

of his activity on behalf of the Union, or for testifying adversely to Respondent at the unfair labor practice hearing. Either would be a reasonable assumption, and neither would be rendered more or less reasonable than the other by the mere abruptness of Hammock's discharge, for in the mind of employees, immediate discharge for adverse testimony would have been as understandable as immediate termination for activity in the Union, first learned. And, in connection with the latter, it is to be observed that there is no warrant for a conclusion that rank-and-file employees were apprised that Respondent had been aware since March or April 1962 of Hammock's union membership.

But, in the ultimate, as I view this matter, it little matters that for a very brief, transitory period rank-and-file employees may have experienced ambivalent reaction to the discharge of Hammock, or may even have believed Hammock's discharge resulted from his adverse testimony, for by the time his discharge had been effectuated, employees Tom Gary, M. A. Atwood, and Galen Britt had also appeared as witnesses and testified adversely to Respondent; other employees had, I find, for the reasons above discussed with respect to Hammock's testimony, learned of the fact and nature of their testimony; and, yet, they continued in the employ of Respondent immediately thereafter and for the 2 weeks following the hearing until they joined the strike on August 6. Neither Atwood nor Galen Britt was alleged as a discriminatee in the July 1962 proceeding and, thus, employees had no reason to believe Respondent's circumspection with respect to them was forced. This retention of rank-and-file employees without retribution could, in my opinion, have no other reasonable effect than to either completely negate the formation of any belief on the part of employees that Respondent would take discharge action against them if they similarly testified at a Board proceeding; or, so completely dilutes the effects of any transitory doubt that employees may have harbored on this score immediately after Hammock's discharge and until the retention of Gary, Atwood, and Britt became apparent, as to negate the actuality of interference or restraint. Of similar and continuing effect were subsequent and immediate restoration to employment of Enoch James Britt upon his medical release; and the poststrike rehire of Galen Britt and M. A. Atwood.

In all of the circumstances delineated, I conclude that under the rationale of *Better Monkey Grip* and *Dal-Tex* a result different than that reached by the Board and affirmed by the court there is required in this proceeding; that Hammock's discharge did not cause nonsupervisory employees reasonably to fear that the Respondent would take discharge action against them if they testified against Respondent in a Board proceeding to enforce their Section 7 rights under the Act. Accordingly, upon a careful consideration of this additional evidence, I revised the conclusions reached in my March 29, 1963, Intermediate Report, and recommend that the complaint be dismissed.

CONCLUSION OF LAW

Oil City Brass Works did not commit an unfair labor practice by discharging John Hammock, a supervisor, because he gave testimony adverse to its interests at a Board hearing.

RECOMMENDED ORDER

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

Anderson Box Company, Inc. and Earnest G. Wade. Case No. 25-CA-1783. June 24, 1964

DECISION AND ORDER

On February 11, 1964, Trial Examiner Sidney D. Goldberg issued his Decision in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety, as set forth in the attached Decision. Thereafter, the Gen-

eral Counsel and the Respondent filed exceptions to the Trial Examiner's Decision and 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 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 the case, and hereby adopts the findings,¹ conclusions, and recommendations of the Trial Examiner.²

The Trial Examiner found that, although there were suspicious circumstances in employee Wade's discharge on July 1, 1963, and in the subsequent refusal to reinstate, the General Counsel had not established by a preponderance of the evidence that the Respondent violated the Act. We find, contrary to our dissenting colleague, that the record supports these findings of the Trial Examiner.

The Respondent discharged Wade on the grounds of his insubordination to Lamont, and Lamont refused to reinstate Wade for reasons of his own not shown to be illegal under the Act. Our dissenting colleague agrees that there is insufficient evidence to warrant finding a violation in the discharge. Disagreement in this case centers on the adequacy of the evidence of discrimination in the refusal to reinstate Wade. Although, as mentioned in the Trial Examiner's Decision, there were suspicious circumstances in the events surrounding the meeting to consider reinstatement, the evidence of discriminatory motivation is remote, scattered, and tenuous. The suspicions raised do not support an inference of union animus on Lamont's part directed against Wade.

It is significant, in our opinion, that both Stanley, Wade's immediate supervisor, and Tubbs, a higher official of the Respondent, were favorably inclined to reinstate Wade. Indeed, it appears that even the president of the Respondent would not have objected if Lamont decided to reinstate this employee. This evidence mitigates against the conclusion that it was Respondent's union animus rather than Lamont's personal hostility against Wade which was the basis for

¹ While we agree with the Trial Examiner that Supervisor Tubbs' inability to perform his promise to reinstate Wade does not justify an inference that Supervisor Lamont blocked such action for illegal reasons, we note that the stated basis for such finding—i.e., that Tubbs was subordinate to Lamont—is erroneous. Thus, the Respondent concedes and the record shows that in fact the two supervisors had equal authority. However, in view of Lamont's personal involvement in the dispute with Wade, we agree with the Respondent's position that it was reasonable for Tubbs to defer to Lamont on the question of Wade's reinstatement.

² Like the Trial Examiner, we are of the view that Stanley's passing remark as to his belief concerning the reason Wade was fired is entitled to little or no weight, especially in the absence of other evidence indicating an unlawful motive. However, we do not adopt the Trial Examiner's reason set forth in footnote 6 of his Decision.

Wade's failure to secure reinstatement. Our dissenting colleague relies upon Wade's uncorroborated testimony that Stanley told him he would have been reinstated but for his union activities. Such testimony would indicate that Lamont alone among all of the Respondent's officials felt so strongly about the Union that he decided and was permitted to decide, for unlawful reasons, to discriminate against a union adherent. If this were so, the conclusion that Lamont initially discharged Wade in violation of the Act would be equally supportable. Yet our dissenting colleague concedes that the evidence is not sufficient to warrant such a finding. The above testimony of Wade was not mentioned by the Trial Examiner and was apparently discredited. We are satisfied that the totality of the evidence in this case does not preponderate in favor of a finding that Wade was unlawfully refused reinstatement.

[The Board dismissed the complaint.]

MEMBER BROWN, dissenting:

I cannot agree with my colleagues' refusal to find that employee Wade was unlawfully refused reinstatement. In this case the Trial Examiner failed to mention the most incriminating evidence in the record. Thus, it is undenied that Foreman Stanley, immediately after the meeting of the three supervisors to consider Wade's reinstatement, told Wade that but for his union activities he would have been reinstated.³ The omitted testimony by Wade was:

And he [Stanley] said that if it hadn't of been for my union activities, he said that Mr. Tubbs would have got my job back, or something to that effect.

He said that if it hadn't of been for that, Mr. Tubbs would have got my job back for me. And he said, "You knew that there is a law against this sort of thing." He said, "You can take it up with"—he didn't—I don't remember exactly what he called it, but he didn't call it the National Labor Relations Board. He said, "If you need any backing, I'll back you up 100 percent."

This evidence would even suffice without more.⁴ For, the important consideration in this case is that Wade was told that he was refused reinstatement because of his union activities. Under these circumstances, in my opinion, discriminatory motivation has been shown

³ Because the Trial Examiner omitted reference to this testimony the majority opinion would infer that it was discredited. There is no justification for such an inference. For, the failure of the Trial Examiner to mention uncontradicted, unimpeached evidence does not preclude its consideration by the Board. See *Valley Steel Products Co.*, 111 NLRB 1338, 1345. Cf. *Macon Textiles, Inc.*, 80 NLRB 1525, 1526. In fact, it has been held that testimony similar to that involved herein cannot be disregarded by the Trial Examiner. *N.L.R.B. v. Local 138, International Union of Operating Engineers, AFL-CIO; et al. (Nassau & Suffolk Contractors' Assn.)*, 293 F. 2d 187, 192 (C.A. 2).

⁴ See, e.g., *Drico Industrial Corporation*, 115 NLRB 931, 932.

and a violation of Section 8(a) (3) has been established. The Board has so held, and my colleagues have joined therein. See, e.g., *Florida Steel Corporation (Florida Steel Products Division)*, 132 NLRB 1110, 1118. In my view, that case and the instant one are indistinguishable. But even if this were inadequate evidence by itself, at the very least it supports other credited testimony in the case which is to the same effect.

Stanley's statement is rendered highly significant because it was made immediately after the meeting to discuss Wade's reinstatement. Furthermore, in view of the admitted fact that the meeting was held to discuss Wade's request for reinstatement, Lamont's testimony that he refused to return Wade to work because he was ". . . unaware that Wade might have demonstrated something to the effect that he wanted his job back . . ." is totally incredible. As Lamont has offered no other reason for his own refusal to reinstate Wade, and as no other credible reason appears on the record, it is difficult, when due consideration is given the other evidence in the case, to avoid the conclusion that the true reason was one proscribed by the Act.⁵

Accordingly, I would find that the Respondent violated Section 8(a) (3) and (1) of the Act by its discharge of Wade.

⁵ Contrary to the implication by my colleagues, I would find that it was Lamont's unlawful motive, rather than his personal hostility, that was the basis for the refusal to reinstate Wade, and that this was attributable to Respondent. It is a *non sequitur* that, because Wade was discharged lawfully, *a fortiori* he was lawfully refused reinstatement.

TRIAL EXAMINER'S DECISION

In this proceeding under Section 10(b) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151-168, herein called the Act), the complaint¹ alleges—and the answer denies—that Respondent discharged and refused to reinstate the Charging Party because of his union activities and that it thereby violated Section 8(a) (3) and (1) of the Act.

A hearing upon the issues so raised was held before Sidney D. Goldberg, duly designated as Trial Examiner, at Evansville, Indiana, on October 15 and 16, 1963, at which all parties were present and afforded an opportunity to adduce evidence, cross-examine witnesses, and argue upon the facts and the law. Briefs filed by the General Counsel and by counsel for Respondent have been considered.

For the reasons set forth in detail below, I find that the General Counsel has failed to prove his case by a fair preponderance of the evidence and, accordingly, I must recommend that the complaint herein be dismissed.

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

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent is engaged in the business of supplying boxes, shipping cases, and other supplies and equipment to the poultry industry. It has its principal office in Indianapolis, Indiana, and, in addition to a chain of sales branches characterized as "nationwide," and several warehouses, it operates manufacturing plants at Omaha, Nebraska, and Evansville, Indiana. From its plant at Evansville, which is the one involved in this proceeding, Respondent concedes that it shipped, each year since 1958, "several hundred thousand dollars worth of goods" to points in other States. The Board, in the representation case hereafter referred to, exercised jurisdiction. Respondent concedes that it is an employer engaged in commerce within the meaning of the Act and I so find.

¹ Issued September 6, 1963, on a charge filed July 25, 1963.

II. THE LABOR ORGANIZATION INVOLVED

United Papermakers and Paperworkers, AFL-CIO, herein referred to as the Union, is admittedly a labor organization within the meaning of the Act.

III. THE UNFAIR LABOR PRACTICES

A. Background

In October 1962, Earnest Wade, the Charging Party, signed an application-authorization card for the Union. On the basis of a petition² filed by the Union, an election was held December 13, 1962, at the Evansville plant and Wade acted as the Union's observer. By a vote of 11 to 9, with two ballots challenged, the Union lost.

The same day, after the result of the election had been announced, James Lamont, manufacturing and inventory manager of Respondent and its chief official at Evansville, addressed the employees. He stated that there were no hard feelings against those who had voted for the Union and that the Company wanted to get some things settled. He invited the employees to write out what they would like in wages and opportunities and suggested that an employees' committee be formed with one man from each of the four departments. Wade was chosen as the representative of the warehousemen and thereafter participated with the others in several meetings with Lamont.

Sometime during February 1963, all of the employees, including Wade, gathered in the conference room. Lamont came in and, first addressing no one in particular, asked, "Is this a walkout?" Nobody answered and Lamont repeated his question, this time addressing it directly to Wade, who answered: "I don't know, we just came in to get things settled." Lamont, who appears to have known in advance that the employees were concerned about wages, made a proposal and left the room so that the employees could discuss it among themselves. They took a vote on the proposal and accepted it.

B. Wade's discharge

The warehousemen, whose duties appear to be principally loading and unloading trucks and railroad cars, are under the supervision of William Stanley. There is no doubt that Wade was a satisfactory employee. He was also the oldest, in point of service, in the crew. On several occasions during the year preceding July 1, 1963, Stanley was away from the plant for different reasons and, during his absences, Wade directed the work.³ On July 1, Stanley was in the hospital, where he had been for 2 weeks, and Wade was in charge of the warehouse crew. One of the regular members had been on vacation and had not returned and another began his vacation that day, their places being filled by temporary employees. The crew had fallen behind in its work and cargo was piling up.

Early in the morning on July 1, Lamont came out on the dock to talk to Wade about the work to be performed by the warehouse crew that day.⁴ There is no dispute concerning their conversation: the account of it in the General Counsel's brief is a fair summary and it reads as follows:

On this day, Stanley and Tubbs, warehouse supervisors, were absent and Lamont came out to the truck dock to see Wade, who was more or less filling in for Stanley. Lamont told Wade that he wanted two box cars loaded and

² Case No. 25-RC-2330.

³ It is not seriously contended that Wade was a supervisor within the meaning of the Act. I. W. Tubbs, Respondent's manager of warehousing, testified that he was not; Wade's personnel records identify him as a "warehouseman"; there is no claim or evidence that he had authority to hire or fire or to recommend such action and neither Wade, himself, nor his coworkers regarded him as supervisor. The work to be done by the warehouse crew was usually fixed by sets of written orders received from the shipping office and, even in Stanley's absence, there is no evidence that Wade "responsibly" directed the small crew. Even on July 1, when both Stanley and Tubbs were in the hospital and the gap in supervision reached from the crew to Lamont, it must be noted that there were, presumably, supervisors in the other three departments and, in any event, Respondent's entire force at the Evansville plant consisted of 22 nonsupervisory employees. (Compare: *The Bama Company*, 145 NLRB 1141.) I find that Wade was, at most, a leadman and that he was not a supervisor within the meaning of the Act.

⁴ As noted in the preceding footnote, Stanley and Tubbs, who represented the two levels of supervision between the warehouse crew and Lamont, Respondent's top official at Evansville, were both in the hospital.

two unloaded, plus two trailers unloaded and loaded back. Wade said, "We can't do that." Lamont said, "What do you mean, you can't do it?" Wade said, "Well, we just can't do that. It is asking too much." Lamont said, "Well, I know you can't do it if you go into it with the attitude that you can't do it before you start." Wade said, "Well, I have worked here long enough with these boys to know what we can do in a day and what we can't do, and it's just asking too much. Do you think you can do it any better?" Lamont said, "By God, I don't have to do it any better." Wade said, "By God, I don't either. I am doing the best I can." Lamont said, "Don't get smart with me. You can punch your card and go home." Wade then left after getting paid.

Both Lamont and Wade, in their testimony, conceded that the conversation became heated and that several "damns" flew in both directions.

Upon leaving Respondent's plant, Wade went to the hospital where Stanley was, returned the keys to the warehouse, and told Stanley what had happened. Stanley promised to "talk to" Lamont and suggested that Wade visit Tubbs. That afternoon Wade saw Tubbs at another hospital: Tubbs said he had heard Lamont's side of the story and wanted to hear Wade's. According to Wade's testimony, when he had finished telling his story, Tubbs said that he knew that Lamont and Wade did not get along very well but that "if you want your job back, you come out there Monday . . . and you can have it."

C. Respondent's refusal to reinstate Wade

The following Monday, July 8, Wade came to Respondent's plant about starting time—8 a.m. At 9:30 Stanley told Wade that he, Tubbs, and Lamont had just had a conference concerning Wade's reinstatement. Stanley said that he had told Lamont he would like to take Wade back, that Tubbs had pointed out that he had not been present the previous Monday and said it was entirely up to Lamont, and that Lamont said he wanted to think about it and would let Stanley know his decision later in the day.⁵

That afternoon Lamont told Stanley that he had thought about the matter and had decided to "leave well enough alone" and not rehire Wade. Stanley conveyed this message to Wade.

D. Discussion and concluding findings

As shown above, Wade's account of the clash which preceded his discharge was couched practically in the words used by the participants and it was substantially corroborated by Lamont. It contains no indication of union animus on Lamont's part and, on the basis of the incident alone, appears to be a discharge for cause. The General Counsel, however, in support of his contention that the apparent insubordination was merely a pretext to cover Wade's discharge for protected activities cites: (1) the admissions of Supervisors Stanley and Tubbs to that effect; (2) Tubbs' promise to Wade that he could have his job back; and (3) the insufficiency of Wade's conduct to constitute insubordination meriting discharge.

1. The "admissions" by Respondent's supervisors

Dewey Boylls, who had worked with Wade in the warehouse, testified that about a month after Wade's discharge he was discussing it with Stanley, the regular supervisor of the warehouse crew; that he said that he believed Wade was fired "because of the union"; and that Stanley said "He thought he was, too." The weight of this testimony is negligible: Stanley was not present when the firing occurred and there is no evidence that he had acquired any factual information to serve as a basis for this unsupported conclusion.⁶

Ronald Brown and Charles Raven, also former coworkers of Wade, testified—as did Boylls—that in a meeting with Tubbs about a month after Wade's discharge,

⁵ This account is based upon Wade's testimony of what Stanley reported to him. Lamont's testimony covering this meeting is generally in agreement with it.

⁶ While Stanley's supervisory status, under appropriate circumstances, might make him an agent of Respondent or render Respondent liable for his acts on the basis of *respondere superior*, it cannot elevate his passing remark into an admission binding on his employer. Cf. *Custom Underwear Manufacturing Company*, 108 NLRB 117, 120, where the company official involved was a partner and the plant manager and his admission supported other proof of a factual element of the case, i.e., Respondent's reason for discharging an employee.

Boylls asked Tubbs whether Wade was discharged "on account of the union" and that Tubbs, without answering the question, changed the subject. This testimony is obviously without substance for the function assigned to it.

In both of the foregoing incidents I have accepted the testimony of the General Counsel's witnesses. Accordingly, the failure of Tubbs to contradict the Brown-Raven-Boylls account and the failure of Stanley to testify at all—factors that would be relevant only in reaching a conclusion as to whether the dialogues occurred as claimed—can lend no weight to testimony which, even if accepted, is insufficient for the purpose offered.

2. Tubbs' promise to reinstate Wade

Wade's testimony that Tubbs, on July 1, promised to reinstate him the following Monday, was not contradicted by Tubbs and I find that the promise was made. This finding, however, is a far cry from a conclusion that Respondent's failure to reinstate Wade constituted discrimination violative of Section 8(a)(3) of the Act. As Wade knew—and as the General Counsel recognizes—Tubbs was a subordinate of Lamont and any promise by Tubbs would be subject to a possible veto by Lamont. Moreover, the clash which led to Wade's discharge involved Lamont personally and both Wade and Tubbs must have realized that Lamont would have definite views of his own on the matter. Accordingly, the mere failure or inability of Tubbs to perform his promise to reinstate Wade cannot, by itself, justify an inference that Lamont must have had an illegal motive in blocking Wade's reinstatement. Appropriately, therefore, the argument of the General Counsel is that Lamont's refusal to reinstate Wade was based upon Wade's protected activities. The evidence supporting this argument consists of: (a) Wade's having acted as the Union's observer at the Board election in December 1962 and as the representative of the warehousemen in subsequent dealings with Respondent, and (b) Wade's testimony that, in March 1963, Stanley told him that Lamont had said that, since the Union had lost "There were going to be some new faces around there."⁷

In my opinion, neither of these items constitutes substantial evidence: Wade's service as the Union's observer had occurred more than 6 months earlier, the Union had lost, and, except for the remark attributed to Lamont by Stanley, there was no evidence that Lamont harbored any resentment against the Union's adherents. Stanley's account of Lamont's remark concerning "new faces"—accepted at its full value—does not mention Wade, is so vague, and occurred so long before July 8 that I find it without substance as proof on this point.

As further evidence that Lamont's refusal to reinstate Wade was based upon union animus, the General Counsel offered various bits of indirect testimony to establish that Lamont had had a telephone discussion about Wade with John Holton, president of Respondent, and that Holton had left the decision up to Lamont because Lamont knew Wade's "dealings with the Union." Assuming the conversation to have been established as set forth by the General Counsel, it fails to show union animus. As Respondent's counsel points out in his brief, Holton's statement is equivocal: The reference to Wade's "dealings with the Union" might as well have been a reminder to Lamont that, in reaching a decision with respect to Wade, he should keep in mind the possibility that, if not reinstated, Wade might file a charge of unlawful discrimination under the Act.

Without substance, also, as proof of discrimination against Wade is Respondent's refusal to reinstate him is the testimony concerning the discharge and reinstatement of other employees. In neither of the instances mentioned was there any evidence of protected activity. In each of the cases the employee was discharged for a specific reason and, after making amends, succeeded in obtaining reinstatement. Analysis of this argument, therefore, reduces it to a contention that the disparity of treatment was due to Wade's protected activities. This element, as above noted, has not been established on this record.

3. The insufficiency of Wade's conduct to justify his discharge

The General Counsel's statement of facts in his brief concerning the "impossible nature of Lamont's demands" is not followed by a legal argument based thereon.

⁷ It is not certain, from Wade's testimony, whether it was Lamont who referred to the Union's loss of the election before making his prediction or whether Stanley added that element. For the purpose of this discussion it is assumed that the reference to the Union's defeat was Lamont's.

The "pretext" argument was separately made and has been discussed above; no citation of authority is required for the proposition that an employer may discharge an employee for a good reason, a poor reason, or no reason at all, so long as the terms of the Act are not violated. Accordingly, further discussion of this subject seems unnecessary.

Summing up, it appears that Wade and Lamont clashed over a matter involving the operation of Respondent's business and that Lamont discharged Wade. It also appears that, despite the efforts of Tubbs and Stanley, Lamont chose, for reasons of his own not shown to be illegal under the Act, not to reinstate Wade. The record contains, in my opinion, no substantial evidence that union animus was a factor in either of these decisions by Lamont and I cannot find that Respondent's discharge of Wade or its failure to reinstate him constituted discrimination violative of Section 8(a)(3) or (1) of the Act. Accordingly, I shall recommend dismissal of the complaint.

Upon the basis of the foregoing findings of fact, and upon the entire record in the case, I make the following:

CONCLUSIONS OF LAW

1. The Respondent is, and has been at all times material to the issues in this proceeding, an employer within the meaning of Section 2(2) of the Act, engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The evidence fails to establish that Respondent discharged or refused to reinstate Earnest Wade for union or concerted activities in violation of Section 8(a)(3) and (1) of the Act.

RECOMMENDED ORDER

The complaint should be, and hereby is, dismissed.

The Horn & Hardart Company and Bakery and Confectionery Workers' International Union of America, Local 3, Petitioner.
Case No. 2-RC-13147. June 24, 1964

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c)(1)(A) of the National Labor Relations Act, a hearing was held before Hearing Officer Haywood E. Banks. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

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].

Upon the entire record in this case, the Board finds:

1. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.
2. The labor organization involved claims to represent certain employees of the Employer.
3. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.