

United Parcel Service, Inc. and Robert W. Bowlds. Case 25-CA-10318

September 30, 1980

DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS
JENKINS AND PENELLO

On January 10, 1980, Administrative Law Judge John P. von Rohr issued the attached Decision in this proceeding. Thereafter, Respondent and the General Counsel filed exceptions and supporting briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,¹ and conclusions of the Administrative Law Judge and to adopt his recommended Order.

During the course of the hearing in this proceeding, the Administrative Law Judge issued a telegraphic order dismissing the allegation in the complaint concerning Respondent's discharge of employee Bowlds. The Administrative Law Judge found that the allegation should be dismissed because the Board should defer, under *Spielberg Manufacturing Company*, 112 NLRB 1080 (1955), to a previous arbitration award which had been rendered on a grievance which Bowlds had filed after his discharge. Counsel for the General Counsel filed with the Board a Request for Special Permission To Appeal the Administrative Law Judge's dismissal of the allegation. On June 29, 1979, the Board issued an Order granting the request for permission to appeal, reversing the Administrative Law Judge's dismissal of the allegation, and remanding the case to the Regional Director for Region 25 for further appropriate action. For the reasons set forth below, we reaffirm our previous

¹ Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

In sec. III.D.2, of his Decision, the Administrative Law Judge states that it became necessary, during the hearing, to show witness Charles Elder his "pre-hearing affidavit." The record shows that the paper which was shown to Elder during the hearing was not an affidavit and was not signed by Elder. The "statement" was a summary of a conversation which Elder had with a Board agent on the telephone. The Board agent summarized what Elder said during the conversation and sent it to him, asking that he sign it. Elder did not do so. We find the Administrative Law Judge's erroneous reference to the writing as an "affidavit" was an inadvertent error which does not affect the results of our decision.

conclusion that this case is not appropriate for deferral to the arbitration award.

The grievance procedure followed by the parties in processing Bowlds' grievance is contained in the collective-bargaining agreement between Respondent and Teamsters Local No. 89, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, which represents Respondent's employees.² The grievance procedure consists of six steps, ending with a hearing before a panel of the United Parcel Service vice president of labor relations, or his designee, and the International director of the Central Conference of Teamsters, or his designee. Bowlds' grievance reached this final step, and the hearing was held on October 3, 1978. The panel reached and issued its decision that day. The panel held: "Based on the facts presented, the Committee has agreed to reduce the Discharge to a Disciplinary Suspension and Final Warning. [Bowlds] shall be returned to work without compensation, Monday, October 9, 1978." The decision also included a written warning that Bowlds would be subject to immediate discharge if he failed to follow management's instructions or to work as directed.

In order for the Board to defer to an arbitration award, it is necessary that the evidence relevant to the unfair labor practice allegation be presented to the arbitrator or panel determining the propriety of an employer's disciplinary actions.³ The record here shows that factual evidence concerning Bowlds' protected concerted activities was not presented to the arbitrator. Thus, Douglas Borders, the Union's business representative who represented Bowlds at the arbitration, testified at the unfair labor practice hearing that the grievance was pur-

² The collective-bargaining agreement is an area agreement between United Parcel Service, Inc., and the Central Conference of Teamsters, an organization of local unions including Teamsters Local No. 89.

³ *Suburban Motor Freight, Inc.*, 247 NLRB No. 2 (1980). This Decision overruled *Electronic Reproduction Service Corporation, et al.*, 213 NLRB 758 (1974), cited by our dissenting colleague. Under the latter Decision, the Board would defer to an arbitrator's award, even though the litigants had withheld the evidence relevant to the unfair labor practice in order to present the issue to the Board. Now, for equitable reasons, we will not defer to an award unless the evidence relevant to the unfair labor practice case has been presented to the arbitrator or panel. Contrary to our dissenting colleague, this case illustrates the wisdom of the policy set forth in *Suburban Motor Freight*. Here, the Union, which determined what evidence would be presented at the arbitration, was the target of dissident union activities on Bowlds' part, and those dissident activities formed the basis of Bowlds' claim that he was a victim of discriminatory treatment. Our colleague would have us find that Bowlds, along with his union representative, "chose" not to present that claim of discrimination, notwithstanding the fact that Bowlds in fact included that claim in his grievance while his representative chose not to present evidence in support of his claim. While in any event we would not defer to an arbitration award where the litigants chose to reserve the unfair labor practice issue for a different forum, we would be particularly hesitant to do so in a case of this nature where the "choice" of evidence to be presented was made by a union whose interests were not entirely congruent with those of the grievant due to the grievant's dissident union activities.

sued on a contractual basis and that he was unaware, and so did not urge, that Bowlds' activities on behalf of PROD and UPSurge had caused his discharge.

Because of the Union's failure both to advocate Bowlds' claim that he was discharged for dissident activities and to present evidence on that claim, we find deferral inappropriate.⁴ In these circumstances, it is not enough that Bowlds' grievance was read at each step of the proceeding, even though in the grievance Bowlds contended that he was discharged for his "union activities and involvement in a class action suit . . ." The mere presentation of the contention, without more, cannot support deferral.

Turning to the merits of the case, the Administrative Law Judge found, and we agree, that Respondent violated Section 8(a)(3) and (1) when it issued a warning to, and later discharged, Bowlds.⁵ In so finding, the Administrative Law Judge relied on evidence adduced by the General Counsel concerning Respondent's knowledge of Bowlds' dissident activities, its expressions of hostility toward Bowlds for those activities, its circumvention of normal channels of supervision in investigating Bowlds' alleged shortcomings, and the extraordinary measures taken in response to Bowlds' purported extension of his breaks. This evidence gave rise to an inference that Respondent was motivated by unlawful reasons to find a "good cause" to discharge Bowlds.

The Administrative Law Judge also set forth the evidence presented by Respondent in rebuttal of the General Counsel's *prima facie* case, evidence which we find wanting. The Administrative Law Judge found, and we agree, that Respondent's evidence does not rebut the inference raised by the General Counsel's evidence that the discharge and warning were unlawfully motivated. Thus, Respondent has not proffered evidence that the manner in which Bowlds was monitored was consistent with its past practice when other employees were suspected of extending their breaks. Similarly, Respondent introduced no evidence of similar abrupt and harsh discipline meted out to longtime employees. While Respondent introduced evidence that other drivers had been discharged for overstaying breaks and falsifying timecards, it introduced evi-

dence concerning the work records of only one of those discharged drivers. The evidence concerning that individual showed that he extended his breaks by significantly longer periods than did Bowlds. Finally, Respondent's explanations for the use of supervisors from distant facilities to monitor Bowlds, without consulting or even notifying the manager of the Owensville facility, were both incomplete and conflicting. In these circumstances, we adopt the Administrative Law Judge's finding that Respondent violated Section 8(a)(3) and (1) of the Act by warning and discharging Bowlds.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, United Parcel Service, Inc., Owensboro, Kentucky, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

MEMBER PENELLO, dissenting:

I would defer to the arbitration award herein with respect to the complaint allegation that Respondent unlawfully discharged Robert Bowlds. The award is, in my opinion, in full compliance with the *Spielberg* standards for deferral. My colleagues disagree and refuse to defer only because they believe that evidence relevant to the unfair labor practice allegation was not presented to the arbitration panel. For reasons set forth fully in my dissenting opinion in *Suburban Motor Freight Inc.*,⁶ I would adhere to the rule in *Electronic Reproduction Service Corporation, et al.*,⁷ by deferring to arbitration decisions when no unusual circumstances appear to justify the alleged discriminatee's failure to introduce evidence of unlawful discriminatory discipline during the arbitration proceeding. No such circumstances exist in this case. On the contrary, Bowlds and his union representative deliberately chose not to present evidence of alleged discrimination at the arbitration hearing even though Bowlds had contended in his initial written grievance that he was discharged for his "union activities and involvement in a class action suit." At each subsequent step of the grievance and arbitration proceeding, this statement was read and Bowlds was given a full opportunity, independent of his union representative, to present any evidence

⁴ For the reasons set forth in his dissenting opinion in *Terminal Transport Company, Inc.*, 185 NLRB 672 (1970), Member Jenkins would find that the lack of a neutral member on the arbitration panel constitutes an independent reason sufficient in itself to render inappropriate deferral to the arbitration award in this case.

⁵ In evaluating the evidence presented at the hearing herein, we have utilized the mode of analysis set forth in *Wright Line, a Division of Wright Live, Inc.*, 251 NLRB No. 151 (1980), which we apply in cases where a respondent asserts that it had "good cause" for taking disciplinary action against an employee.

⁶ 247 NLRB No. 2 (1980).

⁷ 213 NLRB 758 (1974).

in support of it.⁸ The Board majority's willingness to permit relitigation of the discharge issue in spite of Bowlds' failure to pursue the discrimination defense denigrates the parties' collective-bargaining relationship and its voluntary means for fair resolution of disputes. I find such a consequence totally indefensible and would instead dismiss the allegation of the complaint relating to Bowlds' discharge.

⁸ I am astounded by my colleagues' suggestion that some conflict of interest between Bowlds and the Union prejudiced Bowlds and prevented the presentation of evidence in the arbitration proceeding with respect to the unfair labor practice issue. The General Counsel has made no such conflict of interest claim, Bowlds has made no such claim, and the parties have not litigated such a claim in this proceeding. On the contrary, the record reflects apparent cooperation between Bowlds and the Union throughout the entire grievance and arbitration procedure.

APPENDIX

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

WE WILL NOT discharge employees or issue warnings to them because they engage in protected concerted activities.

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

WE WILL make Robert W. Bowlds whole for any loss of earnings he may have suffered by reason of the discrimination practiced against him, plus interest, and WE WILL expunge from his personnel file the final warning which we discriminatorily issued to him on May 24, 1978.

UNITED PARCEL SERVICE, INC.

DECISION

STATEMENT OF THE CASE

JOHN P. VON ROHR, Administrative Law Judge: Upon a charge filed on October 31, 1978, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 25 issued a complaint on December 12, 1978, against United Parcel Service, Inc., herein called Respondent or the Company, alleging that it had engaged in certain unfair labor practices in violation of Section 8(a)(1) and (3) of the Act. Respondent filed an answer denying the allegations of unlawful conduct in the complaint.

Pursuant to notice, a hearing was held before me in Owensboro, Kentucky, on April 5, May 30, and September 11 and 12, 1979. Briefs were received from the General Counsel and Respondent on October 24, 1979, and they have been carefully considered.

Upon the entire record in this case, and from my observation of the witnesses, I hereby make the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent is an Ohio corporation with an office and place of business located at Owensboro, Kentucky, where it is engaged in the interstate transportation and distribution of parcels, and a parcel delivery service. During the year preceding the hearing herein, Respondent performed services valued in excess of \$50,000 in states other than the State of Kentucky. During the same period it received gross revenues in excess of \$500,000, as a link in the interstate transportation of goods. It is conceded, and I find, that Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Teamsters Local 710, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and Teamsters Local 89, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, are labor organizations within the meaning of Section 2(5) of the Act.

III. UNFAIR LABOR PRACTICE

A. *The Issue*

Employee Robert W. Bowlds was terminated by Respondent on April 24, 1978. Pursuant to a grievance proceeding, he was thereafter reinstated on May 8, 1978. Thereafter, on May 24, 1978, Bowlds received a final warning. This warning, also pursuant to the grievance procedure, was rescinded on June 14, 1978. Bowlds was again terminated on August 4, 1978. Pursuant to proceedings and a decision at the final arbitration step of the grievance procedure, Bowlds was again reinstated on or about October 4, 1978.¹ However, in the absence of an award for backpay by the arbitration panel, Bowlds was not reimbursed for the aforesaid period that he was off work.

The General Counsel contends, and Respondent denies, that the final warning issued to Bowlds on May 24 and his discharge on August 4 was motivated by his union activities and other protected, concerted activities.²

¹ The decision of the arbitration panel was reached on October 3, 1978 (G.C. Exh. 2). On May 23, 1979, after hearing evidence on the subject, I issued an Order recommending dismissal of this proceeding on the ground that the Board should defer to the arbitrator's decision under the doctrine enunciated in *Spielberg Manufacturing Company*, 112 NLRB 1080 (1955). Since this action was reversed by order of the Board dated June 29, 1979, I deem this to be dispositive of Respondent's *Spielberg* defense.

² Although a relevant part of the background of this case, Bowlds' termination on April 24, 1978, is barred by Sec. 10(b) of the Act. I would further note that at all times material hereto Respondent's employees were represented by Labor Union No. 89 of the Teamsters' Union, and that the aforesaid arbitration award resulted from a grievance filed

Continued

B. Bowlds' Protected, Concerted Activities

Robert W. Bowlds was employed as a feeder-driver at Respondent's Owensboro, Kentucky, facility since 1965. With reference to the allegations that Bowlds was discharged for engaging in protected activities, these allegations particularly concern Bowlds' activities in connection with two organizations, namely, PROD and Upsurge, as well as his participating in a lawsuit against Respondent that was initiated in 1977. Before turning to the alleged discriminatory incidents, I shall begin with Bowlds' aforesaid activities.

Preliminarily, it is noted that Upsurge is an organization of Respondent employees which is generally critical of the Teamsters Union, as well as the Respondent, in matters pertaining to labor relations and in matters pertaining to the employees' wages, hours, and working conditions. This organization periodically publishes a newspaper and other pamphlets to express its views. "PROD" is a related organization of Respondent employees, similarly involved. I need not dwell further on the subject, since the Board has held, and I find, that employee activities on behalf of these organizations constitute concerted, protected activity.³ As relevant background to the instant case, I further take official notice that the Board, in the aforesaid cases, has found that Respondent has engaged in various unfair labor practices in connection with its opposition to employee activities on behalf of the organizations in question.

Upsurge activities among Respondent's Owensboro employees began in 1975. From then and at all times material hereto, Bowlds was solely responsible for distributing Upsurge's newsletters and literature among the 45-50 employees at the Owensboro center. He also solicited subscriptions and collected money for the Upsurge newsletter. PROD became active at the Owensboro Center in late 1976 or early 1977. Bowlds engaged in similar activities on behalf of PROD at this facility and distributed the bimonthly PROD newsletter to the Owensboro employees.

Concerning the foregoing activities, Bowlds credibly testified, without contradiction, about an incident which occurred prior to Christmas 1977. On this occasion he was passing out PROD literature to employees outside the office door at the Owensboro Center. While so doing, he was broached by two of Respondent's supervisors who were with a group of supervisors visiting the Owensboro facility, which was new at the time. These were Herschel Cash and Mike Worth, supervisors from Respondent's Paducah, Kentucky, facility. At this time, they stated that he had to leave the building immediately because he had already punched out. Bowlds replied that he was not distributing the literature to employees who were working. Noting that he had PROD literature in his hand, one of them stated that they did not want [him] to be passing out any of that literature "around here" or on company premises. When Bowlds responded that he had a right to pass out literature on company premises,

under the grievance procedure of the collective-bargaining agreement between the parties.

³ *United Parcel Service, Inc.*, 230 NLRB 1147 (1977); *United Parcel Service, Inc.*, 234 NLRB 223 (1978); *United Parcel Service, Inc.*, 234 NLRB 483 (1978).

he was told that he had to leave the building within 10 minutes after punching out.

Bowlds further testified that on various occasions during the months of March, May, and June, 1978, as he was passing out Upsurge literature, he was told by Owensboro Supervisors Thomas Campbell and Buddy Ellis that he should leave the premises after punching out and that he should not hang around passing out literature.⁴ On one such occasion, he said, Campbell asked if he was aware of a company no-solicitation rule that was posted on the bulletin board.⁵ Campbell testified that he is familiar with PROD and Upsurge, that in 1978 he has seen Upsurge literature on Respondent's premises, but denied that he had spoken to Bowlds about distributing literature on the premises. From observing him testify, I do not believe that Bowlds fabricated his testimony and I credit it.

Bowlds also initiated and was responsible for the filing of a class action lawsuit against Respondent in the United States District Court for Western District of Kentucky on March 3, 1977, it therein being alleged that Respondent failed to comply with a Kentucky Statute providing that an employer shall not require any employee to work more than 4 hours without rest periods of at least 10 minutes. Thus, Bowlds circulated a petition among the employees to join the class action suit, he collected money from employees for the retainer fee, and thereafter kept them informed as to the progress of the suit. Bowlds' name, along with 12 other employees, appears as a plaintiff on the face of the complaint.⁶ It is well settled that activities of this nature are concerted, protected activities, and I find this to be so here.

C. Respondent's Case as to Bowlds

With respect to the alleged discrimination against Bowlds, Respondent's defense is that in each instance it took action against him for the asserted reason that he took excessive break periods, and that he falsified his timecard for these break periods.

Employed since 1965, for the last 4-1/2 years Bowlds was assigned to a scheduled run on the night shift from Owensboro, Kentucky, to Nashville, Tennessee, and then a turn-around, after making delivery, from Nashville to Owensboro. Reporting to work about 8:30 p.m., Bowlds would generally leave on the down leg shortly before 9 p.m., returning between 6 and 6:30 a.m. He was allotted a lunch or coffee break of 15 minutes, plus 5 minutes for an equipment check, on both the down and return leg.⁷

⁴ At one point Bowlds testified, "They would just tell me that I could not hang around the building passing out literature, but they did not say Upsurge."

⁵ There is no issue in this case concerning any no-solicitation rule. The above is recited only as part of the conversation.

⁶ In a post-hearing stipulation of the parties (placed in the exhibit file) it was stipulated that the complaint in this action was filed on March 3, 1977, that the action was dismissed by the United States District Court Judge on December 14, 1978, and that the matter was appealed to the United States Court of Appeals for the Sixth Circuit on March 19, 1979, where it is still pending.

⁷ The break periods for the drivers were given pursuant to oral instructions by the supervisors. There were no posted rules.

1. The termination-suspension of Bowlds in April 1978

A number of individuals exercised supervisory authority over Respondent's feeder-drivers, including Bowlds, during the times material hereto. These included Darwin Turpin, who became feeder-manager for the State of Kentucky in early March 1978; Jerry Kaler, who became feeder-supervisor over the Western Division of Kentucky in January 1978; Wayne Prewitt, feeder-supervisor over the Eastern Division of Kentucky; and Thomas Campbell, the center manager of Owensboro, Kentucky.

Since the alleged discrimination against Bowlds ultimately resulted from Respondent's surveillance of this employee, it is to be noted that this activity was primarily initiated by Supervisors Turpin and Kaler. Testifying as to how this surveillance happened to be initiated against this senior employee, Turpin testified that Kaler called him on April 19, 1978, to say that while driving with another driver he observed Bowlds farther down the Green River Parkway than Bowlds' schedule should have permitted.⁸ Turpin and Kaler met that afternoon. According to Turpin, when it came to discussing Bowlds, Kaler mentioned that he had heard that Bowlds was arriving late at Nashville, and that "he felt he [Bowlds] was overextending—the possibility of his overextending his breaks."⁹ In any event, the two supervisors decided to follow Bowlds that night and keep him under observation. It was customary for Bowlds to take his break, on both the down leg and return trip, at a restaurant-motel operation known as the Key Truck Stop. That evening Turpin and Kaler arrived at the Key Stop after Bowlds had already arrived, hence they were only able to observe that he departed this stop at 11:37 p.m.¹⁰ According to these supervisors, they observed Bowlds on the return leg and noted that he stopped at 3:43 a.m. and pulled away at 4:29 a.m. (Bowlds' timecard, which he filled out, reflects this break to have been from 4:03 until 4:18 a.m.) Turpin reported the entire matter to Bobby R. Jones, Respondent's division manager of its Lexington, Kentucky, facility. Jones instructed that they observe Bowlds again.

On the evening of April 20, Bowlds again arrived at the Key Stop Restaurant before Kaler and Turpin. He left, they said, at 11:30 a.m. (Bowlds' timecard showed 11 to 11:15 p.m.) On the return leg, the time testified to by the supervisors was from 3:50 to 4:36 a.m. (Bowlds' timecard showed: 4:10 to 4:25 a.m.)

Suffice it to note that as a result of all the foregoing, Bowlds was terminated on April 24 assertedly for falsifying his timecard and overextending his breaks.¹¹ As a result of a grievance filed by Bowlds, he was reinstated

⁸ Although Kaler testified extensively, he did not testify concerning this alleged incident.

⁹ Testimony of Turpin. There is no testimony from any Nashville supervisors to establish that Bowlds in fact was arriving late at Nashville at this time.

¹⁰ Here, and in the other instances when Respondent kept Bowlds under surveillance at the Key Truck Stop, I cite the testimony of the supervisors as to the arrival and departure times of Bowlds. Since this matter is in dispute, I do not find the times testified to by the supervisors to be necessarily accurate.

¹¹ Bowlds was discharged by Turpin at 8:40 p.m. on April 24. Union Steward Jim Weafer was present at the time.

pursuant to an early step of the grievance procedure on May 8, 1978. The discharge was converted to a suspension.

2. The warning letter of May 24, 1978

According to the testimony of Jones, it was about 2 weeks after Bowlds' reinstatement on May 8 that Turpin came to his office and left some tachograph charts from Bowlds' truck. Jones testified that he visually analyzed the charts (he said it was a "visual calculation without an analyzer") and from such observation concluded that Bowlds was again overstaying his break periods. According to Jones, his analysis of the charts showed that for the dates May 16, 17, 18, 22, and 23, Bowlds' breaks for the down leg and the return leg varied from 25 minutes to 32 minutes. For this reason, he said he decided to take further disciplinary action against Bowlds.

By letter of May 24, 1978, which was prepared by Jones but signed by Turpin, Bowlds was thus notified as follows:

This letter will serve as a final warning concerning your excessive breaks and failing to follow your supervisors instructions.

As you know, you were suspended for falsifying your timecard and taking excessive breaks. Upon your return to work, you told your supervisor, Jerry Kaler, that you would continue to take your breaks as you pleased. However, again at that time, he instructed you on how your breaks were to be taken. You have continued to take excessive time on your breaks completely ignoring your supervisor's instructions.

As part of the evidence in the entire case, there is a point to be made with reference to the statement in Respondent's letter asserting that Bowlds told Kaler that he would continue to take his breaks as he pleased. Thus, not only is there no testimony by Kaler of any such conversation, but Kaler in fact testified that during a telephone conversation with Bowlds on April 14, 1978, he told Bowlds that he was returning late to Owensboro and that he expected him to run on schedule. Bowlds responded, Kaler testified, that "he'd do the best he could to do that."

Pursuant to a grievance filed by Bowlds on May 26, a grievance meeting was held on June 14. Present at this meeting were Bowlds, Jones, Turpin, and two union representatives. Jones finally stated that he would withdraw the warning letter of May 24 if Bowlds would agree to adhere to his scheduled breaktime and to document his timecard accurately. Bowlds said that he would agree to do so, whereupon the warning letter was rescinded.¹² Jones testified without contradiction that at one point during the meeting Bowlds asserted that UPS was a hard company to work for, that it keeps an eye on its employees at all times, and that he felt they were trying to fire

¹² Although Bowlds acknowledged so agreeing, he did not at this meeting admit to any such infraction in the past. Thus, Bowlds testified, "And I agreed that I would continue to do this, as I felt I had in the past."

him. Jones said he responded that the Company did not want to fire him, they just wanted him to do his job. On the other hand, Bowlds credibly testified that at another point during the meeting Jones told him, "I'm telling you to place a tachograph chart in your clock every day and if you so much as forget to do so I will fire you on the spot."¹³

3. The discharge of Bowlds on August 4, 1978

Division Manager Bobby Jones testified that on Mondays it is his practice to check the operations reports turned in by the feeder-operators. In about the middle of July, he said, it came to his attention from these reports that Bowlds was not running on schedule. He thereupon requested copies of Bowlds' tachograph charts. According to Jones, the tachographs for July 20, 21, 24, 25, 27, 28, and 31 were blank. Unrelated to the foregoing, but giving as another reason for placing Bowlds under surveillance again, Jones testified that in the latter part of July he received calls from Campbell and Benjamin Cissell to the effect that Bowlds was returning late to the Owensboro Center.¹⁴ On August 2, 1978, according to Jones, he received a report from Kaler that Bowlds' tachograph charts were blank and that he was arriving late at Owensboro. At that point, he said, he instructed Kaler to observe Bowlds on the night of August 2. Kaler testified that he complied by going directly to the Key Truck Stop. According to Kaler, he observed that on the down leg break Bowlds arrived at 11:08 p.m. and departed at 11:38 p.m. As to the return trip, Kaler testified that he waited in his automobile at a rest stop 1 mile south of the Key Truck Stop and followed him, when he passed by, back to the Truck Stop. Bowlds' arrival and departure time, this in the early morning of August 3, was said by Kaler to be from 3:45 to 4:15 a.m. Kaler reported this to Jones.

On August 3, Jones arranged to have Larry Harris, Respondent's loss prevention manager who works out of Louisville, Kentucky, to accompany Kaler that night for the purpose of keeping Bowlds under surveillance. This time Kaler and Harris took a motel room at the Key Stop Motel, which is adjacent to the restaurant where Bowlds took his coffeekes. Harris testified that after observing Bowlds' down leg arrival from the window of the motel room, he went outside the motel and observed him from behind some shrubbery. In rather confusing testimony, Harris first testified that it was while he was within the motel that he noted the time as 10:58 p.m. when Bowlds first pulled in. At another point, however,

¹³ The complaint alleges this statement to be independently violative of Sec. 8(a)(1) of the Act. Disposing of this here, and notwithstanding the other findings and conclusions in this Decision, I am not persuaded that this spontaneous remark during the course of this meeting was violative of the Act. It is recommended, accordingly, that the allegation be dismissed.

¹⁴ Cissell is division manager of Western Kentucky. Cissell testified only when called by the General Counsel as an adverse witness. Neither he nor Campbell was called by Respondent to corroborate the testimony of Jones, related above. In fact, although Cissell was stationed at the Owensboro Center, Cissell testified that he played no part, nor was he consulted, in Respondent's decision that Bowlds be terminated on August 4. He was absent from the terminal during the months of May and June 1978.

he testified that it was while outside the motel that he clocked the time as 10:58 p.m. when Bowlds got out of his cab. In any event, Harris said that he then returned to the motel room and remained there until Bowlds came past the motel to continue his trip, at which point, he said, it was 11:30 p.m. With respect to the return trip, Harris said that he made his entire observation from within the motel while standing at the window. On this occasion, according to Harris, Bowlds pulled in at 3:44 a.m. and left the Key Truck Stop at 4:25 a.m.

Kaler telephoned Jones at home at 5:30 a.m. and reported the foregoing. Jones instructed to terminate Bowlds upon checking his timecard.¹⁵ Harris testified that he followed Bowlds to Owensboro as far as the Holiday Inn, at which point Kaler caught up with him. At this point Harris testified, "And we had called the Center and made sure that Bob had finished his day's work and had turned in his timecard, and at that time we would come over and take the disciplinary action against him."¹⁶ Later that morning Kaler and Harris, in the presence of Supervisors Campbell and Buddy Ellis and Union Steward James Weafer, terminated Bowlds for assertedly overextending his breaks and falsifying his timecard.

D. The General Counsel's Case as to Bowlds

1. Testimony concerning Bowlds' break periods

A number of witnesses testified concerning the length of time Bowlds took for his break periods, most specifically as to the length of time he spent inside the Key Truck Stop Restaurant, on the night of August 3-4, 1978. These included Steven Hamm, manager of the Key Stop Restaurant, Charlotte Johnson, a waitress at the same restaurant, and Larry Branscum, a truckdriver for Leeway Motor Freight. Johnson and Hamm were well acquainted with Bowlds from his many stops at the restaurant, with Johnson serving him nightly. Hamm was well aware that Bowlds had been terminated previously for allegedly overstaying his breaks at the Key Truck Stop and testified that he had been told by Bowlds that he was being watched or followed. Johnson testified that she, too, had been apprised of Respondent's alleged "harassment" of Bowlds in the past. Both testified that it was for this reason that they watched the clock when Bowlds appeared and when he left, noting that Bowlds also was watching his watch. Both Hamm and Johnson testified that on the night in question, as well as on preceding nights, Bowlds did not remain in the restaurant for over 15 minutes. Truckdriver Branscum was acquainted with Bowlds for 6 years through trucking operations on similar routes. Branscum testified that he customarily stopped as many as four times a week at the Key Truck Stop, where he would see Bowlds. Branscum also had been apprised of Bowlds' previous discharge for

¹⁵ It is unclear from the testimony whether Kaler was to terminate Bowlds if his timecard was not correct or whether he was to discharge Bowlds for overextending his break even if his timecard was accurate.

¹⁶ Although from this testimony it does not appear that Harris or Kaler in fact checked Bowlds' timecards, the timecards (received in evidence) reflect that Bowlds noted a 15-minute break for each leg.

allegedly overstaying coffeebreaks at the Key Stop Restaurant.¹⁷ Branscum, who produced a copy of his log while testifying, testified that his log showed that on August 4, 1978, he arrived at the Key Truck Stop Restaurant at 3:33 a.m. and that he left at 4:15 or 4:20 a.m.¹⁸ Branscum further testified that Bowlds arrived after he did and departed before he did. He said that he recollected this particular occasion because, "Robert was sitting across the table from me. Of course, he kept looking at his watch. And I asked him if he was nervous. And he said yeah, that he had to go. And I brought up the subject was the Company still following him up and down the highway."

Bowlds himself testified that on the night of August 3-4, 1978, as well as on the other occasions at issue herein,¹⁹ he did not spend more than 15 minutes inside the restaurant, although his testimony reflects that he may have spent more than 5 minutes checking his vehicle, parking it, and removing it from the premises.²⁰ (Bowlds said that sometimes parking was difficult due to other parked trucks on the premises.)

Turning to a consideration of Respondent and the General Counsel witnesses on the subject of Bowlds' break periods, I preliminarily arrive at two conclusions. On the one hand, Bowlds did not impress me as an individual who would, particularly under the circumstances of his justified or unjustified earlier warnings, deliberately overextend the time of his break periods. I was particularly impressed by the testimony of employee and patron witnesses of the Key Stop Restaurant to the effect that they were aware of Bowlds' concern over the earlier action taken against him, that they were cognizant of his suspicion that he was being kept under surveillance by Respondent supervisors, and that they noted his overt display of nervousness about overstaying his coffeebreaks. All this convinces me that Bowlds was seriously concerned that he not take steps to jeopardize his job. On the other hand, I find it hard to believe that Respondent would take the disciplinary action herein at issue unless it at least had some basis for doing so. While Respondent witnesses may well have exaggerated their testimony in this regard, I shall for decisional purposes assume that at times material hereto Bowlds took breaks in excess of the total 20 minutes allotted.

2. Evidence of hostility towards Bowlds

I shall begin with the testimony of Charles Elder, employed by Respondent since 1967. At the times material hereto Elder was a truckdriver at Louisville, Kentucky, under the supervision of Darwin Turpin. Elder proved to be a recalcitrant witness and clearly evidenced that he did not wish to testify adversely to his employer. In elic-

¹⁷ At one point Branscum spontaneously testified, "Of course, I was always joking with Robert. I asked him if they were still following him up and down the highway."

¹⁸ Branscum acknowledged that he did not know "precisely" when Bowlds left the restaurant.

¹⁹ There is also testimony from the General Counsel witnesses to the effect that Bowlds did not overstay his break periods during the previously mentioned occasions in April 1978. However, for decisional purposes I do not deem it necessary to set forth all this testimony herein.

²⁰ It will be recalled that Bowlds was permitted 15 minutes for his coffeebreak, plus 5 minutes to park and check his truck.

iting his testimony, it became necessary to show him his prehearing affidavit, upon which he finally confirmed the following: Thus, in May 1978, sometime after Bowlds' termination on April 24, 1978, Elder became engaged in a conversation with Turpin at the Louisville terminal. When Bowlds' name was brought up, Turpin stated, "We didn't get him this time but we will get him next time." Turpin recalled having a conversation with Elder at the Louisville location on May 10, 1978. Denying Elder's testimony as aforesaid, Turpin testified that at this time he talked about Bowlds' overstaying his breaks, whereupon he told Elder that if he caught Bowlds doing it again he would have to get rid of him. From my observation of the witnesses, I credit the testimony of Elder over that of Turpin.

Billy Higgins is employed as a feeder-driver out of Respondent's Paducah, Kentucky, facility, and at the times material hereto was supervised by Jerry Kaler. Higgins testified that on the evening of May 19, 1978, he received a call from Kaler with reference to his tachograph cards and other working matters. During the conversation Kaler mentioned that Bowlds had returned to work and that he [Higgins] would probably see him at Nashville that night. (Higgins said that this was the first he learned that Bowlds was reinstated after having been discharged on April 24.) With further reference to Bowlds, Higgins testified that at one point Kaler stated, "It's not over with Bob," and that later in the conversation Kaler repeated, "I'm not through with Bowlds yet."²¹ Although Kaler denied the foregoing, I am convinced that Higgins was telling the truth, and I credit his testimony as stated.

While not directly related to Bowlds, nevertheless pertinent is a conversation which Tom Mouser, the supervisor of Respondent's Campbellsville, Kentucky, Center, had with David Perkins, a feeder-driver employed by Respondent at that facility in about latter May 1978. On this occasion Mouser stated, according to Perkins, that he heard a "bad rumor," that he had heard from a friend who owned a truck stop at Franklin, Kentucky, that someone who was a UPS employee was distributing Upsurge literature "down there." Mouser then asked if he (Perkins) was a member of Upsurge and supported it, to which Perkins replied yes. Mouser denied having had any such conversation with Perkins and testified that he did not discuss Upsurge with anyone.²² From my observation of the witnesses, I credit Perkins' testimony concerning this conversation.²³

²¹ Although Respondent introduced Higgins' pre-trial statement in evidence, the statements with respect to what Kaler said about Bowlds in the above conversation are substantially the same as his testimony. In fact, Higgins' statement reflects that he made written note of Kaler's statements on the same night on which the conversation occurred.

²² However, Mouser conceded having found a copy of the Upsurge paper in the locker room of one of his drivers in early 1978. Testifying that he was only vaguely familiar with Upsurge, he said that several drivers asked if he had ever read the Upsurge newspaper.

²³ I have considered the testimony concerning a conversation which Bowlds and his wife had with Charles Young, Respondent's Midwest Regional Labor Relations Manager, at a hotel lounge on the evening of October 2, 1978. It is my view that the testimony concerning Young's purported statements about Bowlds' attitude is too ambiguous to add any-

Continued

E. Additional Facts; Conclusions

In the first place, the evidence leaves no doubt that Bowlds was singled out as the subject of extraordinary surveillance activity by Respondent supervisors at a time when he was known to be engaged in concerted activities. Bowlds, it will be recalled, testified without contradiction that he had driven the same route for 4-1/2 years without encountering any problems with his employer. These problems did not begin until the time he was observed passing out PROD and Upsurge literature, and at the time when a class action suit, for which he was principally responsible, was pending against Respondent. It is significant to consider, then, Respondent's reason for undertaking such surveillance over this employee in the first instance. In this regard, it will be recalled that, according to Kaler, he [Kaler] and Turpin decided to follow Bowlds on the night of April 19, 1978, because he had "heard" reports that Bowlds was arriving late in Nashville. As previously noted, Respondent offered no direct testimony to establish that this in fact was true. In any event, even assuming Kaler received such a report, I find it hard to believe that, absent some outside motive, the two supervisors would go to such lengths as to follow Bowlds that night without first having discussed the problem directly with Bowlds and/or with the supervisor of the Owensboro facility, Thomas Campbell. The facts concerning Respondent's asserted reasons for following Bowlds on the subsequent occasions here at issue have been previously related. Without repeating them again, I find Respondent's reasons for following him on those occasions to be equally suspect.

Occasionally, in cases such as these, a small but enlightening piece of evidence comes into the record by happenstance or perhaps by inadvertence. Such was the case here. Thus, the testimony of Respondent witnesses was to the effect that Larry Harris, Respondent's loss prevention manager, was finally called on by Division Manager Bobby Jones, together with Kaler, to engage in the surveillance of Bowlds on the night of August 3-4, 1978. Both Jones and Harris testified in detail as to this carefully planned operation. After hearing Jones' testimony and the direct testimony of Harris on the subject, the distinct impression was that this was the first time Harris was at all involved in the Bowlds' situation. However, a general question was then posed to Harris with respect to his involvement of observing drivers on other occasions. Harris' response to this was as follows:

Well, prior to this I had checked Bob Bowlds out one night on my own by myself. At that time I didn't find him taking excessive breaks, or anything so there was nothing said at all about it. [Emphasis supplied.]

The implication of the foregoing is plain. Harris is not a supervisor of Bowlds. He is headquartered at Louisville, which is some 105 miles distance from Owensboro, Kentucky, where Bowlds is stationed.²⁴ I find it incredible to believe that Harris would take it upon himself to

thing of decisional importance to the case, and that further discussion of the matter is therefore not warranted.

²⁴ Rand McNally mileage chart.

single out an employee who is located this distance away, and put him under surveillance unless he did so for some outside reason and/or pursuant to instructions from above. This becomes even more apparent when it is considered, as Harris testified, that prior to August 4, 1978, he had followed only one other employee "on his own." Again, all of the foregoing leads to the inescapable conclusion that Respondent deliberately sought to find a reason for ridding itself of the alleged discriminatee herein. In this connection, it is also interesting to note that on the night of August 3-4, 1978, feeder-driver Bob Keltner stopped at the Key Truck Stop the same time as Bowlds. He was also observed there by Kaler and Harris, the latter of whom testified, "he happened to be there." Keltner was also discharged on August 4, 1978, but was reinstated about 2 days later after filing a grievance. Had it not been for the deliberate surveillance of Bowlds, Keltner, of course, would not have been "caught." Considering the job and the uncertainties of long distance over-the-road travel, it is indeed not unreasonable to assume that other drivers would be susceptible to similar infractions if they were also kept under constant surveillance.

It is, moreover, noteworthy that Bowlds was the only feeder-driver out of Owensboro to be discharged for assertedly overstaying his breaks.²⁵

Apart from all the foregoing, which is demonstrative that Respondent's defense does not stand up under scrutiny, there is the previously related direct evidence that Respondent's disciplinary action against Bowlds and its termination of him was not objectively motivated. If this were not so, it would be hard to otherwise explain why Supervisor Turpin would tell employee Elder, after Bowlds' initial termination on April 24, 1978, "We didn't get him [Bowlds] this time but we will get him next time," as well as why supervisor Kaler would tell employee Higgins, also after the April 24 termination, "It's not over with Bob," and "I'm not through with Bowlds yet."

In sum, and by reason of all the foregoing, I conclude and find that Respondent's warning letter to Bowlds on May 24, 1978, and its discharge of him on August 4, 1978, was motivated, at least in substantial part, by its opposition to Bowlds' protected, concerted activities.²⁶

²⁵ Jones testified that in February 1978, five drivers were discharged from Respondent's Paducah, Kentucky, facility for overstaying their breaks and falsifying their timecards. However, the evidence does not disclose the circumstances of this termination or the seriousness of the infractions involved. Loss Prevention Manager Harris testified that he discharged one package car driver for overstaying his break periods. Significantly, however, Harris revealed that this employee had overstayed his breaks by 1 hour and 40 minutes, which is far in excess of the time that Bowlds allegedly overextended his breaks.

²⁶ I specifically find that this was in relation to Bowlds' activities in connection with PROD and Upsurge, as well as his participation in the class action suit which he was instrumental in bringing against Respondent. Although the complaint alleges and the General Counsel contends that the discrimination against Bowlds was also based on his union activities, namely, that as a union steward he filed numerous grievances against the Company, I find insufficient evidence in the record to support this allegation. It is, accordingly, recommended that the allegation be dismissed.

Accordingly, I find that by such conduct Respondent violated Section 8(a)(1) and (3) of the Act.²⁷

IV. THE EFFECTS OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with the operations of Respondent described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in certain unfair labor practices in violation of Section 8(a)(1) and (3) of the Act, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent discriminatorily discharged employee Robert W. Bowlds because of his protected, concerted activities, I will recommend that Respondent make him whole for any loss of earnings he may have suffered by reason of his unlawful discharge, by paying to him a sum of money equal to that which he normally would have earned from the date of Respondent's discrimination on August 4, 1978, until the date of his reinstatement on or about October 4, 1978, less net earnings during such periods, with backpay and interest thereon to be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).²⁸

Having found that Respondent discriminatorily issued Bowlds a written warning on May 24, 1978, I will recommend that the said warning be expunged from his personnel file.

CONCLUSIONS OF LAW

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

2. The Unions are labor organizations within the meaning of Section 2(5) of the Act.

3. By engaging in the conduct described in section III above, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.

²⁷ Some comment should be made with respect to the so-called falsification of Bowlds' timecard. Thus, this is not the typical case of where an hourly paid employee is paid for time not worked due to a false entry on his timecard. Assuming that Bowlds took a longer break than the 15 minutes shown on his timecards, there is no evidence, nor is there any contention, that this had any effect on his earnings.

²⁸ See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

Upon the foregoing findings of fact and the entire record and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER²⁹

The Respondent United Parcel Service, Inc., Owensboro, Kentucky, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging employees or issuing them warning notices because they engage in concerted activity for their mutual aid or protection.

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

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

(a) Make Robert W. Bowlds whole for any loss of pay he may have suffered due to the discrimination against him in accordance with the manner set forth in the section of this Decision entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its facility in Owensboro, Kentucky, copies of the attached notice marked "Appendix."³⁰ Copies of said notices, on forms to be provided by the Regional Director for Region 25, after being signed by Respondent's duly authorized representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced or covered by any other material.

(d) Notify the Regional Director for Region 25, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER RECOMMENDED that the complaint be dismissed insofar as it alleges violation of the Act not specifically found herein.

²⁹ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

³⁰ In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted By Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."