

Carter's of California, Inc., d/b/a Carter's Rental and International Association of Machinists and Aerospace Workers, AFL-CIO, District Lodge No. 190, Local Lodge No. 1546. Cases 32-CA-199, 32-CA-352, and 32-CA-727

June 30, 1980

DECISION AND ORDER

**BY CHAIRMAN FANNING AND MEMBERS
JENKINS AND TRUESDALE**

On February 5, 1980, Administrative Law Judge Richard J. Boyce issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

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 brief and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.

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, Carter of California, Inc., d/b/a Carter's Rental, Berkeley, Oakland, and San Pablo, California, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

DECISION

I STATEMENT OF THE CASE

RICHARD J. BOYCE, Administrative Law Judge: This matter was heard before me in Oakland, California, on February 27, and March 5-9 and 19-20, 1979.¹ The underlying complaint² issued on April 28, 1978, was amended during the hearing, and alleges that Carter of California, Inc. d/b/a Carter's Rental (herein Respondent) had committed certain violations of Section 8(a)(3) and (1) of the National Labor Relations Act as amended.

The complaint arose from charges filed by International Association of Machinists and Aerospace Workers, AFL-CIO, District Lodge No. 190, Local Lodge No. 1546 (herein IAM) on April 13, 1977, August 29, 1977, and February 17, 1978.

¹ This matter was heard in consolidation with a backpay matter in Cases 32-CA-78 and 32-CA-96. A separate supplemental decision, dealing with the backpay matter, also issued this date.

² Cases 32-CA-199 and 32-CA-352 formerly were Cases 20-CA-12746 and Case 20-CA-13334, respectively.

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent is a California corporation engaged in the rental of tools and sundry other items at locations in Berkeley, Oakland, and San Pablo, California. Its annual revenues exceed \$500,000, and it annually brings into California goods of a value in excess of \$5,000. It is undisputed that Respondent is an employer engaged in commerce within the meaning Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATIONS

It is undisputed that IAM and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (herein IBT), are labor organizations within the meaning of Section 2(5) of the Act.

III. ISSUES

The complaint alleges that Respondent violated Section 8(a)(1) and (3) of the Act by issuing "numerous and frequent warning notices" to returning strikers between October 1976 and February 1978, by discharging six employees—Walter Freeman, Richard Mead, James Morgan, Janice Browne Tucker, Alfred Walker, and Kimberly Westbrook—on various dates from November 1976 to February 1978, by constructively discharging Coleen Hogle in September 1977, and by suspending Alfred Walker for 1 week in September 1977.

The answer denies any wrongdoing.

IV. BACKGROUND

Some 25 of Respondent's employees struck from April 8 to May 6, 1976. Respondent began reinstating strikers in August 1976, continuing to do so into January 1977. In all, 15 were reinstated. By mid-February 1978, however, none remained. Among those reinstated and then separated are the seven discriminatees herein.

In settlement of charges filed in part over Respondent's failure to reinstate the strikers as of the end of the strike, Respondent entered into a settlement stipulation on October 13, 1976, agreeing to offer reinstatement to them and to make them whole for earnings lost by reason of its failure to reinstate them on May 6. Elsewhere in the stipulation, Respondent acknowledged that IAM and IBT, jointly, had become the bargaining representative of the customer service and plant clerical employees at Respondent's three rental locations on April 21, 1976, and that IAM had become the representative of the office clerical employees at Respondent's Berkeley headquarters on May 6, 1976. The stipulation was adopted by order of the Board on December 21, 1976, and the order was enforced by a judgment of the Ninth Circuit Court of Appeals on March 11, 1977.³

A bargaining agreement between Respondent and the two Unions eventually was entered into on November 1,

³ The backpay matter mentioned above in fn. 1 is concerned with Respondent's obligation under the make-whole portion of the stipulation, as adopted by the Board and enforced by the court.

1977, effective from October 1, 1977, to October 1, 1978, covering both units.

V. THE WARNING NOTICES

A. *Facts*

Respondent admittedly ran a "loose ship" before the strike, with few warnings given and with no system of written warnings. A new system supposedly was instituted in April 1976, coincident with the first hiring of striker replacements. The immediate effect, if such was the case, was not dramatic. From April through September 1976, the monthly number of written warnings ranged from none in May to five in August. In September, for the first time, a written warning issued to a reinstated striker, as against two to striker replacements.

In October, the situation changed markedly, with seven written warnings issuing to three ex-strikers (out of five on the payroll at some time during the month),⁴ and eight issuing to four striker replacements (out of an undisclosed but manifestly larger group of replacements on the payroll during the month).⁵ In November, 17 warnings issued to 4 ex-strikers (out of 4 on the payroll at some time during the month), while 6 issued to 4 replacements; and, in December, 28 issued to 8 ex-strikers (out of 11 on the payroll at some time during the month), as against 11 spread among the replacements.

In January 1977, 7 ex-strikers (out of 10 still on the payroll) received a total of 17 warnings, and 8 replacements received a total of 14. In February, 6 ex-strikers (out of 9 on the payroll) received a total of eight warnings, while 5 replacements received 11. Warnings continued to issue thereafter, but the flurry had largely subsided. Only one ex-striker, Alfred Walker, remained on the payroll after September 8, 1977, and he continued to receive warnings from time to time until his discharge on February 12, 1978.

Robert Berg credibly testified that, upon becoming assistant manager at San Pablo in October 1976, he was told by Fred Carter, Respondent's president, to "be hard on" the returning strikers, Carter elaborating that, the more writeups they received, the faster Respondent would be able to fire them. Carter cautioned, however, that it would be necessary to write up nonstrikers, as well, "to make the books look good," adding that he "would make sure that" such writeups did not remain in the nonstrikers' files.

Berg estimated that 85 to 90 percent of the writeups "were not justified." A number of those placed in the files of the discriminatees, described later, reveal that pettiness indeed was the order of the day.

B. *Conclusion*

It is concluded that the system of written warnings, as implemented from October 1976 until there no longer were any ex-strikers on the payroll in February 1978, was designed to discriminate against the ex-strikers, and

⁴ Two ex-strikers were reinstated in August, two in September, one in October, none in November, none in December, and one in January.

⁵ Respondent employed 28 striker replacements at one time or another.

that it consequently violated Section 8(a)(3) and (1) as alleged.

While Respondent professes to have changed its warning procedure in April 1976, it is plain that the change became an operational reality in October, with the issuance of an unprecedentedly large number of warnings in that and succeeding months. It also is plain that the change was calculated to harass and provide "grounds" for discharging the ex-strikers. Not only did it coincide, more or less, with their return to the payroll in significant numbers but, as Berg credibly testified, Carter gave out the instruction in October to "be hard on" the ex-strikers on the theory that, the more writeups they received, the faster they could be fired. The ex-strikers received a discrepant proportion of warnings, as well, which doubtless would have been even more marked but for Carter's admonition that some be issued to non-strikers, too, "to make the books look good"; i.e., to disguise the discriminatory scheme.

VI. THE ACTUAL DISCHARGES

A. *Walter Freeman*

Facts: Freeman was reinstated on September 2, 1976 then discharged on November 6. He was an assistant manager at Berkeley when the strike began, and was made a yardman/counterman at that location upon reinstatement, being restored to his prestrike status about a month later.⁶

The record contains a written termination notice, signed by Mel Healey, Respondent's vice president, which explains Freeman's discharge this way:

Walt Freeman came in the yard after closing & took \$35.00 for personal use. He should not have been in the yard. He should not have taken company money.

None of Respondent's officials having testified concerning the discharge, there is only Freeman's testimony of the surrounding circumstances. It was persuasive and is credited. He admittedly took the money, elaborating that he asked the Berkeley manager, Mike Privatte, on November 4, if he could borrow \$35 from the safe; that Privatte said "sure," provided it was returned by the following Monday, November 8, and that he in fact returned it on November 5 notifying Privatte at the time.

Freeman's story continued that he was asked by Healey on November 6 if he had borrowed the money. He said that he had, whereupon Healey asked why he had not obtained approval from Fred Carter or him. Freeman replied that, neither being around, he had cleared with Privatte. Healey countered that Carter or he could have been called at home; and that, since neither was, Freeman was being fired.

Freeman had borrowed money—not over \$7—from the safe "once or twice" before the strike, without adverse consequence. He then had left an "IOU" in the safe, which he did not do at the time in question. The

⁶ As is concluded in the companion backpay decision of this date, however, Freeman never was paid at a proper level after reinstatement.

termination notice to the contrary, Freeman is credited that he did not enter after closing to get the money.

About a month after his reinstatement, Freeman was asked by Carter if "the striking employees really thought that they could come back after walking out on strike." Freeman answered that he thought so, prompting Carter to ask what led him to believe that. Freeman replied that the NLRB and the Union said so, to which Carter declared: "That [is] a bunch of malarkey." Carter then said he would not take back some of the strikers "under any conditions," and that he "could drag this thing out for 10 years or longer"— "I can just keep appealing it."

Freeman's personnel file contained four written warnings postdating his reinstatement, none of which he had seen. They report his being warned "to keep safe monies at a proper level," "not to punch timecard in early or to stay late if not authorized," "to work yard and not stay behind the counter," and "to answer phone on at least 3rd ring—we are losing customers."

The California Employment Development determined that Freeman was not entitled to unemployment benefits following his discharge, giving this as its reason:

You were discharged when it was shown beyond a reasonable doubt that you took money from your employer for your own use. Under those circumstances, it must be held that you were discharged for actions which injured your employer's interests.

Conclusion: It is concluded that Freeman's discharge was in retribution for his striking, and that it consequently violated Section 8(a)(3) and (1) as alleged.

This conclusion follows from Carter's unremitting animus toward the ex-strikers, as expressed to Freeman; from Carter's resolve, stated to Robert Berg, to discharge the ex-strikers as quickly as grounds could be posited; from the misleading nature of Freeman's termination notice, falsely stating that he took the money after closing, the implication being that it had been a clandestine undertaking; from Freeman's in fact having acted with the consent of his immediate superior, Private, having returned the money both within the time set by Private and before being confronted by Healey about what he had done; and from the failure of Respondent's witnesses to address any testimony to the question of Freeman's discharge.⁷

B. Richard Mead

Facts. Mead was reinstated on December 7, 1976; then was discharged on March 19, 1977. He was a mechanic at Respondent's repair shop in Richmond before the strike, working primarily as a welder.⁸ Upon reinstatement, he was made a yardman, first at Oakland, then at San Pablo.⁹

⁷ The determination of the California Employment Development Department, suggesting that Freeman had acted improperly concerning the money, is rejected as contrary to the weight of evidence as developed in the present proceeding.

⁸ The Richmond shop was closed at the start of the strike, never to reopen.

⁹ As is concluded in the companion backpay decision of this date, Respondent was not warranted in reinstating Mead as other than a mechanic, at a mechanic's wage level.

Mead was discharged by George Westbrook, the San Pablo manager, after fighting with a coworker, Richard Moody. Before the fight, Moody, a striker replacement, had ignored Mead's request for help in loading a rototiller into a Volkswagen, after which Westbrook had criticized Mead "about putting something in a car that might ruin or wreck it." Mead replied that no one would help him, at which point, as Mead recalled, Moody "started saying smart remarks about he didn't have to help . . . and all this other stuff." Mead asked Westbrook to "tell that goddamn Mexican [Moody] to shut up." Then, according to Mead, Moody "really started getting irate."

Mead's testimony continued that Moody threatened to "cut me with his knife," whereupon Mead "pushed him backwards" with both hands. As Moody sought to recover his balance, Mead "grabbed him by his hair" and "in a headlock." Then, "petrified" that Moody might be reaching for his knife, Mead grabbed a steel timing light from the counter, hitting Moody over the head with it several times and drawing blood.

A coworker, Mike Hoffmann, intervened, taking the timing light from Mead. Mead continued that he then "looked around . . . and Richard Moody has got his knife out." Mead clutched a piece of pipe. Westbrook, who had inexplicably left the area during the fracas, returned about then. He disarmed Moody and Hoffman again disarmed Mead.

Westbrook shortly returned Moody's knife, and he again brandished it. Mead wrapped his coat around his hand and challenged: "Well, if we are going to get it, let's get it." Before anything could happen, Westbrook took the knife once more. He then escorted Mead to the gate and told him he was fired.¹⁰

Following the discharge, Westbrook placed a termination notice in Mead's file stating:

Rich Mead has a very violent temper. 3 times he has threatened other employees. He hit Richard Moody over head with heavy timing light putting five stitches in his head. Richard Moody did not do anything to provoke this type of attack & only tried [sic] to defend himself.

Moody received no reprimand over the affair.

Robert Berg, the San Pablo assistant manager at the time, credibly testified that, 4 or 5 days before Mead's discharge, Fred Carter had encouraged Moody, in Berg's presence, to get Mead into an argument so that Respondent would have grounds to fire him in order to help it with its labor problems. Then, the day after the discharge, as Berg credibly recalled, Carter exulted that "it finally broke loose," alluding to Mead's notoriously "hot temper," and urged Moody to press criminal charges against him.

¹⁰ Mead's version of the fight, just set forth, corresponds in most particulars with Westbrook's less detailed version. Moody and Hoffmann did not testify. Regarding Moody's saying, before the first contact, that he was going to "cut" Mead with his knife, Westbrook initially testified that Moody said something to that effect, later amending: "I don't believe he said that, no." Mead's testimony in this regard, initially corroborated by Westbrook, is credited.

Mead's personnel file contained seven post-reinstatement warnings. In seeming contradiction of the termination notice, six refer to such matters as tardiness, failure to call in, and absence because of car trouble, with only one mentioning a threat. That one, dated February 19, 1977, and signed by Healey and Westbrook, cites Mead for "using abusive & profane language and threatening bodily harm to a superior in front of Al Walker, shop steward, directed at Fred Carter." Under "Action to be Taken," the document states: "None at this time. Next time, 4 days off without pay. Next time, termination."

Recalling the incident underlying the February 19 warning, Mead testified that Carter had taken offense and shoved him after he had referred to one of the employees as "a jerk" and "a knucklehead." That same afternoon, as Carter was talking with Walker and Westbrook, Mead approached them "to see what was going on." Carter said "something smart" to him, according to Mead, and he responded: "Fred, if you touch me again, I am going to knock your f—ing head right off your shoulders."

Conclusion: It is concluded that Mead's discharge was in retribution for his striking, and that it consequently violated Section 8(a)(3) and (1) of the Act as alleged.

While Mead arguably responded with excessive force to Moody's taunts, he by then had reason to be apprehensive about being "cut" by Moody; such taunts had been encouraged by Carter in the hope of inflaming Mead and creating a pretext for discharge; and Respondent, by its failure to adequately reinstate Mead and the other ex-strikers and by its discriminatory and profligate issuance of warnings, had created a climate of utmost hostility to them.

Then, too, there is the haste with which Mead was fired, even though Westbrook had strangely absented himself from the fight and attempted no investigation of what had happened while he was gone; the fact that Moody, a nonstriker, received not so much as a warning for his part in the fray, although probably no less culpable than Mead; Carter's exultation on the day after Mead's temper had "finally broke loose"; and Respondent's general predisposition to discharge the ex-strikers, the sooner the better.

These considerations, in the aggregate, compel the conclusion that the fight, or something like it, had been foreordained as a device to purge Mead; and, even if it were not, that Mead would not have been discharged had he been the nonstriker and Moody the striker.

C. James Morgan

Facts: Morgan was reinstated on October 13, 1976; then discharged on December 4, 1976. He was a yardman at Berkeley before the strike, and held that same position at San Pablo after reinstatement.¹¹

Morgan's discharge was accompanied by a termination notice signed by Robert Berg, the San Pablo assistant manager. It cites two December 4 incidents in support of the action. Regarding the first, it states:

Sending out equipment in unsatisfactory condition. Not checking equipment for satisfactory connections. Causing customer to wait 1 hr. for horse trailer because connection was bad and on [illegible].

Morgan credibly testified that this involved a customer named Chuck Steele; that the reference to a bad connection had to do with a nonfunctioning trailer light; and that eventually, after the San Pablo repairman, Richard Moody, was unable to fix it, Morgan hooked up another trailer.

Concerning the second December 4 incident, the termination notice states:

Later in day, R.L. Creston came in. Waited 2-1/2 hrs. for trailer. All was wrong was wire was worn out. Cust. came in complaining. I went out within 5 min. found problem. Cust. want to see owner. He wasn't in. Made written complaint. 2 in one day. Bad customer relations lost rental.

This in fact involved a customer named Louis Schultz. Schultz operates a business under the style of R. L. Customs, which perhaps explains his being identified in the warning as R. L. Creston.

Morgan testified in elaborate and convincing detail of the events comprising this incident. Summarizing, Schultz browsed around the San Pablo yard for a considerable length of time, resisting Morgan's attempts to be of service. Finally, he asked that a 5-by-8 foot trailer be hooked to his car. After Morgan had accomplished that, Schultz said he wanted a trailer with two brake lights instead of one, so Morgan unhooked the trailer. Schultz then decided to keep the original, and Morgan again hooked it up.

About then, according to Morgan, Schultz said that he needed a 5-by-12 foot trailer instead of one 5-by-8 feet. Morgan unhooked the first trailer once more, and asked Schultz to back his car to a 5-by-12 foot one. This was a labored process, with Schultz appearing to have trouble following Morgan's hand signals. "At one point," Morgan recalled, "he almost ran over me." Morgan eventually hooked the second trailer to Schultz' car, only to be told by Berg to unhook it because the trailer was too large for the car, an Opel.¹² Schultz then said he would settle for the original trailer, and Morgan began to hook it up again.

By now, Morgan continued, Schultz was evincing great impatience, and seemingly was withholding his cooperation as Morgan attempted to hook up the brake light. Overcoming that, Morgan nevertheless was unable to get the light to work, even though he had succeeded earlier with the same trailer and car. He called for Berg, who came after a several-minute delay. Berg crawled under the trailer and announced that he had found a broken wire. With that, Schultz declared that he did not want a trailer, and Morgan unhooked it a last time. Examining the broken wire, Morgan observed that it had a

¹¹ As is concluded in the companion backpay decision of this date, however, Morgan's reinstatement was inadequate in part because the content of his work was appreciably more onerous than before; and also because he was not paid at a proper level after reinstatement.

¹² Thinking that the hookup of the 5-by-12 foot trailer "looked real precarious, Morgan had asked Berg to approve it. Berg went to the office, according to Morgan, presumably to talk to Fred Carter about it, telling Morgan upon returning to unhook it.

clean, unfrayed break, leading him to surmise that it had been cut deliberately after he last previously had unhooked the trailer from Schultz' car.

Morgan saw Schultz go into the office with Berg at this time, after which they "sort of waved" to each other as Schultz left. Morgan credibly testified that Fred Carter was on the premises at least at times during this sequence, and that Schultz and Carter had coffee together.

Schultz submitted a written complaint over the incident before leaving. He at first testified that it was his idea, "because I don't think he [Morgan] is competent enough to be working for the public." He later testified, variously, that Carter had suggested that he "make out a complaint," that he did not so much as see Carter that day, that a woman employee had broached the idea before he spoke with Carter, that the woman's proposal came after he had spoken with Carter, and that he talked with Carter perhaps 20 minutes after he wrote the complaint. Schultz further testified that "about two hours" had elapsed before he first voiced dissatisfaction, that being to an unidentified person who "shrugged his shoulders"; and that he could not recall if Carter offered to have someone other than Morgan hook up the trailer—"I was running out of time by now, there was no sense in me messing around."

Schultz had done business with Respondent "for many years," and he and Carter belong to the same Rotary Club. Berg credibly testified that Schultz "came to the yard very frequently" and that he and Carter "talked about Rotary and they would go to lunch quite a bit together." The day before Morgan's discharge, again according to Berg's credible testimony, Berg heard Carter tell Schultz of his wish to "get rid of" Morgan. Schultz, who had told Carter in the same conversation how a union had "broke" him and how he "hated" unions, asked if there was anything he could do "to help." Carter proposed:

Well, why don't we do this, can you come in acting as a contractor to rent some rental equipment and just put him through the mess and see if he messes up and just ride him.

Schultz replied: "Sure, I will do that."

Later, still tracking Berg's credible testimony, Carter told him about the arrangement with Schultz, instructing Berg "to make sure" that Morgan was assigned to serve Schultz when Schultz came in, and to be alert to write Morgan up and fire him "on the spot."

Berg's testimony continued that, the day after Morgan's discharge, Schultz came to the San Pablo yard and boasted that, since Morgan had done "everything right," he finally had to snip the wire under the trailer with fingernail clippers to "get him."

Morgan's personnel file contained 12 post-reinstatement warnings, the first dated November 4. They cite such things as tardiness, a failure to wear safety goggles around the grinder, the need to turn off machinery when not in use, a failure to clean up his assigned area, his disagreeing that his job duties included repairing flat

tires,¹³ and a failure to test equipment before renting it. Morgan credibly testified that he was never shown several of these warnings.

Conclusion: It is concluded that Morgan's discharge was in retribution for his striking, and that it consequently violated Section 8(a)(3) and (1) as alleged.

Berg's credible testimony tells the whole story. Even without it, Schultz was an obvious ringer, brought in to discredit Morgan and create a pretext for discharge.

Janice Browne Tucker

Facts: Tucker was reinstated on December 13, 1976; then discharged on April 4, 1977. She was an office clerical employee at Respondent's Berkeley headquarters both before and after.¹⁴ She began with Respondent in mid-1973. Yvonne Carter, Fred's wife and a bookkeeper and supervisor for Respondent, described Tucker as an "exceptionally good typist"—"the best we ever had."

One of Tucker's main postreinstatement duties was to review rental contracts for errors.¹⁵ Respondent writes about 600 contracts per week at its three locations, and Tucker was to check every one of them, according to Yvonne Carter. The stated reason for Tucker's discharge, as contained in a termination notice given her by Mel Healey, was:

Jan has falsified records pertaining to errors made on contracts by overlooking errors made by certain employees.

Tucker credibly testified that, when he gave her the notice, Healey disclaimed any knowledge of the underlying circumstances and asserted that he was carrying out Yvonne Carter's instructions. Yvonne testified, on the other hand, that she had merely told Healey "what was happening," but made no recommendation. Regardless, the errors supposedly being overlooked were those of three former strikers—Coleen Hogle, William Mattick, and Alfred Walker. Yvonne testified that she noticed, probably in January, that Tucker was finding no errors in the contracts prepared by those three, so checked back and found errors by them that had not been picked up.

Yvonne elaborated that she found "about a dozen" contracts, written over a 2-week period, in which one or the other of three had made errors that Tucker had not detected. She added that five or so of the errors were at-

¹³ Morgan did not repair tires before the strike; and he credibly testified that, upon his reinstatement, he was told by George Westbrook, the San Pablo manager, that he was not to do any repair work. Westbrook presently left to undergo surgery, however, being supplanted by Berg, who assigned tire-repair tasks to Morgan. The disagreements ensued, Morgan citing both what Westbrook had told him and the terms of his reinstatement—"that I was not to do duties other than what I had performed before."

¹⁴ As is concluded in the companion backpay decision of this date, however, Tucker's reinstatement was inadequate in part because of dissimilarities between her prestrike and post-reinstatement work; and also because she was not paid at a proper level after reinstatement.

¹⁵ Tucker is credited that she did not check contracts before the strike, as against Yvonne Carter's assertion that she did. Carter's testimony simply was unconvincing that contracts were spot checked before the strike "if [she] made a recommendation," and that she "imagine[d]" she made such a recommendation "over the years."

tributable to Hogle, who had written about 200 contracts in that 2-week period; and that two each were attributable to Mattick and Walker, each of whom wrote "very few" contracts. Yvonne continued that she did not mention the oversights to Tucker, explaining that she "was just watching" her and that "it wasn't my place to say anything to her." She said that she reported her findings to Fred Carter and to Healey "a couple times," and that "we just watched her."

Other than a single contract attached to Tucker's termination notice, reflecting her failure to catch an error by Hogle, the record is devoid of documentation that Tucker failed, purposely or otherwise, to detect errors by the ex-strikers. On rebuttal, the General Counsel introduced two contracts in which Tucker had noted errors by Hogle, and one each in which she had found errors by Mattick and Walker. Moreover, a written warning to Kimberly Westbrook, an ex-striker, on January 18, 1977, has as an attachment nine contracts with errors. A comparison of handwriting indicates that errors in four of the nine were found by Tucker.¹⁶

On an undisclosed date after her reinstatement, Tucker received a written warning from Healey which states:

Jan was threatening and intimidating Linda [Hall] with the fact Kathy [Coughlin] would return & take her job.

Tucker credibly testified that this derived from a conversation with Hall, a striker replacement, in which, replying to Hall's expressed fear of losing her job should Coughlin, an ex-striker, be reinstated, Tucker said that Respondent, "would have to offer" Coughlin reinstatement, and then it would be for her to decide if she would return.

Tucker was a union steward when discharged, and had been for about a month.

Conclusion: It is concluded that Tucker's discharge was in retribution for her striking, and that it consequently violated Section 8(a)(3) and (1) as alleged.

Being human, Tucker doubtless failed to detect all of the errors in all of the hundreds of contracts that she checked. There is nothing to suggest, however, that she exercised less scrutiny in reviewing the work of ex-strikers than nonstrikers. Indeed, that it took Respondent until April to build what it deemed a case for discharge, when the suspicion of misconduct professedly arose in January, speaks eloquently of her even-handedness and of Respondent's duplicity. Duplicity is evident, as well, in Respondent's failure to apprise Tucker of her alleged oversights as they were perceived, rather than "just watching" her in the manifest hope that she would misstep.

The obvious pretextuousness of Tucker's discharge, in combination with the lengths Respondent was willing to go to rid itself of the ex-strikers (as witness Morgan), leaves no doubt that the discharge was improperly motivated.

¹⁶ This does not mean that Tucker neglected to find errors in the other five. Westbrook was reinstated before Tucker, and Tucker did not begin checking contracts until some weeks after her reinstatement. Prior checking was done by Yvonne Carter and Eleanor Nunes.

E. Alfred Walker

Facts: Walker was reinstated on December 16, 1976; then was discharged on February 12, 1978. With his discharge, Respondent had no ex-strikers on its payroll. Walker was an assistant manager at Oakland when the strike began, and was made a yardman at Berkeley upon his return. He was transferred to Oakland after about 3 months, still as a yardman and, after another 3 months or so, was returned to Berkeley, continuing as a yardman.¹⁷ Walker had been with Respondent for 6 years before the strike, and was its most senior nonsupervisory employee.

About a week before his discharge, Walker was awarded a \$202 judgment against Respondent over some defective equipment he had rented. That was followed by a letter to him from Yvonne Carter in which she said that the judgment would be satisfied on March 25, 1978. On February 11, after receiving the letter, Walker telephoned Fred Carter to protest the delay in getting the money. Both were working when the call was made, Walker at Berkeley, Carter at San Pablo. Carter rebuked Walker for calling about private business on company time and asked to speak with Healey, who also was at Berkeley.

After Healey finished speaking with Carter, he said to Walker: "Fred said he don't want you calling . . . anymore to talk about personal business, and he don't talk to niggers nowhere." Walker is black. Offended, Walker tried to call Carter again, only to be told that he had left for the day.

That night, Walker telephoned the Carter home, seeking to talk to Fred. Yvonne answered and said that Fred was asleep, so he spoke with her. He said he was "tired of playing games" over the money Respondent owed him,¹⁸ and was tired, as well, of Fred's calling him a nigger. Earlier, soon after his reinstatement in 1976 and having heard from coworkers that Fred had been referring to him as "'that black nigger' or nigger this or nigger that," Walker had confronted Carter about calling him names.¹⁹

The next day when he got to work, Walker was told by Healey that he was fired "because you threatened to blow up Fred's house." Healey gave him a termination notice stating:

Al threatened Yvonne Carter and her house over the telephone that if Fred didn't stop calling him names he threatened to blow up house and anyone in it.

¹⁷ As is concluded in the companion backpay decision of this date, Walker's reinstatement was inadequate because of dissimilarities between his prestrike and postreinstatement work.

¹⁸ Walker first sued Respondent in small claims court, receiving a favorable judgment. Respondent appealed, necessitating a second hearing in superior court, which Walker also won.

¹⁹ Robert Berg credibly testified, with reference to Walker's being assigned to clean restrooms after his reinstatement, that Carter had said: "Every yard should have a nigger to do it." Charles Eyley, a striker replacement, credibly testified that Carter once referred to Walker as a "black bastard" in a conversation with him. Carter testified that he had "never called him [Walker] a nigger in front of his face, ever."

Walker admitted to Healey that he had been "extremely upset" in the conversation with Yvonne, but denied threatening to blow up the house.²⁰

Walker then was called into Carter's office. There, in the presence of Healey and George Westbrook, Carter proclaimed that "no one is going to threaten me or my family," and warned that, if Walker ever went to the Carter ranch, he would never leave. A "heated discussion" ensued—Carter's characterization—and Carter at length told Walker to "get out." A shoving match followed, police were called, and Walker left. By Carter's admission, Walker denied again in this exchange that he had made any threats.

Walker served as chief union steward after his reinstatement, and was on the union bargaining committee in the negotiation of the agreement with Respondent. Carter caused two written warnings to be placed in Walker's personnel file over his activities as a steward. On November 22, 1976, while speaking to Carter on behalf of Mark St. John, Walker said: "You had enough problems now, and you shouldn't add anymore." The sense of the warning was that Walker had threatened Carter. And, on December 30, 1976, Carter cited Walker as being "demanding and disrespectful" after he had attempted to speak to Carter about a writeup given to Janice Tucker.

In late August 1977, after the refusal of Coleen Hogle's request that a shop steward be present while Carter spoke with her, Walker told Carter that he had been in violation of the labor law and that he could not "pull this kind of shit." A few days later, as is more fully detailed below, an obscene limerick appeared on the wall of the women's restroom at San Pablo, referring to Al and Coleen—presumably Walker and Hogle.

Charles Eyer, a striker replacement, credibly testified of a conversation with Carter in November 1977 in which Carter complained that Walker ("some black bastard") had gotten a little power and it had gone "to his head," and that he would have "got rid" of Walker by then "but he has got that goddamn union."

In all, Walker's file contained 13 postreinstatement written warnings. Apart from those already described, they relate to such things as tardiness; allegedly threatening a striker replacement by telling him he would be subject to replacement when a striker was reinstated; failing to examine equipment before renting it out; accepting an expired credit card; talking to Kimberly Westbrook, a striker yet to be reinstated, at the Oakland yard; and saying "f— you" to Richard Moody and offering to "beat his ass."

Conclusion. It is concluded that Walker's discharge was in retribution for his striking, and that it consequently violated Section 8(a)(3) and (1) of the Act as alleged.

²⁰ Yvonne originally testified that Walker did not identify himself and simply said he was "going to blow up the house." Then, faced with her affidavit, she testified that he said that, if Fred ever called him a nigger again, he would blow up the house. The affidavit of Kimberly Westbrook, who was with Walker when he made the call, states that he said he was "sick and tired of being called a nigger and he [Carter] better not do it anymore." She did not testify, having died before the hearing. Walker denied making any threats. He was a forthright and persuasive witness. As the above alteration in Yvonne Carter's testimony suggests, she was not. Walker is credited.

Having been credited Walker that he did not threaten to blow up Carter's house, either absolutely or should Carter persist in referring to him in a racially slurring manner, the stated ground for discharge proffered was fabricated. That, coupled with Carter's remark to Charles Eyer approximately 3 months before the discharge that he long since would have "got rid" of Walker but for the "goddamn union," and Respondent's virulent hostility toward the ex-strikers generally, of whom Walker was the last on the payroll, forces the conclusion that the discharge was unlawfully motivated.

F. Kimberly Westbrook

Facts: Westbrook was reinstated on December 1, 1976; then was discharged on January 31, 1977. She was a counterclerk at Berkeley before the strike and after her return.²¹

Westbrook received a termination notice explaining her discharge as follows:

Employee arrived for work at 7:35. Gave no explanation to supervisor as to reason for being late.

Normal starting time was 7:30.

Westbrook's personnel file contained 11 postreinstatement written warnings. They reflect that she twice was sent home for 1 day as a disciplinary measure, once for tardiness and once for extending credit without authorization and overcharging a customer; and that she was sent home for 2 days on one occasion and 3 on another because of contract errors. The warning reflecting the 2-day suspension was accompanied by nine contracts on which errors by her were noted.

James Morgan testified credibly and without refutation that he overheard a conversation, on December 2, 1976, between Mike Privatte, the Berkeley manager, and an agent of the linen service used by Respondent. Motioning toward Westbrook, the agent said, "She is back." Privatte replied, "For awhile," and the agent asked, "Do you want me to order for her?" Privatte shook his head in the negative. The agent asked, "You want me to hang loose for awhile?" Privatte answered, "Yeah, hang loose."

Westbrook did not testify, having died February 28, 1979. Nor did anyone on behalf of Respondent testify concerning her discharge. She was the daughter of George Westbrook, San Pablo manager.

Conclusion. It is concluded that Westbrook's discharge was in retribution for her striking, and that it consequently violated Section 8(a)(3) and (1) as alleged.

The stated ground for discharge—reporting 5 minutes late—is so fraught with pettiness as to be demonstrably pretextuous. Moreover, Privatte's comments to the agent of the linen service, the day after Westbrook's reinstatement, betrayed an intention to retain her only temporarily. Finally, Respondent's failure to bring forth witnesses privy to the discharge suggests a realization that their testimony would not bear scrutiny. These factors, together

²¹ As is concluded in the companion backpay decision of this date, however, Westbrook never was paid at a proper level after reinstatement.

er with Respondent's fierce antistriker resolve, necessitate a finding that the discharge was improper.

VII. THE ALLEGED CONSTRUCTIVE DISCHARGE OF
COLEEN HOGLE

A. *Facts*

Hogle was reinstated on December 4, 1976; then quit on September 8, 1977. She was a counterclerk at San Pablo before the strike. She performed the same function upon reinstatement, first at Oakland, then at Berkeley, and finally at San Pablo.²²

Upon her return to San Pablo, in August 1977, Hogle began to suffer from harassment and vandalism. On August 7, she found motor oil in her coffee at work. On August 10, she noticed that someone had written "Coleen screws" on an office calendar. That same day at lunchtime, she found grease on the hood of her car, the car had been scratched and squirted with a fluid that bleached out the paint, and the tires were surrounded by T-shaped nails used by a certain tool that Respondent rents. The car was parked on a public street near the San Pablo facility. Hogle had served Alfred Walker's small claims complaint on Carter, at San Pablo, the morning of August 10.

That afternoon, Hogle showed her car to George Westbrook, San Pablo manager. He reacted that he did not "think anybody from here would do anything like that." She replied that he was "full of it." Robert Berg credibly testified that he had heard Carter encourage some of the employees to "mess up" the cars of ex-strikers, even offering rides to where the cars were parked. Berg described a time when Richard Moody boasted of either scratching Hogle's car with a key, or of poking a hole in its radiator. Later, Berg heard Carter ask Moody if he had done it, after which, when Moody said he had, Carter exclaimed that he could "hardly wait until tonight when she got ready to go home."

On August 21, Hogle told some of the striker replacements at San Pablo that, whenever they might ask for a raise, Carter would tell them that his money was "tied up at the Labor Board," to which she added:

When you think you are going to get a raise, you look around and see who is driving the Cadillac and then see when you get your raise.

Carter, evidently having heard about these remarks, confronted Hogle on August 24, stating:

All through this thing, Coleen, you know I felt really close to you, but I am not going to stand for you starting rumors about me and calling me a thief and telling my employees that I am taking company funds, I won't have that.

In response, Hogle denied that she had called Carter a thief or said anything about company funds, and asked that a shop steward be present on her behalf. Carter replied:

I am sick and tired of you and your people coming in here and disrupting things. If you don't like it, you get the hell out.

Hogle again asked for a steward. Westbrook, present during the exchange, interjected that she did not need a steward— "nothing was said about you and . . . it does not relate to your job." A while later, Carter received a telephone call from Alfred Walker, the chief steward, about the situation, after which Walker spoke to him face to face, telling him he had violated the labor law by refusing Hogle's request. Carter caused a written warning to be placed in Hogle's personnel file over the matter. It was not shown to her, and she apparently was not aware of it before she quit.

On August 31, Hogle found an obscene limerick scribbled on the wall of the women's restroom at San Pablo. It began, "There once was a whore named Coleen," and ended, "even Al fell in & was never again seen." The "Al" presumably was a reference to Walker. Hogle showed this to Westbrook, remarking, "You can tell me that these aren't any of your people doing these things." Westbrook replied that he did not think Carter did it. Later that day, Carter apologized to Hogle "for the filth written on the bathroom wall," and said he had "no idea those things were happening." On duty at San Pablo that day, besides Hogle, Carter, and Westbrook, were Moody and Mike Hoffmann.

The charge in Case 20-CA-13334 (later renumbered Case 32-CA-352) was served on Respondent on about August 31.²³ On September 1, Carter assembled some of the San Pablo employees in the yard, stating to them:

I was just served with more papers from the Board last night and I apologized to Coleen for the stuff that was written on the bathroom wall, and I'm sorry I did that because now they are really trying to hang me at the Board and this vandalism stuff has really got to stop. We can't have this around here. What you do off the job is your own business.²⁴

As previously mentioned, Hogle quit a week later, on September 8, leaving Walker as the only ex-striker on the payroll.

Hogle was a union steward and on the union bargaining committee in negotiations with Respondent.

B. *T3Conclusion.*

It is concluded that Respondent induced Hogle to quit because of her striking and subsequent union activities, and that it consequently was tantamount to a discharge, violating Section 8(a)(3) and (1) as alleged.

The harassment, the vandalism, and the obscenities inflicted on Hogle in the last month of her employment clearly had management sanction, and obviously were meant to punish her for striking and for requesting the presence of a steward when Carter confronted her, and plainly were so offensive and recurring as to make her

²² As is concluded in the companion backpay decision of this date, however, Hogle never was paid at a proper level after reinstatement.

²³ The charge was filed on August 29.

²⁴ This is Hogle's credible version of Carter's comments. She testified that she was not part of the group, but was within earshot.

work situation intolerable. She therefore was warranted in claiming the benefits of unlawful discharge even though quitting. E.g., *Fidelity Telephone Company*, 236 NLRB 166 (1978); *Crystal, Princeton Refining Company*, 222 NLRB 1068, 1069 (1976).

VIII. THE SUSPENSION OF ALFRED WALKER

A. Facts

Walker, it will be recalled, was reinstated on December 16, 1976, and discharged on February 12, 1978.

On September 8, 1977, he was suspended for 1 week without pay. He then was a yardman at Berkeley. Carter prepared a written warning incidental to the suspension. It states:

Al checked out equip. at Berkeley store improperly, causing equip. to break down and delay of job by customer. Damage to equip. app. 800.00 & loss of rental of \$90.00. Cust. has signed statement to the fact of substandard work and carelessness.

On the morning of August 8, Walker rented out a small tractor, called a Bobcat. The customer called in about 2 hours later, reporting that the machine was losing power and could not "pull a hill." Walker went to the site, finding it in a ditch. He started it and it seemed to be "running fine." The oil, however, appeared to be overly full, so he drained some. Then, as Walker tried to drive it out of the ditch, the customer observed oil leaking from the rear. Walker assured him not to worry, that it was oil "coming from the pan."

At length, unable to extricate the machine from the ditch because of its steepness, Walker told the customer to pull it out with a larger tractor, which was en route. Walker cautioned the customer to check the oil before starting the engine, explaining that Respondent would reimburse him for any oil he added. Walker then returned to Berkeley.

Later in the day, the customer called in that the Bobcat had blown up. Walker again went to the site, verifying that the engine indeed had blown up. He asked the customer if he had checked the oil before starting the engine. The customer said no, that the Bobcat had been driven only a short distance "and then we heard this noise." Walker remonstrated that he had "specifically told" the customer not to start the engine without checking the oil, to which the customer replied: "Well, we were just trying to get it out of the way."

Walker afterwards telephoned Carter to explain the situation. The record intimates that Carter was not interested in what Walker had to say, instead declaring that Walker had been negligent and cost him money, and was being suspended. Walker also went to see the customer at the customer's home. The customer told him: "I know that it is not your fault, but I don't want to pay for the tractor."²⁵

As against the statement in the warning notice that Walker had checked out the equipment improperly,

²⁵ The foregoing recital is based on Walker's credible and unrefuted testimony. The customer did not testify, and neither Carter nor anyone else from management testified concerning Walker's suspension.

Walker credibly testified that he had been working around Bobcats since 1972, and had followed the same procedure on this occasion as always. Regarding the assertion that the customer had signed a statement describing "substandard work and carelessness," no such document was placed in evidence.

Walker was suspended the day of Hogle's constructive discharge. About 2 weeks before, as has been detailed, Walker, as steward, told Carter that he was in violation of the labor law in denying Hogle's request for a steward when Carter spoke to her; about 1 week before, the obscene limerick referring to Walker and Hogle appeared in the restroom at San Pablo; and, about 1 week before, the charge was filed against Respondent in Case 20-CA-13334 (Case 32-CA-352).

B. Conclusion

It is concluded that Walker's suspension was in retribution for his striking and subsequent union activities, and that it consequently violated Section 8(a)(3) and (1) of the Act as alleged.

Perhaps most revealing was its timing relative to the matters concerning Hogle and to Walker's activities, as steward, on her behalf. Beyond that, there is no convincing evidence that Walker in fact was negligent or departed from the usual practice regarding the Bobcat; Carter's eagerness to announce his suspension, in their telephone conversation, belied any interest in honestly ascertaining the facts, instead exposing a predisposition to be punitive; the record reflects no precedent for this kind of punishment in these or kindred circumstances; and Respondent's failure to place in evidence any written statement attributable to the customer suggests that none was given and that the reference in the warning notice is untrue.

All of this, in combination with Respondent's consuming hostility toward Walker, as one of the ex-strikers, dictates the conclusion that the suspension was unlawfully motivated.

CONCLUSIONS OF LAW

Respondent violated Section 8(a)(3) and (1) of the Act by:

1. Its system of written warnings, as implemented from October 1976 until there no longer were any ex-strikers on the payroll in February 1978.
2. Discharging Walter Freeman on November 6, 1976; Richard Mead on March 19, 1977; James Morgan on December 4, 1976; Janice Browne Tucker on April 4, 1977; Alfred Walker on February 12, 1978; and Kimberly Westbrook on January 31, 1977.
3. Constructively discharging Coleen Hogle on September 8, 1977.
4. Suspending Alfred Walker for 1 week on September 8, 1977.

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

ORDER²⁶

The Respondent, Carter of California, Inc., d/b/a Carter's Rental, Berkely, Oakland, and San Pablo, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Implementing a system of written warnings for the purpose of discriminating against employees for having engaged in a strike or other union or protected concerted activities.

(b) Discharging, suspending, causing to quit, or otherwise discriminating against employees for having engaged in a strike or other union or protected concerted activities.

(c) In any other manner interfering with, restraining, or coercing employees in their exercise of rights under the Act.

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

(a) Remove from its records, including the personnel files of the affected persons, all written warnings issued from October 1, 1976, through February 12, 1978, and expunge any reference thereto; and notify the affected persons in writing that this has been done and that the warnings have been retracted.²⁷

(b) Offer Walter Freeman, Coleen Hogle, Richard Mead, James Morgan, Janice Browne Tucker, and Alfred Walker immediate and full reinstatement to the jobs they held before the strike in April-May 1976, or, if any such job no longer exists, to a substantially equivalent position, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings and benefits suffered by reason of its discriminatory discharges of them.²⁸

(c) Make the estate of Kimberly Westbrook whole for any loss of earnings and benefits suffered by reason of its discriminatory discharge of her.²⁹

(d) Make Alfred Walker whole for any loss of earnings or benefits suffered by reason of his unlawful 1-week suspension.³⁰

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

²⁶ 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.

²⁷ Warnings having issued to non-strikers to conceal the discriminatory thrust of warnings against the ex-strikers, there being no way to determine which if any of the warnings might have been valid, and applying the precept that any ambiguity be resolved against the wrongdoer, it is appropriate the Respondent be required to remove all warnings issued during the period stated.

²⁸ Loss of earnings shall be computed as prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), plus interest as set forth in *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962), and *Florida Steel Corporation*, 231 NLRB 651 (1977).

²⁹ See fn. 28, *supra*.

³⁰ See fn. 28, *supra*.

(f) Post at its locations in Berkeley, Oakland, and San Pablo, California, copies of the attached notice marked "Appendix."³¹ Copies of said notice, on forms provided by the Regional Director for Region 32, after being duly signed by Respondent's authorized representative, shall be posted by Respondent 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 the notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director for Region 32, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

³¹ 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."

Appendix

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

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives all employees the following rights:

- To engage in self-organization
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To engage in activities together for the purpose of collective bargaining or other mutual aid or protection
- To refrain from the exercise of any or all such activities.

WE WILL NOT implement a system of written warnings for the purpose of discriminating against employees for having engaged in a strike or other union or protected concerted activities.

WE WILL NOT discharge, suspend, cause to quit, or otherwise discriminate against employees for having engaged in a strike or other union or protected concerted activities.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in their exercise of rights under the Act.

WE WILL remove from our records, including the personnel files of the affected persons, all written warnings issued from October 1, 1976, through February 12, 1978, and expunge any reference thereto, and notify the affected persons in writing that this

has been done and that the warnings have been retracted.

WE WILL offer Walter Freeman, Coleen Hogle, Richard Mead, James Morgan, Janice Browne Tucker, and Alfred Walker immediate and full reinstatement to the jobs they held before the strike in April-May 1976 or, if any such job no longer exists, to a substantially equivalent position, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings and benefits suffered by reason of our discriminatory

discharges of them in 1976, 1977, and 1978, plus interest.

WE WILL make the estate of Kimberly Westbrook whole for any loss of earnings and benefits suffered by reason of our discriminatory discharge of her in 1977, plus interest.

WE WILL make Alfred Walker whole for any loss of earnings or benefits suffered by reason of his unlawful one-week suspension in 1977, plus interest.

CARTER OF CALIFORNIA, INC. D/B/A
CARTER'S RENTAL