

Airborne Freight Corporation and David L. Cook and Charles Beasley. Cases 10-CA-11849-1 and 10-CA-11849-2

June 2, 1977

DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS
PENELLO AND WALTHER

On November 29, 1976, Administrative Law Judge Joseph I. Nachman issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and Respondent filed cross-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 briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Airborne Freight Corporation, Atlanta, Georgia, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

DECISION

STATEMENT OF THE CASE

JOSEPH I. NACHMAN, Administrative Law Judge: This case, heard before me at Atlanta, Georgia, on June 7 and 8 and July 1 and 2, 1976, involves a consolidated complaint¹ pursuant to Section 10(b) of the National Labor Relations Act, as amended (herein Act), which, as amended at the hearing, alleges in substance that during and shortly after an organizational campaign by Local 728, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (herein Union or Local 728), Airborne Freight Corporation (herein Respondent or Company), interfered with, restrained, and coerced its employees in the exercise of their Section 7 rights, and

¹ Issued May 4, on two charges filed and served on March 15, 1976.

² Following the close of the hearing, Respondent filed with me a 13-page motion to correct the transcript in the particulars therein set forth which motion I have identified as Exh. X and now make a part of the record. No opposition to said motion has been received. In most instances, I find the motion well taken, and therefore grant the same in its entirety, except for 10 items as to which I find the record correct, and accordingly deny the motion.

discharged two employees because of their assistance to and support of the Union. By answer, Respondent admitted certain allegations of the complaint, but denied the commission of any unfair labor practice. For reasons hereafter more fully stated, I find and conclude that, except with respect to one incident, the General Counsel has failed to prove the allegations of the complaint by a preponderance of the evidence.

At the hearing all parties were afforded full opportunity to introduce relevant and material evidence, to examine and cross-examine witnesses, to argue orally on the record, and to submit briefs. Oral argument was waived. Briefs submitted by the General Counsel and Respondent have been duly considered. Upon the pleadings, the stipulations of the parties, the evidence, including my observation of the demeanor of the witnesses while testifying, and the entire record in the case,² I make the following:

FINDINGS OF FACT³

As its name indicates, Respondent is engaged in the transportation of goods by air, and for that purpose maintains terminals at Atlanta, Georgia, and elsewhere in the United States, where it receives, sorts, and forwards goods by air or by connecting truck transportation, to the consignee thereof. In the late summer of 1975,⁴ the Union began a campaign to organize Respondent's employees, and, on September 17, filed a petition seeking certification as their collective-bargaining representative. An election was scheduled for October 25, but a few days before that date the Union withdrew its petition, apparently with prejudice, and the election was canceled. The General Counsel contends that in the campaign, and within a short period thereafter, Respondent's supervisors made statements to employees which constituted interference, restraint, and coercion, and discharged Charles Beasley and David L. Cook because of their assistance to and support of the Union. The facts concerning these incidents are now separately set forth.

A. *The Alleged Interference, Restraint, and Coercion*

1. Larry Burnett, who was employed by Respondent from September 1973 until November 1975,⁵ testified that he participated in the Union's campaign and went with Cook to the Union's office to deliver authorization cards signed by a number of employees. According to Burnett, on the Sunday following this visit, he received a telephone call from his supervisor, Richard Estes,⁶ who asked what Burnett knew about the union activity at the plant, and

³ No issue of commerce or labor organization is presented. The complaint alleges and the answer admits facts which establish those jurisdictional elements. I find those facts to be as pleaded.

⁴ All dates hereafter mentioned are 1975, unless otherwise stated.

⁵ There is no contention that Burnett's employment ceased for reasons proscribed by the Act.

⁶ For the purpose of this case, Respondent concedes that Estes was a supervisor within the meaning of the Act.

that he (Burnett) replied that he knew nothing he could tell Estes.⁷

2. Kenneth Feltman was employed by Respondent from May 1974 until March 1976 and had been active on behalf of the Union in its campaign to organize the employees. Feltman voluntarily terminated his employment, but testified that, just before doing so, he went to Supervisor Estes and told the latter that he had a job offer from another employer, and to assist him in making a decision asked Estes what his future with Respondent might be. According to Feltman, Estes replied that he (Feltman) would not get anywhere with Respondent; that management regarded him as a union instigator; that as soon as adequate reason to discharge him could be found, it would do so; and, if Feltman had what he thought was a good offer, he would be well advised to take it.⁸

Estes denied that he made any statements of the nature attributed to him by Feltman. Estes admits that Feltman discussed with him the acceptance of another job offer and claims that he told Feltman that the latter had to consider not only the immediate monetary increase, but what the situation would be in the future. According to Estes, Feltman then made a remark to the effect that as the union movement had fallen through, he felt management was against him and he probably would not have good opportunity, and that he told Feltman that it was illegal for the Company to discriminate against him, and if it was his desire to belong to a union, he was free to do so.

This conflict in the testimony I resolve by crediting Estes. I do so because Estes impressed me as the more credible witness, and Feltman's version of the conversation is, to say the least, somewhat suspect.

3. David Cook worked for Respondent from November 1974 until his discharge on December 9.⁹ At the time of the incident here involved, Cook was weekend operations manager. In that position Cook had a number of employees working directly under him; fixed their hours of work; located replacements for sick employees; granted time off to employees; interviewed employees who might be assigned to work the weekend shift and advised Station Manager Austin, Cook's immediate supervisor, whether he would accept those employees in his crew; saw that the employees who worked weekends properly performed their duties; and on at least two occasions exercised the authority to reprimand and discipline employees.¹⁰ Cook signed a card for the Union, and otherwise assisted it in its campaign.

Cook testified that, during the weekend following the delivery of the employee authorization cards to the Union, he was called to the office of Station Manager Austin. According to Cook, Austin said that he had heard rumors

that the Union was trying to organize, and asked if Cook knew anything about it; that he replied that 17 cards had been turned over to the Union, and this was group action and not that of any individual; that Austin then asked how he (Cook) felt about the Union, and Cook replied that while he did not particularly like the Teamsters, if the raise he was expecting was less than 10 percent, he would vote for it. According to Cook, Austin then stated that the Company had a policy of not promoting from the Union to management positions, which would affect Cook's career, because when it became necessary to fill a management job Respondent would hire from the outside before it would promote from among its employees who were union members. According to Cook, he made no reply.

Austin denied that he had any conversation with Cook regarding the latter's union activity, or what effect such activity might have on his career with the Company. Indeed, Austin claimed that he was not then aware that Cook had engaged in any union activity.¹¹

4. Charles Beasley was an employee of National Uniform Service, whose employees are represented by Teamsters' Local 528. For about a year prior to October 1975, Beasley also worked as a part-time dockman for Respondent, working virtually a daily schedule from 6 to 10 p.m. During his work hours for Respondent on September 20, Beasley learned of the union campaign at Respondent from a fellow employee. Beasley testified that later that evening Station Manager Austin came to the dock and appeared quite upset. According to Beasley, he asked Austin what was wrong and commented, "it isn't because Teamsters are coming in?", and that Austin replied, "yes, a petition was filed yesterday," adding that he was going over to the Ford Distribution Center¹² and talk to them, so that he would get to the bottom of it. Beasley testified that during this conversation he told Austin that if it came to an election, he (Beasley) would support the Company.

Austin admits that Beasley talked with him about the Union on this occasion, but denied that he asked Beasley any question or made any statements concerning the Union. According to Austin, he merely listened to the statements Beasley volunteered and made no reply.¹³

5. Sometime about early to mid-October, Beasley claims to have had a conversation with Night Operations Manager Piper, an admitted supervisor, in the latter's office. According to Beasley, he was summoned to Piper's office and told by the latter that things were going to tighten up if the Union came in; that part-time employees would be the first to go, and the Company would no longer employ part-time employees if the Union came in; that employees would not be allowed to take breaks, or to have

⁷ Based on the credited testimony of Burnett, and the admission of Estes that, suspecting that union activity was in progress, he telephoned Burnett (although he claimed that it was sometime in October) and asked the latter if he knew anything about it.

⁸ When this testimony came out, Respondent objected that it was beyond the allegations of the complaint. The General Counsel's motion to amend the complaint was granted with the understanding that, if Respondent did not have adequate opportunity to locate and interview Estes, who was then no longer employed by Respondent, the General Counsel would be required to elect whether he wished to abandon his amendment or submit to a continuance. When it developed that Respondent would be unable to contact Estes for some time, and the General

Counsel elected to stand on his amendment, a continuance was granted to enable Respondent to interview Estes and arrange for his testimony.

⁹ The circumstances surrounding Cook's discharge are detailed in the section hereof dealing with the alleged 8(a)(3) violations.

¹⁰ Respondent contends, but the General Counsel denies, that Cook was a supervisor. The issue is hereafter resolved.

¹¹ I find it unnecessary to resolve this conflict, because in my view the issue can be disposed of on other grounds.

¹² An area of Respondent's dock which handles Ford Motor Company freight.

¹³ This credibility issue is hereafter disposed of.

cokes, as had been the practice theretofore; and that everything would just have to tighten up.

Piper denied that he ever had any discussion with Beasley of the nature attributed to him by Beasley.¹⁴

B. *The Alleged Discriminatory Discharges*

1. Charles Beasley

As heretofore stated, Beasley's regular employment was with National Uniform Service, but from September 1974, until his discharge on October 28, he worked regularly about 4 hours a day for Respondent. In late October, the employees of National, including Beasley, went on strike against National in support of contract terms. The first day of that strike was October 27. During the preceding week, and in anticipation of the strike at National, Beasley asked Station Manager Austin if Respondent would provide him with additional hours of work for the duration of the strike at National. Austin agreed that beginning Monday, October 27, Beasley could work full time.

According to Beasley, on October 27, he reported for work about noon, and worked until shortly before 4 p.m.,¹⁵ leaving at that time to attend a union meeting at a point near National's premises, which is not too distant from that of Respondent. While at the meeting, which he testified he left between 4:20 and 4:30 p.m., he admittedly had two or three 6-ounce cups of beer, then stopped at a McDonalds where he had a Big Mac and a cup of black coffee. He thereafter went to his home where he arrived about 5:30 p.m., and after joining his wife in a cup of coffee left for Respondent's premises where he claims he clocked in at about 6:15 p.m. Beasley then attended a short meeting addressed by Respondent's director of personnel, who discussed the upcoming election, and then returned to work. His first task was to complete the loading of a truck that employee McClama was to drive to the airport. In the process of doing this, according to Beasley, some of the freight which had been stacked on a forklift by someone else fell off and he restacked it. While doing this Beasley admitted that he was asked by McClama if he had anything to drink that afternoon, and that he responded by saying that he did not know what McClama was talking about. Shortly thereafter Beasley was informed that he was wanted in Station Manager Austin's office, and when he arrived Beasley admits that he was asked by Austin if he (Beasley) had anything to drink that day, and that he replied that he had a couple of drinks. Austin told Beasley

¹⁴ This credibility issue is also disposed of in a subsequent portion of this Decision.

¹⁵ Beasley's timecard for October 27, shows that he clocked in at 10:56 a.m., clocked out at 4:16 p.m., clocked in again at 5:38 p.m., and clocked out for the day at 7:44 p.m.

¹⁶ The record shows that Respondent promulgated and posted by its timeclock a set of rules governing employee conduct. Rule A8 provides:

using or possessing intoxicants or narcotics while on duty or attempting to work while under the influence of either. (This included lunch-hour period also.)

Both Station Manager Austin and Day Operations Manager Upchurch testified that the above-quoted rule was adopted as a safety measure and applied to those employees who drive trucks or handle mechanical equipment. There is no contrary testimony. For this reason, I regard as

that drinking any alcoholic beverage during duty hours was strictly forbidden,¹⁶ and directed Beasley to clock out and return the next day when he would be told what action Respondent would take. The following day Beasley was told that under the circumstances Respondent had no alternative but to discharge him.¹⁷

The testimony of Austin, Piper, and Smith is substantially in accord. The substance of their testimony is that two employees reported to Smith that they smelled alcohol on Beasley. Smith, after observing that Beasley acted belligerently, and also after smelling alcohol on him, reported to Piper that he smelled alcohol on Beasley's breath and that the latter was "driving the hell out of the forklift." Piper in turn told this to Austin, who directed Piper to personally investigate the facts and, if he found the allegation to be true, to send Beasley in to see him. Piper went to the dock to observe Beasley, and in a few minutes concluded that the latter was driving the forklift "much too fast for safety;" on one occasion started the forklift so fast that the freight on it toppled to the floor; that Beasley stopped and reloaded the freight, and when he started up again he came around a conveyor so close that he almost struck one of the dockworkers. Piper then went to Beasley and told him to get off the forklift, and that getting the job done could not justify possible injury to the dock employees, and sent Beasley to Austin's office. According to Piper, while talking to Beasley he smelled alcohol on the latter's breath. Austin testified that, when Beasley came to his office, he asked the latter if he had been drinking, and that Beasley admitted that while at lunch he "had a couple of beers." Dock employee Adams also testified that he observed that on the occasion in question Beasley was more talkative than usual and did not seem to be able to work as he normally did; that he observed Beasley drop the load of freight in the aisle across from him and shortly thereafter back the forklift into a steel beam that supports the loading dock. Adams also testified that he heard dockman McClama, who observed the foregoing, ask Beasley whether the latter had been drinking, and that Beasley replied that it was none of his business.

Although Beasley admits that he had the two or three cups of beer between 4 and 4:30 that afternoon and claims that he consumed no other alcoholic beverage that day, the burden of his testimony is that consumption of the beer he drank had no effect on his ability to perform his work. Not only is the uncontradicted testimony of Piper, Smith, and Adams to the contrary, but, upon consideration of

irrelevant to the issue the testimony of Cook that, on an occasion more than a year ago, he detected alcohol on the breath of Piper, and that during the last week of May 1976 he observed Piper and Wallace drinking beer at Lum's. When Cook later called the plant to find out if Piper was working, he found out that the latter was there, but only to make preparation for the annual picnic. There is no evidence as to whether Wallace was at work or not. Not only is there a complete lack of evidence that any official of Respondent was aware of the facts, but neither Piper nor Wallace was charged with the duty of operating mechanical equipment. Accordingly, the rule had no application to them.

¹⁷ As a result of a discussion between Austin and District Manager Fite, a meeting was attended by Austin, Night Operations Manager Piper, and Dock Foreman Smith to decide what action to take against Beasley. Their decision was that to avoid establishing a precedent that might later prove unfortunate Beasley had to be terminated, notwithstanding his prior satisfactory work record, and he was notified accordingly.

Beasley's entire testimony, I conclude that I cannot credit him.¹⁸

C. *The Discharge of David L. Cook*

Cook worked for Respondent from November 1974, until his discharge on December 9, 1975. Cook started as a dockworker, then moved to the computer system, then as a rater router, night office supervisor, then to weekend operations manager, which job I have found was supervisory within the meaning of the Act, and in later September was assigned as a transfer agent during the day shift, a nonsupervisory position, which he held at the time of his discharge. The evidence shows that Cook signed a card for the Union and accompanied other employees to the union office to deliver the authorization cards which became the basis for the representation petition the Union filed. According to Cook, he received no warnings or reprimands regarding his work prior to the Union's campaign, but thereafter received two, both dated September 30, 1975.¹⁹ On cross-examination Cook admitted that he received from and discussed with Austin a report evaluating his job performance which listed some seven areas in which his work needed improvement, and concluded by stating, in substance, that improvement in these areas would have to be shown if Cook was to achieve the goals he sought with the Company. Cook did not deny the testimony of Austin, which I credit, that he told Cook that the evaluation was not a good one, and that he would have to show improvement in his performance.

On Monday following the withdrawal of the Union's representation petition, Cook, while in the office of Station Manager Austin on the other matters, asked the latter if his union activity would hurt his chances with the Company. Austin replied that he did not think so. Cook then asked how District Manager Fite felt about it. Austin stated that, knowing Fite as he did, he did not think Fite would hold it against him. Cook replied that he wanted to make certain,

¹⁸ As an example, when recalled on rebuttal, Beasley was shown his timecard for the week beginning October 27, and which bore a signature reading "Charles S. Beasley, Jr.," and testified that the card was not his, saying that, although the signature there "looked like" his, and was "roughly my signature," that he believed "somebody could've copied my name enough to sign my name" to it. When pressed to state whether he denied that the signature on the card was his, Beasley at first stated that "I don't think I make an 'S' that way," and then denied that the signature was his. Beasley admitted, however, that he signed Resp. Exhs. 22 and 23 which are the Federal and Georgia information forms for income tax withholding purpose. My comparison for those documents with the timecard involved convinces me and I accordingly find that the same person signed all three documents. Why Beasley thought it necessary to deny his signature on the card is not clear unless he felt that the card which shows that he returned to work at 5:38 somehow impinged upon his prior testimony that he returned at or about 6:15. The fact remains, however, whatever his reason might have been, that he did deny it, and this speaks volumes with respect to the confidence one can have in the reliability of his testimony. Additionally, in an effort to show that Respondent had permitted other employees to work after consuming alcoholic beverages, Beasley testified that on an occasion in the summer of 1975, dock employee McClama admitted to him that he had been out all night with his girl friend and that the two of them had consumed a gallon or half gallon of Vodka, and that he could smell the odor of alcohol on McClama. Beasley's testimony in this regard is difficult to believe in view of the Regulation of the Bureau of Alcohol, Tobacco and Firearms (27 CFR 5.22(ii)) which defines Vodka as:

... neutral spirits so distilled, or treated after distillation with charcoal or other materials as to be without distinctive character, aroma, taste or color.

and asked Austin to discuss the matter with Fite, and let him (Cook) know how Fite felt. Austin promised to do so and advised Cook of the result. The following Monday, Cook was called to Austin's office and told by the latter that effective immediately he (Cook) was being transferred from his job of weekend operations manager to transfer agent on the day shift.²⁰ Cook asked if his union activity had anything to do with the decision to transfer him. Austin assured Cook that it did not. According to Cook, he assumed the duties of a transfer agent at that time and from then until his discharge on December 9 his work was never criticized or questioned in any way.

On December 9, according to Cook, he again went to Austin and asked whether his union activity had hurt him with the Company. Austin replied that it had not, but he would check with Fite, and let Cook know what the latter said. Cook gave no testimony as to his reasons for putting this question to Austin at this time and the record is otherwise silent on this point. Later the same day Cook was called to the office of Day Operations Manager Upchurch and told by the latter that, based on an evaluation of his performance, it had been decided to terminate him effective that day. The termination notice supplied Cook stated the reasons for his discharge as "poor performance and poor attitude." Admittedly Cook's only reply was "Okay, I'll see you in court."

Both Austin and Upchurch, who made the decision to terminate Cook, agree that two incidents brought about that decision. Upchurch in particular testified to a number of problems he had with Cook's performance from the time the latter came under his supervision after he was made transfer agent. Upchurch credibly testified that in a number of instances Cook failed to pouch and label²¹ packages coming on the dock during his tour of duty and left this work for the night crew to perform, which unnecessarily burdened the latter's work and in many instances delayed movement of the freight. Upchurch

It is also noted that there is no evidence showing that any management official of Respondent was aware of this incident.

¹⁹ One of these related to the allegation that sufficient attention was not being given on weekends to communications over the message center. Cook's reply was that on Sundays he processed only those messages that were sent on Sundays and required an answer the same day, and that this was in accordance with instructions given him. The other was signed by District Manager Fite, stating that on Sunday, September 21, Cook was 1 hour and 20 minutes late reporting for work, that by reason thereof two employees had to wait outside for that period of time, and that Cook failed to call to advise that he would be late. The memo concluded with the statement that such action was inexcusable and in the future would not be tolerated. Cook's response was that on Sundays the workday started at 8 a.m. He admitted that he was 20 minutes late on the day in question because he had overslept; that no one could have waited an hour and 20 minutes because he was at the plant by 8:20. He gave assurance that this would not happen again and stated that he did not call to advise that he would be late because he knew that he would be at the plant before anyone else could get there.

²⁰ Transfer agent is a nonsupervisory position.

²¹ This refers to Respondent's practice of attaching a label to each package in a shipment to facilitate the movement and identification of each package passing over its dock. The shipping papers, which the consignee signed when delivery was made, were attached to one of the packages of a multipackage shipment and were returned to and retained in Respondent's files as proof of delivery.

credibly testified, and Cook did not deny, that he discussed with and explained this problem to Cook, and that the latter had little to say regarding it. According to Upchurch, his discussion with Cook led him to conclude that Cook's attitude was that he would do only what he was told to do, or what he felt his job demanded.

Upchurch referred to another incident involving a roll of cloth consigned to Butler Manufacturing Company in Butler, Georgia. The shipment had been delivered to Butler, but was refused by the latter because the wrapper had been torn and the cloth was soiled, and it was returned to Respondent's dock where it stayed for several days. After some discussion between Respondent's claim representative and the consignee, the latter agreed to accept the shipment if it could get it the following day. Upon receipt of this information, Upchurch explained the situation to Cook, particularly that the consignee needed the package the next day, and directed Cook to prepare the necessary papers and see that the shipment went forward that day. When Upchurch got out of a meeting about 7 p.m. that day, he found that Cook had left for the day and the shipment was still on the dock. Checking the office, Upchurch was unable to find that any papers had been prepared for its movement. Accordingly, Upchurch prepared the papers himself and prevailed upon a trucking firm to pick the shipment up that night. The following day, Upchurch asked Cook why he had not prepared the proper papers on the shipment to Butler Manufacturing and arranged for the shipment to go forward the preceding day, as he had been specifically directed to do. Cook at first claimed that he had done so, but when Upchurch insisted that he searched for but was unable to find them, and that he personally prepared the papers and arranged for the shipment to go forward the preceding night, Cook made a search of the office himself, but was unable to find the papers he claimed to have prepared. On December 4, Upchurch sent a memorandum to District Manager Fite setting forth the above and pointing out that, had not the situation been caught and corrected by him, Cook's action might have cost the Company a customer.

Testifying in chief, the only testimony Cook gave regarding this incident was that the shipment was sent out on a truck line that did not serve Butler, Georgia, and for that reason was returned to Respondent's dock and he then forwarded it again on a truck line that did serve Butler and it was delivered. Recalled on rebuttal, after hearing the testimony of Upchurch, Cook gave no testimony concerning this incident. I can only conclude that he failed to deny the testimony of Upchurch because he could not truthfully do so.

The other incident which Austin assigned for the termination of Cook involved a freight bill which came into Atlanta without a prefix which is used to enter the computer should it become necessary to trace a shipment or obtain other information regarding it. The freight bill showed that the shipment originated at Tecumseh, Michigan, through Detroit, for which the proper prefix is DTW, and was consigned to a firm in Panama City, Florida. The freight bill was handled by Cook, who inserted the prefix MSP (the prefix for Minneapolis). When a request for information on this shipment came in, and the information

on the face of the bill was fed into the computer, the request was rejected because of the incorrect prefix. After some delay the fact that the prefix was erroneous was discovered and the necessary corrections were made. With the correct prefix, the computer provided the information sought. As a result of this incident, Night Operations Manager Piper sent a memorandum to Day Operations Manager Upchurch, dated December 4, with a copy to District Manager Fite, outlining the events of this incident and the problems it caused. The memorandum concluded:

When the alert is generated with the incorrect origin, as you know, it causes problems for tracing procedures and even further it causes (or can cause) immense problems in Accounting and Claims in the event that future research is needed. Pls. advise your people to scrutinize such small items as this, as they can cause major problems in the long run.

When testifying during the General Counsel's direct case, Cook gave no testimony concerning this incident. Called on rebuttal, his testimony on direct consisted only of an explanation of the fact that it was not essential to have the correct prefix or, indeed, to have any prefix at all in order to trace a shipment, and that in performing his duties he had a number of instances where he had to trace a shipment when he had an incorrect prefix and, in some instances, no prefix at all. Cook explained that the proper prefix could readily be obtained by checking a directory providing the prefix for all airports, and the airport of origin appeared on the face of the waybill. Although Cook claimed that he was not sure that it was he who made the mistake in question, he did not deny that he did so, and did admit that the initials DC on the airbill, were his.

Following these incidents Upchurch talked with Austin telling the latter that he had tried to work with Cook, but that the latter just did not do his part. Upchurch told Austin about the Butler Manufacturing incident, referred to Piper's memorandum to Fite regarding the incorrect prefix on the airbill, and recommended that Cook be terminated. Austin said that the matter had to be discussed with Fite before any action could be taken, which was done the following day. Fite approved the recommendation, and Cook was terminated on December 9.

Contentions and Conclusions

A. *The 8(a)(1) Allegations*

1. I find and conclude that Respondent violated Section 8(a)(1) of the Act by Estes' admitted inquiry of Burnett as to what the latter knew about the Union. Interrogation for the purpose of ascertaining the union attitudes and sympathies of employees, without adequate assurance against reprisal which were not given in the instant case, is inherently coercive, constituting interference with the statutory rights of employees, and hence violates Section 8(a)(1) of the Act. *Long Island Airport Limosine Service Corp.*, 191 NLRB 94 (1971), enf'd. 468 F.2d 292 (C.A. 2, 1972); *J.D.B., Inc., d/b/a Jim Bradley's Bucks Co. Country House*, 223 NLRB 1163 (1976). The fact that Burnett reacted as he did to the question put to him by

Estes indicates that he was fearful of disclosing to Estes his activities on behalf of the Union.

2. Having credited Estes' version of his conversation with Feltman in March 1976, it follows that the General Counsel has failed to prove by a preponderance of the evidence that the incident involved constituted a violation of Section 8(a)(1) of the Act in that regard.

3. I also find and conclude that the General Counsel has failed to prove by a preponderance of the evidence that the conversation between Cook and Austin, even accepting Cook's version thereof, violated Section 8(a)(1) of the Act. The evidence clearly establishes, as I have found, that at the time of this incident Cook was a supervisor within the meaning of Section 2(13) of the Act and, hence, was not an "employee" within the meaning of Section 2(3) or 8(a)(1) of the Act. The proscription of Section 8(a)(1) of the Act going only to that interference, restraint, and coercion which is directed at "employees," it follows that the statements Austin allegedly made to Cook, the latter being a supervisor, did not violate Section 8(a)(1) of the Act. Although the General Counsel does not argue that the evidence fails to establish that Cook was a supervisor, he nonetheless urges that the incident violated Section 8(a)(1) of the Act. His brief does not provide the theory for that position. The contention appears to be based on the premise that because Respondent included Cook on the *Excelsior* list it provided in the representation proceeding, it is somehow estopped from asserting in this proceeding that Cook was a supervisor. General Counsel cites no authority to support his contention, and my independent research has not revealed the existence of such authority. Although the Board has held that, under certain circumstances, employer action directed at a supervisor may violate Section 8(a)(1), such a finding has been limited to two types of cases: (1) where the supervisor is disciplined for having testified in a Board proceeding brought to vindicate employee rights under the Act, *Oil City Brass Works*, 147 NLRB 627 (1964); *Better Monkey Grip Company*, 115 NLRB 1170 (1956); and (2) where the supervisor is disciplined for refusing to assist the employer in committing unfair labor practices. *Transitron Electronic Corporation*, 129 NLRB 828 (1960); *Talladega Cotton Factory, Inc.*, 106 NLRB 295 (1953); *Brookside Industries, Inc.*, 135 NLRB 16 (1962). In both types of cases, the Board's theory in finding a violation is that such conduct on the part of an employer had a clear and direct impact on the Section 7 rights of "employees," and obviously tended to impinge on the exercise of such rights. *Great Lakes Towing Company*, 168 NLRB 695, 702 (1967). Where the employer's conduct directed at a supervisor falls in neither of the two aforementioned categories, as in the case here, no violation of Section 8(a)(1) of the Act occurs. *Karl Kristofferson and Sigvold Kristofferson, Co-partners d/b/a United Painting Contractors*, 184 NLRB 159 (1970). Accordingly, I find and conclude that the General Counsel failed to prove that the incident involved violated Section 8(a)(1) of the Act, and dismissal of this allegation of the complaint will be recommended.

²² Whether adoption of the rule was wise or unwise or whether it was perhaps unduly broad is, of course, not an issue here. The Board's only interest is that rule was not disparately applied, or seized upon in

4 and 5. With respect to both of these incidents, I likewise find and conclude that the General Counsel has failed to prove a violation of the Act by a preponderance of the evidence. As indicated in the section hereof setting forth the facts regarding the alleged 8(a)(3) violations, Beasley did not impress me as a witness whose testimony I could accept with confidence in its reliability. As Austin and Piper both denied the testimony of Beasley regarding the statements they allegedly made to him, and as I do not credit Beasley's testimony in that regard, it follows that the General Counsel has failed to prove those allegations of his complaint, and I shall recommend that said allegations be dismissed.

B. *The 8(a)(3) Allegations*

1. The Beasley discharge

The facts surrounding Beasley's discharge, as heretofore detailed, are in the main undisputed. That Beasley consumed a quantity of beer during the approximately 1 hour and 20 minutes he was absent from Respondent's dock for his evening break is admitted. That Beasley's action in this regard violated Respondent's work rules, there can be no doubt; he plainly undertook to work after having partaken of alcoholic beverages. The issue then boils down to whether Respondent's motive in discharging Beasley was its good-faith effort to enforce a rule of employee conduct,²² or whether it seized upon the rule, in circumstances that it would not ordinarily have done so, in order to discriminate against Beasley because of his assistance to and support of the Union, and thus rid itself of a union adherent. The question is, therefore, one of motive, which must be determined upon consideration of all the evidence. My review of the entire record convinces me, and I therefore find and conclude, that Beasley was discharged for cause; namely, his admitted consumption of intoxicants during his duty hours. I reach this conclusion upon the totality of the following considerations:

1. Although Beasley had worked for Respondent since September 1974, Respondent knew that this was part-time employment, and that Beasley's regular employment was with National Uniform Service, and that he was a member of Teamsters Local 528, which represented National's employees. Thus Respondent was well aware of Beasley's union membership during the entire period of his employment.

2. The weekend prior to Beasley's discharge, the latter told Station Manager Austin of the impending strike at National and obtained Austin's permission to work a greater number of hours for Respondent for the duration of that strike. If Respondent had any desire to retaliate against Beasley for his union activity, such permission would hardly have been granted.

3. Before Beasley was discharged, Respondent knew that Local 728 had withdrawn its representation petition and had no reason to fear that Beasley's vote might be in favor of the Union.

circumstances for which the employee would not ordinarily have been discharged, in order to discriminate against Beasley because he supported a union.

4. The General Counsel's attempt to show that Respondent knowingly permitted other employees to work after having consumed intoxicants does not stand up under scrutiny. The evidence so relied on by the General Counsel is that given by Beasley and Cook. I have heretofore indicated (fn. 17, *supra*) that I do not credit Beasley, stating my reasons therefor. Cook's testimony likewise fails to support the General Counsel's contention in this regard (see fn. 15, *supra*).

Accordingly, I shall recommend that the complaint herein, to the extent that it alleges that Respondent discriminatorily discharged Charles Beasley, be dismissed.

2. The discharge of David Cook

Upon review of the entire record, I am convinced and therefore find and conclude that, in the case of David Cook, the General Counsel has likewise failed to prove by a preponderance of the evidence that, in discharging Cook, Respondent was motivated by his assistance to or support of the Union. I reach this conclusion basically for two reasons.

To begin with, the evidence summarized above shows that in the late summer and early fall of 1975, Cook was employed in a supervisory capacity and while so employed he was given a merit review in August which stated that his performance was deficient in certain respects and that he had to show improvement in his work. In late September, after Cook told Austin, pursuant to the latter's inquiry, that the activity on behalf of the Union was group action and not that of any individual, Cook was transferred to the nonsupervisory job of transfer agent, in which position he remained until terminated on December 9. Although Cook claimed that except for the two memoranda dated September 30, which he received and to which he replied, he was never criticized for his work, he did not deny the testimony of Upchurch and Piper regarding his failure on numerous occasions to pouch and label shipments, leaving that work for the night shift and his failure to comply with the direct order of Upchurch, that the shipment to Butler go forward that day. Although Cook testified that he was not certain that it was he who made the error regarding the prefix on the airbill, I must conclude, absent clear evidence to the contrary, that he did so, in view of his admission that his initials appear on the document. In view of the fact that Cook's activity on behalf of the Union, all of it occurring while he was a supervisor, was rather minimal, the length of time that elapsed between that activity and time of his discharge, at which time the Union's petition had been withdrawn and all activity on its part had ceased, and the rather strong evidence that Cook failed on a number of occasions to properly perform his duties, I must and do find and conclude that Respondent's conclusion that Cook failed to properly perform his duties, and not his activities on behalf of the Union, was the motivating cause for his termination. Whether Respondent acted wisely or unwisely in making its decision in that regard is not an issue; dispositive of the case is the fact, as I have found, that Respondent's motive for terminating Cook was not his union activity.

Secondly, during the entire union campaign and Cook's participation in it, the latter was a supervisor, and it was not until after the Union withdrew its petition in October that Cook's status changed to that of an "employee," entitled to the protection of the Act. While Cook was a supervisor, Respondent was free to discharge him even for his union activity, except in the limited areas delineated above, and which do not apply to the facts of this case. If Respondent in fact decided to terminate Cook *because* of his union activity it strains credulity to believe that Respondent would have passed up the opportunity to do so when Cook was a supervisor, and the discharge would not have violated the Act, but wait and within the relatively short period of 6 weeks thereafter, when the discharge would be unlawful, terminate Cook because of his union activity.

Accordingly, I shall recommend that the complaint herein, to the extent that it alleges that Cook's discharge was discriminatory, be dismissed.

Upon the foregoing findings of fact, and the entire record in the case, I state the following:

CONCLUSIONS OF LAW

1. Respondent is an employer within the meaning of Section 2(2) of the Act and is 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. By Estes' interrogation of Burnett as to what the latter knew about the Union, Respondent interfered with, restrained, and coerced its employees in the exercise of rights guaranteed by Section 7 of the Act, and thereby engaged in, and is engaging in, unfair labor practices proscribed by Section 8(a)(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.

5. Except to the extent set forth in Conclusion of Law 3, above, the General Counsel has failed to establish by a preponderance of the evidence that Respondent engaged in any conduct alleged in the complaint, as amended, to constitute a violation of the Act, and with respect to all such allegations said complaint should be dismissed.

THE REMEDY

Having found that Respondent interfered with, restrained, and coerced its employees in the exercise of rights guaranteed by Section 7 of the Act, I recommend that Respondent should be required to cease and desist from in any other manner interfering with, restraining, or coercing its employees in the exercise of their Section 7 rights.

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

ORDER²³

Respondent Airborne Freight Corporation, Atlanta, Georgia, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interrogating employees regarding their membership in, sympathies for, or activities on behalf of Local 728, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization of its employees.

(b) In any other manner interfering with, restraining, or coercing its employees in the exercise of their right to self-organization, to form, join, or assist a 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 and found necessary to effectuate the policies of the Act:

(a) Post at its premises in Atlanta, Georgia, copies of the attached notice marked "Appendix."²⁴ Copies of said notice, on forms provided by the Regional Director for Region 10, after being duly signed by an authorized 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 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.

(b) Notify the Regional Director for Region 10, in writing, within 20 days from the date of this Order, what steps it has taken to comply herewith.

IT IS FURTHER ORDERED that, except to the extent herein specifically found that Respondent violated the Act, all allegations of the complaint, as amended, are hereby dismissed.

²³ 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.

²⁴ In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

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

After a hearing in which all parties had the opportunity to present their evidence, it has been decided by the National Labor Relations Board that we violated the National Labor Relations Act, and we have been ordered to post this notice. We intend to carry out the order of the Board and abide by the following:

Section 7 of the Act gives all employees these rights:

- To organize themselves
- To form, join, or help unions
- To act together for collective bargaining or other mutual aid or protection
- To bargain collectively through representatives of their own choosing
- To refuse to do any or all these things.

WE WILL NOT interrogate our employees regarding their membership in, sympathies for, or activities on behalf of Local 728, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization.

WE WILL NOT interfere with you in the exercise of the aforementioned rights.

All our employees are free to become or remain a member of Teamsters Local 728, or not to become or remain a member of that or any other union.

AIRBORNE FREIGHT
CORPORATION