

Ackerman Manufacturing Company and Amalgamated Clothing and Textile Workers Union, AFL-CIO, CLC, Local # 1594. Case 14-CA-11125

March 30, 1979

DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS JENKINS
AND PENELLO

On November 8, 1978, Administrative Law Judge Claude R. Wolfe issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the Charging Party filed a brief in response to Respondent's exceptions.

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

The Board has considered the record and the attached Decision in light of the exceptions¹ and briefs and has decided to affirm the rulings, findings,² and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified herein.

The Administrative Law Judge found, and we agree, that Respondent violated Section 8(a)(3) of the Act by discharging employees Ellis and Atkins in January 1978 on the pretext that they were suspected of stealing company property. The Administrative Law Judge found that the real reason for the discharges was Respondent's animus caused by the union activity of the two employees, particularly their opposition to company proposals during the 1977 negotiations for a new contract. During the hearing on the 8(a)(3) complaint, Atkins testified, *inter alia*, to a conversation between himself and Respondent's official, Lester Ackerman, approximately 2 months before the discharges. According to Atkins, Ackerman called him aside, complained that he did not think Atkins was getting along with other company officials, and suggested that Atkins "get together" with Respondent. Finally, Ackerman advised Atkins that if the Union was out of the plant "I could afford to pay you more money." Atkins' testimony with respect

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

² In rejecting the Respondent's contention that this matter should be deferred to the arbitral process, the Administrative Law Judge relied on the Board's decision in *General American Transportation*, 228 NLRB 808 (1977). For the reasons set forth in the dissenting opinion in that case, Member Penello continues to defer to the arbitration process in appropriate 8(a)(3) cases. However, in the present case, the Respondent did not specifically except to the failure to defer. Accordingly, Member Penello does not have the deferral issue before him for consideration.

to his conversation with Ackerman was not controverted by Respondent and was specifically credited by the Administrative Law Judge. However, although he found Ackerman's statements to Atkins on this occasion were an effort "to persuade Atkins to forswear his union allegiance" by promise of benefits, in the absence of a specific allegation in the complaint, the Administrative Law Judge declined to find and remedy this conduct as violative of Section 8(a)(1) of the Act.

As the Administrative Law Judge apparently recognized, the offer of benefits in the circumstances here presented is plainly violative of Section 8(a)(1). See *Gulf States Cannery, Inc.*, 224 NLRB 1566 (1976). Moreover, inasmuch as Atkins' testimony concerning this incident was uncontroverted and fully credited, and because the matter is closely related to the subject of the complaint,³ we shall find the 8(a)(1) violation and provide an appropriate remedy. See, generally, *Alexander Dawson, Inc. d/b/a Alexander's Restaurant and Lounge*, 228 NLRB 165 (1977); *Crown Zellerbach Corporation*, 225 NLRB 911 (1976).

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, as modified below, and hereby orders that the Respondent, Ackerman Manufacturing Company, St. Louis, Missouri, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Insert the following as paragraph 1(b) and reletter the existing paragraph accordingly:

"(b) Offering increased wages to induce employees to abandon their support for Amalgamated Clothing and Textile Workers Union, AFL-CIO, CLC, Local # 1594, or any other labor organization."

2. Substitute the attached notice for that of the Administrative Law Judge.

³ In this connection, we note that the implied promise of a wage increase to Atkins appears to have been part of Respondent's effort to neutralize Atkins and his fellow employee and committee member, Ellis, an effort that culminated in the discharges of both employees in January.

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 or activities on behalf of Amalgamated Clothing and Textile Workers Union, AFL-CIO, CLC, Local

1594, or any other labor organization, by discharging or refusing to reinstate any of our employees or in any other manner discriminating against them in regard to their tenure of employment or other term or condition of their employment.

WE WILL NOT offer our employees increased wages to induce them to withdraw or withhold their support from Amalgamated Clothing and Textile Workers Union, AFL-CIO, CLC, Local # 1594, or any other labor organization.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer Hayward Atkins and Silas Edward Ellis immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent employment, without prejudice to their seniority or other rights and privileges previously enjoyed, and make them whole for any loss of pay they may have suffered by reason of our unlawful discrimination against them, with interest computed thereon.

All our employees are free to join or assist Amalgamated Clothing and Textile Workers Union, AFL-CIO, CLC, Local # 1594, or any other labor organization.

ACKERMAN MANUFACTURING COMPANY

DECISION

STATEMENT OF THE CASE

CLAUDE R. WOLFE, Administrative Law Judge: This case was heard before me at St. Louis, Missouri, on April 24 and 26, 1978, pursuant to a complaint issued on March 23, 1978, and charges timely filed on February 3, 1978, by the Amalgamated Clothing and Textile Workers Union, AFL-CIO, CLC, Local No. 1594, herein referred to as the Union. The complaint alleges that the Respondent discharged Hayward Atkins and Silas Edward Ellis on January 23, 1978, and has since failed and refused to reinstate them, all because they engaged in union activity or other protected concerted activity. The Respondent duly denied the unfair labor practice allegations of the complaint on March 30, 1978, and affirmatively pleaded as follows:

A. Further answering, Respondent states that Hayward Atkins and Silas Edward Ellis have been temporarily suspended pending investigation of an allegation of theft and have not been discharged.

B. On January 23, 1978, Robert Herhold, an independent sales representative, reported to Stephen Ackerman that employees Atkins and Ellis had removed a mattress from the plant at 4140 Park Avenue on the preceding day, Sunday, January 22, 1978, in an unauthorized manner and that said employees had

placed such mattress in a private camper/pickup vehicle.

C. Respondent reported this allegation to the St. Louis Police Department, and the Prosecuting Attorney of St. Louis issued warrants [sic] for the arrest of employees Atkins and Ellis.

D. Respondent placed employees Atkins and Ellis on temporary suspension without pay and stated that, upon resolution of the matter, they would be able to voluntarily resign or be reinstated.

Such suspension was wholly on account of the allegation of unauthorized removal of Company property by employees Atkins and Ellis and so was for cause and wholly unrelated to the engagement of employees Atkins and Ellis in Union activity.

Further answering, Respondent states that Amalgamated Clothing and Textile Workers Union, AFL-CIO, CLC Local # 1594, the charging party herein, has filed a grievance in respect of the temporary suspension of employees Atkins and Ellis, and that there is now pending the procedure or commencing arbitration to which the Board must defer.

Upon the entire record,¹ my observations of the demeanor of the witnesses as they testified before me, and after due consideration of the post-trial briefs filed by all parties, I make the following:

FINDINGS AND CONCLUSIONS

I. JURISDICTION

The Respondent is a Missouri corporation with its principal office and place of business in St. Louis, Missouri, where it is engaged in the manufacture, sales, and distribution of bedding and related products. During the year ending December 31, 1977, a representative period, the Respondent manufactured, sold, and distributed at its St. Louis, Missouri, facility products valued in excess of \$50,000, of which products valued in excess of \$50,000 were shipped directly from the Respondent's St. Louis facility to points located outside the State of Missouri. The Respondent is now and has been at all times material herein an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION

The Union is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

¹ Certain errors in the transcript have been noted and are hereby corrected.

The record does not reflect, as it should, that Resp. Exh. 7, a February 3, 1978, letter to the Respondent from the Union, was received into evidence.

Further, I rejected Resp. Exh. 6, a report of a certified polygraphist dated February 20, 1978, containing an opinion that Herhold was truthful when he related to the polygraphist that he saw Atkins and Ellis remove a mattress from the Company. Upon reconsideration I conclude that, although the document is pure hearsay entitled to no weight in assessing the credibility of Herhold and the use of polygraph tests to determine truthfulness of a witness has not met with approval in most courts, the report is admissible for the purposes of evaluating the investigative efforts of the Respondent and its bona fides in failing to recall Atkins and Ellis. Resp. Exh. 6 is hereby received into evidence, but I place no reliance on it in evaluating the credibility of witnesses Herhold, Atkins, or Ellis.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Findings of Fact

Hayward Atkins was employed by the Respondent on January 9, 1962, and Silas Ellis was employed on March 26, 1963. Both continued as Respondent's employees until January 23, 1978. The Respondent concedes that they were good employees, and there is no contention that their work performance played any part in their suspension. Respondent's chairman of the board, Lester Ackerman, testified that he had known Atkins and Ellis throughout their employment, that they have done work at his home, and that he has the highest regard for them, trusts them implicitly, and believes in their integrity. The substance of Stephen Ackerman's testimony in this respect is that through the 15 years that he has been acquainted with Atkins and Ellis he trusted them and had no reason to suspect their integrity.

The Respondent and the Union have been parties to a collective-bargaining agreement for many years. The parties commenced negotiations for a new contract sometime in March 1977. Throughout most of these negotiations, the Company negotiating team consisted of Phil Rosenblum and Francis Kern. The Union's negotiation committee was headed by Garold Rulon, business agent for the International Union. Atkins, Ellis, the local president, the local vice president, and one other employee were elected by the membership to serve on the negotiating committee with Rulon.

Among the various proposals discussed was one by the Respondent that the parties agree on a group incentive program. The entire union negotiating team was adamantly opposed to this, and negotiations were tense. On March 24, 1977, the Union voted 21 to 0 not to ratify the contract and to strike after the expiration of the then existing contract. According to Rulon, whom I credit, he persuaded the members to postpone the strike date to the first Sunday in April, April 3, rather than April 1, the first day after the expiration of the contract. At that point, Rulon went on vacation and did not rejoin the negotiations.

The most coherent and credible account of the negotiations following the exit of Rulon was given by Charles Sallee, regional director for the International Union and manager of the St. Louis Joint Board. Sallee entered into the negotiations after the Local had voted to strike. After Sallee entered the picture as the Union's negotiator, he met with the Company in place of Rulon. The negotiators dealing with Sallee and the committee on behalf of the Respondent were Lester and Stephen Ackerman, who replaced Rosenblum and Kern. It is not clear from the testimony when the Ackermans became negotiators and met with the Union, but I am persuaded that they only met on 1 day. A signed letter of agreement between Sallee and Rosenblum, as vice president of the Company, was executed on March 28, 1977. The Company's group incentive plan proposal, which had been vigorously opposed by the Union, was replaced, as a compromise between the parties, by an agreement that the Respondent would implement an individual incentive plan during the term of the contract. It appears from a synthesis of all of the testimony of the various witnesses as to when this individual incentive plan was to be instituted that the agreement was that the Company would prepare

and institute the plan within the first 6 months of the contract, which was of only 1 year's duration.

The only written agreements between the parties which appear to me even remotely related to the agreement reached to implement the individual incentive plan are the letter of agreement dated March 29, 1977, signed by Sallee and Rosenblum, and the contract itself. The March 29 letter, which purports to be an agreement on certain economic issues, relates, in pertinent part, the following:

This tentative agreement is subject to Local # 1594 ACTWU ratification March 31, 1977. It was further understood, between the parties to the Labor Agreement, that the Company would make every effort to shape up the plant over the next 9 months and would, at that time, resume bargaining with the Union for improvements hopeful [of] having a smoother operation going at that time.

In the event that a suitable contract can be worked out before the 1-year contract period, it would be put into effect at the time of the agreement.

The collective-bargaining agreement signed by the parties had an effective date of April 1, 1977. Article XIV, "Duration," relates that the agreement is effective April 1, 1977, and shall renew itself from year to year unless notice is given by either party to the other, in writing, of a desire to terminate or modify it not less than 60 days prior to March 31, 1978. The only item I find in the agreement which appears to me possibly to relate to the agreed-upon incentive plan is article X, which reads:

Changes in work pattern

It is agreed that the Company has the right from time-to-time to make changes in job assignments, *workloads and piece work rates*. The Company agrees that any such changes shall not be inconsistent with the terms of this Agreement and that they shall be effected by mutual agreement between the parties.

The Respondent had not implemented any incentive plan by January 23, 1978, when Atkins and Ellis were suspended. Such a plan was instituted after the suspensions. The Respondent had, however, previously caused some studies to be made of the problems involved in implementing the agreed-upon incentive plan.

Stephen Ackerman, Ellis, and Atkins agree that after the 1977 negotiations Stephen Ackerman had conversations with Ellis and Atkins about incentive plans and that Ellis and Atkins expressed their opposition to incentive plans during these conversations. Atkins credibly testified that he and Stephen Ackerman also frequently talked about increasing production but disagreed on the methods, and that during one of these conversations, shortly before he was suspended, he and Stephen Ackerman had a rather heated exchange, during which Ackerman told him, "Hayward, between you and this company, one of you all is too much for me." Atkins replied, "Don't get your jaws tight, that's your privilege. When you say something wrong to me I have the privilege—the same privilege of getting mad, too."

Atkins further testified that a couple of months before his suspension he was called into the office by Lester Ackerman who told him that they had to get together and that Atkins and Stephen Ackerman did not seem to be "hitting it off

too hot." A conversation then ensued, with Atkins explaining that Stephen Ackerman wanted more production but didn't want to pay more money. This evoked statements from Lester Ackerman to the effect that if the Company did not have a union it could afford to pay Atkins more money because he would not have to pay insurance or union dues, and would have the right to work because of a right-to-work law. Atkins replied that he could not live under that law because he had a family, could not afford to pay the high hospital bills, and the Union took care of all his hospital bills. Lester Ackerman's reply was that he was sorry, but that Atkins would have to blame his union because he was not making more money.²

Lester Ackerman denies having any discussion with Atkins about the right-to-work law but does not otherwise deny the conversation related by Atkins. On the whole, I observed Atkins to be a believable witness trying to recount as best he recalled the events that had happened. On the other hand, Lester Ackerman left the distinct impression that he was trying to avoid being entangled in the matters under litigation to the extent that he could and was not being completely forthright in his testimony. His manner, as well as the substance of his entire testimony, persuades me that he was trying to take a middle position without either casting aspersions on Atkins and Ellis or testifying adversely to the Respondent's interest in an effort to avoid any imputation of personal responsibility to him for the suspensions of Atkins and Ellis, which he asserts were given on the sole discretion of his son. Accordingly, I credit Atkins' version of his conversation with Lester Ackerman.

Silas Ellis credibly testified that, immediately after the completion of the negotiations in the spring of 1977, he overheard Stephen Ackerman tell his father that he wished unions had never come to this country. He further credibly testified that a few days before he was suspended he asked Ackerman if he was going to sit on the negotiations for 1978 and received the reply that Ackerman did not know and that it really did not matter because they did not all agree on everything. I further credit Ellis' testimony that sometime in late December 1977 Ackerman talked to him while he was on break and asked him not to talk union business on company time. Ellis replied, "O.K.," but that at that moment it was his time, to which Ackerman responded that he was paying for it and Ellis rejoined that it was still his time.

Ellis was elected president of the Union and was installed in that office on January 11, 1978. Atkins continued as a member of the negotiating committee. The Respondent was well aware that both Atkins and Ellis were going to be members of the Union's negotiating team and that negotiations for a new contract were going to commence shortly after January 23, the day of the suspensions of the two men.

The events of January 22, 1978, were related by Robert Herhold, a private entrepreneur and a friend of Lester Ackerman for over 20 years, and of Hayward Atkins. According to Herhold, he was conducting a sale from the Respondent's inventory on Sunday, January 22, and met some customers at the warehouse at noon that day. After he spent an hour or more with these customers, he went into

² Lester Ackerman's statements are not alleged as unfair labor practices in the complaint.

the office and started working on his bank balance. After completing this chore, he left to get breakfast. He testified that it took him about 45 minutes to be served at the restaurant that he visited. Although anything is possible, I find it difficult to believe Herhold's testimony that the restaurant cook first burnt one egg, then dropped another on the floor, and then later told Herhold that he had forgotten Herhold was there. In any event, Herhold said that he returned to the factory after taking breakfast and observed that a tractor-trailer was backed into one loading dock and a small pickup truck was backed into another loading dock. He said that at this point Atkins waved at him and called to him to come on around. He walked over to Atkins and saw that Silas Ellis was there and that Atkins was handing a mattress to Ellis, who put it inside the pickup truck. Then, at Atkins' request, Herhold went with him to the tractor-trailer and checked off the furniture that Atkins unloaded from the truck. When he completed this function, Herhold testified, he went back into the office to complete working on his bank balance and Atkins was still around doing cleaning services. Atkins came to where Herhold was working on his bank balance and said that he would appreciate it if Herhold did not say anything about Ellis being there. Herhold stated that he agreed, finished his bank balance, and left the building toward the latter part of the afternoon. He did not know whether or not Atkins left before he did. He claimed that shortly after Atkins told him not to mention Ellis he realized that there had been an unauthorized taking from the warehouse, which he did not realize before because the men at times made deliveries in their own vehicles. He did not call the authorities, nor did he call the Ackermans. He testified that he did not know the Ackermans' telephone number, even though he had been a close acquaintance of over 20 years, and that he did not look in the telephone book to find it.

On the whole, I observed Robert Herhold to be a nervous, inventive, and evasive witness³ who appeared to be

³ The following excerpts from the record are illustrative of Herhold's evasiveness and adeptness at fencing with counsel.

[By Mr. Kretmar]

Q. You were in the hearing room during Mr. Lester Ackerman's testimony, is that correct?

A. As I recall I was, yes.

Q. And you recall Mr. Ackerman's testimony, Lester Ackerman's testimony, that the only involvement he had in this case was his conferring with his son, Stephen, as to giving Steve counsel as to how to deal with the situation that's at issue here, is that correct?

A. I'm not sure what the question is. What is your question to me?

Q. Do you recall Mr. Ackerman's testimony that the only involvement he had with this matter was his counseling with his son, Steve, is that correct?

A. I can't recall all of Mr. Ackerman's testimony, no, because his—

Q. (Interrupting) But to your recollection he made no reference, when I asked him about his involvement with this, to his speaking with you about the incident, is that correct?

A. I'm sorry, give me that question again.

MR. KRETMAR: Would you repeat that question back? (The pending question was read by the reporter.)

A. Mr. Ackerman—

JUDGE WOLFE: (interrupting) As he testified here, if you recall.

[Colloquy between counsel for the Charging Party and Respondent and Judge Wolfe]

THE WITNESS: Did Mr. Ackerman confer with me?

MR. KRETMAR: I didn't ask that question.

JUDGE WOLFE: No, do you remember his testimony on the stand on

Monday when he testified. As I recall, you were in the hearing room. I saw you most of the time in the hearing room. I'm aware you left some of the time.

THE WITNESS: Right.

JUDGE WOLFE: And the question is whether or not you recall his testimony to a certain point, and I'll let counsel take it over from there, and this is what he's asking you. He's asking you if you recall this, and then he's telling you what he wants you to recall that Mr. Ackerman testified to. Not what happened, but what did Mr. Ackerman testify to that you heard, O.K.?

Now go ahead. I don't want the witness to be confused.

Q. The question was posed, you heard Mr. Ackerman's testimony when I asked him about—

A. (Interrupting) You're talking too fast. You're going to have to talk slower for me to comprehend what the question is. You're confusing me.

Q. Mr. Ackerman's testimony was that his only involvement in this matter was conferring with his son, Steve.

A. You're making a statement.

Q. Do you recall that testimony?

A. I believe that I recall that, yes.

Q. He made no mention, when I asked him about any other involvement, he made no mention of his conferring with you, is that correct?

A. Right, he didn't. He did not say that he hadn't conferred with me.

Q. And it's your testimony that on Monday morning, January the 23rd at approximately 10:30, you conferred with Mr. Lester Ackerman about this, is that correct?

A. Mr. Ackerman's testimony as far as conferring with Mr. Steve Ackerman, I thought was after—

(Interrupting): Would you please answer my question? I object to this as being not responsive, it either calls for a yes or a no answer. If you want to explain, you may, but please answer my question.

A. All right. Give me that question again.

MR. KRETMAR: Would you repeat the question? (Pending question was read by the reporter.)

JUDGE WOLFE: I think you understood the question. I think it was a very direct question at the end of that recitation. The question was very simply, have you not testified here today that you've, in fact, did confer with Lester Ackerman?

A. Did I speak to him that morning when I arrived at the factory, yes.

JUDGE WOLFE: About this matter, isn't that right?

THE WITNESS: Yes.

JUDGE WOLFE: Did you not say something to him about an unauthorized absence?

THE WITNESS: Yes.

[By Mr. Kretmar]

Q. Let me ask you this, Mr. Herhold, did you ever give a statement to the police concerning this matter?

A. I'm sure at sometime I did.

* * *

Q. Could you please read the caption that appears on the first page of the document that has been marked as charging party's Exhibit No. 2?

A. The caption, where is the caption?

Q. At the very top.

A. Metropolitan Police Department, City of St. Louis, Warrant Disposition Report.

Q. I direct your attention to the next to last page excuse me, second to last page, third to last page of that report and you did make a statement to the police concerning this matter, is that correct?

A. I imagine that I have.

Q. And does it not say on the report that you returned to the plant from your lunch at approximately 2:30 or 3 o'clock? I direct your attention specifically to the third and fourth paragraphs of what appears on that page.

A. This is not something that I, this is the words of apparently a police officer.

Q. I turn you to the last page and, or the next to last page, and there are some police officials' names that appear there.

A. Detective Lavid and Detective Billet.

Q. And they are the gentlemen who investigated the matter, is that correct?

A. Yes, I recall those names, Lavid and Billet, in regards to this matter.

Q. And it states on the third paragraph on the page in question that we're reviewing that according to you you returned to the plant around 2:30 or 3 o'clock after lunch, is that correct?

consciously fabricating. I do not believe his version of the incident.

According to Atkins, after Herhold completed his dealings with his private customers, Herhold went into the office. The two then discussed factory problems and personal problems of Herhold until Herhold received a call from his wife. Herhold then sat down with his checks and bills and started using an adding machine to do his accounts. Shortly thereafter, Atkins told Herhold that he was going to have to leave. Atkins also worked cleaning up the union hall on Sundays. As Atkins left, a tractor-trailer arrived at the facility and the driver wanted to unload furniture. After the driver explained that he had been away from home for several days and would like to get unloaded, Atkins told him if he would wait until Atkins returned from cleaning the union hall they would see about unloading the truck. Atkins returned from his chores at the union hall at about 3:30 or 4 o'clock, and he and the driver unloaded the truck, with Herhold checking off the items as they were unloaded. At that time Herhold told Atkins that he had gone to eat in Atkins' absence, and it had taken him about an hour. After the unloading was completed and the driver had gone, Herhold told Atkins that he would lock the plant up, and Atkins left. Atkins denied taking a mattress or anything else from the Company and also denied that Silas Edward Ellis was at the plant that day. I observed Atkins to be a witness testifying to only that which he honestly recalled, without evasion or invention. I credit his version of the events of January 22 over that of Herhold, whom I have found incredible.

Silas Ellis testified that he went to church on Sunday, January 22, at 11 or 11:45 a.m. and left the church at about 2 p.m., returned home, and remained there for the rest of that day. He denies going to the Company that day, seeing Atkins that day, taking a mattress from the Company that day, or ever taking anything from the Company in an unauthorized fashion. That Ellis was in church on the day in question until around 1:30 or 2 p.m. is corroborated by the credible testimony of his pastor. Ellis struck me as an entirely honest and forthright witness, and I credit his testimony, supported by Atkins, that he was not at the facility on Sunday, January 22.

Herhold testified that he went to the offices of Stephen and Lester Ackerman on January 23 at about 10:30 a.m., where he told Lester Ackerman that he had witnessed an unauthorized removal of merchandise from the factory on the previous day. According to Herhold, Lester Ackerman repeatedly asked him who it was, but he declined to say. He avers that Lester Ackerman then said that he knew that Atkins had been at the plant, which Herhold acknowledged, and then, after Lester Ackerman asked him several times if the other person was Ellis, he said that it was. Herhold then left the office.

A. That apparently is what the police officer wrote down here, yes.

JUDGE WOLFE: Is that what you told him?

THE WITNESS: I don't recall. I wouldn't remember.

Q. You have no reason to disbelieve what's said in here is inaccurate, is that correct?

A. No.

Q. In other words, it is correct?

A. I don't know if it's correct.

Stephen Ackerman testified that Herhold reported that he saw Atkins and Ellis stealing a mattress.

When called as a witness by the Respondent, Lester Ackerman only testified that he did not make the decision with respect to the suspension of Atkins and Ellis, and that if he gave Stephen Ackerman any advice about it that advice was to check with his attorney, because Stephen Ackerman makes the decisions. He did not testify as to whether or not he was present when Herhold made his report or made the inquiries regarding the identity of the individuals involved that Herhold asserts he did. He denies taking any part in the decision to suspend the two employees and states that his only involvement with the incident was giving counsel to his son as to what his actions should be.

The failure of Lester Ackerman to testify in support of Herhold and Stephen Ackerman with regard to the details of Herhold's communications to the Respondent, coupled with Herhold's incredibility regarding the events of January 22 and the questionable nature of the testimony of Stephen Ackerman, as more fully set forth below, on other matters raises considerable doubt as to whether or not Herhold even communicated the alleged incident of January 22 to the Company as he and Stephen Ackerman testified. However, the testimony of Stephen Ackerman and Herhold with respect to the report of Herhold of the January 22 incident is not so inherently incredible as to warrant totally disregarding their mutually corroborative, and otherwise uncontradicted, testimony that Herhold did make a report that Atkins and Ellis had taken a mattress from the plant. I therefore find that Herhold did tell Stephen Ackerman that he had observed Atkins and Ellis remove a mattress. I do not believe Herhold's testimony that he was reluctant to name the participants, because it flies in the face of reason that he would go to the trouble to inform the Respondent of alleged unauthorized removal of company property if he were not also prepared to name the participants in the mattress removal. I am, rather, persuaded that Herhold's professed reluctance to reveal the names of Atkins and Ellis was a construct by Herhold to lend credibility to his report, which I have found not to be based on fact. I shall not speculate on Herhold's reasons for the report.

Stephen Ackerman called his attorney, who advised him to give Atkins and Ellis an opportunity to resign or be suspended pending an investigation of the matter. Stephen Ackerman testified that he then called Garold Rulon, the union representative, and told him that he should come to the plant because the Company had a problem that needed Rulon's immediate attention. I am persuaded that Stephen Ackerman did, as Rulon claims, tell Rulon that he was going to terminate some employees who had been caught stealing mattresses.⁴ Rulon came to the plant about 12:30 and met with Stephen Ackerman and the warehouse manager, Michael Ellmo. Prior to Rulon's arrival, Ackerman had told Ellmo to handle the actual presentation of the alternatives to Atkins and Ellis. Ackerman told Rulon that Atkins and Ellis had been seen taking company property and that the Company had decided to give them the choice between resigning or going through an investigation during

⁴ This comports with Ackerman's later statement to Charles Sallee that he was firing the two men for stealing, and Rulon was a more believable witness than Stephen Ackerman in most respects.

suspension.⁵ Stephen Ackerman also claims that Rulon said, during the preliminary conversation with him and Ellmo, that Atkins and Ellis had probably been doing it for some time and the Company was probably lucky that this had happened so the men could be caught. Ellmo's version is that Rulon said that he was surprised that it had not come out before that time. In response to a question as to whether or not he recalled telling Stephen Ackerman that the men had been stealing for some time, Rulon asked the rhetorical question, "[I]f I'd said that, if I had said the men were stealing all along, why would I be here?" I conclude that there was some mention during this conversation by Rulon to the effect that he was surprised that this type of thing had not been discovered earlier, but I'm not inclined to believe that Rulon would state that the union president and a member of his negotiating committee had probably been stealing for some time and that the company was lucky that it had caught them. In any event, the decision to suspend absent resignation had already been made.

The Respondent did not ask either Atkins or Ellis about Herhold's accusations before making and implementing its decision to face them with the two unpalatable alternatives of resignation or suspension pending investigation. The Respondent proffered no good reason for this failure to inquire, and, as the testimony of Stephen Ackerman clearly shows, the reasons advanced are clouded by evasion and extraordinary circumlocution to such an extent that they are unbelievable.⁶

⁵ Although Rulon claims that Ackerman told him that he was going to terminate the two employees and that Rulon asked him to consider suspending them pending investigation, I am convinced that his recollection is faulty in this respect and that Stephen Ackerman did inform him of the choices that were going to be given to the two employees.

⁶ The following testimony of Stephen Ackerman is a prime example and not unlike much of his testimony.

JUDGE WOLFE: Let me ask you a few questions in regard to that. These people worked for the company 15 years right?

THE WITNESS: Yes.

JUDGE WOLFE: They are in your house, right?

THE WITNESS: One of them at least was.

JUDGE WOLFE: Have access to your father's home?

THE WITNESS: Yes.

JUDGE WOLFE: Apparently your home at one time?

THE WITNESS: Yes.

JUDGE WOLFE: No reason to suspect them of any—

THE WITNESS (interrupting): I was totally shocked by the whole thing. I had no reason to suspect them.

JUDGE WOLFE: Well then my question is why rely, why with employees of 15 years whom you've trusted, would take on the mere statement of a Mr. Herhold, whom you also knew and trusted. I have nothing against that. But on the mere statement of Mr. Herhold take such drastic action without investigation of the employees themselves. Why didn't you ask them?

THE WITNESS: Well, the reason I did not ask them directly, there's a long explanation. The management of the company for these 15 years has basically been on a personal level which I felt the present level needed to be changed to more professional type management. The basic problems we had with the employees were that whenever that had a problem they would come to management. Get more money, if they were unhappy with something. And I felt it was better for the employees and better for the company if the union would take a more active role in representing their employees.

And I think if you look at the record, you'll see that after I took over there was a lot more union activity than before. Basically the reasons for that were I instituted rules and had a meeting with the union in which they recognized the rules. They said they would have the right to grieve them but they recognized the rules.

A meeting was conducted with Rulon, Ellmo, Union Steward Omega Futrell, and Atkins and Ellis present. Ellmo told Atkins and Ellis that they were suspended for alleged theft. Neither Atkins nor Ellis understood what alleged meant, and Rulon asked Ellmo to leave the room while he explained. Ellmo left, and Rulon then explained that they had been accused of stealing. Both denied taking anything and then clocked out in accordance with Rulon's instructions to leave and meet him at the union hall the following morning. At about the same time they left the plant, Ellmo called the police at Stephen Ackerman's direction and reported the alleged theft.

The following morning, when Atkins and Ellis were talking to Rulon at the union hall, Ellmo called Rulon and told him that there was a warrant out for the arrest of Atkins and Ellis which could be rescinded if they resigned. At about this time, Charles Sallee, regional director for the International Union, entered the office. After some discussion with Rulon, Atkins, and Ellis, he called Ackerman on the phone and asked him what was going on. Ackerman told him that he was firing the two men for stealing. Sallee inquired into the reasons. Ackerman reported what Herhold had told him and told Sallee that Herhold's report was good enough for him. In response to Sallee's question as to what was taken, Ackerman said that he was not sure. The Respondent, by its various witnesses, concedes that they cannot tell from their records and inventory whether or not any mattress was indeed taken, and it is further conceded that no mattress was ever recovered. After Sallee ascertained from Ackerman that he was proceeding solely on what he had been told by Herhold, he asked Ackerman to withdraw the order that he had put out for the men's arrest until the matter could be resolved. At this point Ackerman said that if Atkins and Ellis would resign the company would act favorably on their behalf in any way that they could to see that they got other employment.⁷ Sallee also told Ackerman that both men had agreed to take a poly-

graph test, but Ackerman replied that the decision had been made and he would not reconsider.

After Sallee's conversation with Ackerman, Atkins and Ellis left the union hall and were shortly thereafter arrested, charged with theft of a mattress valued under \$50, and held in jail for some 8 hours. Subsequently, the prosecutor declined to pursue the case and caused an entry of *nolle prosequi* to be entered on the record.

On or about January 27, 1978, Ackerman called Rulon and suggested that negotiations should begin and asked when they would start. Rulon replied that he was in a difficult position because two of his negotiators had been suspended. According to Rulon's credible testimony, Ackerman said that he could take care of that. Rulon asked him what he meant, and Ackerman replied, "I can fire them." Rulon incredulously replied that "you've got to be kidding."⁸

In the midst of these conversations with the Union, Ackerman sent identical letters to Atkins and Ellis, dated January 23, which were received on January 25 and read as follows:

This letter confirms in writing your temporary suspension without pay following the activities of January 23rd, 1978.

Upon resolving this matter you will be able to voluntarily resign or be reinstated.⁹

Neither has yet been offered reinstatement.

On February 3, 1978, Sallee, Ellis, and Atkins signed a letter which was sent to Lester Ackerman, wherein Sallee referred to Stephen Ackerman's letter of January 23. Sallee stated the Union's position that the men were innocent until and unless found guilty by an appropriate court of law, the employees should be made whole if exonerated, the Union should be made whole for any and all expenses incurred as a result of any false allegations against its officers, and the letter should be considered as a grievance which would be held in abeyance until legal due process had prevailed on the Union to proceed or withdraw. The letter also pointed out that the arrest of Union President Ellis and negotiating committee member Atkins caused the Union considerable embarrassment and irreparable harm. It appears from the record that the grievance is still pending. The parties have negotiated a new collective-bargaining agreement since the suspension of Atkins and Ellis began.

B. Conclusions

Preliminary, I find that the Respondent's contention that the Board must defer the arbitration in the instant case is contrary to Board law and must be rejected. *General American Transportation Corporation*, 228 NLRB 808 (1977).

Atkins and Ellis had been opposed to the institution of an incentive plan during the 1977 negotiations, as had the

⁸ I credit Rulon's version of this conversation, in view of Ackerman's evasive testimony, wherein he states that he may have talked to Rulon about upcoming negotiations on January 27, does not believe that he told Rulon he could take care of the problem by firing the two, does not remember ever saying that, does not remember saying he could fire them, and does not really think he said that.

⁹ Contrary to the Respondent's contention in his post-trial brief, the letter does not invite Atkins and/or Ellis to bring forth any evidence to "resolve" the matter.

And in these rules were, in other words, just basic management rules, tardiness, absenteeism, and up until this point if someone come to work late, it was no big deal. And I felt it was important for the company to have more discipline. And the personnel records would show that. O.K. someone comes to me and say—

JUDGE WOLFE (Interrupting): O.K., let get back.

THE WITNESS: O.K., that's the background. Why I took the action. Someone comes to me, Bob Herhold, who had been, who I'd known for an equal amount of time, and he says these two people were stealing. And I said to myself, "What do I do?"

JUDGE WOLFE: He didn't say that himself. He said unauthorized removal but go ahead.

THE WITNESS: O.K. He said he saw them taking something out of the building. I said to myself, "How do I handle the situation?"

My only objective, if he is telling the truth, is for them not to be in my employment anymore. I felt that if it were true, that Eddie and Hayward would resign and if it weren't true they would be suspended and we could resolve the matter. But in any case, I didn't want them to continue in my employment presently with this kind of accusation.

JUDGE WOLFE: You still didn't answer my question. Why didn't you ask them? After all that.

THE WITNESS: It was a personnel matter that was the responsibility of Mike Ellmo.

JUDGE WOLFE: Why did[n't] you have somebody else ask them and report back to you before you made the decision which you communicated to Ellmo before he talked to them?

THE WITNESS: I don't know.

⁷ Ackerman does not remember if he told Sallee he would try to get the men employment if they resigned. I credit Sallee.

entire union negotiating team, and the Company and the Union only reached agreement on a 1-year contract with the imposition of an individual incentive plan, as opposed to the group incentive plan advocated by the Company, as a compromise after a strike had been authorized by the union membership and was imminent. The degree of hostility generated by these difficult negotiations is illustrated by the remark by Stephen Ackerman, in the hearing of Ellis, shortly after the negotiations to the effect that he wished unions had never come to this country. Whether this statement resulted from frustration with the negotiation results or a general dislike of unions, it clearly shows hostility of the Respondent's president toward collective bargaining.

Hayward Atkins had several conversations with Stephen Ackerman about incentive plans during the period between negotiations and his suspension. During these conversations Atkins continued to oppose the institution of incentive plans and was advised by Stephen Ackerman on one occasion that "between you and this company, one of you all is too much for me." At the very least, this statement shows Stephen Ackerman's displeasure with Atkins, and I conclude from the context of disagreement within which it was made that this displeasure stemmed from Atkins' continuing refusal to agree to the idea of an incentive plan or other company ideas for increasing production. Similarly, Ellis expressed his opposition to incentive plans to Stephen Ackerman during the period between March 1977 and his January 1978 separation. There is no evidence that Ackerman had similar conversations with other employees.

Lester Ackerman took note of the conflict between Stephen Ackerman and Atkins and called Atkins into his office a couple of months before January 23, 1978. He told Atkins that they had to get together and Atkins and his son did not appear to be getting along well. Lester Ackerman explained to Atkins that the company could pay him more money without a union, that he should blame the Union because he was not making more money, and that he would still have the right to work without a union, without need of paying insurance premiums or union dues. I view Lester Ackerman's statements as a not-too-subtle effort to persuade Atkins to forswear his Union allegiance and "get together" with the Respondent.

Negotiations were to begin shortly after January 23, 1978, and the Respondent was aware that Ellis, who had been recently installed as union president, and Atkins would again be on the Union's negotiating team.

Against this background of pending negotiations with Atkins and Ellis at the bargaining table, open opposition of the two to Stephen Ackerman's production and incentive plan ideas, Stephen Ackerman's opposition to unions in general, and Lester Ackerman's transparent attempt to persuade Atkins to abandon the Union, Atkins and Ellis were "suspended" without pay on January 23, 1978.

The Respondent's precipitous suspensions of Atkins and Ellis on January 23, closely followed by a report to the police which caused their arrest the following day, on the basis of a mere accusation which Respondent itself apparently entertained some doubts about, as shown by its action in later prevailing on Robert Herhold to take a polygraph test, betrays a suspicious haste to get rid of the two. Such extreme treatment of employees who had been considered of the highest integrity for some 15 years, without any tan-

gible evidence that any of its property was indeed missing, is persuasive evidence in itself that something more than Herhold's report caused the Respondent's action. Stephen Ackerman's delegation of the action to be taken to Warehouse Manager Ellmo, for reasons I find unconvincing, smacks of an effort to disassociate himself from the prospect of directly facing Atkins and Ellis. No attempt was made to investigate Herhold's accusation before the decision to act against Atkins and Ellis was reached and implemented; nor did the Respondent make any effort to interview the two men with regard to the serious charge against them before reaching that decision. It is well settled that the failure to conduct a full and fair investigation of alleged misconduct before taking action against employees, especially where, as here, evidence of employer union hostility is present, is evidence of unlawful motivation.¹⁰ That this motivation existed is further confirmed by Stephen Ackerman's refusal on January 24, 1978, to even consider union official Charles Sallee's proffer of Atkins and Ellis for polygraph tests. Clearly, Stephen Ackerman was set on a course from which he would not be deterred and was not interested in giving Atkins and Ellis any opportunity to present their case. In these circumstances, it ill behooves the Respondent to seek reliance on a polygraph test administered to Herhold almost a month after it refused Sallee's proffer on behalf of Atkins and Ellis.¹¹ On the whole, after considering all the evidence, and particularly noting that Stephen Ackerman told Charles Sallee that the Respondent would act on behalf of Atkins and Ellis to get them other employment¹² and the further fact that Stephen Ackerman told Garold Rulon on or about January 27 that he could fire them to get negotiations going, I am convinced that the Respondent's real concern was not determining who, if anybody, had stolen its property¹³ but was getting rid of Atkins and Ellis before negotiations opened.

I view the Respondent's refusal to recall Atkins and Ellis, after the prosecutor declined to proceed against them, as further evidence of its fixed intent to rid itself of the two for reasons other than the alleged theft. The Respondent's protest that the matter has not been "resolved" within the meaning of the suspension letter and that the *nolle prosequi* leaves the question of theft in limbo rings hollow. Further, Respondent's lengthy argument on the meaning of the suspension letter strikes me as nothing more than an effort to transform Respondent's burden of showing that a theft occurred into a duty of Atkins and Ellis, who must be presumed innocent until proved otherwise, to prove their innocence to the Respondent's satisfaction even though the Respondent can not even prove that anything has been taken. This argument, as well as Respondent's position that

¹⁰ *Firestone Textile Company, A Division of Firestone Tire & Rubber Company*, 203 NLRB 89, 95 (1973), and cases cited therein.

¹¹ I find the vague testimony of Warehouse Manager Ellmo that he at some time told Garold Rulon that if everybody took a polygraph test the matter could be solved, but that he does not recall Rulon's response, to be unpersuasive, particularly in the face of Stephen Ackerman's rejection of the tests on January 24. At best, Ellmo's claim, if credited, amounts to nothing more than an afterthought and is not supportive of Respondent's bona fides in taking the original action against the employees.

¹² I consider it most improbable that Stephen Ackerman would make such an offer if he truly believed the two had stolen company property.

¹³ The record is clear that the Respondent has not even determined that any of its merchandise is missing.

there must be some judicial decision that no theft has occurred before the matter can be "resolved" favorably to Atkins and Ellis, is patently unreasonable. Such an obdurate stance against two long-trusted employees, with nothing more than the report by Herhold to rely on and no evidence of any missing merchandise, is suspect by virtue of its very unreasonableness and warrants an inference, in my view, that the resistance to reinstatement is based on unlawful considerations, which I find to be the protected union activities of Atkins and Ellis. I further conclude that the language of the "suspension" letter did not truly reflect Stephen Ackerman's intent, which was to discharge, not suspend, the two. This conclusion is supported by Stephen Ackerman's statement to Garold Rulon on January 23 and to Charles Sallee on January 24 that he was firing the two men for stealing and by his unseemly offer to Rulon on January 27 that he could fire them to facilitate negotiations. I am persuaded that the Respondent never intended to recall Atkins and Ellis and that the "suspension" language in the letter was designed to mask the discharge of the two.

In summary, I conclude and find for all the reasons set forth above that the Respondent, by its president, Stephen Ackerman, seized on Herhold's accusation as a pretextual basis to rid itself of two outspoken members of the Union's negotiating team in the imminent negotiations, both of whom were known by the Respondent to be unwavering in their opposition to its proposals. A more direct attack on employees' union membership and activities and their right to be represented in negotiations by persons of their own choosing is difficult to imagine. Such an effort to mold the Union's negotiating team to one more to the Respondent's liking cannot be countenanced. Accordingly, I find that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging and refusing to reinstate Hayward Atkins and Silas Edward Ellis.

IV. THE REMEDY

In order to remedy the unfair labor practices found herein, my recommended Order will require the Respondent to cease and desist from further violations, to post an appropriate notice to all employees, and to offer unconditional reinstatement to Hayward Atkins and Silas Edward Ellis to their former jobs, or to substantially equivalent employment if those jobs no longer exist, and make them whole for all wages lost by them as a result of their unlawful discharge, such backpay and interest thereon to be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).¹⁴

CONCLUSIONS OF LAW

1. The Respondent, Ackerman Manufacturing Company, is, and at all times material has been, engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Amalgamated Clothing and Textile Workers Union, AFL-CIO, CLC, Local #1594, is a labor organization within the meaning of Section 2(5) of the Act.

3. By discharging and refusing to reinstate Hayward Atkins and Silas Edward Ellis because they engaged in protected union activities and in order to discourage such activities by its employees, the Respondent has violated Section 8(a)(3) and (1) of the Act.

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

Upon the basis of 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 issued the following recommended:

ORDER¹⁵

The Respondent, Ackerman Manufacturing Company, St. Louis, Missouri, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in or activities on behalf of the Union, or any other labor organization, by discharging or refusing to reinstate employees or otherwise discriminating in any manner with respect to their tenure of employment or any term or condition of their employment.

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

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

(a) Offer Hayward Atkins and Silas Edward Ellis immediate and full reinstatement to their former positions or if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges previously enjoyed, and make them whole for any loss of earnings they may have suffered as a result of the discrimination against them, in the manner set forth in the section entitled "The Remedy."

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

(c) Post at the Respondent's place of business in St. Louis, Missouri, copies of the attached notice marked "Appendix."¹⁶ Copies of said notice, on forms provided by the Regional Director for Region 14, after being duly signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to

¹⁵ 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.

¹⁶ 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."

¹⁴ See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 14, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply with this Order.