

5.2 Automotive shall promulgate the above rules and regulations and charges thereto in writing and supply all parties with copies thereof.

5.3 Automotive shall hire, pay, account for and supply all drivers and mechanics and other personnel necessary for the testing to be conducted on the track. *Automotive shall be the final authority on the retention of any such employee.* [Emphasis supplied.]

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**Reichart Furniture Co. and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, General Teamsters, Chauffeurs, Warehousemen and Helpers, Local Union No. 697.** *Case No. 6-CA-2465. October 24, 1962*

### DECISION AND ORDER

On July 11, 1962, Trial Examiner Frederick U. Reel 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 attached Intermediate Report. He also found that Respondent had not engaged in certain other unfair labor practices as alleged in the complaint and recommended dismissal of those allegations.<sup>1</sup> Thereafter, the Respondent and the General Counsel filed exceptions to the Intermediate Report, together with supporting briefs.

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

The Board has reviewed the Trial Examiner's rulings and finds no prejudicial error. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions, the briefs, and the entire record in this case, and adopts the findings, conclusions, and the recommendations of the Trial Examiner as modified herein.

### ORDER

The Board adopts the Recommended Order of the Trial Examiner as its Order with the following modifications:<sup>2</sup>

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<sup>1</sup> As found by the Trial Examiner, the strikers who returned to work at the end of October 1961 did so pursuant to an understanding between them, the Union, and the Respondent that they would be treated the same, with respect to seniority, as the strikers who returned to work on October 9. These strikers did not receive the written Statement of Policy which was given the earlier returning strikers because, as appears in the Intermediate Report, the assurances of job security which were contained in the Statement of Policy were not necessary in their cases because they, unlike the strikers who returned on October 9, returned with union approval. In view of these facts, we agree with the apparent conclusion of the Trial Examiner that the Respondent did not establish one seniority system for the strikers who returned to work on October 30 and 31 and another policy, more favorable, for those who returned on October 9.

<sup>2</sup> For the reasons given in *Isis Plumbing & Heating Co.*, 138 NLRB 716, we also order that the Respondent's backpay obligation include the payment of 6-percent interest on the backpay due Stillwell and Kovalsky. Member Leedom, however, for the reasons stated in the dissent in the aforementioned case, would not grant such interest.

Below the signature of the notice the penultimate sentence shall be changed to read: "This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material."

## INTERMEDIATE REPORT AND RECOMMENDED ORDER

### STATEMENT OF THE CASE

Following charges filed February 26, and April 20, 1962, General Counsel issued a complaint on April 20, 1962, alleging that Respondent had violated Section 8 (a)(1) and (3) of the Act. Issue was joined by an answer filed May 9, 1962, and, following the granting in part of a motion for a bill of particulars, the matter was heard before Trial Examiner Frederick U. Reel in Wheeling, West Virginia, on May 28 to 29, 1962. At the conclusion of the hearing General Counsel argued briefly on the merits, and counsel for Respondent waived oral argument. Thereafter both parties filed briefs which have been fully considered. On the entire record and on my observation of the witnesses, I make the following:

### FINDINGS OF FACT

#### I. THE BUSINESS OF THE EMPLOYER AND THE LABOR ORGANIZATION INVOLVED

The pleadings establish and I find that: (a) Respondent (herein called the Company) operates retail furniture stores in several States, and maintains a warehouse at Wheeling, West Virginia; (b) during the 12 months preceding the issuance of the complaint its sales exceeded \$500,000, and it received over \$15,000 of merchandise at the warehouse from points outside West Virginia; (c) it is engaged in commerce within the meaning of the Act; and (d) the Charging Party (herein called the Union) is a labor organization within the meaning of the Act.

#### II. THE ALLEGED UNFAIR LABOR PRACTICES

General Counsel urged that as the result of a strike, Respondent established a dual seniority system which discriminated against the strikers in terms of layoff and recall, discriminatorily withheld overtime from the strikers, and threatened them with discharge if they struck again. We turn first, therefore, to the events surrounding the strike and its termination, and then to the particular unfair labor practices alleged.

##### *A. Background—the strike and its termination*

For a number of years Respondent's warehouse employees, drivers, and helpers were represented by the Union, which enjoyed amicable contractual relations with the Company. The last contract terminated June 30, 1961, and in the course of negotiations for a new contract the Union called a strike on September 6, 1961.

On October 9, 1961, without the approval of the Union, the strikers reported back to work. On this occasion, Donald Levenson, the officer of the Company who handled its labor relations, handed each of the returning employees a typewritten "Statement of Policy," which Levenson had signed before a notary public as "the act and deed" of the Company. The statement read in part:

The REICHART FURNITURE COMPANY will give you the full protection in the seniority provisions of our past and in any future contracts covering your job which we may have with any union or other organizations. Even if there were no union representing the employees, the REICHART FURNITURE COMPANY fully subscribes to the basic principles of protecting the senior employees. We have evidenced our good faith in this respect with our store and our warehouse personnel, both those represented and those not represented.

Our past practice will continue. The company has always believed in and will positively continue to support your job seniority provisions of our past contract and will give you the benefits of any future provisions, and if there be no future contracts with any union, we want you to know you still will receive full seniority protection and benefits of your employment.

Other passages in the statement of policy assured the employee that the Company "will be willing to continue your job as if the strike had never occurred" and gave

the employee assurances of company protection against union reprisal for his having abandoned the strike.

At lunch time seven of the employees decided to continue to strike.<sup>1</sup> In accordance with Levenson's request to all employees when he gave them the statement of policy, the copies of the statement which had been given the seven men in question were returned to Levenson. The seven men continued on strike for approximately 3 more weeks. On or about October 30, one of them, Hill, returned to work. The next day the remaining six (Chavanak, Kovalsky, Custer, Moore, Kimey, and Stillwell) returned to work. The return of the last six was the result of an understanding reached by the Company, the six strikers, and the Union that the men would be accorded their full seniority and would be "treated the same" as the men who had been at work since October 9, but would not receive the formal Statement of Policy. When called as a witness, Levenson explained that he withheld the statement at that time because the primary purpose of the statement had been to give assurances against union reprisal, and as these men were returning with union approval no such assurances were required. On November 22, the Union was decertified in a Board election conducted pursuant to a petition filed by the Company.

#### *B. The layoffs of December 30, 1961, and the subsequent failures to recall*

The Company's business normally reaches its peak shortly before Christmas and declines immediately thereafter. In 1961, as in other years, a post-Christmas layoff was an economic necessity, and the Company accordingly laid off five men from the warehouse on December 30, 1961. In previous years when the Company was under contract with the Union, the layoffs and recall had been strictly in accordance with seniority. In 1961, however, seniority was not strictly followed. The five men laid off included the three most junior, Kovalsky, Custer, and Bane, the first two of whom had been strikers, unlike Bane, the most junior. The Company then "skipped" Clark, fourth from the bottom, but laid off striker Stillwell, fifth from the bottom. The Company then "skipped" four more men, including striker Kimey, and laid off striker Chavanak, 10th from the bottom.

The Company at the hearing explained its retention of Clark on the ground that he was an "inside" man, and it preferred to lay off drivers and helpers. In previous years, under union contract, no such selectivity was possible, and the retained drivers or helpers were assigned to "inside" work if necessary. Likewise at the hearing the Company explained its layoff of Chavanak rather than of a junior driver or helper on the ground that Chavanak was far inferior to the others in ability, and also on the ground that he had less family obligations than the others. These matters are further considered later in this report.

In mid-January, in the course of a warehouse sale, the Company recalled Bane, the most junior of the laid-off employees, and the only nonstriker in the group, to operate its passenger elevator.<sup>2</sup> He did so for 2 weeks during the sale, and as business then warranted it, he was retained as a regular warehouse employee and driver. At the hearing, the Company explained its choice of Bane over Chavanak on the ground that so far as the elevator job was concerned Bane has the more pleasant personality as well as more family obligations, and so far as the permanent job was concerned, Bane not only had more family responsibilities but was a far better driver than Chavanak. The Company did not offer any comparison of Bane's personality or ability with those of the other laid-off men senior to him; the record suggests that their family responsibilities are roughly comparable to Bane's.

On or about February 19, 1962, at a time when none of the laid-off strikers had been recalled, the Company put one Ronald Shelek to work in the warehouse. Shelek's father has been in the Company's employ for 17 years, and another son, Donald, has been in its employ for nearly 10 years. Donald sustained an injury while at work in February 1962, and Ronald was hired as a temporary replacement for the period of Donald's absence, a matter of approximately 8½ working days. At the hearing the Company explained that it had expected Ronald's employment to last only approximately 3 days, and that his hiring to take the place of his temporarily incapacitated brother was not only something of an obligation on the part of the Company but was no disservice to the laid-off men, who would have had to

<sup>1</sup> Hereinafter these seven men will sometimes be referred to as "strikers" to distinguish them from those who abandoned the strike on October 9.

<sup>2</sup> In previous years store employees rather than warehouse personnel had operated the passenger elevator during the warehouse sale.

forfeit unemployment compensation for some time had they taken such temporary work.

On or about February 28, 1962, at a time when none of the laid-off strikers had been recalled, the Company needed a new driver and hired one Francis Montgomery. At the hearing Donald Levenson, the company treasurer and its representative in labor relations, explained that he hired Montgomery because of the following circumstances:

Montgomery had been a member of the Union at the time of the strike and had been employed as a driver by another Wheeling firm. During the strike, he crossed a picket line in front of one of the Company's subsidiaries to pay a bill he owed there. As a result of union discipline visited upon him for not respecting the picket line, he lost his job on Saturday, November 4, 1961.<sup>3</sup>

On or about Monday, November 6, 1961, Montgomery, accompanied by his wife and daughter, came to Donald Levenson's office to tell him that Montgomery had lost his job under the circumstances just related, that he had tried unsuccessfully to find employment elsewhere, and that the daughter would have to quit high school in her senior year to find a job. Levenson became interested in the problem and wrote his counsel, apparently without result, to ascertain what could be done to help the Montgomerys. During the following months the Montgomerys often got in touch with Levenson, both in person and by telephone, to tell him of their plight. At Levenson's advise they wrote the Labor Board; at the Board's advice they wrote the Department of Labor; on January 5, 1962, the Department of Labor again referred them to the Board, which was investigating Montgomery's charge at the time of the hearing. The Montgomerys continued to keep in touch with Levenson, who was concerned with the family's ability to survive and with the daughter's prospects of graduating from school. On January 17 (2 days after Bane's recall to work) Levenson wrote Attorney General Kennedy in the hope (as Levenson testified) "that possibly the Department of Justice could help this man get justice." Finally, on or about February 28, 1962, the Company hired Montgomery with the understanding that he would hold his job only until his daughter's graduation.<sup>4</sup>

The Company recalled Kovalsky and Stillwell in the week ending April 21, 1962, and Custer in the week ending May 5. According to Levenson, the Company intended to recall Chavanak after Montgomery was let go, but Chavanak (according to Levenson) indicated on May 24 that he no longer desired to work for the Company. This matter was not fully developed at the hearing and if it should become relevant (i.e., if Chavanak's reinstatement should be ordered) must be left for compliance.

### *C. Concluding findings with respect to the layoffs and recalls*

The law is clear, and the Company does not deny, that at all times here relevant the fact that several men (including Chavanak, Stillwell, Custer, and Kovalsky) remained on strike between October 9 and 30, 1961, furnished no lawful basis for their being accorded any different treatment with respect to tenure or terms of employment than was accorded the men who abandoned the strike on October 9. In other words, if any of these four men would not have been laid off on December 30, 1951, if he had been at work between October 9 and 30, or if any of these four men would have been recalled at an earlier date in 1962 than he was, if he had been at work during that period, the Company was guilty of discrimination against him because he engaged in a union activity and a protected concerted activity between October 9 and 30, and the Company would therefore have violated Section 8(a)(3) and (1) of the Act. Moreover, under the circumstances of this case, the Company could not lawfully apply one system of seniority to men who abandoned the strike

<sup>3</sup>This "fact" and certain others regarding Montgomery appear in the record as among the reasons motivating the Company's action in hiring him. The evidence is "hearsay" so far as it goes to establishing the "fact," but is admissible insofar as it goes to the Company's motivation. See *Ohio Associated Telephone Company v N L R B.*, 192 F. 2d 664, 666-667 (C.A. 6).

<sup>4</sup>For some reason, unexplained on the record, Montgomery worked for 2 weeks then missed 5 full weeks and part of a 6th, but worked the 5 full weeks preceding the hearing. Respondent's assertion in its brief, p. 21, that Montgomery was laid off for the intervening 5 weeks finds no support in the record; for all that the record shows he may have been absent because of illness. If a layoff of one man did occur for those 5 weeks, Montgomery was the most junior employee, and Bane was next in line. Montgomery's daughter was apparently able to graduate with her class, as Donald Levenson indicated that he had received a graduation announcement.

on October 9, and another to men who stayed on strike until October 30. With these principles in mind, we turn to their application to this case.

The parties apparently are in agreement that a layoff of five men on December 30, 1961, was justified by legitimate business considerations. Insofar as the layoff was made on the basis of seniority, it was plainly unobjectionable, and hence the layoff of Stillwell, who was the fifth man from the bottom of the list (and, *a fortiori*, the layoff of Custer and Kovalsky, both of whom were junior to Stillwell), cannot be found to have been motivated in any way by the fact that he was a striker. As to layoff, therefore, the only questionable case is that of Chavanak. As to recall, however, the recall of Bane, the temporary recall or hiring of Ronald Shelek, and the hiring of Montgomery all occurred before the recall of any of the laid-off strikers, thus giving rise to several more questionable cases. As the order of recall sheds some light on Chavanak's case, we shall consider the recalls first.

The first man recalled was Bane, the lowest man on the seniority list by a wide margin, but the only nonstriker laid off. Although the Company was under no formal contractual obligation to recall the men in order of seniority, it had given its word that seniority would be observed. Its selection of the junior-most man for first recall, coupled with the fact that this man was the only nonstriker involved, gives rise to an inference that the latter fact played some role in his selection. To rebut this *prima facie* case of discrimination, the Company showed that Bane was selected to operate the passenger elevator during the warehouse sale, that his personality was better suited than Chavanak's to such a job, and that he had a son in his 30's afflicted with cerebral palsy and unable to work. I find the explanation totally unconvincing. In the first place, while Bane was not called as a witness, I find it difficult to believe that his personality for this particular job was so much more pleasing than that of Stillwell or Custer, whose personalities I observed when they appeared as witnesses, and both of whom (as well as Kovalsky) have as many dependents as Bane, if not more. And even if Bane's personality were particularly suited to the elevator job, this would not justify his retention in preference to the recall of senior men when he was shifted from the elevator to a regular warehouse job 2 weeks later. It may be urged that the elevator job had never been a "warehouse" job, and that therefore the Company was free to choose the operator without regard to seniority. Even on this basis, however, the selection of Bane over all the other laid-off men, who were at least as available for the job as Bane, suggests a discrimination in hire based on whether the "applicant" had been a striker. And again, Bane's transfer to the regular warehouse job would be unlawful discrimination as against the laid-off strikers, even if (contrary to my view) his being given the elevator job could be found nondiscriminatory. In short, I find that the Company violated Section 8(a)(1) and (3) in recalling nonstriker Bane ahead of laid-off men senior to him, all of whom had been strikers.

The Shelek matter stands on an entirely different footing. Ronald Shelek was taken on as a temporary replacement for his injured brother. There is no reason to believe that the Company would have acted differently if the brother had been a striker, or if nonstrikers had been among those in layoff status at the time.

The hiring of Montgomery on or about February 28, presents a different problem. No moral judgment should be, or need be, passed as to whether the Company, acting through Donald Levenson, should have been more concerned over Miss Montgomery's graduation this particular year than over the fate of its own laid-off employees or Kovalsky's pregnant wife or Custer's or Stillwell's young children. If Montgomery would have been hired even if the laid-off men had been nonstrikers, the fact that they had been strikers would not establish a violation. But if the Company preferred nonstrikers to Montgomery, and preferred Montgomery over strikers, then the statutorily protected activity would appear to have been the basis for his selection over them. On this record I believe such unlawful preference is established by comparing the treatment of Montgomery, first with that of the laid-off nonstriker, Bane, and then with that of the laid-off strikers.

The Montgomery affair had troubled Levenson deeply since early November. It was still bothering him in January. On January 17, he wrote a letter about it to the Department of Justice. Yet, only 2 days before, he had called Bane back to run the elevator, and within 2 weeks after his letter to the Attorney General, when a regular warehouse job was available, he gave it to Bane, not to Montgomery. In short, when a choice was to be made between a laid-off nonstriker and Montgomery, the Company favored its employee. A different result obtained as between Montgomery and a laid-off striker. From this it seems fair to infer that the job given Montgomery when the Company "needed a man" would have gone to a laid-off man but for the fact that all the men still laid off had been strikers. The Company preferred the nonstriker Bane to Montgomery for a warehouse job in late January and presumably would still have preferred Bane, had he been still in layoff status, in

February. I find therefore that but for having engaged in a strike one of the laid-off men would have been recalled at the time Montgomery was hired, and that the Company on this occasion again violated Section 8(a)(3) and (1).

Turning now to Chavanak's case, we find that not only was his seniority disregarded in selecting him for layoff, but it was equally disregarded in order of recall. After Montgomery was hired, the Company recalled Stillwell, Kovalsky, and Custer, in order of seniority, but not Chavanak, who was senior to all three. This "discrimination" against Chavanak was not motivated by his strike activity, for in that respect he was not distinguishable from the other three.

In reaching Chavanak, who was 10th in line for layoff on a seniority basis, the Company passed over five men, including Kimey, a striker. Clark, who was fourth in line, and Kimey, who was eighth, were both "inside" men, as distinguishable from drivers or helpers. Although in previous years, under the union contract, no such distinction had been drawn in layoffs, the Company felt that it had suffered therefrom and that such a distinction would benefit its operations. I credit this explanation for not laying off Clark or Kimey. The other three men passed over to reach Chavanak were two helpers and one driver, none of whom were strikers. As to them, Respondent made some faint suggestion that they had more dependents than Chavanak, but also emphasized that his performance was vastly inferior, and indeed merited discharge.

A large share of the record is devoted to Chavanak's shortcomings as an employee. After reviewing it, and making due allowance for the self-interest of the witnesses in testifying as their employer (or, in some cases, their customer) would wish, I can only conclude that Chavanak was a poor driver, that he damaged more truck motors and tires than any other driver, that he damaged more furniture in the course of delivering it than any other driver, and that his personal habits in customers' homes were not conducive to spreading goodwill toward his employer. In short if Chavanak had been discharged,<sup>5</sup> I should find that it was for cause and not for union activity. To be sure, the Company did not discharge him and apparently planned to recall him in June to the job temporarily filled by Montgomery. Nevertheless, the quality of Chavanak's work was plainly at least one of the reasons why he was selected for layoff as well as why all the other laid-off men, including three fellow strikers, were recalled ahead of him.

General Counsel urges that Chavanak's ability is not in issue here, and that the question is whether the Company applied different methods in selecting employees for layoff, depending on whether they were strikers or nonstrikers. According to General Counsel, the Company followed its statement of policy with respect to nonstrikers strictly observing seniority, but picked and chose among the strikers. This argument, it seems to me, simply restates the General Counsel's conclusion, for seniority was observed (allowing for the exception of inside men) for four of the five layoffs, leaving only Chavanak's case to be examined.

As to Chavanak, it may well be that had he not continued on strike through October, the Company might have felt that his "loyalty" wiped out or at least compensated for his shortcomings, and he might have been retained at the time of the layoff. But this is the purest speculation, supported—if at all—only by the Company's discrimination against the other strikers in deferring their recall. The Company's claim that it selected Chavanak for layoff because of his unsatisfactory work finds support in its failure to recall him when it recalled in order of seniority the other strikers junior to him. I appreciate that under well-settled law if Chavanak's strike activity proved to be only part of the reason for his layoff, the statutory violation would be established. See, e.g., *N.L.R.B. v. Jamestown Sterling Corp.*, 211 F. 2d 725, 726 (C.A. 2); *N.L.R.B. v. Minnesota Mining & Manufacturing Company*, 179 F. 2d 323, 327 (C.A. 8). But in this case we have only speculation, and not evidence, that Chavanak's strike activity had anything to do with his selection.

It may also be that in selecting Chavanak for layoff the Company violated its obligation to accord to him the seniority benefits promised in the statement of policy, in which it promised to observe seniority. While the strikers did not receive such a statement on their return to work, the Company promised them equal treatment with the others (which, indeed, the Company was legally obligated to afford), and the Company withheld the statement solely because much of it, dealing with possible reprisals by the Union, was inapplicable to the strikers. But this would establish, at most, a breach of agreement or promise and leave us with the question whether the breach was occasioned in part by Chavanak's continuing on strike.

<sup>5</sup> Company witnesses testified that they had retained Chavanak for several years for fear of protracted trouble with the Union if they attempted to discharge him

It seems to me that the record establishes no more than that the Company laid off Chavanak on December 30, 1961, and, in effect, dropped him to the bottom of the list for recall purposes. The latter part of the action was plainly nondiscriminatory, and I find no proof that his initial selection was otherwise motivated. In short, I find discrimination in delaying the recall of Stillwell, Kovalsky, and possibly Custer, but not in the layoff or nonrecall of Chavanak.

#### D. Alleged discrimination in assignment of overtime

The complaint alleges that after the strike finally ended on or about October 30, 1961, the Company penalized the six employees who had continued on strike to the end by discriminating against them in the assignment of overtime. Apart from the testimony of Chavanak, who testified that both before and after the strike he was given less overtime than the other drivers, and the explanation of the Company that Chavanak got less because of his work deficiencies, the entire subject of overtime was left untreated in the testimony. Instead, both parties agreed to let the case on that issue turn to General Counsel's Exhibit No. 5, which is a list of hours worked by each employee in each workweek from the end of May 1961 until the strike, and from the end of the strike to the week preceding the hearing. Analysis of that exhibit shows that the complaint in this respect should be dismissed.

During the 14 full workweeks preceding the strike, the regular warehouse employees worked a total of 17,035 hours.<sup>6</sup> Of this total, the alleged discriminatees worked the following percentages:

Moore -----	3.49	Custer -----	3.25
Stillwell -----	3.50	Kovalsky -----	3.42
Chavanak -----	3.49	Kimey -----	3.50

In the 8 full weeks between the end of the strike and the layoff,<sup>7</sup> the warehouse employees worked a grand total of 11,791 hours, of which the alleged discriminatees worked the following percentages:

Moore -----	3.26	Custer -----	3.23
Stillwell -----	3.27	Kovalsky -----	3.32
Chavanak -----	3.23	Kimey -----	3.32

At first blush these tables suggest a possible discrimination, as each of the men involved worked a smaller percentage of the total hours in the poststrike period. The average amount lost by the six strikers in question was about one-sixth of 1 percent of the total—0.0017. Multiplying this by the number of hours (11,791) and dividing the product by 8, the number of weeks, would show an average loss of about 2½ hours per week per man. But similar variations can be found among nonstrikers as the following table shows:

Employee:	Percent of prestrike work	Poststrike work
Gettys-----	3.83	3.36
Beltz-----	3.80	3.42
E. Weisenhorn-----	3.50	3.33
Henderson-----	3.52	3.31

In any event, while a steady deprivation of 2½ hours of work per week may not be termed *de minimis*, it must be noted that the Company cannot strictly regulate the hours of truckdrivers and their helpers. Finally, it should also be noted that Chavanak may well have been given as little work as possible; that Custer (his helper) necessarily shared that fate; that Kovalsky in two of the poststrike weeks in question received more overtime than all but one or two of the employees; and that Kimey's overtime continued high through the poststrike period as compared with that of Clark, also an inside employee.

In short, General Counsel fell short of carrying the burden of proof as to the alleged discrimination in assigning overtime, and the complaint in that respect should be dismissed.

#### E. Other alleged interference, restraint, and coercion

Chavanak testified that upon his return to work after the strike, Warehouse Supervisor Schramm said to him that if he "ever went on strike again, or walked out of

<sup>6</sup> This figure includes straight time and overtime. With insignificant exceptions each employee worked at least 40 hours in each week.

<sup>7</sup> As the strikers returned on a Tuesday, their lack of overtime in that week was obviously not discriminatorily motivated.

there, or he [Schramm] asked me [Chavanak] for the garage key," he would be fired. Such a statement, if made, would obviously violate Section 8(a)(1). Schramm, however, denied making the statement, and testified that he told Chavanak only to be sure to leave his garage key with Schramm in the event Chavanak went out again. Schramm further testified that the Company was short of keys and had been seriously inconvenienced in that respect during the strike.

The issue posed is thus purely one of credibility between Chavanak and Schramm, for neither side produced any other witnesses to the conversation. There is no evidence that Schramm made any similar statements to other strikers, but on the other hand all the other strikers have been reinstated, and those who were called testified in support of the Company.

Making a choice between the credibility of Schramm and that of Chavanak is not easy. Schramm has been employed by the Company for over 20 years; he impressed me with his dignity and his apparent command of his job; and his testimony in other respects was corroborated by other witnesses. Chavanak had none of these advantages; and, although a complaining witness, was on the defensive most of the time he was on the stand, explaining attacks on his performance of his job. This led him, at times, into a manner half-querulous, half-surly. For all that, he impressed me as basically a truthful witness.

The conversation in question occurred 7 months before the hearing, and the probability is that neither man could quote it exactly. It may well be that Schramm told Chavanak that if the latter ever went out again without giving Schramm the key, Chavanak would be fired. In any event I find that the preponderance of the evidence does not support this allegation of the complaint, and that General Counsel failed to sustain his burden of proof in this respect. Moreover, as I have already found that the Company in fact discriminated against strikers, the remedy I will recommend for that violation will necessarily forbid any future threat of discrimination. In other words, even if I were to find that Schramm uttered the threat, the recommended order would not be altered.

#### CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of the Act.
2. By discriminating against former strikers in the course of recalling laid-off employees, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

#### III. THE REMEDY

As I have found that, but for the strike, Respondent would have recalled all the laid-off employees except Chavanak, in order of seniority, it follows that Stillwell should have been recalled on or about January 15, 1962, when Bane was taken back, and that Kovalsky should have been recalled on or about February 28, when Montgomery was hired. The record also suggests that Custer should have been recalled on or about April 16, when Stillwell and Kovalsky were recalled, instead of on or about May 3. Custer, however, was not named in the complaint as a victim of discriminatory nonrecall, and it may well be that if he had been so named, the Company could have produced a defense (perhaps similar to that put forth as to Chavanak) which would have shown that Bane and Montgomery could have been lawfully preferred to Custer. I therefore shall recommend no relief as to him. Stillwell and Kovalsky, however, should each be made whole in the manner set forth in *Crossett Lumber Company*, 8 NLRB 440, 497-498, for wages lost as the result of the discriminatory failure to recall them on the respective dates set forth above.<sup>8</sup>

<sup>8</sup> In the event reviewing authority reverses my finding as to Chavanak, it will follow that he should not have been laid off at all, in which event he would be entitled to reinstatement and full backpay, in accordance with the formula set forth in *F. W. Woolworth Company*, 90 NLRB 289. In that event (assuming my findings that Clark was lawfully retained is sustained) the fifth man laid off would have been senior to Stillwell. Stillwell then would be entitled only to the Montgomery job, not to Bane's and no relief would lie for Kovalsky. In the event that I am reversed as to Clark, Stillwell would get the Bane job (as found in the text), but Clark would get Montgomery's and Kovalsky would get no relief. Also, if I am reversed as to Custer, he would be entitled to the earlier recall date, even if Kovalsky got no relief under the hypotheses discussed in this

## 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 Respondent, Reichart Furniture Company, its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Discriminating against employees with respect to terms and conditions or tenure of employment because they have engaged in a lawful strike.

(b) Discouraging membership in or activities on behalf of International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, General Teamsters, Chauffeurs, and Helpers, Local Union No. 697, by discriminating in regard to tenure or terms or conditions of employment.

(c) In any like or related manner interfering with, restraining, or coercing its employees from engaging in lawful strike activity.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Make John Stillwell and Edward Kovalsky whole in the manner set forth in the section of the Intermediate Report entitled "The Remedy," for any loss of pay they may have suffered by reason of the discrimination against them.

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payments records, timecards, personnel records and reports, and all reports necessary to determine the amounts of backpay due and the rights of employees under the terms of this Recommended Order.

(c) Post at its warehouse in Wheeling, West Virginia, copies of the notice attached hereto marked "Appendix."<sup>9</sup> Copies of said notice, to be furnished by the Regional Director for the Sixth Region, shall after being duly signed by the Respondent, be posted immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for the Sixth Region in writing, within 20 days from the receipt of this Intermediate Report and Recommended Order, what steps the Respondent has taken to comply herewith.<sup>10</sup>

footnote. This result follows because Stillwell and Kovalsky had the same date of recall, and improving Kovalsky's position by one gives him no benefit. Finally, for reasons I have previously set forth in another case, I deny the General Counsel's request for interest. See *Gaylord Discount Stores of Delaware, Inc., Gay Apparel Corporation*, 137 NLRB 557, Intermediate Report, footnote 10.

<sup>9</sup> If these Recommendations should be adopted by the Board, the words "as Ordered by" shall be substituted for "as Recommended by a Trial Examiner of" in the notice. In the further event that the Board's Order be enforced by a United States Court of Appeals, the words "a Decree of a United States Court of Appeals, Enforcing an Order of" shall be inserted immediately following "as Ordered by"

<sup>10</sup> If these Recommendations should be adopted by the Board, this provision shall be modified to read: "Notify said Regional Director in writing within 10 days from the date of this Order what steps the Respondent has taken to comply herewith"

## APPENDIX

## NOTICE TO ALL EMPLOYEES

As recommended by a Trial Examiner of the National Labor Relations Board and in order to conduct our labor relations in compliance with the National Labor Relations Act, we notify our employees that:

WE WILL NOT discriminate against any employee because he engaged in a lawful strike.

WE WILL NOT discourage membership in, or activities on behalf of, Local 697 of the Teamsters, by discriminating against employees who engage in a lawful strike.

WE WILL NOT in any like or related manner interfere with or restrain or coerce our employees in the exercise of their right to engage in a lawful strike.

WE WILL give backpay to John Stillwell and Edward Kovalsky because of our failure to recall them in order of seniority when work became available after the layoff of December 30, 1961.

REICHART FURNITURE Co.,  
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, 2107 Clark Building, Pittsburgh 22, Pennsylvania, Telephone Number, Grant 1-2977, if they have questions concerning this notice or compliance with its provisions.

**Pepsi-Cola Louisville Bottlers, a Division of Pepsi-Cola General Bottlers, Inc. and Brewery and Soft Drink Workers, Local Union No. 20, of International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America, AFL-CIO.** *Case No. 9-CA-2571. October 24, 1962*

### DECISION AND ORDER

On August 3, 1962, Trial Examiner Leo F. Lightner 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 attached Intermediate Report. Thereafter, the Respondent filed exceptions to the Intermediate Report and a supporting brief.

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

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 and the entire record in the case, including the exceptions and brief,<sup>1</sup> and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.<sup>2</sup>

<sup>1</sup> In contending that it was under no duty to bargain with Brewery Workers Local Union No. 20 for a new collective-bargaining agreement, Respondent relies on *Sheets v. Los Angeles Metropolitan Transit Authority*, 364 P. 2d 332 (Calif., 1961). Apart from any other consideration, that case is distinguishable from the instant case on the following grounds. While the California Supreme Court held that a collective-bargaining agreement "survives certification," the court made it clear that the precertification contract would apply only to those employees who were represented by the same union both before and after certification. Here, however, Respondent seeks to apply the Teamster precertification contract to employees now being represented by Brewery Workers. Moreover, in *Sheets*, the court, in reaching its conclusion, relied in part on the provisions of a California statute.

<sup>2</sup> Respondent contends that Brewery Workers, by entering into an agreement with Respondent providing for a monthly checkoff of union dues to Brewery Workers, and by