at the end of the workday he also told Supervisor Currie that the woman was crazy, drunk, or on drugs and that if he sent anyone back there the meterman should be given police protection. He also

turned in a work order with a penciled notation, "The customer won't let me at meter."

Currie testified that Knight told him that the woman had said, "you cannot come on my property"; that Knight had responded that the meter was not located on her property; and the woman had backed up a few steps and drew an imaginary line and stated, "you cannot come across this line." Knight then told her that that was not her property either, and at that point he went back to the truck and left the premises.

Currie further testified he asked Knight if he had felt threatened in any way and Knight said, "no." Currie again asked, "[d]id you in any way receive a threat from this lady?" Knight again said, "no." Currie testified that he asked him these questions because, if he had received a threat, Currie would have asked him to fill out a "property protection form," which would have been used to record on that customer's permanent records the fact that a threat had been made. He further denied Knight said anything about police protection at that time. He also noted that the dispatcher did not notify him that Knight had called about the incident. He further testified that he was not aware of any property protection forms ever being issued between the time he became a supervisor in March 1978 and June 10, 1981.

On Friday morning, June 12, 1981, Knight heard on his radio that meterman Tom Young's truck was being sent to the Alba Street address. That afternoon, near 4 p.m., when both had returned to Respondent's facilities, Knight asked Young if he had police protection on the call. Young replied "[N]o, not until after [he] had been assaulted." Knight asked what had happened and was told that Young had learned a lot of new four-letter words and had been kicked by the woman. After hearing this response, Knight became "kind of hot under the collar," and said, "come on Tom, we had better go and get supervision in on this before somebody gets killed." The two approached Currie, who was talking to another employee, Ed Podell, at the telephone counter. Currie testified that Young first told him about his efforts to revive a child who had just been injured in a motorcycle accident and then, as Currie asked Young to explain what had taken place at the Alba Street address, Knight interrupted and said, "God damn you, Stuart, why did you send him out there without police protection?" Knight testified he said, "[W]hy in the hell, didn't you give Tom police protection over on Alba Street, before somebody gets killed. Somebody is going to get killed if you don't start getting a little protection on these calls." Knight testified that Currie said he would take care of it, while moving his hands up in front of him, apparently as if to gesture or shake his finger in Knight's face (Currie did not recall having shaken his finger in Knight's face). Knight testified that he then defensively brought his hands up between himself and Currie with his fist clenched. Currie then said something to the effect of: "what is meaning of this [or] we are not going to put up with this," when Podell stepped between them, pushed Knight back, and said, "lets cool down and take care of this Monday." Currie said he would see Knight Monday in his office and Knight replied, "You are damn right you will."

Currie testified that he started to explain to Knight that he had informed Young of the situation before he sent him out, but before he could finish Knight stepped close to him with his fists raised and with a flushed face, and he struck Currie in the upper left chest with his right fist as he was hollering something. Currie telephoned his superintendent, Robert Vaughn, later that evening and told him that Knight had hit him. On Monday morning Vaughn reviewed the incident with Currie and then interviewed Young and Podell. He then went to see Knight, after being informed Knight was in the training room. Knight was with several union officers, one of whom expressed his concern about Vaughn talking to Young and Podell without benefit of anybody from the Union being present. Vaughn then became agitated and said he would continue the matter under investigation.

On Wednesday morning, June 17, 1981, Vaughn informed his supervisor and other officials of the situation. They reviewed the matter and concluded that Knight had struck Currie. They further concluded that under the Employer's constructive discipline policy assault or threat of physical violence is a first-offense discharge and it was decided to suspend Knight pending further investigation. Consideration of the fact that Knight had 32 years of service and was old enough to take retirement led to a proposal that the Company consider offering Knight the opportunity of taking early retirement. This option was discussed with the Union and a formal meeting was set up in which the various persons present during the incident described what had occurred. Both union and management representatives asked questions. William R. Mills, Respondent's corporation director of union relations, who has the final authority for disciplinary matters in the Company, short of a "Presidential Hearing process," concluded that there had been an assault, a threat, and a battery. At this point, the parties directed their attention to the early retirement possibility. A recess was called, and Davis, the local union officer, and Knight talked privately.

Knight initially decided to accept the early retirement proposal and signed a agreement to that effect, however, a month later, he withdrew his request. He then was discharged, effective June 17, 1981. The discharge was appealed to arbitration where it was reduced to a 75-day disciplinary layoff by an arbitration award dated November 12, 1981.

Prior to the incidents of June 10 and 12, 1981, several events had occurred at Respondent's meter service department which have a bearing on this case. Sometime in early May 1981, Knight was threatened as he was on an assignment to South Division Street to make a collection or turn off the electricity. A customer became very irate, swore, threw the money on the floor, stood between Knight and a second floor door, and threatened to hit Knight over the head and throw him down the basement. No actual battery took place, however, the matter was discussed at the Wednesday morning meeting regularly held between the meterman and Supervisor Currie. Although Knight had not been warned of any potential problem, he learned that another meterman had been

threatened there earlier. Knight then told Currie that notations should be made on work orders if there was a threat of violence.

Knight further testified that safety matters frequently were discussed at these regular Wednesday meetings and on one occasion, shortly before Currie became supervisor, Podell had his arm broken by a customer under similar circumstances. This matter was discussed and concern was expressed over what was perceived to be a company attitude that valued property but not the safety of its workers.

Harvey Snyder, a former employee of the meter department, testified that he also was involved in an incident during the summer of 1979 that was discussed at the Wednesday meeting. The incident had involved threats, violence, and police participation. Again, employees were concerned because of a perceived feeling that the Company was leaving the employees on their own and not taking any actions to back them up.

Supervisor Currie testified that in January or February 1981 an incident occurred between himself and Knight involving a question of whether Knight had received a radio call from the dispatcher. During the incident Currie touched or tapped Knight on his left shoulder. Knight reacted by clenching and raising his hands. Nothing further occurred and Currie made a complaint or notification to his superiors; however, he did admonish Knight that he should be careful and the consequences of such actions could be very serious. Currie testified that he was aware of only two occasions when "property protection" forms had ever been filled out, one for the Young incident on June 12, 1981, and on one occasion thereafter. Currie admitted that Knight had spoken to him about safety concerns and a need for protection as a result of the South Division Street incident but denied that the situation was one where Knight had *personally* received a threat. He admitted that a phone threat was made to Respondent while Knight was on the premises, and although the dispatcher then called and asked Knight if everything was all right, he was not told until after he returned to the office that the customer had threatened to throw Knight down the stairs. No property protection form was filled out as a result of the incident.

Mills testified that as Respondent's corporation director of union relations, he was instrumental in the preparation of Respondent's disciplinary policy. This policy expression was not a negotiated document. Under one heading the policy list "Major Offences," including "2. Insubordination" and "3. Abusive language directed at a Supervisor." These offences "may require severe disciplinary action (but short of discharge) on the first occasion." Under the next heading "First-Offence Discharge," the policy states: "these are acts of misconduct of such a nature that constructive progessive discipline steps to rehabilitate the employee are inappropriate. Such acts would constitute cause for discharge on the first occasion and require no preliminary steps in progressive of discipline. Examples of these infractions would include but not be limited to: 1. Theft. 2. Assault or threat of physical violence. 3. Sabotage. 4. Curbing of meter reads."

Mills, who is a lawyer, testified that it was his "intention" in drafting the policy that Respondent define assault as "not a battery" but including "something more than a fear of someone touching. Threats themselves are not enough."

When Shepard called Mills on June 17, 1981, he expressed the conviction that Knight had struck his supervisor and they were in the process of following the disciplinary policy. Subsequently, after the initial suspension and investigation, Mills testified that it was his conclusion that "based upon our Progressive Disciplinary Policies, that whether or not the blow was struck was relatively unimportant. Our policy called for discharge, first offense, for either the assault or the threatening language. Whether or not a blow is struck was unimportant."

Knight and the Union were not told that Knight was being discharged for "assault" and "threatening remarks," and the first time that this was presented as a reason for termination was at the hearing on October 12, 1982. During the arbitration proceedings the principal subject of inquiry was whether or not Knight had struck Currie and the subject of Knight's concern over safety matters was not discussed. The arbitrator framed the issue as "was the Grievant's discharge based on just cause?" He thereafter found he could not "characterize Grievant's said action as assaultive or threatening, and without provocation by Currie" and, as noted, he awarded Knight reinstatement, subject to a 75-day disciplinary layoff.

IV. DISCUSSION

The issues in this proceeding are whether the Board should defer to the arbitrators award and whether the Respondent violated the Act by discharging or otherwise subjecting the alleged discriminatee to a disciplinary penalty. With respect to the latter issue, Respondent contends that Knight was not engaged in a concerted activity; that Knight was discharged for assaulting his supervisor and not for complaining about working conditions; and that even if Knight's conduct was concerted, it was so outrageous as to be unprotected.

A. *Nature of the Alleged Discriminatee's Conduct*

The unfair labor practice necessarily is related to Knight's having been engaged in a protected concerted activity. In *Brown & Root, Inc. v. NLRB*, 634 F.2d 816 (1981), it recently was affirmed that employee activities are protected when, as a concerted protest, they complain about and even refuse to work in what they perceive to be unsafe conditions. Moreover, it is well established that one employee's protest over safe conditions is a protected purpose and it can be considered to be a concerted activity if, as here, it directly involves the furtherance of a right which insures to the benefit of fellow employees. *Alleluia Cushion Co.*, 221 NLRB 999 (1975).

Here, the General Counsel has not only shown that Knight protested about safe working conditions that related to threats and physical attacks on himself and fellow employees, but also that employees Podell and Snyder had raised similar concerns, and that these con-

cerns were mutually discussed at regular weekly meetings between the employees and management. Accordingly, I conclude that Knight was engaged in a protected, concerted activity on June 12, 1981, when he approached Supervisor Currie with an inquiry and complaint about Respondent's failure to provide a fellow employee with police protection after Knight himself had been involved in an earlier incident at the same location.

B. *The Employee's Termination*

Knight was suspended shortly after his protest, with the anticipation that he would be discharged, inasmuch as Respondent allegedly believed that Knight had struck Supervisor Currie. Here, I find that the incident involved Knight's clenching and raising his hands in a defensive position in front of his chest as Supervisor Currie, while raising his hand and gestering in front of Knight's face, was apparently avoiding Knight's attempt to voice a complaint about safety matters. This occurred against a background where Currie previously had physically tapped Knight on the shoulder during a previous discussion only a few weeks previously.

Respondent's highest level of management investigated the incident; however, they looked only at the matter of whether an actual striking had occurred. No apparent concern was expressed by Respondent regarding possible provocation for the employee's behavior or the reasons that precipitated the incident. Although the Respondent subsequently arranged a "deal" whereby in lieu of discharge, Knight would be allowed to take an early retirement, allegedly because of his age and many years of good service, Knight withdrew his initial agreement to the arrangement. There is no indication, however, that Respondent ever considered any lesser charge or penalty than "first-offense discharge" for "assault or threat of physical violence" as a possible method of resolving the matter.

As presented in its own investigation and at the subsequent arbitration proceeding, Respondent's expressed singular concern was whether or not a striking had occurred. At the hearing, however, Respondent's most involved senior official relied on his technical definition of the term "assault" as justification for discharge. He further testified that it was his conclusion in June 1981 that: "Our policy called for discharge first offense, for either the assault or the threatening language. Whether or not a blow is struck was unimportant." This testimony presents Respondent's policy in absolute, mandatory terms. Yet Respondent's policy is actually worded, "Such acts *would* constitute cause," phraseology that is nonmandatory in nature. Moreover, "battery" is not mentioned, yet both "assault" and "threat of physical violence" are. Thus, the naming of the latter two acts would appear to be redundant if in fact the term assault was not intended to mean or embrace physical violence. Again, the term "violence" is used and not the term "contact," which would approximate what occurred in the incident of June 12.

I find that Knight's action was a reflexive reaction and that physical contact, if any, was moderate and amounted to nothing more than Knight's hand brushing against Supervisor Currie's chest. There was no attempted blow, threatening gesture, or threatening words by Knight and no other contact between the two men occurred. Respondent's reaction was to make a mechanistic application of its so-called discipline policy with an absolute intent to discharge Knight for his alleged first offense violation. Respondent made no allowance for the nonmandatory terminology in its policy that would appear to allow a balanced evaluation of all surrounding circumstances, such as the provocation by the supervisor and the insubstantial nature of the alleged assault. Moreover, Respondent could have made a justifiable attempt to pursue its right to enforce reasonable discipline in the workplace by charging Knight with its offense of "Abusive language directed at a supervisor," but instead, Respondent took a minor incident and blew it completely out of proportion, without apparent thought to circumstances or alternatives, and charged Knight with its most serious catergory of misconduct and imposed the most severe penalty possible.

I conclude that Respondent's decision to discharge Knight under these circumstances was arbitrary, discriminatory, and capricious and I infer that it would not have occurred were it not for Knight's protected, concerted protests about safe working conditions, and Respondent's desire to seize the opportunity to rid itself of an apparent troublemaker. The relied-on offense was so minor that it cannot be regarded as outrageous conduct that would vitiate the employee's protected conduct and it likewise can not be considered to be such that a justifiable discipline would be termination for a first offense. See *E. I. du Pont & Co.*, 263 NLRB 159 (1982), or suspension for 75 days, *Postal Service,* 250 NLRB 4 (1980).

Accordingly, I find that the General Counsel has met her overall burden of proof and persuasively shown that Respondent's discharge of Knight violates Section 8(a)(1) of the Act as alleged.

C. *Deferral to the Arbitrator's Award*

I find the arbitrator's decision in this matter repugnant to the purposes and policies of the Act for several reasons. First, although he found that Knight should be reinstated, he went on to penalize Knight with a 75-day disciplinary layoff, and the issue of whether Knight was engaged in protected conduct was not addressed. See *Raytheon Co.*, 140 NLRB 883 (1963), and *Suburban Motor Freight* , 247 NLRB 146 (1980). Also, although he downgraded the level of punishment to be inflicted for the incident because: "such conduct, while short of a battery, is disrespectful and threatening to supervisor at the least, and cannot be condoned," he otherwise did not evaluate any aspect of Knight's conduct as being part of the res gestae of the concerted protected activity, and not of such an extreme nature that it would likely entitle Respondent to discipline Knight under Board law. See *Firch Baking Co.* 232 NLRB 72 (1977), and *American Telephone & Telegraph Co.*, 211 NLRB 782 (1974). Accordingly, I conclude that deferral to the decision of the arbitrator, as urged by Respondent, would not be appropriate under the circumstances of this case. See also *Richmond Tank Car Co.*, 264 NLRB 174 (1982).

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By discharging Robert Knight on June 17, 1981, and by otherwise imposing a 75-day disciplinary layoff, Respondent engaged in an unfair labor practice in violation of Section 8(a)(1) of the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, it is recommended that Respondent be ordered to cease and desist therefrom and to take the affirmative action described below, which is designed to effectuate the policies of the Act.

With respect to the necessary affirmative action, it is recommended that Respondent be ordered to reinstate Robert Knight, if it has not already done so, to his former job or, if such job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed, and make him whole for any loss of earnings he may have suffered because of the discrimination practiced against him by payment to him of a sum of money equal to that which he normally would have earned from the date of the discrimination to the date of reinstatement, in accordance with the method set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977), see generally *Isis Plumbing Co.*, 138 NLRB 716 (1962), and that Respondent remove from its files any references to the discharge and suspension of Knight and notify him in writing that this had been done and that evidence of this unlawful discipline will not be used as a basis for future personnel action against him.

Otherwise, it is not considered to be necessary that a broad order be issued.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[1]

ORDER

The Respondent, Consumers Power Company, Grand Rapids, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging, suspending, or laying off any employees or otherwise discriminating against them in retaliation for engaging in protected concerted activities.

(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 Robert Knight immediate and full reinstatement and make him whole for the losses he incurred as a result of the discrimination against him in the manner specified in the remedy section.

(b) Remove from its files any reference to the unlawful discharge and notify the employee 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 payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Jackson, Michigan, facility, copies of the attached notice marked "Appendix."[2] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the 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 the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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

[1] 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.

[2] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board"