

3. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of 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 cable service repairmen² employed by the Employer at its Lewistown, Montana, operation, excluding office clerical employees, professional employees, guards, and supervisors as defined in the Act.

[Text of Direction of Election omitted from publication.]

MEMBER RODGERS took no part in the consideration of the above Decision and Direction of Election.

stated at the hearing that these companies have "a very, very close interrelated working arrangement, and, in fact, are managed and operated by the same personnel."

Upon the entire record, we find that the Employer and other companies mentioned above constitute a single employer under the Act and that their combined volume of business satisfies the communications systems standard adopted in *Raritan Valley Broadcasting Company, Inc.*, 122 NLRB 90, which is applicable herein. The assertion of jurisdiction over the Employer is therefore warranted. Cf. *Warren Television Corporation*, 128 NLRB 1, where the employer's operation did not include a microwave transmission system.

² Petitioner seeks a unit of cable service repairmen employed by the Employer. The Employer would broaden the scope of this unit as indicated above. However, the Employer and Livingston alone regularly employ cable service repairmen. The Employer is located about 130 miles from Livingston. It has its own manager who hires employees and directs them in their work. Such interchange as takes place between it and Livingston occurs mainly in emergency situations. Under all the circumstances, we find the proposed unit to be an appropriate one

A. E. Schultz Fuel Co., Inc., and Midwest Bulk, Inc. and Marvin Rochon. *Case No. 13-CA-3973. November 22, 1961*

DECISION AND ORDER

On June 16, 1961, Trial Examiner Eugene E. Dixon issued his Intermediate Report in the above-entitled proceeding, finding that the Respondents had engaged in and were engaging in certain unfair labor practices and recommending that they cease and desist therefrom and take certain affirmative action, as set forth in the Intermediate Report attached hereto. Thereafter, the Respondents filed exceptions to the Intermediate Report, and the General Counsel filed a brief in support of the Intermediate Report.

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 McCulloch and Members Leedom 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 the brief, and the entire record in the case, and hereby adopts the Trial Examiner's findings, conclusions, and recommendations.¹

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 Respondents, A. E. Schultz Fuel Co., Inc., and Midwest Bulk, Inc., their officers, agents, successors, and assigns, shall :-

1. Cease and desist from :

(a) Discouraging membership in General Drivers and Dairy Employees Local Union 563, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, or in any other labor organization of its employees, by discharging, refusing to reinstate, or in any other manner discriminating in regard to their hire or tenure of employment or any term or condition of employment.

(b) Discharging or otherwise discriminating against any employee because he has given testimony under the Act.

(c) In any other manner interfering with, restraining, or coercing employees in the exercise of their right to self-organization, to form labor organizations, to join or assist the above-named or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in any other 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.

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

(a) Offer to Marvin Rochon immediate and full reinstatement to his former or substantially equivalent position and make him whole for any loss of earnings suffered in the manner set forth in the section of the Intermediate Report entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social

¹ As background to this case, the Trial Examiner refers to an earlier case in which he found that Respondents had violated Section 8(a)(1) and (3) of the Act and recommended the usual remedial order for such violations. Subsequent to the issuance of the Intermediate Report herein, the Board adopted *in toto* the Trial Examiner's findings, conclusions, and recommendations in the earlier case. See *A. E. Schultz Fuel Co., Inc and Midwest Bulk, Inc.*, 132 NLRB 702.

security payment records, timecards, personnel records and reports, and all other records necessary to or convenient for a computation of the amount of backpay due under the terms of this Order.

(c) Post at their plant in Neenah, Wisconsin, copies of the notices attached hereto marked "Appendix."² Copies of said notice, to be furnished by the Regional Director for the Thirteenth Region, shall, after being duly signed by each of the Respondents, be posted by them immediately upon receipt thereof, and be maintained for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondents to insure that such notices are not altered, defaced, or covered by any other material.

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

²In 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, as amended, we hereby notify our employees that:

WE WILL NOT discourage membership in General Drivers and Dairy Employees Local Union 563, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, or any other labor organization, by discharging any of our employees because of their concerted or union activities, or in any other manner discriminating in regard to their hire or tenure of employment or any term or condition of employment.

WE WILL NOT discharge or otherwise discriminate against our employees because they have given testimony under the National Labor Relations Act, as amended.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form, join, or assist the above-named or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activity, 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 Marvin Rochon immediate and full 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 our employees are free to become, remain, or refrain from becoming members of the above-named or any other labor organization, except to the extent that this 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.

A. E. SCHULTZ FUEL CO., INC.,
Employer.
MIDWEST BULK, INC.,
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 on December 15, 1960, by Marvin Rochon, an individual, a representative of the General Counsel of the National Labor Relations Board, herein called the General Counsel and the Board, issued a complaint signed by the Board's Regional Director for the Thirteenth Region (Chicago, Illinois), alleging that A. E. Schultz Fuel Co., Inc., and Midwest Bulk, Inc., of Neenah, Wisconsin, herein called the Respondent, had committed unfair labor practices within the meaning of Section 8(a)(1), (3), and (4) of the National Labor Relations Act, as amended (61 Stat. 136), herein called the Act.

The complaint alleged that Respondent discharged Marvin Rochon on December 9, 1960, because he engaged in union or concerted activities for the purpose of collective bargaining or mutual aid or protection and because "said employee filed charges or gave testimony under the Act." In its answer Respondent denied any violations of the Act.

Pursuant to due notice, a hearing was held on the matter before the duly designated Trial Examiner from March 14 through 16, 1961, inclusive, at Neenah, Wisconsin. All parties were afforded full opportunity to participate in the hearing, to be heard, to examine and cross-examine witnesses, and to introduce relevant evidence. Although time was extended on behalf of Respondent for the filing of briefs, only the General Counsel availed himself of the opportunity of filing a brief.

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

FINDINGS OF FACT

I. RESPONDENT'S BUSINESS

It is admitted, and I find, that Respondent Schultz and Respondent Midwest are and at all times material herein have been operated as a single integrated enterprise, and will be referred to herein in the singular. Respondent operates as a corporate entity duly organized under the laws of the State of Wisconsin and has been engaged in the business of the wholesale and retail sale, distribution, and transport of coal and fuel oil with principal offices and place of business at Neenah, Wisconsin.

In the course and conduct of its business operations during the calendar year 1960, Respondent purchased, transferred, and received, all within the State of Wisconsin, coal and fuel oil and other goods and materials valued in excess of \$100,000, which goods and materials originated from States other than the State of Wisconsin. During the same period, Respondent in the course and conduct of its business operations sold and distributed products within the State of Wisconsin, the gross value of which exceeded \$800,000. Of these goods, in excess of \$100,000 worth were sold to firms, each of which in turn during the same period sold and shipped goods outside the State of Wisconsin valued in excess of \$50,000. I find that Respondent is, and has been at all times material herein, engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION ¹

General Drivers and Dairy Employees Local Union 563, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, is, and at all times material herein has been, a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

The Previous Proceeding and Issue Herein

On July 6 and 7, 1960, I conducted a hearing in another proceeding by the General Counsel against the Respondent herein in which it was alleged that Respondent had engaged in unfair labor practices within the meaning of Section 8(a)(1), (3), and (5) of the Act.² During that hearing, Marvin Rochon, one of Respondent's employees, was called as a witness by the General Counsel and gave testimony damaging to the Respondent. On December 9, 1960, Respondent discharged Rochon. The General Counsel contends that the discharge was because of Rochon's union activity and because of the charges filed in the first matter and because of Rochon's testimony therein. The Respondent contends that Rochon was discharged for cause.

The General Counsel's Case-in-Chief

To show "the spirit of vengefulness and retribution" which characterized Respondent's attitude toward the employees who participated on behalf of the General Counsel in the previous hearing, the General Counsel adduced evidence showing that immediately after that hearing Respondent discontinued various privileges and services it had up to then been affording its employees. Thus, the undenied and credited evidence shows that the employees were no longer permitted to work in Respondent's garage on their own cars or to wash them, to obtain automotive parts at wholesale prices, to be paid for extra work on Respondent's trucks and to be accorded certain laundry services as a personal accommodation. Not only was most of the above shown in the testimony of Respondent's president, Clifton A. Schultz, but the latter admitted in effect that Respondent's action in this connection was motivated in part by the employees' testimony in the prior hearing.

Besides the foregoing curtailment of privileges by Respondent because of the employees' participation in the original hearing,³ the General Counsel in his credited and largely undenied evidence showed several other examples of what he claims were similarly motivated discriminations against the employees. Most of these were directed against Rochon. Among them were the following:

1. Robert Babcock testified in the first hearing. He also testified in the hearing herein that he had previously alternated with four other drivers on Sunday work and was eliminated from such assignments less than 2 weeks after the hearing. He was

¹ Although no labor organization is alleged in the complaint, I make this finding on the basis of the record made before me in a previous case involving the Respondent in which the hearing therein and the above Union play a part in the case at bar.

² In my Intermediate Report (132 NLRB 702) I found that Respondent had interfered with the rights of the employees guaranteed in the Act by threatening them with economic reprisals and promising them benefits in connection with the exercise of the rights guaranteed them in the Act. I also found that Respondent had discriminated against its employees by the discharge of one Herman Knoll for engaging in union activities. As to these violations of Section 8(a)(1) and (3) of the Act, I recommended the usual remedial order. I further found that Respondent had not violated Section 8(a)(5) of the Act and recommended dismissal of that allegation of the complaint.

³ Because frequent references will be made to that hearing, I will refer to it henceforth simply as "the hearing."

not restored to such work until about 5 months later. This restoration occurred after he had a talk with Schultz in which he told Schultz in substance that he was all through supporting the Union because he could not afford to do it.

2. Prior to the hearing Rochon had worked from 7 a.m. to as late as his duties required, often putting in considerable overtime. In the week following the hearing, however, he was told to start at 8 a.m. and not to work past 5 p.m.⁴ As a result, during the period from July 8 to December 9, 1960, he worked 93¼ less hours than he did in the corresponding period for 1959.

3. Prior to the hearing, Rochon was never sent home before the end of his normal shift unless he so requested. After the hearing this occurred several times, one occasion being on August 29. At noon on that day, he had asked Schultz if he should start unloading coal or work in the yard. Schultz told him to "go on home, I ain't got a damn thing for you to do." Actually he had a 700-gallon oil delivery to make to Hoerning's Concrete Products Company. It was his own agreement with Hoerning's that to avoid interfering with their operations he would never make deliveries there until after 4 p.m. or else on Saturdays. When he came to work on the following day, he was instructed by Spencer Laurin, Respondent's general manager, to make the delivery to Hoerning's because they were "just about out of oil" and should have been supplied the previous day.

4. On June 30 Rochon received a ticket for a moving traffic violation with Respondent's truck and prior to the unfair labor practice hearing had asked Schultz for the use of the truck's tachograph,⁵ which would be useful in court in his defense. Schultz indicated that it was a good idea and that Rochon was welcome to use it. About 2 weeks later, after Rochon had testified in the hearing, he asked Laurin for the tachograph and was told he could not have it. Later the same day Rochon again asked Laurin for the tachograph and this time was told by Laurin that it had been destroyed. Rochon further testified that from his observation, Respondent kept the tachographs about a month hanging on nails in Schultz' office. Schultz testified both that the tachographs were kept for "a couple of days" and that he disposed of them the same day that he got them. Laurin's testimony was that they were kept for "approximately a half hour."

5. Although in previous years Rochon had always been given time off to go deer hunting, during the 1960 season he was denied such permission. He had asked Laurin for hunting leave about a month prior to the deer season but had had no reply. When he repeated his request to Laurin some 2 weeks later, the latter said, ". . . the way things look around here you are going to lose all your privileges. . . . The boss was highly discouraged with you guys for what you pulled on him."⁶ By November 18, two of the other drivers, Donald Gore and Elmer Hansen, had already received permission to take some time for deer hunting. On that date, when Rochon again asked Laurin if he was going to be able to get off the next day to hunt, Laurin told him that he was not because there were some fuel orders and some coal to deliver. When Rochon offered to deliver them that night, Laurin said, "I told you to be here at 8:00 o'clock tomorrow morning." When Rochon remonstrated that he had already made his arrangements to go, Laurin said "that's tough s——."

On November 28, 1960, Rochon was given the following letter:

To: Marvin Rochon.

From: A. E. Schultz Fuel Co., Inc., and Midwest Bulk Inc.

You are hereby being notified of the following unsatisfactory work and behavior on your part and that any repetition of the following will mean a permanent discharge for you, from these Companies.

- | | |
|--------------------------|-----------------------------------|
| 1. Customer Complaint | 6. Carelessness |
| 2. Discourtesy | 7. Carelessness with Equipment |
| 3. Gross Insubordination | 8. Quality of work |
| 4. Lack of Cooperation | 9. Failure to follow instructions |
| 5. Wasting Time | |

⁴ His coworker, Elmer Hansen, was also instructed at this time to start at 8 a.m. But at Hansen's request, he was permitted to continue a 7 o'clock starting time. A similar request by Rochon, however, was turned down with the result that he was the only one of the drivers required to start work at 8 a.m.

⁵ Respondent's trucks are equipped with tachometers which make continuous records of the operations of the trucks, enabling Respondent to check such things as speed of operation and length of stops.

⁶ Of this entire incident, as testified to by Rochon, this comment was the only part denied in Laurin's testimony.

Explanation

No. 1—On or about August 13, 1960 discourtesy was shown to Richard Natrop, when questioned about the oil being spilled at Natrop's Store.

No. 2—Same as No. 1.

No. 3—On or about July 8, 1960, you were instructed to do certain work which was not done. Grease trucks, clean garage, etc.

No. 4—On or about July 21, 1960, you were instructed to break down your time, which you didn't.

No. 5—On or about July 21, 1960, you were instructed to help George Nelson to fix a tire, when Spencer Laurin arrived he found you standing and watching.

No. 6—On or about the 18th of September 1960 and on several other occasions, Spencer Laurin found the pump house open which is supposed to be locked by you.

No. 7—On or about the 19th of November 1960, the oil truck was found with leaking valves, and a mess in the back compartment with oily rags strewn all over, which was found by C. A. Shultz.

No. 8—On or about the 19th of November 1960, C. A. Schultz found several fill caps on oil tanks belonging to our customers, with loose fill caps.

No. 9—Same as 3 and 4 and 5 and 6.

C. A. SCHULTZ, *President*.

On December 9, according to Rochon's testimony, he was told by Laurin to measure the diesel tank located near the entrance to the office. After telling Laurin what the measurement showed, the latter checked his chart and told Rochon that it would take between 450 and 550 gallons.⁷ Rochon then set his truck meter at 550 gallons and started to fill the tank. As soon as he heard the tank beginning to fill up he attempted to shut off the nozzle. Finding that it would not release he ran back to the truck and shut off the meter. He was too late, however, to prevent some overflow from the tank. As he was reeling up the hose Laurin came by and asked him what happened. He told Laurin the oil had run over because the nozzle had failed to "kick out." Laurin told him to clean it up which he proceeded to do with the use of wood shavings from the garage. At no time did Laurin "severely reprimand" him nor indicate that he would be discharged because of the matter.

After cleaning up the oil spillage at the office that day, Rochon went about his other duties. Returning from his deliveries somewhat after 5 p.m., he found the following letter together with his pay envelope at the garage:

To: Marvin Rochon.

28 NOVEMBER 1960.

From: A. E. Schultz Fuel Co., Inc., and Midwest Bulk Inc.

On the 28th of November, 1960, you were notified that any repetition of the unsatisfactory work and behavior as listed would result in a permanent discharge for you from the Companies named above.

You are hereby notified that you have been discharged as of 5 o'clock of December 9, 1960, for the following reasons;

Repetition of No. 1, No. 3, No. 6, No. 8, No. 9, of the notification of the 28th of November 1960.

C. A. SCHULTZ, *President*.

In addition to the foregoing, it appears from Laurin's admission on cross-examination that it was only after the hearing that Respondent began keeping "more detailed" records of its employees' derelictions.⁸ Similarly, although the employees had always had timecards to fill out, it was only after the hearing that they were required "to fill in their timecards with a detailed breakdown of time spent on specific work."

Respondent's Case-in-Chief

Laurin testified regarding the following reprimands he had given to Rochon:

1. Rochon was warned on about July 2 about having let his wife ride on one occasion in his truck.

⁷ The measurement is made by noting the level of oil on a stick placed in the tank Laurin in his testimony denied that Rochon made any measurement of the tank or that he was told what it should take

⁸ Schultz testified that Respondent began keeping such records sometime before July 8 but could not recall the date, maintaining only that it had been done for "about a year" Laurin also testified that he believed such records were started before July 8, 1960, but did not say how long before. In any event, all of the matters relied upon by Respondent as the basis for Rochon's written warning of November 28 had occurred on or after July 8, 1960

2. On July 8 he had been instructed to grease some trucks, clean the garage, and stack some additives. Just what part of the above Rochon did not do does not clearly appear in Laurin's testimony but it would appear that no trucks were greased.⁹

3. On July 21 Rochon was warned for not breaking down his time. He had been similarly reprimanded several times prior to July 8 according to Laurin.¹⁰

4. On July 27 Rochon was sent home for failure to help another employee with a flat tire as he had been ordered.

5. On August 6 he was reprimanded for coming in late.

6. On about September 18 he was reprimanded for leaving the pumphouse unlocked. According to Laurin, he had on other occasions reprimanded Rochon for the same thing at least one of which times was before July 8. On the September 18 matter, it was late at night when Laurin found the pumphouse unlocked. He immediately called Rochon and told him he had "found the pump house open again." Rochon said that he had locked it. Laurin told Rochon "he'd better get down here and lock it." Rochon asked if he would be paid for doing so and Laurin said, "No." Rochon did not come down and Laurin locked it himself.

7. On October 18 Rochon was reprimanded for denting the back chute of an aluminum trailer.

8. On November 1 Rochon was reprimanded because of a customer's complaint about spilled oil.

9. On November 11 he was again "talked to" about oil spillage at a customer's premises.

Schultz testified that he made oil deliveries with Rochon's truck on November 19 replacing Rochon who had broken his glasses and could not work until they were repaired. On this occasion Schultz found the back end of Rochon's truck "one of the biggest messes" he had ever seen. There was oil, oily rags, wrenches, and pipes laying all over. It was so bad that he had to close the covers in the back end to hide the embarrassing mess from public view. It was on the deliveries he made at this time that he first discovered that Rochon in many instances was not properly tightening the fill caps on the customers' oil supply pipes.¹¹

Richard Natrop, Respondent's sales manager and also an oil customer, testified that on August 13 Rochon had spilled some oil at Natrop's home. In the office that afternoon when he told Rochon, "Gee, Marv, that's a heck of a mess back there," Rochon "just kind of shrugged his shoulders" and said, "Yah, well that's too bad" and walked out into the garage. Natrop said nothing about the matter to Schultz, but the office girl did.¹² According to Schultz' further testimony about the matter, he "wanted to get to the bottom of the thing" so he got Natrop and went back to talk to Rochon about it. Rochon at first denied that he had spilled any oil then admitted it. Schultz said, "Marv, if you are doing this to Mr. Natrop, I wonder what you are doing to the rest of our customers?" Rochon shrugged his shoulders. Schultz made it clear in no uncertain terms that he "didn't want to see it ever happen again."¹³

When Schultz had seen the overflow oil in front of the office on December 9, according to his testimony, he asked Laurin what happened. Laurin told him that he did not know, that he thought Rochon had been sitting in the truck not watching the fill pipe.¹⁴ Schultz thereupon sent Laurin out "to make a random selection of the customers serviced by Mr. Rochon and check to see if they had loose fill caps and spillage of oil." According to Laurin's testimony he did as ordered and found

⁹ Laurin admitted that the additives had been stacked. He further testified that he did not "believe the whole garage was cleaned," leaving the implication that at least part of it had been cleaned. He also admitted that it was Rochon's responsibility along with Hansen, the other domestic driver, to clean up the yard and the garage. On the occasion in question Rochon had weeded the flowerbeds in front of the office trying to "get that looking half way decent."

¹⁰ This is obviously inconsistent with Laurin's testimony elsewhere that it was not until after July 8 that the employees were required to break down their time.

¹¹ "Fill caps" was a term used to describe the cap or cover of the end of the supply pipe. Some are screw types that tighten with a wrench and some are clip types that are simply snapped shut and apparently may also be locked. The importance of having them closed in such a way as to prevent vandalism is obvious.

¹² The office girl did not testify.

¹³ Schultz did not deny Rochon's testimony that Schultz told him on this occasion, "Listen you little _____, if this ever happens again, I will kick your ass until your nose bleeds."

¹⁴ This was in direct conflict with Laurin's testimony which was that he told Schultz that Rochon had told him the nozzle would not "kick out." Laurin also testified that no attempt was made to check whether or not the nozzle was faulty.

four customers who had loose fill caps and/or oil spillage. On reporting this to Schultz it was decided by them to discharge Rochon.

In his testimony, Rochon denied many of the accusations leveled at him or gave plausible explanations (if credited) as to what actually occurred.¹⁵

From the testimony of Respondent's witnesses the following facts regarding the above matters appear:

1. Other drivers have in the past had their wives or members of their families ride with them in Respondent's trucks "with permission." To Respondent's knowledge, on no occasion after his reprimand about it did Rochon have any unauthorized riders in his truck.

2. The tire helping incident. When Laurin arrived at the disabled truck on Main Street in Neenah, everything had been done regarding the tire changing and all that remained was "just finishing tightening the wheel." This was being done by Nelson as Rochon stood by.¹⁶ On this basis Laurin sent Rochon home with the comment that "if he didn't want to work, he should go home."

3. The dent in the aluminum trailer. Respondent has two aluminum trailers used for hauling coal. Only one is operated at a time, the other apparently being held in reserve. The trucks are operated both day and night, the night work involving the transportation of coal from Green Bay to the Neenah area.

In his testimony Laurin could not say when the dent in the trailer occurred other than that Schultz called his attention to it on October 19, the day after Rochon had been using it. It was Laurin's position that if it had occurred before the 18th "It would have been noticed" sooner. Laurin at first testified that Rochon was the only one who drove the truck on the 18th. He later testified that he did not "believe" anyone else drove it that day or could have driven it. He also finally admitted that he did not know if the truck had been used the night before Rochon drove it. When he talked to Rochon about the dent, the latter denied that he had done it. On this basis, without asking anyone else about the matter and making no further investigation Laurin tagged Rochon as the guilty one.

4. Access to the pumphouse was had by the oil drivers, both semitrailer and local. Primarily these were Babcock and Rochon but others may occasionally have had such access. Laurin testified that on September 18 when he called Rochon about the unlocked pumphouse, Babcock had worked a full day but Laurin was unable to say whether or not Rochon had left before Babcock. On this basis and in the face of Rochon's denial, Laurin attributed the failure to lock the pumphouse to Rochon.

5. Schultz' testimony that there was oil on the back end of Rochon's truck tends to corroborate Rochon's testimony that he had a leaky fill line nozzle and that he kept a bunch of rags in the back to stuff in the nozzle and to sop up the leaking oil. I find this to be the fact as well as Rochon's additional undenied testimony that he had informed Laurin of the leaky nozzle but that he never got the replacement parts Laurin had promised to get.

Conclusions

Considering the inconsistencies in Respondent's evidence and admissions of Schultz that the participation of the employees in the hearing motivated a curtailment by Respondent of employee privileges which, as the General Counsel contends, indicates a "spirit of vengefulness and retribution" toward the employees for that participation, I have no difficulty, in the light of the entire record and Respondent's actions toward Rochon, in finding that Rochon was discharged because of the part he played in the hearing. In doing this I rely almost entirely on the testimony of Respondent's witnesses and deem it unnecessary to weigh and decide many of the foregoing (and some unmentioned) conflicts between Rochon's version of what happened and Respondent's.

The flimsy basis of many of the accusations against Rochon (as particularly exemplified by the tire helping and trailer denting incidents), the lack of investigation, and the apparent eagerness with which Laurin acted on them clearly bespeak of an ulterior motive. And the patently clumsy attempt of Respondent with its warning letter of November 28 and its discharge letter of December 9, by the use of repetition and terminology,¹⁷ to multiply single incidents into multiple complaints tends,

¹⁵ Some of these denials were admitted by Laurin to have been made to him by Rochon at the time.

¹⁶ On direct examination Laurin testified that there were a number of things Rochon could have been doing at this time such as, "Getting the rim that was busted, getting it on the pickup, tightening the lug bolts, letting the truck down . . ." On cross-examination, however, he was unable to recall whether Rochon put his tools back in the pickup or loaded the flat tire into it before he got into it and returned to the garage.

¹⁷ As admitted in the testimony of both Schultz and Laurin.

with other evidence, to show what that motive was. An important part of the other illuminating evidence was the starting of a record of employee transgressions which, notwithstanding Respondent's attempt to show otherwise, I find did not start until after the hearing.¹⁸ These things, among others in the record as a whole,¹⁹ convince me that because of Rochon's part in the hearing Respondent was determined to eliminate him as an employee and to this end began keeping a dossier on him of ostensible cause to mask its illegal motive for such action. Cf. *Gulf Bottlers, Inc.*, 127 NLRB 850, 873.

In reaching this conclusion I do not mean to imply that I feel Rochon was necessarily an exemplary employee or that none of the complaints against him had merit or that Respondent was not sincerely irked by some of them. Nor do I mean to substitute my judgment for Respondent's in the matter of how it is to appraise and evaluate its employees' services. What I am saying is simply that the evidence to me does not indicate a genuine concern with Rochon's performance as such. What it does indicate to me was an attempt to take what for the most part were normal, day-to-day, employee frailties²⁰ and magnify them into a justification for Rochon's discharge in retribution for his participation in the hearing. That Respondent had an inclination for such retribution was frankly admitted by Schultz.

In this connection a look at Rochon's record and Respondent's attitude toward its employees in general is enlightening. Rochon had worked for Respondent for more than 4 years, over 3½ of which apparently were satisfactory and acceptable to Respondent.²¹ That this satisfactory record should have been completely reversed in a few months' time seems incredible. Even more incredible, in my opinion, is Respondent's attempt to show that Rochon was an unacceptable employee during his entire 4 years of employment.²² The fallacy of such a position for Respondent is that if such were the fact and Respondent had put up with Rochon for years and did not find it necessary to discharge him until a time when an attempt was made to organize Respondent's employees and he gave damaging testimony against Respondent on matters connected with the Union, it would seem that his discharge must have had some vital connection with those matters.

I have one other observation to make. Schultz testified that one of the "primary reasons" for Rochon's discharge was his oil spillage on December 9. Whatever favorable inference Respondent might claim regarding the effect of the combined seriousness and spontaneity of that incident²³ on its action is lost, in my opinion, by having sent Laurin out to look for further aberrations by Rochon.

On the basis of the foregoing, I find that Respondent discharged Rochon, and has failed and refused to reinstate him because he gave testimony in the prior hearing, a proceeding arising out of charges filed by the Union, thereby violating Section 8(a)(4) of the Act. I further find that by so doing Respondent thereby discouraged membership in a labor organization within the meaning of Section 8(a)(3) of the Act and interfered with, restrained, and coerced its employees in the exercise of rights guaranteed in the Act in violation of Section 8(a)(1) thereof. *The Sandy Hill Iron & Brass Works*, 69 NLRB 355, 378, enfd. 165 F. 2d 660 (C.A. 2).

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 set forth in section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the

¹⁸ The fact that none of the matters covered in the letters occurred before the hearing tends to show this as well as Respondent's failure to offer in evidence any such records made before the hearing.

¹⁹ Respondent's explanation of some of its conduct toward Rochon was inconsistent with the facts. For example, Rochon's 8 o'clock starting time was explained by Respondent as due to the summer season slackness. But Rochon was continued on that schedule up to the time he was discharged—well into the busy season.

²⁰ That Schultz is generally sophisticated and tolerant regarding employee shortcomings is evidenced by his testimony that his employees lie to him about matters pertaining to their work which fact Schultz apparently accepts philosophically on the basis that everyone lies occasionally—even he as he admitted on the stand.

²¹ Respondent's attempt to show otherwise is controverted by its providing makework for its employees, including Rochon, during the slack summer seasons and by Schultz' testimony that if an employee were not satisfactory he would not provide such employment and would seize upon slack business as an opportunity to eliminate such an employee.

²² Laurin testified essentially to that effect.

²³ Respondent estimated that 25 or 30 gallons had been spilled

several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

I have found that Respondent discharged Marvin Rochon because he gave testimony under the Act in a proceeding arising out of charges filed by the Union, thereby violating Section 8(a)(3) and (4) of the Act. Accordingly, I shall recommend that Respondent be ordered to reinstate Rochon to the position that he would have occupied but for the Respondent's discrimination against him, or to a substantially equivalent position, without prejudice to his seniority and other rights and privileges. I shall also recommend that Respondent be ordered to make Rochon whole for any loss of pay that he may have suffered because of the Respondent's discrimination against him, by payment to him of a sum of money equal to the amount he normally would have earned as wages from date of such discrimination to the date of the offer of reinstatement, less his net earnings. *F. W. Woolworth Company*, 90 NLRB 289.²⁴

In view of the violations herein and the violations previously found by me against Respondent, it is apparent that the commission of other unfair labor practices by Respondent may reasonably be anticipated by its past conduct and that the preventive purposes of the Act may be thwarted unless the recommendations herein are coextensive with the threat. To effectuate the policies of the Act, therefore, it will be recommended that the Respondent cease and desist from infringing in any manner on the rights guaranteed employees in the Act.

Upon the basis of the foregoing findings of fact, and upon the entire record in this proceeding, I make the following:

CONCLUSIONS OF LAW

1. General Drivers and Dairy Employees Local Union 563, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

2. By discriminating in regard to the hire and tenure of employment of Marvin Rochon, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(3) and (4) of the Act.

3. By interfering with, restraining, and coercing its employees in the exercise of rights guaranteed in Section 7 of the Act, Respondent has engaged in and is 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 affecting commerce within the meaning of Section 2(6) and (7) of the Act.

[Recommendations omitted from publication.]

²⁴ There is additional evidence in the record herein of discrimination by Respondent against his employees because of their testimony in the proceeding in question. Since these were not alleged in the complaint nor claimed by the General Counsel as additional violations of the Act, I shall recommend no affirmative order regarding them and will rely on the cease and desist portion of the order herein to remedy such violations.

**International Brotherhood of Electrical Workers, Local 861,
AFL-CIO and Cleveland Construction Corp.**

**International Brotherhood of Electrical Workers, Local 861,
AFL-CIO and Elco Electric, Inc. Cases Nos. 15-CC-129 and
15-CC-130. November 22, 1961**

DECISION AND ORDER

Upon charges and amended charges duly filed by Cleveland Construction Corp., herein called Cleveland, and Elco Electric, Inc.,
134 NLRB No. 62.