

G & J Company, Inc. and Local 210, Merchandising & Distribution Employees Union, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.
Case No. 22-CA-1657. April 29, 1964

DECISION AND ORDER

On January 20, 1964, Trial Examiner Harold X. Summers issued his Decision 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 affirmative action, as set forth in the attached Trial Examiner's Decision. He further found that the Respondent had not engaged in certain other unfair labor practices alleged in the complaint and recommended that such allegations be dismissed. Thereafter the Respondent and the General Counsel filed exceptions to the Trial Examiner's Decision and supporting briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, the Board has delegated its powers in connection with this case to a three-member panel [Chairman McCulloch and Members Leedom and 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 this case, including the Trial Examiner's Decision, the exceptions, and the briefs, and hereby adopts the Trial Examiner's findings, conclusions, and recommendations, with the following additions and modifications:

1. We adopt the Trial Examiner's findings that the Respondent violated Section 8(a)(1) of the Act by unlawfully interrogating its employees; threatening employees and union organizers; and soliciting and promising benefits for its employees' withdrawal from the Union.¹

2. We find, in agreement with the Trial Examiner, that the Respondent discriminatorily laid off James Sippio, John Lee, and Lorenzo McPhatter in violation of Section 8(a)(3) and (1) of the Act.

3. The General Counsel filed exceptions to the Trial Examiner's finding that the discharge of Harry Davis was not in violation of the Act. We find merit in these exceptions.

¹In the absence of exceptions thereto, Member Leedom adopts *pro forma* the finding of the Trial Examiner that the Respondent violated Section 8(a)(1) of the Act by President Gabriel Borsellino's statement in a speech to the employees to the effect that there would be eventual layoffs should the efforts to organize the Union be successful, as the Respondent could not afford to operate under the higher costs occasioned by union demands.

Davis was hired by the Respondent as a mechanic's helper in February 1962. He had been frequently absent or late to work. Although usually admonished, he was generally allowed to make up the time lost and was never warned that such conduct, if continued, would cost him his job.

On Sunday, May 5, 1963, Davis attended a union organization meeting with Sippio, Lee, and McPhatter, where each signed an application for membership in, and an authorization as his bargaining representative to, the Charging Union. On May 7, 1963, Charles Perkosky, Respondent's secretary-treasurer, received notice from the business agent of the Charging Union that the latter represented a majority of the Respondent's employees, and a meeting between the Union and the Employer was arranged for the next afternoon. The same day, at quitting time, President Gabriel Borsellino assembled the employees and told them, *inter alia*, that the Respondent could not afford to operate with a union because of the higher costs involved; that if the Union came in, there would be layoffs and the owners and their sons would perform all the work themselves; and that he would not stand for a union but would close Respondent's doors before permitting a union to organize. He also inquired as to who had "signed up," and invited anyone who had signed or who wanted the Union to pack his tools and leave.

During the next 3 days Borsellino interviewed Sippio, Lee, McPhatter, and Davis individually and asked each whether he had signed a union card, and requested each to sign a "paper" withdrawing from the Union. He also told them that he knew "the fellows" had signed with a union; that if the Union came in, the Respondent would pick out its best customers and the owners and their sons would do the work themselves. Borsellino also told one employee that if he signed a paper against the Union, he would continue to hold his job. When Davis refused Borsellino's request that he sign the paper against the Union, Borsellino told him that the Respondent could not afford a union, would not stand for one, would close before allowing a union in the shop, and he would discharge anyone he knew had signed a card.

On Friday, May 10, 1963, Davis did not report for work until noon because of concern for one of his children who was ill. He failed to notify the shop, and when he reported to work Borsellino summarily discharged him. The only reason given by Borsellino for the discharge was Davis' late arrival to work that day.

On May 22, McPhatter and Lee were laid off because of their activity on behalf of the Union, as was Sippio on May 29.

In August, Davis asked Perkosky for a job as a driver for a truck rental company owned by Respondent and operated at its premises.

Perkosky told Davis that he was afraid to hire anyone as "they might try to bring a union in again," but if Davis "took his name off the Labor Board claim" Davis might be able to get his job back.

At the hearing, the Respondent contended, for the first time, that Davis was discharged in order to give his job to Eddie Sposobiec, Borsellino's future son-in-law. Prior to Davis' discharge, Sposobiec had been employed full-time by the Essex County Park Commission, and also worked as a mechanic's helper at Respondent's shop afternoons and evenings 5 to 8 hours a day. Borsellino and Perkosky testified that they had intended "eventually" to hire Sposobiec on a full-time basis and, as there was enough work for only one mechanic's helper, they had intended to let Davis go. However, there is no evidence as to when, if ever, this vaguely expressed intention was to be carried out. Thus, although Borsellino testified that Sposobiec had given the Park Commission 2 weeks' notice, there is no evidence as to when he had done so. Moreover, the Respondent had given no notice to Davis that he would be discharged when Sposobiec was hired for full-time work. That there was work for more than one mechanic's helper is additionally shown by the fact that Sposobiec had been employed 5 to 8 hours a day for a month prior to Davis' discharge.

As the Respondent had tolerated, over a long period of time, Davis' frequent absences and tardiness, and had never warned him that he might be discharged therefor, we find that Davis' lateness in coming to work on May 10 was used by the Respondent as a pretext to conceal its real reason for discharging him. We further find, contrary to the Trial Examiner, that the Respondent's vaguely expressed intent to replace Davis with Sposobiec, advanced for the first time at the hearing, was an afterthought. In all the circumstances of the case—particularly the timing of Davis' discharge, 3 days after the Respondent learned of the Union's efforts to organize its employees, the Respondent's attempt to persuade Davis to withdraw his support of the Union and threat to discharge him if he did not, and its subsequent refusal to rehire him unless he renounced his advocacy of the Union and withdrew his charge against the Respondent—we find that a preponderance of the evidence establishes that the Respondent discriminatorily discharged Davis because of his union activity, in violation of Section 8(a) (3) and (1) of the Act.²

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the Board hereby adopts as its Order, the Order recommended by the Trial Examiner and orders that Respondent, G & J

² The Respondent's contentions regarding the discriminatees' rights to reinstatement and backpay are matters to be determined at the compliance stage of this proceeding.

Company, Inc., of Newark, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order, with the following modifications:

1. Modify provisions 2(b) and (c) by adding the name of Harry Davis to the other discriminatees named therein.³
2. Delete the last paragraph of the Recommended Order.

³ The notice shall be amended by adding the name of Harry Davis to the other discriminatees in the fourth indented paragraph.

TRIAL EXAMINER'S DECISION

This case was heard upon the complaint¹ of the General Counsel of the National Labor Relations Board, herein called the Board, alleging that G & J Company, Inc., herein called Respondent, had engaged in and was engaging in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the National Labor Relations Act, herein called the Act. Respondent's answer to the complaint admitted some of its allegations and denied others; in effect, it denied the commission of any unfair labor practices. Pursuant to notice, a hearing was held before Trial Examiner Harold X. Summers at Newark, New Jersey, on September 30 and October 2 and 3, 1963. All parties were afforded full opportunity to examine and cross-examine witnesses, to argue orally, and to submit briefs. Briefs filed by the General Counsel and Respondent have been fully considered.

Upon the entire record² of the case, including my evaluation of the witnesses based upon the evidence and my observation of their demeanor, I make the following:

FINDINGS OF FACT

I. COMMERCE

Respondent, a New Jersey corporation with principal office and place of business in Newark, New Jersey, is, and at all times material has been, engaged in providing and performing truck and automobile repair and related services. In the course and conduct of its operations during the 12 months preceding the issuance of the complaint herein, which period was representative of all times material herein, it provided and performed automotive repair and related services valued at in excess of \$100,000, of which services valued at in excess of \$50,000 were provided and performed for nonretail enterprises located within the State of New Jersey each of which enterprises itself annually either ships goods valued at in excess of \$50,000 to points outside the State of New Jersey or performs services valued at in excess of \$50,000 at such points.

I find that Respondent is an employer engaged in commerce within the meaning of the Act.

II. THE UNION

The Charging Party, Local 210, Merchandising & Distribution Employees Union, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, hereinafter called Local 210, is a labor organization within the meaning of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Setting*

As of May 7, 1963, Respondent's working force consisted of the following individuals: Gabriel Borsellino, Respondent's president; Charles Perkosky, Sr., secretary-treasurer; Howard Buell, part-time bookkeeper; Charles Perkosky, Jr. (son of Perkosky, Sr.), mechanic, hired in June 1957; Mario Borsellino (son of Gabriel), mechanic, hired in September 1960; James Sippio, mechanic, hired in August 1961;

¹ The complaint was issued August 22, 1963. The charge initiating the proceeding was filed July 10, 1963.

² On November 12, 1963, I issued an order to show cause why the transcript of the hearing should not be corrected in specified respects. No good cause to the contrary having been shown, the corrections indicated in the order to show cause, which is received in evidence as Trial Examiner's Exhibit No. 1, are hereby ordered made.

Harry Davis, mechanic's helper, hired in February 1962; Lorenzo McPhatter, mechanic, hired in September 1962; John Lee, mechanic, hired in December 1962; Edward Sposobiec, mechanic's helper, hired on part-time basis April 19, 1963; and Ray Farparan, mechanic, hired on May 4, 1963.

On the basis of admissions in the pleadings and on the testimony in this record, I find that Gabriel Borsellino and Charles Perkosky, Sr., during all times pertinent, were and are agents of Respondent and supervisors within the meaning of Section 2(11) of the Act.³

B. Chronology of Events ⁴

1. On or about April 20, 1963,⁵ James Sippio communicated with Otto Roquemore, an organizer for Local 210, expressing an interest, on behalf of some of Respondent's employees, in union membership. A meeting for interested employees was arranged for 10 a.m., Sunday, May 5, at Sippio's home. At that time and place, Roquemore met with Sippio, Harry Davis, Lorenzo McPhatter, and John Lee. Each of the four signed an application for membership in and an authorization as bargaining representative to Local 210.

2. On May 7, Local 210 mailed a letter to Respondent, in which Local 210 claimed to represent a majority of Respondent's employees and asked for a meeting to discuss terms of an agreement covering the employees. (The letter was received by Respondent within a day or two of the mailing.) At or about the same time Robert Beshlian, Local 210 business agent, telephoned Respondent and spoke to Perkosky; being told that Respondent's place of business was open from 8 a.m. to 6 p.m., Beshlian said that a Local 210 representative would visit Respondent next day (May 8) at noon.

3. That afternoon (May 7), Perkosky told Borsellino of the telephone call and of the impending visit. Having discussed the matter between them, they decided to meet with the employees that afternoon. Thereafter, Borsellino told individual employees of a meeting to be held later that day.

At or about quitting time, 5 p.m., Borsellino spoke to the assembled employees. Saying that he was speaking for himself and for Perkosky, he opened with the statement that he had heard someone was trying to bring a union into the shop. He said that Respondent could not afford to operate with a union; that it could not pass on to customers the higher costs which would be occasioned by union demands; and that, if a union came in, there would be layoffs—he and Perkosky and their two sons would themselves perform all repair services in a smaller place with lower overhead costs. He could, he said, demonstrate the truth of his statements "in black and white"—by showing the books. He asked who had "signed up" with the Union but received no affirmative answers. Warning to his subject, he said he would not stand for a union; he would close Respondent's doors before permitting a union to organize there; and if he found out who was responsible, he would throw him out—and he would personally eject any union organizer. He invited anyone who had signed a union card or who wanted a union to pack his tools and leave.⁶

4. Next morning, at approximately 10:30 o'clock, Borsellino called Lee into his office. He said he knew that "the fellows" had signed "for a union" and asked what Lee intended to do about it; specifically, he asked whether Lee would "sign a paper against the Union." He said he wanted to know because he could not afford a union and would not have a union, and that if a union came in, the employees,

³ There was some dispute—the resolution of which is not called for in the proceeding—as to the employee status of Mario Borsellino and Charles Perkosky, Jr. References hereinafter to "Borsellino" and "Perkosky" will be to Gabriel Borsellino and Charles Perkosky, Sr.

⁴ My findings of what occurred—or did not occur—as recited in this section will not be repeated elsewhere in this decision. Subsequent references to items in this section will take the form of the abbreviation "chron." followed by the item number or numbers being alluded to.

⁵ Unless otherwise indicated, all dates mentioned in this section are within the year 1963.

⁶ These findings as to the contents of Borsellino's speech constitute an amalgam of the credited testimony of the six witnesses who testified thereon—Sippio, Davis, McPhatter, Lee, Borsellino, and Perkosky. The testimony of the six, although varied, did not differ in relevant detail except in two respects: (1) Borsellino was the only witness who testified that, at this time, he asked who had signed up with the Union. On this admission against his interest, I credit him. (2) Borsellino expressly denied that he invited anyone interested in a union to pack his tools and leave or that he said anything like this; he concedes, however, that he was speaking of an "eventual future layoff" if a union came to the shop. In this respect, I credit the testimony of Sippio, McPhatter, and Lee, each of whom impressed me as being truthful witnesses.

including any shop steward, would eventually be fired. Lee said there was nothing he could do about it without talking to the rest of the employees. In the course of the conversation, Borsellino said that a union representative was expected at noon that day.⁷

5. At noon on May 8, Perkosky was visited by Local 210 Representatives Adrian DeLange and Robert Beshlian. (Borsellino was out of the shop.) This record reveals no details of the meeting.

6. On May 8, 9, or 10, Borsellino spoke to each of the employees individually along the lines indicated in his conversation (*supra*) with Lee. He asked each if he had signed a union card and whether he would "sign a paper" withdrawing from the Union. Each of them, without admitting he had signed a card, refused to sign such a paper.⁸

In the specific conversation with Davis, Borsellino asked him if he approved of the Union. Davis said he had not made up his mind. Later the same day, he asked Davis if he had signed a union card.⁹ He said that "papers against the Union" would be drawn up for signature, but Davis said he would not sign "any more papers." At this, Borsellino said he could not afford a union, would not stand for one, and would close the shop before he let a union in; moreover, he said, if he knew anyone who signed a card, he would fire him.

His conversation with Sippio followed similar lines. He said he knew "the fellows" had signed up with the Union, but that Sippio knew enough about the business to know that it could not afford a union. He could not afford a union—Borsellino continued—and he would not stand for one; Respondent would lay off the employees one by one, and eventually the fathers and sons, Borsellino and Perkosky, would pick out selected customers and do the work themselves.

In Borsellino's talk with McPhatter, he asked if McPhatter were "still" for the Union. (McPhatter's answer: he didn't know—he would do what the rest did.) When Borsellino asked him if he would sign a "statement against the Union," McPhatter said he would not. Then Borsellino said he could lay the employees off one at a time, ending with the shop steward, and Respondent would pick its best customers, whose work would then be done by the Borsellinos and the Perkoskys. His concluding remark, "If you sign, you have a job."

7. On May 10, Davis was discharged. On the same day, Edward Sposobiec, until then a part-time helper, began working full time. (Details *infra*.)

8. On May 20, Local 210 filed with the Board's Regional Office a representation petition covering employees of Respondent.

9. On May 22, McPhatter and Lee were laid off, and, on May 29, Sippio was laid off. (Details *infra*.)

10. On June 6, Respondent and Local 210 met at the Board's Regional Office on the matter of the representation case above referred to. On the same day, Local 210 filed an unfair labor practice charge against Respondent.¹⁰

11. On an unspecified date in August, Davis visited Respondent's shop, seeking employment with one of Respondent's auxiliary enterprises.¹¹ He spoke to Perkosky. Perkosky said that if they should need a driver for a rented-out truck, Davis would be called. During the same week, Davis again visited the shop and again asked for work. Perkosky said he was afraid to hire anyone—"they might try to bring a union in again." If Davis "took his name off the Labor Board claim," Perkosky continued, he might be able to get his job back.¹²

C. Independent interference, restraint, and coercion

I have found that Respondent, through agents and supervisors, made inquiries of employees as to their activities on behalf of a union,¹³ threatened with immedi-

⁷ It is on the basis of this last item that I place this conversation as having occurred on May 8. The entire conversation, as here found, is bottomed on the credited, uncontradicted testimony of Lee, who, however, thought that it occurred on May 9.

⁸ In the above finding, I have substantially accepted Borsellino's version.

⁹ I do not credit Davis' testimony that he answered in the affirmative. I find, instead, that Davis, at best, gave an equivocal answer.

¹⁰ The charge, Case No. 22-CA-1625, was subsequently (on July 10) withdrawn and the instant charge was filed. Action on the representation petition has been suspended in view of the instant proceeding.

¹¹ Respondent's officers also operate firms known as Gem Truck Rental and Cooperative Car Rental.

¹² This finding is based on Davis' credited uncontradicted testimony.

¹³ See chron. 3 and 6.

ate discharge employees who might be interested in a union,¹⁴ ordered union-interested employees to leave the premises,¹⁵ threatened the physical ejection of any union organizer who might visit the premises,¹⁶ threatened employees with eventual discharges should efforts to organize a union be successful,¹⁷ sought to influence employees to withdraw from a union,¹⁸ and promised a benefit—continued employment—to an employee if he withdrew from the Union.¹⁹ Considering the nature and timing of such actions—immediately following, as they did follow, notice to Respondent of Local 210's interest—I find that such inquiry, threats, order, attempts to influence, and promise of benefit were designed to discourage membership in or activities on behalf of Local 210, and thereby constituted interference with, and restraint and coercion of, employees in the exercise of self-organizational rights guaranteed them by the Act.

D. The terminations of employment

The complaint alleges, and the answer denies, that Respondent discharged Davis, Lee, McPhatter, and Sippio because they formed, joined, or assisted Local 210, sought to bargain collectively through a representative of their choosing, and engaged in other concerted activities for the purpose of collective bargaining or mutual aid or protection.

(The evidence in this record reveals, as I have heretofore found, that Davis was discharged and that Lee, McPhatter, and Sippio were laid off.)²⁰

In further explication of the denials contained in its answer, Respondent contends that it discharged Davis because of his poor attendance record but that, at any rate, he was replaced by another mechanic's helper, for reasons unrelated to union considerations; that it laid off Lee, McPhatter, and Sippio because, at the time of their respective layoffs, no work was available for them; and, finally, that Respondent had no knowledge of the union activities, if any, of the four.

With respect to the last point, I find that Respondent was aware of union activities on the part of the four employees involved. They, and only they among Respondent's employees, signed union cards; Local 210 notified Respondent, on May 7, that it now represented a majority of Respondent's employees. Borsellino questioned the men on the subject²¹ and, although none of them would admit signing union cards, he clearly demonstrated, in conversations with the affected employees,²² that he was aware that each had signed: he told Lee and Sippio he knew that "the fellows" had signed and asked Lee what he intended to do about it; and he asked all four if they would sign a paper "reneging"²³ on the Union. (Why were they asked to withdraw from the Union unless it were known, or believed, that they had joined?) Finally, Perkosky, testifying in explanation of the reason for the "anti-union paper," said that he and Borsellino thought the men "might have changed their minds." Clearly, Respondent knew of or suspected the employees' activities.²⁴

The case of Harry Davis will be considered separately from those of the others. He was discharged, assertedly, for his poor attendance record. It is stipulated, and I find, that his record was a poor one. On many occasions he was absent or tardy, sometimes with and sometimes without notice. He had frequently been warned about this, and had frequently given assurances of corrective action. Normally, he would be permitted to "make up" the lost time by being given the opportunity to work extra hours, either on the same or the next several days.

¹⁴ Chron. 3, 6.

¹⁵ Chron. 3.

¹⁶ Chron. 3.

¹⁷ Chron. 3, 6.

¹⁸ Chron. 4, 6.

¹⁹ Chron. 6.

²⁰ As previously found, Lee and McPhatter lost their employment on May 22, rather than on May 15, as alleged in the complaint.

²¹ Chron. 3.

²² Chron. 4 and 6.

²³ His word, as used in his testimony.

²⁴ Knowledge of union activity may and often of necessity must be based upon reasonable inference drawn from circumstantial evidence. See, e.g., *N.L.R.B. v. Link-Belt Company*, 311 U.S. 584, 602; *F. W. Woolworth Company v. N.L.R.B.*, 121 F. 2d 658, 660 (C.A. 2); *Hickory Chair Manufacturing Company v. N.L.R.B.*, 131 F. 2d 849, 850 (C.A. 4); *Angwell Curtain Company, Inc. v. N.L.R.B.*, 192 F. 2d 899, 903 (C.A. 7); *N.L.R.B. v. C. W. Radcliffe, et al., d/b/a Homedale Tractor & Equipment Company*, 211 F. 2d 309, 315 (C.A. 9).

On Friday, May 10, Davis, without having called in, reported for work at noon instead of 7:55 a.m. Refusing to accept his explanation that the tardiness had been due to the illness of his child,²⁵ Borsellino said that this was the "straw that broke the camel's back" and discharged him.

Considering the fact that Davis had a known record of frequent absences and tardiness, and the fact that, in the past, when he was absent or late he had been permitted to offset his loss of time by working extra hours during the week,²⁶ I have considerable doubt that Davis' tardiness on May 10 was the underlying cause of the action. I am inclined, however, to accept Respondent's explanation, which says, in effect, that if the tardiness was not the sole reason, it was either in combination with or a pretext for another. Edward Sposobiec, until then a part-time mechanic's helper, was engaged to marry Borsellino's daughter. Prior to this time, Sposobiec had been employed, in a menial capacity, by the Essex County Park Commission. Borsellino, wanting his future son-in-law to learn a trade, had, from time to time, used Sposobiec as a mechanic's helper. From on or about April 19, 1963, Sposobiec had worked in Respondent's shop daily for 5 to 8 hours after his Park Commission duties were finished, and he had given notice of an intention to leave that job. On May 10, he took Davis' place as full-time mechanic's helper. Although suspicious as to the motivation behind Davis' discharge are aroused by its timing vis-a-vis the union-connected conduct outlined in the above *Chronology of events*, that Respondent replaced Davis with its president's son-in-law-to-be is no less plausible an explanation²⁷ than that, as urged by the General Counsel, Davis was discharged because of his union membership or activities. At the very least, it cannot be said that a preponderance of the evidence supports the General Counsel's theory.

In support of its position that it laid off Lee, McPhatter, and Sippio because of lack of work, Respondent submitted figures showing the value of all services performed for customers over a period of 15 months.²⁸ It urged in testimony and argument that, because of a drop in business in February, March, or April, 1963, its officers became aware of the necessity for cutting down the work force early in May, at or about the time of Borsellino's speech to his employees.²⁹ Allegedly, this was the sole cause of the layoffs.

I cannot accept this defense for a number of reasons.

According to the credited evidence, the business of Respondent is at least in part seasonal. Traditionally, there is a wintertime peak; in addition to the automotive problems attendant upon inclement weather, a substantial portion of Respondent's work is performed upon oil trucks which, of course, are most used during the heating season. Yet, there was no parallel layoff action during the preceding spring.

Respondent contends that the instant contraction of business was due to a non-recurring factor—specifically, to the permanent loss of a number of customers. Cited were instances in which one or another customer went through bankruptcy, underwent fire damage, or changed its method of using trucks. Also, Respondent's witnesses expressed opinions that a number of customers had been permanently lost because of poor work by Respondent—opinions which are not supported by evidence in this record.³⁰ Recognizing that enterprises such as Respondent's con-

²⁵ Davis testified that the child was ill when he got home from work on the previous day; that throughout the night the child suffered nosebleeds; that he and his wife administered home treatment and that, on Friday morning, he decided to await developments at home; and that he finally left for work when the child appeared to be better. (In a pretrial interview with a Board agent, he said he had taken the child to a hospital. He now testified that this was not accurate.) In his explanations to Borsellino, he had invited the latter to call his doctor to verify his story, even though, he now testified, he had called no doctor. To the extent that it may have any bearing, I find that Davis' present testimony is truthful and that his "explanation" to Borsellino and his pretrial affidavit contained distortions.

²⁶ In this business, regularity of hours was something less than essential. Often, employees reporting for work had to wait for someone with a key to the shop. Repair jobs came in at different times of the day and work requirements shifted by the hour.

²⁷ I find that there was work for one mechanic's helper only.

²⁸ July 1962, \$312,671; August 1962, \$11,102; September 1962, \$10,381; October 1962, \$15,352; November 1962, \$13,706; December 1962, \$12,689; January 1963, \$16,130; February 1963, \$14,013; March 1963, \$19,583; April 1963, \$11,728; May 1963, \$10,014; June 1963, \$5,488; July 1963, \$9,173; August 1963, \$8,035; and September 1963, \$8,402.

²⁹ Chron. 3.

³⁰ Except with respect to a single self-serving hearsay statement drawn with difficulty from one of these witnesses, each of them conceded that he had heard no such complaints from the customers named. No customer testified at this hearing.

stantly lose old and acquire new customers, and particularly in view of the fact that the April and May 1963 figures showed no great disparity from those of other months in last year's nonpeak period, I do not adopt any contention that the instant state of business was believed by Respondent to constitute a permanent change.³¹

That Respondent did not regard the situation as calling for layoffs early in May (as testified to by Borsellino) is borne out by the fact that, in Borsellino's speech of May 7, he spoke of "eventual" layoffs should the current organizational attempt be successful. It taxes my credulity to be asked to believe, that, under the circumstances, had he truly believed that layoffs were imminent irrespective of union considerations, he would not have said so. This is strengthened, moreover, by the fact that Respondent hired a new mechanic, Ray Farparan, on May 4; although, it is alleged, he came with glowing recommendations, the competence of Lee, McPhatter, and Sippio has not here been called into question.³²

In my considerations, I take note of the postlayoff (August) remark of Perkosky found in chron. 11.³³ Although, I would not find (and the General Counsel does not allege) an independent discriminatory refusal to hire at that time, I cannot ignore this clue as to motivation which comes from one of those most likely to know that motivation.

My analysis of the testimony persuades me, and I find, that Respondent customarily staffed up to its peak (winter) situation; that, in addition, overtime hours were worked during periods of heavy need; that, because of the nature of the business, the work needs fluctuated not only from season to season but from hour to hour; and that, as and when available work declined, Respondent would make adjustments by cutting overtime, assigning cleanup jobs, and the like. In short, I find that the decline in business was used as a pretext for the layoffs.³⁴

Upon the entire record and on the basis of what I am convinced a fair preponderance of credible evidence (giving full consideration to the acts of interference with employees' self-organizational efforts above found, the union animus inherent therein, the union activities of Lee, McPhatter, and Sippio and Respondent's knowledge thereof, and the timing of the events herein), I conclude and find that Respondent's underlying reason for laying off John Lee, Lorenzo McPhatter, and James Sippio was their interest in and activities on behalf of Local 210; and that, by such layoffs, Respondent not only interfered with, restrained, and coerced employees in the exercise of rights guaranteed them in Section 7 of the Act, but also discouraged membership in a union, in violation of Section 8(a)(1) and (3) of the Act.

IV. THE REMEDY

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

Having found that Respondent discriminated with respect to the hire and tenure of employment of John Lee, Lorenzo McPhatter, and James Sippio, I shall recommend appropriate action. James Sippio, this record reveals, was reinstated on June 11, 1963; since no reinstatement order appears necessary with respect to him, I shall recommend that the reinstatement previously effected be without prejudice to his seniority or other rights and privileges, and that he be made whole for the loss of earnings suffered by him because of the discrimination against him. I shall recommend that Respondent offer John Lee and Lorenzo McPhatter full and immediate reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make each of them whole for any loss of earnings suffered by him because of the discrimination. Each of the three shall be made whole by payment to him of a sum of money equal to the amount he would have earned from the date of his layoff to the date of

³¹ The sharp fall in June 1963 has no probative significance with respect to the situation in May. For all this record reveals, that decline could have been the result of Respondent's fulfillment of its threat to cut out all but selected customers (see chron. 3 and 6) or, as pointed out by the General Counsel, it could have been the result of Respondent's understaffing.

³² Farparan was laid off on June 7, after the other three had been laid off. The assigned reason for his retention: he was a "better" mechanic than the others. Yet, Sippio was recalled to work—after this charge was filed—and Farparan was not.

³³ He expressed a fear of hiring anyone lest "they might try to bring a union in again."

³⁴ In so finding, I do not adopt or rely upon the General Counsel's arguments that (1) Respondent could have made up any loss of income from declining business by the profits from its sister enterprises, or (2) Respondent's shop, subsequent to the layoffs, was open on a number of Sunday mornings.

Respondent's offer of reinstatement, less his net earnings during said period. Back-pay shall be computed on a quarterly basis in the manner prescribed by the Board in *F. W. Woolworth Company*, 90 NLRB 289, with interest at the rate of 6 percent per annum computed quarterly.

As the unfair labor practices committed by Respondent are of a character striking at the roots of employee rights safeguarded by the Act, it will also be recommended that Respondent cease and desist from infringing in any manner upon the rights guaranteed in Section 7 of the Act.

Upon the foregoing factual findings and conclusions, and upon the entire record in the case, I come to the following:

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local 210 is a labor organization within the meaning of Section 2(5) of the Act.

3. By discriminating in regard to the hire and tenure of John Lee, Lorenzo McPhatter, and James Sippio in terminating their employment on May 22 and 29, 1963, respectively, because of their activities on behalf of a union, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a) (1) and (3) of the Act.

4. By the foregoing conduct, by interrogating employees as to their activities on behalf of a union, by threatening employees interested in a union with immediate discharge, by ordering employees interested in a union to leave the premises, by threatening physical ejection of any union organizer who might visit the premises of Respondent, by threatening employees with eventual discharges should efforts to organize a union be successful, by seeking to influence employees to withdraw from a union, and by promising benefits in return for a withdrawal from a union, Respondent has interfered with, restrained, and coerced employees in the exercise of the rights guaranteed them in Section 7 of the Act, in violation of Section 8(a)(1) thereof.

5. The aforesaid unfair labor practices are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

6. Except for the above, Respondent has not engaged in unfair labor practices as alleged in the complaint herein.

RECOMMENDED ORDER

Upon the basis of the foregoing findings of fact and conclusions of law and upon the entire record in the case, and pursuant to Section 10(c) of the Act, the Trial Examiner hereby recommends that the Respondent, G & J Company, Inc., of Newark, New Jersey, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in any labor organization by discriminating in regard to hire, tenure, or other conditions of employment.

(b) Interrogating employees as to their activities on behalf of a union.

(c) Threatening employees interested in a union with immediate discharge.

(d) Ordering employees interested in a union to leave the premises.

(e) Threatening the physical ejection of any union organizer from the premises.

(f) Threatening employees with eventual discharges should efforts to organize a union be successful.

(g) Seeking to influence employees to withdraw from a union.

(h) Promising benefits in return for withdrawals from the Union.

(i) In any other manner, interfering with, restraining, or coercing its employees in the exercise of their right to self-organization, to form labor organizations, to join or assist any labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, and to refrain from any and all such activities, except to the extent that any such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a) (3) of the Act.

2. Takes the following affirmative action which I find will effectuate the policies of the Act:

(a) Accord, to the extent it has not already done so, to James Sippio his seniority or other rights and privileges as if he had suffered no layoff period.

(b) Offer John Lee and Lorenzo McPhatter immediate and full reinstatement to their former positions even though this may necessitate displacement of a present

incumbent (or if their former positions no longer exist, to a substantially equivalent position); without prejudice to their seniority or other rights and privileges.

(c) Make James Sippio, John Lee, and Lorenzo McPhatter each whole for any loss of earnings suffered by reason of the discrimination against him, in the manner set forth in the section above entitled "The Remedy."

(d) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, time-cards, and personnel records and reports necessary to analyze the amount of back-pay due and the right of reinstatement.

(e) Post at its place of business at Newark, New Jersey, copies of the attached notice marked "Appendix."³⁵ Copies of such notice, to be furnished by the Regional Director for the Twenty-second Region, shall, after being duly signed by an authorized representative of Respondent, be posted 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 are customarily posted. Reasonable steps shall be taken by Respondent to ensure that such notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director for the Twenty-second Region, in writing, within 20 days from the date of the receipt of this Decision, what steps the Respondent has taken to comply herewith.³⁶

It is further recommended that the complaint be dismissed insofar as it alleges that Respondent's discharge of Harry Davis was violative of the Act.

³⁵ If this Recommended Order is adopted by the Board, the words "A Decision and Order" shall be substituted for the words "The Recommended Order of a Trial Examiner" in the notice. If the Board's Order is enforced by a decree of the United States Court of Appeals, the notice will be further amended by the substitution of the words "A Decree of the United States Court of Appeals, Enforcing an Order" for the words "A Decision and Order."

³⁶ If this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify the Regional Director for the Twenty-second Region, 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

Pursuant to the Recommended Order of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we notify our employees that:

WE WILL NOT discourage membership in Local 210, Merchandising & Distribution Employees Union, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization, by discriminating as to the hire, tenure, or any other term or condition of employment of any of our employees.

WE WILL NOT ask employees about their union activities; threaten employees with immediate discharge if they are interested in a union or with eventual discharge should they select the Union for collective bargaining; threaten to eject any union organizer who might visit our shop; seek to influence employees to withdraw from a union; or promise benefits in return for a withdrawal from the Union.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their right to organize; perform, join, or assist a labor organization; to bargain collectively through a bargaining agent chosen by themselves; to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; or to refrain from any such activities, except to the extent that the right to refrain is limited by the lawful enforcement of a lawful union-security requirement.

WE WILL offer John Lee and Lorenzo McPhatter their former or substantially equivalent jobs, without prejudice to seniority or other employment rights and privileges, and WE WILL pay them and James Sippio for any loss suffered because of our discrimination against them.

All our employees are free to become or remain members of any labor organization.

G & J COMPANY, INC.,
Employer.

Dated _____ By _____
(Representative) (Title)

NOTE.—We will notify the above-named employees if serving in the Armed Forces of the United States of their right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act of 1948, as amended, after discharge from the Armed Forces.

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.

Employees may communicate directly with the Board's Regional Office, 614 National Newark Building, 744 Broad Street, Newark, New Jersey, Telephone No. Market 4-6151, if they have any questions concerning this notice or compliance with its provisions.

Wabana, Inc. and International Union of Electrical, Radio and Machine Workers, AFL-CIO. *Case No. 25-CA-1739. April 29, 1964*

DECISION AND ORDER

On December 10, 1963, Trial Examiner A. Norman Somers issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices within the meaning of the Act and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent filed exceptions to the Decision and a supporting brief.

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

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 Trial Examiner's Decision, the exceptions and briefs, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the Board hereby adopts as its Order, the Order recommended by the Trial Examiner and orders that Respondent, Wabana, Inc., its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order, and the complaint with respect to any alleged unfair labor practices other than those found by the Trial Examiner is hereby dismissed.

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

This case was heard before Trial Examiner A. Norman Somers on August 6 and 7, 1963, in Frankfort, Indiana, on a complaint alleging, and an answer denying, violation 146 NLRB No. 147.