

including the responsible officials of the Respondent Union, in the course and conduct of their daily affairs; and quite naturally were familiar with the language and phraseology used in the discussion of labor matters. In the circumstances they would have been most naive indeed to have "mis-interpreted" Seibel's statements to them as regards the consequences that would ensue if they failed to heed his demands that Thorpe cease doing business with Holland. That they were not so naive is amply demonstrated by the action they took as to Holland.

The same reasoning applies to Henry J. Stager who had been plant manager for McCourt Construction Company for 25 years, and at the time of the hearing herein was its vice president while it is true that Seibel raised the "knife incident" in his conversation with Stager about Holland, nevertheless he did tell him to ". . . lay him off, or he would make us trouble."¹⁴ Stager clearly understood what Seibel meant, and as a result Holland was laid off shortly thereafter.

While the Trial Examiner is not unmindful of the "knife incident," he is convinced that in the final analysis it was used by Seibel merely as an excuse to cover up the real reason for his demands that the employers herein cease doing business with Holland. The Trial Examiner's reasoning in this regard is predicated upon the undisputed fact that Seibel made his first demand upon Thorpe to cease doing business with Thorpe, on September 15, 1960, the day before the "knife incident" occurred. As a matter of fact it was this action on the part of Seibel that provoked the incident itself.

In the circumstances the Trial Examiner concludes and finds that by the acts and conduct described above that the Respondent Union did engage in and is engaging in conduct violative of Section 8(b)(4)(ii)(A) 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 Charging Party, Jesse Holland, as set forth 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 of commerce.

V. THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, the Trial Examiner shall recommend that it cease and desist therefrom and take certain affirmative action which he finds necessary to effectuate the policies of the Act.

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

CONCLUSIONS OF LAW

1. Local 348, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of the Act.
2. Jesse Holland is a person engaged in commerce or in an industry affecting commerce within the meaning of Section 8(b)(4) of the Act.
3. McCourt Construction Company and Thorpe Construction Company are engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
4. By the unfair labor practices as found above, the Respondent has thereby violated Section 8(b)(4)(ii)(A) and Section 2(6) and (7) of the Act.

[Recommendations omitted from publication.]

¹⁴ Quotes from Stager's credible testimony.

Becker-Durham, Inc. and International Union of Electrical, Radio and Machine Workers, AFL-CIO. Case No. 3-CA-1525.
August 21, 1961

DECISION AND ORDER

On May 3, 1961, Trial Examiner Stephen S. Bean issued his Intermediate Report in the above-entitled proceeding finding that the Re-
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spondent 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 Intermediate Report attached hereto. Thereafter, the General Counsel filed exceptions to the Intermediate Report and a supporting brief.

The Board 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 and brief, and the entire record in the case, and hereby adopts the Trial Examiner's findings, conclusions, and recommendations.

[The Board dismissed the complaint.]

INTERMEDIATE REPORT

PRELIMINARY STATEMENT

This proceeding came on to be heard before me at Catskill, New York, March 7 and 8, 1961, on issues of whether Becker-Durham, Inc., herein called the Respondent, has violated any of the provisions of Section 8(a)(3), (4), and (1) of the National Labor Relations Act, herein called the Act, by alleged failures and refusals to reemploy Martha Hillicoss and to recall Helen Forma, production employees. At the outset of the hearing Trial Examiner Stephen S. Bean granted a request to take official notice of the evidence recorded in Case No. 3-CA-1428, in the matter of Becker-Durham, Inc., to the extent of agreeing to give appropriate consideration to those portions therein which the parties might call to my attention either during the presentation of evidence, in argument or in briefs. This has been done with equal treatment accorded the Decision and Order (130 NLRB 1356) which toned down the Intermediate Report (IR-294) and was issued March 15, 1961, 8 days after the grant of request but 13 days prior to the closing date of the hearing—a time period amply affording opportunity for admonitory convergence thereon.

During the week before this hearing, there was served upon Respondent a *subpoena duces tecum* requiring the production of employment records with particular reference to so-called leaves of absence granted to any or all of Respondent's employees over a substantial period of time. For reasons appealing to me as being adequate, Respondent did not comply with this subpoena. However, as a result of discussion among counsel and the Trial Examiner it was arranged and agreed on March 8, 1961, that on or before March 18, 1961, Respondent would supply the General Counsel, for incorporation into this record, with the employment records of 11 named employees, and that the hearing should be closed on March 28, 1961, *unless* on or before that date, either party should request a continued hearing for the sole purpose of presenting oral evidence pertaining to said particular records. Counsel for Respondent orally argued the case at the close of the reception of evidence on March 8, 1961. Counsel for the General Counsel, hereinafter called the General Counsel, waived argument. The Trial Examiner announced that upon final closing of the hearing he would fix the time within which the parties might file briefs. The employment records in question not having been submitted for incorporation into this record and no request for a continuance having been made by March 28, 1961, the hearing was then closed and the last date for submitting briefs set for April 10, 1961. A brief has been received from the General Counsel.

Upon substantial, reliable evidence "considered along with the consistency and inherent probability of testimony" (*Universal Camera Corporation v. N.L.R.B.*; 340 U.S. 474, 496), upon the record as a whole, from my observation of the witnesses and their demeanor, and in careful consideration of the able argument of counsel for Respondent and the skillful brief of the General Counsel, I make the following:

FINDINGS OF FACT ¹

I. RESPONDENT'S BUSINESS

It is agreed, and I find, that Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

It is agreed and I find, that International Union of Electrical, Radio and Machine Workers, AFL-CIO, herein called the Union, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Martha Hillicoss*

Hillicoss first entered Respondent's employ on or about September 25, 1956, and worked with interruptions for a total of some 39 months until May 27, 1960. Her job was mainly that of a coil worker. Around April 22, 1960, she signed a petition opposing the unionization of the employees in the plant. The following month because of the recurrence of difficulty in procuring help to care for her children during the summer school vacation which had resulted in her being "off" the previous year from April 20, 1959, to September 18, 1959, she planned to give 2 weeks' notice that she had to leave again. Edward McQuillen, Respondent's plant manager, had re-employed her in September 1959 in reliance upon her assurance that she would not leave again the following summer. Before she actually gave such notice, however, McQuillen told her he had heard she would be leaving and asked her when she expected to quit.² Hillicoss replied that she would have to, the middle of June when school closed. McQuillen then asked her if she would mind leaving during the last week of May in order that he might arrange for her replacement before the boarding house season opened up.³ Hillicoss agreed that she would do so. McQuillen asked her to see him in September about her possible readiness for employment then and told her he would take her back if he had a job for her, provided her summer absences were not to recur.⁴

Thereupon on May 16, 1960, 11 days before Hillicoss left, Linda Pohler was permanently hired to take the former's place, working on the job of coil winding. When Pohler started breaking in on the job, Hillicoss asked lead coil winding girl, Elizabeth Crotty, if she was the person who was going to fill her job. Crotty replied in the affirmative.

On July 26, 1960, Hillicoss, as a witness under subpoena by the General Counsel, gave evidence in Case No. 3-CA-1428, to which previous allusion had been made. Among other things, she testified there that she had decided to quit in May 1960, that McQuillen found out she was going to quit and asked her to leave earlier than she had planned to.⁵

¹ Insofar as there may appear to be any testimony at variance with these findings, it is regarded as being of insufficient weight to be controlling or unworthy of credence.

² John Jay, a fellow employee who was present during the conversation, testified credibly that McQuillen said "I heard you're quitting" and Hillicoss said "Yes." Margaret Pierson, a fellow employee testified credibly that Hillicoss told her personally so, and out of her own knowledge she knew, that Hillicoss quit and that she would not be back that fall.

³ It appears that in the Catskill, summer resort area Respondent and other employers experience a labor-market problem during the summer, a usually busy period, due to a heavy competitive drain away at the hands of the seasonal proprietors of establishments, locally called "boarding houses," catering to tourists and vacationers.

⁴ Hillicoss testified that McQuillen asked her if she would be taking the 1961 summer off and she replied she could not tell.

⁵ Much of Hillicoss' testimony in that case, including her unwillingness to be inveigled into answering leading questions propounded by the General Counsel and finally excluded by the Trial Examiner, discloses little to incur Respondent's resentment. Indeed she could scarcely be categorized as a hostile witness, testifying for example as she did, that McQuillen made neither promises nor threats, nor interfered in any way, and in March 1960 told a group of 35 to 40 employees that he was through with opposing union activity and that they could have a union if they wanted it, it was up to them.

On September 16, 1960, Hillicoss talked with McQuillen about returning to work and, although experienced coil winders were then needed, was told there was no place for her, for the reason that she could not give him assurance that she would not yet again stop working the following summer.

B. Helen Forma

Forma first entered Respondent's employ on or about August 29, 1957, and worked with interruptions for a total of some 22 months until October 31, 1960, when she was laid off at inventory time with all except possibly one⁶ of the production workers. As was Hillicoss', her job was mainly that of coil winder although she had considerable experience as a coner in the general assembly department.⁷ On July 26, 1960, Forma, as a witness under subpoena by the General Counsel gave evidence⁸ in Case No. 3-CA-1428, to which previous allusion has been made.

On the morning of August 9, 1960, Forma, with a nonemployee distributed near the entrance in the back of the plant 30 or 40 leaflets issued by "IUE-AFL-CIO, Becker-Durham Organizing Committee" "betting on Uncle Sam" with respect to some of the charges aired before the Trial Examiner 2 weeks earlier in Case No. 3-CA-1428 and referring to McQuillen in unflattering terms. Other persons distributed the leaflets in front of the plant. A foreman named "Dick" declined her proffer of the leaflet. Forma does not know if McQuillen saw her. She also distributed about the same number of leaflets around September 28, 1960.

The plant was completely closed down the last of October 1960. As was the case in 1957 and 1958, but not in 1959, Forma was not called back early in November 1960 when, as was the invariable fiscal yearend practice due to reduction from 4 to 2 "lines," only approximately one-half of the some 100 who had been working previously to October 31 were employed. On December 19, 1960, one of the two remaining lines was discontinued with a consequent layoff for 2 days down to about 25 percent of the normal. The plant was again completely closed from December 21, 1960, until January 3, 1961, when one line was started up. A second line went into operation shortly before this hearing.⁹ On November 4, 1960, while in the plant picking up her paycheck, Forma asked McQuillen when she could return to work and was told that as soon as business picked up and warranted such action she would be called back. Forma referred to Juanita and Yvonne Terrell and Schuessler (previously mentioned in the footnote) who had been recalled and whom she claimed were less senior than herself. In her department, Forma was the less senior but one.¹⁰ The Terrell women were not in her department. Schuessler, referred to above in footnote 6 worked only until November 4, 1960, when she was joined in the general layoff. McQuillen explained these matters to Forma. She asserted she thought she would be able to do Yvonne Terrell's job of soldering and Juanita Terrell's job on the eyelet machine if given a reasonable time to learn the operations. To acquire

⁶ Adele Schuessler was asked to do 2 or 3 days' special work after October 3, in finishing transformers.

⁷ Basically Respondent's production process is divided into an assembly department, a testing area, and a coil winding department. Employees moving from one to another such division do not "bump" those there having less seniority.

⁸ None of Forma's testimony there clearly bears upon the 8(a)(3) allegation in the instant case. As to the 8(a)(4) allegation, considerable evidence she gave there, testifying for example as she did, that McQuillen on March 30, 1960, told a group of employees that if they wanted a union to go ahead and have one, that the company had been planning a pay raise which it would give in spite of what might happen that he had no "jurisdiction" over his employees, if they decided to do a thing, they could do it, they could do what they wanted, and that McQuillen did not make any threats or promises to her or anybody before a poll which she helped to count was taken, gives rise to little indication of management animus on Forma's part or occasion for belief of arousal of resentment on Respondent's part.

⁹ The record is not clear on the probably immaterial point as to when the four lines existing before October 31, 1960, may all be expected again to be in operation.

¹⁰ Linda Pohler, who it will be recalled became Hillicoss' replacement, to whose temporary reinstatement Forma raised no objection on November 4. Pohler's situation which the General Counsel apparently points as an example of disparate treatment tending to support the contention of unlawful discrimination against Forma will be adverted to *infra*, in appropriate chronology.

production speed or quota as a solderer requires approximately 3 months; as an eyelet machine operator, a few months. McQuillen told Forma he could not go into restraining employees at that time. The conversation ended by Forma saying she was going to see the Labor Board.

Facts regarding Pohler and Betty Messina, whose names did not enter the November 4 conversation, but whose employment was stressed by the General Counsel¹¹ deserve brief mention. Pohler, a young mother, was treated as a "hardship case." In late October 1960 her husband faced the likelihood of incarceration. She was returned to work on about November 4, 1960, was laid off on December 19 or 21, 1960, after Mr. Pohler had received a suspended sentence, and not since then reinstated. Messina possessed exactly the same seniority in the coil winding department as Forma. Messina was selected for work for the period from November 4 to December 19, 1960 (when she too was laid off) because of her superior productiveness. Comparative production records of the 2 for 12 weeks before November 1960 show that Messina produced 2,386 rods and 47,720 pieces as against Forma's 1,975 rods and 39,500 pieces.

Conclusions

Familiarity with the above facts convinces me that no more probatively appears, than that Martha Hillicoss was not rehired after her resignation in May 1960 because of her inability or unwillingness to give Respondent assurance that she would not for a third time leave during the summer, when the need for her services was likely to be the greatest. I am unable to believe that she, a known opponent of the Union, was discriminated against for having testified in the earlier case when employees such as Catherine Cummings, for example, who may have or may not have favored the Union and who also testified in that case, continue in Respondent's employ.

Helen Forma's pronoun attitude was known to Respondent, who was equally aware of the antiunion inclinations of Joyce Fortunato and Helen Greer both of whom had signed the antiunion petition. None of the three were called back at the time of the November 1960 reopening of the plant. There is a dearth of evidence in this case to justify the conclusion that the unwillingness of Respondent, so shortly before the loser in a Federal unfair labor practice proceeding¹² to include Forma among the 50 percent of the employees, soon to be reduced to about 25 percent, who were given work for a maximum of about a month and a half in November and December until the plant was completely shut down, was occasioned either by her having testified the previous July, as did others, or having passed out leaflets on two occasions the previous August and September. Indeed, upon the facts found in this case, it appears to me that Forma's failure to return to her job as early as some others after the November shutdown was due primarily to her lack of seniority and less than superior productiveness, causes entirely unrelated to management conduct the Act interferes with or protests.

But straining at a gnat, one bids us swallow a camel. Likely tongue in cheek, there is declaimed the thesis that because of the evidence of remote events for which Respondent was once taken to task, there is warrant for finding here that the resigned and known antiunion Hillicoss and the less than fully efficient Forma were victims of unlawful discrimination.¹³

¹¹ During the course of the hearing the work situation of 23 other female employees, Alyce Burke, Kathrine German, Florence Hunt, Evelyn Ondrek, Leta Pagne, Ellen Potter, Alice Kirlander, Otrud Boyle, Doris Faoro, Coroleann Lucas, Ethel Ackerman, Josephine and Henrietta Wilk, Edna Goodfellow, Virginia Roe, Ellen J. Kudlack, Eileen Schultzenberger, Eileen Ballou, Estelle Cooper, Mary Scott, Anna Hillicoss (not the claimant in this case), Martha Starr, and Alice de Francisco were the subject of inquiry. The evidence adduced covering these 23, although resourcefully labored by the General Counsel, was unpersuasive of indication that the treatment accorded by any of them, vis-a-vis that received by either Hillicoss or Forma, should lead to a conclusion that the 2 latter were objects of unlawful discrimination.

¹² IR-294 was issued September 8, 1960.

¹³ It appears probable from the tone of the General Counsel's statement on April 7, 1960, that ". . . the amount of backpay remedy to Forma may be small," and McQuillen's undenied testimony that on November 4, 1960, she was told that as soon as business picked up she would be called back that Forma returned, or could have returned, to work among others in substantially regular order.

Without reiterating the facts, it seems to me it should be evident to anyone acquainted with them—as well as to those whose unhappy lot the ever exasperating footnotes become required reading—that they do not make out a case. Nor can one reasonably, I believe, recommend by means of a process of boosting, bootstrapping, bolstering, and borrowing from 130 NLRB 1356, that a second restraining or constraining order should issue. Sufficient unto *that* case is the evil thereof.

The way to industrial peace and prosperity is not found paved with litigious stumbling blocks on suspicion of malign intent whenever an already chastened employer, once called to account for having slipped over the metes and bounds of fair practice, thereafter exercises his legitimate managerial prerogatives.

CONCLUSIONS OF LAW.

Respondent, an employer engaged in commerce within the meaning of the Act, has not engaged in conduct in violation of Section 8(a)(3), (4), or (1) of the Act.

[Recommendations omitted from publication.]

Avis Rent-a-Car System, Inc.¹ and Auto Transportation, New Trailer & Armored Car Drivers, Garagemen, Gas Station & Parking Lot Operators Union, Local No. 964, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Petitioner. Case No. 8-RC-4263. August 21, 1961

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed, a hearing was held before a hearing officer of the National Labor Relations Board. His rulings made at the hearing are free from prejudicial error and are affirmed.

Pursuant to Section 3(b) of the National Labor Relations Act, the Board has delegated its powers herein to a three-member panel [Members Leedom, Fanning, and Brown].

Upon the entire record, the Board finds:

1. The Employer is engaged in commerce within the meaning of the Act.
2. The labor organization named below claims to represent certain employees of the Employer.
3. A question affecting commerce exists concerning the representation of certain employees of the Employer within Section 9(c)(1) and Section 2(6) and (7) of the Act.
4. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within Section 9(b) of the Act:

All garage employees, including garagemen, mechanics, mechanics helpers, lotmen, lubrication men, tiremen, and gasmen, at the Employer's Cleveland, Ohio, truck rental agency, excluding all rental

¹ The name of the Employer appears as amended at the hearing.