

Wilkes-Barre Wholesale Service, Inc. and Laborers' International Union of North America, District Council of Eastern Pennsylvania, Local Union 1300, AFL-CIO and Alan J. Ravert. Cases 4-CA-9781, 4-CA-9932, 4-CA-10074, 4-RC-13372, and 4-CA-9798

November 19, 1979

DECISION, ORDER, AND DIRECTION

BY CHAIRMAN FANNING AND MEMBERS JENKINS
AND PENELLO

On August 20, 1979, Administrative Law Judge Thomas A. Ricci issued the attached Decision in this proceeding. Thereafter, Respondent, the Union, and the General Counsel filed exceptions and supporting briefs.

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

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

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 Judge² and hereby orders that the Respondent, Wilkes-Barre Wholesale Service, Inc., Wilkes-Barre, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

IT IS FURTHER ORDERED that the complaint be, and it hereby is, dismissed insofar as it alleges violations of the Act not specifically found herein.

¹ Before he discharged Michael Nadzan, Respondent's president, Sabol, apparently telephoned an attorney to ask for advice. The Administrative Law Judge questioned whether such advice would be necessary absent an unlawful motive. We place no reliance on any implication that consulting an attorney constitutes evidence of illegality.

The Administrative Law Judge's Decision also contains several inadvertent errors. First, the hearing took place on June 13, 14, and 15, 1979, instead of in 1976 as recited in the Decision. Additionally, the discharge of Thomas Anderson occurred on March 5, 1979, and not in January 1979 as indicated at one point. Finally, the correct spelling of the name of one of the employees whose ballot was challenged is "Opsitos."

² The Administrative Law Judge recommended that Respondent cease and desist from "in any other manner" interfering with the employees' Section 7 rights. We find that the issuance of a broad order is warranted in this case in light of Respondent's egregious conduct, including interrogations, threats to close the shop, and three discharges. See *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979).

DIRECTION

It is hereby directed that the Regional Director for Region 4 shall, within 10 days from the date of this Decision, open and count the ballots of Alan Ravert, Michael Nadzan, Michael Boyko, Steve Hynick, Joseph Opsitos, and Aldo Zorzi, and, thereafter, prepare and serve on the parties a revised tally of ballots, upon the basis of which he shall issue the appropriate certification.

APPENDIX

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

WE WILL NOT discourage membership in Laborers' International Union of North America, District Council of Eastern Pennsylvania, Local Union 1300, AFL-CIO, or any other labor organization, by discharging employees or otherwise discriminating against them concerning their employment conditions because of their membership in, or activities on behalf of, the above-named or any other labor organization.

WE WILL NOT interrogate employees concerning their union activities.

WE WILL NOT threaten to sell our business in retaliation for union activities by employees.

WE WILL NOT threaten to discharge employees to curb their union activities.

WE WILL NOT question employees concerning how they intend to vote in union elections.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of their rights to self-organization, to form, join, or assist the above-named Union, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

WE WILL offer Alan Ravert, Michael Nadzan, and Thomas Anderson immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and WE WILL make them whole for any loss of pay suffered as a result of the discrimination against them, with interest.

WILKES-BARRE WHOLESALE SERVICE, INC.

DECISION

STATEMENT OF THE CASE

THOMAS A. RICCI, Administrative Law Judge: This is a consolidated proceeding in which a single hearing was held in Wilkes-Barre, Pennsylvania, on June 13, 14, and 15, 1976, on complaint of the General Counsel against Wilkes-Barre Wholesale Service, Inc., here called Respondent, or the Company, and to resolve questions raised by challenges to ballots cast in a related representation case election involving the same Company. The complaint issued on April 30, 1979, based on charges filed on November 24, 1978 (Case 4-CA-9781), on January 30, 1979 (Case 4-CA-9932), and on March 26, 1979 (Case 4-CA-10074) by Laborers' International Union of North America, District Council of Eastern Pennsylvania, Local Union 1300, AFL-CIO, here called the Union, and on a charge filed on November 30, 1978 (Case 4-CA-9798) by Alan Ravert, an individual. The election involved was held on November 17, 1978, and on January 2, 1979, the Regional Director issued a notice of hearing to resolve eight challenges, in which he consolidated all the cases for a single hearing. The issues to be resolved are whether Respondent in fact discharged three employees in violation of Section 8(a)(3) of the Act and whether the persons who cast challenged ballots were eligible to vote. Briefs were filed by all parties.

Upon the entire record and from my observation of the witnesses I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE EMPLOYER RESPONDENT

Respondent, a corporation existing under the laws of the Commonwealth of Pennsylvania, is engaged in the wholesale distribution of building supplies at its location in Wilkes-Barre, Pennsylvania. During the year preceding issuance of the complaint, in the course of its operations, it purchased goods valued in excess of \$50,000 directly from out-of-state sources. I find that Respondent is engaged in commerce within the meaning of the Act.

II. THE LABOR ORGANIZATION INVOLVED

I find that the Laborers' Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *A Picture of the Case*

During the summer of 1978 there was a move among the approximately 22 warehousemen and drivers of this Company to join the Teamsters Union, its Local 401, and a substantial number of employees signed authorization cards in favor of that Union. The president of that local informed Respondent of its asserted majority representative status and requested a meeting. Nothing came of that organizational campaign, and the employees then turned to the Laborers' Union, and its Local 1300, the Charging Party and

Petitioner here. After a number of authorization cards were signed, this Union filed its election petition with the Board on September 22, 1978, and by agreement of the parties a Board-conducted election was held on November 17. The results were inconclusive because of challenges.

On June 9, 1978, Respondent discharged Alan Ravert, a driver who had been in its employ for 5 years and who had been active in the campaign in favor of the Teamsters. The complaint alleges this man was discharged for such union activity, and that the Company thereby violated Section 8(a)(3) of the Act. On November 10, a week before the election, Respondent discharged Michael Nadzan, another driver. And on March 5, 1979, it discharged Thomas Anderson, a warehouseman, who had acted as the Laborers' observer in the November 17 election. The complaint says each of these discharges was also motivated by union animus, and therefore unlawful under the statute.

There are also separate allegations of violations of Section 8(a)(1)—interrogations, threats of reprisal, deliberate hiring of unneeded employees in order to pad the payroll list, and thereby influence the outcome of the election improperly.

Respondent denies the commission of any unfair labor practices. As to each of the three dismissed employees it advances an affirmative defense of discharge for cause.

1. Ravert

The transcript of testimony presents substantial and determinative questions of credibility, both factually as to what was and was not said by the individual parties involved, and with respect to the question of the true motivation in the three discharges—was it just cause, as asserted, or was it retaliation for prounion activities. Three managing agents, all conceded supervisors, testified for Respondent on these issues. They were Joseph Sabol, Sr., president and owner of the Company, his son Joseph Sabol, Jr., an office manager, and Joseph Lyons, warehouse supervisor and dispatcher. These are the men who run the business on a day-to-day basis and who were responsible for everything that was done on behalf of the Company. Their credibility will best be appreciated if first the discharge of Ravert be considered.

Ravert started by testifying that in 1975, because the men were dissatisfied with their conditions of employment, he contacted Teamsters Union Local 401 to have authorization cards signed. Word got to the Company and Sabol Sr. talked to him in the warehouse, saying: "Why are you trying to do this to me? Why are you starting trouble for me? . . . Why did you go to a union? You could have talked to me. We could have worked something out." At Sabol's request, still according to Ravert, he arranged a meeting of the men, and they talked to Sabol. The result was a promise of raises over the next 3 years, and that union movement died. A year or two later the promised raises were not forthcoming, and when the men complained Sabol told them "we wouldn't see another raise until he died." This starting testimony by Ravert stands uncontradicted on the record.

Ravert continued that in May or early June 1978, he and other men went back to the Teamsters and this time signed union cards. Again, as Ravert recalled, Sabol learned of their activity and said to him: "Why are you starting trou-

ble? What are you getting a union for?" In the office Sabol then said to him: "we shouldn't be contacting a union and that he wasn't going to—that even if we got a union, he refused to pay, that he'd sell the business before he'd give us a raise . . . He asked me if I wasn't happy why don't I get another job . . . 'If you don't like it here, well, why don't you just quit?' " When Ravert answered that he could not afford to quit, Sabol came back with: "Well, I'll ride you until you quit." Sabol called Ravert into the office a second time, as the driver continues to testify. "You talk to the people. They'll listen to you. You can stop this union . . . Are you going to go out there and talk to them or not?" Ravert's answer was: "I can't stop it . . . If you want it, I don't want to act as a spokesman, if you want to stop the union, you go out and talk to them yourself, and nobody will listen to you because you've lied to them before and I don't want to have any part of it."

After this, on June 9, Ravert was discharged.

If Sabol's very lengthy discourse at the hearing about this man's utter unfitness for employment can at all be reduced to simple language, it is that he was just a terrible worker, he refused to take orders, he disrupted the whole operation, he generated discord and dissatisfaction in others, he was a physical menace to people around him—in short, an intolerable employee. The trouble with this asserted defense is that Ravert worked at this job for 5 years, and throughout that time, whatever his character and whatever his failings, Respondent deemed him a valuable employee and was glad to keep him on. That is, it kept him until the moment he chose to disregard the old warning of several years earlier and tried once again to bring a union into the picture. In the light of the terrible story Sabol very colorfully and very angrily described as of old, the timing of the discharge virtually compels the finding that his real reason had to be something else.

When he first told the story of Ravert being "a tough man to try to control. He seemed to want to do things on his own. He didn't want to do things or way; . . . he was determined that he was only going to take so many stops and no more, . . ." Sabol talked of the entire period of the man's employment. He even recalled, quite inconsistently, that Ravert would return at the end of the day and boast: "You know I had 16, I had 17 stops today . . . I'm a good man . . . I could do it." Later in his testimony, Sabol tried to shorten the period of Ravert's faults, to only a year, then 9 months, then only 6 months before the discharge.

But as he kept adding to the reasons for the discharge, Sabol in fact reached further and further back. He repeatedly emphasized the assertion Ravert had been in jail, on probation, or on parole. It then developed that all this amounted to was that about 6 months after he came on the job, back in 1973, Ravert did tell the boss he had once been arrested, erroneously it seems, and been kept in jail somewhere overnight. Other than simply disparaging the man, what such a fact, 4-1/2 years after it came to Sabol's knowledge, could conceivably have had to do with the discharge, the president did not explain.

Aside from the revealing significance of the timing, when seen against such an assertedly consistent history of misbehavior, there are other elements in the combined stories of the defense witnesses which further discredit them. Sabol said that although he did not personally supervise Ravert,

he knew all along he simply was no good because Lyons, the dispatcher supervisor, had told him so. Ravert did say at the hearing that in the summer of 1978, after all this union business started, the Company kept adding to his daily delivery orders to the point where it was more than he could handle and that he did complain. Lyons testified he repeated these complaints to Sabol in criticism of Ravert. But in complete conflict with Sabol's testimony, Lyons added that when he asked Sabol "to straighten him out," the president instead responded: "He's a work horse. He does deliver." Again: Testifying before Lyons, Sabol said he dismissed Ravert because Lyons told him he had to. He quoted Lyons as saying: "Either I fire Alan Ravert or he's [Lyons] going to quit." In absolute contrast, Lyons went out of his way while testifying to make clear he did not ask for the discharge. What did he say to Sabol? "Either straighten him out, or if you can't straighten him out, you know, if you are going to get rid of him, get me a replacement," but I never told—went to Mr. Sabol and said, 'Fire him,' specifically." Moreover, Lyons even said that he never knew until 2 weeks later that Ravert had been discharged at all. Again from Lyon's testimony: "I don't know if they fired him or laid him off, because no one ever consulted me on this." How does one reconcile such direct conflict in testimony between the two principal defense witnesses?

There are other contentions advanced by Sabol at the hearing that do not really merit much discussion here. Among the reasons for the discharge he listed the fact Ravert sometimes came to work in sandals, wearing a "tee shirt," and even with "jeans that were cut up to above his knees." From this Sabol went on that Ravert came to work "either drunk or he was on dope." Other than his unsupported conclusionary statements, there is no proof at all that the man ever took "dope," or came to work drunk.¹

One last element in the accumulation of reasons now advanced in justification of the June 1978 discharge merits comment. As he rambled along in answer to his lawyer's question as to why he discharged Ravert, Sabol started talking about the man having "the sawed-off shot guns . . . and I saw the guns." He repeated vehemently several times that he "saw the guns." His first implication was clear: That Ravert was a dangerous man to have around. As he continued, however, the articulated idea changed, and became that the fault lay in Ravert having bought "them on my time, hauled them in my trucks." To hear the witness one imagined a desperado. What came to light later, not only by the testimony of Ravert, but with Sabol's own admission, is that one day—long before the discharge—Ravert bought one shotgun, for hunting I suppose; had the purchase wrapped up in the store; and took it home with him after returning his delivery truck to the yard and checking out. Other than this, there is no credible evidence that Ravert ever appeared at the place of work with a single shooting iron, to say nothing of two! That the entire busi-

¹ From Sabol's testimony:

Q. You testified that sometime you feel he came in intoxicated or on dope. When was this?

A. Well, again, I can't give you the dates, but he did come in in the morning. He'd come in there in the morning, and to me he was flushed in the face and he looked like he was drunk and he was high and singing and he was this, and "today is the day, and 'God is going to make the day for me today,' and so, so, so, so."

ness about the gun was pure fabrication by Sabol as a reason for releasing Ravert, is proven conclusively by Lyons' statement, testifying after Sabol: "That [the shot-gun] to me had nothing to do with his being laid off, discharged or straightened out."

Still on this matter of deadly weapons, Lyons, the dispatcher, said that sometime after the discharge Ravert parked his car on the Company's property when visiting the "unemployment office." Apparently that office is not far from Respondent's place of business. Lyons said that from a distance he signaled Ravert to park his car elsewhere, and that in response Ravert "reached underneath his seat or in back of the seat, and he pulled out a revolver . . ." Other than blackening the man's character, this part of the asserted affirmative defense could not possibly have had anything to do with the discharge, if only because it all came later. Ravert said he never had a pistol or a revolver of any kind in his life, and I certainly believe him, especially in the light of Lyon's further testimony that: "he didn't point it at me—it was done smiling . . . He never threatened me with, he never done—it was done in jest. I never reported this to Sabol or anything." If Ravert was so friendly towards him, why did Lyons tell this story at all? I do not believe this company witness.

And finally, there is the question of knowledge about the union activity. Sabol said he never heard a word about any union activity until the day the representation case petition was filed, on September 22. I take this as intended to deny also that that he had any conversation with any employee about union activities before that day, although Sabol did not directly contradict other testimony on that score. And his son, Joseph Sabol, Jr., said flatly no one representing the Teamsters Union ever communicated with him at all. The last witness called by the General Counsel in rebuttal was Francis Belusko, president of Teamsters Local 401. He testified that about a year before the hearing—this would be in the spring of 1978 (it will be recalled that Ravert's uncontradicted testimony is that the men signed Teamsters cards in May or June)—he called at the plant and spoke to Joseph Sabol, Jr., saying he "had a majority signed up" and requesting that Sabol Sr. call him. This record is completely silent as to what came of that movement. But in any event, there can be no question but that of all the witnesses who appeared, Belusko was the one person who had no interest in the outcome. I certainly credit him against Sabol Jr.

From all this it follows that the two Sabols, father and son, were not telling the truth throughout this hearing, and that Lyons, who attempted to talk consistently with the president, is also a discredited witness. All things considered, I find that Respondent discharged Ravert because of his attempt to establish the Teamsters as bargaining agent and that thereby Respondent violated Section 8(a)(3) and (1) of the Act. I also find that by questioning Ravert about his union activities in June, by threatening to sell his business in retaliation for union activities, and by telling Ravert he would "ride" him until he quit—an effective threat of discharge—Sabol Sr. violated Section 8(a)(1).

On this matter of using the threat of "selling the business," there is also the testimony of a driver named Leonard Minots. He said that in the fall of 1978—this would be while the Laborers' election petition was in progress—Sabol Sr. called him aside and said "he didn't like what was going

on with the Union. . . . and he doesn't know why we're doing this He showed me a letter . . . and he said, 'I have a card here that a business man from Philadelphia, if I send this back to him, I could sell the business, one, two, three;' . . . he said . . . he gave me a job, and if it wasn't for a friend of mine . . . I wouldn't have gotten a job there." In the course of the conversation, according to Minots, he told the boss the union activity was being pushed "because the guys think that they're not being treated fair."

Sabol's only testimony relating to this talk with Minots was to deny he ever threatened to sell his business. I do not credit him against Minots. I therefore find that, by his threat to that employee, Respondent committed further a violation of Section 8(a)(1).

2. Nadzan

Nadzan was also a truckdriver; he signed a union card and went to union meetings. On November 9 he damaged the top of a company truck as he drove through an underpass on the highway that was too low for his vehicle. The accident happened towards the end of his workday and while he was off the regular route. Nadzan explained that he had decided to take a round-about route, instead of the regular one, so he could stop at his home and repair his personal car so that his wife could drive it to the Company and he could get home after returning the truck and checking in. That this took him out of his way, that it was a matter of adding 5, 7, maybe 10 miles to his driving, that the added time used for his nonwork and personal purpose would have added to his timecard and paid for by the Company, all this is conceded.

With the truck jammed in the underpass, the Company was advised and sent people to disengage it and drive it back to the yard. Among the people who came was Joe Sabol, Jr., the boss' son. Right there, as Nadzan testified, he told Jr. "I know I'm going to be fired for this." The office manager answered: "No, my father wouldn't do a thing like that."

The next morning, when Nadzan came to work, Sabol Sr. sat him down and had a talk with him. His son was present. Sabol recalled Nadzan's past accidents, telephoned his lawyer, or somebody, for advice, and then fired the driver. If the record showed nothing more than this on the issue of Nadzan's discharge, it could hardly be said there was no cause for dismissal, or that a case of illegal motive has been proved. This, if only because, by his contemporaneous statement to Sabol, Jr. that he expected to be fired, the driver himself admitted that what he did that day could be grounds for dismissal. But there is more, and again it goes directly to Sabol Sr.'s credibility.

Nadzan testified that, after he punched in the next day and started to work, Sabol called him into the office because "he wanted to talk to me." Nadzan's testimony continues: "Sabol Sr. told me how nice he's been to me when he loaned me the truck when I was moving and other things like how he took me, he gave me a job, he took me out of the gutter when I was nothing, and then he proceeded, he asked me . . . 'What were you talking to the guys out there about on the dock?' and I told him, 'I says, I was talking to them about the accident that I had yesterday,' . . . he said . . . 'I thought you were talking about the Union,' . . . and

then he asked me, he says he wanted to know who started a Union out there, and I told him, I said, 'It wasn't one of us; it's all of us,' and then after that he asked me, "What are you going to do in the election?" and I told him, I said that was none of his business, that was my business. And he kept sitting there telling me, he said, kept replying, 'You're not telling me what I want to hear.' . . . And I even asked him, I said, 'What do you want to hear?' And he wouldn't reply."

During this conversation, still according to the driver, Sabol also told him this was his third accident, that he had "wrecked the flatbed engine," and had "knocked a fence over," causing "\$1500 damage." At this point, as Nadzan recalled, Sabol Jr., "stood up and he told him that I only had one accident, and his father told him to shut up and sit down and that's exactly what he did." Sabol Jr., who was present throughout the hearing and testified after Nadzan, did not deny having said this to his father. Of course, as Nadzan explained, the reason Sabol Jr. said this is because he had really never had a road accident before. An engine had gone out of order while he was driving and he had once inadvertently backed his truck into a customer's fence after making a delivery.

Sabol denied interrogating Nadzan during the discharge conversation or having mentioned a union at all. I do not believe him.

Before he rested, the General Counsel proved, by the testimony of Nadzan and other employees, two of them still in Respondent's employ, that there had been many road accidents, some with extensive and costly damages, but that no one had ever before been discharged because of them. Testifying in defense later, Sabol was careful to stress that his sole reason for the discharge was because Nadzan had gone off the beaten path to use the company truck for personal reasons, and on company time. With so much direct evidence by his present employees of his having tolerated serious road accidents by other employees, Sabol had to take this position. But again, as in the case of Ravert, Sabol kept talking about what were really irrelevancies, according to him now. He emphasized that he estimated the truck damage at about \$3,000, and that it had not yet been repaired, and that there was no insurance. He did not deny having discussed the man's previous driving record with him before the discharge. But if the damage had nothing to do with his criticism, why belabor it at the hearing, and why discuss it with the man before firing him? Moreover, if his motive was pure, why clear with the lawyer in advance?

It is as much a matter of demeanor of the witnesses as it is a credibility resolution resting upon the record as a whole. Taken altogether, Sabol Sr.'s testimony was simply unconvincing, all things considered. Merely because there was solid base for discharging the man is not reason enough for disregarding the direct and credible evidence pointing to antiunion motive. When Sabol asked Nadzan "who started a union," and "what are you going to do in the election," had the driver told him what the boss wanted to hear, and, I suppose, assured Sabol he would vote against the union, I have no doubt the man would have been permitted to keep the job. I find, on the entire record, that Respondent discharged Nadzan because of his prounion resolution, and thereby violated Section 8(a)(3) of the Act. I also find that by asking the employee who had started the union move-

ment, and how he was going to vote in the election, Sabol Sr. violated Section 8(a)(1).

3. Anderson

Anderson worked for 7 years as a warehouseman. He joined the Union and in the November election acted as union observer. He was discharged on March 5, 1979, when Sabol Sr. saw him smoking while at work and dismissed him summarily. The next day Anderson phoned in and talked to Albert Sabol, office manager and brother of Sabol Sr., to say: "Is there any chance of getting back to work?" The manager answered: "I don't know . . . You'd have to talk to Joe . . . Joe is upset over the union." This is from Anderson's testimony, and stands uncontradicted, because Albert Sabol did not testify.

Anderson also testified that in November, during the election, Sabol Sr. called him into the office one day, closed the door, and asked "what I know about the union, and I told him I knew nothing." [This had to be before the November election, where Sabol Sr. saw Anderson act as the union's observer.] Anderson's testimony continues that Sabol then said: "this union couldn't do anything for me; they couldn't guarantee me a raise; they could not guarantee me my job; basically, the union could not guarantee me anything. He produced a paper that was a letterhead . . . he stated that he could sell the business, and if the Union got in he would sell the business. . . ." Sabol denied ever having threatened to sell his business because of the union, but he not otherwise contradict Anderson's testimony.

It is a fact that smoking is prohibited in this warehouse; in fact there are and there were at the time of the events "no smoking" signs posted about the premises. At the hearing Anderson admitted he was caught smoking. He admitted that when Sabol asked him that day whether he had been smoking, he said yes. He also admitted that Sabol immediately discharged him with two words: "Get going." Asked as a defense witness on the second day of the hearing why he had discharged Anderson, Sabol spoke for two pages on the transcript to describe the smoking incident—where Anderson was sitting, which way he was facing, where ashes lay on the ground, were they or were they not smoldering, etc., etc. It was typical of his earlier testimony—argumentative, full of irrelevancies, often evasive. It only served the more to lessen his credibility.

Three other employees—Honeywell, Minots, and Asbury—testified that they saw employees smoking inside the building in Sabol's presence, that Sabol criticized them for it and told them they had to stop, but that none of them was discharged for violating the rule. If not they, why was Anderson sent home? Sabol denied ever having seen employees smoking inside the building without dismissing them.

But another employee, Robert Grabinski, testified that a year before the hearing—June 1968?—Sabol saw him smoking near an open window and told him to "put it out" and he did. With this, Grabinski continued to testify, he started arguing with the owner "hot and heavy," insisting that there should be a place in the building where the employees could enjoy a smoke. When the arguing got too hot, Sabol told him he was fired. The next day Grabinski called Sabol on the phone, apologized, and asked could he return

to work. The owner said yes and Grabinski came right back on the job, where he still remains. Sabol's explanation of this incident, an attempt to avoid the adverse inference arising from the disparate treatment of the Union's observer later, is even less convincing than his purported defense of the other disputed discharges. In fact, in his again elusive and vacillating explanation, it is not possible to pin down precisely what he was saying his true reason to fire Anderson had been.

. . . he sat on the windowsill of a window a little smaller than that [indicating] but just about the same height. Bobby was sitting on that windowsill with his foot up against it like this here [indicating], and . . . he was holding onto the window. He was holding onto the window and he was hanging out of the window like this [indicating], and when I saw him hanging out that window, I gave such a yell that I probably got every body alerted in the building, because the windows in the building—it's a pretty old building, and for him to lean out there at that time, that window could give with him and it wouldn't hold him. There was nothing to hold him, see, and I did not see Bobby Grabinski smoke a cigarette on that windowsill. Now, I saw some smoke coming up from some place, whether it was from the lower level or somebody smoking on the sidewalk and it brought it up, the wind brought it up, but as for taking the puff, I did not see Bobby Grabinski take a puff, just like that. But what I did with him, he wasn't supposed to be on that sitting down. He was supposed to be working at that time. They get breaks in the morning and he wasn't supposed to be on that windowsill, and I caught him sitting down on the job and I told him to go home and he went home.

Later, on cross-examination, Sabol said that when he saw Grabinski sitting on the windowsill he "just got so shook up because of the fear of him falling out of that building."

There are too many questions raised by this testimony. Did Sabol discharge the man because he endangered his life by leaning out the window? Did he send him home because he was taking a break at the wrong time? If smoking endangered the building because of its too many inflammable materials, as Sabol also detailed, why did he not look out the window to see where the smoke came from? He admitted he ignored the smoke he saw near Grabinski. He sneaked in the phrase that he did not see the man "take a puff, just like that." With Anderson having shown his cigarette and admitted smoking when he was released, why was it so important for Sabol to emphasize at the hearing, as he did, that he saw Anderson "take a puff on a cigarette," and then again take "another draw on the cigarette?" Why was one offense pardonable and the other not?

I cannot credit this witness. When to the whole story of Anderson's discharge one adds the other facts, already found here, revealing the union animus of Respondent, I credit Anderson instead. I find, again on the basis of the whole record, that he was discharged in January, while the outcome of the union election was still in balance, because of his prounion activities, and that thereby Respondent again violated Section 8(a)(3) of the Act.

Throughout the extended testimony of conversations there are, or at least there may be, other phrases attributed

to management representatives that may amount to separate violations of Section 8(a)(1). No purpose would be served by unduly extending this report by making any such additional minute findings. In any event, the remedial order that is indicated would not be changed.

The Challenges: Alan Ravert and Michael Nadzan

It having been found that Ravert and Nadzan were unlawfully discharged before the election, and that they are therefore entitled to reinstatement to full status as of before their dismissals, it follows they were eligible to vote in the November 17 election. Accordingly, I find the challenges to their ballots without merit and recommend that their ballots be opened and counted.

David Mieczkowski

Mieczkowski, a school boy 16 years old in 1978, was a full-time employee during the summer. With his return to school in September he took to working only an occasional Saturday for very brief periods. His total work record thereafter, as shown by his timecards received as evidence, was as follows, always Saturday work only. Week ending September 21—4-1/4 hours; week ending September 28—3-3/4 hours; week ending October 26—3-3/4 hours; week ending November 16—4 hours; week ending November 23—1-3/4 hours; week ending November 30—4 hours; week ending December 21—4 hours; and week ending December 28—15 hours.

I find that from September 21 on Mieczkowski was a casual employee and therefore ineligible to vote in the November election. Accordingly I recommend that the challenge to his ballot be sustained.

Michael Boyko

Grabinski, the only witness offered by the Union to sustain its challenge on the grounds of asserted supervisor status, said he was once told by Sabol Sr. that Boyko was the "boss" in the carpenter shop. For the rest, the witness' story stemmed from things he said he heard Boyko say about his position, not anything that came from management. He quoted Boyko as saying "he [Boyko] always suggested to people, or the boss, that if they were good employees or they weren't, or they weren't going to work out for him . . . and suggested that he be dismissed." Asked just what kind of work did Boyko do, Grabinski said: "his job then mainly was to distribute the work copies in the morning and to show the men what orders have to be put out during the course of the day, and if there's anything wrong that the men couldn't figure out on these windows, he would come over and show them what to do."

In the end, Grabinski admitted Boyko does the same kind of work he does—answers the phone, as he sometimes does, receives orders, and passes them down to the other employees. There is also direct and uncontradicted testimony that Boyko does not possess or exercise any of the conventional powers that distinguish a supervisor from the rank and file. On this record, I can only find it has not been established Boyko was a supervisor. Compare *Vapor Corporation*, 242 NLRB 776 (1979) I therefore recommend that the challenge to his ballot be overruled.

George Sabol

George Sabol is the brother of Sabol Sr. and for 25 years has worked as a warehouseman. As the close relative of the president, he enjoys a significant status in the shop. There is direct testimony that at the time of the election, unlike all other employees, he was not required to and did not punch a timecard. In a very unconvincing attempt to belittle this fact, Joseph Lyons, the warehouseman supervisor, said George Sabol "used to have a timecard ten years ago." But as to whether he used it or not during the period preceding the election, he, Lyons, did not know. Sabol Sr. had occasion to say at the hearing that in the warehouse "no body would go above the \$4.70 rate." But his brother George was being paid at the rate of \$6.87 per hour. Nothing was offered by the employer to explain this favored treatment in terms of work performed. When George so desires, he takes as long a lunch period as he pleases. There is also testimony that he does work on his personal property—such as snowmobiles—even during regular working hours right inside the plant. I find merit in the Union's contention that this man cannot be said to have a community of interest in conditions of employment together with the rest of the employees working in the warehouse at the time of the election. I therefore think the challenge to his ballot should be sustained. Cf. *Groehn Spotting Fixtures Co., Inc.*, 224 NLRB 842 (1976).

Hynick, Obsitos, and Zorzi

On October 26, when the parties met and signed a consent election agreement, they discussed and agreed to an election date—October 19. Three voters, all warehousemen—Hynick, Obsitos, and Zorzi—were challenged by the Union on the ground that they were hired after the eligibility date. At the hearing the Union advanced as an additional contention in support of these challenges that if in truth the three men were hired and started work before October 19, the Company hired them solely to insure three antiunion votes.

All three of the disputed voters testified and said unequivocally that they started work before October 19. All three of them also said they asked for the job in previous conversations with Sabol Sr., who they knew either as old friends and/or neighbors, or as yard customers. Three other employees—Anderson, Minots, and Rittenhouse—testified that they worked in the warehouse and had never seen any of the disputed three men at work before Monday, October 23. And of course there is also the testimony of Sabol Sr. that he spoke to them before October 19, that he agreed to hire them before that date, and that all three actually worked before October 19.

The timecards of all three men were received in evidence. Hynick's card shows that he worked 1 hour on Friday, October 13; 3-3/4 hours on Monday, October 16; 3 hours on Tuesday, October 17; 4-1/4 hours on Wednesday, October 18; and 4 hours on Thursday, October 19. Obsitos' card shows he worked 2-1/2 hours on Monday, October 16; 4 hours on Tuesday, October 17; and 3-1/2 hours on Wednesday, October 18. And Zorzi's card shows he worked 1 hour on Friday, October 13; 1-1/2 hours on Monday, October 16; 3 hours on Tuesday, October 17; 2-1/2 hours

on Wednesday, October 18; and 3 hours on Thursday, October 19. Thereafter, beginning on Friday, October 19—the first day of the next pay period week—all three of them worked a full 8 hours a day throughout their continuing employment. Zorzi worked regularly until November 23, when he fell sick and underwent surgery; he never returned. Hynick and Obsitos were still at work at the time of the hearing, 8 months later.

Between the conflicting oral recollections of the three challenged men and the three unionees, I accept the documentary evidence of the timecards, and I therefore find it a fact that the three men were hired, and did work during the week preceding the eligibility date. There is more reason for doubting the testimony of the union's witnesses than there is for questioning that of the three other men. The new hires were old acquaintances, or maybe even friends of Sabol, and he did do them a favor by hiring them. But it does not follow of necessity their interest in the outcome must be said to be the same as his now. The other men did favor the Union, and there is no question about that.

To strengthen their stories they added that as early as October 25 they told Robert Ferrari, the Union's International representative, that these three men in question, plus a fourth, had started to work on October 23. They even offered into evidence an affidavit they signed on November 29—restating their story about having said that to Ferrari on October 25. The fact that they made and signed that document, of course, proves nothing, for it is purely self-serving and was made after the voting, clearly intended to support the asserted basis for the challenges.

I also very much doubt their testimony about telling Ferrari what they now say they told him on October 25. As the Union's brief admits, at the October 26 conference, the very next day, where the parties discussed a consent election, they "negotiated the terms" of their agreement. They set October 19 as the eligibility date. If as his union members would now have it, Ferrari knew that four men had started working only 2 days earlier, in an overall unit of 22 men, surely he would have said something to guard against what is now called "padding the payroll." How many times have original timecards served in Board proceedings to resolve conflicting testimony about when employees really worked?

I also find unsupported the alternative assertion that, even if these men did work before October 19, they were hired only so that the employer could count on three votes against the Union. The direct testimony of each one of them that they were not told one word about the Union when hired stands clear and uncontradicted. I know no reason for questioning it. Sabol Sr. said he hired them, and even a fourth man, at that particular time because the volume of business was mounting and had reached an indicated peak. This claim is not really supported by the company records. But against this element of doubt, there is the fact that two of the original four were still at work 8 months later. I doubt it can be said that an employer would continue to pay two full-timers for so long if he does not really need them. Zorzi left about a month later, but this was only because he became disabled. The Company did not let him go. And this equally true of the fourth man, who worked less than a week and then quit of his own volition. In the light of these facts, the further fact that the newly hired men were around 70 years, also means less than at first would

appear. Decrepit old men cannot continue to work full time, and earn their pay, as these men have been doing.²

I find that Hynick, Obsitos, and Zorzi were eligible to vote in the election, and therefore that the challenges to their ballots must be overruled.

THE REMEDY

Respondent must be ordered to reinstate each of the three unlawfully discharged employees. It must also be ordered to make them whole in keeping with established Board law for any loss of earnings they suffered in consequence. Respondent must also be ordered to cease and desist from in any manner violating the statute.

IV. THE EFFECTS OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

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

CONCLUSIONS OF LAW

1. By discharging Alan Ravert, Michael Nadzan, and Thomas Anderson Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(3) of the Act.

2. By the foregoing conduct, by interrogating employees concerning their union activities, by threatening to sell its business in retaliation for union activities by its employees, by threatening to discharge employees to curb their union activities, and by questioning employees as to how they intended to vote in union elections, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1).

3. The aforesaid unfair labor practices are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

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

ORDER³

The Respondent, Wilkes-Barre Wholesale Service, Inc.,

² The charge about the Company having deliberately placed people it did not need on its payroll only to influence the outcome of the election also appears in the complaint as an unfair labor practice allegation. I recommend dismissal of that allegation for the same reason that I find the three men eligible to vote.

³ 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.

Wilkes-Barre, Pennsylvania, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in Laborers' International Union of North America, District Council of Eastern Pennsylvania, Local Union 1300, AFL CIO, or any other labor organization of its employees, by discharging employees or otherwise discriminating against them in their employment conditions because of their membership in or activities on behalf of the above-named or any other labor organization.

(b) Interrogating employees concerning their union activities, threatening to sell its business in retaliation for union activities by its employees, threatening to discharge employees to curb their union activities, or questioning employees as to how they intend to vote in union elections.

(c) In any other manner interfering with, restraining, or coercing employees in the exercise of their rights to self-organization, to form, join, or assist the above-named labor organization, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

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

(a) Offer to James Ravert, Michael Nadzan, and Thomas Anderson immediate and full reinstatement to their former jobs, or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of pay or any benefits they may have suffered by reason of Respondent's discrimination against them, with interest thereon to be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).⁴

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

(c) Post at its plant in Wilkes-Barre, Pennsylvania, copies of the attached notice marked "Appendix."⁵ Copies of said notice, on forms provided by the Regional Director for Region 4, after being duly signed by Respondent's authorized representative, shall be posted by it for a period of 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by it to insure that said notices are not altered, defaced, or covered with any other material.

(d) Notify the Regional Director for Region 4, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

⁴ See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

⁵ 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."