

The majority of the time the department heads work on the line, and are engaged in the same type of work as the other employees. They have no authority to hire, discharge, or discipline other employees, nor to recommend such action. They are, however, responsible for keeping production up to the level established by the plant manager, and when necessary, assisting the employees to bring their work up to the required level. Although the superintendent schedules how many employees are required for a particular job, the department head selects the individual employees who will work in his department on the job.

In view of the foregoing, and as, apart from these individuals, there are only 3 supervisors for 170 employees, a disproportionate number of supervisors to rank-and-file employees, we find that the department heads responsibly direct other employees in a manner requiring the exercise of independent judgment, and that they are therefore supervisors as defined in the Act. Accordingly, we shall exclude them from the unit.⁹

The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act, All production and maintenance employees at the Employer's Noel, Missouri, plant, excluding all office clerical employees, guards, watchmen, department heads, and all other supervisors as defined in the Act.

5 The Employer asserts that its operations are in the process of a substantial expansion, and that there is not a substantial and representative group of employees presently employed, it argues, therefore, that a present election would be premature. At the time of the hearing the Noel plant was operating with between 150 and 170 employees, and the Employer's plans call for 225 employees at some undetermined time in the future. We find that the employees employed at the time of the hearing constitute a substantial and representative segment of the complement to be employed in the future.¹⁰ Accordingly, we find that an election at this time would not be premature.

[Text of Direction of Election omitted from publication]

⁹ *Wonderkist Corporation* 123 NLRB 53

¹⁰ *Brown and Root Caribe, Inc.*, 119 NLRB 815, 816

Cone Brothers Contracting Company and Gerald W. Exum.
Case No 12-CA-832 December 18, 1959

DECISION AND ORDER

On July 23, 1959, Trial Examiner Reeves R. Hilton issued his Intermediate Report in the above-entitled proceeding, finding that
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the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the Respondent filed exceptions to the Intermediate Report and supporting brief.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to a three-member panel [Members Rodgers, Jenkins, and Fanning].

The Board has reviewed the rulings of the Trial Examiner made 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 and brief, 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 the case, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Cone Brothers Contracting Company, Tampa, Florida, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging its employees from engaging in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or from membership in Local 925, International Union of Operating Engineers, AFL-CIO, or any other labor organization, by discharging any of its employees or discriminating in any other manner in respect to their hire or tenure of employment, or any term or condition of employment.

(b) In any other manner interfering with, restraining, or coercing its employees in the exercise of their rights to self-organization, to form, join, or assist Local 925, International Union of Operating Engineers, AFL-CIO, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection or to refrain from engaging in such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Offer Gerald W. Exum immediate and full reinstatement to his former or a substantially equivalent position, without prejudice to his seniority or other rights and privileges.

(b) Make Gerald W. Exum whole for any loss of pay he may have suffered by reason of the discrimination against him, in the manner set forth in the section of the Intermediate Report entitled "The Remedy."

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

(d) Post at its shop in Tampa, Florida, copies of the notice attached hereto marked "Appendix."¹ Copies of said notice, to be furnished by the Regional Director for the Twelfth Region, shall, after being duly signed by the Company's representative, be posted by the Company immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices are customarily posted. Reasonable steps shall be taken by the Company to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for the Twelfth Region, in writing, within 10 days from the date of this Order, what steps have been taken to comply herewith.

¹In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "Pursuant to a Decision and Order" the words "Pursuant to a Decree of the United States Court of Appeals, Enforcing an Order."

APPENDIX

NOTICE TO ALL EMPLOYEES

Pursuant to a Decision and Order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

WE WILL NOT discourage our employees from engaging in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or membership in Local 925, International Union of Operating Engineers, AFL-CIO, or any other labor organization, by discharging any of our employees or discriminating in any other manner in respect to their hire or tenure of employment, or any term or condition of employment.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of the right to self-organization, to form labor organizations, to join or assist Local 925,

International Union of Operating Engineers, AFL-CIO, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959.

WE WILL offer to Gerald W. Exum reinstatement to his former or substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of pay suffered as a result of the discrimination against him.

All of our employees are free to become, remain, or to refrain from becoming or remaining members in Local 925, International Union of Operating Engineers, AFL-CIO, or any other labor organization.

CONE BROTHERS CONTRACTING COMPANY,
Employer.

Dated----- By-----
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

INTERMEDIATE REPORT

STATEMENT OF THE CASE

Upon charges filed by Gerald W. Exum, the General Counsel of the National Labor Relations Board duly issued a complaint, dated April 23, 1959, alleging that the Respondent, by discharging Exum because of his union affiliation or because he engaged in concerted activities, thereby violated Section 8(a)(3) and (1) of the Labor Management Relations Act. The Respondent's answer denies the commission of any unfair labor practices. Pursuant to notice a hearing was held at Tampa, Florida, on June 8, 1959. All parties were represented by counsel and were afforded opportunity to adduce evidence, present oral argument, and to file briefs. Counsel for the Respondent submitted a brief which I have fully considered.

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

FINDINGS OF FACT

I. THE BUSINESS OF THE COMPANY

The complaint alleges, and the answer admits, the Company, a Florida corporation, maintains its principal office and place of business in Tampa, Florida, where as a general contractor it is engaged in the construction of highways, drains, sewers, and excavations. During the year 1958, its gross income was in excess of \$3,000,000, of which more than \$1,000,000, was derived from the State of Florida, for the construction and maintenance of highways. In the same period purchases amounted to approximately \$2,500,000 of which about \$50,000 represented purchases made directly outside the State of Florida. I find the Company is engaged in commerce within the meaning of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Local 925, International Union of Operating Engineers, AFL-CIO, herein called the Union, is a labor organization as defined in the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The issue*

The only issue here is whether the Company discriminatorily discharged Exum by reason of his union affiliation or because he engaged in concerted activities with other employees.

B. *The Company's operations*

This case involves the Company's shop in Tampa, where it repairs and maintains its truck and tractor equipment. About 90 persons are employed in this operation.

At all times material, Julian L. Cone, Jr., was president of the Company; J. C. Doolittle was maintenance superintendent in charge of the shop; John (Jack) P. Mulvihill, foreman or assistant superintendent; and Gordon R. McGhin and Willard Wilson Bryant were employed as leaderman in the caterpillar or heavy equipment department.

C. *Exum's participation in organizational or concerted activities; his discharge*

Exum was first employed by the Company as a mechanic from October 1954 to 1958. During 1957 the Union engaged in some organizational activity among the employees and Exum was a member of the organizing committee, composed of six employees. In June 1958, Exum resigned to open his own service station and garage but sometime later (he did not give the date) he shut down due to the construction of a new highway at or near his place of business.

After closing his business, Exum asked Doolittle for a job and in the latter part of January 1959, he was employed as a heavy equipment mechanic, at \$1.85 per hour,¹ working on tractors, bulldozers, and draglines. Sometime after his employment Grady Weed, an employee, asked Exum what he thought of the Union and he said he was in favor of it and they should try to organize the employees. Exum, Weed, and others then signed up about 35 or 40 men, using union cards which they had left over from the 1957 activities. Exum arranged a meeting with R. N. McCullough, business agent for the Union, and a meeting was held at the union hall on February 9, with about 15 employees present. At that time Exum turned over the union cards to McCullough.

The next day, during the luncheon period, a group of the employees discussed wages and working conditions and they figured that maybe Cone was not familiar with the wage rates in the shop. They, therefore, decided that someone should discuss the matter with Cone and they selected Exum to act as their spokesman in that respect. That evening Exum telephoned Cone and, after identifying himself as one of the mechanics, explained he was calling in regard to wage rates and working conditions on behalf of himself and a group of the shop employees. Exum stated it was not right to hire new men at a higher rate than that received by the older men and pointed out that a new man from Texas had been hired at \$2 per hour whereas some of the men with 5 or 6 years' service were getting \$1.85 an hour. Cone replied he knew the pay rate of every mechanic and mentioned he had heard something about Exum trying to organize the men. Exum said he had heard the same thing but he did not know how far it had gone. The conversation lasted 2 or 3 minutes and ended on that note. The next day, February 11, Exum reported for work about 7 o'clock in the morning and Cone, who usually came in around 8:30 or 9 o'clock, was already in the shop.

On Friday, February 13, regular payday, Mulvihill delivered the checks about 30 minutes earlier and attached to Exum's check was a discharge ticket signed by Doolittle, dated February 14, stating he was discharged because he was "Dissatisfied." Exum then went to Doolittle and thanked him for what he had done. Doolittle replied Cone "had got onto him about" the call and "if you hadn't called J. L. everything would have been all right." In the course of their conversation Doolittle called Mulvihill over to hear what Exum had to say. Doolittle remarked he had rehired Exum at more money than he had been making and now he was causing him all this trouble. Exum denied he was dissatisfied with his job or pay rate and denied making any complaints along those lines to Bryant. He also denied he spent a good part of his time trying to supervise the work of other men.

¹ He was paid \$1.75 an hour when he resigned.

Samuel L. Kight, a welder, stated he signed a union card and was present when a group of the employees met at lunchtime on February 10. At that meeting the men discussed the fact that new employees were being hired at a higher rate than the older men were receiving and the group selected Exum to take up the matter with Cone. When Kight came to work at 6:30 the next morning Cone was already in the shop which was unusual. Shortly thereafter, he observed Cone talking to Doolittle. At lunchtime Exum advised the men he had telephoned Cone the previous evening.

1. The Company's evidence

Cone said Exum telephoned him around February 9 or 10, and told him some of the men were talking about a union and he replied that that was their prerogative. Exum, according to Cone, ". . . went on to state further—I mean, I don't know that what I am saying are his exact words, because I talk to a bunch of people everyday, but he went on to say that one of their—I don't know whether you would call it gripes or what, that the men weren't—that there was discrimination in the wages that were paid. . . ." and then mentioned a new mechanic from Texas being hired at a higher rate than he was being paid. Cone told him wage rates were based on merit rather than length of service, that the Company needed experts to work on their type of equipment, and the new man from Texas was a better mechanic than Exum. Exum disagreed and asked to be put on a job with the new man but Cone replied as long as he and Doolittle were running the shop they would judge or grade the mechanics. Exum did not inform Cone he was speaking on behalf of a group of employees, although he did state that "some of the men were unhappy." Cone told him, ". . . anytime that any of the men had any grievance or complaints of this nature, that I would be glad to talk to them in my office about it." Cone denied he inquired if Exum was engaging in union activities or that he made any commitments to him. He estimated their conversation lasted 10 or 15 minutes.

The following morning Cone stopped by the shop² on his way to the office, about a block away, and related his conversation with Exum to Doolittle. Cone said Exum "seemed to be disgruntled" and while he did not instruct Doolittle to talk to him, he presumed he would do so. Doolittle did all the hiring and fixing of wage rates which were approved by Cone.

Doolittle testified he had known Exum for about 3 years and during the first period of his employment he considered him a good worker. Sometime in January 1959, Exum telephoned Doolittle one evening about a job and Doolittle hired him the next day. Exum was put in the tractor department doing the same work he had performed previously. The tractor department, as described by Doolittle, has two sides, separated by the parts department, and while Exum wanted to work on one particular side, he was assigned to the other side. Doolittle had an opportunity to observe Exum and, after the first week, he did not believe he was as thorough on the job as he had been previously, and that he did not want to stay on the job, in that he would talk to other men or show them how to do their work when he should have been looking after his own job. On one occasion, probably a week before his discharge, Doolittle told him in a nice way to go back to his work. Exum also asked when he was going to get more money and he told him he could not give him any increase at that time. From Exum's attitude Doolittle concluded he was dissatisfied with his job, although he never did ask Exum if he was dissatisfied.

On Tuesday or Wednesday, February 10 or 11, Cone asked Doolittle what was wrong with Exum and he answered he did not know. Cone then related that Exum had telephoned him the night before and complained he was being treated unfairly because some new men were making more money than he was. At that point the conversation apparently ended, for Doolittle left to answer the telephone and he presumed Cone left the shop. Doolittle did nothing that day insofar as Exum was concerned.

Doolittle also testified regarding an incident involving Exum which was reported to him by Bryant. As thus reported, Bryant told Exum to go out to the asphalt plant, 4 or 5 miles distant, and put a master pin in a tractor which is a minor job. Exum said Bryant should send a better and higher paid mechanic but, although dissatisfied, he did go out and do the job. When Exum returned he reported the tractor had a leak in the gasoline, which was simple to repair and under shop rules or practice he should have fixed it. Doolittle conceded Exum could not have repaired it if he did not have his toolkit although it is possible he could have borrowed a wrench. On direct examination Doolittle was asked when the incident occurred and he replied he thought it was on February 10 or 11. On cross-examination when questioned

² Cone had no fixed schedule for visiting the shop. When in the city, some weeks he would go there three or four times or maybe everyday. The office opened at 8 o'clock.

whether the incident occurred or was called to his attention on the above dates he answered, "Well, I don't know. It was Tuesday or Wednesday it occurred. It was soon after it occurred that he said something about it, I am almost positive." Again, when questioned whether Bryant reported the matter before or after Doolittle's conversation with Cone, Doolittle stated he thought it was after that conversation, perhaps the same day, he was not certain. On redirect he said the incident took place after the Cone conversation, then changed to prior thereto and concluded by stating he did not know but was sure it was sometime during the week.

On Thursday or Friday, February 12 or 13, Doolittle decided to fire Exum because "he didn't act like to me that he was satisfied, so I just figured, if he wasn't satisfied I would just let him go." He then prepared and signed his discharge ticket. Admittedly, nothing occurred on February 11, 12, or 13, indicating Exum was more dissatisfied than usual. After receiving his discharge notice Exum came to Doolittle and Mulvihill and asked why he had been terminated. Doolittle told him:

Well, Gerald, you seemed to be dissatisfied, and you didn't want to do what the boys asked you to do around there, and I said that, I am not firing you because you called up J. L., because, I says, that didn't make a lot of difference to me. And I says I don't imagine you got very far.

Exum said he did not know whether he got very far with Cone, thanked Doolittle for the job and left. Doolittle could not recall ever firing an employee because of dissatisfaction.

Doolittle admitted he subsequently offered Exum a job as road mechanic, at \$2 an hour, at some place outside of Tampa.

Mulvihill handed Exum his termination slip and was present when Exum talked to Doolittle about his discharge. When asked the direct question whether Doolittle told Exum everything would have been all right if he had not called Cone, Mulvihill answered no such statement was made by Doolittle.³

Bryant testified that sometime during the week of February 9, he told Exum to go to the asphalt plant and drive in a master pin that was coming loose on a tractor. Exum remarked since he was getting helpers' pay a mechanic should go along to show him how to do the job. Bryant said the job was a simple one and any laborer could do it if he had a hammer. He again asked Exum to do the job and when he received the same comments, he said he would send someone else. Exum then went out on the job. Upon his return Exum said he had completed the job and reported a fuel line was leaking and the adjustment cover was off the tractor. Bryant inquired if he had taken care of these minor adjustments, as all mechanics were supposed to do, and he said no, he did not have any tools with him. When Bryant sent Exum on the job he told him to take the necessary tools and ordinarily the men carry their small handtools with them. On cross-examination, Bryant admitted Exum could not have repaired the adjustment cover since parts were needed, but he could have fixed the gasoline with a small open-end wrench. This was the only occasion Bryant had any difficulty with Exum. Bryant reported the incident to Doolittle the day it happened.

McGhin stated Exum worked under him for about 3 weeks, from January 24 to February 13, during which time Exum seemed to resent suggestions, left his job, and tried to show other men how to do their work. However, McGhin was unable to cite any particular instances of such conduct. McGhin claimed Exum created "unrest" in the department and around February 1, he explained the situation to Doolittle.

2. Exum's testimony in rebuttal

Exum denied Doolittle ever spoke to him about being away from his place of work.

He stated that during the week of his discharge, or the previous week, Bryant told him he had an emergency call to fix a master pin on a tractor at the asphalt plant. Bryant gave him a new pin and instructed him to get a hammer, bar, and block to install the pin and not to fool with anything else. Exum asked if he should take the rest of his tools and Bryant said, no, this was a rush job, the tractor will shut down the plant. Exum followed Bryant's instructions. While at the plant the operator

³ When Exum inquired the reason for his discharge, Mulvihill gave the following version of Doolittle's reply:

He said he didn't let him go on account of different things that people that were over him said he didn't do good, in the caterpillar part of the shop, that is the part he was in.

said here were a few things wrong with the tractor, which Exum checked. Upon his return to the shop Exum reported what was wrong with the tractor. He believed he made his report to Jack Telford because Bryant and McGhin were not around at the time. Exum said in the last 2 weeks of his employment Bryant sent him on three or four service calls and he denied he suggested or commented that a mechanic should accompany him on this particular job.

Concluding Findings

The Respondent contends the General Counsel has failed to carry his statutory burden of proving, (1) knowledge on the part of the Company of Exum's membership in the Union or his engaging in concerted activities, and (2) that his discharge was motivated by unlawful considerations. I agree with the foregoing statement of legal principles and the only issue here is a factual one, namely, has the General Counsel established the allegations of his complaint by a fair preponderance of the credible evidence.

It is undisputed that Weed and Exum discussed organization and solicited employees to sign union cards and that a number of employees attended a union meeting on February 9, which was arranged by Exum. At lunchtime the following day a group of the employees expressed dissatisfaction with pay rates, especially the hiring of a new mechanic at a higher rate than they were getting. After some discussion they reached the conclusion that perhaps Cone was not familiar with their hourly rates, so they decided someone should take up the matter with him and they selected Exum to act as their spokesmen for that purpose. That evening Exum telephoned Cone and advised Cone he was speaking on behalf of himself and a group of employees to complain about the disparity in pay rates, specifically the employment of a new mechanic at \$2 an hour when men with long service were being paid \$1.85 an hour. Cone said he knew the pay rate of every mechanic. He then stated he heard Exum was trying to organize the men and Exum agreed he had heard the same thing but did not know how far it had progressed.

Cone admitted having a telephone conversation with Exum, which I find took place on the evening of February 10. According to Cone, Exum opened the conversation with a statement some of the men were talking about a union and he said that was their prerogative. Exum then advised Cone (as quoted above) the men were griping or complaining about discrimination in wage rates and pointed out a new man had been hired at a rate higher than he was being paid. Cone conceded Exum stated some of the men were unhappy with conditions and he assured Exum "anytime that any of the men had any grievance or complaints of this nature" he would talk to them at his office. Cone did not dispute the hiring of the new man at a higher rate and asserted rates were based on merit not length of service. He also made it clear to Exum that mechanics would be graded by himself and Doolittle. Cone denied Exum stated he was speaking on behalf of a group of employees or that he questioned Exum regarding union activities at the shop.

The Company does not question the fact that Exum was engaging in protected concerted activities with fellow employees, but contends the Exum-Cone telephone conversation is inadequate to prove knowledge of such activities on the part of the Company. This contention is refuted by Cone's own testimony, for he made it very clear he knew, through Exum, some of the employees were complaining about the discriminatory pay rates in effect at the shop. Moreover, in line with his understanding that Exum was speaking for the group, Cone offered, through Exum, to meet and discuss complaints of this nature with the men. Testimony of this character coming from the company president to an employee-spokesman conclusively establishes knowledge that the employees were engaging in concerted activities. But completely avoiding this evidence, the Respondent, in its brief, seeks to cast some doubt on knowledge by implying Exum's call to Cone was prompted by selfish or ulterior motives. I fail to see the significance of this argument insofar as knowledge is concerned, and in addition there is no testimony whatever remotely suggesting the inference that Exum was not acting in good faith as spokesman for the employee-group. Counsel also argues that since 35 to 40 men signed authorization cards and attended a union meeting it is unlikely that, the day following the meeting, Exum and a group of employees would abandon the union leadership and approach Cone directly. I fail to see how this action presupposes abandonment of the Union by Exum and his group. It is sufficient to say that at that time the Union had not even requested recognition as the bargaining representative of the employees. Exum impressed me as an honest, frank witness and I accept and credit his testimony, set forth above. On the basis of his testimony, as well as Cone's, I have no difficulty in finding the Company, on and after February 10, had full knowledge of the fact that Exum was engaging in concerted activities with other employees.

The remaining issue to be decided is whether Exum was discriminatorily discharged. Cone admitted he went to the shop in the early morning of February 11 and informed Doolittle of his conversation with Exum the previous evening. Cone declared Exum was "disgruntled" and assumed Doolittle would have a talk with him. Doolittle's version is somewhat different. Cone, according to Doolittle, first asked what was wrong with Exum and when he replied he did not know, Cone related his conversation held the evening before wherein Exum complained new men were making more money than he was. The conversation ended abruptly when Doolittle left to answer the phone. Doolittle did not speak to Exum that day, but on February 12 or 13 he decided to fire him because he was dissatisfied and on February 13 Exum was dismissed, his discharge slip giving "Dissatisfied" as the reason therefor. After receiving his termination notice Exum told Doolittle he was not dissatisfied with his job and Doolittle stated everything would have been all right if he had not called Cone, that Cone "had got onto him" because of the call and Exum was causing him a lot of trouble. Doolittle testified he told Exum he seemed to be dissatisfied but he was not being fired by reason of his telephone call to Cone.

There is no convincing evidence indicating Exum was dissatisfied with his job. Doolittle's testimony amounts to nothing more than broad, vague assertions Exum did not want to stay on his job, talked to other men about how the work should be done and apparently asked for an increase. McGhin, too, was unable to give any instances of dissatisfaction although he claimed Exum caused "unrest" and he brought the matter to Doolittle's attention. Admittedly, Doolittle never spoke to Exum concerning his attitude or dissatisfaction, and only once did he find it necessary to speak to Exum and then, in a nice way, he told him to go back to his job. Oddly enough, on February 11, when Cone asked what was wrong with Exum, Doolittle made no mention of his unsatisfactory attitude. He further conceded nothing unusual occurred from that date to the date of Exum's discharge.

The only specific incident the Respondent could come up with was the so-called tractor service call, which it characterizes as an act of insubordination and failure to follow rules on the part of Exum. Manifestly, Doolittle and Bryant attached no importance to the incident for they could not remember, with any degree of certainty, when it happened and Doolittle in his conversation with Exum did not refer to it as a reason for his discharge. In any event the incident is trivial. Bryant's testimony is to the effect Exum remarked a mechanic should accompany him but he went on the call, fixed the pin, and when he came back reported a leaky fuel line and the adjustment cover off, which he did not repair. At first Bryant stated Exum should have made these repairs but later admitted he could not have fixed the adjustment cover. Exum's account of this affair is far more plausible and convincing and his testimony in rebuttal, that Bryant instructed him to leave immediately for the job, without carrying his usual tools, fix the pin and nothing more, is undenied. Again, it strikes me, if Exum was merely attempting to avoid making additional repairs it is highly improbable he would have promptly reported certain repairs were necessary. I accept Exum's testimony and find the incident occurred in the manner described by him.

Thus, the evidence plainly shows that Cone, following his talk with Exum, at once advised Doolittle that Exum was disgruntled and 2 days later he was fired because of dissatisfaction. Admittedly, Exum and Doolittle had a conversation the date of his discharge wherein Exum asked the reason for this action and Doolittle said everything would have been all right if he had not called Cone. On the other hand, Doolittle related he told Exum he seemed dissatisfied and specifically declared he was not being fired because of his telephone call to Cone. If, as claimed by Doolittle, the subject matter of Exum's call had nothing to do with his discharge, it is incongruous that he would volunteer and emphasize the information he was not being fired for that reason. It may be that Doolittle was acting impetuously, but, whatever the reason, I am not persuaded by his testimony in this respect.⁴ Finally, Doolittle's offer to reemploy Exum as a road mechanic negates the idea that he was fired for dissatisfaction.⁵ On the contrary, it seems reasonable to infer that while the Company was willing to utilize the services of Exum as a competent mechanic, it did not want him in the Tampa shop where he could engage in organizational or concerted activities with other employees.

⁴ In making these findings I do not rely upon Mulvihill's version of Doolittle's statement, quoted *supra*. Likewise, I do not rely upon Kight's assertion (which was denied) he overheard Doolittle tell Bryant and one or two other men Exum was not being fired for union activity but for talking to Cone without his permission.

⁵ Cf. *N.L.R.B. v. Richter's Bakery*, 140 F. 2d 870, 872 (C.A. 5).

Of course, it is well established the Act does not interfere with the normal right of an employer to discharge his employees but is directed solely against abuse of that right by interfering with the countervailing right of self-organization guaranteed employees under the provisions thereof.⁶ From the foregoing findings I have no difficulty in further finding the Company's summary discharge of Exum for pre-tentious reasons, almost simultaneously with his organizational or concerted activities, was motivated by a desire to eliminate an active proponent of such activities and to discharge employees from becoming members of the Union or participating in concerted activities for the purpose of collective bargaining or other mutual aid or protection.⁷ By thus discharging Exum the Company violated Section 8(a)(3) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

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

V. THE REMEDY

Having found that the Company has engaged in and is engaging in certain unfair labor practices affecting commerce, I shall recommend that it cease and desist therefrom and take certain affirmative action in order to effectuate the policies of the Act.

It has been found that the Company, by discharging Gerald W. Exum, discriminated against him in respect to his hire and tenure of employment in violation of Section 8(a)(3) of the Act. I shall therefore recommend that the Company cease and desist therefrom and from infringing in any other manner upon the rights guaranteed in Section 7 of the Act. I shall recommend that the Company offer to Exum immediate and full reinstatement to his former or substantially equivalent position⁸ without prejudice to his seniority or other rights and privileges. I shall further recommend that the Company make Exum whole for any loss of pay he may have suffered by reason of the discriminatory action aforementioned by payment to him of a sum of money equal to that which he would normally have earned less his net earnings, computation to be made in the customary manner,⁹ from the date of his discharge to the date of a proper offer of reinstatement. I shall further recommend that the Board order the Company to preserve and, upon request, make available to the Board, payroll and other records to facilitate the checking of the amount of backpay due and the rights of employment.

Upon the basis of the above findings of fact, and upon the entire record in the case, I make the following:

CONCLUSIONS OF LAW

1. Cone Brothers Contracting Company is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local 925, International Union of Operating Engineers, AFL-CIO, is a labor organization as defined in Section 2(5) of the Act.

3. By discriminating in regard to the hire and tenure of employment of Gerald W. Exum, the Company has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(3) and (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.]

⁶ *Phelps Dodge Corp. v. N.L.R.B.*, 313 U.S. 177, 187, *N.L.R.B. v. T. A. McGahey, Sr., et al.*, *d/b/a Columbus Marble Works*, 233 F. 2d 406, 413 (C.A. 5).

⁷ *N.L.R.B. v. Avondale Mills*, 242 F. 2d 669, 671 (C.A. 5); *N.L.R.B. v. Armstrong Tire and Rubber Company, Tire Test Fleet Branch*, 228 F. 2d 159, 161 (C.A. 5); *N.L.R.B. v. S. S. Coachman & Sons, Inc.*, 203 F. 2d 109, 111 (C.A. 5).

⁸ *The Chase National Bank of the City of New York, San Juan, Puerto Rico, Branch*, 65 NLRB 827.

⁹ *Crossett Lumber Company*, 8 NLRB 440; *Republic Steel Corporation v. N.L.R.B.*, 311 U.S. 7; *F. W. Woolworth Company*, 90 NLRB 289, 291-294.