1-10-1977

Petition for Review and Application for Enforcement of an Order of the National Labor Relations Board

Lewis M. Steel '63

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 77-1239

DISTRICT 65, DISTRIBUTIVE WORKERS OF AMERICA, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

HARTZ MOUNTAIN CORPORATION, INTERVENOR

No. 77-1367

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

THE HARTZ MOUNTAIN CORPORATION, RESPONDENT

DISTRICT 65, DISTRIBUTIVE WORKERS OF AMERICA, INTERVENOR

Petition for Review and Application for Enforcement of an Order of the National Labor Relations Board

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Argued May 4, 1978

Decided September 26, 1978

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Andrew Tranovich, Attorney, National Labor Relations Board a member of the bar of the Supreme Court of Pennsylvania, *pro hac vice*, by special leave of Court with whom *John S. Irving*, General Counsel and *Elliott Moore*, Deputy Associate General Counsel were on the brief, for the National Labor Relations Board, petitioner in No. 77-1367 and respondent in No. 77-1239.

Louis M. Steel with whom *Eugene G. Eisner* was on the brief, for District 65, Distributive Workers of America, petitioner in No. 77-1239 and intervenor in No. 77-1367.

Seymour Goldstein a member of the bar of the Supreme Court of New York, *pro hac vice*, by special leave of Court with whom *Fred F. Fielding* and *James Skelly Wright, Jr.* were on the brief, for The Hartz Mountain Corporation, respondent in No. 77-1367 and intervenor in No. 77-1239.

Also *Lorin H. Bleecker* entered an appearance for petitioner in No. 77-1239.

Before BAZELON and MACKINNON, *Circuit Judges*, and JAMESON,* *Senior District Judge*.

Opinion for the court filed by *District Judge* JAMESON.

Opinion filed by *Circuit Judge* BAZELON, concurring in part and dissenting in part.

JAMESON, *District Judge*: These consolidated cases are before the court upon the petition of the National Labor Relations Board for enforcement of an order against The Hartz Mountain Corporation and the petition of District 65, Distributive Workers of America, the charging party, to review portions of the Board's order. District 65 is an

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* Of the United States District Court for the District of Montana, sitting by designation pursuant to 28 U.S.C. § 294(d) (1970).

intervenor in the N.L.R.B. petition, and Hartz is an intervenor in the District 65 petition.

Following a 58 day hearing, an administrative law judge issued his decision, comprising 179 pages, with detailed findings of fact and conclusions of law, and a recommended order. The judge found: that Hartz (1) had violated Sections 8(a)(2) and (1) of the National Labor Relations Act as amended, 29 U.S.C. § 158(a)(2) and (1), by its recognition of Local 806 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and its subsequent execution of collective bargaining agreements with that union; (2) had violated § 8(a)(3) and (1) by its mass discharge of 46 employees; and (3) had violated § 8(a)(1) by issuing disciplinary warnings and docking the pay of eight employees for engaging in a protected activity; but that (4) it had not been established that 12 other employees were discharged in violation of the Act; and (5) that two employees were discharged for good cause. The recommended order required Hartz to withdraw its recognition of Teamsters Local 806, to offer reinstatement with back pay to the 46 employees, and to reimburse District 65 for its organizational expenses and counsel fees.

The Board adopted the findings, conclusions and recommended order of the administrative law judge with two exceptions: (1) it found that the firing of the 46 employees also violated § 8(a)(3) of the Act, and (2) it deleted the provision for payment of expenses and counsel fees to District 65.

District 65 in its petition challenges only the failure of the Board to order reinstatement of the 14 employees and reimbursement of District 65 for its organizational and legal expenses. Hartz opposes the Board's petition for enforcement of its order and District 65's petition for review.

I. BACKGROUND

We summarize briefly the factual background set out in detail in the decision of the administrative law judge, adopted by the Board:

On May 11, 1973, a decertification election was conducted by the Board at Hartz' Jersey City, New Jersey plant, pursuant to which Local 888, Retail Clerk's International Association was decertified as the bargaining representative of the employees at that plant. Local 888 immediately began a campaign to obtain recertification and by August had procured over 300 authorization cards from the 400 plus employees. James Lucas, Local 888's Business Agent, contacted Hartz vice-president Gilbert Kaye and demanded recognition, offering to submit the cards for an impartial "card check". Kaye rejected this request on the ground that under the National Labor Relations Act, Hartz was free to decline to recognize a bargaining agent for its employees for a period of one year following decertification.[1]

On May 16, 1973, District 65 held a meeting attended by about 100 employees, at which an Employees Organizing Committee of 15 members was elected.[2] The Committee sponsored several employee meetings and solicited members during their free time. In addition, District 65 representatives actively campaigned outside the plant gates to attempt to attract employees to membership.[3]

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[1] Under § 9(c)(3) of the Act, 29 U.S.C. § 159(c)(3), employees may not compel a certification election in a bargaining unit in which a valid election has been held within the preceding twelve months.

[2] A petition in support of District 65, signed by over 200 employees, was received at the meeting.

[3] The representatives remained outside in apparent respect for Hartz' "no solicitation" rule. There is no suggestion, however, that Hartz ever enforced the rule against either District 65 or Local 888.

When they had procured what they thought to be a sufficient number of authorization cards, District 65 representatives contacted Hartz by mail, demanding recognition and offering to demonstrate the union's majority status. When no reply was received, District 65 representatives contacted Hartz plant manager John Petrera, who told them that any decision on recognition would have to come "from Harrison", *i.e.*, from Hartz corporate headquarters, in Harrison, New Jersey.

District 65 continued its organizational efforts and continued to await a response from Hartz.[4] On July 10, 1973, District 65 again requested recognition in a telephone conversation with Hartz' counsel. Counsel denied this request eight days later, asserting a "good faith doubt" in District 65's alleged majority status. District 65 thereafter continued its organizational activities in front of the plant. The possibility of a recognitional strike was again discussed at an employee meeting on July 25. On advice of counsel, the strike idea was discarded, and an interim hospitalization plan was set up.[5] In late August, the Employee Organizing Committee met with plant General Manager Feinberg and Personnel Manager Morales. Feinberg assured the Committee that employee problems would be cleared up in the near future. He also stated that Hartz would decline to recognize any union for one year following the decertification of Local 888.

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[4] At a meeting on June 21 the employees were advised that the decertification election precluded recognitional picketing for one year (see § 8(b)7(B) of the Act, 29 U.S.C. § 158(b)(7)(B)), but that the company could voluntarily recognize District 65 after it had established its majority status.

[5] The plan later fell through when an insufficient number of employees requested coverage.

The inability of the employees to gain recognition of a union to aid in the negotiation of a hospitalization plan and other benefits resulted in frustration among the members of the Committee. Finally in mid-November, Juan Vazquez, a member of the District 65 Committee, went "to Harrison to see about another union". On November 16, members of the Committee were allowed to leave work an hour early to discuss and meet with Teamster representatives at the home of committee member Concepcion Pastrana. On two occasions that day, Vazquez was heard to say that Hartz would not accept either District 65 or Local 888, but that International Brotherhood of Teamsters Local 806 could gain earlier recognition. At the meeting Vazquez brought in two Local 806 business agents, Calagna and Gonzales, who presented the Teamsters' case. After the business agents left, however, the Committee agreed to continue its support for District 65.

Vazquez and four other Committee members then withdrew their support for District 65 and began a campaign on behalf of Local 806. Vazquez solicited authorization cards for Local 806 on company time. He was allowed to solicit cards from new job applicants, telling them that Local 806 was the union which would represent them. Applicants were told that signature of a Local 806 card was a precondition to employment. Vazquez and the other supporters of Local 806, who included at least one supervisory employee, engaged in coercive tactics to procure cards. For example, employees were told that Local 806 was their bargaining agent, and that employees who failed to sign with Local 806 would be discharged.

On November 26, after ten days of organizational campaigning, Local 806 met with Kaye and demanded recognition. After the employees present executed a certificate that they represented the plant employees, Kaye agreed to consider the demand for recognition upon proof

of majority status. The union representatives met with Kaye, Feinberg, and Morales on November 30 to attempt to establish majority status. Calagna gave Kaye a stack of authorization cards, asserting that they represented the views of a majority of the employees.[6] Kaye did not count the cards or handle them in any way.[7] He did agree to forward a recognition agreement to the Hartz management for consideration. Hartz vice-president James O'Connor signed the agreement on December 3, again without counting the cards or otherwise verifying the alleged Teamster majority. Hartz thereafter entered into two contracts with Local 806 covering substantially all the employees in the Jersey City plant. Each contract contained union-security mandatory membership requirements.

On November 29, District 65 filed the unfair labor practice charge against Hartz, alleging that Hartz was engaged in a consistent practice of unlawful aid and support for Local 806. The charge was subsequently amended to include allegations that approximately 60 District 65 adherents were unlawfully discharged and that eight employees were wrongfully disciplined for engaging in protected activities.

II. Recognition of Local 806

The Board agreed with the conclusion of the administrative law judge that Hartz "unlawfully aided, assisted and supported" Local 806 and that Hartz' recognition of that union, when it "did not represent an uncoerced

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[6] Calagna testified, however, that at no time did he count the cards, nor did he know precisely how many employees were in the bargaining unit.

[7] Kaye testified that he declined to count the cards on the basis of Calagna's assertion that handling the cards in any way would be "tantamount to recognition" of the Teamsters. The administrative law judge discredited this testimony.

majority" of the employees, and "while substantial real questions concerning the representation" of the employees existed, was an unfair labor practice under § 8(a)(1), (2) of the Act, 29 U.S.C. § 158(a)(1), (2).[8] The Board based its conclusion on the findings that (1) Hartz supervisors solicited Local 806 membership cards; (2) Vazquez and other Local 806 adherents were allowed to solicit authorization cards on company time; (3) Local 806 organizers were given access to the plant for organizational purposes; and (4) Hartz hastily recognized Local 806 when the union did not have the support of a majority of the employees in the appropriate unit. We find substantial evidence in the record to support these findings, and agree that they justify the conclusion that Hartz' unlawful aid and support for Local 806 constitutes an unfair labor practice.

We note initially Hartz' differing responses to the organizational campaigns of the three unions. Both District 65 and Local 888 made repeated unsuccessful attempts to gain recognition as bargaining agent for Hartz' employees in the course of recognition campaigns covering several months. Both unions offered to submit their authorization cards for a check by an impartial observer. This is significant in light of the fact that on at least one occasion District 65's demand for recognition was denied on the basis of a "good faith doubt" as to the Union's majority status. In contrast, Hartz entered into a recognition agreement with Local 806 upon receipt of the first demand for recognition, and after that union had been campaigning for less than two weeks. Recognition was granted despite the claim of each of the other unions that

[8] § 8(a)(1), 29 U.S.C. § 158(a)(1), makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of" their right to choose a bargaining agent. § 8(a)(2), 29 U.S.C. § 158(a)(2), makes it an unfair labor practice for an employer to "contribute financial or other support to" a labor organization.

it in fact commanded majority support. Further, it is undisputed that at no time did either the union or Hartz officials verify that the cards presented by Local 806 represented the views of a majority of the employees in the bargaining unit. Hartz' blunt rejection of the demands of two unions and its precipitate recognition of a third hardly exemplifies the policy of strict neutrality required by the Act in situations where rival unions seek recognition.[9] See *NLRB* v. *Signal Oil and Gas Co.*, 303 F.2d 785, 786 (5 Cir. 1962), citing *Midwest Piping and Supply, Inc.*, 63 NLRB 1060 (1945).

While Hartz' differing responses to the three unions might not be sufficient in itself to constitute a violation of the Act, the record as a whole supports the Board's conclusion that Hartz gave unlawful aid and support to Local 806's organizational campaign. The testimony of employees Cansing, Aguirre, and Lorenzano establishes that Plant Manager Feinberg and Personnel Manager Morales[10] attempted to induce employees to sign authorization cards for Local 806 by making either promises or threats.[11] Several witnesses, some of whom were Hartz supervisory employees, testified that Local 806 adherents and organizers were permitted to engage in organizational activities in the plant on company time in violation of

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[9] The administrative law judge found that both Local 888 and District 65 had "engaged in substantial union organizational activity" from May through August, 1973, "to the knowledge of the Company".

[10] Morales was responsible for the interviewing and hiring of prospective employees. There is testimony to support the Board's finding that he gave union cards to at least three prospective employees and told them to "fill them out", because the card was "from the union that was going to represent them . . . ."

[11] For example, employee Nelson Cansing testified that Feinberg told him that his promotion to supervisor was hindered by Cansing's membership in District 65.

Hartz' "no solicitation" rule.[12] There is, as Hartz points out, evidence contrary to these findings. The administrative law judge, however, made specific and detailed findings as to the credibility of the witnesses on whose testimony he relied in his ultimate findings of fact. His credibility findings were accepted by the Board.[13] From our review of the record we conclude that the testimony upon which he relied was not inherently incredible. Giving due reference to the findings of the administrative law judge and the Board, our inquiry can go no further. *NLRB* v. *Pittsburgh S.S. Co.*, 337 U.S. 656, 659-60 (1949); *Truck Drivers Local 705* v. *NLRB*, 509 F.2d 425, 426 (D.C. Cir. 1974).

Hartz characterizes its conduct as "isolated acts of lawful employer cooperation" which, even if found to be coercive, did not affect enough authorization cards to taint Local 806's alleged majority status. On the contrary, the Board found, and we agree, that Hartz' aid to and support of Local 806 pervaded that Union's campaign from beginning to end, and that this support violates § 8(a)(1) and (2) of the Act, 29 U.S.C. § 158(a)(1), (2). Local 806's organizational campaign was begun only after Vazquez "went to Harrison" to discuss another union. Vazquez returned with the news that

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[12] Supervisor Domingo Negron testified that he was aware of employee solicitation of cards on company time. He also stated that he saw Teamster organizers in the plant and asked Feinberg's permission to "chase them out", to which Feinberg replied, "No, leave them alone."

[13] The Board noted that all of the parties had excepted to certain credibility findings made by the administrative law judge. Consistent with its established policy not to overrule an administrative law judge's "resolution with respect to credibility unless the clear preponderance of the relevant evidence convinces us that the resolutions are incorrect", the Board from a careful examination of the record found "no basis for rejecting his findings".

Hartz management would not deal with District 65 or Local 888, but would recognize Local 806. Vazquez and his companions on the Local 806 committee were apparently given free rein to conduct their organizational campaign on company time, despite Hartz "no solicitation" rule. Company time was also set aside for other Local 806 campaign activities,[14] and Local 806 officials were allowed in the plant on working time. As noted *supra*, recognition was extended to Local 806 after less than two weeks campaigning, without even a count of the authorization cards. Finally, after Hartz and Local 806 entered collective bargaining agreements in the face of protests and unfair labor practice charges from the two rival unions, the employees on the Local 806 committee received wage increases far in excess of those granted to other employees, under circumstances which were found by the administrative law judge to "smack of rewards for services rendered in helping to esconce [sic] a union of [Hartz'] choice." While any one of these elements might, in a different case, be found to be permissible employer cooperation, we are constrained to view the totality of circumstances in evaluating the effects of employer assistance. *International Association of Machinists, etc.* v. *NLRB*, 311 U.S. 72, 80 (1940). When we do so, the conclusion is inescapable that Hartz' aid and support of Local 806 was widespread, pervasive, and in violation of the Act.

Hartz argues that the General Counsel must demonstrate that the improper activities of the employer af-

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[14] On December 7, after Hartz had extended recognition to Local 806, a meeting was held on company time in the plant cafeteria, at which approximately 400 employees were addressed by Teamsters representatives. At least eight Hartz supervisory employees, including Kaye and Feinberg, were also present. The meeting turned into a melee when the numerous militant District 65 supporters shouted down the Teamster officials.

fected a sufficient number of employee authorization cards to destroy the majority status of the recognized union. It is true, of course, that the General Counsel must show the nature and extent of the employer's improper activities and its likely impact upon the employees so that the Board and this court may determine whether the conduct was sufficiently pervasive to taint the union's majority status. It is not necessary, however, that this impact be established with mathematical certainty. We agree with the approach taken by other circuits, that proof of a pattern of employer assistance may provide sufficient circumstantial evidence to justify the inference that the union's majority support is tainted. *Amalgamated Local Union 355* v. *NLRB*, 481 F.2d 996, 1002 n. 8 (2 Cir. 1973); *Department Store Food Corp.* v. *NLRB*, 415 F.2d 74, 77 n. 4 (3 Cir. 1969); *NLRB* v. *Clement Bros. Co., Inc.*, 407 F.2d 1027, 1029-30 (5 Cir. 1969).[15] The Board properly drew such an inference in the instant case, stating that Hartz' "numerous acts of unlawful assistance to Local 806 render the authorization cards obtained by that Union unreliable as indicators of employee choice".

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[15] We find Hartz' attempts to distinguish these cases unpersuasive. Hartz argues that in *Department Store Food Corp.*, "direct evidence existed that the very cards constituting the union's majority had been secured by coercion". To the contrary, the discussion which appears in 415 F.2d at 77 n.4 suggests that the company raised an argument identical in principle to the one raised here.

> Petitioners contend that the evidence adduced at the hearing shows that no more than 26 employees could have been subjected to checking in procedure . . . and therefore, assuming without conceding these signatures to be invalid, the remaining 32 signatures unaffected by the charge were sufficient to give a numerical majority to the union (out of a total of 58 employees).

The court did not resolve this question by the "numbers game", but rather permitted the Board to infer that coercion of a minority of cards tainted the union's alleged majority.

The Board drew additional support for its conclusion from its finding that Local 806 was a minority union on the date of recognition. We agree with the administrative law judge, however, that this finding is unnecessary to a decision in this case. As the judge noted, under all the circumstances, including the large number of authorization cards signed for each union,[16] "it is not feasible or possible to arrive at a rational or absolute determination as to which, if any, of three competing unions here commanded the allegiance of a majority of the unit employees". Accordingly the judge concluded that it was improper for the company to "preempt that determination in the arbitrary, high-handed and unfair manner which it employed".

Employer recognition of a union is as much an unfair labor practice when the union has majority support procured by employer assistance as when the union in fact lacks majority support entirely. See *NLRB* v. *Clement Bros. Co. Inc.*, 407 F.2d 1027, 1029 (5 Cir. 1969); cf. *ILGWU* v. *NLRB, (Bernhard-Altmann Corp.)* 366 U.S. 731 (1961). The record supports the Board's finding that Hartz engaged in a pervasive campaign of support for Local 806 and the Board's conclusions that employee support for the union was tainted by the Company's unlawful assistance and Local 806 did not repre-

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[16] A summary of the union affiliations, as of December 3, 1973, of 408 employees in Hartz' production unit shows that 88 had signed only with Local 806, 16 only with Local 888, 96 only with District 65, 43 with both 806 and 888, 66 with 806 and 65, 20 With 888 and 65, 36 with all three unions and 43 with none.

Hartz argues that the duplicate cards should be ignored since the cards for Local 806 were the last to be signed. It appears, however, that at least 39 duplicate cards were signed in November, i.e., the same "time frame" in which Local 806 obtained its cards.

sent an "uncoerced majority" of the employees.[17] On this basis we grant enforcement of the portion of the Board's order dealing with the recognition issue.

III. Employee Discharges

From March through August, 1974, Hartz discharged a large number of employees, 60 of whom were alleged to be the victims of unlawful discrimination. In extensive and detailed findings the administrative law judge reviewed the evidence as to each discharged employee. On the basis of these findings the Board concluded that in the termination of the employment of 46 employees Hartz discouraged membership in District 65 and encouraged membership in Local 806 in violation of § 8(a)(3) of the Act; unlawfully assisted Local 806 in violation of § 8(a)(2) of the Act; and interfered with, restrained, and coerced employees in violation of § 8(a)(1) of the Act. The Board concluded further that it had "not been established by substantial credible evidence upon the record as a whole", that Hartz' termination of the remaining 14 employees was in violation of the Act. Two of the 14 were found to have been discharged for cause unrelated to their union activities.

A. *Discriminatory Discharge of 46 Employees*

The Board found that Hartz terminated 46 employees because of their adherence to District 65 and their refusal to join or support Local 806. Hartz contends that

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[17] Having reached this conclusion, it is unnecessary to consider the detailed analysis of employee cards presented respectively by the Board and Hartz. We do note, however, that the Board makes a persuasive showing, on the basis of specific cards held invalid and the signing of cards with a competing union during the same "time frame" as the Teamster Cards, that Local 806 did not have a majority status on the date of recognition.

(1) there is no evidence that it had knowledge of the current union affiliation of any of the alleged discriminatees; (2) it had "substantial and legitimate business reasons" for each termination; and (3) the terminations were neither "inherently destructive of employee rights" nor motivated by a discriminatory purpose.

The administrative law judge found that Hartz had knowledge of the identity of the District 65 supporters, either through the authorization cards delivered to the company on April 11, 1974 or through observation of its supervisory employees. The judge credited testimony from the 46 dischargees to establish discriminatory intent. Their testimony differed in some particulars, but generally established that they were summoned to the plant cafeteria, singly or in groups, and informed that they had a choice of either affiliating with Local 806 or facing termination. The plant public address system was often used to summon the employees, and the plant manager was often present. The 46 discharged employees resisted this coercion and were later terminated. To recite in detail the testimony of the employees witnesses would unduly lengthen this opinion and would serve no useful purpose. We are convinced that the record supports the Board's conclusion that Local 806 was engaged in its activities to enforce the security clause of the contracts with the knowledge and assistance of Hartz, and that a prima facie case of unlawful discrimination was made.

Hartz argues that the discharges were justified by either substantial business reasons or poor work performance. Hartz vice-president Kaye testified that during the period in question the company was in a financial decline which required a reorganization of its production operations, with a concomitant lay-off of employees. He testified further that he personally decided which employees to terminate based on reports from high-level supervisors at the Jersey City plant and on his personal review of the personnel folders of the employees.

The administrative law judge discredited Kaye's testimony that the discharges were due to business retrenchment and found that under admitted facts less qualified employees were in many instances retained, many new employees were hired while the 46 discriminatees were terminated,[18] none of the "laid off" employees were recalled, and the economic justifications offered were belatedly added to Hartz' answer to the complaint by amendment during the trial. While the judge's inference of incredibility is not compelled, we agree that it is warranted by the evidence, and we will not disturb it.

The Board likewise found no justification for Hartz' contention that "poor work performance" was the basis of the discharge of the 46 employees. On the contrary, the administrative law judge, following his analysis of the work records of each of the employees, noted, *inter alia*, the "fact that, without explanation, no line supervisors were produced by the Employer to testify to dispute or refute the testimony of the terminated employees as to lack of criticism or fault found with their work", and "the precipitate nature of the terminations and the manner in which they were effected for what was in most cases long-term, satisfactory employees".[19]

Kaye's testimony that he personally reviewed each personnel file and ordered the discharges on the advice

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[18] While terminating 312 employees Hartz also hired 288 more. The median length of employment of the 46 discharged employees was four and one-half years, whereas overall the plant median length of employment was only one year, two and one-half months.

[19] The administrative law judge noted some deficiencies in the work performance and attendance records of some of the discharged employees. He found, however, that the records of the discharged employees generally were not substantially different from those of the employees retained.

of plant supervisors was strongly discredited.[20] At the time the alleged file review took place, there were, according to Hartz Personnel Manager Levy, no centralized personnel files at Hartz' Harrison headquarters. Hartz did not call any official other than Kaye or any supervisor to testify as to the poor work performance of these employees.[21] The only supervisor who testified, Domingo Negron,[22] was called by the General Counsel. He testified that neither he nor the other supervisors knew why their employees were being discharged; that no one asked his opinion on their work performance; that he found no fault with the work of these employees who were working for him; and that he was informed by General Manager Feinberg that the discharges were upon "orders from Harrison".

On the basis of this testimony and other inconsistencies in the evidence presented by Hartz,[23] the administrative law judge concluded that the offered justifications were mere pretext and insufficient to rebut the prima facie case of discrimination. From our review of the record we find substantial support for this conclusion. The portion of the

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[20] The administrative law judge found Kaye's testimony to be characterized by "inconsistencies, lapses, alleged recollective failures, [and] carelessness under oath . . . ."

[21] The administrative law judge inferred that the testimony of missing witnesses would be unfavorable to the party who would be expected to benefit from their testimony. This was proper. *International Union (UAW)* v. *NLRB*, 459 F.2d 1329, 1336-37 (D.C. Cir. 1972).

[22] Negron was a supervisor at the time of the discharges, but had been fired by Hartz prior to the hearing, allegedly for taking some scrap items from the plant. His testimony, however, was specifically credited by the administrative law judge.

[23] For example, reports filed with the State of New Jersey for unemployment insurance purposes often reflected reasons for discharge different from those offered by Hartz in this case.

Board's order finding discriminatory discharge of 46 Hartz employees will therefore be enforced.[24]

B. *Discharge of 12 Employees*

The Board concluded that it "was not established by substantial credible evidence upon the record as a whole" that 12 employees had been discharged in violation of the Act. This court has held that the Board's determination that there has been no violation of the Act "must be upheld unless it has no rational basis". *ILGWU* v. *NLRB*, 463 F.2d 907, 919 (D.C. Cir. 1972). Findings of the Board should not be disturbed unless they "are irrational or unsupported by substantial evidence". *Oil, Chemical and Atomic Workers International Union, Local 4-243* v. *NLRB*, 362 F.2d 943, 946 (D.C. Cir. 1966).

District 65 contends that there is no legal justification for drawing a distinction between these 12 employees and the 46 who were granted relief, and that relief was denied in the 12 cases solely by reason of the fact that none of these employees testified regarding the circumstance of his or her dismissal. District 65 argues that neither principle nor common sense requires that each employee fired in a mass discriminatory discharge testify in order to secure reinstatement. While we might agree with this statement as a broad general principle, we do not believe it is applicable under the circumstances of this case.

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[24] Hartz offers statistical data in an attempt to prove that District 65 employees were discharged at a rate which was proportional to their percentage of the Hartz work force. This evidence might be compelling if we viewed this as a mass discharge case. However, the General Counsel presented direct evidence of anti-union motivation in the discharge of these employees. The Board did not infer improper motivation on the basis of statistical data alone, and the statistics offered by Hartz do not rebut the direct evidence of improper motive on which the Board relied.

This is not a case in which a group of employees was unlawfully terminated in one discrete action by the employer. Rather approximately 308 employees were terminated over a span of nine months. Of this group over 100 were District 65 supporters, as evidenced by signed authorization cards. Yet the General Counsel brought charges with respect to only 60. The Board made individual detailed findings as to each of the 60. The contention that the Board's award of relief to the 46 employees rested solely on a conclusion that they were part of a class of District 65 members subject to unlawful discrimination is incorrect. The General Counsel did not include some 60 District 65 members in his charge and the administrative law judge made specific findings with respect to each of the 60 who were charged.

Two of the 12 employees did in fact testify at the hearing. One of them, Jose Maisonet, had worked for about five and one half months. The administrative law judge found "slight indication of activity on behalf of District 65 other than mere membership therein and wearing its button" and a "seemingly atypically long list of attendance defalcations disclosed by his personnel record considering his short term of employment". With respect to the other employee who testified, Wilfredo Lorenzana, the administrative law judge found "no indication of any protected concerted activities" on his part and that his personnel file "indicated that he received two work warnings" and "what appears to be an atypically poor attendance and punctuality record during his short 4¾ month tenure of employment".

With respect to the remaining 10 employees, who did not testify, the administrative law judge found no indication that one of them, Maria L. Sanchez, was a member of any of the unions and that her personnel folder "discloses, among other things, a seemingly extremely poor attendance and punctuality record". As to the re-

maining nine employees, the administrative law judge found generally no indication of any District 65 activity other than membership. In addition he found that Francisco Altamirano, who had worked about five months had an "arguably poor attendance and punctuality record, as well as a warning during his short-term employment". Fulvia Benjumeda, who had worked for two years and five months was also found to have an "arguably unsatisfactory punctuality and attendance record".

Each of the 46 employees the Board ordered to be reinstated was found to have been an active supporter of District 65 and a victim of coercive demands to abandon District 65 and embrace Local 806. In contrast, none of the 12 alleged discriminatees were shown to be active supporters of District 65. Rather the record reflects little more than mere membership.[25] The record contains no evidence of any pressure or threat against any of these 12 employees to join Local 806 or be fired. This case is thus distinguishable from *Riley Stoker Corp.*, 223 NLRB No. 178, 92 LRRM 1110 (1970), on which District 65 heavily relies. In that case, unlike this one, the administrative law judge specifically found that the three discharged employees were terminated under identical unlawful circumstances. Here no such finding was, or could be, made.

It is undisputed that the burden is on the general counsel to prove unlawful discharge. *NLRB* v. *Patrick Plaza*

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[25] Typical of the group of 46 is Dominga Cintron. The administrative law judge found that she was "a District 65 activist . . . , attending its meetings, wearing its distinctive button at work, discussing and promoting it with fellow-employees, and distributing not only its membership cards but also its literature and announcements of meetings". In contrast, Maria Cruz, who was one of the 12 employees, was found on the basis of the evidence presented to have engaged in no District 65 activity beyond "mere 'petitioning' and card signing".

Dodge, Inc., 522 F.2d 804 (4 Cir. 1975). We cannot say that the conclusion of the Board that it was "not established by substantial credible evidence" that any of the 12 employees had been discharged in violation of the act was either "irrational" or "unsupported by substantial evidence". See *ILGWU* v. *NLRB, supra, Oil, Chemical and Atomic Workers International Union* v. *NLRB, supra.*

C. *Peguero and Bueno*

District 65 also contends that the other two discharged employees, Jose Peguero and Rafael Bueno, two active adherents of District 65, were unlawfully terminated. It is undisputed that both men were known to Hartz to be District 65 supporters.

Peguero was discharged on December 10, 1973 after he had urinated on the plant floor in the area where he worked. The Board could properly conclude from the evidence that this was the reason for his termination and that Peguero's adherence to District 65 did not influence the decision to discharge him.

Bueno was discharged on January 3, 1974 for a variety of reasons, including repeated absences from work, insubordination to supervisors, "freshness" with female employees, and other work shortcomings. The incident which precipitated his discharge was his leaving work at noon on December 27, 1973 and failing to return until January 3, 1974. Both his foreman and supervisor testified that this absence was unauthorized. At the request of his supervisor, Bueno's employment was terminated. Although Bueno's testimony conflicts with that of the other witnesses, the administrative law judge credited those witnesses. We do not find their testimony inherently incredible and therefore accept the Board's finding.

There was ample cause for the discharge of both Peguero and Bueno. Mere activism in union affairs does

not insulate an employee from discharge for any reason other than the employee's union activity. See *NLRB* v. *Bangor Plastics, Inc.*, 392 F.2d 772, 776-77 (6 Cir. 1967). An employee may be discharged for any reason without violating the Act, as long as the discharge is not motivated by anti-union reasons. *NLRB* v. *Waterman S.S. Corp.*, 309 U.S. 206, 218-19 (1940). We conclude that the Board properly evaluated the evidence in determining the motivation for the discharge of both Peguero and Bueno.

IV. Discipline of Eight Employees

On numerous occasions in July, 1974, eight production workers requested their supervisor, Hector Santiago, to supply them with an electric fan to alleviate the intense heat in their work area. The requests were ignored. On August 2, the employees again requested a fan and were informed by Santiago that no fans were available. The eight employees then left their work station and went to Plant Manager Petrera to request a fan. Within ten minutes three fans were provided. The employees were gone from their work station about 15 minutes.

On August 4, Hartz issued formal disciplinary warnings to each of the eight employees and docked them 15 minutes pay for leaving their work without authorization. The Board found that they did so in the course of engaging in concerted activity for their mutual aid and protection under § 7 of the Act, 29 U.S.C. § 157, and that the disciplinary warnings were therefore in violation of the employees' rights under § 8(a)(1), 29 U.S.C. § 158 (a)(1).

Section 7 provides that employees have the right to engage in "concerted activities for the purpose of . . . mutual aid or protection". These rights extend beyond formal union activities and include concerted activities of the type engaged in here, where the employees found it necessary

to present their demands as a group [26] in order to secure relief from intolerable working conditions. *NLRB* v. *Washington Aluminum Co.*, 370 U.S. 9, 17 (1962).[27]

V. Organizational Costs and Counsel Fees

The administrative law judge concluded: "In view of all of the circumstances of this case, including the unusually protracted, complex, and difficult nature of the proceedings . . . all growing out of Respondent's precipitate, unlawful recognition of Teamsters Local 806, in contrast to its refusal to even meet with Distributive Workers District 65 to enable that Union to demonstrate its alleged representation credentials, in my opinion fairness requires the reimbursement of Distributive Workers District 65 for its organizing expenses and reasonable counsel fees, and I shall so recommend."

In modifying the recommended order to delete the requirement for reimbursement of District 65's counsel fees and organizational expenses, the Board said in part: "We conclude that Respondent's defenses in this proceeding are not patently frivolous and consequently, in accord with our usual policy, this extraordinary remedy is not war-

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[26] Hartz argues that it was not necessary for all eight employees to leave their posts in order to secure the relief granted. However, § 9(a) of the Act, 29 U.S.C. § 159(a), allows employees to present their grievances to the employer at any time, individually or as a group. In light of the repeated failure in their contacts with their supervisor, Santiago, and the immediate success of the group request to the plant manager, we conclude that the Board properly found the actions of the employees to be reasonable.

[27] Relying on *NLRB* v. *Washington Aluminum Co., Inc., supra,* Hartz argues that the employees were not engaged in a protected activity by reason of the no-strike clause in the bargaining agreement. Since the Company violated the Act in recognizing and entering into the collective bargaining agreements with Local 806, the no-strike clause was not binding on these employees.

ranted in this proceeding. Cf. *Heck's, Inc.*, 215 NLRB 765 (1974)."

In *Heck's, Inc.*, following remand from the Supreme Court (*NLRB* v. *Food Store Employees Union, Local 347*, 417 U.S. 1 (1974)), for clarification of the Board's policy with respect to extraordinary remedies, the Board made it clear that awarding organizational costs and fees was limited to cases where employees assert "patently frivolous defenses", and that litigation expense is not recoverable where the defenses "are 'debatable', that is, for example, where they are dependent upon resolutions of credibility".[28] Here the administrative law judge and the Board made numerous credibility determinations. We agree with the Board that the Hartz defense was not frivolous,[29] even though its conduct was found to be in violation of the Act.

VI. CONCLUSIONS

We conclude that the petition of District 65 should be denied and that the Board's order should be enforced in its entirety.

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[28] The Board said further: "The fact that in retrospect a respondent is found to have engaged in a flagrant repetition of conduct previously found unlawful, otherwise characterized as aggravated and pervasive, does not in our judgment justify our discouraging that respondent from gaining access to an appropriate forum where the credibility of witnesses leaves an unfair labor practice issue in doubt."

[29] There is no finding or even suggestion in the decision of the administrative law judge that the Hartz defense was "frivolous". See also *Eisenberg* v. *Hartz Mountain Corp.*, 519 F.2d 138, 143 (3 Cir. 1975), where the court vacated a temporary injunction issued upon the petition of the Regional Director of the National Labor Relations Board, concluding that on the record then presented it seemed "as likely as not that a majority of the Hartz employees freely chose to be represented by Teamsters Local 806".

BAZELON, *Circuit Judge, concurring in part and dissenting in part*: I fully concur in Parts I-IV of Judge Jameson's opinion. However, on this record I am unable to join the court in affirming the Board's decision rejecting the Administrative Law Judge's (ALJ) recommended award of fees and expenses to District 65.

Congress has given the NLRB considerable discretion in fashioning remedies to effectuate the policies of the National Labor Relations Act.[1] Moreover, the award of fees and expenses is an extraordinary remedy.[2] Nonetheless, the facts of this case suggest that, at a minimum, the Board's decision should have addressed the record more carefully and clearly in modifying the remedial aspect of the ALJ's recommended order.

The Board has made clear that the award of fees and expenses is not a punitive tool to be used against repeated violators of the Act,[3] but rather serves to deter abuse of the Board's processes, such as frivolous litigation pursued only for the purpose of delay.[4] At the same time, fee awards should not create a disincentive to the assertion of good faith defenses.

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[1] NLRB v. Food Store Employees Local 347, 417 U.S. 1, 8 (1974).

[2] *See, e.g.*, Heck's Inc., (Heck's II) 215 N.L.R.B. 765, 767 (1974).

[3] *Id.* at 767, 768; Heck's Inc. (Heck's I), 191 N.L.R.B. 886, 889 (1971).

[4] Tiidee Products Inc., 194 N.L.R.B. 1234, 1236 (1972):

> [F]rivolous litigation . . . is clearly unwarranted and should be kept from the nation's already crowded court dockets, as well as our own. While we do not seek to foreclose access to the Board and courts for meritorious cases, we likewise do not want to encourage frivolous proceedings. The policy of the Act to insure industrial peace through collective bargaining can only be effectuated when speedy access to uncrowded Board and court dockets is available.

The Board has thus articulated a rationale for awarding fees which bears a strong resemblance to the equitable doctrine that "when the losing party has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons' " in the course of the litigation, a court may award fees to the prevailing party.[5]

The ALJ's careful and thorough opinion is replete with evidence that suggests that the company's conduct in the Board proceedings constituted just such "bad faith." Repeatedly the ALJ noted direct and inexplicable self-contradictions in the testimony of key witnesses for the company.[6] After noting instance after instance self-

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[5] Runyon v. McCrary, 427 U.S. 160, 183 (1976), quoting F.D. Rich Co. v. United States ex rel. Industrial Lumber Co., 417 U.S. 116, 129 (1974). *See* Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 258-59 (1975).

[6] Illustrative examples abound throughout the ALJ's decision, *e.g.*, Hartz Mountain Corp., 228 N.L.R.B. 492, 512 (1977):

> On cross-examination, [Company Personnel Manager] Morales retreated into his "I don't remember" pattern when asked so broad a question as whether he ever had any discussion with any employee concerning Teamsters Local 806; although Morales subsequently acknowledged informing employees that "normally, the contract had to have a security clause that called for the employees to join the union . . . ," he again pulled back into denial of ability to "recall" the occasion or context of, or any person involved in, any such remarks by him. In contrast we observe Morales' assertion in his July, 1974 affidavit to the United States District Court that "I did indicate on a few occasions that I thought the Teamsters were a good union, and that once a union achieved recognition, all employees would probably have to join that union or be fired." (*CP Exh.* 9, p.4). After first denying that he ever discussed Distributive Workers District 65, Retail Clerks Local 888, or any other union, with any employee, Morales' attention was drawn to his statement in his District Court affidavit (*id.*) that "Occasionally I would discuss unions with an employee at his initiative" and he

contradiction in the testimony of company Vice-President Kay, the ALJ observed: "This is but another example of what might be regarded as a penchant for misleading

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was asked which unions; his response, characteristically, was that he does "not recall" and, further, that he could not "remember" how that information got into his affidavit to the District Court.

And, *id.* at 523 n.148:

> [Company Vice-President for Engineering and Labor Relations] O'Connor also conceded on the record at the trial that—contrary to his July 22, 1974 affidavit to the United States District Court (*GC Exh. 143*, p. 1, para. "2(c)"), part of paragraph "29" of Kaye's affidavit to that Court (*GC Exh. 138*, p. 14) is *not* true, and that O'Connor in effect misled the District Court in that Section 10(j) injunction proceeding by failing to state the true facts thereon (*Trial transcript*, pp. 5712-5718). Contrary also to his earlier testimony at this trial itself, O'Connor swore on cross-examination that he extended recognition to Local 806 for a "clerical and maintenance unit" *not* on December 17 but on December 21.

And, again, *id.* at 517:

> But there is, again, as in so many instances and aspects of [Company Vice-President] Kaye's testimony, a degree of apparent incongruity if not outright inconsistency between his own statements in the record here. For example, although his stipulated (*GC Exh. 114*) "testimony" is that he "noticed that they [i.e., "some" of the Local 806 cards presented to him by Calagna on November 30] were signed and dated," his actual testimony is that he could see no dates on any but the top card and paid no attention to any dates; while he swore in his July 22, 1974 affidavit to the United States District Court that he "checked" a "random sample" (*GC Exh. 138*, p. 9) of those cards, he testified at the trial here that he did *not* take a random sample; and while he swore to the District Court that he "looked" at "many" of the cards (*id.*) and he testified here that he "thumbed through most" (later, "looked at"; still later, "didn't look at" but merely "thumbed through") of the cards in the batch, his stipulated testimony states that "I did *not* look at most of the cards in the batch."

with words or a high degree of carelessness with candor and accuracy." [7]

The Board has held that "where the merit of [a defense] in the last analysis rests upon a trial examiner's resolution of credibility" an award of attorneys fees would be improper because it would discourage legitimate resort to the Board's processes.[8] But to permit a party to defeat an award of fees simply by exhibiting "carelessness with candor" would render meaningless the Board's attempt to discourage frivolous litigation through the remedy of fee awards endorsed in *Hecks, Inc.*, 215 N.L.R.B. 765 (1974) *(Heck's II)* and *Tiidee Products, Inc.*, 194 N.L.R.B. 1234 (1972).

It is true that, in his "Conclusions of Law", the ALJ did not point with any precision to the company's conduct during the hearings as a basis for his recommendation that the company reimburse District 65's expenses. Nonetheless, the ALJ's opinion is hardly silent on this point, as is clear from even a cursory review. And the Board's response to the ALJ's recommendation fails to illuminate with much clarity the basis of the Board's disagreement

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[7] *Id.* at 523 n.146.

> In my view, such factual contradictions, particularly in statements under oath to governmental authorities, like others elsewhere pointed out herein—are substantial and serious, should be seriously regarded, and merit poor marks for their affiant's credibility if, indeed, not more serious consequences.

Id. at 523 n.147.

[8] Heck's I, *supra,* 191 N.L.R.B. at 889. The same principle applies with equal force under bad faith rationale for shifting fees in the courts. *See, e.g.*, Runyan v. McCrary, *supra,* 427 U.S. at 183-84:

> Simply because the facts were found against the schools does not by itself prove that threshold of irresponsible conduct for which a penalty assessment would be justified.

[Continued]

with the ALJ.[9] While the Board does have considerable discretion in this area, the talismanic characterization of the company's defense as "not patently frivolous", without more, gives us little guidance in determining whether the Board's conclusion reflects "reasoned decisionmaking."[10] As the Board itself has recognized in fashioning a remedy the Board must explicate the application of existing criteria to the case at bar.[11] Yet the Board's decision sheds no light on what aspects of the record support the conclusion that the company's defense was not frivolous.

In light of the Supreme Court's decision in *NLRB v. Food Store Employees Local 347*, 417 U.S. 1 (1974), it would be inappropriate for us to exercise our authority

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[8] [Continued]

> Whenever the facts in a case are disputed, a court perforce must decide that one party's version is inaccurate. Yet it would be untenable to conclude ipso facto that that party had acted in bad faith.

[9] The Board's only discussion of this issue appears in footnote 2 of the Board's opinion, Hartz Mountain Corp., *supra*, 228 N.L.R.B. at 492 n.2 (1977).

> Respondent has excepted to the portion of the Administrative Law Judge's recommended Order which requires Respondent to reimburse District 65 for reasonable counsel fees and disbursements incurred in the course of this proceeding and for expenses incurred in connection with the organizing campaign at Respondent's Jersey City plant prior to December 1, 1973. We conclude that Respondent's defenses in this proceeding are not patently frivolous and consequently, in accord with our usual policy, this extraordinary remedy is not warranted in this proceeding. Cf. *Heck's Inc.*, 215 NLRB 765 (1974). We shall therefore modify the recommended Order by deleting the reimbursement requirement.

[10] Greater Boston Television Corp. v. FCC, 444 F.2d 841, 851 (D.C. Cir. 1970), cert. denied 403 U.S. 923 (1971).

[11] Heck's II, *supra*, 215 N.L.R.B. at 768.

under §§ 10(e) and (f) of the Act, 29 U.S.C. §§ 160(e) and (f) (1976), and modify the Board's order to provide for the award of fees. Nonetheless, it is my view that a limited remand is necessary to elucidate the basis for the Board's decision not to accept the ALJ's recommended award.[12] In this connection, it may be appropriate for the Board to consider its own suggestion in *Heck's II* whether it "ought to apply some more definitive criterion than the distinction between 'debatable' and 'frivolous' defenses which thus far [the Board] has been utilizing." [13] Such a course would "effectuate the policies of the Act by making workable the system of restricted judicial review in relation to the wide discretionary authority which Congress has given to the Board" [14] and would help assure that future decisions on the award of fees are based on ascertainable and predictable criteria "without unreasonable discrimination." [15] Such, after all, is the essence of the rule of law.

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[12] NLRB v. Food Store Employees Local 347, *supra,* 417 U.S. at 10:

> Thus, when a reviewing court concludes that an agency invested with broad discretion to fashion remedies has apparently abused that discretion by omitting a remedy justify in the court's view by the factual circumstances, remand to the agency for reconsideration, and not enlargement of the agency order, is ordinarily the reviewing court's proper course.

[13] Heck's II, *supra,* 215 N.L.R.B. at 768.

[14] Phelps Dodge Corp. v. N.L.R.B., 313 U.S. 177, 196 (1941).

[15] Greater Boston Television Corp. v. FCC, *supra,* 444 F.2d at 851.

Nos. 77-1239 and 77-1367

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

DISTRICT 65, DISTRIBUTIVE WORKERS OF AMERICA,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

THE HARTZ MOUNTAIN CORPORATION,
Intervenor.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

and

DISTRICT 65, DISTRIBUTIVE WORKERS OF AMERICA,
Intervenor,

v.

THE HARTZ MOUNTAIN CORPORATION,
Respondent.

ON PETITION FOR REVIEW AND APPLICATION
FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

BRIEF FOR DISTRICT 65, DISTRIBUTIVE WORKERS OF AMERICA

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Nos. 77-1239 and 77-1367

Certificate required by Rule 8(c) of the General Rules of the United States Court of Appeals for the District of Columbia Circuit:

In accordance with Rule 8(c) of the General Rules of this Court, the following parties have an interest in the outcome of this case:

1. District 65, Distributive Workers of America, Petitioner in this Court and Charging Party before the Board
2. Hartz Mountain Corporation, the Respondent
3. Local 806 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, party to the contract
4. Francisco Altamirano, discriminatee, seeking back pay and reinstatement
5. Miriam Rivera Arango, discriminatee, seeking back pay and reinstatement
6. Fulvia Benjumeda, discriminatee, seeking back pay and reinstatement
7. Maria Cruz, discriminatee, seeking back pay and reinstatement
8. Natalia Esquilin, discriminatee, seeking back pay and reinstatement
9. Maria Lopez, discriminatee, seeking back pay and reinstatement
10. Wilfredo Lorenzana, discriminatee, seeking back pay and reinstatement
11. Jose Maisonet, discriminatee, seeking back pay and reinstatement

12. Elisa Martinez, discriminatee, seeking back pay and reinstatement

13. Raul Salcedo, discriminatee, seeking back pay and reinstatement

14. Maria Sanchez, discriminatee, seeking back pay and reinstatement

15. Awilda Soto, discriminatee, seeking back pay and reinstatement

16. Rafael Bueno, discriminatee, seeking back pay and reinstatement

17. Jose Peguero, discriminatee, seeking back pay and reinstatement

18. Rita Acevedo, discriminatee, seeking back pay and reinstatement

19. Clara Aguilar, discriminatee, seeking back pay and reinstatement

20. Fernando Aguirre, discriminatee, seeking back pay and reinstatement

21. Julia Aguirre, discriminatee, seeking back pay and reinstatement

22. Marie Elena Arguello, discriminatee, seeking back pay and reinstatement

23. Irma Avellaneda, discriminatee, seeking back pay and reinstatement

24. Elesa Bello, discriminatee, seeking back pay and reinstatement

25. Damiana Cancel, discriminatee, seeking back pay and reinstatement

26. Milagros Cancel, discriminatee, seeking back pay and reinstatement

27. Luz C. (Celenia) Cardona, discriminatee, seeking back pay and reinstatement

28. Mariana Castro, discriminatee, seeking back pay and reinstatement

29. Dominga Cintron, discriminatee, seeking back pay and reinstatement

30. Marie Diana, discriminatee, seeking back pay and reinstatement

31. Gladys Diaz, discriminatee, seeking back pay and reinstatement

32. Luz Fabiola Diaz, discriminatee, seeking back pay and reinstatement

33. Amada Flores, discriminatee, seeking back pay and reinstatement

34. Alejandrina Fontanez, discriminatee, seeking back pay and reinstatement

35. Jacinta Fontanez, discriminatee, seeking back pay and reinstatement

36. Maria (J.) Gonzalez, discriminatee, seeking back pay and reinstatement

37. Lucia Malave, discriminatee, seeking back pay and reinstatement

38. Pascual Malave, discriminatee, seeking back pay and reinstatement

39. Alejandrina Nieves, discriminatee, seeking back pay and reinstatement

40. Marta Ocasio, discriminatee, seeking back pay and reinstatement

41. Virginia Otero, discriminatee, seeking back pay and reinstatement

42. Cecilia Pacheco, discriminatee, seeking back pay and reinstatement

43. Elsa Pacheco, discriminatee, seeking back pay and reinstatement

44. Alida Pagan, discriminatee, seeking back pay and reinstatement

45. Daisy Pagan, discriminatee, seeking back pay and reinstatement

46. Enriqueta Pagan, discriminatee, seeking back pay and reinstatement

47. Gladys Pelliccia, discriminatee, seeking back pay and reinstatement

48. Eloisa ("Aloisa") Perez, discriminatee, seeking back pay and reinstatement

49. Luis (Enrique) Ramos, discriminatee, seeking back pay and reinstatement

50. Amalia Rivera, discriminatee, seeking back pay and reinstatement

51. Lydia M. Rivera, discriminatee, seeking back pay and reinstatement

52. Mercedes Rivera, discriminatee, seeking back pay and reinstatement

53. Rosa M. Rivera, discriminatee, seeking back pay and reinstatement

54. Damiana Ruiz, discriminatee, seeking back pay and reinstatement

55. Maria del Carmen Salcedo, discriminatee, seeking back pay and reinstatement

56. Angel Santiago, discriminatee, seeking back pay and reinstatement

57. Maria Estelle Santiago, discriminatee, seeking back pay and reinstatement

58. Maria Teresa Santiago, discriminatee, seeking back pay and reinstatement

59. Ada Iris Vargas, discriminatee, seeking back pay and reinstatement

60. Ana Ventura, discriminatee, seeking back pay and reinstatement

61. Rosa Villegas, discriminatee, seeking back pay and reinstatement

62. Ana Zapata (DeKalb Street), discriminatee, seeking back pay and reinstatement

63. Ana Zapata (Bright Street), discriminatee, seeking back pay and reinstatement

These representations are made in order that Judges of this Court, inter alia, may evaluate possible disqualification or recusal.

Eisner, Levy, Steel & Bellman, P.C.

Attorneys of Record for District 65, Distributive Workers of America

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Court Cases

*Authorities chiefly relied upon are marked by an asterisk.

STATEMENT OF THE ISSUES

1. Was it proper for the National Labor Relations Board to deny relief to twelve discharged employees because they failed to testify in the face of conclusive evidence that they were subjected to the same discriminatory treatment for which the Board afforded relief to 46 other employees under Section 8(a)(3) of the National Labor Relations Act?

2. Did the National Labor Relations Board improperly consider the Section 8(a)(3) charges brought in behalf of two strong union adherent employees in isolation from the massive evidence of union animus and employer dishonesty?

3. Did the National Labor Relations Board inadequately consider whether to include organizational expenses and litigation costs in its remedial order?

PRELIMINARY STATEMENT

In this proceeding, District 65, Distributive Workers of America (hereinafter District 65) seeks review of certain limited aspects of an order of the National Labor Relations Board (hereinafter the Board), 228 NLRB No. 49, which was entered on March 2, 1977.

The Board order is directed against the Hartz Mountain Corporation. It found that Hartz violated §8(a)(2) and (1) of the National Labor Relations Act*/ (hereinafter the Act), by unlawfully assisting Local 806 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (hereinafter Local 806) and then recognizing that union and subsequently executing a collective bargaining agreement with it. Hartz was also found to have violated §8(a)(3) of the Act by terminating, through the device of mass discharges, the employment of 46 employees identified with District 65. The Board ordered that Hartz, among other things, cease and desist from giving effect to its recognizion agreement and collective bargaining agreement with Local 806, cease assisting Local 806, cease threatening not to recognize, deal, and negotiate with District 65, and cease interfering with the rights of any employees in the exercise of the right of self-organization. The Board also ordered Hartz to reimburse all employees or former employees for Local 806 checkoff deductions, initiation

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*/ 29 U.S.C. §158 (a), et.seq.

fees, dues or other exactions. The Board further ordered Hartz to offer the 46 employees it found to be discriminatorily discharged reinstated with back pay.

The Board, however, failed to order the reinstatement of 14 other District 65 adherent employees, 12 of whom also lost their jobs during mass discharges. The Board also failed to order Hartz to reimburse District 65 for its organizational and legal expenses. District 65 has filed this petition for review to challenge only those aspects of the Board decision which did not provide these forms of relief.

The Board is seeking enforcement of its order against Hartz in a proceeding which has been consolidated with this matter. Therefore, District 65 expects that the Board will detail to the Court the massive evidence in the record upon which the Board concluded that Hartz was guilty of pervasive unfair labor practices. In this brief, District 65 will not duplicate the efforts of the Board. Instead, District 65 will urge that the Board should have found that all the District 65 supporters whose discharges were litigated were entitled to relief. Further, District 65 will contend that Hartz's defenses in this case were worse than frivolous. They were a sham. Therefore, the Board incorrectly denied District 65 organizational expenses and attorneys' fees to compensate for the efforts expended in organizing and in the proceedings before the Board.

REFERENCE TO PARTIES AND RULINGS

A.

PROCEDURAL HISTORY

The initial charges giving rise to this proceeding were filed by District 65 on November 29, 1973. Hearings on the amended complaint issued by the Board commenced on April 9, 1974 before Administrative Law Judge Stanley H. Ohlbaum. After the commencement of that proceeding, District 65 filed additional charges which were related to the massive layoff of employees, which occurred during the spring and summer of 1974. Twelve (12) out of fourteen (14) District 65 adherents whose claims are under consideration here were fired during this period.

Hearings consumed 58 days and were concluded on January 14, 1975. On November 24, 1975, Judge Ohlbaum issued his decision. The Board affirmed all of Judge Ohlbaum's factual findings. It also generally affirmed the Administrative Law Judge's conclusions of law, with certain modifications discussed below.

During the pendency of the proceedings before the Administrative Law Judge (hereinafter sometimes referred to as the "ALJ"), the Regional Director of the 22nd Region of the Board applied to the United States District Court for New Jersey, seeking a temporary injunction under Section 10(j) of

the Act*/. The District Court granted relief, but that order was vacated on appeal. Eisenberg v. Hartz Mountain Corporation, 519 F.2d 138 (3rd Cir. 1975).

B.

JUDGE OHLBAUM'S DECISION

Judge Ohlbaum's decision takes up 179 pages. Much of this opinion deals with resolution of the question as to whether Hartz assisted Local 806's entry into the plant and then illegally recognized that union and entered into a collective bargaining agreement with it. Presented with a massive amount of evidence, the ALJ had no difficulty in determining that Local 806 was a sweetheart union which gained access to the plant and its workers through open management support, and, thereby aborted a six month intensive District 65 campaign. There can be no doubt that the ALJ understood that Hartz wanted District 65 out of its plant, and was willing to let Local 806 in to accomplish this objective. During Local 806's brief November campaign, according to Judge Ohlbaum, Hartz's management and supervisors openly helped Local 806 adherents obtain card signatures and made sure that new employees understood they would be represented by Local 806. In reaching

*/ 29 U.S.C. §160(j)

these conclusions, the ALJ, of course, was required to consider the testimony of the many Hartz and Local 806 witnesses who asserted that no special treatment had been granted to that Union. The ALJ not only rejected this testimony, he devoted a major part of his decision to illustrating why the Hartz defenses had to be rejected.

1. The Quality of the Hartz Defense.

In analyzing the contentions with regard to the critical issue of whether an independent Local 806 committee existed in the Hartz plant prior to recognition, the judge pointed out that Hartz witnesses presented three startlingly different versions of what occurred. Namely, the version presented to the Board by affidavits prior to the commencement of the administrative proceeding, that presented to the federal court in opposition to the Board's 10(j) proceeding, and that presented to him. (A. 52-53, 56,58; fn. 107 and 66)*/. Additionally, the judge pointed out that Hartz had submitted differing versions of what it claimed was the same document in order to buttress different critical factual claims at different times. (A. 58, fn. 12). Clearly, the ALJ concluded that the use of altered documents and the presentation of contradictory and

*/ "A" refers to the Appendix filed with this Court.

ever-changing sworn testimony did not result from mere lapses of memory or mistakes, but was intentional.

For example, when dealing with major contradictions between sworn testimony and filed affidavits with regard to what happened at an allegedly crucial plant meeting, he found:

> These sworn statements can hardly be considered an inadvertence; indeed, they are repeated later in the same affidavit where [Hartz Vice President] Kaye again swears that 'no contract has been signed'...In my view such factual contradictions particularly in statements under oath to governmental authorities, like others elsewhere pointed out herein— are substantial and serious, should be seriously considered, and merit poor marks for their affiants' credibility if, indeed, not more serious consequences. (A. 80, fn. 159).

Regarding the testimony of another Hartz vice president, the ALJ concluded:

> O'Connor also conceded on the record of the trial that— contrary to his July 22, 1974 affidavit to the United States District Court...part of paragraph 29 of Kaye's affidavit to that Board is not true and that O'Connor in effect misled the District Court in the 10(j) injunction proceeding by failing to state the true facts thereon. (A. 80, fn. 160).

2. The Administrative Law Judge's Determinations With Regard to the Mass Discharges of District 65 Adherent Employees.

The ALJ determined that, during the trial of the proceedings before him, Hartz engaged in mass discharges. He found that in the process of these discharges Hartz discriminatorily fired 46 District 65 supporters. Judge Ohlbaum, however, found against the General Counsel and District 65 with regard to the discharges of 12 other persons who were fired during the same period (A. 128-176).

In sustaining the bulk of the 8(a)(3) charges, the ALJ found:

> Respondent pleads ignorance as to the identity of the District 65 supporters. Even if one were to indulge in the supposition--contrary to established facts herein--that [Hartz] was up to a point unaware of the identity of all of the District 65 supporters at least from the date early in this trial when it was furnished with a copy of all the signed membership cards of its employess in that union, pursuant to my April 11, 1974 expediting order (Judge's Exh. 1), it was made fully and specifically cognizant in detail as to their identity. And other credited proof, already described, shows that responsible members of the [Hartz's] supervisory and managerial hierarchy were well aware of the District 65 organizational activities and the employee participation therein in the plant. Thus [Hartz's] assertion of ignorance of the District 65 affiliation of the terminated employees does not hold water. (A. 175; fn. 257).

Additionally, the ALJ found 16 factors which in his opinion led him to conclude that Hartz had engaged in discriminatory mass discharges. (A. 174-176). These factors were:

1. The consistent and essentially uncontradicted pattern which evolved from numerous employee witnesses;

2. Disbelief in the testimony of Hartz witnesses;

3. Disbelief that a vice president of a large corporation would terminate individual low level employees;

4. Failure of Hartz to produce line supervisors;

5. Strong Hartz animus against District 65 and in favor of Local 806;

6. The loyalty of the discharged employees to District 65;

7. The known District 65 affiliation of the employees;

8. The precipitate nature of the terminations and the fact that they were for the most part directed against long term employees;

9. The conflicting, inconsistent, and shifting defenses of Hartz;

10. The essential absence of expression of dissatisfaction with discharged employees prior to termination;

11. Hartz's own records and/or the reasons advanced to the New Jersey Unemployment Insurance authorities;

12. The substantial number of replacements and new hires;

13. The fact that the firings were consistent with an attempt on the part of Hartz to enforce the Union security provision of the Local 806 contract;

14. The fact that many terminated employees were directed on company time to sign Local 806 cards;

15. The fact that local 806 did not grieve the discharges;

16. The reasons advanced by Hartz failed to withstand scrutiny.

The ALJ, however, found that the following employees were not discriminatorily discharged: Francisco Altamirano (A.134); Miriam Arango (A. 134); Fulvia Benjumeda (A. 136); Maria Cruz (A. 140); Natalia Esquilin (A. 142a); Maria Lopez (A. 145); Wilfredo Lorenzana (A. 146); Jose Maisonet (A. 146); Elisa Martinez (A. 148); Raul Salcedo (A. 163); Maria L. Sanchez (A. 164); Awilda Soto (A. 166).

Significantly, Judge Ohlbaum found that 11 of these 12 persons had, in fact, signed District 65 cards. And, as has been pointed out, supra, the ALJ ruled the names of the card signers were known to Hartz prior to their discharges (A. 175; fn. 257). Only Maria Sanchez had not signed with District 65, but the ALJ found, with regard to another aspect of the case, that she had been subjected to a discriminatory disciplinary warning for protesting intolerable working conditions in violation of the Act (A. 176-178).

The ALJ engaged in an individual analysis of the facts with regard to each of the above persons. It is clear, however, that the central fact upon which he based his decision in each of these cases was the non-testimony of these individuals. */ For example, with regard to Miriam Arango, the ALJ noted that she had worked for Hartz for almost two years prior to her termination and was a District 65 member. Nonetheless, he found:

> While her personnel file shows no reason for her termination, in the absence of testimony on her part I am unable to speculate as to the reason therefor, which could conceivably have been a sheer administrative error which, while regrettable, may not have been violative of the Act. (A. 134).

3. The ALJ's Discussion of the Firings of Jose Peguero.

The ALJ found that Jose Peguero was a member of the

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*/ Two of the 12, Lorenzana and Maisonet, did testify during the proceeding. However, their testimony was devoted to the 8(a)(2) allegations which were heard at the beginning of the hearing and they were not subsequently recalled to testify when the General Counsel presented evidence in support of the 8(a)(3) allegations. At the time Lorenzana and Maisonet testified, they were employees of Hartz. Therefore, Hartz was obviously aware of their District 65 membership and active support at the time of the discharges.

District 65 employees organizing committee and actively opposed Local 806. Hartz discharged him on December 10, 1973, nine days after the company had recognized Local 806, allegedly for urinating on the plant floor. The ALJ credited the testimony of plant manager Feinberg, who said that he was informed by one of Peguero's supervisors that the latter had urinated on the plant floor. According to Feinberg, he went to the spot and observed a wet yellow area which smelled of human urine. Feinberg said he was told by a key Local 806 employee activist that he saw Peguero urinate. Feinberg summoned Peguero to the personnel manager's office, accused him of urination and Peguero laughed it off without denial but demanded to be confronted by his accusers. Feinberg, who admitted that he knew of Peguero's opposition to Local 806, declined to have Peguero confronted and fired him on the spot (A. 122).

The ALJ then discussed the testimony of a former Hartz supervisor, Domingo Negron, called by the Board as a witness. The ALJ summarized Negron's testimony, pointing out that Negron did not tell the plant manager that he had seen Peguero urinate nor did anyone else tell him he had seen Peguero do such an act. Moreover, Negron testified that Peguero had denied urinating. Faced with conflicting testimony, the ALJ found that it was "unnecessary to determine whether Peguero actually urinated on the floor since upon the record presented I believe and find that [the plant manager] discharged him in a reasonable belief that he had."(A. 124).

4. The ALJ's Discussion of the Discharge of Rafael Bueno.

The ALJ found that Rafael Bueno, like Peguero, was a District 65 activist who participated in a leadership role at a December 7, 1973 cafeteria protest related to the recognition of Local 806. The ALJ found that Bueno was discharged for leaving work early on December 27, 1973 and for failing to report or call in for several days afterward (A. 127).

5. The ALJ's Findings With Regard to District 65's Organizational Efforts.

The ALJ made numerous findings that District 65 organizers and officials put substantial time and effort into their drive at the Hartz Plant (A.17-22). The ALJ, of course, was also aware that District 65 was represented by counsel during its organizational drive (e.g., A. 19, fn. 16) and throughout virtually all of the proceedings at the NLRB.

6. The ALJ's Findings With Regard to Organizing Expenses and Attorney Fees.

The ALJ made the following finding:

> In view of all the circumstances of this case, including the unusually protected, complex and difficult nature of the proceedings--all growing out of Respondent's precipitate, unlawful recognition of Teamsters Local 806, in constrast to its refusal to even meet with...District 65 to enable that Union to demonstrate its alleged representation credentials, in my opinion fiarness requires the reimbursement of...District 65 for its organizing expenses and reasonable counsel fees... (A. 180).

C.

THE ADMINISTRATIVE LAW JUDGE'S ORDER

The ALJ's order not only sought to sever the Hartz-Local 806 connection and reinstate 46 District 65 adherent employees with back pay, but also recommended that Hartz:

> Reimburse Distributive Workers, District 65, for its expenses of organization incurred in connection with the employees of the Jersey City, New Jersey plant of the Hartz Mountain Corporation prior to December 1, 1973, and for its reasonable counsel fees and disbursements incurred in the consolidated proceedings resulting from this order; the amounts thereof to be determined, if agreement cannot be reached thereon by order on petition to the Board, jurisdiction being expressly retained for that purpose (A. 183).

D.

THE DECISION AND ORDER OF THE NLRB

The Board modified the ALJ's recommended order in only one respect which is material to this petition. Before the Board, District 65 had urged that the December 1, 1973 cutoff date for reimbursement of organizational expenses was improper. Hartz, on the other hand, urged the Board to drop this aspect of the ALJ's decision altogether. The Board ruled with Hartz, finding that Hartz's defenses were not "patently frivolous" and, therefore, in accordance with what it states was its usual policy, the Board held that this relief was unwarranted (A. 3).

STATEMENT OF THE CASE

A.

THE FACTS WITH REGARD TO THE TWELVE EMPLOYEES TERMINATED IN MASS DISCHARGES WHO WERE NOT ORDERED REINSTATED.

The ALJ declined to find 8(a)(3) violations with regard to 12 out of 58 District 65 adherents who were terminated in the mass discharges. None of these 12 testified as to the 8(a)(3) aspect of the case, and therefore their individual factual pictures are necessarily not as complete as they are for the other 46 employees.

Nonetheless, it is established that Hartz knew prior to their discharge that 11 of these 12 employees were District 65 supporters, as Hartz was given court exhibits with their names prior thereto (A. 175; fn. 257). The 12th employee, Maria Sanchez, as discussed at 10, supra, was also known to Hartz as a militant employee. The facts as to the 12 are:

1. Francisco Altamirano

Francisco Altamirano was hired on November 15, 1973 and terminated on April 19, 1974, allegedly for "poor work performance" (A. 1943-1957). Although the ALJ's decision stressed his "arguably poor attendance", his attendance compared favorably to those of other employees, including acknowledged active supporters of Local 806, who were not terminated. (See, the findings at A. 136-137; fn. 227 and the exhibits referred to therein, including, A.2147-75; 2176-83; 2184-89; 2190-97; 2324-28;

2329-36; 2337-44; 2345-52; 2353-67; 2368-72; 2373-82; 2383-86; 2387-94; 2395-99; 2400-07).

2. Miriam Rivera Arango

Miriam Rivera Arango was hired on June 9, 1972. Her personnal file (A. 1960) contains a termination slip which reads, "laid off, lack of material," dated April 29, 1974.

3. Fulvia Benjumeda

Fulvia Benjumeda was hired on March 9, 1973 and terminated on August 9, 1974, allegedly for "poor work performance." (A.1966-2002). Her file, however, reveals no warnings, and a continous pattern of wage increases during her employment is shown.

4. Maria Cruz

Maria Cruz worked for Hartz from July 12, 1970 until April 19, 1974. Her personnel file (A. 1967-1983) states that she was laid off for lack of material and terminated for poor performance. However, her file contains no warnings.

5. Natalia Esquilin

Natalia Esquilin worked for Hartz from August 8, 1968 until August 23, 1974, when she was allegedly terminated for poor work performance (A. 1984-1995). Her file contains no warnings of any kind, and reveals a steady pattern of wage increases.

6. Maria Lopez

Maria Lopez worked from October 15, 1971 until July 3,

1974 when she was allegedly terminated for poor work performance (A.2003-2014). Her personnel file contains no warnings. Lopez was fired along with two other District 65 supporters (Iris Vargas and Anna Ventura) by Personnel Manager Morales who told all three they were being laid off. Like Lopez, the personnel files of Vargas and Ventura state they were fired for poor work performance (A. 1934, 1935, 2290-07, 2308-23). Vargas and Ventura testified in the proceedings before Judge Ohlbaum. In their cases he found that their discharges were pretextural (A. 167-8).

7. Wilfredo Lorenzana

Wilfredo Lorenzana worked for Hartz from November 27, 1973 until April 19, 1974 when he was terminated, allegedly for poor work performance (A. 2015-25). Hartz's report to the New Jersey Unemployment Insurance authorities, which is contained in the same file, however, states that Lorenzana was terminated for lack of work.

8. Jose Maisonet

Jose Maisonet worked from November 13, 1973 to April 26, 1974 when he was terminated, allegedly for poor work performance (A. 2236-43). New Jersey Unemployment Insurance records in the same file list his termination as resulting from lack of work; his records indicate no warnings for poor work performance.

9. Elisa Martinez

Elisa Martinez worked from April 6, 1972 until July 19, 1974 when she was terminated, allegedly for poor work performance.

Her files contain no warnings (A. 2026-39).

10. Raul Salcedo

Raul Salcedo worked from July 29, 1969 to August 16, 1974, when he was terminated for poor work performance, although nothing in the personnel files supported that assertion (A. 2040-51).

11. Maria Sanchez

Maria Sanchez worked from January 8, o970 until August 22, 1974 when she was terminated for poor work performance (A. 2052-91). The only warning in her file relates to an incident in which she left her machine to protest unbearable working conditions on August 1, 1974. As discussed, supra, the ALJ found that this warning constituted a separate 8(a)(3) violation.

12. Awilda Soto

Awilda Soto worked from May 11, 1972 until May 10, 1974 when she was terminated for poor work performance. Her file contains no warnings (A. 2099-2120).

B.

FACTS WITH REGARD TO THE 46 EMPLOYEES WHO WERE FOUND TO HAVE BEEN DISCRIMINATORILY DISCHARGED.

All 46 employees who were found to hae been discriminatorily discharged testified. The facts with regard to their

discharges substantially match the facts with regard to the above 12. For example, some actually had signed cards for Local 806 after having supported District 65 (e.g., Clara Aguilar, A. 132). Others had poor attendance records which in the abstract could have justified their terminations (e.g., Marie Diana, A. 140-1). Others were employees who worked in the plant for extremely short periods of time and had not even signed a card for District 65 (e.g., Marta Ocasio, A.150). It is, of course, uncontested that most of the 46 employees who were found to have been discriminatorily discharged, like most of the 12 employees who were found to be discriminatorily discharged, were long term Hartz employees who had not signed cards for Local 806 and had signed for District 65.

In fact, the charts upon which the ALJ relied on in order to determine that District 65 adherents were treated infinitely worse than those who had not supported District 65 during the period of the mass layoffs, used all 58 District 65 employees, for purposes of analysis, not merely the 46 for whom relief was granted (A. 171-4).

C.

THE FACTS WITH REGARD TO THE BUENO AND PEGUERO DISCHARGES.

It is undisputed that both Rafael Bueno and Jose Peguero were discharged in December, 1973. On December 1, 1973, Hartz recognized Local 806. Six days later, on December 7, 1973, all

the Hartz employees were ordered to attend a meeting in the cafeteria, conducted on company time, in which they were to be addressed by the business agent and president of Local 806. During the course of the meeting, the 806 leaders were interrupted by employees, who began to chant, "Out 806" (A. 436). The meeting was literally taken over by District 65 adherents who addressed their fellow employees and urged that the employees reject Local 806 because it did not legitimately represent the workers. The two main District 65 spokesmen at this meeting were Bueno and Peguero (A. 479-487; 512, 519). As a result, Hartz's plant manager informed both Bueno and Peguero that they were discharged (A. 485).

On the following day, both Bueno and Peguero nonetheless reported to work and were instructed to attend a meeting with the plant manager and plant personnel manager (A. 488). At that meeting, they were reinstated but put on notice to refrain from engaging in union activities and were warned that they would be watched carefully (A. 521; A. 78, fn. 157). One hour after Peguero reported back to work he was told to go back to the plant office with a Hartz supervisor (A. 524). It was at this second meeting that he was accused of urinating on the plant floor.

The plant manager, Feinberg, explained the discharge as follows in an affidavit which he gave to the Board in January, 1974 (A. 2220):

> Within an hour of putting Peguero to work, Negron, his supervisor, called me and informed me that Mr. Peguero had urinated in the aisle in the area he was working. Five people witnessed this. The two supervisors who saw this are Hector Santiago and Negron. Three employees also saw this. I can't give their names because they have been threatened and asked me not to give their names.

At trial, supervisor Negron testified he was shown Feinberg's affidavit (A. 2217-26) shortly after it was made and was asked by Hartz vice president Arthur Anderson to back it up (A. 1743). Negron, however, refused and at the hearing flatly denied that he had ever seen Peguero urinate and also denied ever having told Feinberg that he had (A. 1743). Negron also contradicted Feinberg's statement that Peguero had not denied urinating on the floor (A. 1742). The ALJ evaluated Negron's credibility as follows:

> Considering his excellent background, the clarity, precision and firm ring of truth with which he testified, his unshaken testimony...I was most favorably impressed with Negron's testimony after closely observing his demeanor on the witness stand. (A. 59, fn. 106)

Despite plant manager Feinberg's affidavit (A. 2217-26), that five people witnessed the urination incident, Hartz produced no such witnesses at the administrative hearing. The best Hartz could do on this score was to produce a highly active supporter of Local 806, Eddie Sinabria, who testified that he saw Peguero zipping his fly. */

*/ Sinabria was one of the 806 supporters who was rewarded by Hartz with a special pay increase (A. 27, fn. 31).

Hartz also relied on the testimony of personnel manager Morales to support the Peguero discharge. Morales testified that Peguero admitted often using the plant floor as the toilets were far away. The ALJ, however, found that "since Morales made no mention of any such thing in his July, 1974 affidavit to the U. S. District Court (A. 2424-33) and since I regard it as most unlikely that Peguero would make any such admission, I do not credit this aspect of Morales' testimony, ascribing it--as I have in other connections--to Morales' over eagerness to embellish, if not more, in favor of his employer." (A. 124, fn. 213).

Rafael Bueno fared only a little better than Peguero. On December 26, 1973, Bueno led a contingent of employees to the personnel manager's office at the end of the work day to complain that the workers had been promised a full day's pay for a half day's work on December 24. Plant Manager Feinberg disputed that claim (A. 125).

The following day Bueno asked his supervisor for permission to leave the plant at noon. Bueno's supervisor, Urdaneta, did not reply, which signified to Bueno that his request was at least tacitly approved. Bueno left at lunch time and did not return for the remainder of the day (A. 493-495). On the following day Bueno reported for work, observed that his time card was missing and learned from personnel manager Morales that he was discharged (A. 496).

Hartz's personnel files reveal that company policy with resepect to absences, lateness and early departures was extremely lenient. In many instances, employees including new hires have been retained by Hartz despite repeated and unexcused absence over a period of several months. In fact, one of the Hartz supervisory personnel, Felipe Rivera, who testified that he recommended that Bueno be fired, admitted that he had never previously recommended the discharge of an employee for punching out without authorization and subsequently failing to return (A.127, fn. 220). Rivera, after first denying knowledge of Bueno's activity on December 7, directed against Local 806, finally admitted knowledge after being shown his own affidavit (A. 1311). Additionally, the personnel file of Local 806 employee leader Juan Vazquez reveals that he had punched in late or out early without permission on at least 15 to 20 occasions without disciplinary action (A. 127, fn. 220). In fact, Vazquez had disappeared from the plant on two critical days in November, 1973 immediately prior to the sudden appearance of Local 806 in the plant. Vazquez's absences on those days were without permission and, of course, went unpunished (A. 2176-83; 871-73; 877-8).

LEGAL ARGUMENT

I.

THE BOARD HAD NO LEGAL BASIS TO DISTINGUISH AMONG THE DISTRICT 65 SUPPORTERS WHO WERE SUBJECTED TO DISCRIMINATORY MASS DISCHARGE.

The Board, by adopting the ALJ's findings of fact with regard to the discriminatory motive behind Hartz's mass discharges, has found that the employer engaged in a carefully conducted, vicious campaign to cleanse its plant of District 65 supporters. All of Hartz's alleged justifications for engaging in mass discharges have been dismissed by the Board. The testimony of Hartz's key witness, Vice President Kaye,has in effect been branded as perjurious; his claim that he personally studied the personnel files of all employees to determine whom to discharge and whom to keep was, in fact, exposed as a lie by another Hartz employee, who testified that at the time Kaye claimed to have conducted the review of files (A. 1709), no centralized filing system existed which Kaye could have used (A. 1784-94). District 65 anticipates that the Board will cite chapter and verse to this Court in this consolidated proceeding to illustrate the complete lack of integrity of Hartz's defense.

Given the Board's understanding that the discharges were directed against District 65 adherents as a group, the question which must now be faced is whether there is any legal basis upon which the 12 who were not granted relief may be viewed in

a different light than the 46 who were. District 65 asserts there is no justification for making a distinction between these employees.

Significantly, Hartz knew prior to discharge that 11 of these 12 employees supported District 65. */ At the very beginning of the proceeding, the ALJ signed an order requiring District 65 to turn over copies of the District 65 cards to Hartz. As the ALJ found, it was therefore impossible for Hartz to plead ignorance about the identity of District 65's supporters prior to the mass discharge of employees (A. 175, fn. 257). Given the fact that all were exposed at the outset of this proceeding, and were brazenly discriminated against shortly thereafter while proceedings were in progress, the Board should not be allowed to pick and choose which of the District 65 supporters are entitled to relief without substantial evidence in the record to support the making of such distinctions.

Analysis of the record reveals that there are no meaningful distinctions between the group of 46 who were granted relief and the group of 12 who have been left in the cold. Although a few of the 12, in the words of the ALJ, may have had "arguably poor attendance records" or may have received warnings, the same is true of the other 46. Moreover, it has

*/ With regard to the 12th employee, Maria Sanchez, see the discussion, supra, at p. 17, wherein it was pointed out that this employee had been warned for engaging in protected activities shortly before having been fired.

been established that the personnel files, which contain all warnings and attendance information referred to in the record, were not considered in any event. Without a doubt, both the ALJ and the Board understood that the sole criterion used by Hartz to determine whom to keep and whom to fire was District 65 affiliation. For example, it was found:

> ... credited cross-examined testimony of Respondent's former Supervisor Domingo Negron, subpoenaed by General Counsel as a witness, establishes that he was at no time informed why any of the employees here in question was being terminated; that other fellow supervisors of the line (identified by him by name and, without explanation, not produced by Respondent to contradict him) were likewise kept in the dark as to why some of their subordinates were being terminated; that nobody ever asked him for his opinion or evaluation of any employee thus terminated; that when he asked Personnel Manager Morales why two named, valuable employees of his--both known to be Distributive Workers District 65 supporters--were being terminated, Morales answered that it was beyond his control and referred him to General Manager Feinberg, who told him (Negron) that the 'orders' had come 'from Harrison' [the Hartz Headquarters]; that as a result of those terminations his department was unable to carry out its work until other employees were supplied in their place; and that the replacements were not superior in ability to the employees terminated.
> (A. 130.)

At this late date, the Board simply cannot argue that a meaningful factual distinction exists between the 12 and the 46. In fact, there is only one distinction between the two groups which was continuously stressed in the ALJ's decision (A. 134) [Altamirano], A. 134 [Arango], A136 [Benjumeda], A. 140 [Cruz], A. 142a [Esquilin], A. 145 [Lopez], A. 148 [Martinez], A. 163 [Salcedo], A. 164 [Sanchez], and A. 166-7 [Soto]) adopted

by the Board. Ten of the 12 did not testify at all during the hearings, and the remaining two testified on the unlawful assistance aspects of the case, not on the discharge aspects of the case. Obviously, this failure to testify was given controlling weight, as illustrated by the ALJ's ruling in regard to Miriam Arango, where no justification for her discharge, no matter how tenuous or unbelievable, was given (A. 134; quoted, supra, at p. 10).

This case is, therefore, identical in all respects but result to Riley Stoker Corp., 223 NLRB No. 178 (1976). In Stoker, the ALJ had found that two employees were terminated because of union activities, but failed to reach the same conclusion with regard to a third because the latter did not testify. The Board reversed, ruling:

> The Administrative Law Judge's determination that 'public interest' and 'private rights' will not be served by reinstating an employee who abstains from appearing at a hearing is clearly erroneous. We note that the Supreme Court in National Licorice Company v. N.L.R.B., 209 U.S. 350,362,363 (1940) stated:
>
> > 'The proceeding authorized to be taken by the Board under the National Labor Relations Act is not for the adjudication of private rights... It has few of the indicia of a private litigation and makes no requirement for the presence in it of any private party other than the employer charged with an unfair labor practice. The Board acts in a public capacity to give effect to the declared public policy of the Act to eliminate and prevent obstructions to interstate commerce by encouraging collective bargaining and by protecting the 'exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing,

> for the purpose of negotiating the terms and conditions of their employment...' The immediate object of the proceeding is to prevent unfair labor practices which, as defined by §§7, 8, are practices tending to thrwart the declared policy of the Act. To that end the Board is authorized to order the employer to desist from such practices, and by §10(c) it is given authority to take such affirmative remedial action as will effectuate the policies of the act.'"

The Board pointed out in Stoker that once an ALJ has found that an employer has knowledge of a discriminatee's union connections and has generally found union amimus, testimony from each individual discriminatee is not necessary on these points. The Board, of course, recognized that an individual's testimony might be required, if the defense, for example, is poor work performance. But, here the ALJ completely rejected that defense because, (a) no line supervisors testified, (b) so many of the discharged employees were long term workers, and (c) Hartz Vice President Kaye, who made the decisions, could not possibly have known about work performance. This is clear because he could not have studied the different personnel files, and, in any event, the files themselves were conflicting. Additionally, Kaye had no recollection of what supervisors said to him about any specific employee (A. 151, fn. 235; A. 1712).

Given the fact that these proceedings consumed nine months, it is amazing that the General Counsel was able to produce such a high percentage of individual discriminatees,

since their testimony was not heard until the end of the hearings. Even though the Supreme Court ruled in National Licorice Company v. NLRB, 309 U.S. 350,362,363 (1940), that the General Counsel was not required to produce individual discriminatees in order to obtain a remedial order, the great majority of the discriminatees were produced. Certainly, most of their testimony was merely cumulative. Obviously, the ALJ, given his findings with regard to the low or non-existent credibility of Hartz witnesses, would have been entitled to reach his conclusions concerning the discriminatory purpose of the mass discharges even if the General Counsel would have located far fewer witnesses. Equally obvious, however, is the fact that if other discriminatees did not testify, they, too, would have found themselves remediless because of the approach taken by the ALJ and adopted by the Board. For the Board to penalize those who did not testify does violence to the Act and rewards Hartz for its delaying tactics. The Board decision in this regard simply cannot be justified, and is contrary to Board law. Stoker Corp., supra.

II.

THE BUENO AND PEGUERO FIRINGS WERE PRETEXTURAL.

The ALJ engaged in lengthy discussions concerning the factual context of the Rafael Bueno and Jose Peguero discharges. In both instances he found that these discharges were not pre-

textural. In both cases, the Board, without discussion, approved these findings. District 65 contends that these findings are not supported by substantial evidence.

The parties presented voluminous testimony with regard to the unrest which occurred at the Hartz plant after the Company's illegal and hasty recognition of the Teamsters on December 1, 1973. Much of this testimony focused on a meeting in the Hartz cafeteria during working time on December 7th. At that cafeteria meeting, to which the plant's workers were summoned by supervisory personnel, opposition was expressed to the speech of the Teamsters' business agent. This opposition came from District 65 adherents, and was led by two workers, Rafael Bueno and Jose Peguero (A. 479-487; 512, 519). At that meeting, Bueno and Peguero were marked as District 65 agitators whose presence in the plant threatened the Hartz-Teamsters alliance. After the meeting both were summarily fired. But, given the fact that 8(a)(2) charges were already pending before the 22nd Region, Hartz officials well understood they could not fire these two District 65 supporters immediately after they had voiced support for their union. Thus, on Monday, December 10, Bueno and Peguero were told that their discharges were rescinded.

A. Peguero

Peguero was the first to be subjected to a pretextural discharge. On December 10, soon after he was "reinstated",

he was accused of urinating on the floor in a work area by a Teamsters committeeman and fired after a kangaroo hearing presided over by Plant Manager Feinberg.

The testimony revealed that firing to be a complete farce. Neither Hartz nor Local 806 called one witness to testify he saw the incident. The best they could do was produce Eddie Sanabria, a Local 806 committeeman, who admitted he never actually saw Peguero urinate, but claimed to see him "zip his fly"(A. 1040*/). Morris Feinberg added color to this testimony by stating he went to the alleged spot and saw a puddle the color of a "yellow pad". Feinberg said he smelled the substance, put his hand in it, and identified it as "human urine" (A. 1445). Domingo Negron, however, stated it was impossible to distinguish odors in the area because the smell of the Company products was so strong (A. 1750). Nor was Feinberg supported in his testimony that Personnel Manager Morales was on the scene as an observer (A. 1445). To the contrary, Morales testified he did not know where the incident allegedly occurred and did not even know where Peguero was working on that day (A. 1584-5). Finally, contrary to Feinberg's testimony that Peguero did not deny he urinated on the floor when Feinberg accused him of this (A. 1449), Negron, who was

*/ The ALJ found that Sanabria, as well as other Local 806 employee leaders, was specially rewarded by Hartz (A. 27, fn. 31) and despite the fact that there was documentary proof of the raise, "boldly" denied having received it until confronted with the payroll record. (A. 81, fn. 162).

present at the confrontation, stated that Peguero did deny the charge (A. 1742).

Negron's testimony was praised by the ALJ as having "clarity, precision and [the] firm ring of truth..." (A. 59, fn. 106). By contrast, plant manager Feinberg's testimony as to what happened regarding this incident was totally contradicted by every other witness. Given the lack of testimonial support for Feinberg's version of the events, his testimony should not have been credited.

Additionally, the record reveals that Feinberg was secretly testifying as a paid witness in behalf of Hartz. Feinberg testified on direct examination that he had been employed as the general manager of the Hartz plant on July 16, 1973 and that his employment was terminated on July 28, 1974 (A. 1400). He stated he had no present connection with Hartz Mountain "in any way" (A. 1400). On cross-examination, he admitted that he had been attending court on prior days at the suggestion of Hartz's general counsel (A. 1512-3). When asked if he had received any compensation for coming, he answered that he had not "up to this date", but expected to receive expenses (A. 1514). Later testimony and records revealed, however, that Feinberg was still on the Hartz payroll under an arrangement continuing his pay through January, 1975 (A. 1715-1719; A. 2434-7). Feinberg's attempt to conceal his financial interest should have destroyed whatever little credibility he would otherwise have been entitled to.

B. Bueno

The firing of Rafael Bueno toward the end of December was handled in a slightly more sophisticated fashion. Again, however, it came on the heels of an incident in which he represented the workers over an issue as to whether they should have been paid for a full day's work on December 24 (A. 125). The parties did not contest that on December 27 Bueno sought permission to leave the plant around noontime, and thereafter left for the remainder of the day (A. 493-5). Standing in isolation, Hartz may have been able to make a case that its action in firing Bueno on the following day was justified by this absence. A close examiniation of the record, however, reveals the pretextural character of this discharge. First, Hartz's claim that Bueno was absent three days rather than one was simply not borne out by the relevant personnel records and testimony. Secondly, the testimony of Hartz officials made clear that such brief absences were at least tacitly condoned by management. Moreoever, a random sampling of employee attendance records (A. 2324-73) proves no action whatsoever, not even a warning, was taken against employees with far worse absentee records. As a result, there can be no doubt that Bueno, like Peguero, was discharged in an attempt to remove articulate District 65 adherents from the plant.

Much of the ALJ's reasoning in support of his determination that Bueno was not wrongfully discharged centers around

an analysis of his work record. The ALJ noted that Hartz supervisors testified that Bueno had a poor work record (A. 126). This justification for discharging Bueno, however, is devoid of support in Bueno's personnel records, which contain no notations with regard to poor work performance (A. 1530).

C. The Bueno and Peguero Discharges Should Not Have Been Viewed as Isolated Incidents.

District 65 has previously urged that, given the ALJ's findings of strong anti-District 65 animus, the Board should have not indulged the ALJ's practice of resolving certain aspects of the case in isolation from his broader findings. Judge Ohlbaum repeatedly found that Hartz officials had no respect for the truth. In order to sustain Hartz's position with regard to Bueno and Peguero, the ALJ and the Board had to ignore the fact that Bueno, in absenting himself, had done nothing out of the ordinary, and that other employees had not been fired for the same behavior. With regard to Peguero, the ALJ had to accept what Feinberg said was his subjective belief as to what happened, because Hartz was totally unable to prove that Peguero had engaged in the conduct of which he was accused. In this case, where mendacity on the part of the employer was the rule rather than the exception, the shoddy proof supplied by Hartz with regard to Bueno and Peguero did not provide the Board with sufficient evidence upon which to sustain the ALJ's rulings.

III.

THE BOARD"S CONSIDERATION OF DISTRICT 65'S RIGHT TO ORGANIZATION EXPENSES AND LITIGATION COSTS WAS INADEQUATE AND GIVEN THE STRONG FACTUAL SHOWING SUPPORTING THOSE REMEDIES, A LIMITED REMAND IS REQUIRED.

Since Heck's, Inc., 215 NLRB 765 (1974), the Board has adhered to the view that it will not order reimbursement for organizing expenses and litigation costs, "where the defenses raised by the respondent are debatable rather than frivolous." Kings Terrace Nursing Home, 227 NLRB No. 47 (1976). District 65 contends in this case that the Hartz defenses were not debatable, but were obviously a sham, interposed only for the purpose of obtaining delay, and, therefore, worse than frivolous. The Board,however, in failing to follow the ALJ's recommendations with regard to organizational expenses and attorneys fees, engaged in virtually no discussion of the operative facts upon which it based its conclusions that Heck's precluded such relief. This aspect of the Order should, therefore, be remanded to the Board for reconsideration. NLRB v. Food Store Employees Union, 417 U.S. 1 (1974); International Union of Electrical, R & M Workers v. NLRB, 426 F.2d 1243 (D.C. Cir. 1970), cert.den., 400 U.S. 950 (1970); International Union of Electrical, R & M Workers v. NLRB, 440 F.2d 298 (D.C. Cir. 1970). In Heck's, the Board ruled that merely because an employer engages in repeated and aggravated unfair labor practices, and therefore, is not

a "stranger to the Board's processes," does not mean that its defenses in a particular proceeding are frivolous. In this case, to be consistent with Heck's , the focus should be on what happened during the administrative proceedings. Here, the ALJ, in effect, ruled and the Board concurred that Hartz manufactured evidence, both oral and physical, in order to create issues of facts where none really existed. Moreover, the ALJ found that Hartz's key witness, Vice President Kaye, engaged "in a seemingly endless parade of contradictions under oath." (A.79, fn. 159). Kaye, as well as other Hartz witnesses, filed contradictory sworn statements with the Board and the United States District Court, apparently without the slightest hesitation or concern about the meaning of an oath.

The ALJ, in his remedy section, viewed this conduct on the part of Hartz as justifying an order requiring reimbursement for organizational and legal expenses. Clearly, the resort to perjury as a litigative tactic caused what should have been a relatively straightforward proceeding to become an "unusually protracted, complex and difficult" proceeding (A. 180), which required 58 days of hearings over nine months to resolve. The Board disagreed, stating merely that it concluded that Hartz's defenses were not "patently frivolous" (A. 3). District 65 contends that this analysis is inconsistent with prior Board decisions where organizational expenses and attorneys fees were found to be warranted.

The conduct engaged in by Hartz was far more heinous than that found to have occurred in Tiidee Products, Inc. (Tiidee I), 194 NLRB 1234 (1972), or Tiidee Products, Inc. (Tiidee II), 196 NL B 158 (1972). In Tiidee I, the employer was found to have frivolously objected to an election and refused to bargain. The Board in Tiidee II found that the employer had continued to engage in frivolous litigation for the purpose of delay. The rationale of both Board decisions was set forth in Tiidee I, as follows:

> ... frivolous litigation such as this is clearly unwarranted and should be kept from the nation's already crowded court dockets, as well as our own. While we do not seek to foreclose access to the Board and courts, for meritorious cases, we likewise do not want to encourage frivolous proceedings. The policy of the Act to insure industrial peace through collective bargaining can only be effectuated when speedy access to uncrowded Board and court dockets is available. Accordingly, in order to discourage future frivolous litigation, to effectuate the policies of the Act, and to serve the public interest we find that it would be just and proper to reimburse the Board and the Union for their expenses incurred in the investigation, preparation, presentation, and conduct of these cases...

In Heck's, supra, the Board reaffirmed its Tiidee decision, stating that it has "a continuing function... to consider on a case-by-case basis, in the light of both our experience and the facts of such cases, what remedy will best remedy the misconduct found."

In this case, Hartz's defense was worse than frivolous; it was a sham. Black's Law Dictionary, 4th Ed. Rev. 796, distinguishes between frivolous and sham defenses as follows:

> A sham plea is good on its face but false in fact; it may, to all appearances, constitute a perfect defense, but is a pretense because false and because not pleaded in good faith. A frivolous plea may be perfectly true in its allegations, but yet is liable to be stricken out because totally insufficient in substance. (Citations omitted.)

Hartz's defense classically fits this definition of sham because it was based upon perjured testimony. Time after time, the ALJ found that the sworn testimony of Hartz officials was contrary to sworn affidavits they had filed with either the 22nd Region or in the United States District Court. (A. 52-3; 56,58,66). Significantly, he found that these sworn contradictions were intentional, and so serious and substantial that the consequences should be more serious than merely giving the witnesses poor credibility marks (A. 80, fn. 159, 160). Thus, in this case, the Board was confronted with defenses which were not pleaded in good faith. Obviously, as a matter of legal mechanics, the ALJ had to make credibility findings to dispose of these defenses, but these credibility questions could have been resolved no other way because the Hartz officials themselves had submitted so many different sworn versions of the same events. Surely, these, then, are not the types of credibility resolutions which the Board referred to in Heck's, supra, when it stated the general proposition that defenses are debatable if they are dependent upon credibility resolutions. Here, the credibility resolutions were not debatable with regard to the major issues in this case, because the testimony of the

Hartz witnesses was incredible as a matter of law. Failure to resolve the credibility issues against Hartz would have amounted to a clear abuse of discretion. In this case, Hartz has sought and gained years of delay in which it has had time to allow Local 806 to strengthen its hold on the Hartz workers. Given the "quality" of the Hartz defenses, the Board should be required to determine whether this case falls within the framework of its Tiidee and Heck's decisions, and specifically to decide whether sham defenses fall within the kind of conduct made remediable by these cases.

CONCLUSION

For the foregoing reasons, this Court should find that the Board erroneously denied relief to the 12 District 65 adherent employees subjected to mass discharge, as well as to Rafael Bueno and Jose Peguero. The Court should further determine that the Board inadequately considered the question as to whether it should award organizational expenses and litigation costs.

Wherefore, the Court should, upon the legally sufficient evidence presented, find that the 14 dischargees are entitled to reinstatement with back pay. In the alternative, the Court should remand to the Board for reconsideration of the issue as to whether there was sufficient evidence to grant relief to the

14 discriminatees and entry of an appropriate Order thereon. Furthermore, the Court should remand this matter to the Board for the limited purpose of reconsidering District 65's right to organizational expenses and litigation costs.

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