

**All Brite Window Cleaning and Maintenance Service,  
Inc. and Robert A. Engel and Ronald J. Engel.**  
Cases 3-CA-6952-1 and 3-CA-6952-2

April 3, 1978

**DECISION AND ORDER**

BY MEMBERS JENKINS, MURPHY, AND  
TRUESDALE

On December 14, 1977, Administrative Law Judge Robert W. Leiner issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

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

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

**ORDER**

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, All Brite Window Cleaning and Maintenance Service, Inc., Albany, New York, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

<sup>1</sup> 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 (C.A. 3, 1951). We have carefully examined the record and find no basis for reversing his findings.

In the fourth paragraph of his Decision, the Administrative Law Judge states that employees commence work at 6 p.m. whereas they begin work at 6 a.m. In discussing the testimony of David Patrick, the fifth sentence should begin "Verhagen answered that he . . ." And in the next to the last paragraph under the caption "Thomas Race Appointed Respondent's Foreman," the correct date the Engel brothers had knowledge that Tom Race was the new foreman was January 31 not 21. These inadvertent errors, however, do not affect the results herein.

**DECISION**

**STATEMENT OF THE CASE**

ROBERT W. LEINER, Administrative Law Judge: The hearing in this proceeding was held before me in Albany, New York, on June 22, 1977, based on a consolidated complaint of the General Counsel of the National Labor Relations Board against All Brite Window Cleaning and Maintenance Service, Inc., herein called Respondent or the Company. The consolidated complaint was issued on April 18, 1977, based on unfair labor practice charges filed by the above-captioned Charging Parties, Robert A. Engel and Ronald J. Engel, individuals, on March 8, 1977. Respondent filed a timely answer to the complaint in which it denied violations of the Act. The issues in the case are whether Respondent, in violation of Section 8(a)(3) and (1) of the National Labor Relations Act, as amended, unlawfully discharged the Charging Parties, and whether telling them of the unlawful basis of the discharges independently violated Section 8(a)(1) of the Act. Briefs were timely filed by Respondent and General Counsel.

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

**FINDINGS OF FACT**

**I. JURISDICTION**

The complaint alleges, Respondent admits, and I find that Respondent, a New York corporation, maintaining its principal office and place of business in Albany, New York, is engaged in the window cleaning and building maintenance service business. During the year preceding issuance of complaint, Respondent received gross revenues in excess of \$100,000 and performed services valued at in excess of \$50,000 for enterprises in New York State, which enterprises purchased and received goods valued at in excess of \$50,000 from States other than the State of New York. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

**II. THE LABOR ORGANIZATION INVOLVED**

The complaint alleges, Respondent admits, and I find that Local 200, Service Employees International Union, AFL-CIO, is, and has been at all material times, a labor organization within the meaning of Section 2(5) of the Act.

**III. THE ALLEGED UNFAIR LABOR PRACTICES**

The complaint alleges and Respondent admits that Peter Verhagen, president of Respondent, and Thomas Race, foreman of Respondent, are supervisors of Respondent within the meaning of Section 2(11) of the Act and, at all material times, have been Respondent's agents. The com-

plaint alleges and Respondent also admits that on or about February 1, 1977, it discharged Robert A. Engel and Ronald J. Engel, its employees, and since that time has refused to reinstate them to their old employment. Respondent denies, however, that it discharged them because of their membership and activities on behalf of the Union or because they engaged in protected concerted activities, and denies that the refusal to reinstate them was caused by their union activities or protected concerted activities.<sup>1</sup> The issues thus presented are solely the motive for the discharge of these two admitted employees, both window cleaners, who are brothers and whether what was said to them at that time was independently a violation of Section 8(a)(1) of the Act, as amended.

Ronald Engel first met Peter Verhagen about 12 years prior to the hearing when Verhagen was a foreman employed by another cleaning contractor. At that time Ronald Engel worked under Peter Verhagen's supervision. It is uncontradicted that there was no difficulty between the two men. Ronald Engel thereafter left for other employment. Ronald Engel next met and worked for Verhagen, after Verhagen became a principal of Respondent, for a 1-year period commencing about 7 years ago. At that time Respondent was a union shop and Ronald Engel was a member of the Union. He again left Respondent because of an offer of more money with another employer. Ronald Engel was last hired by Respondent in May 1973. His brother, Robert Engel was hired in June 1973. They were both discharged on February 1, 1977.

The two brothers worked as a team ordinarily as "route men," a term signifying that they ordinarily did not perform work on scaffolding or ladders or employing a belt which is required in the cleaning of windows at the upper levels of buildings. The uncontroverted evidence, however, demonstrates that Ronald J. Engel, at least, performed belt and ladder work from time to time while employed by Respondent.

As routemen, the Engel brothers ordinarily worked from a route book. This route book, kept in Respondent's office on the wall, showed the daily assignment of work to be performed by the routemen in cleaning the windows of the various establishments under contract with Respondent. Thus, there was a route book for each day of the week which was given out to each routeman at the commencement of the workday, 6:30 a.m. Ordinarily, the employees arrived at or about 6 a.m. and commenced work at 6:30 p.m. They would take their mops, buckets, and other cleaning utensils, load them into Respondent's trucks, perform their jobs, and return to the shop about 3 p.m.

<sup>1</sup> At the opening of the hearing, Respondent moved to dismiss the consolidated complaint on the ground that a collective-bargaining agreement (Jt. Exh. 1) between Respondent and the Union covered all the terms and conditions of employment of the Charging Parties and, by virtue of a four-step binding grievance procedure therein (art. XIII), should have been and is the agreed-upon procedure for resolving the instant controversy. I denied the motion.

Apart from the fact that the Union, on this record, never urged the controversy as a grievance under the collective-bargaining agreement, the discharges of employees in violation of Sec. 8(a)(3) and (1) of the Act are no longer to be deferred to arbitration. *General American Transportation Corporation*, 228 NLRB 808 (1977).

<sup>2</sup> There was a sharp dispute at the hearing as to whether Ronald Engel

Payday was Friday of each week, the pay period consisting of the preceding 5 days.

The route book also contains, from time to time, additional pieces of or slips of paper denoting the necessity of executing "monthly" or "semi-monthly" jobs. These are often jobs requiring greater hourly input and are to be done in addition to the jobs which appear on the daily route sheet in the book.

Up to January 31, 1977, Peter Verhagen distributed the route books from his desk in the office. From time to time, the route books would already be on the desk and, Verhagen being absent, the employee would pick up his book from the desk and, sometimes, an employee would reach over the desk and take out the route book and give it to the routeman for whom it was ultimately destined.

When Ronald Engel was first employed in May 1973, he received a salary of \$150 per week. He had originally requested \$155 per week but Peter Verhagen said he could not afford to pay him that much at that time. After 1 year, his salary as a window cleaner was raised to \$155 per week.<sup>2</sup> The evidence is also uncontradicted that, in addition to working 40 hours per week as a routeman for Respondent, Ronald Engel was also employed by Respondent as a night janitor, working 20 hours per week and receiving \$80 for such 20 hours of work.

#### Ronald Engel: Requests for Higher Pay and Union Activity

In June, August, and October 1976, Ronald Engel asked Peter Verhagen for a pay raise. No specific amount of money was discussed but Engel requested a raise above the \$155 per week he was receiving. In the first conversation, Verhagen told them that there was no money to pay him, that he would give him a raise later, but Engel should not let the other employees know about it. In the August 1976 request, Verhagen said there was no money available; and in the October 1976 request, Verhagen told him that not only was there no money available but also that, if Engel could get a better job, he should get it and there would be no hard feelings.

After the October 1976 request, Engel went to the Union and spoke with Union Vice President David Patrick. He told Patrick that the employees of Respondent were not receiving their proper holidays and vacations, especially the two "floating holidays" and Good Friday. With regard to himself, Engel told Patrick that (1) he should have received greater pay under the contract because he was properly to be classified as a "mechanic" and he was not receiving mechanics' pay; and (2) he should be receiving time-and-a-half the regular rate of \$4 per hour for the 20

was properly paid under the terms of the collective-bargaining agreement then in effect between the Union and Respondent (Jt. Exh. 1). "Appendix A," the wage scale attached to the collective-bargaining agreement, is coextensive with the effective dates of the agreement (February 23, 1974-February 22, 1977), in that there are two classifications of employees for whom wage rates are established: "apprentice" and "mechanic." The apprentice wage scale rises from \$125 per week in 1974 to \$145 per week in 1976. Similarly, the scale for a "mechanic" rises on a yearly basis from \$164 in 1974 to \$176 per week in 1976. It therefore appears that, whatever Ronald Engel's proper classification, he was not paid according to the terms of the collective-bargaining agreement. For purposes of this proceeding, in which the ultimate issue is Respondent's liability, it is unnecessary to determine whether Ronald Engel was an "apprentice" or a "mechanic."

hours per week above 40 hours which he worked as a night janitor for Respondent. Patrick told him that he thought he had a "good case" and that Patrick would try to get proper pay for Engel. Although Patrick first heard from Engel on the telephone, he later had Engel submit in writing the claimed contract discrepancies and holiday and vacation problems which existed generally under the collective-bargaining agreement, particularly with regard to Engel's pay problem. Engel submitted such a list to Patrick in October 1976 (G.C. Exh. 2).

In accordance with Patrick's suggestion, Engel was to keep in touch with Patrick regarding the progress of Patrick's attempt to correct the alleged contract violations and pay discrepancies. Engel telephoned Patrick on at least two occasions commencing 2 weeks thereafter. He did not speak to Patrick, but Patrick's secretary told him that the matter was taking longer than was previously thought. In a December 1976 telephone call, while Engel was speaking with Patrick's secretary, Patrick interrupted the conversation, cursed Engel, and told him that, when Patrick found out something, he would tell Engel about it and not before. Engel then told Patrick that he thought that Patrick was supposed to be on his (Engel's) side. It was at this point that Ronald Engel decided to get a lawyer. He retained Joseph F. Donnelly, Esq.

#### The Testimony of David Patrick

Patrick, vice president of the Union for 5 years, represents the window cleaners employed by Respondent, including Robert and Ronald Engel. Patrick confirms the testimony of Ronald Engel with regard to Ronald Engel making verbal and written complaints about actual working conditions under the contract with Respondent. As a result of these complaints he first called Peter Verhagen in October 1976 immediately after the complaints were made. He told Verhagen of Ronald Engel's complaints regarding holidays, vacations, and pay. Verhagen answered that he had not withheld any holidays under the contract and had given all vacations, but had paid Ronald Engel the correct amount of pay under the contract because the nighttime janitorial job which Engel performed was not a classification covered under the contract and was not a concern of the Union.

After Ronald Engel sent Patrick the written itemization of contract and other violations, which Patrick said occurred in mid-November, Patrick again telephoned Verhagen with regard to the violations. Verhagen again denied violating the contract or doing anything illegal with regard to paying Engel at the rate he was paying him for janitorial work. Nothing up to this point, according to Patrick, was said about any complaints emanating from Robert Engel.

About a month after Patrick's November phone call to Verhagen, Patrick received a call from Engel's lawyer, Joseph F. Donnelly. Donnelly told him that the Engel brothers had come to him regarding the policing of the union contract and asked him to have Patrick enforce the contract. Patrick told Donnelly that he had spoken to Verhagen and would enforce any legitimate grievance. Patrick called Verhagen at the end of December 1976 or the beginning of January 1977 and told him of the

telephone call from the lawyer for the Engel brothers. In this telephone call, Patrick testified that he discussed with Verhagen the problems raised by Donnelly including holidays, vacations, and the pay situation.

Lastly, on or about Friday, January 28, 1977, Donnelly sent Patrick a letter (G.C. Exh. 4) in which Donnelly requested that Patrick immediately bring the matter of compliance with the collective-bargaining agreement before the State Labor Mediation Board. He also requested the payment of backpay lost as a result of the Employer's alleged breach of contract based on the failure to pay Ronald Engel at the "mechanic" rate of pay.

Patrick called Verhagen and told him of Donnelly's letter, particularly with regard to the issue of the claimed backpay due to Ronald Engel as "mechanic." Verhagen insisted that both the Engel brothers were "apprentices" because they did not do the scaffolding, "belt work," and "ladder work" of a "mechanic." Although, in the initial part of his testimony in this phone conversation, Patrick, who testified that he had known Peter Verhagen for many years, stated that Verhagen was not upset or angry in his tone over the telephone, Patrick thereafter admitted that Verhagen was upset and angered. Patrick's demeanor at the hearing and his reluctant testimony lead me to infer that Patrick's testimony understated the emotional condition that Verhagen displayed at this time. It was undenied at the hearing that Verhagen is a man of quick temper.

Verhagen testified that Patrick's version of the conversations between Patrick and himself was correct.

#### Thomas Race Appointed Respondent's Foreman

At the time of the hearing, Race was employed by Respondent for a period of 3-1/2 years. He was classified as a "mechanic" and, since in or about December 1976, was paid at the highest contract rate of pay, \$176 per week.

Verhagen testified that, after his previous foreman, Ed Despart, left Respondent's employment in May 1976, he secretly commenced the training of Tom Race as a foreman. By this "secret" training, he testified that he was training Race in parts of the business not performed by any other employee except Verhagen himself, and he never told Race that he was training Race to become Respondent's foreman until approximately 2 weeks before Race was allegedly appointed foreman, on Monday, January 31, 1977. Verhagen also testified that he originally desired to appoint Race foreman on February 1, 1977, but that since January 31, 1977, fell on a Monday he decided to appoint him foreman at that time.

It is undisputed that in or about January and February 1977 Respondent employed five employees: the two Engel brothers, Thomas Race, his brother, Billy Race, and Henry Sprague. Neither Billy Race nor Henry Sprague was called to testify in this proceeding by any party.

Thus, Verhagen testified that he told Race, about 2 weeks prior to Monday, January 31, 1977, that he would be appointed foreman. Race did not corroborate this testimony. Rather, he testified that, about 1 month before he became foreman, he received a raise to \$176 while he was a mechanic and received no further raise when promoted to foreman.

Verhagen and Race testified that on Monday, January 31, 1977, at or about 6:15 a.m., Peter Verhagen called all the men together and told them that Tom Race was their new boss; that he would hand out the work in the morning, check the men in at night, and give them their orders. Both Verhagen and Race testified that the employees were standing within a few feet of Verhagen when he made the announcement and that both Engel brothers were present at the time.

Ronald Engel testified that he alone drives the truck in which he and his brother Robert worked and that on the morning of January 31, with his brother waiting for him out in the truck, he first appeared to work at or about 6:30 a.m., with work starting at 6:30. He thus not only denies being present when Peter Verhagen made the alleged announcement of Race being named foreman, he also denies ever knowing, prior to the time of his discharge, that Race had been named Respondent's foreman.

When Ronald Engel went into the office to get the daily route book on January 31, he says that Race was standing near the desk and pointed to the Engel route book which was lying on the desk. Ronald Engel then picked it up and walked off with it. Race says that he was at the desk and gave the route book to Ron Engel. It was also agreed that Ed Despart, the prior foreman, gave out the route books; thereafter Verhagen himself gave out the route books.

January 31, 1977, was a cold day; just how cold it was was disputed at the hearing, but there is no dispute that the application of water to windows that day, even heated windows, caused the water to freeze up and therefore to interfere with the proper cleaning of the windows by Ronald and Robert Engel. Ronald Engel testified that, on that morning, Respondent did not have the regular antifreeze liquid which it normally had in stock. Verhagen, instead, had automobile windshield antifreeze in stock and told Engel to use that. Engel took the automobile antifreeze out to the truck and drove off to his job.

At or about 9 a.m., Ronald Engel telephoned Verhagen and told Verhagen that they were having trouble cleaning the windows because the antifreeze solution was freezing on the windows, and that they were running out of the antifreeze solution. Verhagen told them to come to the shop to pick up 2 more gallons of the automobile antifreeze. They returned and again complained to Verhagen regarding the difficulty of cleaning the windows and Verhagen told them to do the best they could. In addition to their daily route, the Engel's route book for that day also contained two additional jobs. One of the additional jobs was to clean the windows of Albany Dodge. The second

additional job is a matter of dispute; the Engels contend that it was to clean the Colony Motel, and Respondent contends that the second job was to clean the Armory Garage. The route book was not submitted and the resolution of this dispute does not appear to be material.<sup>3</sup> The Engels testified that, because of the freezing weather, they performed their daily route work but did not execute the two "monthly" jobs, the Colony Motel and Albany Dodge. They therefore returned at the end of the workday at 3 p.m. with the two workslips unsigned, indicating that they had not performed the work.<sup>4</sup>

Ronald Engel put the route slip on the desk in the office and went home on the evening of January 31. Race did not have an opportunity to speak to Ron Engel at that time about Engel's failure to complete the "monthly" jobs because Engel had left too quickly.

Ronald Engel's brother, Robert, testified that, although he never heard Verhagen say that Tom Race was a foreman, he admitted that his brother Ronald "may have have mentioned that Race was handing out the (route) books" when Ronald came into the truck on the morning of January 31.

Despite the denials by Ronald and Robert Engel, and despite the extremely unimpressive testimony of Peter Verhagen, I conclude that commencing with the morning of January 31, 1977, Ronald and Robert Engel knew, or had reason to believe, that Race had been appointed foreman. I do so particularly on Robert Engel's admission that, on the morning of January 31, Tom Race, according to Ronald Engel, was handing out the route books. If, as Ronald Engel would have us believe, ordinary employees often handed out the route books, there would be no reason for Ronald Engel to mention to his brother that Tom Race was handing out the route books. Thus, whether or not Ronald Engel and his brother were actually present at the time that Verhagen notified the employees that Tom Race was the foreman, I conclude that both Engel brothers knew of this on the morning of January 21. I make this finding notwithstanding the Engel brothers' denial and the fact that the evidence is uncontradicted that at no time up to and including the time of the hearing did Verhagen give Race a pay raise to go along with his appointment as foreman.

At the end of the workday of January 31, 1977, with all the employees having checked in at 3:20 and departed, Race and Verhagen had a conversation. Race and Verhagen contradict each other as to who started the conversation but it is otherwise uncontradicted that Race told Verhagen that, on his first day of the job, he had been

<sup>3</sup> The above facts, and the facts hereafter stated, are derived from the credited testimony of the Engel brothers, Verhagen, and Race. To the extent that Verhagen's testimony is not supported by the testimony of the other witnesses, I do not credit Verhagen. At the hearing, he was consistently confronted with written statements in his prior sworn affidavit which he gave to agents of the Labor Board which were inconsistent in many material respects with his testimony. He did not regard the errors in his statement to be important. In view of this situation, and while it would still be possible to credit Verhagen if there were any suggestion at all that the prior sworn statement was not an accurate version or was not properly taken, I refuse to do so and conclude that Verhagen's credibility, regardless of the credibility of the Engel brothers (which I do not rate highly), was severely impeached. The matters on which Verhagen were clearly inconsistent included the amount of time Race was in training as a foreman and whether Ronald Engel's abuse of Race entered into his decision to terminate the Engels.

<sup>4</sup> The Engels testified that the ordinary course of work required them to perform their daily work first and then perform the longer "monthly" or "semi-monthly" jobs, regardless of geographical area. Thus, they testified, that they would perform their daily assigned route work and then perform the "monthly" work regardless of the geographical location. Verhagen denied this. He said that, ordinarily, work in the same geographical area was done so that a "monthly" job in the same area as a daily route job would be performed before continuing with the daily route work. If this were germane and necessary, I would credit Verhagen since it would seem entirely implausible, as a matter of work routine, to finish the route first and then travel a great distance to perform a "monthly" job which was in the same geographical area in which a daily job existed.

"shafted" because the two Engels had done their route work but had not done the two "monthly" jobs. Verhagen testified that he told Race to forget it and to see if they could do better the next day.

#### The Events of Tuesday, February 1, 1977

On February 1, at or about 6:20 a.m., Ronald Engel came into the garage to get his work equipment and then into the office to get his route book. There, with Thomas Race leaning on the desk next to the wall where the route books were held in pockets on the wall, Race asked him why he had not done the two monthly jobs on the previous day. Ronald Engel answered that he and his brother had had a tough time and that even in good weather they could not have performed the two "monthly" jobs. Race responded by saying that they had to do the two jobs that day, "or else."<sup>5</sup>

At this point, Ronald Engel testified that he said to Race: "How can you tell me, punk, how much I can do in a day. I'm here 12 years, you are here 2 years."

Tom Race testified that Engel said: "I don't have to take this shit, punk, from you," and "I don't have to take orders from you, punk." Ronald Engel also said: "Whose ass do you have to kiss to get this job, punk?" None of these statements appear in Race's pretrial affidavit. He testified that he either forgot to mention some of them or that he regarded them as too obscene to put in the statement and so informed his lawyer who was present when the affidavits were taken. Notwithstanding these obviously crucial omissions from the affidavits, I conclude that Ronald Engel told Thomas Race on the morning of February 1, 1977, that Race was a "punk" and that Ronald Engel did not have to take orders from him, particularly since Ronald Engel had been employed by Respondent for 12 years and Race for less time. I have already concluded that Ronald Engel knew or had reason to believe as early as January 31, 1977, that Thomas Race was Respondent's foreman.

At any rate, the Engel brothers then left for their daily route jobs. Within a half hour, Race also left on his route (he is a working foreman) and testified that he saw Ronald Engel, at or about 7 a.m., making a telephone call from within a laundromat. He said he saw Robert Engel sitting in the truck outside. Ronald and Robert Engel denied that a telephone call was made that morning. In addition, Race testified that, having seen Ronald Engel make the telephone call, he himself telephoned Verhagen and told Verhagen that "something was up." It was unclear from Race's testimony as to why he would telephone Verhagen and report this matter since the testimony was undisputed that employees sometimes make telephone calls and, indeed, do personal shopping while being paid by Verhagen. Verhagen testified that his sole concern was that the employees performed their work and that he did not care

<sup>5</sup> At this time, Verhagen was in the garage, about 30 feet away. He did not hear the particular statements in the Ronald Engel-Thomas Race exchange, but he did hear that an argument with raised voices was taking place.

<sup>6</sup> Race testified, but Verhagen did not confirm, that, when Race telephoned to Verhagen and notified him that there was "something up" because Ronald Engel was on the telephone in the laundromat, Verhagen allegedly answered that Ronald Engel was at that moment driving into the garage.

what else they did even though they were being paid by him.<sup>6</sup>

The Engel brothers testified that, after they left for the job, Ronald Engel got sick and vomited and felt so poorly that he could not work. (He subsequently received a cough medication from a physician.) He and his brother returned in the truck to Respondent's garage. There they were met by Verhagen. When Ronald Engel told Verhagen that he was sick, and could not work, Verhagen told him: "Don't tell me you're sick<sup>7</sup> —you've gotten the union and your lawyer on my back— you're not sick, you're through."

Robert Engel, who was standing about 20 feet away near the truck, confirms his brother's testimony. He recalls that the conversation was: "You verbally can't tell me you're sick. . . . I know you have a lawyer and the union on my back. I can't have this here. . . you're through."

Verhagen's version is entirely different. At first he could not recall who had telephoned him and told him that he saw Ronald Engel making a phone call with Robert Engel sitting in the truck. He thereafter recalled that it was Tom Race.<sup>8</sup> Verhagen testified that Ronald and Robert came into the garage and Ronald Engel smashed his route book on the table and said he would not work under these "god damn conditions," and that he would not work for "that punk." Verhagen said he told Ronald Engel that he must take orders from Race and that, when Ronald Engel said that he would not take orders, Verhagen told him that he was fired. Verhagen then asked Robert Engel if he felt the same way and, when Robert Engel said that he did, Verhagen fired him too.

Verhagen said that at this time Ronald Engel said he felt sick and also wanted the pink slip to indicate that he had been laid off in order to qualify for unemployment compensation. Ronald Engel and Verhagen then went into Verhagen's office and he made out two pieces of paper indicating that they had been terminated. Verhagen did not deny Ronald Engel's testimony that, at this point, Engels said a new contract was coming due and the Union was making no proposals; but that it would not do any good anyway. Engel said: "We didn't get nothing from our last contract." Verhagen answered: "You know, you're right, I didn't give you anything (in) your last contract, did I. . . ." Verhagen testified that he would not have fired Robert Engel if Robert Engel had not said that he felt the same way as his brother. Although Verhagen said he knew that Ronald Engel had gone to the Union and had engaged a lawyer, these matters had nothing to do with his firing both the Engel brothers. In any case, Engel paid them for Monday, January 31, in cash, gave them the layoff slips, and they left. He did not pay them for February 1, 1977. Verhagen also insisted that Ronald Engel's claim of sickness occurred after he had been discharged.

<sup>7</sup> Robert Engel testified that Verhagen said: "You verbally can't tell me that you're sick."

<sup>8</sup> There is nothing in Race's pretrial affidavit regarding his phone call regarding the telephone call that Ronald Engel was making. Race testified that he first recalled making the telephone call to Verhagen while sitting in the hearing room. When confronted with his pretrial affidavit he admitted that it was not in there. This is only one of many material omissions in the prehearing affidavit.

Verhagen also testified that, in the past, he often let employees say things to him and to his foreman which would ordinarily not be tolerated. He said he did this because, among other things, good employees were hard to replace.

#### Discussion and Conclusion

As a preliminary matter, it must be noted that I have viewed the testimony of Verhagen, Race, and the Engel brothers as the testimony of interested parties. I have not credited any of them in the entirety of their testimony. Rather, I conclude, on the basis of my observation of them and their demeanor, and the logic and probability of events, that what actually occurred in the terminal conversation was a combination and an amalgam of various parts of their testimony.

I must first note that I find that in view of Union Vice President David Patrick's testimony, Peter Verhagen, contrary to his testimony, was particularly upset over the fact that the Engel brothers had not only gone to the Union but also had hired a private attorney to press their claims under the collective-bargaining agreement for further and other holidays, vacations, and pay. It is not unreasonable to believe, and I conclude, that Verhagen (and, from his inaction, Patrick) viewed Ronald Engel's assertion that proper pay rates under the collective-bargaining agreement were not being observed as an assertion which might generally open a "Pandora's box" regarding compliance with the terms of the collective-bargaining agreement. Such an assertion would be in addition both to any sums of money that he might particularly owe to Ronald Engel pursuant to misclassification of Engel as a mere "apprentice" rather than as a "mechanic," and to Verhagen's failure to pay Ronald Engel at the rate of time and a half the regular rate for the 20 hours of work performed by Engel as a janitor after the 40 hours he worked as a window cleaner.

Patrick's testimony comes from a source which, if not neutral, seemed to me to be given with an eye toward the fact that he had known Verhagen for many years and theretofore enjoyed apparently peaceful contract relations with him. Thus, although Patrick was called as a witness by the General Counsel and was the Engels' representative, I do not believe that his testimony was at all given in a partisan or favorable attitude in support of Robert and Ronald Engel. When he finally admitted that Verhagen was angry because of Engel getting a lawyer and claiming contract violations, I credit him.

Further, I was impressed with the fact that Verhagen admitted that he often let employees say abusive things to him and to his previous foreman on the ground that, if he fired them, he would be firing good employees and good employees were hard to replace. Thus I find it significant that, in view of his long and otherwise good relations with Ronald Engel, he would not seek to ameliorate Ronald

Engel's alleged refusal to obey the orders of a new foreman of less experience than Ronald Engel.

Lastly, the record is replete with examples of Verhagen being met with his prior sworn statement which was inconsistent in many material respects from testimony he gave on the witness stand. Similarly, Tom Race was met with his prior sworn statement which was inconsistent in many respects with testimony that he gave on the witness stand. Counsel for Respondent had Ronald Engel's lengthy statement for purposes of cross-examination and no prior inconsistent statements were revealed.

In view of the testimony of all of the witnesses, and the above observations, I conclude that, in the February 1, 1977, conversation between Ronald Engel and Peter Verhagen, Ronald Engel did say that he would not take orders from a "punk" like Tom Race. Whether his motive was jealousy or otherwise is immaterial. I conclude, further, that, in discharging Ronald Engel, Peter Verhagen, in substance, gave as one of the reasons for the discharge Ronald Engel's failure and refusal to obey Tom Race's orders as foreman.<sup>9</sup>

In addition, Verhagen did not deny Ronald Engel's testimony that, after discharging him, and when Ronald Engel complained about the Union's inadequate contract demands, Verhagen told Engel that he had not been forced to give the employees any benefits under the old contract.

I conclude, in sum, that, in addition to saying to Ronald Engel that he was discharging him for refusing to obey Foreman Race's orders, Verhagen also told him that he was discharging him for getting the Union and the lawyer "on his back." I reach this conclusion particularly because of Union Vice President David Patrick's reluctant testimony that Verhagen was angry as late as Friday, January 28, when Patrick discussed lawyer Donnelly's letter regarding Verhagen owing Ronald Engel backpay, correct contract interpretation, and other similar matters; on the basis of Ronald Engel's several complaints and on the undisputed fact that Verhagen has a quick temper and would reasonably resent Engel's retaining an attorney with regard to matters which could cause Respondent a great deal in money and grief.

Thus, on the basis of all the evidence, and my observation of the witnesses, discounting their self-interest and viewing the evidence as a whole, I conclude that Verhagen told Ronald Engel on February 1, 1977, that he was discharging him because Ronald Engel would not obey Foreman Race's orders and because Ronald Engel had gotten the Union and a lawyer "on my back." I also conclude that, regardless of the words used with regard to Robert Engel, Verhagen discharged Robert Engel because the two Engels worked as a team and because of his closeness to his brother.<sup>10</sup>

The facts show that, by going to the Union and requesting the Union's assistance in securing Respondent's proper administration of the collective-bargaining agreement, Ronald Engel was engaged in protected concerted activity. The evidence is uncontradicted that, in the

<sup>9</sup> Verhagen's prior sworn statement indicates that he told the Board that he fired Ronald Engel because of his refusal to obey Race's orders and because of his argument with and abuse of Race the night before. This second reason is inconsistent with his having told Race to forget the matter.

<sup>10</sup> The evidence is uncontradicted that on February 1, 1977, in the

morning, Ronald Engel telephoned a physician for an appointment and on the afternoon of that day visited Dr. Henry F. Hosely, Castleton-on-Hudson, New York, where he was prescribed hycomine for a cough and was given an antibiotic, "vibramycin." Thereafter Ronald Engel received and used further vibramycin for his "illness."

January 28, 1977, phone call from Vice President Patrick to Verhagen, Patrick told him that the Engel brothers had retained counsel and were pressing claims for proper administration under the contract. Though they were looking for personal redress, they also claimed failure of Respondent to give proper holidays and vacations under the collective-bargaining agreement. Nothing could be clearer than that they were thereby engaged in protected concerted activity. *Bunney Bros. Construction Company*, 139 NLRB 1516, 1519 (1962); *James T. Hughes Sheet Metal, Inc.*, 224 NLRB 835 (1976); *Brooklyn Nursing Home, Inc. d/b/a Sassaquin Convalescent Center*, 223 NLRB 267, 276 (1976).

An employer has a right to discharge its employees for cause (*N.L.R.B. v. Audio Industries, Inc.*, 313 F.2d 858, 861 (C.A. 7, 1963)), or even without cause (*N.L.R.B. v. McGahey et al., d/b/a Columbus Marble Works*, 233 F.2d 406 (C.A. 5, 1956)), and the mere fact that an employer is or was participating in union activities does not insulate him from such a discharge. *Klate Holt Company*, 161 NLRB 1606, 1612 (1966); *H. L. Meyer Company, Inc. v. N.L.R.B.*, 426 F.2d 1090, 1094 (C.A. 8, 1970); *N.L.R.B. v. Hanes Hosiery Division, Hanes Corporation*, 413 F.2d 457, 458 (C.A. 4, 1969).

On the other hand, the cases are legion that the existence of a justifiable ground for discharge will not prevent such discharge from being an unfair labor practice if partially motivated by the employee's protected activity; an otherwise justifiable business reason cannot be used as a pretext for discriminatory firing. *N.L.R.B. v. Central Power & Light Company*, 425 F.2d 1318, 1322 (C.A. 5, 1970); *N.L.R.B. v. J. W. Mays, Inc.*, 356 F.2d 693 (C.A. 2, 1966).

In view of Verhagen's admission that he has, in the past, accepted insubordinate conduct from employees on the pragmatic ground that they are difficult to replace when discharged, I conclude that, "but for" the protected activity in which the Engel brothers engaged, they would have not been discharged notwithstanding their refusal to obey Race's orders and/or their abusive language to him. It suffices to say that one of the reasons given by Verhagen for the discharge of Ronald Engel was that the brothers had gone to the Union and had hired a lawyer to prosecute and perfect their claims for back wages under the collective-bargaining agreement and to cause the Union to strictly interpret and enforce that agreement. I conclude, in sum, particularly in view of Verhagen's anger at the Engel brothers engaging in this conduct, and in view of Verhagen's testimony that he, in the past, would permit employees to make abusive statements to supervisors, including himself, on the ground that the replacement of good employees is a difficult matter, that one substantial and motivating reason for the discharge was the Engel brothers having engaged in the above protected and union activities. Such a finding is sufficient for the discharges to violate Section 8(a)(1) and (3) of the Act. *O & H Rest., Inc., trading as The Backstage Restaurant*, 232 NLRB 1082 (1977); *The Youngstown Osteopathic Hospital Association*, 224 NLRB 574, 575 (1976). That Robert Engel was discharged because of his brother's leadership in complaining to the Union and

hiring a lawyer does not make his discharge any the less unlawful. *Murray Golub, et al., d/b/a Golub Bros. Concessions*, 140 NLRB 120, 121 (1962).

#### IV. THE EFFECT OF THE UNFAIR PRACTICES UPON COMMERCE

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

#### V. THE REMEDY

It will be recommended that the Respondent be ordered to cease and desist from engaging in the unfair labor practices found herein and to take certain affirmative action, as provided in the recommended Order below, designed to effectuate the policies of the Act. It having been found that Respondent unlawfully discharged Robert Engel and Ronald Engel on February 1, 1977, it will be recommended that Respondent be ordered to offer them immediate and full reinstatement to their former jobs or, if their jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges. It will be further recommended that Respondent be ordered to reimburse Ronald Engel and Robert Engel for any loss of pay they may have suffered as a result of Respondent's discriminatory action against them in the manner established by the Board in *F. W. Woolworth Company*, 90 NLRB 289, 291-294 (1950), together with interest thereon as prescribed by the Board in *Florida Steel Corp.*, 231 NLRB 651 (1977).<sup>11</sup>

Upon the basis of the foregoing findings of fact and upon the entire record in this proceeding, I make the following:

#### CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
  2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
  3. Respondent, by Peter Verhagen, its president, discriminatorily discharged Robert Engel and Ronald Engel on February 1, 1977, in violation of Section 8(a)(3) and (1) of the Act and unlawfully coerced them in violation of Section 8(a)(1) on that date by telling them they were discharged because they had gotten the Union to intervene on their behalf.
  4. The aforesaid unfair labor practices affect commerce 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 issue the following recommended:

<sup>11</sup> See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

ORDER<sup>12</sup>

The Respondent, All Brite Window Cleaning and Maintenance Service, Inc., Albany, New York, its officers, agents, successors, and assigns, shall:

## 1. Cease and desist from:

(a) Discouraging membership in a labor organization by discharging its employees or otherwise discriminating against them because of their membership in, sympathies for, or activities on behalf of Local 200, Service Employees International Union, AFL-CIO (herein called the Union), or in any labor organization, or because they engage in protected concerted activities.

(b) Telling employees that they were discharged because they caused the Union to intervene of their behalf.

(c) In any other manner interfering with, restraining, or coercing employees in the exercise of the right to self-organization, to form labor organizations, to join or assist the 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.

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

(a) Offer Robert A. Engel and Ronald J. Engel reinstatement to their former jobs and to the positions which they occupied prior to their discharge or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges, and make them whole for any loss of earnings they may have suffered by reason of the unlawful discrimination against them in the manner set forth in the section of this Decision entitled "The Remedy."

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

(c) Post at its Albany, New York, office, copies of the attached notice marked "Appendix."<sup>13</sup> Copies of said notice, on forms provided by the Regional Director for Region 3, after being duly signed by Respondent's representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees or members are customarily posted. Reasonable steps shall be taken by Respondent to

insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 3, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

<sup>12</sup> 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.

<sup>13</sup> In the event this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

## APPENDIX

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

WE WILL NOT discourage membership in a labor organization by discharging any of our employees, or otherwise discriminate against them because of their membership in, sympathies for, or activities on behalf of Local 200, Service Employees International Union, AFL-CIO, herein called the Union, or any other labor organization or because they engage in any protected concerted activities; and WE WILL NOT coerce them by telling them they were discharged because they caused the Union to intervene on their behalf.

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

WE WILL offer to Robert A. Engel and Ronald J. Engel reinstatement to their former positions of employment or, if those positions 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 earnings they may have suffered by reason of our unlawful discrimination against them, together with interest.

ALL BRITE WINDOW  
CLEANING AND  
MAINTENANCE SERVICE, INC.