

**Alfred M. Lewis, Inc. and Roger Hendershot and Paul V. Gregan, Harlan Swetnam, Peter Brix, David Woodard, Derol Cheatham, Robert Riland, Jr., Kendall C. Jones, Jack Nelson and Paul E. Jaynes.** Cases 28-CA-3628, 28-CA-3714, and 28-CA-3714-2

August 4, 1980

**SUPPLEMENTAL DECISION AND ORDER**

**BY CHAIRMAN FANNING AND MEMBERS JENKINS AND PENELLO**

On February 1, 1980, Administrative Law Judge Gerald A. Wacknov issued the attached Supplemental Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and Respondent filed an answering brief, cross-exceptions, and a brief in support of its cross-exceptions.

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 Supplemental Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge only to the extent consistent herewith.

On May 18, 1977, the Board found, *inter alia*, that Respondent violated Section 8(a)(5) and (1) by instituting a production quota and disciplinary system.<sup>1</sup> The Ninth Circuit enforced the Board's Order,<sup>2</sup> and provided for reinstatement and back-pay for those employees who were discharged, suspended, or otherwise disciplined or denied work opportunities "solely" as a result of the unlawful system.<sup>3</sup> We agree with the Administrative Law Judge that this language is a departure from the Board's usual remedial provisions. The General Counsel has not challenged the language, however, and we accept the Ninth Circuit's judgment as the law of the case.

The Administrative Law Judge found that employee George McCown was not discharged solely as a result of the unlawful production quota and disciplinary system implemented by Respondent in July 1975.<sup>4</sup> He observed that the August 12 termination statement cited "attitude" and "low production" as the reasons for the discharge, and found that McCown's bad attitude could be partly attrib-

uted to both his prior discharge in connection with the marijuana incident and to his disrespect for Supervisor Fred Numkena. The Administrative Law Judge therefore concluded that McCown's attitude constituted a separate rationale for his discharge, since it was not entirely a response to the production quota system. Contrary to the Administrative Law Judge, however, we find for the reasons below that McCown was discharged solely as a result of the unlawful system and the prescribed counseling which was a part of it.

Under the system, Respondent required each employee to meet a daily production standard of 95 percent of the crew average. The record discloses that McCown reacted negatively to this standard, and that his production suffered as a result. We note that in a July 10 memo Supervisor Numkena indicated that he informed McCown that his production was inadequate and that he should pick up his pace. Numkena then observed that McCown "looked at me and proceeded to label his merchandise at a very slow pace as to intimidate me for my comments." Numkena also recalled that, when instructed to improve his performance, McCown "waved his hand and proceeded to ignore me and went back at his slow pace to work." On July 14, McCown announced that he was unable to work because of Numkena's attempts to increase his production, and walked off the job in the middle of the day.

It is also noteworthy that, in the arbitration proceeding which upheld the discharge, Respondent contended in its brief that McCown "was simply capable of producing more but had made up his mind that he would deliberately defy his supervisors and stall and slow down to test the system." The conclusion that McCown was slowing down to test the system is consistent with the frequent references to speed in Numkena's memos. On July 10, Numkena indicated that he told McCown that "he moved too slowly" and that "he strutted along when he should walk at a good swift pace and develop a sense of urgency toward his work." On July 13, Numkena recalled that he urged McCown to go faster and increase his pace, and, on August 6, he noted on several occasions that McCown was still not improving his speed.

In light of the above, we find that McCown's bad attitude was inextricably intertwined with Respondent's production quotas, and that his attitude toward the quota system in turn caused his low production. Therefore, we find that "attitude" and "low production" are not separate and independent issues, and that consequently McCown was discharged solely as a result of the system.

<sup>1</sup> 229 NLRB 757.

<sup>2</sup> *Alfred M. Lewis, Inc. v. N.L.R.B.*, 587 F.2d 403 (9th Cir. 1978).

<sup>3</sup> The word "solely" also appeared in the make-whole portion of the Board's Order.

<sup>4</sup> Unless otherwise specified, all dates herein refer to 1975.

We note that the result would not be altered even if it is assumed that attitude formed a separate basis for the discharge, apart from low production. We find that, to the extent that McCown's attitude may be a separate problem, it is the result of the unlawful counseling he received from Fred Numkena,<sup>5</sup> which was in turn part of a system unlawfully introduced by Respondent without bargaining. Numkena's July 13 memo provides extensive evidence of McCown's negative reaction to that counseling. Numkena observed that McCown requested twice to be left alone, insisted three times that he did not need help, and ignored Numkena's comments on four other occasions. When reminded that he should refrain from talking and concentrate on production, McCown angrily stated, "I'll talk any time I want to and nobody can tell me not to." McCown also said that he knew how to perform his job and that Numkena could not show him anything. In his August 6 memo, Numkena observed that McCown "shrugged his shoulders" and continued working in response to counseling, and indicated that he was not going to discuss his production any further. Additionally, McCown's negative reaction was undoubtedly reinforced by the persistent nature of the counseling. The record discloses that four counseling memos were written between July 6 and his second discharge on July 16, and that six were written between his July 28 reinstatement and his third discharge on August 11.

Accordingly, we conclude that McCown's attitude, to the extent that it may be viewed as separate and independent from "low production" under the unlawfully introduced quota system, developed as a reaction to Respondent's counseling in implementing the system. McCown had a right to refuse this unlawful counseling, and therefore his failure to accept it cannot be used as a legitimate basis for his discharge.

The Administrative Law Judge also found that McCown's bad attitude derived, at least in part, from his first discharge on March 18 in connection with the marijuana incident, and his subsequent reinstatement without backpay on June 8 pursuant to an arbitration award. We find, however, that this incident was essentially unrelated to either McCown's attitude or to Respondent's decision to discharge him. After McCown was reinstated, Supervisor Dale Brant noted in a June 13 memo that McCown was determined to obtain his backpay "one way or another," and concluded that he had a "very poor opinion" of Respondent. The memo

also recorded McCown's comment that he "had no hard feelings against anyone in this department and would do his job as usual." In a June 16 memo, Respondent's superintendent of operations, Caldwell, observed that McCown intended to sue the security service involved in the marijuana incident, and concluded that he had a "bad attitude" toward Respondent.

However, the record discloses no evidence that the marijuana incident was ever mentioned again after June 16 by either McCown or Respondent, and on subsequent occasions Respondent referred to McCown's attitude in an entirely different context. In his July 13 memo, Numkena concluded that McCown had a poor attitude, after summarizing a lengthy counseling session in which McCown repeatedly ignored or rejected Numkena's efforts to increase his production. The memo indicates that McCown's attitude was expressed exclusively as contempt for the counseling process and not in terms of any lingering resentment over the marijuana incident.

Similarly, Jeff Thrasher indicated in his August 11 termination memo that McCown was being discharged because he had not fulfilled the July 28 reinstatement conditions that he change his attitude and improve his production. The memo was primarily concerned with McCown's failure to meet the production quota and his continuing resistance to Numkena's counseling, and there is no indication that Thrasher considered the marijuana incident as an influence on McCown's attitude. We therefore conclude that when Respondent discharged McCown it perceived his attitude problem as being related to his failure to accept the unlawful production quota and counseling system, and not to any lingering resentment concerning the marijuana incident. Our finding in this regard is in accordance with the Ninth Circuit's observation that the suspensions and discharges were effected "pursuant to the program"<sup>6</sup> and because the employees "failed to meet the production quota."<sup>7</sup>

We find, therefore, that McCown was discharged solely as a result of Respondent's unlawful production quota and disciplinary system and is entitled to backpay as set forth in the Administrative Law Judge's Supplemental Decision.

<sup>5</sup> The court of appeals noted that the Board found that the counseling was an integral part of the disciplinary system. 587 F.2d at 410. It is therefore clear that the Board's finding that the disciplinary system was unlawful encompassed a finding that the counseling was unlawful.

<sup>6</sup> 587 F.2d at 406. The court of appeals did not mention McCown by name, but indicated in fn. 5 that it was referring to three employees discharged by December 1975. McCown was one of the three employees discharged by that date.

<sup>7</sup> 587 F.2d at 412.

## CONCLUSIONS OF LAW

1. George McCown was discharged solely as a result of Respondent's implementation of the unlawful production quota and disciplinary system.

2. George McCown made the requisite diligent search for employment following his discharge, and the backpay amounts and periods are accurately set forth in the backpay specification, as modified in the Administrative Law Judge's Supplemental Decision.

## THE REMEDY

Having found that George McCown was discharged solely as a result of Respondent's implementation of the unlawful production quota and disciplinary system, we shall order Respondent to offer him immediate and full reinstatement to his former position or, if it no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed. We shall also order Respondent to make George McCown whole for the loss of earnings he has suffered, by paying to him the sum of \$49,334, plus interest, until his backpay is paid and less appropriate tax withholdings, for that portion of his backpay period running through June 5, 1979; together with such additional backpay, plus interest, until his backpay is paid and less appropriate tax withholdings, as shall accrue after June 5, 1979, until he receives a valid offer of reinstatement or terminates his employment with Respondent. We shall also order Respondent to pay to the Western Conference of Teamsters' Pension Trust, on behalf of McCown, the sum of \$3,223.85 for contributions due as of June 30, 1979; together with such additional pension trust contributions as shall accrue after June 30, 1979, until McCown receives a valid offer of reinstatement or terminates his employment with Respondent.\* Interest shall be computed in accordance with the formula set forth in *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962), and backpay accruing after June 5, 1979, shall be computed in accordance with the formula set forth in *F. W. Woolworth Company*, 90 NLRB 289 (1950).

## ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Alfred M. Lewis, Inc., Phoenix, Arizona, its officers, agents, successors, and assigns, shall offer George McCown immediate and full reinstatement

\*The Remedy and Order herein appear as amended by the Board's Order Granting Motion for Reconsideration and Amending Supplemental Decision and Order, issued April 27, 1981.

to his former position or, if it no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed, and make him whole for any loss of earnings incurred in the manner set forth in the section of this Supplemental Decision entitled "The Remedy." Respondent shall also make payments to the Western Conference of Teamsters' Pension Trust, on behalf of McCown, in the manner set forth in the section of this Supplemental Decision entitled "The Remedy."<sup>8</sup>

## MEMBER PENELLO, dissenting:

I did not participate in the Board's original Decision and Order in this proceeding wherein it held that Respondent violated Section 8(a)(5) and (1) of the Act by, *inter alia*, unilaterally instituting a production quota and disciplinary system. 229 NLRB 757 (1977). Thereafter, the Board's Order was enforced in pertinent part by the United States Court of Appeals for the Ninth Circuit, 587 F.2d 403 (1978). As stated by the Administrative Law Judge, both the Board's Order and the court's Judgment departed from established law by limiting the remedial provisions to employees discharged "solely" as a result of Respondent's unlawful actions. However, the parties to this litigation, the Administrative Law Judge, and my colleagues have all accepted this language as the law of the case and I shall as well. Applying this unusual standard to the facts presented here, I would find, contrary to my colleagues, and for the reasons stated by the Administrative Law Judge, that employee George McCown was not discharged *solely* as a result of Respondent's unlawful production quota and disciplinary system, but rather was also discharged for an independent reason, namely his poor attitude. Accordingly, I conclude that Respondent is not required to offer reinstatement to McCown and does not owe him any backpay.

<sup>8</sup> See *Merryweather Optical Company*, 240 NLRB 1213 (1979). As part of the remedy herein, Member Jenkins would require the payment of interest on all pension trust contributions until the date that payment of the contributions is made.

## SUPPLEMENTAL DECISION

GERALD A. WACKNOV, Administrative Law Judge: On May 18, 1977, the Board issued its Decision and Order in this proceeding wherein it held that the Respondent violated Section 8(a)(1) and (5) of the Act, *inter alia*, by unilaterally instituting a production quota system and attendant disciplinary procedure. *Alfred M. Lewis, Inc.*, 229 NLRB 757 (1977). The Board's Order was enforced by the United States Court of Appeals for the Ninth Circuit. *Alfred M. Lewis, Inc. v. N.L.R.B.*, 587 F.2d 403 (9th Cir. 1978).

### A. The Facts

#### 1. Positions of the parties

During the aforementioned proceedings it was not disputed that Respondent had suspended 10 employees and discharged 3 other employees, one of whom was George McCown, the only alleged discriminatee directly involved herein, for failure to meet certain production quotas. Rather, the principal issue in the underlying proceedings was whether the establishment of the production quota system constituted a unilateral change in violation of Section 8(a)(5) of the Act. The court agreed with the Board that such a violation had been committed and enforced the Board's Order. Respondent has fully complied with the remedial provisions of the court's judgment with respect to all but one employee, George McCown, basing its refusal to offer reinstatement and pay backpay to McCown on the precise language of the said judgment.

Thus, the court ordered, *inter alia*, that Respondent:

(c) Offer all employees discharged, suspended, or otherwise disciplined or denied work opportunities solely as a result of Petitioner's unlawful actions described above, immediate and full reinstatement to their former positions or, if they no longer exist, to substantially equivalent ones, without prejudice to their seniority or other rights privileges. [Emphasis supplied.]

(d) Make whole all employees who were discharged, suspended, or otherwise denied work opportunities solely as a result of Petitioner's unlawful actions described above. In all cases involving backpay and/or benefits, the amounts thereof shall be computed in the manner set forth in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest added thereto in the manner set forth in *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962). [Emphasis supplied.]

Moreover, the "Notice to Employees" attached to the court's judgment contains similar language.

The Board's Order contains the following paragraphs which correspond to those above-quoted paragraphs of the court's remedial Order:

(c) Offer all employees discharged, suspended, or otherwise disciplined or denied work opportunities as the result of the institution of production quota and disciplinary systems in July 1975, and on March 29, 1976, and/or the refusal to allow union representation at counseling sessions and disciplinary interviews, immediate and full reinstatement to their former positions or, if they no longer exist, to substantially equivalent ones, without prejudice to their seniority or other rights and privileges.

(d) Make whole all employees who were discharged, suspended, or otherwise denied work opportunities solely as a result of the institution of said production quota and disciplinary systems and/or refusal to allow union representation at counseling sessions and disciplinary interviews in the manner

set forth in the section of this Decision entitled "The Remedy." [Emphasis supplied.]

Interestingly, the word "solely" does not appear in the Board's paragraph (c), above, but does so appear in the following paragraph, (d), above. Moreover, the notice to employees attached to the Board's Order contains no reference whatsoever to the word "solely" but reads as follows:

WE WILL offer all employees discharged, suspended, or otherwise disciplined or denied work opportunities as a result of the unilateral institution of said production quota and disciplinary systems, or refusal to allow union representation at counseling sessions and disciplinary interviews immediate and full reinstatement to their former positions or, if they no longer exist to substantially equivalent ones, without prejudice to their seniority or other rights and privileges.

WE WILL make whole all employees who were discharged, suspended, or otherwise denied work opportunities as the result of the unilateral institution of said production quota and disciplinary systems, or refusal to allow union representation at counseling sessions and disciplinary interviews.

Respondent maintains that, unlike the other employees involved herein, McCown was not discharged solely as a result of his failure to meet the unilaterally established production quota, which was admittedly a reason for the discharge, but that he was also discharged for a secondary and independent reason; namely, his "poor attitude," and that therefore the court's judgment does not require Respondent to either offer reinstatement or pay backpay to McCown.

The General Counsel acknowledged at the hearing that the court's above-quoted remedial language constitutes a radical departure from well-established Board and Ninth Circuit precedent.<sup>1</sup> Nevertheless, despite the fact that neither the Board's Decision and Order nor the court's opinion and judgment contain any explanation whatsoever for such a departure from established law, the counsel for the General Counsel emphasized that she was not attempting to challenge such language. Rather, the General Counsel enunciated a willingness to accept the court's judgment as the law of the case and, in attempting to fit McCown's case within the ambit of the court's judgment, maintains that McCown was in fact solely discharged as a result of the unilaterally imposed production quota and disciplinary system. Thus, the General Counsel argues that McCown's alleged poor attitude, rather than being a separate and distinct phenomenon, resulted directly from Respondent's persistent implementation of the unlawful quota and disciplinary systems, and therefore that the dual reasons advanced by Respondent for McCown's discharge are intertwined to such an extent that they are inseparable.

<sup>1</sup> See *The Youngstown Osteopathic Hospital Association*, 224 NLRB 574 (1976), reversed on other grounds 574 F.2d 891 (6th Cir. 1978); *Western Exterminator Company v. N.L.R.B.*, 565 F.2d 1114 (9th Cir. 1977).

## 2. McCown's employment history

McCown began working at Respondent's grocery warehouse on about October 4, 1970, and held various jobs thereafter. There is no evidence showing that his employment was considered to be other than entirely satisfactory until he was discharged on about March 28, 1975,<sup>2</sup> along with three other employees, as a result of a marijuana smoking incident in Respondent's parking lot. Following an arbitration proceeding wherein it was found that the evidence pertaining to McCown and another employee was not sufficiently "clear and convincing" to show that they participated in smoking marijuana, the two employees were reinstated but were awarded no backpay because the arbitration panel determined that the two employees "have not been completely truthful in their testimony."

Upon his return to work on or about June 8, McCown was interviewed by several supervisors or officials of Respondent. A memo of one interview, dated June 13, written by Supervisor Dale Brant, is as follows:

On June 10, I had a talk with George to find out what his attitude was upon his return to work on June 8, 1975. He told me he had no hard feelings against anyone in this department and would do his job as usual. He did however make the comment that he was going to get paid for his time off, one way or the other. He left me with the following impressions:

1. He is a very cocky, unstable person.
2. He has a very poor opinion of the Co.
3. He is a very good example of what A. M. Lewis people aren't.
4. He is out to get what he can as easily as he can.

Another memo by another supervisor, dated June 16, states:

At 5:15 P.M. on this date I talked to George and asked him what he meant by his comment to Dale Brant that he intended to get his money (meaning back pay or lost wages) back?

George said he planned to take civil action against Burns Guard Service, because he thought that he had been wronged. He has a bad attitude toward the Company and feels that we were not fair to the employees involved in the incident. He thought we should have had a meeting with the employees, the Union and the Burns Guards.

McCown was transferred to the grocery warehouse on July 6 and was assigned the work of filling grocery orders. Thereafter, McCown was supervised by Fred Numkena, who had held this supervisory position only since early 1975, and who had worked in the warehouse only a short time prior to becoming a supervisor. At or about the same time, the second phase of Respondent's unlawful production quota system; namely, the disciplin-

ary procedure consisting of a series of warnings, suspensions, and ultimately discharge for failing to meet the production quota, was placed in effect in the grocery warehouse.

Pursuant to the production quota system whereby supervisors were instructed to engage in the daily counseling of employees in order to cause them to improve their production to a predetermined standard, set at 95 percent of the crew average for the day, Numkena immediately began counseling McCown for his low production. The memoranda of such counseling sessions are lengthy and voluminous. The memoranda of counseling sessions on July 7, 8, and 10 show that McCown was requested by Numkena to try to do better, and that McCown attributed his failure to meet the production quota to his newness on this particular job, having been recently transferred to the grocery warehouse. However, a second counseling session also occurred on July 10, and Numkena's lengthy memo of the conversation is as follows:

I told George McGowen that his production at lunch was below 100 units per hour and I asked him to pick up his pace and try to do better. He looked at me and proceeded to label his merchandise at a very slow pace as to intimidate me for my comments. I told him that he did drop in production from Tuesday and I told him that he needed to move faster if he was going to improve his ability.

He told me that he was doing the best he could and that he didn't know the merchandise locations.

I told him that he appeared to go to the correct merchandise knowingly and that moving faster would improve his production.

He stated that that wasn't the problem and that I didn't know what the real problem was. He said that he hurt himself in a kite flying accident and said that he hurts all over. He said that if he called in sick that we'd be all over him for absences.

I then told him that if he couldn't move any faster, then he should cut down on his socializing in the aisles. I said that I've seen him on a number of occasions talking to another employee on company time and that just as I came to talk to him, he was socializing (talking) with another employee and that perhaps if he talked less and used that time for productivity he would show a better performance. I told him that I was here to help him and that his improvement by me and him helping would make him a better employee. I asked him if he wanted to improve himself and be a better person.

He stated that he didn't know the merchandise that well or the location and that he was doing the best he could. I told him that he picked up almost everything with ease and that the only trouble I could see was that he moved too slowly, he strutted along when he should walk at a good swift pace and develop a sense of urgency toward his work. I told him that all we were after was just a good day's work.

He said that he didn't want to argue about it that he might lose himself. I told him, asking if he wanted to improve himself. I said all it takes is an

<sup>2</sup> All dates or time periods hereinafter are within 1975, unless stated to be otherwise.

effort on my part and a little on his to help him improve his performance.

He then waved his hand and proceeded to ignore me and went back at his slow pace to work. I then told him to try what I said and he would improve and I left him in "S" aisle.

On July 13, Numkena again counseled McCown, and the memo of the counseling shows that McCown made "No" comments. The employee ignored me. On the same day Numkens wrote another lengthy memo concerning McCown:

I rode with George McCown for thirty mins. From 7:30 p.m. to 8:00 p.m. Sunday, July 13, 1975, with the onlook of developing George into a productive order runner. I talk[ed] to him about his running and pointed out his faults and told him how he could improve himself. He ignored me and didn't say anything. I asked him if he understood me and if he heard what I said to him. I told him that I was with him to help him better himself, that my instructing him would be beneficial to him by developing a sense of urgency in his order runs and would benefit the company by his inspiration. He again just moved on ignoring me. I told him that I needed him to respond so I would know that he understood me. I said that his ignoring me told me that he didn't want to improve and that I was wasting my time. I said that he went to the items with no difficulty but he moved with no intention of going any faster. I then asked if he wanted to better himself and increase his production. I said that all we wanted was a good days work. That by him developing himself with my help, his fellow union brothers wouldn't have to carry him everyday. I asked if he would like to better himself and carry him everyday. I asked if he would like to better himself and carry his share of the working load. He responded saying that, "He didn't need my help." I then asked if he could do it alone, if he could improve his production and carry his share of the work and give us a good days work by himself. He again ignored me and stood [and] started at the case he placed on the dolly. He then said that I didn't know his problem and that I couldn't help him. I told him that I was here to help him and to try and solve his problems. I said that I would listn to him and that we could do something about it. He then said that, I don't know his problem and that I couldn't help him. I told him that I didn't know his problem and that I could't help him. I told him that I was here to help him and to try and solve his problems. I said that I would listen to him and that we could do something about it. He then said that, "I don't need your help, and even if I told you you wouldn't do anything about it." I said that I was here to help him and that I would listen to him and find a solution if I could and if I couldn't that I would surely find someone who could. He again ignored me and said, "Just leave me alone." I told him that it was obvious that he needed help and

that his refusing my help only give me the impression that he doesn't want to improve himself. I again asked if he wanted to improve himself. He still ignored me. I then asked him if he could go faster and increase his pace; because that was his only major problem. He then answered saying "Just leave me alone, I don't need your help or anybody's." I told him that I'm his supervisor and that I'm here to help him and guide him, and him saying he didn't need my help only alerts me to the fact that he doesn't want to improve.

He then went back to his salisbury [a motorized vehicle for pulling order carts] and was going to an other aisle when Jerry Metheny came by with a fork and started talking to him. I walked up to them and Mr. Metheny went on. I told Georced that the last time I wanted to help that I saw him talking as I was walking toward him and that I've seen him a number of occasions talking when he should be working. I said that he should stop talking and concentrate on improving himself. He burst out saying that, "I'll talk any time I want to and nobody can tell me not to." I then said that the time he uses is the company's time and that he is stealing company time and is not concerned with his self improvement. I told him that a minute here and a minute there adds up in an eight hour day. Also that this could be used in a more beneficial way. He ignored me again and finish[ed] his bill. He said that he knew how to run orders and that I couldn't show him how. That he has been here long enough and I couldn't show him how.

George McCown has a poor attitude toward his work, and his refusing help and ignoring me and my suggestion leads me to believe that he doesn't and isn't willing to meet me or the company in establishing a solution to his problem.

On the same day, Numkena wrote:

Mr. McGown has refused my help and my suggestions that would prove beneficial to his improvement. He doesn't and isn't willing to improve or give us a good days work.

I have tried on two occasions to help George and both have been unsuccessful through his unwillingness.

His attitude is very poor and he is unwilling to develop himself or his pride as an employee of Alfred M. Lewis.

On the next day, July 14, McCown left work during the middle of the shift. The memo of this incident is as follows:

At about 12:30 a.m. Monday, July 14, George McCowen brought his time card into the office & stated "I'm going home. Because Fred Numkena counselled me, I can't work." He then left the warehouse. He did not claim illness or injury. He did not claim any pressing business that would force him to leave before the end of the shift.

As a result, McCown was "terminated for cause," effective July 16. Respondent's "Termination Statement" shows that McCown was terminated because of "attitude, production, attendance," and that his character and ability were "poor."

Thereafter, the Union contended that McCown's discharge was improper, and as a result of a meeting and interview between Respondent, McCown, and the Union, McCown was again reinstated on July 28. A memo, dated August 11, from Leonard Taylor, assistant business agent of the Union, shows that as a result of the interview "it was agreed that Mr. McCown would improve his attitude and apply himself to his employment."

A memo dated July 28 shows that McCown was again counseled for low production by Numkena immediately upon his return to work. Similar memos are dated July 29 and 30 and August 4, 5, and 6. A second memo by Numkena dated August 6 states as follows:

I rode with George to watch him work and to see why he hasn't improved in his production. He has been below the crew average on pallets and dollyloads for the past two weeks and on a daily basis.

I observed him picking orders and placing them on the dollies, and he still hasn't changed his speed.

I told him then that he was still not developing his self or his order picking speed, that he hasn't improved at all. I told him that he needs to work and concentrate on his picking speed and show a desire for development.

He then told me that he has improved, that he ran the crew average and why should he do more, that that was all we were concerned with and that he ran a 98, that's the crew average, and that's all he's after, so why bother.

I told him that if he worked toward developing his speed that he would soon develop to his full potential.

He stated again that he ran the crew average and, "that's all I'm after." He told me that he wasn't counseled so why bother.

I then asked if he wanted to develop to his full potential and be more productive.

He then shrugged his shoulders and ran the rest of his order.

I then caught him at the end of "S" aisle and proceeded to counsel him for Monday night's production, because he did not make the crew average.

He stated that he wasn't going to discuss it any further and that he would bring the "union man down" and see about it.

The final memo, written by J. Thrasher, dated August 11, states as follows:

I called George McCown in and told him that his production for the past two weeks was not satisfactory. He continued to run more than 5% below the crew average, and resisted attempts by Fred Numkena to help him improve.

I stated that he had been allowed to return to work two weeks ago, after being terminated, on the

conditions that he change his attitude and improve his production. He has not done so.

I told McCown he was being terminated effective immediately.

McCown's termination statement, dated August 12, states that he was terminated for "attitude and low production," and that his character was "poor;" and his ability was characterized as "no desire."

This final termination of McCown was arbitrated on October 17 and 18, and the ultimate issue to be determined was whether McCown was discharged for "just cause." At the arbitration proceeding, Respondent contended that McCown was discharged for the dual reasons of "bad attitude and low production," and introduced the various memos which appear and are discussed above, and which have been made part of the record herein. A careful reading of the briefs submitted and the decision of the arbitration panel shows that the panel considered McCown's attitudinal problems and Respondent's rights under the contract to impose a production quota and disciplinary system, and concluded that McCown was indeed dismissed for just cause.

### 3. McCown's search for employment

McCown testified that, following his discharge in August 1975, he diligently looked for work and applied for and received unemployment benefits from the Arizona Department of Employment Security. However, he obtained only sporadic part-time employment, and declined at least one offer of employment because the \$2.35 wage rate for the particular job was far below the \$6.40 per hour he had earned while working for Respondent.

During the period of his unemployment, from the date of his discharge until about March 1977, he had no bank account, filed no income tax returns, kept no records of the small sums he periodically earned, and subsisted on the unemployment checks he received. About March 1977 he commenced to work full time, and thereafter to the present date has enjoyed full-time employment at various jobs.

## H. Analysis and Conclusions

### 1. McCown's discharge

In accepting the court's language as the law of the case, rather than seeking a modification of the court's judgment, counsel for the General Counsel has undertaken an exceedingly difficult task, for it is beyond peradventure of a doubt that at least one reason consistently given for McCown's discharge, regardless of how subordinate to the primary reason of McCown's failure to meet production standards, has been his poor attitude toward his supervisor's encouragement, instructions, and offers of assistance. To be sure, Supervisor Numkena was attempting to meticulously follow instructions by counseling McCown each day that he failed to meet the production standard, and the counseling memoranda indicate that perhaps Numkena was excessively verbose and repetitive. While a reasonable reaction to counseling of this

nature would be one of frustration on the part of McCown, it also appears that McCown's attitude toward the work became apparent to Numkena as a result of the counseling, and that McCown's obvious lack of desire caused Numkena to prolong the discussions. Moreover, it is reasonable to conclude that McCown's apparent inattentive and uncooperative mannerism during the counseling sessions caused Numkena to thereafter observe McCown's work to a greater degree than would have otherwise been the case.

General Counsel argues that the attitude which McCown exhibited resulted directly from the frequent and persistent counseling, bordering on harassment, to which he was subjected. While this contention is not entirely unpersuasive, it appears more probable that McCown's lackadaisical and sometimes impudent attitude is attributable to other factors.

Thus it is significant that McCown's work record, over a not insubstantial period of some 4-1/2 years, was apparently highly satisfactory until his reinstatement on or about June 8, following the marijuana incident, immediately after which time he expressed to management an intention to get paid "one way or the other" for being terminated. Moreover, upon his return to work and before he was even required to meet the production quota, two supervisors other than Numkena noted his poor attitude.<sup>3</sup> Further, McCown admittedly had a negative attitude toward Numkena who, according to McCown's testimony, lacked the experience and knowledge which McCown possessed as McCown had been "running orders" for 6 or 7 years. In this latter regard, McCown candidly testified that his attitude toward Numkena reflected his opinion that "the man [Numkena] hadn't been in the business long enough, I think, really to know how to tell me how to do my work." The memoranda of the counseling sessions, during which McCown would give responsive or ambiguous answers to Numkena, who persistently attempted to encourage McCown to perform at satisfactory level, also graphically reflect McCown's attitude of disrespect for Numkena. While McCown's testimony suggests that at certain times his work performance may have been adversely affected by a hang-glider injury which he sustained prior to July 10, such a consideration does not explain or provide an excuse for McCown's demeanor.

The above considerations, when combined, indicate that McCown's poor attitude, which is virtually admitted and which commenced so abruptly upon his reinstatement on June 8 and continued until his final discharge some 2 months later, was motivated by factors other than the imposed production standard. Moreover, it is of great significance that, as Respondent emphasizes, the

<sup>3</sup> McCown testified that he "was pretty discouraged, and hurt" that he was falsely accused of the marijuana incident, and went to an attorney for the purpose of instituting a lawsuit against Burns Security Service, which had been hired to maintain the security of Respondent's parking lot. Apparently the lawsuit never materialized.

unlawful discharges or suspensions of the other employees involved herein were not even in part attitude related, but rather such discharges were based solely and unequivocally upon the employees' failure to meet production quotas. The General Counsel has offered no contrary evidence in this regard.

As a result of the foregoing, I am constrained to conclude that McCown's attitude was not inextricably interwoven with or totally derivative from his failure to meet the unlawful production standards. Rather, on the basis of the record before me, it appears reasonable to conclude that McCown's attitudinal problem did not solely reflect a mere impertinence with the work standards being imposed upon him, but that other considerations, discussed above, provided a separate rationale, however secondary in importance, for effectuating his discharge. Therefore I am unable to conclude, as urged by General Counsel, that McCown's discharge resulted solely from his failure to meet the unlawful quota system standards.

## 2. McCown's search for employment

Respondent has not discredited McCown's testimony, summarized above, regarding his search for employment, or his reasons for refusing offers of employment,<sup>4</sup> nor has Respondent shown that the amount of backpay set forth in the backpay specification is incorrect except for the sum of \$400 which I find, in agreement with the General Counsel, constitutes additional interim earnings. I therefore find the amount of backpay to which McCown would be entitled, but for the conclusion reached herein that McCown was not solely discharged as a result of the unlawful production quota and disciplinary system, to be \$49,334 as of June 5, 1979. I further find that the remainder of the backpay specification, to which Respondent has raised no objection, accurately sets forth the amounts and continuing amounts to which McCown and the appropriate funds would otherwise be entitled.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. McCown was not discharged solely as a result of Respondent's implementation of the unlawful production quota and disciplinary system, but rather was also discharged for an independent reason; namely, his attitude toward work and toward supervision.

2. McCown made the requisite diligent search for employment following his discharge, and the backpay amounts and periods are accurately set forth in the backpay specification except to the limited extent modified herein.

[Recommended Order omitted from publication.]

<sup>4</sup> See *Fire Alert Company*, 223 NLRB 129 (1976), *enfd.* 566 F.2d 696 (10th Cir. 1977); *McLoughlin Manufacturing Corporation, et al.*, 219 NLRB 920 (1975); *Waukegan - North Chicago Transit Co.*, 235 NLRB 802 (1978).