

Thomas J. Aycock, Jr., an individual, d/b/a Vita Foods and Truckdrivers, Warehousemen & Helpers Local Union No. 512, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case No. 12-CA-2001. February 28, 1962

DECISION AND ORDER

On November 13, 1961, Trial Examiner A. Bruce Hunt issued his Intermediate Report in the above-entitled proceeding, finding that 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 Intermediate Report attached hereto. He further found that the Respondent had not engaged in certain other unfair labor practices alleged in the complaint and recommended that such allegations be dismissed. Thereafter the Respondent filed exceptions to the Intermediate Report and a supporting brief.

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 briefs, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, with the following addition.

In adopting the Trial Examiner's finding that Respondent violated Section 8(a)(4), (3), and (1) by transferring John Mathis to a less desirable job, we rely on the fact that Mathis was transferred because he attended a representation case hearing before the Board for the purpose of giving testimony as a union witness, even though he did not in fact give testimony.¹

ORDER

Upon the entire record in this case, and pursuant to Section 10(c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the Respondent, Thomas J. Aycock, Jr., an individual, d/b/a Vita Foods, Jacksonville, Florida, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in Truckdrivers, Warehousemen & Helpers Local Union No. 512, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or in any other labor organization of his employees, by transferring any of his employees from one job to another because of their concerted or union

¹ See *Dal-Tex Optical Company, Inc.*, 131 NLRB 715.

135 NLRB No. 133.

activities, or in any other manner discriminating in regard to their hire or tenure of employment or any term or condition of employment.

(b) Transferring or otherwise discriminating against any employee because he has attended a hearing before the Board for the purpose of giving testimony under the Act.

(c) Interrogating and threatening employees concerning union activities in a manner constituting interference, restraint, or coercion in violation of Section 8(a) (1) of the Act.

(d) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed in Section 7 of the Act.

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

(a) Offer John Mathis immediate and full reinstatement to his job as capping machine operator, or to a substantially equivalent position, without prejudice to his seniority or other rights or privileges, and make him whole for any loss of pay he may have suffered as a result of the Respondent's discrimination against him, in the manner set forth in "The Remedy" section of the Intermediate Report.

(b) 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, as set forth in "The Remedy" section of the Intermediate Report.

(c) Post at his place of business copies of the notice attached hereto marked "Appendix"² Copies of said notice, to be furnished by the Regional Director for the Twelfth Region, shall, after being duly signed by the Respondent, be posted by him immediately upon receipt thereof, and be maintained by him for at least 60 consecutive days thereafter in conspicuous places, including all places where notices to employees customarily are posted. Reasonable steps shall be taken by the Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

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

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges that the Respondent (1) discriminated against John Mathis other than by the transfer to the job of cook's helper, (2) discriminated against Steve Barner in any manner, (3) threatened to discharge Barner because of Barner's appearance at the hearing in Case

² In 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 "

No. 12-RC-1200 (not published in NLRB volumes), and (4) threatened to discharge Lonnie Mitchell because of Mitchell's refusal to indicate whether he had signed a union card.

CHAIRMAN McCULLOCH and MEMBER LEEDOM took no part in the consideration of the above Decision and 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 membership in Truckdrivers, Warehousemen & Helpers Local Union No. 512, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or in any other labor organization of our employees, by transferring any of our employees from one job to another because of their concerted or union activities, or in any other manner discriminate in regard to their hire or tenure of employment or any term or condition of employment.

WE WILL NOT transfer or otherwise discriminate against any employee because he has attended a hearing before the Board for the purpose of giving testimony under the Act.

WE WILL NOT interrogate or threaten our employees concerning union activities in a manner constituting interference, restraint, or coercion in violation of the Act.

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 Truckdrivers, Warehousemen & Helpers Local Union No. 512, or any other labor organization, to bargain collectively through representatives of their own choosing, or to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities.

WE WILL offer John Mathis immediate and full reinstatement to his job as capping machine operator, or to a substantially equivalent position, without prejudice to his seniority or other rights or privileges.

WE WILL make whole John Mathis for any loss of pay he may have suffered as a result of our discrimination against him.

All our employees are free to become or remain, or to refrain from becoming or remaining, members in good standing of Truckdrivers,

Warehousemen & Helpers Local Union No. 512, or any other labor organization.

THOMAS J. AYCOCK, JR., D/B/A VITA FOODS,
Employer.

Dated----- By-----

THOMAS J. AYCOCK, JR.

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

Employees may communicate directly with the Board's Regional Office (112 East Cass Street, Tampa 2, Florida; Telephone Number, Central 6-9660), if they have any question concerning this notice or compliance with its provisions.

INTERMEDIATE REPORT

STATEMENT OF THE CASE

This proceeding involves allegations that the Respondent, Thomas J. Aycock, Jr., an individual, d/b/a Vita Foods, violated Section 8(a)(1), (3), and (4) of the National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519. On July 26, 27, and 28, 1961, I conducted a hearing at Jacksonville, Florida, at which all parties were represented. The Respondent's motions to dismiss the complaint are disposed of in accordance with the determinations below.

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

FINDINGS OF FACT

I. THE RESPONDENT

The Respondent Aycock is engaged at his plant in Jacksonville, Florida, in processing and selling jellies, preserves, juices, salad dressings, and other food products. During 1960, the Respondent purchased goods and materials valued in excess of \$50,000 which were shipped to him directly from points outside the State of Florida. I find that the Respondent is engaged in commerce within the meaning of the Act.

II. THE UNION

Truckdrivers, Warehousemen & Helpers Local Union No. 512, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization which admits to membership employees of the Respondent.

III. THE UNFAIR LABOR PRACTICES

A. *The issues*

The complaint alleges, and the Respondent denies, that during March and April 1961 the Respondent (1) interrogated and threatened employees concerning whether they had designated the Union to represent them; (2) transferred two employees, John Mathis and Steve Barner, to more arduous and less desirable tasks than they had been performing because they appeared under subpoena at a representation hearing in Case No. 12-RC-1200; (3) threatened Barner with discharge because of his appearance at that hearing; and (4) failed to assign Mathis and Barner to work on a Saturday because of their appearance thereat.

B. *Interrogation of employees*

The Respondent has about 25 employees. During February 1961 organizational activities began. Some of the employees signed union cards. On March 29, William E. Fowler, a representative of the Union, telephoned Respondent Aycock and said that a majority of the employees had designated the Union to represent them. Fowler outlined the Board's procedure in representation cases, and Aycock suggested that such procedure be followed. Fowler asked if Aycock would like to have copies of Fowler's communications to the Board, and Aycock replied in the

affirmative.¹ On the same day, Fowler wrote to Aycock, saying *inter alia* that the Union possessed majority status and asking for a conference on March 31. Fowler enclosed a copy of a letter which he had written that day to the Board's Regional Office concerning a petition for an election.

On March 30, Aycock received Fowler's letter and showed it to John Chancellor, the plant superintendent. Chancellor, as he testified, suggested to Aycock that they "find out for" themselves whether the Union had majority status. Chancellor prepared a typewritten interrogatory for each employee to answer. It read:

I, [name] an employee of Vita Foods, _____ partitioned [sic]
(have or have not)
the [Union] to represent me as my bargaining agent with this company.

(Signature)

On March 31 Chancellor attached the interrogatories to the timecards of the employees. Most employees responded negatively and, insofar as appears, none responded affirmatively. Several declined to answer, and reattached the interrogatories to the timecards. Thereafter Chancellor talked with those employees individually and insisted that they answer. In talking with Mathis, Chancellor asked why he had not answered, and Mathis, who had signed a union card, replied: "No reason." Chancellor gave the interrogatory to Mathis and said that it had to be answered. Later Mathis returned it, still unanswered, and said to Chancellor that it was "unfair the way that" management was "going at it." Chancellor wrote on the interrogatory, "Refused to sign." He wrote like words on the interrogatories of Barner and Lonnie Mitchell who had designated the Union to represent them and who had adhered to their refusals to answer the interrogatories.

Whit Marcus, an employee, cannot read or write. His union card was signed for him by his daughter. When Chancellor spoke to him about his not having answered the interrogatory, he explained that he could not write. Chancellor said to him, "We don't want [the] Union." When Chancellor spoke with Elijah Riley, who had signed a union card, Riley said that he had not answered the interrogatory because he did not know its meaning. Chancellor wrote on it, "Refused to sign," but then erased the words when Riley said that he would answer the interrogatory in order to avoid getting "into trouble." Riley answered the interrogatory in the negative.²

The Respondent, in defending the allegation that Chancellor's interrogatories and oral questions of employees violated Section 8(a)(1), asserts in his brief that the interrogatories were prompted by the Union's demand for recognition and were unaccompanied by coercion. The Respondent relies upon *Blue Flash Express, Inc.*, 109 NLRB 591. For several reasons, however, I believe that the defense is not meritorious. First, *Blue Flash* is inapposite because Chancellor did not assure any employees, with the possible exception of Riley, that they would not be subjected to reprisals for engaging in union activities. *Frank Sullivan and Company*, 133 NLRB 726. Second, *Blue Flash* is inapposite also because Chancellor's inquiries of employees were "not solely undertaken for the purpose of informing the Respondent with respect to whether or not he should deal with the Union." *Frank Sullivan, supra*. When Chancellor and Aycock decided to submit interrogatories to the employees, Aycock knew that the Union's claim of majority status would not be resolved by the interrogatories but, instead, in a representation proceeding initiated by the Union's petition to the Board. Cf. *Lincoln Bearing Company*, 133 NLRB 1069. Third, an employer's right under *Blue Flash* to inquire, in limited circumstances, whether employees have designated a labor organization to represent them is not an unrestricted right to press the inquiry upon employees who prefer to maintain silence. Here Chancellor's insistence that some employees answer the

¹ These findings are based upon Fowler's uncontradicted testimony. Aycock was not a witness.

² The findings concerning the remarks between Chancellor and employees when Chancellor spoke with them individually are based upon the employees' testimony. Chancellor acknowledged having talked with them, having written "Refused to sign" on interrogatories, and having erased those words on Riley's interrogatory. Chancellor testified, however, that he merely asked the employees to sign the interrogatories and that he did not threaten them. With respect to whether Chancellor assured Riley that there would be no reprisal, Riley testified that Chancellor did not tell him that his job would not be affected "one way or another" but that Chancellor did say "something like that." It does not appear from Chancellor's testimony that he gave such assurance to Riley or anyone else.

interrogatories, after those employees already had refused, constituted repeated invalid interrogation. The employees upon whom Chancellor pressed the inquiry constituted only a minority. Other employees, a majority, had answered the interrogatories in the negative and, therefore, there could have been no legitimate reason for Chancellor to inquire further of anyone. In summary, I find that Chancellor's conduct was violative of Section 8(a)(1).

C. Barner's and Mathis' attendance at the hearing in Case No. 12-RC-1200

As recited, on March 29 Fowler wrote to Aycock and to the Board's Regional Office. Fowler's petition for an election was docketed in that office on March 31 and the conference which he had requested with Aycock for the same day was not held.

The hearing in the representation case was set for the afternoon of April 27. Two days or so earlier, Barner and Mathis were subpoenaed as witnesses for the Union. Mathis, upon receipt of his subpoena, asked Chancellor for permission to be absent from work during the afternoon of April 27, saying that he had "some business to take care of." Chancellor granted the request. With respect to Barner, there is a conflict in the testimony concerning whether he also asked Chancellor for permission to be absent and whether Chancellor refused the request. Barner so testified, but Chancellor denied that Barner had asked for such permission. In any event, it is clear that Barner did not tell Chancellor that he had been subpoenaed or that he wished to attend the hearing and, insofar as appears, Chancellor was unaware of the reason why Barner and Mathis wished to be absent from work.

On April 27, about noon, Mathis punched his timecard and left the plant. Barner left too, without punching his card and without telling any superior that he was leaving. Both Barner and Mathis were seen at the hearing by Aycock. After the hearing, Barner did not return to the plant, remaining away for the balance of the day, and Chancellor did not know of his absence until Aycock returned to the plant and informed Chancellor.

D. Mathis' assignment to new duties on April 28

Prior to the hearing in the representation case, Mathis' principal work was to operate the capping machine which automatically puts caps or tops on jars of food as the jars reach the machine on a conveyor belt. Mathis performed that work well and, as Wesley Matthews, the Respondent's general maintenance man, testified for the Respondent, Mathis "is a very good man on" the capping machine. That machine and other devices are powered by steam, and Mathis' additional duties were to fire a boiler in the mornings and to keep it in proper operating condition. On April 28, Chancellor transferred Mathis to a job as cook's helper which required more physical exertion and was performed in less pleasant surroundings than the job of capping machine operator.³ The issue is whether Mathis was transferred because he attended the representation hearing or, as the Respondent contends, because he did not properly perform his duties in connection with the boiler. About 2 months after the transfer, Chancellor offered Mathis a job as a truckdriver, saying that the regular driver had quit and that Chancellor was aware that Mathis did not like the job of cook's helper. Mathis accepted the transfer. There is no issue concerning it. Moreover, at all times material to the date of the hearing herein, Mathis earned \$1 hourly and it does not appear that he suffered a loss of earnings as a result of any change in his duties.

One function which Mathis performed in connection with the boiler was to "blow" it each day, that is, to cause the sediment which had accumulated in the bottom to be blown out of an opening. The heating unit is in the center of the boiler, and the water boils first from the center upward. Usually the boiler is blown each morning after the water in it has been heated sufficiently to build up the necessary pressure of steam but before the water in the bottom has begun to boil and to disturb the sediment. When the pressure has reached the correct point, valves at the bottom of the boiler are opened momentarily to permit the sediment and some water to be discharged.

During early March 1961, according to the Respondent, a practice was begun of having Mathis blow the boiler each morning rather than in the late afternoons. Matthews, the maintenance man, thereafter observed that Mathis was blowing the boiler properly and, upon two or three occasions when Chancellor inquired, Matthews told him that Mathis was doing so. Mathis testified that he performed the

³ The capping machine is located in a relatively clean area on the floor beneath the cooking apparatus. A cook's helper handles heavy drums of juices and bags of sugar, and he works in high temperatures which are attributable partly to the cooking apparatus and steam.

function daily except on April 28 and that he was transferred that morning before there was sufficient steam for the blow operation. The Respondent asserts, however, that during late April Mathis twice neglected to blow the boiler, as a consequence of which Mathis was transferred to the job of cook's helper on April 28. The weakness of this assertion is that the Respondent's two witnesses on the matter, Chancellor and Matthews, gave substantially dissimilar testimony. According to Chancellor, on April 27 he asked Matthews about Mathis' attention to the boiler, to which Matthews replied that Mathis had not blown it on April 26, and Chancellor told Matthews to check again the following morning and report to Chancellor. Chancellor testified further that on April 28 Matthews reported that the boiler had not been blown that morning, that Chancellor in turn told Aycock, that Aycock directed Chancellor to put someone else in Mathis' job, and that Chancellor told Mathis and Monroe Johnson to exchange jobs. Thus, according to Chancellor, Matthews reported to him that Mathis had neglected to blow the boiler on April 26 and 28. Matthews' testimony differs. He testified that on April 27 Chancellor asked him whether the boiler had been blown on that day, that he answered in the negative, that on April 28 Chancellor inquired again, and that he answered that Mathis had not blown the boiler on that day either. With respect to Mathis' alleged failure to perform the operation on April 27, Matthews testified that upon his observing that the boiler had not been blown, he inquired of employees concerning Mathis' whereabouts and was informed that Mathis had not come to work that day and that another employee, Henry Martin, had lit the burners. When, however, it was pointed out to Matthews that Mathis had worked that morning and was off work that afternoon, Matthews testified that his inquiry concerning Mathis' whereabouts was answered by Johnson who had said "something about a pipe leaking in the kitchen." During Mathis' absence that afternoon to attend the representation hearing, Matthews operated the capping machine and, according to his testimony, he blew the boiler at the end of the working day. Matthews did not testify whether, in telling Chancellor that Mathis had not blown the boiler on April 28, he also told Chancellor that he, Matthews, had blown it the evening before.

I cannot credit the Respondent's explanation for having transferred Mathis on April 28. First, Mathis' time was spent mainly in operating the capping machine at which he was quite capable. He spent considerably less time in attending the boiler, and his work in this respect was satisfactory until April 26 by the Respondent's own testimony. Second, the Respondent's testimony concerning Mathis' alleged failure to blow the boiler on April 26 or 27 is conflicting and unpersuasive. It also is contradicted by Mathis who had not neglected the task earlier and who testified credibly that he did not neglect it on either of those days. Third, Mathis' failure to blow the boiler on April 28 is advanced by the Respondent as the incident which precipitated Mathis' transfer to other tasks, but such failure constituted an implausible reason for transferring a man who knew his duties and performed them well. This is so even if one should disregard Mathis' testimony that he was transferred that morning before he had time to blow the boiler. Fourth, Chancellor, upon assigning Mathis to a job as cook's helper, did not say that the reason was an alleged neglect to blow the boiler, and thus Chancellor did not notify Mathis of his alleged shortcoming.

Chancellor's hostility toward the Union is reflected by his use of the interrogatories, his insistence that employees answer them, and his remark to Whit Marcus during such insistence that "we don't want [the] Union." Chancellor knew of Mathis' adherence to the Union because Mathis had refused to answer an interrogatory, had criticized Chancellor's use of the interrogatories as "unfair," and had attended the representation hearing. In view of the factors recited, particularly the abrupt transfer of Mathis on the morning after the representation hearing and the absence of any reliable evidence that Mathis was not a capable employee, I find that his transfer to the less desirable job of cook's helper was violative of Section 8(a) (3), (4), and (1).

E. The threats to Barner and Mitchell

Shortly before Mathis' transfer on April 28, Barner went to Chancellor's office as usual to be assigned work for the day. Barner stood in the doorway where he and Chancellor saw each other, but Chancellor did not tell him what work to perform, so he went into the plant and used his own judgment in selecting work. In about a half hour, Aycock and Chancellor went to Barner. Aycock, holding Barner's timecard, and aware that Barner had attended the hearing without having been excused from work, asked Barner why he had not clocked out upon leaving the plant the day before. Barner produced the subpoena. Aycock examined it and then reprimanded Barner for having left work without notice to the Respondent and without clocking out. Barner replied untruthfully that he had expected to

be back at work "in time," and Aycock pointed out that this could not have been so because lunch hour ended at 12:45 p.m. whereas the subpoena had been returnable at 1 p.m. Aycock then said, "If you do this again, I'll fire you." Barner said nothing.⁴ Aycock and Chancellor walked away. In about a half hour, Chancellor returned to Barner who then was standing alongside Mitchell. Addressing Barner, Chancellor said that he understood, or that he had a feeling, that Barner would not be employed much longer. Turning to Mitchell, Chancellor said impulsively: "You either . . . [a vulgar phrase]."⁵

The General Counsel contends that Chancellor's remark to Barner was a threat to discharge Barner because he had appeared at the representation hearing in response to the subpoena. I disagree. Chancellor testified that, in saying to Barner that the latter might be discharged, he was motivated by Barner's having left work the day before without Chancellor's knowledge or permission. This explanation is reasonable. The fact that Barner had been served with a subpoena did not excuse his having left work under the circumstances mentioned, and he was properly subject to disciplinary action or the threat thereof. The record will not support a finding that Chancellor's threat was prompted by Barner's having obeyed the subpoena, as distinguished from Barner's having left work without permission and without clocking out, and thus it cannot be found that the threat was violative of the Act.

The General Counsel also contends that Chancellor's remark to Mitchell, "You either . . .," was a threat to discharge Mitchell because of Mitchell's refusal on March 31, about a month earlier, to answer the interrogatory. The Respondent, conceding that the remark was "a nonsensical, ill-chosen jibe," points to Chancellor's testimony that he intended to jibe Mitchell and that he was not motivated by Mitchell's having refused to answer the interrogatory. I do not believe that the General Counsel has sustained his burden of proof. Although Chancellor's conduct on March 31 in connection with the interrogatories and on April 28 in the transfer of Mathis, was violative of the Act, there is no reason to suppose that Chancellor would have spoken to Mitchell if Mitchell had not happened to be present when Chancellor spoke to Barner. I cannot infer that Chancellor's impulsive remark to Mitchell was motivated by Mitchell's refusal to answer the interrogatory nearly 1 month earlier.

F. *The change in Barner's duties for 1 week*

In the discussion above of the threats to Barner and Mitchell, we saw that when Barner reported for work on April 28 he went to Chancellor's office as usual to be given work assignments, but that Chancellor did not speak to him and that he used his own judgment in selecting work to do. During the next workweek, ending Friday, May 5, the same situation existed. Barner did not sustain any loss in pay, however, and it is not alleged that there was discrimination against him after May 5. The question is whether the Respondent, motivated by Barner's appearance at the representation hearing, transferred him for 1 workweek to more arduous and less desirable tasks than he had been performing.

According to Barner, for some months before the representation hearing he worked as shipping clerk and packer, in which capacities he had the duties of operating a machine to label containers of food products, packing the containers into cases or cartons, and transporting the cartons by tow motor. Barner testified also that he performed such work "mostly regularly" upon assignment each day by Chancellor, but that he understood that he should work as a cook's helper on days when there was no work as shipping clerk or packer.

On Monday, May 1, when Barner reported for work, he went to the door to Chancellor's office and stood there awaiting a work assignment. Chancellor did not speak to him, and after some minutes he looked around for work to do. He went to a case sealing machine, then to a labeling machine, and then to a control machine at which he had worked on the preceding Friday, but, as he testified, there was no work to be done at any of the machines. So, he went to the floor above to work as a cook's helper, a job which entails more labor than he had performed as shipping clerk and packer, and which he regarded as "harder and nastier" for

⁴ Aycock was not a witness and there is little inconsistency in the testimony of Barner and Chancellor concerning what was said. Barner acknowledged having said to Aycock that he had expected to return to the plant "in time" although he knew that the remark was untrue. He testified also that Aycock and Chancellor were "a little upset" with the untrue explanation but that he could not recall that Aycock reprimanded him.

⁵ There is no substantial dispute in the testimony of Barner, Mitchell, and Chancellor concerning what was said.

that reason and because one gets "juices all over your clothes, sugar falling all down your back, [and] just a lot of heat come out from the steam of the pots." Barner continued to work as a cook's helper through Friday, May 5, because Chancellor assigned no other work to him. On the other hand, Chancellor assigned no one to take Barner's place as shipping clerk and packer, but himself performed any tasks of a shipping clerk that needed to be done.

I conclude that the General Counsel has not sustained his burden of proof that there was discrimination against Barner. In addition to Barner's testimony that, each day during the workweek beginning May 1, he unsuccessfully looked for work downstairs before going to work upstairs as a cook's helper, he testified that during that workweek "There wasn't nothing downstairs to do" so he and "all the boys went upstairs" to work. Thus, there was no work for Barner in his regular job, and this situation is unlike the discrimination against Mathis where, as we have seen, he was required to change jobs with Johnson. With respect to Chancellor's having performed some of the functions of a shipping clerk during the workweek ending May 1, Barner and Riley testified for the General Counsel that it was not unusual for Chancellor to do so, and it is reasonable to conclude that Chancellor did so during that workweek because there was insufficient work in that capacity to keep Barner busy.

G. The Respondent's failure to offer Barner and Mathis the opportunity to work on Saturday, April 29

The Respondent's plant operates on a 5-day week. On Saturdays, if there is work to be done, employees load and unload trucks and do maintenance work. The Respondent's practice is to notify an employee on a Friday if there will be work for him the next day. On Friday, April 28, no one was told to come to work the next day. On Saturday afternoon there was a truck to be loaded. Two employees other than Barner and Mathis were called to the plant to load it. Our issue is whether Barner and Mathis, having attended the representation hearing 2 days earlier, were for that reason denied an opportunity to load the truck.

On Saturday morning, Chancellor asked Martin and John Smith to help load a truck that afternoon and to bring a few other employees. Chancellor did not specify anyone whom they should or should not bring. Neither Martin nor Smith was successful in locating any employee, however, but Smith brought an acquaintance named Bailey. Smith worked 4¼ hours that afternoon, Martin worked 3¼ hours, and Bailey worked an undisclosed period of time for which he was paid \$5.

The General Counsel, in support of his contention that Mathis and Barner were invalidly denied work on April 29, points out that they were accustomed to working on Saturdays more frequently than other employees, that they had home telephones, and that Chancellor did not telephone them. During the 13 Saturdays immediately preceding April 29, Mathis and Barner worked 11 and 10 days, respectively. The record discloses, however, that several other employees worked nearly as often. Thus, of those 13 Saturdays, Martin and Smith, who worked on April 29, had worked on 9 and 7 days, respectively, and several other employees had worked on 8 or 9 of those days.

I conclude that the General Counsel has not sustained his burden of proof. First, the loading of a single truck on a Saturday afternoon was the only work performed on April 29, and Chancellor's decision to load the truck was made on that day. Therefore, notice to several employees to come to work on Saturday could not have been given before they left work on Friday. Second, although Chancellor did not telephone Barner or Mathis to offer them work on April 29, I cannot conclude from this fact that he sought to discriminate against them. Chancellor testified that Smith came by the plant on Saturday to borrow money and that he asked Smith to return that afternoon to load the truck.⁶ Chancellor testified also that he telephoned Martin because Martin owned an automobile and could have transported to the plant any fellow employees whom Martin might have located. Chancellor did not tell Martin or Smith not to bring Mathis or Barner. Finally, Mathis and Barner had not enjoyed an invariable preference in Saturday employment over other employees. Thus, on March 4, Martin was the only employee who worked. On March 25, Smith and certain other employees worked but Barner did not. For the reasons given, the record will not support a finding that on April 29 the Respondent invalidly discriminated against Mathis or Barner.

⁶ Smith testified for the Respondent that Chancellor telephoned him at his home about noon. Smith was not asked whether he had gone by the plant earlier that day. I believe that Smith was mistaken.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Respondent set forth in section III, above, to the extent found to have been invalid, 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 of commerce.

V. THE REMEDY

Having found that the Respondent has engaged in unfair labor practices, I shall recommend that it cease and desist therefrom and that it take certain affirmative action designed to effectuate the policies of the Act. I have found that Mathis was transferred to the job of cook's helper, that about 2 months later he was transferred to a job as a truckdriver, that only the first transfer was invalid, that his rate of pay was not changed, and that, insofar as appears, he had not sustained a loss in earnings. Thus, there may be no need for a recommendation that Mathis be made whole. Moreover, the record indicates that Mathis, as a truckdriver, may have received an increase in wages by now and, therefore, he may not desire reinstatement in the job of capping machine operator.⁷ Nevertheless, because I do not know whether Mathis (1) sustained a loss in earnings after the hearing⁸ and (2) prefers to continue as a truckdriver, I shall recommend the usual reinstatement and backpay order. Specifically, I shall recommend that the Respondent offer Mathis immediate and full reinstatement to the job of capping machine operator, or a substantially equivalent position (*The Chase National Bank of the City of New York, San Juan, Puerto Rico, Branch*, 65 NLRB 827), without prejudice to his seniority or other rights or privileges, and that the Respondent make him whole for any loss of pay he may have suffered as a result of the discrimination against him, by payment to him of a sum of money equal to that which he normally would have earned from the date of the discrimination, April 28, 1961, to the date of a proper offer of reinstatement, less his net earnings (*Crossett Lumber Company*, 8 NLRB 440, 497-498) during said period, the payment to be computed on a quarterly basis in the manner established in *N.L.R.B. v. Seven-Up Bottling Company of Miami, Inc.*, 344 U.S. 344. I shall recommend also that the Respondent 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 and the right to reinstatement under the terms of these recommendations.

In order to make effective the interdependent guarantees of Section 7 of the Act, I shall recommend further that the Respondent cease and desist from infringing in any manner upon the rights guaranteed in said section. *N.L.R.B. v. Express Publishing Company*, 312 U.S. 426; *N.L.R.B. v. Entwistle Mfg. Co.*, 120 F. 2d 532 (C.A. 4).

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. The Union is a labor organization within the meaning of Section 2(5) of the Act.

2. By discriminating against an employee because he attended a representation hearing before the Board, by discouraging membership in a labor organization through discrimination in employment, and by interfering with, restraining, and coercing employees in the exercise of their rights under the Act, the Respondent has engaged in and is engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(4), (3), and (1) and Section 2(6) and (7).

3. The allegations of the complaint that the Respondent (1) discriminated against John Mathis other than by transfer to the job of cook's helper, (2) discriminated against Steve Barner in any manner, (3) threatened to discharge Barner because of his appearance at the hearing in Case No. 12-RC-1200, and (4) threatened to discharge Lonnie Mitchell because of Mitchell's refusal to indicate whether he had signed a union card, have not been sustained.

[Recommendations omitted from publication.]

⁷ The rate of pay for truckdrivers is more than \$1 hourly

⁸ That is, whether Mathis' quarterly earnings as a truckdriver have been less than he would have earned as the capping machine operator