In its reference to animus, the Board in *Redwing Carriers* presumably meant, not that animus bars discharge based on need to continue operations, but that animus should be considered in deciding whether the discharges were in fact based on such need or whether they were at least in part prompted by a desire to interfere with protected concerted activities. Having considered the animus and interference, I find that the discharges and the replacement steps were in fact prompted by the need to continue operations, and that the Company did not discriminatorily discharge these employees or unlawfully refuse to reinstate them.

Roe's undenied remark to Reeves the following April that the latter had perhaps "learned [his] lesson" is cited by the General Counsel, presumably as an admission of violation. If we must attempt to construe this patent ambiguity, it is at least as reasonable to believe that, the Company maintaining that its action had been lawful, Roe was telling Reeves of the lesson that the latter's refusal in December warranted discharge under the circumstances.

### III. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Company, set forth in section II, above, occurring in connection with the operations 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.

### IV. THE REMEDY

Having found that the Company has engaged in and is engaging in certain unfair labor practices affecting commerce, I shall recommend that it cease and desist therefrom, and take certain affirmative action in order to effectuate the policies of the Act.

It has been found that the Company, by threat and impression of surveillance, interfered with, restrained, and coerced its employees in violation of Section 8(a)(1) of the Act. I shall therefore recommend that the Company cease and desist therefrom and from any like or related conduct.

For the reasons cited in the subsection entitled "The alleged violation of Section 8(a)(3)," I shall recommend that the complaint be dismissed insofar as it alleges the discriminatory discharge and failure to reinstate Reeves, Taylor, Miller, and Dunlap.

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. General Drivers & Helpers Union, Local 749, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America is a labor organization within the meaning of Section 2(5) of the Act.
2. By threatening and creating the impression of surveillance in connection with union activity, thereby interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, the Company has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.
3. The aforesaid labor practices are unfair labor practices affecting commerce, within the meaning of Section 2(6) and (7) of the Act.
4. The Company has not engaged in unfair labor practices within the meaning of Section 8(a)(3) of the Act.

[Recommended Order omitted from publication.]

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## Gold Merit Packing Company, Inc. *and* United Packinghouse, Food and Allied Workers, AFL–CIO, Local Union No. 774.

*Case No. 12–CA–2385. April 23, 1963*

## DECISION AND ORDER

On November 30, 1962, Trial Examiner Fannie M. Boyls issued her Intermediate Report in the above-entitled proceeding, finding that

the Respondent had not engaged in the alleged unfair labor practices and recommending that the complaint be dismissed in its entirety, as set forth in the attached Intermediate Report. Thereafter, the General Counsel 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 [Members Leedom, Fanning, 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 entire record in the case, including the exceptions and brief, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner with the following modification.

Although we agree with the Trial Examiner's ultimate disposition of the issues herein, we do not adopt her interpretation of the Supreme Court's decision in *Bryan Manufacturing Co.*[1] insofar as it relates to Section 10(b) of the Act. We have, rather, considered the Respondent's conduct within the 6-month limitation period in the light of its conduct prior to that period. Upon the entire record, including the matters stressed by our dissenting colleague, we conclude that, although the matter is not free from doubt, the General Counsel has failed to establish by a preponderance of the credible evidence that the alleged violations in fact occurred.

## ORDER

The Board adopts as its Order the Recommended Order of the Trial Examiner.

MEMBER BROWN, dissenting, in part:

Although I concur in my colleagues' rejection of the Trial Examiner's interpretation of the Supreme Court's decision in *Bryan Manufacturing*, I must disagree with their adoption of the Intermediate Report, which dismisses the complaint in its entirety. I would find a violation of Section 8(a)(3), arising out of the discharge of Taylor, as well as independent violations of Section 8(a)(1), which are clearly established by Respondent's conduct within the 6-month limitation period of Section 10(b).

Foreman Martin's remark to the beef boners, implying that they could improve their working conditions by removing their union buttons, consituted, in my opinion, a promise of benefit conditioned upon cessation of protected union activity, and the circumstances attend-

[1] *Local Lodge No. 1424 International Association of Machinists, AFL–CIO (Bryan Manufacturing Co.) v. N.L.R.B.*, 362 U.S. 411.

ing its utterance denuded it of the protection afforded by the Trial Examiner's finding that it was made jocosely or in a light vein.[2]

Taylor, who attended a Board hearing on the Union's representation petition and wore a union button in the plant, was sought out on the day before the representation election by Respondent's president, who told Taylor he was against it; remarked that Taylor had a good job, and reminded him that employees at Swift, where Taylor once worked, had lost their jobs as the result of a strike. Shortly after the election Taylor was laid off without previous warning and given as the reason the fact that he was the junior boner, although the record indicates that two employees were junior to him. These facts clearly support the conclusion that the selection of Taylor for layoff was violative of the Act.[3] Additionally, the record indicates that Taylor was acknowledged to be one of the best, if not the best, boner; that for at least 5 years previous to 1962 Respondent, during slow seasons, did not lay off any boners but, instead, reduced the hours of all of those in his employ; and, finally, that Taylor's alleged misconduct in 1961 was not advanced as a reason for his layoff until the hearing. On the basis of the foregoing evidence, I would reverse the determination of the Trial Examiner and find violations of Section 8(a)(1) and (3) of the Act.

[2] *Star Cooler Corporation*, 129 NLRB 1075, 1076, footnote 3.
[3] *Austin Powder Company*, 141 NLRB 183.

## INTERMEDIATE REPORT AND RECOMMENDED ORDER

### STATEMENT OF THE CASE

Upon a charge filed on June 20, 1962, by United Packinghouse, Food and Allied Workers, AFL–CIO, Local Union No. 774, herein called the Union, a complaint was issued on August 6, 1962, alleging that Respondent, Gold Merit Packing Company, Inc., had violated Section 8(a)(1) and (3) of the National Labor Relations Act by offering economic benefits to employees if they ceased wearing union buttons and by discharging or laying off an employee, Louie E. Taylor, because of his union or protected concerted activities. Respondent filed an answer in which it denied engaging in any of the unfair labor practices alleged.

A hearing, at which all parties were represented, was held before Trial Examiner Fannie M. Boyls in Jacksonville, Florida, on September 24, 25, and 26, 1962. At the conclusion of the hearing, counsel for the General Counsel argued orally before me. Respondent waived oral argument but filed a brief, which I have carefully considered. Although specifically requested to do so, the General Counsel has failed to submit a brief.

Upon the entire record in the case,[1] and from my observation of the witnesses, I make the following:

### FINDINGS OF FACT

#### I. THE BUSINESS OF RESPONDENT

Respondent is a Florida corporation, engaged in the operation of an abattoir and meat processing plant at Jacksonville, Florida. During the year preceding the issuance of the complaint, Respondent, in the course and conduct of its business,

[1] The General Counsel filed a motion subsequent to the conclusion of the hearing, requesting that the official report of proceedings in this case be corrected in a number of respects. The proposed corrections being consistent with my recollection of what transpired at the hearing, and Respondent having failed to object to any of them, the motion is hereby granted and the record is corrected accordingly.

received goods and supplies valued in excess of $50,000 directly from sources located outside the State of Florida. I find that Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that it will effectuate the policies of the Act to assert jurisdiction herein.

### II. THE LABOR ORGANIZATION INVOLVED

United Packinghouse, Food and Allied Workers, AFL–CIO, Local Union No. 774, is concededly a labor organization within the meaning of Section 2(5) of the Act.

### III. THE UNFAIR LABOR PRACTICES ALLEGED

#### A. *Issues*

In seeking to prove that Respondent's layoff of employee Louie E. Taylor on February 26, 1962, was discriminatorily motivated, as alleged in the complaint, the General Counsel has relied almost exclusively upon evidence of employer conduct prior to the 6-month limitations period provided in Section 10(b) of the Act which, if believed, would establish the commission of unfair labor practices during the time-barred period. The basic issue presented, it seems to me, is whether, in determining Respondent's motivation in laying off Taylor, I may properly take into account evidence bearing upon Respondent's reasons for discharging the same employee more than 6 months prior to the filing of the charge in this case. In other words, since the limitations proviso to Section 10(b) of the Act would bar a finding that Taylor's discharge was an unfair labor practice, would that proviso also bar a consideration of Respondent's motives for discharging him in determining its motive, after rehiring him, for subsequently laying him off.

The Supreme Court has pointed out in *Local Lodge No. 1424, International Association of Machinists, AFL–CIO (Bryan Manufacturing Co.)* v. *N.L.R.B.*, 362 U.S. 411, 416, that "where occurrences within the 6-month limitations period in and of themselves may constitute, as a substantive matter, unfair labor practices . . . earlier events may be utilized to shed light on the true character of matters occurring within the limitations period." On the other hand, "where conduct occurring within the limitations period can be charged to be an unfair labor practice only through reliance on an earlier unfair labor practice . . . the use of the earlier unfair labor practice . . . serves to cloak with illegality that which was otherwise lawful." Such use of a time-barred event would in effect result "in reviving a legally defunct unfair labor practice" and is not permissible under Section 10(b) of the statute.

The application of these principles to a given case is, of course, no simple matter, as the Supreme Court recognized. And the principles it enunciated did not purport to comprehend all types of situations which come before the Board. The Court expressly declined, for example, to express its views on that line of cases in which the Board has refused to consider evidence of an unfair labor practice nature from a time-barred period where evidence of an unfair labor practice marshaled from within the 6-month period was not substantial.[2]

Without attempting to delineate further the principles governing the application of Section 10(b) in this controversial area, it is sufficient at this point to examine the evidence relating to the employer's conduct within the limitations period, along with pertinent background evidence relating to the employer's knowledge of Taylor's union or other concerted activities, without at the same time appraising evidence of a time-barred unfair labor practice nature. At the very least, I would not feel warranted in examining evidence of the latter nature if Respondent's explanation for Taylor's layoff is not incredible, ambiguous or equivocal and there is, within the limitations period, no evidence of antiunion motivation. Cf *L. B. Woods, et. al. d/b/a Breckenridge Gasoline Company*, 127 NLRB 1462, 1464–1465 and *Paramount Cap Manufacturing Company*, 119 NLRB 785 enfd. 260 F. 2d 109, 113 (C.A. 8).

In addition to the issues presented by Respondent's layoff of Taylor, there is one further issue involved in this case—whether a preelection statement allegedly made by Foreman Martin was of a coercive nature. I shall dispose of this latter issue first.

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[2] See, e.g., *News Printing Co., Inc.*, 116 NLRB 210, 212; *Universal Oil Products Company*, 108 NLRB 68; *Tennessee Knitting Mills, Inc.*, 88 NLRB 1103. But, cf. *Paint, Varnish & Lacquer Makers Union Local 1232, AFL–CIO, et al. (Andrew Brown Company)*, 120 NLRB 1425.

B. *Alleged coercive remark of Foreman Martin*

For several weeks prior to a representation election held on February 23, 1962, almost all the beef boners wore union buttons. According to employee Stallons, on one occasion during this period, when work was slow, Jimmy Martin, foreman over the boners, made a statement to the group of boners to the effect that "if we'd pull those buttons off things would be a lot different." Stallons testified, "Well, it's possible that he could have meant it either way [seriously or in jest]. I didn't hear the statement well enough or didn't look up to see the expression on his face." Stallons further testified that several weeks before the hearing, in a "kidding" manner, he remarked to Martin, "it looks like you meant what you said about those buttons" and Martin replied, "what did I say?" Thereupon, Stallons dropped the matter. Stallons conceded that he had never heard Martin say anything against the Union.

Taylor likewise testified to hearing a remark by Martin similar to the one Stallons described. He did not believe that Martin was joking but did not recall looking at him when the statement was made. Martin, on the other hand, denied making such a statement.

Martin was on friendly terms with the boners and occasionally had drinks with them. He appeared to be a good-natured fellow and even permitted to go unchallenged a false rumor started by one of the boners in jest to the effect that Martin was a fugitive from justice in Georgia, because, as Martin explained, the employees seemed to enjoy the rumor. Although I am convinced and find that Martin made a statement of the nature of that described by Stallons and Taylor, I am convinced that it was not meant to be and was not in fact, taken seriously by the employees. Indeed, I am persuaded that because of the light vein in which it was made, Martin himself soon forgot it and was sincere in testifying that he had not made such a statement. In these circumstances and because of the isolated nature of the remark, I find no substance to the allegation of the complaint that Respondent, through Foreman Martin, interfered with, restrained, or coerced its employees in the exercise of their Section 7 rights by offering economic benefits to employees if they got rid of the union buttons they were wearing.

C. *Taylor's union and other concerted activities and his employment background*

In 1957, prior to Taylor's employment by Respondent, the Amalgamated Meat Cutters, etc., Local 433, AFL–CIO, herein called the Amalgamated, was certified as the employees' bargaining representative following a consent election. That union failed to obtain a contract with Respondent and became dormant at the plant prior to 1961. During the early part of 1961, Taylor and some other employees sought to revive the employees' interest in the Amalgamated and Taylor obtained the signatures of a number of employees on Amalgamated membership cards. During this same period there was a lot of discontent and dissension among some of the employees, particularly those in the beef boning department, and, as a result, work was disrupted on a number of occasions as the boners, in a group, talked to President Sol Goldman or his brother, Supervisor Joe Goldman, about how they thought the boning and trimming operations should or should not be run. Taylor was frequently the spokesman for the group.

One day in March 1961, after there had been some interference with production on account of this dissension, President Goldman gave each of the boners a week's layoff. However, two of them, Goodman and Shedd, after a telephone conversation with Goldman on the night of their layoff, were permitted to return to work the next day. The others, with Taylor as their spokesman, came to see Goldman on the next day and were permitted to return to work after missing only 1 day of work.

Within a few days or a week following these layoffs there occurred an incident at the home of employee Goodman which precipitated the discharge of Taylor and two other employees, Walker and Petty, on March 25.[3] Following the discharge of these three employees, the effort to reestablish the Amalgamated as a bargaining representative appears to have been abandoned.

Taylor was rehired on July 15, 1961. He found that a number of employees were talking about the selection of another union, the Charging Party herein, to represent them. Shortly thereafter he joined the organizational movement and

[3] In connection with an attempt by Taylor, Walker, and Petty to persuade Goodman to join the Amalgamated, Walker and Petty, at least, engaged in misconduct of an aggravated nature which unquestionably warranted their discharge. It is the General Counsel's contention that Taylor engaged in no misconduct on this occasion and was, instead, engaging in a protected union activity. Respondent asserts that prior to the hearing in this case, it had no knowledge of any union activities of its employees in 1961.

signed up a number of employees in the new union. When the Union filed a representation petition with the Board, he and four other employees appeared at the scheduled hearing at which President Goldman signed a consent-election agreement.[4] The Union won the election and was certified on February 23, 1962. On the following day, at a union meeting, Taylor was elected to the bargaining committee as a representative of the boning department. Three other employees were elected to represent other departments. The Union, however, did not inform Respondent of the selection of these employees for the bargaining committee and I accept Goldman's testimony that he did not know about it until they appeared at the first bargaining conference about April 1.

### D. *Taylor's layoff on February 26, 1962*

In the meantime work for the boners had slackened and Goldman decided to lay off one of them on February 26. He selected Taylor and, according to the latter's undenied and credited testimony, he told Taylor that the Company had too many boners and "We are going to lay you off, old buddy, because you are the youngest boner here." Taylor disputed the assertion that he was the least senior boner but Goldman replied, "Well, we are going by our pay cards." He added that Taylor was the one getting laid off anyway. Taylor protested that two boners, Jimmy Tanner and Ike Jones, were junior in seniority to him and said, "I am going to protest this through the union, you are not treating me right." According to Taylor, Goldman then angrily retorted, "If you want to look up the union, go ahead, so goddam, why don't you go back to Swift. They have got a union there." Taylor further testified that after he replied to Goldman that he was not working for Swift any longer and that Swift did not concern them, Goldman cooled off and Taylor assured him, "However it comes out . . . me and you will still be friends." [5]

Thereafter, in bargaining conferences, the Union stated that Taylor's reinstatement was one of its bargaining demands. The Union took the position that in addition to there being two boners with less seniority than Taylor when he was laid off, another employee, Carlton, who had been trimming but after Taylor's layoff was transferred to boning, had less seniority than Taylor. Goldman nevertheless took the position that he had no work for Taylor and was unwilling to take him back at that time. At one point in the bargaining, Respondent's counsel, who was one of Respondent's bargaining representatives, acknowledged that if seniority were followed, Taylor would probably have a right to work but that Goldman was not recognizing seniority as controlling. At another bargaining conference Taylor complained that he was not being told the reason for his layoff and stated that he likewise had never been told the reason for his discharge in 1961. Thereupon Goldman retorted that Taylor knew the reason for his discharge: that he had gotten drunk, gone to Goodman's house and engaged in misconduct—describing the misconduct of which ex-employee Petty was in fact guilty. Taylor replied, "Mr. Goldman if anybody has accused me of such a thing, they are a liar." There followed a conference between

[4] Taylor testified that on the day before the election, Goldman reminded him of the forthcoming election, stated that he was against the Union, that Taylor had a good job and they were getting along fine, and remarks that following a strike at the Swift plant (where Taylor used to work) some of the strikers did not have jobs. Taylor understood the latter statement to refer to a loss of business by Swift and a consequent loss of work for its employees. Goldman testified, on the other hand, that he never told Taylor or anyone else that he was against the Union but, instead, told each employee that the election would take place on the next day, that the employees could vote however they pleased and no one would know how they voted. I find it unnecessary to resolve the conflict in testimony, for, even assuming that Goldman made the statements attributed to him by Taylor, these were not proscribed by the Act, nor do they constitute any evidence of a discriminatory motivation in the subsequent layoff of Taylor.

[5] Goldman did not testify regarding the details of what was said when he laid Taylor off but in response to a question by his counsel as to whether he recalled making a statement on the day Taylor was laid off to the effect that "If you are so happy with the union, why don't you go back to Swift or Armour or some other meat packing company?" he replied, "No sir. I did not make that statement." The statement Goldman denied making is one attributed to him by Union Representative Hall at one of the bargaining sessions at which Taylor's reinstatement was discussed. In connection with what was said at the time of the layoff and in other respects, Goldman did not appear to be as frank a witness as Taylor and his mere denial, without attempting to explain what was in fact said, leads me to believe, and I find, that Taylor's account is substantially correct.

Goldman and his counsel, after which the latter asked Goldman, "Do you want to put him back to work?" and Goldman replied, "No." [6]

At the hearing in this case Goldman testified that he selected Taylor for layoff because he "was one of the newest boners and then he had been discharged previously for misconduct." Although I am not convinced that Taylor had seniority over employee Jones,[7] it does appear that he had seniority over Tanner, an irregular employee who returned to boning shortly after Taylor was laid off and again worked irregularly,[8] and over Carlton who was hired as a trimmer subsequent to Taylor's rehire and occasionally filled in as a boner when a regular boner was absent. Carlton, according to the credited testimony of Stallons, Smith, and Goodman, was transferred to a boning job within a few days after Taylor was laid off.[9]

Taylor was unquestionably a competent boner and, upon occasions, had been asked by a foreman to show some of the other boners how he seamed and boned hind legs to meet Army specifications. But, according to Goldman, the other boners were also competent and their relative competency was not a factor he took into consideration in selecting one of the boners for layoff. I shall assume, as Goldman testified, that two factors entered into his selection of Taylor: (1) that although Taylor was not the least senior boner, he was "one of the newest" and (2) that he had been discharged during the preceding year for what Goldman considered to be misconduct.

Taylor was called back to work on July 5, 1962, when Goldman needed the services of another boner. The General Counsel, apparently contends that Goldman further discriminated against Taylor after recalling him by assigning him to boning front quarters rather than hind quarters, which he had been doing immediately before his layoff. The complaint, however, does not allege a statutory violation in this respect. Moreover, I find no reason to doubt Goldman's explanation that he preferred another boner, Diaz, who has greater seniority than Taylor, for the hind quarter boning because Diaz is a smoother boner.

### E. *Analysis and conclusions*

In my view, there is no substantial evidence on the basis of events occurring within the 6-month limitations period from which it could be inferred that Goldman was motivated by antiunion considerations in laying off Taylor. Respondent had not

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[6] The General Counsel contends that Goldman thereby took the position that he would never take Taylor back. But in view of the bargaining as a whole and the fact that Goldman did in fact later recall Taylor, I think the more reasonable interpretation of Goldman's statement is that his position was unchanged by Taylor's explanation and he was still unwilling to put Taylor back to work at that time.

[7] Several of the employees (Stallons, Smith, Lippold, Goodman, and Taylor) testified that Jones had been in Respondent's employ on previous occasions but that he was rehired the last time subsequent to Taylor's rehire and was therefore junior to him. Respondent, however, introduced an earnings record for Jones which showed that he had earned some money each week during the period from the week ending April 12, 1961 (prior to Taylor's rehire on July 15, 1961) to the week ending December 27, 1961. From these records, it would appear that Jones was in fact working at the time Taylor was rehired, and, according to Goldman's credited testimony, Jones was not thereafter fired. I am satisfied that the employees were mistaken as to the dates of Jones' tenure with Respondent. What Taylor and some of the other employees interpreted as a discharge of Jones by former Foreman McGhee not long after Taylor's rehire was probably a disciplinary layoff and it could have occurred in early November 1961 when, for 2 weeks in succession, Jones' earnings were very low.

[8] In its brief, Respondent argues that Tanner (also known as Riggs) was a returned veteran and had seniority rights, under the Federal Reemployment Statutes, going back to the time he left for the Services. The record, however, does not support this assertion. Goldman did not testify that he was motivated by any such consideration in retaining Tanner in preference to Taylor. According to Taylor's undenied and credited testimony, Tanner had not been in Respondent's employ for several weeks prior to entering the Services in 1960. He was rehired in the latter part of 1961 and worked irregularly thereafter. He was not working at the time Taylor was laid off but was put back to work several days thereafter.

[9] Goldman explained that although Carlton works most of the time at trimming, he also fills in, when needed, as a boner, and has always been used interchangeably at trimming and boning. Taylor, on the other hand, refuses to trim, and this was a factor in Goldman's selection of Taylor rather than Carlton for layoff.

sought to defeat the Union in the election and had even facilitated its selection by agreeing to a consent election. Taylor had exhibited certain leadership qualities in serving as spokesman for the boners upon a number of occasions during his prior employment by Respondent but Goldman had never appeared to resent this and had attempted to settle employee problems thus presented. Respondent was aware that Taylor as well as some of the other employees were active in the Union, but so far as the record shows, the others were not laid off. Although after telling Taylor of the decision to lay him off, Goldman lost his temper when Taylor announced that he was going to protest his layoff through the Union, and asked Taylor why he did not go back to the unionized Swift plant, I do not regard this statement as evidence of any antiunion motivation in selecting Taylor for layoff. Work was slack before the election and if Respondent intended to discourage union membership by selecting a union protagonist for layoff, it seems more likely that this would have been done before the election.

At the opening of the hearing in this case, the General Counsel, although conceding that evidence of employer conduct prior to the 6-month limitation period was "indispensable" to his case, stated that he was not asking that any unfair labor practice finding be made on the basis of that conduct. He is, nevertheless, in effect doing so. His argument is that Taylor did not in fact participate in the misconduct of his companions, Petty and Walker, in 1961 and, instead, was merely engaging in the protected union activity of attempting peacefully to persuade employee Goodman to join the Amalgamated; that all the facts were reported to Goldman prior to the discharge of Taylor along with Petty and Walker; that his discharge therefore was for engaging in the protected union activity; and that the subsequent layoff in 1962, grounded upon the 1961 discharge, must likewise be considered motivated by unlawful considerations.

If the reason assigned by Goldman for selecting Taylor for layoff had been of an ambiguous or equivocal nature—such as, "I am laying you off for the same reason for which I fired you last year"—there might be warrant in going beyond the limitations period to determine the reason for the discharge. It could be argued, of course, that Goldman's testimony that he took into consideration the fact that Taylor "had been discharged previously for misconduct" puts in issue the nature of the so-called misconduct and permits the General Counsel to show that the 1961 conduct for which Taylor was discharged consisted of the protected activity of soliciting an employee to join a union, rather than misconduct. However, the term "misconduct," though of a conclusionary character, is not an ambiguous or equivocal term and there is nothing in the record from which it could be inferred that Goldman's understanding of it could embrace such conduct as the solicitation of union membership. Indeed, his testimony that he did not know until the hearing in this case that employees were engaging in union activities in 1961 rules out such an interpretation of that term by him.[10]

To make a finding on the disputed evidence as to the true reason for Taylor's discharge in 1961 and sustain the General Counsel's position with respect to that reason, would require a finding that Respondent discharged Taylor, not for misconduct, but for engaging in a protected union activity.[11] Thus, I am, in effect, being asked to revive a legally defunct unfair labor practice in order to cloak with illegality a layoff within the limitations period which otherwise would be lawful. As I interpret the Supreme Court's decision in *Local Lodge No. 1424 International Association of Machinists, AFL–CIO (Bryan Manufacturing Co.)* v. *N.L.R.B.*, 362 U.S. 411, I am not permitted to do so. See also, *L. B. Woods, et al. d/b/a Breckinridge Gasoline Co.*, 127 NLRB 1462, in which the Board dismissed an allegation that the employer had discriminatorily refused to reemploy two employees, pointing out that evidence of what happened within the 6-month limitation period was not sufficient, standing alone, to support a finding of discrimination and that any finding of a violation based

[10] By this statement, I do not mean to make any finding as to whether Goldman in fact knew in 1961 about such activities. I find it unnecessary to resolve, and do not resolve, the credibility issues bearing upon the reason for Taylor's discharge in 1961.

[11] Testimony of the General Counsel's witnesses, if credited, would support a finding that the discharge was of the type proscribed by Section 8(a)(3) of the Act even if Goldman mistakenly believed Taylor responsible for the misconduct of Walker and Petty. See, i.e., *International Ladies' Garment Workers Union (B.V.D. Company, Inc.)* v. *N.L.R.B.*, 237 F. 2d 545 (C.A.D.C.), and Board's decision on remand 117 NLRB 1455; *N.L.R.B.* v. *Marshall Car Wheel and Foundry Co. of Marshall, Texas, Inc.*, 218 F. 2d 409, 417–418 (C.A. 5); *International Ladies' Garment Workers Union, AFL–CIO (Walls Manufacturing Company)* v. *N.L.R.B.*, 299 F. 2d 114 (C.A.D.C.); *Cusano d/b/a American Shuffleboard Co.* v. *N.L.R.B.*, 190 F. 2d 898, 902–903 (C.A. 3).

on the reasons for the employees' earlier discharges would be "inescapably grounded on events predating the limitations period." [12]

On the basis of the foregoing considerations, I find that the General Counsel has not sustained his burden of proving that Respondent violated Section 8(a)(3) or (1) of the Act, as alleged in the complaint.

### RECOMMENDED ORDER

Upon the basis of the foregoing findings and conclusions of law, I hereby recommend that the complaint be dismissed in its entirety.

[12] Cf. also the following cases decided subsequent to the Supreme Court's *Bryan* decision: *Sheet Metal Workers International Association, AFL–CIO, et al. (Burt Mfg. Co.)* v. *N.L.R.B.*, 293 F. 2d 141, 146–47 (C.A.D.C.), union petition for cert. denied 368 U.S. 896; *N.L.R.B.* v. *Plumbers & Pipe Fitters Local Union 214 (D. L. Bradley Plumbing & Heating Company)*, 298 F. 2d 427 (C.A. 7); *N.L.R.B.* v. *American Aggregate Company Inc., and Featherlite Corporation*, 305 F. 2d 599 (C.A. 5); *Borg-Warner Controls, Borg-Warner Corporation*, 128 NLRB 1035, 1046; *Southen Electronics Company, Inc.*, 131 NLRB 1411; *Superior Maintenance Company*, 133 NLRB 746; *Florida All-Bound Box Company*, 138 NLRB 150.

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## Lyman H. Claridge d/b/a Claridge Logging Co. *and* Montana Carpenters District Council. *Case No. 19–CA–2456. April 24, 1963*

### DECISION AND ORDER

On December 27, 1962, Trial Examiner Herman Marx 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 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 Rodgers, Fanning, 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, the exceptions thereto and supporting briefs, and the entire record in this case, and hereby adopts the Trial Examiner's findings, conclusions, and recommendations.

### ORDER

The Board adopts as its Order the Recommended Order of the Trial Examiner with the modifications noted below.[1]

[1] The words "like or related" appearing in the first line of paragraph 1(b) of the Recommended Order are hereby deleted and the word "other" is substituted in their place. The words "like or related" appearing in the second paragraph of Appendix A, in the Notice to Employees, are hereby deleted from that paragraph.