

LLOYD A. FRY ROOFING COMPANY *and* LOCAL 430, CHAUFFEURS, TEAMSTERS, WAREHOUSEMEN & HELPERS UNION, AFFILIATED WITH INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, AFL. Case No. 4-CA-600. April 30, 1953

## DECISION AND ORDER

On March 5, 1953, Trial Examiner Albert P. Wheatly issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety, as set forth in the copy of the Intermediate Report attached hereto. Thereafter the General Counsel filed exceptions to the Intermediate Report and a supporting brief.

The Board<sup>1</sup> has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions, the briefs, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.

## ORDER

Upon the entire record in this case and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the complaint against the Respondent, Lloyd A. Fry Roofing Company, York, Pennsylvania, be, and it hereby is, dismissed.

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<sup>1</sup>Pursuant to the provisions of Section 3 (b) of the National Labor Relations Act, the Board has delegated its powers in connection with this case to a three-member panel [Chairman Herzog and Members Styles and Petersow].

## Intermediate Report

### STATEMENT OF THE CASE

This case involves the layoff of certain truckdrivers (Roy C. Bixby, John P. Bubb, Earl D. Feggly, Sr., Oscar D. Haney, Forrest J. Mullins, Robert W. Zimmerman, and Richard C. Zuller) of the above-named Company<sup>1</sup> at a time when the above-named Union was engaged in organizing them and the principal question in issue is whether the layoffs were for economic reasons or because the truckdrivers engaged in activities protected by the National Labor Relations Act, as amended, herein called the Act. Other issues in this case concern alleged discriminatory refusals to reemploy these drivers and an alleged discriminatory discharge of, and refusal to reinstate, David J. Heppner, a truckdriver.

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<sup>1</sup>Respondent manufactures and distributes roofing materials. It operates plants in several of the States of the United States, but this proceeding concerns primarily its plant in York, Pennsylvania. There is no issue herein concerning jurisdiction.

## The layoff and failure to reinstate

Beginning about March 1, 1951, truckdrivers employed at Respondent's York, Pennsylvania, plant discussed among themselves (in groups of 2 or 3 and "at different beer joints in the town") "joining the union." In the month of May 1951, Roy Bixby, a driver, called Wilbert Godfrey, president of Local 430, regarding membership in the Union. Godfrey stated "he could not take any action with respect to one man or two or three men," and advised Bixby "to get the majority of the drivers there and come and talk to him if we were interested in joining the union." On June 4, drivers Mullins, Zuller, Heppner, Bixby, and possibly Frey, discussed, at Respondent's loading dock, joining the Union. Thereafter and on that same date (June 4, 1951) these drivers went to the local union hall and sought Godfrey. Godfrey was not available for a meeting but did confer with Zuller, via telephone, and told Zuller "to come to see him." On June 6, 1951, drivers Mullins, Zuller, Heppner, Frey, Kreiger, and Bixby gathered at Respondent's loading dock and again conferred regarding joining the Union. That same evening Mullins, Zuller, Heppner, Frey, Bixby, Feggly, and Zimmerman went to the local union hall and became members of the Union. Meanwhile, and on June 4, 1951, Respondent attached to the pay envelopes of its drivers notice of a meeting to be held Saturday, June 9, 1951. Although the notice did not so state, Respondent anticipated discussing at the June 9 meeting the layoff and the extent thereof. Most of the drivers received this notice on June 6 and before they joined (or rejoined) the Union.

On June 7, 1951, Respondent left in its shipping department (the customary method of handling correspondence for the drivers) letters dated June 7 and addressed to Bixby, Bubb, Feggly, Haney, Mullins, Zimmerman, and Zuller.<sup>2</sup> These letters were identical except for the addressee and stated.

Dear Sir:

Supplementing our memo requesting that you report to a meeting on June 9th.

As you know our volume has steadily declined and we anticipate the necessity of temporarily laying off some of our newer drivers. In view of general business conditions and low volume of business our General Office has instructed that we release the equipment that you have been driving and therefore we are obliged to terminate your services effective immediately.

We will fully compute your unpaid earnings and your check will be available on Wednesday, June 13th, the regular payroll date.

Regretting this action.

Sincerely,

/s/ George E. MacDonald  
Office Manager

The drivers thus laid off were junior in service with Respondent to the drivers retained. Respondent denies that prior to the layoff of the drivers it was aware of their union activities. Doubet and MacDonald, the officials directly involved, specifically denied having knowledge of their union activities and the only evidence that Respondent was aware thereof, other than as might be inferred from the foregoing and the small size of the plant involved,<sup>3</sup> consists of certain comments allegedly made by Henry Doubet, the plant manager, and by MacDonald. As noted immediately below herein, the undersigned is not convinced that Doubet and/or MacDonald made the comments concerning the Union or union activities attributed to them and finds that they did not make such comments.

Bixby testified that on or about October 12, 1950, when he applied for a job and after he had told MacDonald that he (Bixby) was working for the Yankee Motor Lines, MacDonald "told me what the wages would be on a mileage unloading pickup basis, and told me at the time that they had enough money to keep the drivers satisfied so that there would not be any

<sup>2</sup> Heppner did not receive one of these letters. He was discharged June 23. The facts and issues concerning Heppner will be treated separately herein. It should also be noted that Frey was not laid off.

<sup>3</sup> Eighty employees when operating 2 shifts, and 50 employees when 1 shift in operation.

union activity in the plant whatsoever." MacDonald testified, concerning this testimony by Bixby:

Q. Did you tell Bixby that you tried to pay enough money to keep drivers satisfied so that there would be no union activity?

A. I probably told Bixby that we tried to keep our drivers satisfied, and that we paid them good money. I think I told everybody that. But I did not tell them we did that so that we would not have any union activity.

Bixby was not a persuasive witness. Furthermore, MacDonald's testimony is more consistent with the facts developed in the entire record herein and his version of this incident appears more probable than that of Bixby. MacDonald's version of this incident is accepted by the undersigned.<sup>4</sup>

Zuller testified that "in the spring of 1951" at a drivers' meeting:

Mr. Doubet said, after Mr. McDonald[sic] got through with his speech, that he had heard of a recommendation to try to get a union in the Lloyd Fry plant, and that he would fire any man that he heard was making any kind of negotiation with the union, and he would appreciate it if anybody would come to him and tell what the man's name was, and he would make sure the name [the name of the informer] would never be mentioned.

Mullins corroborated Zuller's testimony and fixed the time of this episode "in the first part of March, 1951. It was in early 1951, somewhere around there." Doubet and MacDonald testified there was only one meeting with the drivers at which they were present, at which one or both of them spoke, and that this meeting occurred in September 1950. Doubet and MacDonald denied that the statements attributed to Doubet were made, and testified the meeting was called so that certain instructions from Respondent's home offices (near Chicago, Illinois) could be relayed to the drivers and that the only statements made (other than courteous opening remarks) concerned these instructions and such matters as insurance and picking up riders. They testified "labor relations" and "union activities" were not mentioned. On the basis of the entire record herein the undersigned is not persuaded that the meeting occurred at the time stated by Zuller and Mullins and is not persuaded that Doubet made the remarks attributed to him. The undersigned believes and finds the preponderance of the evidence adduced to be to the contrary, i. e., that the meeting took place in September 1950 and Doubet did not allude to union or concerted activities of the drivers.

Mullins testified that "around the last of April or the first of May" 1951, MacDonald asked him if he "knew of any fellows that was trying to get the union in there" and stated "that there had been lots of rumors going around in the platform and in the shipping office of union activities, and he wanted me [Mullins] to try to find out who they were and let him know the names." MacDonald denied making any such statements to Mullins, denied asking Mullins "whether he, Mullins, knew of any fellows who were trying to get the union into the plant" and denied asking Mullins to try "to ascertain who was trying to get the union into the plant." On the basis of the entire record herein and the demeanor of witnesses the undersigned is not persuaded that MacDonald made the remarks attributed to him by Mullins, and outlined above.

Zuller testified that in April or May 1951, and after the drivers had been directed not to congregate in the shipping office, he (Zuller) said (in the presence of John Bugash and MacDonald): "if there was a union in there, it would be changed, there would be a place for drivers to wait where it was warm" and that MacDonald responded, "before Fry had a union, he would close the doors." MacDonald testified:

Q. Did you hear Mr. Zuller testify this morning that you had said that before Fry would have a union, he would close the doors; did you hear Mr. Zuller state that you had made such a statement?

A. Yes, I did.

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<sup>4</sup>In determining credibility in this proceeding the undersigned has considered *inter alia*: The demeanor and conduct of witnesses; their candor or lack thereof; their apparent fairness, bias, or prejudice; their interest or lack thereof; their ability to know, comprehend, and understand matters about which they have testified; whether they have been contradicted or otherwise impeached; and consistency and inherent probability of the testimony.

Q. Did you make such a statement?

A. I have no recollection of making such a statement at any time.

Q. Do you deny that you made such a statement?

A. I did not make such a statement.

Bugash did not testify herein. MacDonald testified on several different occasions and from the manner in which he testified and his demeanor on the stand he impressed the undersigned as an honest witness. In view of this and the entire record herein the undersigned is not persuaded that MacDonald made the statement attributed to him by Zuller and set forth above.

Feggly testified that when he applied for a job, about June 1, 1951, MacDonald asked him if he belonged to the Union and when he (Feggly) responded he "did not at that time" MacDonald said "they didn't want any union activity as the company did not want anyone to run their business." MacDonald denied asking Feggly "if he belonged to the union" and denied saying to him that he (MacDonald) "did not want any union activity in this company" or that he "did not want to have a union run" shop or "anything to that effect." MacDonald testified nothing was said by him during the hiring discussion with Mr. Feggly about the Union. In view of Feggly's prior employment at concerns known to employ union drivers and the discussion of this prior employment it appears likely that some reference was made to union activities. However, on the basis of the entire record, the undersigned is not persuaded that MacDonald interrogated Feggly concerning his union membership or cautioned him against such activity.

Earl Frey testified that "a day or two after" the layoff MacDonald "hollered over the loudspeaker" to John Bugash (shipping clerk) and asked "if Frey joined the Union," that Bugash answered, "Frey is here now" and that he (Frey) then said, "No, I am blackballed from the union." Frey further testified that "a day or two after" the layoff, he complained about a mistake in his pay and that at that time MacDonald "wanted to know if I [Frey] belonged to the union, and I told him, 'No, I was blackballed.'" MacDonald testified he had "no recollection of Frey coming over to our office" about a mistake in his pay and denied that he "at any time" asked Frey if he belonged to the Union. MacDonald also denied that he "hollered" over the loudspeaker and asked "if Frey joined the union."

Frey testified that in August 1951, while the Union was picketing Respondent's York plant, MacDonald telephoned him and asked him to take a truck out, that he (Frey) responded, "No, I can't. I am union," that MacDonald then said he did not know that but he was going to dispatch a load for him anyhow and said, "The union won't get you a damn thing." MacDonald testified he did not "recall having made such a statement."

Frey was not a persuasive witness and from the manner in which he testified and his demeanor on the witness stand and on the basis of the entire record herein, the undersigned is not persuaded that MacDonald made any unlawful inquiries concerning Frey's membership in the Union or stated to Frey that "the union won't get you a damn thing."

Haney testified that around July 10, 1951, he sought work from Respondent (MacDonald), that after being referred to the lessor of Respondent's equipment and being informed by said lessor that there was no equipment available at that time,<sup>5</sup> he again saw MacDonald and asked for a job and that on this second occasion MacDonald said, "Take a withdrawal card from the Union and come back and see me." MacDonald denied that he told Haney to "take a withdrawal card from the union and come back and see me," and testified that Haney volunteered to "get a withdrawal card if by so doing it would help him to get his job back." MacDonald testified he did not make any suggestion that Haney get a withdrawal card. In the light of the entire record MacDonald's version of this incident appears more probable than that of Haney and his version is accepted by the undersigned.

Zuller testified that on or about August 3, 1951, he asked MacDonald for a job and was told, "I have no truck for you to drive."<sup>6</sup> Zuller testified he and MacDonald then discussed a new system MacDonald was working out to keep drivers busy even during slack seasons and that after MacDonald had explained his plans he concluded, "but if there was union activities, the company would just forget about it." Zuller testified that in this same conversation he asked MacDonald "if I could get the rest of the fellows to come in without a union if we could get our jobs back," and MacDonald responded, "come and see me when that happens." Zuller testified further that MacDonald told him that "the bottom of all union activities was communists ideas" and said as long "as there are union activities, none of the drivers would ever come back" and asked him "who were the members of the union" and, when he (Zuller) said he did not know, asked "if Earl Frey was a member." Zuller testified further that MacDonald said to him that if he "squealed to anybody about this conversation, I [Zuller] would get him [MacDonald] in a jam." MacDonald testified that when Zuller asked for a job

<sup>5</sup> There is no evidence that equipment was available.

<sup>6</sup> There is no evidence that a truck was available at this time.

on or about August 3, 1951, he did not have a unit for him to drive and he so informed Zuller and that he and Zuller discussed plans which he (MacDonald) was thinking about for keeping the drivers busy. MacDonald denied making the various comments concerning the Union attributed to him by Zuller and testified the plans discussed were his own, that Respondent at that time had not been consulted or otherwise informed thereof, and that he "could not give any conditions under which they would have it [the plan] or would not, because I just had that notion in my own mind, to keep busy." MacDonald testified that Zuller's reemployment was conditioned only upon "if and when I got the equipment for him" to operate. MacDonald testified the only reference to union activities consisted of a statement by Zuller that he had been sent there (to Respondent's plant) by Godfrey (president of the Union) and his (MacDonald's) reply of "I suspected that." In evaluating and weighing this and the other evidence that after the date of the layoff MacDonald made comments regarding the Union and/or union activities, it must be borne in mind that on or about June 12, 1951, MacDonald was told by Godfrey the names of the employees who were members of the Union. While the matter is by no means free from doubt, the undersigned is not convinced that MacDonald made the comments concerning the Union and/or union activities attributed to him by Zuller and finds that he did not make such comments.

None of the drivers laid off on June 7, 1951, has been reemployed by Respondent although since that date Respondent has hired 14 additional drivers. The table below indicates the names of drivers hired after June 7, 1951 (the date of the layoff), the date hired, and their current status:

Name	Hired	Status
Murray, Norman	7/11/51	discharged 7/30/51
Richards, John	7/11/51	" 7/15/51
Jones, Earl	7/20/51	" 7/30/51
Cohenour, Ira	7/17/51	currently on payroll
Urich, Roy	7/15/51	entered military services 1/26/52
Ansorg, Arthur	7/25/51	discharged 11/26/51
Davis, Walter	8/ 9/51	quit 8/12/51
Mickey, Lloyd	10/ 1/51	currently on payroll
Brady, William	11/25/51	discharged 6/4/52
Nickol, Howard	3/ 1/52	quit 3/5/52
Whetzel, William	3/ 9/52	currently on payroll
Armstrong	4/25/52	quit 11/15/52
Cain, Alfred	6/11/52	currently on payroll
Dunlop, Dale	7/13/52	" " "

Shortly after the June 7 layoff, Bixby, Bubb, Haney, Mullins, and Zuller obtained employment at Miller Motor Freight Co., a trucking establishment located at York, Pennsylvania,<sup>7</sup> and Respondent became aware of this situation. By letter dated June 25, 1951, Respondent advised Miller Motor Freight Co., as follows:

Mr Paul Hively  
c/o Miller Motor Freight Co.  
Zimm's Quarry Road  
York, Pa.

Dear Paul:

Due to business being slow we recently found it necessary to dispense with the services of seven drivers at our York plant.

I am now advised that business has picked up and we are desirous of adding additional drivers. What prompts me to write you regarding this matter is two-fold. First, I am informed that five of our former drivers; namely, Mullins, Zuller, Bixby, Bubb, and Haney, are now driving for your company. I wish you would confirm this, as it is our policy to rehire individuals who were not fired "for cause" when their services are again needed, unless they have been employed elsewhere in the meantime. Secondly, I am writing you for some advice and help in getting additional drivers. In the past, when drivers have been in demand, and the supply of good drivers was short, you

<sup>7</sup>After the layoff, Miller Motor Freight Co. "took over" and operated five of the trucks formerly operated by Respondent.

have been most helpful in putting us in touch with some good men. I am told that we need three or four men at this time, and if you know of any available individuals with good, safe, driving experience, we would be very appreciative of your so advising. Thank you for your past favors, I am

Yours very truly,

/s/ L. A. Fry, Jr.

Vice-President  
Floyd A. Fry Roofing Company

Miller Motor Freight Co. replied as follows:

June 29, 1951

Lloyd A. Fry Roofing Co.  
5818 Archer Rd.  
Summit, Ill.  
Attn: Mr Lloyd A. Fry, Jr

Dear Mr. Fry:

I am writing in reply to your letter of June 25th wherein you advise that due to business being slow, that you recently found it necessary to dispense with the services of seven drivers at your York plant. You further note that business has picked up and that you now wish to add additional drivers.

Your information that five of your former drivers, Mullins, Zuller, Bixby, Bubb and Haney whose services were dispensed with because of lack of work, are now driving for us is correct. We hired these men when they were dismissed, as good drivers are scarce. They have been examined, broken in to the methods of our operation and put on the payroll. It would put us to considerable inconvenience and expense if we had to lose these men at this time. We trust that you will appreciate our position in this matter.

In the event that we learn of three or four men with good safe driving records, we will be pleased to put you in touch with them as we have in the past.

Yours very truly,

/s/ Paul W. Hively

MacDonald testified he "made no effort to contact" the drivers mentioned in the above correspondence except Zuller "because of the fact that they had gone to work for Miller Motor Freight," because of the aforementioned correspondence, and because the employment which Respondent had to offer (in July 1951) was "of a very temporary nature" and "we would not use these fellows for a long enough period to justify them giving up a job that they had found and where they would be able to earn a good weekly wage. We could not offer them that, by the short time we would have on our second shift. You will bear in mind, of course, that at that time I had only three or four months experience on my job and my estimates and opinions on these things were somewhat limited by my limited experience, and I was perhaps wrong in figuring that need for these employees would be only about a month. It might actually have proved out that we could have kept them longer than that but I did [not] know that at the time, and I did not believe that at the time."

Miller Motor Freight Co. never informed Respondent that some of the individuals named in the correspondence set forth above had left its employment. Nevertheless, Mullins last worked for Miller Motor Freight Co. the week ending June 23, 1951. He was not released and did not give notice he was leaving. He merely did not report for work after that week. The same situation prevailed with respect to Zuller. Bixby last worked for Miller Motor Freight Co. the week ending July 14, 1951. The record does not reveal the circumstances concerning the termination of this employment relationship except that he quit and was reemployed by Miller Motor Freight Co. at a later date. Haney worked for Miller Motor Freight Co. throughout 1951 and was employed there at the time of the hearing herein.

(December 1952). Bubb was employed by Miller Motor Freight Co. continuously "until probably March 1952."

As noted above, Zuller, on or about August 3, 1951, asked MacDonald for a job. MacDonald knew at that time that Zuller was not working for Miller Motor Freight Co. but did not have a unit for him to drive. In the latter part of August, Zuller told MacDonald he had gotten a job in Baltimore, Maryland, and asked for a letter of recommendation. MacDonald gave him such a letter and Zuller went to Baltimore where he remained for approximately a year. Zuller moved from Baltimore, "to the west coast" and has been there "ever since."<sup>8</sup> There is no evidence that after August 1951 Zuller kept in contact with Respondent. The inference in the record is to the contrary. MacDonald testified that "as far as" we knew "Zuller was out of the picture" after August 1951.

As noted above, Haney, in July 1951, sought reemployment by Respondent but did not secure such because Respondent did not have a unit for him to drive. Near August 1, 1951, Haney and MacDonald met on the street outside Respondent's plant and Haney indicated to MacDonald that he was dissatisfied with his job at Miller Motor Freight Co. and wanted to come back with Respondent. MacDonald indicated to Haney that Respondent at that time did not have a unit available but that he would be considered for employment when one was available. However, MacDonald did not thereafter send for Haney. MacDonald testified he did not send for Haney because of the correspondence set forth above and because Haney was still employed by Miller Motor Freight Co.

Mullins did not seek reemployment with Respondent.

Bixby did not seek reemployment with Respondent until the late summer of 1952. MacDonald did not explain why Bixby was not reemployed at the time he sought a job other than as is inferred from his testimony that he (MacDonald) was not aware that "Bixby ever quit" the employment of Miller Motor Freight Co.

There is no evidence that Bubb sought reemployment with Respondent.

MacDonald testified that he made no effort to contact<sup>9</sup> Feggly and Zimmerman "because those men came to work for us and they were there only a few days a week or so, and during the time they were they had not established themselves to be the type of drivers that we wanted on our payroll." MacDonald testified that "there were complaints from the shipping department that these men had been a little troublesome over there, that Zimmerman in particular had grumbled about not being assigned longer trips than he had," and that he (MacDonald) had "a customer complaint" that one of them (either Feggly or Zimmerman, MacDonald was not sure which one but thought it was Zimmerman) would not unload the truck and stated that in view of this and the short period Zimmerman and Feggly were employed by Respondent he (MacDonald) "felt no obligation to them." There is no evidence that Zimmerman or Feggly was informed of any dissatisfaction with his work and each denied he was ever told of any dissatisfaction.

Respondent contends that its economic situation was such in June 1951 that it became necessary to lay off not only its production workers<sup>10</sup> at its York, Pennsylvania, plant, but also employees engaged in distribution, i. e., truckdrivers.<sup>11</sup>

Shipments of roofing material increased greatly during the last half of 1950 and January, February, and March, 1951. January, February, and March, 1951, usually slack months, were relatively high and each month showed an increase over the other in this quarter. This differed from the first quarter of 1950 when shipments did not begin their increase until May and then continued sharply upward until September. Total shipments for 1950 and to June 1951 show a large increase after the Korean situation in June 1950, with an upward swing in January 1951 to March 1951. In 1950 shipments increased in May and continued sharply upward until September. In 1951, there was a steady decline from April to June (see tables I

<sup>8</sup> The record reflects that prior to Zuller's departure from York, and after MacDonald was aware that Zuller was no longer working for Miller Motor Freight Co., MacDonald unsuccessfully tried to locate Zuller in contemplation of reemployment.

<sup>9</sup> The plant involved herein has been in operation since about February 1949 and the layoff of drivers on June 7, 1951, was the first such layoff in the plant's history. Accordingly, the record does not establish a practice at this plant of contacting drivers in a layoff status when work again becomes available. The record is also silent as to what, if any, policy Respondent pursued at its other plants in this regard. The record does reveal that, at the plant involved herein, "when the addition of a shift is contemplated the superintendent usually phones any man who might have been laid off earlier."

<sup>10</sup> There is no issue herein concerning the layoff of production workers.

<sup>11</sup> Respondent laid off 7 of its 11 working truckdrivers. It had 13 drivers on its payroll but only 11 were actively working. John Warner worked only on occasions and Heppner was on leave.

and II attached hereto). Shipments declined from 147 cars in March 1951 to 129 cars in April 1951. In May there was a further decline to 104 cars. In addition, orders on hand were very low at the beginning of May and June 1951. They dropped from 51 cars in April to 11 in May, then rose to 22 in June. However, the 22 cars in June were for future deliveries. Between June 1 and June 7, 1951, orders practically ceased.<sup>12</sup>

Respondent contends that it interpreted the large business in the last half of 1950 and the first 3 months of 1951 as due to inventory hoarding because of the Korean situation and the decline of shipments in April and May 1951, as an indication that the market had become saturated and that this decline would continue and concluded that the volume of business on hand and the prospects for future business did not justify having any more employees than it retained at the time of the layoff.

In retrospect, Respondent's conclusion may not have been a sound one. Less than 3 weeks after the layoffs Respondent's business had picked up to such an extent that 3 or 4 additional drivers were being sought. Business the middle of June began rising and Respondent enjoyed its normal June to October seasonal increase (see tables I and II). The problem, however, is not whether Respondent's judgment as to the 1951 trend was sound, but whether its decision to lay off drivers was motivated by economic or other considerations.

The reasons advanced by Respondent for laying off the truckdrivers, without reference to other circumstances, appear to have been the true reasons. However, there are other factors which cast doubt upon the motivation for Respondent's action.

The record reflects that, because of the decline in its business and the pessimistic outlook, Respondent considered, for more than a month before making it effective, the probability of a layoff of the second shift of production workers. However, there is no evidence that similar consideration was given to the layoff of drivers.<sup>13</sup> On May 25 and June 1, 1951, Respondent hired additional drivers (Zimmerman and Feggly).<sup>14</sup> The record reflects that Respondent leased its trucking equipment under an arrangement whereby the lessor could remove the equipment if Respondent did not keep it manned and in use and that Zimmerman and Feggly were hired to foreclose this possibility. Thus, it appears that Respondent did not anticipate a sharp decline in the trucking phase of its York operation as late as June 1, 1951.<sup>15</sup> The record does not reflect when Respondent became concerned about the trucking phase of its York operations, the date when the decision was made to curtail the use of its truck equipment, or the basis for such decision (other than the general production information outlined above and the information stated in the letter informing the drivers of the layoff).

Respondent first employed drivers at this plant beginning November 2, 1949, and in 1949 and 1950, prior to the time the second shift was started (second shift started in August), 7 to 9 drivers were employed (whether these figures include drivers used in the Morehead City operation is not revealed since the record herein does not reveal whether this operation was in effect at this time.) In June 1951 when the second shift was laid off the driving staff was reduced to 8 (6 if the drivers laid off as a result of the discontinuance of the Morehead City operation are counted). The figures on shipments from April through May 1951 could be interpreted as a need to reduce the staff of production workers and drivers. However, in the light of the approaching busy season (busy season usually expected from June to October) and the fact that shipments made the first 3 days in June were higher than any 3 days in the previous 5 weeks, Respondent's reduction of its driving staff to approximately the same

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<sup>12</sup>A single shift of production workers at this plant can produce approximately 160 cars of roofing material a month.

<sup>13</sup>As noted above, the letter informing the drivers of their layoff states the layoff was brought about because of instructions from Respondent's general office to release equipment. This record does not contain any details concerning such instructions. The only reference to such instructions is that contained in the aforementioned letter.

<sup>14</sup>Zimmerman was hired as a replacement for Heppner, after Heppner's driver's license was suspended. Feggly replaced Ford, a driver discharged May 25, 1951.

<sup>15</sup>In addition to delivering shingles to jobbers and distributors, Respondent's York drivers (3) were used to haul slate granules from Whiteford, Maryland, to Respondent's plant at Morehead City, North Carolina, and at Morehead City to pick up felt for use at the York plant. Around June 1, 1951, Morehead City officials objected to this operation as being too expensive and it was discontinued. However, the record reflects this was not a factor in the determination that there should be a layoff of drivers, but merely a coincidence that required the layoff of additional drivers and that absent this coincidence 5 (not 7) drivers would have been laid off.

level it had been at the time the plant first started operating with its own drivers must be viewed with skepticism.

Bubb, a part-time employee, who worked when a driver was sick or when Respondent had equipment available but not being operated by someone else, made \$115 during the week of the layoff (the week ending June 9) and this was high earnings in relation to other drivers. If Respondent's trucking operations were such as to warrant layoffs it seems appropriate to inquire why was it necessary to employ a part-time driver? The record does not reflect the answer.

Around June 16, 1951, Respondent sharply increased its use of outside trucking lines and the record does not reveal whether these shipments were based on orders on hand, orders anticipated before the layoff, or on orders received after the layoff.

The drivers were laid off in the middle of the week, on Thursday, June 7, 1951, 1 day after their regular payday. That week they had been paid on Tuesday, June 5, 1951, and had been requested to report to a meeting on Saturday at which Respondent anticipated (although it did not so inform the drivers) discussing the layoff and the extent thereof. What made Respondent decide between Tuesday and Thursday to make the layoff on Thursday? MacDonald, the official directly involved, testified:

I gave them that letter [notice regarding a meeting on Saturday] before the end of the week, so that they [the drivers] would not waste their time hanging around there waiting for the meeting which had been announced for Saturday. At the beginning of the week I thought we would have enough business to carry them that week, but it did not turn out that way.

The production employees were laid off at the conclusion of the workweek, Friday, and the drivers the day before, Thursday. MacDonald testified it was customary to lay off a shift at the end of the week since they are paid by the hour, but there is no set ruling for doing that with the drivers since they are not paid by the hour. It is not apparent why the drivers could not have been laid off as easily on the 8th as the 7th. It was merely a matter of 1 day. It would have cost Respondent no money since the drivers were paid by the trip rather than the hour. It would have been more logical to lay off the production workers on Thursday, since 8 hours of pay would have been saved.

In the light of the foregoing, the question of timing becomes significant. As noted above, the layoff took place 1 day after the drivers had joined (or rejoined) the Union and the layoff was made in haste, apparently, and the effective date thereof was advanced after the drivers had joined the Union.

As outlined herein, a review of all the evidence raises a suspicion as to the real motive for the layoff of the drivers. Suspicion, however, is not proof. The burden is on the General Counsel to prove by a preponderance of the credible evidence that Respondent's conduct toward these drivers was motivated by antiunion considerations. In the opinion of the undersigned he has not sustained that burden. The unsatisfactory explanations for the treatment of these individuals do not of themselves spell out discriminatory motivation. An employer may act unfairly or unreasonably, but by itself that is not sufficient to charge him with acting illegally under the Act. Notwithstanding a suspicion of discrimination with regard to this layoff the undersigned is unable to find that the reduction of the driver staff was without economic justification. Furthermore, the undersigned believes and finds that the record lacks a preponderance of evidence that antiunion considerations motivated this reduction in force. The undersigned also believes and finds that the record lacks a preponderance of proof that Respondent was actuated by discriminatory rather than lawful motives in not reinstating the drivers laid off on June 7, 1951. Accordingly, the undersigned will recommend that the allegations of the complaint with respect to these matters be dismissed.

#### Heppner

The complaint alleges that Respondent discriminatorily discharged David J. Heppner. Respondent's answer asserts that "Heppner was discharged because he had been involved in a fatal accident for which he was found to be responsible in Court proceedings in May 1951."

On October 28, 1950, while driving for Respondent, Heppner was involved in a fatal accident. The following day Heppner explained to MacDonald the circumstances of the accident. MacDonald in turn reported the accident to Respondent's insurance department and discussed whether Heppner should be removed from Respondent's payroll. This discussion resulted in a decision by Respondent's officials to await further developments. As a result of this

accident the State of Pennsylvania on May 22, 1951, suspended Heppner's driver's license for 90 days. Heppner reported this suspension to MacDonald on May 23, 1951, and indicated that he would use the period of time covered by the suspension "to get my operation" (hernia operation). After receipt of notice of the suspension, MacDonald checked Heppner's driving record at the Bureau of Motor Vehicles, Harrisburg, Pennsylvania, and on or about June 1 or 2, 1951, conferred with P. B. McInerney, director of Respondent's insurance and safety department. McInerney told MacDonald that he (MacDonald) "would have to discharge Heppner." McInerney confirmed the aforesaid direction by a memorandum dated June 4, 1951, addressed to the plant manager, stating:

In view of the revocation of the license issued by the State of Pennsylvania for the above named man [Heppner], it will be necessary that we terminate his employment immediately. Also due to the unfavorable accident reports compiled by this man and on record at Harrisburg, Pennsylvania, this man is not eligible for reemployment.

On or about June 23, 1951, MacDonald mailed to Heppner a letter stating:

Dear Sir:

In connection with recent developments leading to the suspension of your driving privilege our insurance department has made an investigation through the Pennsylvania Department of Revenue.

In view of the Court decisions of May 10 and May 22 which sustained the suspension of your license, it has been established that partial responsibility lies with you.

Due to the serious consequences of this accident and in consideration of speeding charges against your record in 1948, 1949, 1950, we have been directed to terminate your services as a tractor trailer driver.

This action is much regretted in view of your otherwise satisfactory service.

Your insurance policy may be kept in effect if you so desire; the payments to be made through this office. If you are interested in maintaining the policy it is suggested you contact us during the coming week.

Respectfully

Lloyd A. Fry Roofing Co.

/s/ George E. MacDonald  
York Office Manager

As noted above, Heppner joined the Union on June 6, 1951. On June 12, 1951, Godfrey, president of the Union, read to MacDonald "the names of employees who were signed in the Union." Heppner's name was among those read.

MacDonald testified that the delay in informing Heppner of his discharge (delay from on or about June 1 or 2 to June 23, 1951) was because Heppner was undergoing a hernia operation and he (MacDonald) "did not send him his official notice of separation until he was through his serious trouble. I [MacDonald] did not want to present that thing [the letter of dismissal] while he was in such a predicament."<sup>16</sup>

On May 23, 1951, when Heppner informed MacDonald of the suspension of his license, MacDonald and Heppner discussed the advisability of Heppner using the period of the suspension to have performed an overdue hernia operation. During the last week of May 1951, Heppner made arrangements to be hospitalized and informed MacDonald of these arrangements. Heppner was hospitalized between June 7 and June 14, 1951.

While there are certain flaws in Respondent's evidence concerning Heppner (for instance the reasons stated in MacDonald's letter are not the same as those stated in McInerney's memorandum, and there is no evidence that "unfavorable accident reports" were compiled by Heppner and are "on record at Harrisburg"), it is believed that these flaws do not substantially detract from its evidence that Heppner was discharged because he was in-

<sup>16</sup> MacDonald's testimony concerning the reason for the delay in giving Heppner notice of his discharge is subject to an interpretation that Heppner was in the hospital at the time he (MacDonald) received instructions to discharge him and that MacDonald delayed because of this circumstance. However, the entire record indicates that MacDonald's testimony is to the effect that he delayed because of Heppner's physical troubles and his current efforts to correct such and not merely because he was in the hospital.

volved in a fatal accident and was suspended therefor. Here, as in the situation involving the layoff of June 7, the entire evidence adduced raises a suspicion as to Respondent's real motive but the undersigned is not persuaded that the discharge was because of union membership or activity.

In the light of all the foregoing considerations and upon the entire record in the case, the undersigned makes the following:

### CONCLUSIONS

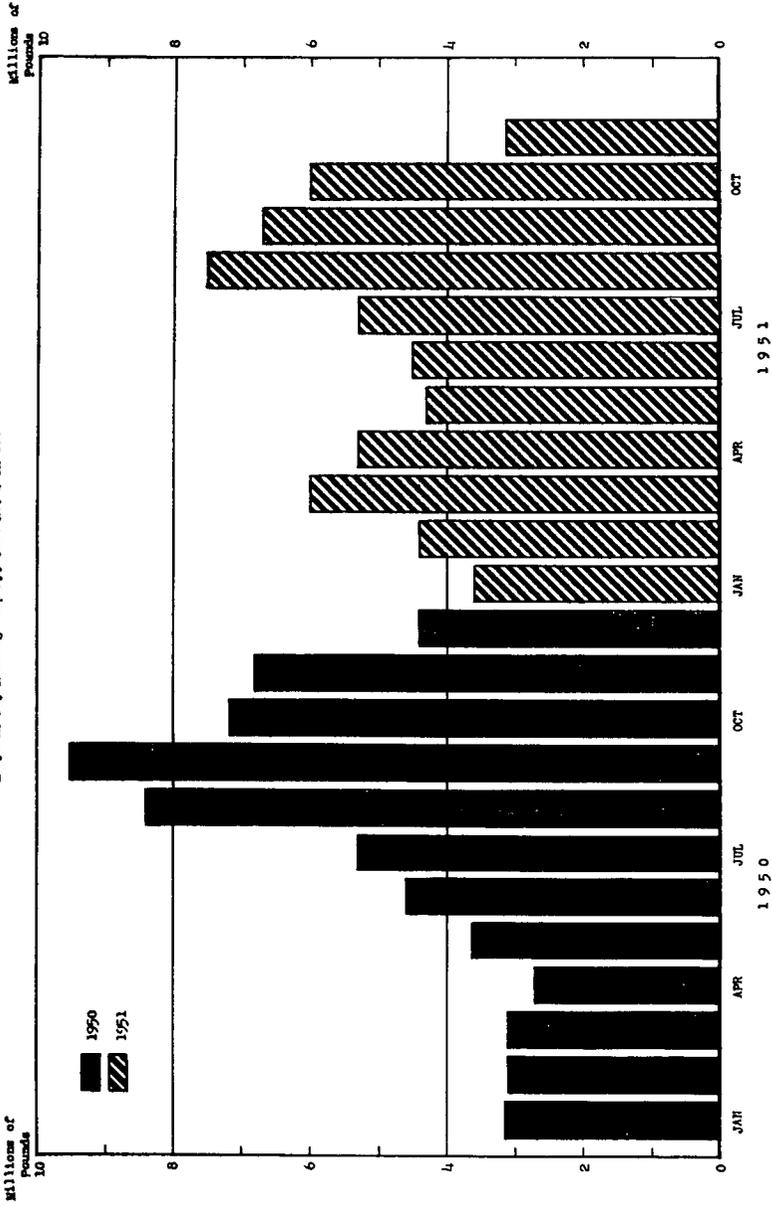
1. Lloyd A. Fry Roofing Company is engaged in a business within the jurisdiction of the National Labor Relations Board and it will effectuate the purposes of the Act to exercise jurisdiction over this business.

2. Local 430, Chauffeurs, Teamsters, Warehousemen & Helpers Union, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL, is a labor organization within the meaning of Section 2 (5) of the Act.

3. The preponderance of the evidence adduced does not establish that Respondent has engaged in or is engaging in the unfair labor practices alleged in the complaint herein.

[Recommendations omitted from publication.]

**TABLE I**  
**TOTAL WEIGHT SHIPPED - JANUARY 1950 THROUGH NOVEMBER 1951, BY MONTH**  
**Lloyd A. Fry Roofing Company, Case No. L-C-600**

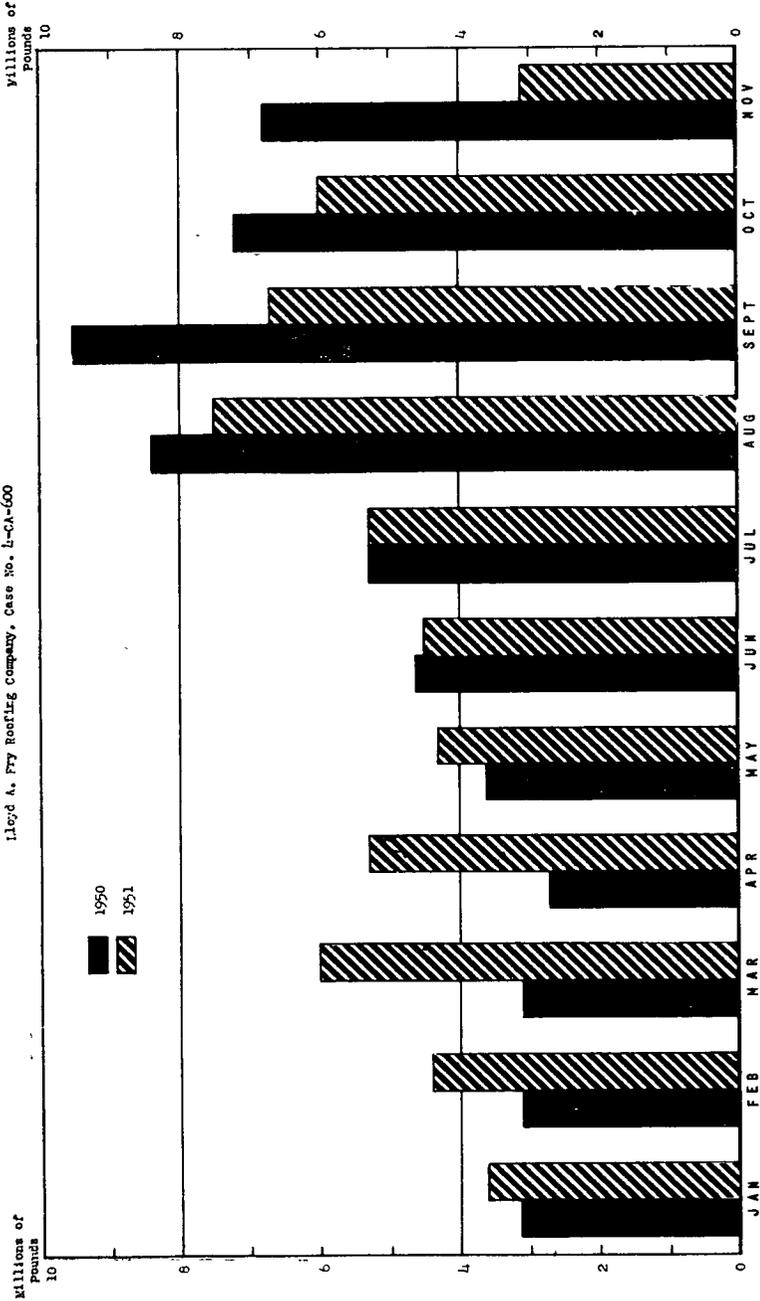


Source: G. C. Exhibit #5

TABLE II

COMPARISON OF TOTAL WEIGHT SHIPPED - JANUARY 1950 THROUGH NOVEMBER 1951, BY MONTH

Lloyd A. Fry Roofing Company, Case No. 1-A-600



Source: G. C. Exhibit 45