

Tucker Aluminum Products, Inc. and Manuel Vilas. *Case No. 12-CA-2071. June 29, 1962*

DECISION AND ORDER

On January 16, 1962, Trial Examiner Lloyd Buchanan issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed, as set forth in the Intermediate Report attached hereto. Thereafter, the General Counsel filed exceptions to the Intermediate Report together with a supporting brief; Respondent filed a reply brief thereto.

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

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 briefs, and the entire record in this case, and hereby adopts only so much of the findings, conclusions, and recommendations of the Trial Examiner as are consistent herewith.

1. As indicated more fully in the Intermediate Report, the Trial Examiner found that employee Vilas had been interrogated by Respondent's Vice President Tucker, regarding a meeting held at the house of Frank Guihan, a supervisor, on the day Guihan had apparently left the Respondent's employ. The meeting, attended by a number of Cuban employees of Respondent, was concerned with methods of reconciling Guihan with the management of Respondent, as Guihan was the only supervisor employed by Respondent who spoke Spanish. The Trial Examiner found that such a meeting was not a protected concerted activity and, therefore, that the interrogation as to the meeting was not violative of Section 8(a)(1) of the Act.

We do not agree with the Trial Examiner. It is clear from the record that the continued employment of Guihan by Respondent was of great concern to the Cuban employees because he was the only supervisor who was able to communicate with them in their native language, Spanish, and was the only person able to understand any grievances which they might have. Accordingly, we find that the restoration of Guihan to his former position concerned the employees' conditions of employment and was therefore a proper subject for concerted activity and that Respondent's interrogation with respect thereto, accordingly, was violative of Section 8(a)(1) of the Act.¹

2. The Trial Examiner also found that the General Counsel had failed to prove that the discharge of Vilas and his wife was motivated

¹ *NLRB v. Phoenix Mutual Life Insurance Company*, 167 F.2d 983 (C.A. 7); *NLRB v. Guernsey-Muskingum Electric Cooperative, Inc.*, 285 F.2d 8 (C.A. 6).

by union activity so as to constitute a violation of Section 8(a) (3) of the Act. In reaching this conclusion the Trial Examiner credited testimony given by James Metzger, a supervisor of Respondent, rather than that of Vilas, his wife, and a coworker, regarding the circumstances surrounding the discharges. As we indicated in *Standard Dry Wall Products, Inc.*, 91 NLRB 544, 545: “. . . we do not overrule a Trial Examiner’s resolutions as to credibility except where the clear preponderance of *all* the relevant evidence convinces us that the Trial Examiner’s resolution was incorrect.” After a thorough review of the entire record, we do not believe that rejection of the Trial Examiner’s resolutions is warranted.² Accordingly, we find that a violation of Section 8(a) (3) has not been proven by the General Counsel, and we must affirm the Trial Examiner’s dismissal of this allegation of the complaint.

THE EFFECT OF THE UNFAIR LABOR PRACTICE UPON COMMERCE

The conduct of the Respondent set forth in the Intermediate Report has a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tends to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

THE REMEDY

Having found that the Respondent has engaged in an unfair labor practice we shall order that it cease and desist therefrom and take certain affirmative action in order to effectuate the policies of the Act.

CONCLUSIONS OF LAW

1. The Respondent is engaged in commerce within the meaning of the Act.
2. Manuel Vilas is an employee within the meaning of Section 2(3) of the Act.
3. By interrogating Vilas regarding concerted activity, the Respondent has engaged in and is engaging in an unfair labor practice within the meaning of Section 8(a) (1) of the Act.
4. The aforesaid labor practice is an unfair labor practice affecting commerce within the meaning of Section 2(6) and (7) of the Act.

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 the Respondent, Tucker Aluminum Products, Inc., Hialeah, Florida, its officers, agents, successors, and assigns, shall:

² Cf. *NLRB v. Pittsburgh S S Co*, 337 U S 656

1. Cease and desist from interfering with, restraining, or coercing its employees in the exercise of the right to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, as 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) Post at its plant in Hialeah, Florida, copies of the notice attached hereto marked "Appendix."³ Copies of said notice, to be furnished by the Regional Director for the Twelfth Region, shall, after being duly signed by the Respondent's authorized representative, be posted by the Respondent immediately upon receipt thereof, and be maintained by it for a period of 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 insure that said notices are not altered, defaced, or covered by any other material.

(b) 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 allegations of the complaint, insofar as they allege unfair labor practices not found herein, be, and they hereby are, dismissed.

³In 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 Labor Management Relations Act, we are notifying our employees that:

WE WILL NOT in any manner interfere with, restrain, or coerce our employees in the exercise of their right to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection.

TUCKER ALUMINUM PRODUCTS, 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.

Employees may communicate directly with the Board's Regional Office, Ross Building, 112 East Cass Street, Tampa 2, Florida, Telephone Number, 223-4623, if they have any question concerning this notice or compliance with its provisions.

INTERMEDIATE REPORT AND RECOMMENDED ORDER

The complaint herein (issued September 15, 1961; charge filed July 25, 1961), as amended, alleges that the Company has violated Section 8(a)(3) of the National Labor Relations Act, as amended, 73 Stat. 519, by discharging Manuel Vilas and Evangelina Montero on or about July 24, 1961, because they engaged in protected concerted activities; and Section 8(a)(1) of the Act by said alleged acts and by interrogating employees concerning protected concerted activities, threatening employees with discharge for participating in such activities, telling employees that they were discharged because of their union activities, and threatening to close the plant if there were union trouble. The answer denies the allegations of violation.

A hearing was held before Trial Examiner Lloyd Buchanan at Miami, Florida, from October 25 to 27, 1961, inclusive, and at the close the General Counsel and the Company were heard in oral argument. Pursuant to leave granted to all parties, a brief has been filed by the Company.

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

FINDINGS OF FACT (WITH REASONS THEREFOR)

I. THE COMPANY'S BUSINESS AND THE LABOR ORGANIZATION INVOLVED

It was admitted and I find that the Company, a Florida corporation with principal place of business in Hialeah, Florida, is engaged in the manufacture, sale, and distribution of aluminum windows and screen doors and related products; and that it annually purchases goods and materials valued at more than \$50,000 directly from States of the United States other than the State of Florida. Although at the beginning of the hearing the Company stood on its denial that it is engaged in commerce, and appeared to indicate that a real issue is involved in that connection, and it was thereupon requested to cover the point in oral argument if not before, and in its brief, neither thereafter during the hearing, in oral argument, or in its brief has the Company adverted to this matter or otherwise suggested any insufficiency in the admitted facts. I find that the Company is engaged in commerce within the meaning of the Act.

It was admitted and I find that United Steelworkers of America, AFL-CIO, is a labor organization within the meaning of the Act.

II. THE UNFAIR LABOR PRACTICES

The basis for the credibility findings herein lies in the entire record as well as in the witnesses' demeanor. To that extent the testimony received in connection with the 8(a)(1) allegations and the 8(a)(3) allegations has been considered as a whole, credibility findings with respect to one subsection depending to some extent on the testimony received with respect to the other allegations. While, as will be seen, I accept as more reliable the testimony of the Company's witnesses, they several times impelled me to reject their testimony; they were merely more reliable than the General Counsel's witnesses, especially the alleged discriminatees, Vilas and Montero. While thus rejecting those elements of the Company's testimony which appeared to be directed at "strengthening," if falsely, its position, I nevertheless have found substantial elements of reliability therein; or, conversely, I have not found such elements in the General Counsel's case, the burden of proof being upon him.

In addition to the issues on which the evidence must be reviewed, there is one other item, which like the question of commerce, needs to be mentioned. The answer admits that Tucker and Metzger, vice president and foreman in the window assembly department, respectively, each "has the title" thus assigned to him; but denies that they are agents and supervisors within the meaning of the Act. Aside from noting the fact that Metzger was identified by counsel for the Company as the supervisor and in charge of the slider window and single hung window sections, and testified to a most significant role in discharging Vilas, it is entirely unnecessary, despite the point-less denial, to recount all of the testimony which without contradiction indicates that each of these is a supervisor within the meaning of the Act.

A. The alleged independent violation of Section 8(a)(1)

Guihan, a supervisor and troubleshooter at the plant, and assistant to Tucker, quit his job on July 19, 1961, apparently because of some personal dissatisfaction. Guihan could fairly well understand and make himself understood by the Spanish-speaking employees, to whom he was "sympatico" and who liked him. That afternoon, Pedro Garcia, foreman in the awning windows section, suggested that Vilas

go to Guihan's home that evening; and approximately 15 employees (the number varied with the testimony) met there that evening to inquire, as they did, whether Guihan had quit or been discharged, and to urge him to return. (Further details concerning this meeting will be considered *infra*.) There is no claim or proof that Guihan's quitting or possible return was so connected with the employees' terms or conditions of employment as to make their discussion thereof a protected concerted activity.

The next morning Vilas was called into Tucker's office. He testified that Tucker asked whether he had been at Guihan's house the night before and, when Vilas said that he and Montero had been there, continued to ask who else, Vilas replying that there had been more than 15 but that he would not disclose their identity. At this point, although he had not been told who had been there, Tucker allegedly called someone and directed that the payroll be held since he was going to fire all who had been at Guihan's house. All of this refers to the allegations of interrogation and threat, in paragraphs numbered 7(a) and (b) of the complaint, in connection with "union and other concerted activities." But the question and the threat, as Vilas himself related them, made no mention of protected concerted activities; they referred only and specifically to those who had been at Guihan's house, and we have already seen that, whatever occurred or was discussed there, it was not protected concerted activity. Not until recross-examination, when he was questioned about this for the fourth time, did Vilas testify that Pedro Garcia had called him to the meeting to explain the Union to the employees. This latter contradicted or certainly differed from Vilas' previous statement, in reply to the direct question why he had gone to Guihan's house, that Garcia had told him that Guihan wanted Vilas to come to his house.

Aside from the question whether concern over a supervisor's employment, in the absence of proof of connection with employees' working conditions constitutes a basis for protected concerted activities, we have here the issue of credibility whether the meeting was in fact connected with union activities. The additional remarks attributed by Vilas to Tucker, asking why he wanted Guihan to return, to the effect that Guihan was no good, drank in the plant, and had caused the Company to lose a great deal of money, do not suggest any connection or concern with protected activities.

Both Tucker and Metzger testified that Vilas volunteered the information that there had been a meeting at Guihan's house the night before and that about 50 had attended. Although this was alleged as violative, Tucker admitted that he asked Vilas who had been there; and this supports Tucker's credibility. Not denying that Tucker asked, Metzger testified only that Vilas did not say who had been at Guihan's. I find that these allegations of interrogation concerning protected activities, and threat have not been proved.

Tucker is alleged to have made another unlawful threat during that same conversation on July 19, declaring that if there were union trouble, the plant would be closed. As pointed out at the hearing and in the Company's brief, none of the three prehearing statements given to the General Counsel by Vilas mentioned any such threat, which was made the subject of an amendment to the complaint after Vilas testified to it. We are informed that not until after the complaint issued did Vilas speak to the General Counsel's representative who tried the case, at which time he mentioned this item. I credit Tucker's and Metzger's denials. Vilas' testimony on this point and the manner in which it was obtained and submitted reflect on his credibility.

Vilas further testified that when Metzger gave him and Montero their checks shortly before noon on July 24 and told them that they were discharged, Metzger explained that someone had told him that Vilas was a unionman, and he did not want him there; he did not want any trouble. Montero's version included the further statement that Metzger did not want any unionman there. This alleged admission by Metzger, which he denied is too pat and is not in keeping with his character as I observed it. I do not find the violation alleged.

B. *The alleged violation of Section 8(a)(3)*

There is apparently no dispute that the action taken by the Company with respect to Montero was based on the fact that she is Vilas' wife. If his discharge was discriminatory, her's was also violative of the Act; if his was not, then there was no discrimination in terminating her employment to avoid a rancorous situation or a "personnel problem."¹

¹ *John McAuliffe Ford, Inc.*, 134 NLRB 340

While not to the extent claimed by the General Counsel, company knowledge of Vilas' union activities is indicated by the circumstances on the record. Vilas testified that he signed a union card about July 17 or 18; that he received more than 100 cards for distribution, and union literature; and that he distributed cards to about 16 to 20 employees, unidentified, during the few days prior to July 24. Despite the purpose clearly indicated to persuade Guihan to return to work, Vilas testified as did his wife, that at the gathering on the evening of July 19 he told those present not to quit work; that they could "get help" only if they signed a union card and had an election. (It does not appear that any cards were signed at that time despite the testimony that Vilas so urged. We shall soon note that various cards were signed on July 14, and some before.)

Employee Sarrain, who sought effectively to bolster the General Counsel's case in connection with the events when Vilas was terminated on July 24, testified that about seven employees signed union cards on July 14, but that he and Vilas, who accompanied these others, signed a day or two before, "or after." The General Counsel later, on rebuttal, produced a witness, Lastra, who, only after his recollection was refreshed by a leading question, testified that Vilas at Guihan's house spoke of union cards, organization, and protection; and another witness, Alvarez, who testified quite confusedly and differently from others, that it was agreed at Guihan's house that they would not go to work immediately the next morning in order to persuade Tucker that Guihan should return to work, and then that Vilas told them that, if nothing came of such an effort, he would be able to facilitate affiliation with the Union. Here again attention and effort were focused on Guihan's return, not on employees' protected activities. Not to slight any who were present at Guihan's house and who were called to testify, Pedro Garcia testified credibly that no one spoke to him there about the Union or union cards. While the latter witness adopted the General Counsel's suggestion that he did not "remember too well" what else occurred at the meeting, he did say that Vilas did not address the group, everybody talking at the same time.

If during the course of the various private or man-to-man conversations held, Vilas mentioned the Union to anyone, there was no such prominence or general discussion of this or of the employees not returning to work the next day as to constitute this meeting a protected concerted activity; nor any evidence of company knowledge of or interest in such private discussion. As the complaint and his argument indicate, the General Counsel's position is that the meeting as such was a protected concerted activity; reference to private discussions was presumably made to support such allegation, not as a claim that the asides themselves constituted such activity. Nor, despite Vilas' alleged urging that they sign union cards, is it claimed that anyone signed a card at Guihan's house. The gathering there can properly be called a meeting only in the generic sense of the word. In no sense can we refer to what was there said as protected concerted activity, or that company knowledge thereof added to its knowledge of such activity by Vilas or Montero.

Having considered the extensive testimony concerning this meeting, I find that, but for its aid in making credibility findings, that testimony served little purpose. No more than with respect to Vilas' attempts to get employees to sign union cards do we have reliable direct evidence that the Company knew of any protected concerted activities by Vilas or Montero at Guihan's home. (In connection with the dismal attempt to show that these were concerted activities, we have seen that Tucker questioned Vilas about that meeting in connection with the employees' desire for Foreman Guihan's return. Whatever the source of Tucker's knowledge that Vilas had been at the meeting, he presumably knew of at least some of the more than 15 who attended; except for Vilas and Montero, none was discharged.)

In reliance on the small plant rule,² I find that the Company had knowledge of Vilas' union activities generally; and such knowledge is sufficient as motive if we find unlawful discrimination in the action taken against Vilas and Montero. But if Vilas did in fact at Guihan's house urge union activity in man-to-man talk, there is no basis for attributing knowledge thereof to the Company even in this small plant. The possibility exists from some of the testimony that someone may have discussed the Union in English. But if any English was spoken, it surely was not in any general remarks addressed to the group, so many members of which do not understand the language, as was apparent at the hearing. Neither is it likely that Vilas or other employees would employ their limited knowledge of English to discuss organizational activities. Nor does the General Counsel rely on such limited or individual discussion. Recognizing perhaps that an aside would not determine the nature of the meeting, his proof was of a general appeal and discussion of union activities; and this I do not credit.

² *Wiese Plow Welding Co., Inc.*, 123 NLRB 616.

Vilas admittedly said that the employees should not refuse to work the next day, the issue being Guihan's voluntary departure. I credit Guihan's testimony that nothing was said at his house about the Union. Guihan returned to the Company's employ on August 2, but I do not believe that, as the employees' friend and supporter, and independent as he appeared to be, he would stultify himself by testifying falsely as claimed by the General Counsel. His testimony was consistent in the face of detailed cross-examination in this connection.

The question is not, as the Company argues, the reasonableness of Vilas' alleged suggestion that the employees sign union cards in order to insure Guihan's return—when the latter had quit. It is rather whether there was in fact talk about joining the Union or about other protected concerted activities. I find that there was not.

Whether other employees besides Vilas (and Montero) and Sarrain made early contact with the Union, we do not know. But attributing to the Company knowledge that Vilas had distributed and solicited union cards, we come to the alleged discrimination against him and his wife. Work to be done on orders had fallen off by July 23, and it was decided to lay employees off unless a large order which the Company had been awaiting was received the following morning. There is no issue concerning fluctuation of employment and the need for layoffs and the evidence offered by the Company in support thereof need not be analyzed. It is not claimed that the layoff of any other employee was discriminatory or unjustified. (One witness, testifying to the need for more people in the department to fill some large orders in August, declared that sometimes people are transferred from other departments. With the orders filled, there were layoffs.)

About 9 or 9:30 a.m. on the 24th Metzger gave Vilas a list of Spanish-speaking employees whom he should tell to go home. (Vilas, differing from his wife and Metzger, had it that this instruction was given to him by another foreman.) Vilas passed this information on to some 10 or 12 as requested. Vilas and Montero, who assembled windows, were slightly more skilled than other employees,³ and Metzger testified that he kept these two so that they could make up windows if any orders should come in, and authorized Vilas to select one other to help him; while awaiting such additional orders,⁴ Metzger directed them to keep busy making up some standard sizes. When no orders were received in the 11 o'clock mail, Metzger had Vilas' and Montero's paychecks drawn; then at or shortly before noon he called Vilas to a small vacant office and, handing him checks for himself and his wife, told him that there were no orders and he would have to lay him off. Unlike the others who had been told they were laid off and who were to return for their checks on the regular payday, the 28th, if not sooner recalled to work (most of them were not recalled, although Sarrain and other witnesses mentioned the names of those who they said were), Vilas and Montero were not told to check back the next morning to see whether they would be needed. Metzger testified that he paid Vilas off because of a "commotion" a few days before, and that he called him aside for the same reason.

Called on to explain his reference to the earlier commotion, Metzger testified that Vilas had berated some people in the shop; Vilas had merely "let off some steam," but Metzger did not want to be "upset" again. While Vilas and Montero had it that Metzger discharged them at their work table when he referred to Vilas as a unionman, as noted *supra*, neither, although recalled, denied Metzger's testimony concerning the earlier commotion as explaining why he now called Vilas aside. Further, Vilas appeared to be quite volatile, a characteristic which lends support to Metzger's explanation for the manner in which he acted.

We should here note Vilas' belligerence as he himself testified that he asked whether Tucker wanted to fire him when he asked about the meeting at Guihan's house, and admittedly repeated the challenge when Tucker allegedly spoke of closing the doors. He testified that he had previously hurled the same challenge at his forelady. In none of these cases was there a showing of provocation to warrant his challenge. If it be explained that Vilas was edgy because of circumstances not before us, we must with understanding of such circumstances sympathetically reply that our concern is with the facts here in issue and the question of discriminatory discharge. As I observed him, Tucker also has a low boiling point; but that is not

³ All were paid at or near the minimum rate. Tucker testified that a man could be trained in a few hours to do Vilas' assembly work. Supporting this is Vilas' testimony that other and newer employees were given more overtime and that he had complained about it several months before the commencement of union activities.

⁴ Correspondence dated August 4 and thereafter, received in evidence and offered to support this testimony, does not refer to any delay in sending the order or support the Company's alleged expectation on July 24, beyond a request that the items be hurried along. I do not credit the oral testimony in this connection.

in issue here. I credit Metzger's testimony concerning these events, and not that of Vilas, Montero, or Sarrain. (Some support may be found in the fact that Metzger gave Vilas both his own check and Montero's.) The latter was quite explicit in his corroboration of Vilas' and Montero's testimony that it was at Vilas' work table that Metzger discharged Vilas and, when asked why, replied that it was because Vilas was a unionman. I have not overlooked the fact that Sarrain skillfully and credibly explained away what at first appeared to be several contradictory prior statements. But he contradicted himself on a simple but important item: How soon after Vilas' discharge Metzger told him that he was no longer needed either.

Coming to the nature of the action taken against Vilas and Montero, it should be noted at the outset that Tucker mentioned complaints against them, but regarded them as good workers, and let them go because of lack of work. He testified variously that Vilas was discharged, here adopting the General Counsel's characterization, and laid off, with emphasis on the latter. It is clear from the fact that Vilas and Montero alone, of all who were sent home on July 24, were not told to call back for work and were paid when they were let out, that the two, their employment terminated as was that of the others for lack of work, were, unlike the other employees, discharged.⁵ This is indicated further by Metzger's testimony despite his denial. That testimony and the different form of their termination (referring here to the fact that they were paid and were not told to call back) indicate that Tucker was not truthful in saying that Vilas and Montero would have been hired had they been outside the plant when people were thereafter hired, employment being admittedly "at the gate"; or that as late as the hearing he did not know of and was not concerned with Metzger's trouble with Vilas and the finality of the action taken against the latter and his wife.

But the issue which concerns us is not primarily the failure to restore the two to work after July 24. If they were not discriminatorily discharged as alleged, there was no violation in failing to rehire them, in the absence of proof that any hiring was done except "at the gate." While employees were hired on personal application at the gate or in the plant, these two did not thereafter thus apply. On the other hand, if they were discriminatorily discharged, such a violation calls for an appropriate and sufficient remedy regardless of later application.

We have seen that, although replacements were easily trained, Metzger kept Vilas and Montero and told the former to select another employee to remain and work with him, while he asked him to notify the others that they would be laid off—this despite the previous trouble or commotion; now, at noon, Metzger gave the two their checks and did not even ask them to call back. What prompted this change in treatment, for it was such, we do not know.

One might speculate that, if the Company had knowledge of Vilas' union activities, it would more likely have included him when it gave notice of the layoff to the other employees on the morning of the 24th, retaining instead a few others, who, although less experienced, could have been assigned had an order come in later that morning. Perhaps on the other hand, an immediate hoped-for order would emphasize the need for Vilas' and Montero's experience. But such speculation is purposeless. We do have Metzger's explanation, but no more, concerning their retention for a possible immediate order. Whatever the explanation for the retention in the morning and the outright discharge at noon, whatever inconsistency might be claimed, whatever puzzlement may exist, it has not been shown that Vilas and Montero were discriminatorily discharged because of protected concerted activities.

Thus if the Company was discriminatorily motivated and had knowledge of Vilas' organizational activities, there is no sufficient explanation for the retention of these two on the morning of July 24, such retention on its face being in marked contrast to the action later taken; and it has not been shown that the Company, between approximately 9:30 a.m. and noon on that day acquired knowledge of Vilas' or Montero's protected activities, or that any other discriminatory element was injected into the picture at that time and connected with their discharge. We must not speculate or attempt to guess why the Company did not discriminate at 9:30 a.m. but allegedly did at noon. (This is not intended as a suggestion to the General Counsel that he should belatedly claim that the retention in the morning itself somehow suggests discrimination.) The General Counsel to this point has not even ventured to speculate on his own.

⁵ The Company's list of checks issued immediately on termination is admittedly incomplete. Omission therefrom of Vilas' and Montero's checks of July 24 therefore does not show that they were not discharged. Nor, if other checks were sometimes issued immediately on layoff as a matter of convenience, as testified for the Company, does it appear that this was the case with respect to these two checks or whose convenience was in this case served.

True, it is conceivable that between 9:30 a.m. and noon the Company for the first time⁶ learned of Vilas' union activities. (We recall that according to Vilas it had at least connected him with union activities several days before.) Even the General Counsel has not claimed that some employees, pointing to Vilas as not to be laid off, if they knew that, may have informed the Company of his union activities; of this we have no evidence. There is no reasonable and sufficient basis, if we rely on the small plant rule, for an inference that it was specifically on the morning of July 24 that the Company acquired knowledge of Vilas' organizational activities; or that it so cleverly plotted to retain him earlier in the day in order to avoid the appearance of discriminatory discharge. If the General Counsel would argue that there was a prior intention to discharge but that it was masked by the retention that morning, or if he would submit any other argument to support his claim of discrimination, he has not to this point suggested these things, much less proved them.

Here it may further be noted that Tucker refused to discharge Vilas on July 19 despite another foreman's insistence. With Vilas' union activities going back to July 14 or earlier, the Company's knowledge thereof may be found to have existed when it thus previously refused to discharge him.

As for the assignment to Vilas and Montero of a job for stock while orders were awaited on the morning of the 24th, this was fill-in work to occupy them during the waiting period. There was no need to keep them on until the stock job was completed; with the absence of orders in the mail, it could reasonably be deemed preferable to leave such work for later brief slack periods.

Although I do not rely on the Company's claim that Vilas and Montero were laid off and not discharged, I have credited Metzger's testimony concerning the reason for the different treatment accorded them. If Vilas had received less overtime, as noted *supra*, perhaps because he did not get along with Anderson, foreman at that time, and well before the commencement of union activities, that fact would not support the claim of discrimination. The facts here alleged to be discriminatory and the reason given concerning personal difficulties may bear some relation to that earlier situation; mere intrusion or addition of concerted activities neither immunizes the employee involved nor itself makes the employer's action discriminatory.

It is to be noted that Sarrain was also let go at noon on July 24, and was not told to check back the following morning. Discrimination against him is not alleged. But having said this, we should also note that he was told to check back for work in 2 or 3 days and in any event to come for his check on Friday, the regular payday. This latter circumstance offers support to Metzger's testimony that checks were given to Vilas and Montero alone to avoid commotion should they return on Friday still unemployed.

Bearing in mind that Metzger testified only that he had laid off Vilas and Montero, we do not have even an attempt to explain any discharge as here found. But we do have Metzger's explanation for the alleged layoff action taken, and the question here is whether that explanation is sufficient and justifies what the Company did even if it says that it did something else. The circumstances here do not warrant a finding that the reason given is merely pretextual. In the face of Tucker's earlier "opportunity" to discharge Vilas, it cannot be fairly found, in the absence of evidence of change insofar as company knowledge or motive is concerned, that Vilas was discharged on July 24 because of his protected activities.

If we weigh the practical effect of the action taken, we have seen that single hung and slider window employees in the window assembly department were laid off on July 24 and that few were later recalled or reemployed. (No discrimination against others is claimed.) Thus Vilas and Montero sustained no greater loss than did those others. Although these two were treated differently in that they were not told to check back and especially since they were given their checks at once, such difference has not been shown to have been discriminatory and in violation of the Act.

In finding that discrimination has not been proved, I recognize a further possibility which the General Counsel has not mentioned: that the decision to discharge Vilas and Montero had been made before the announcement of the layoffs early on July 24; and that these two were ostensibly retained for an additional short time both to counter any impression of animus against them and to gloss over the distinction between their discharge and the layoff of other employees with the direction that they check back the following day. But this is speculative and imaginative to a degree which I would not credit (or charge) to either Tucker or Metzger.

Whatever might conceivably be argued by the General Counsel on a "second chance," it is also conceivable that the Company, found herein to have discharged Vilas and Montero, decided to avoid a public explosion or commotion by the former,

⁶ This is contrary to our presumption, *supra*, commonly indulged in under such circumstances, of company knowledge.

and therefore used him to notify only the others about their layoff; and now letting him go, decided to avoid future trouble by terminating him and his wife permanently. One may wonder, but whether this favors the General Counsel or the Company, there is no profit in such speculation. No more than did the General Counsel offer a theory or explanation supported by the evidence to prove discrimination, has the Company offered this or any other to show absence of unlawful intent. But as noted, the burden is on the General Counsel. If there is more than meets the eye on the record, we may not go beyond that record and the evidence adduced. In short, the burden is not on the Company to show that it did not discriminate. If it did in fact discriminate (on the record before us I would make no positive finding in its behalf), that fact has not been shown; we have a failure of proof.

Similarly, if Vilas and Montero were discharged because they or either of them urged an employee to strike in support of Guihan on July 20, as testified to and denied, this was brought out only to throw light on what Vilas had urged at Guihan's house the night before, and to show that it was not protected activity. A finding of discharge for that reason would not sustain the allegation of unlawful discrimination.

Sarrain testified that, when he returned for his check on July 28, work on sliding windows was being done by Americans, not Cubans. It is not clear whether the witness or the General Counsel here intended to indicate company prejudice against Cubans. Its employment policy appears to negate any such charge, but in any event such a charge, so far from proving the alleged violation, would provide a contrary motive, however unworthy in itself.

I do not conceive it to be my duty to anticipate all possible arguments which may be made to the Board for the first time, no brief or argument pinpointing his claims having been submitted to me by the General Counsel, and assuming that the Board will accept such new arguments. But I have sought to analyze the testimony and the impressions made by the witnesses as these bear on the recognized positions of the respective parties. To the extent that new arguments or approaches may be submitted, the Board will have the record before it; but it will not have the opportunity to relate this to the demeanor of the witnesses.

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 Company is engaged in commerce within the meaning of the Act.
2. United Steelworkers of America, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.
3. The Company has not engaged in unfair labor practices within the meaning of Section 8(a) (3) or (1) of the Act.

RECOMMENDED ORDER

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record in the case, I recommend that the complaint be dismissed in its entirety.

Lori-Ann of Miami, Inc., Rose Uniforms, Inc., Rose of Miami, Inc. and Myron Warshaw and Local 415, International Ladies' Garment Workers' Union, AFL-CIO. *Case No. 12-CA-2027.*
June 29, 1962

DECISION AND ORDER

On February 7, 1962, Trial Examiner John P. von Rohr issued his Intermediate Report in the above-entitled proceeding, finding that Respondents Lori-Ann of Miami, Inc., and Myron Warshaw had engaged 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. The Trial Examiner also found that the Respondents had not engaged in certain