

## V. THE REMEDY

Having found that the Respondent has engaged in unfair labor practices in violation of Section 8 (a) (1) of the Act it will be recommended that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

It has been found the Respondent discriminatorily discharged Morrice Mulligan Dulin on March 23, 1956. In view of the foregoing findings the Trial Examiner will recommend that the Respondent make an offer of reinstatement to Morrice Mulligan Dulin; it is recommended that the Respondent make whole Morrice Mulligan Dulin for any loss of wages he may have suffered as the result of the discrimination against him by payment to him of a sum equal to the amount which he normally would have earned as wages from the date on which the Respondent discharged and failed to reinstate him to date, less his net earnings during such period (*Crossett Lumber Company*, 8 NLRB 440, 497-498), said back pay to be computed on a quarterly basis in the manner established by the Board in *F. W. Woolworth Company* (90 NLRB 289). The Respondent upon request shall make available to the Board or its agents for examination and copying all payroll, social security and personnel records and reports, and all other records and reports necessary to determine the amounts of back pay.

The nature of the unfair labor practices committed by the Respondent indicate a general purpose to limit the lawful rights of employees and persuade the Trial Examiner that such practices are potentially related to similar unfair labor practices, the future commission of which may be reasonably anticipated from the Respondent's past course of conduct. The preventive purposes of the Act will be thwarted unless the recommended order is coextensive with the threat. It is therefore recommended that a broad cease-and-desist order issue against the Respondent.

Upon the basis of the foregoing findings of fact, and upon the entire record in the case, the Trial Examiner makes the following:

## CONCLUSIONS OF LAW

1. The Respondent Roadway Express, Inc., is engaged in commerce within the meaning of Section 2 (6) and (7) of the Act.

2. By discriminatorily discharging Morrice Mulligan Dulin the Respondent has engaged in an unfair labor practice within the meaning of Section 8 (a) (1) of the Act.

3. By such discrimination, including the failure to reinstate this employee without prejudice to his seniority and other rights and privileges, the Respondent has interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act and has thereby engaged in and are engaging in unfair labor practices within the meaning of Section 8 (a) (1) of the Act.

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

[Recommendations omitted from publication.]

---

**Westinghouse Electric Corporation (Meter Plant) and International Union of Electrical Radio and Machine Workers, AFL-CIO, Petitioner.** *Case No. 11-RC-901. October 24, 1957*

## ORDER DENYING MOTION

Pursuant to a stipulation for certification upon consent election, an election by secret ballot was conducted on December 14, 1956, among certain employees at the Employer's Raleigh, North Carolina, plant. At the conclusion of the election, the parties were furnished a tally of ballots which showed that the Petitioner failed to obtain a majority of the ballots cast. On December 21, 1956, the Petitioner filed ob-

jections to conduct affecting the results of the election and on March 7, 1957, the Regional Director issued his report on objections in which he found that the Petitioner's objections did not raise substantial or material issues with respect to the conduct of the election, or conduct affecting the results of the election, and recommended that the objections be overruled. On March 18, 1957, the Petitioner filed exceptions thereto. On June 26, 1957, the Board issued a Decision and Certification of Results of Election.<sup>1</sup> On July 17, 1957, the Petitioner filed a motion for reconsideration of the aforesaid decision in which it urged the Board to reconsider, and set aside, its Decision of June 26, 1957, and direct that a hearing be held on the Petitioner's objections to the election.

The Board<sup>2</sup> has duly considered the matter and concluded that the motion for reconsideration in effect constitutes an additional objection to the election which was not filed timely under the Board's Rules.

[The Board denied the motion for reconsideration.]

CHAIRMAN LEEDOM, concurring:

Like Members Rodgers and Jenkins I would sustain the Regional Director and dismiss the petition. However, aside from the question of whether the exceptions raise matters properly before us for decision, I feel impelled because of my concern over the impact of statements of this character on the election process, to register my views.

A threat or promise with racial overtones, i. e., one which threatens a loss of jobs because of racial distinctions, made for the purpose of influencing employees in their right to choose a bargaining representative, is clearly prohibited by the Act and would constitute grounds for setting an election aside. Whether or not the racial overtone is present, there exists a threat or promise keyed to union activity which is not protected by Section 8 (c). The more subtle problem, however, arises when the reference to job retention or job loss is tied to the fact that the Union has a policy, at odds with that of the Employer, which calls for disregarding racial lines in the allocation of jobs, the implication being that, if the Union wins the election, union policy will probably prevail thereafter in the plant. It is true that the Board has heretofore found that statements endeavoring to forecast what will eventuate because of union demands and union practices are predictions which fall within the protection of the Act, and I have subscribed to that approach. However, I have serious doubts whether that principle should be applied in a case where the prediction involves an advantage or a disadvantage to an employee growing out of racial prejudice. The consequence of injecting the racial issue where racial prejudices

<sup>1</sup> 118 NLRB 364.

<sup>2</sup> Board Members Murdock and Bean dissent; their opinions are attached hereto. Chairman Leedom concurs with an opinion also attached hereto.

are likely to exist is to pit race against race and thereby distort a clear expression of choice on the issue of unionism. Clearly, to draw the issue along these lines does not effectuate the policies of the Act. The implications are far greater, in my opinion, than the reaches of the Act, for they bespeak an assault upon the spirit of our Constitution.

MEMBER BEAN, dissenting:

I joined in the panel decision overruling the Union's objections to the election held in this case. The Union has moved for reconsideration of that decision. On reappraisal of the questions raised at the time of that decision, I now believe that the Board should order a hearing to ascertain whether the Employer's officials in fact engaged in conduct which prevented a free and untrammelled expression of choice by the employees.

Among the objections which the Union first urged as reasons for setting aside the election was the allegation that the Employer had shown moving pictures to its employees "in order to inflame racial prejudice against the IUE." The Regional Director conducted an investigation of all the objections. He reported there was evidence that Babcock (the plant manager) told employees if the Union won the election promotions would be made by seniority regardless of color and displayed news articles to the effect that the Union and the C. I. O. supported civil rights education and legislation.

The Union filed 10 enumerated exceptions to the Regional Director's report. Two of them are expressly directed to the Regional Director's failure to recommend that Babcock's injection of the "inflammatory racial issue" into the preelection campaign improperly influenced the outcome of the voting. Again in aid of its insistence that the election did not take place in a free environment, the Union averred—in its supporting papers—that (1) company officials told the assembled employees that "white employees would be discriminated against" if the Union won; (2) the Employer showed pictures of white and colored employees working together and "coupled this demonstration with the prediction that Petitioner would cause similar practices in the North Carolina plant"; and (3) the plant manager himself raised the racial issue when he called the employees together and made "the implied promise that if the Petitioner was rejected by the employees the then current racial segregation practice would be retained."

It is thus clear that both the fact of the Employer's statements and conduct relating to racial prejudice as well as its effect upon the Board's election processes were put in issue by the timely objections and exceptions.<sup>3</sup> The conduct which the Union alleges that the Em-

<sup>3</sup> The members of the majority deny the Union's motion for reconsideration on ground that it "constitutes an additional objection to the election," thereby implying that these matters are raised for the first time in the motion. However, the motion merely restates

ployer engaged in and the tenor of the Regional Director's report as to what occurred are in substantial accord. Indeed, some of the statements attributed to the plant manager appear to be implicit in the conclusory language appearing in the field investigation report.

Certainly there is here presented a factual issue as yet unresolved, and that is whether or not Babcock's statements intended to influence employees in the selection of their collective-bargaining agent, may be said to have constituted (1) promises, if the Union should lose, of continued discriminatory benefits to employees because of their color, and, conversely, (2) threats to white employees of loss of favorable and disparate treatment if the Union should win.

The Board as the agency entrusted by Congress to protect the right of employees to select their own bargaining agent can do no less than ascertain all of the facts, not by the unsworn and self-serving statements of the parties involved but by an appropriate hearing and the taking of testimony under oath. Such investigation having for its purpose the ascertainment of truth, becomes the more necessary under the circumstances here involved because words otherwise plain and innocuous in one setting may take on a vastly different meaning when interpreted in the light of the background of their expression.

It should be borne in mind that this is not an adversary proceeding under Section 10 of the Act, which must be conducted in accordance with applicable court rules relating to pleadings, evidence, and civil procedure. This is, rather, an administrative investigation which the Board is required to make under Section 9 upon objections to conduct affecting the results of an election. An inquiry into the validity of such objections is not circumscribed by technical limitations devised for narrowing issues in unfair labor practice complaints.

Our primary responsibility is to guarantee to all employees, upon appropriate petition, a Board-conducted election completely free from improper interference with their statutory right to make their own untrammelled decision to choose or reject a collective-bargaining representative. With this cardinal obligation in mind, a careful review of the papers now before us reveals three incompletely developed aspects of the situation surrounding this election which I believe, in the proper exercise of the Board's investigatory function, it is incumbent upon us further to explore.

(1) Did the Employer promise the continuation of a discriminatory advantage, or favored treatment to one class of employees over another

---

the same facts asserted in the original criticism of the Regional Director's investigation report. Originally, the Union said that Babcock promised if the Union lost, the existing racial segregation practice would be retained. Now it tells us that the Regional Director is in possession of employee affidavits quoting Babcock as saying "if the Union won, colored people working in maintenance would get the job promotions instead of the white people." There is no substantial difference between these two quotations, and I therefore cannot agree that the appeals to racial prejudice were never in issue in this case before the present motion was filed.

in return for votes against the Union? If it did, such conduct obviously requires that the results of the election be set aside.

(2) Did the Employer, either directly or by innuendo, tell employees that if the Union lost the election it would persist in its practices of denying Negro employees the equality of opportunity of advancement in employment enjoyed by white employees? It had been my hope that we, unanimously, would seek the answer to this question in order that, if in the affirmative, we could then say whether or not this Company's promise to discriminate in employment on the basis of color in the event of the favorable outcome of an election, is reason for setting aside such election.

(3) Did the Employer deliberately attempt to provoke and inflame the employees to racial prejudice as a technique for clouding the issue of the imminent election? In matters of this kind, where at best reasonability has but a precarious foothold, broad, positive assertions, such as appear in the Union's supporting papers, come easy. It may well be that the situation has been distorted. Only the test of formal hearing and the safeguards incident to sworn testimony and cross-examination can separate fact from emotional argument. Yet, should it clearly appear that Babcock "inflamed the employees to racial prejudice against the IUE," I feel we should not evade the responsibility of deciding whether the resultant balloting reflected the considered judgment of the workmen themselves.

Accordingly, I would grant the Union's motion for reconsideration, set aside the earlier panel decision, and direct a hearing before a Trial Examiner upon the objections to the election.

MEMBER MURDOCK, dissenting:

I join in Member Bean's excellent dissenting opinion. In so doing I should point out that I was not a member of the panel which issued the Decision and Certification of Results of Election and that I am now passing for the first time on the issue raised by the objections to the election as a result of the referral of the Union's motion for reconsideration to the full Board. I would further note that page 2 of the Union's exceptions to the Regional Director's report on objections detail a specific threat of discharge by Plant Manager Babcock and numerous instances of interrogation by named foremen which fall within the Union's objections and which are not treated in the Regional Director's report except to the extent that he dismisses a threat attributed to Foreman Lothian on one of these occasions, on which there is a credibility issue, as isolated. I believe that a hearing should encompass all interrogation and threats.