

and "told him what evidence we had on Mr. Harless" plainly demonstrates, in the opinion of the Trial Examiner, the conduct of an employer who is resolved, in one way or another, to find an excuse to fire a known union adherent.

It does appear that on March 31, the last delivery Harless made at the hospital, there had been some dispute (between the cook and himself) about a pint of half-and-half. But it is undisputed that upon his return to the terminal Harless reported the matter to Hiroskey and that the latter had approved not "making up" the apparently spoiled pint. There is sharp conflict in the testimony of Hiroskey and the cook as to when a letter, purportedly written by the cook, was obtained by the manager. Considering this conflict, in the light of Hiroskey's admission of his trying to get evidence against an employee he had known for many years, leads to the grave suspicion that the actual events are not revealed by the record. Whether the cook, Hiroskey, or his attorney devised the language used in the cook's letter is purely speculative, but having observed the cook on the witness stand the Trial Examiner finds it difficult to believe that the language used is entirely his own. It is couched in general terms, and ends: ". . . you asked that I write you regarding this complaint for you to keep on file."

In any event, the Trial Examiner is persuaded by the preponderance of credible evidence that Harless was not discharged because of any real dereliction in the performance of his work, or because of use of "vulgar" language, but because Hiroskey was resolved to clear his staff of the one remaining union adherent. Such unlawful discrimination interfered with, restrained, and coerced employees in the exercise of their rights guaranteed by the Act.

C. Conclusions

Assuming jurisdiction in this case, the Trial Examiner concludes and finds that by the discriminatory discharges of Jessup and Harless the Respondent has violated Section 8(a) (1) and (3) of the Act.

RECOMMENDED ORDER

For the reasons set forth in section I, above, the Trial Examiner does not believe that, under the circumstances of this case, it would effectuate the policies of the Act for the Board to exercise jurisdiction.

It is therefore recommended that the complaints in both 9-CA-3100 and 3155 be dismissed in their entirety.

Welsh Co. and International Brotherhood of Firemen, Oilers, Maintenance and Production Employees, Local No. 6, AFL-CIO

Welsh Co. and Upholsterers International Union, AFL-CIO, Local 25. Cases Nos. 14-CA-3202 and 14-CA-3275. October 30, 1964

DECISION AND ORDER

On July 13, 1964, Trial Examiner David London 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 certain affirmative action as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent filed exceptions to the Decision, together with a supporting brief.

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

The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and brief, and the entire record in the case, and hereby adopts the findings and conclusions of the Trial Examiner, but not his recommendation that an Order issue.

We agree that the questioning of Virdell Evans and the posting of the notice prohibiting union solicitation during break time constitute violations of Section 8(a)(1) of the Act. The notice was not alleged as an unfair labor practice until the hearing, however, and Respondent immediately offered on the record to change it. Moreover, none of the other parties dispute Respondent's assertion in its brief to the Trial Examiner that after the hearing it revised the rule so as not to prohibit union activity during nonworking time.

We believe that because of the isolated nature of the interrogation, and because it appears that the Respondent has revised the notice to conform with the law, it would serve no useful purpose to issue any order against Respondent.¹

[The Board dismissed the complaint.]

¹ See *Canton Carp's, Inc.*, 130 NLRB 1451.

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

This proceeding was heard before Trial Examiner David London at St. Louis, Missouri, on March 23 and 24, 1964, on a consolidated amended complaint dated February 26, 1964, issued by the General Counsel of the National Labor Relations Board, through the Regional Director for the Fourteenth Region.¹ The consolidated complaint, as further amended at the hearing, alleges that Welsh Co, hereinafter referred to as Respondent, engaged in specified conduct claimed to be violative of Section 8(a)(1) of the National Labor Relations Act, as amended, 29 U.S.C. Sec. 151, *et seq.*, herein called the Act. It is further alleged that on or about October 4, 1963, Respondent, in violation of Section 8(a)(3) and (1) of the Act, "caused the termination of Jerry Jackson's employment by assigning him to a disagreeable and more arduous job," and that on or about January 22, 1964, Respondent laid off Norma Jean Richards without pay for a period of 2 days, and that each action aforementioned was imposed because Jackson and Richards, respectively, engaged in union activities or concerted activities for the purposes of collective bargaining or mutual aid or protection. Respondent's answer denied the commission of any unfair labor practice.

Upon the entire record herein, the briefs of the General Counsel and Respondent, and my observation of the witnesses as they testified, I make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. THE BUSINESS OF RESPONDENT

The Respondent is, and has been at all times material herein, a corporation duly organized under and existing by virtue of the laws of the State of Missouri, with

¹The consolidated complaint was based on a charge and an amended charge filed in Case No 14-CA-3202 on October 7, 1963, and January 14, 1964, respectively, by International Brotherhood of Firemen, Oilers, Maintenance and Production Employees, Local No. 6, AFL-CIO, hereinafter referred to as Local No 6, and on a charge and an amended charge filed in Case No 14-CA-3275 on January 23 and February 20, 1964, respectively, by Upholsterers' International Union, AFL-CIO, Local 25 hereinafter referred to as Local 25.

its main office and place of business in St. Louis, Missouri, and another plant in Trenton, Illinois, where it is, and has been at all times material herein, engaged in the manufacture, sale, and distribution of baby carriages and related products. In the course and operation of its business as set forth above, Respondent manufactured, sold, and distributed at its above plants products valued in excess of \$50,000, which products were shipped from the foregoing plants directly to States of the United States other than the States in which such plants were respectively located. Respondent has been and was at all times material herein engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II THE LABOR ORGANIZATIONS INVOLVED

Local No 6 and Local 25 are, and at all times material herein were, labor organizations within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

As indicated above, Respondent is engaged in the manufacture of baby carriages and related products at its functionally integrated plants in St. Louis, Missouri, and Trenton, Illinois, separated by approximately 33 miles. The operations at the Trenton plant, however, did not commence until on or about July 1, 1963.

On September 25, 1962, Local 25 filed a petition with the Board in Case No. 14-RC-4412, seeking to be certified as collective-bargaining representation of Respondent's production and maintenance employees engaged at its plant in St. Louis, Missouri. Following an election conducted on November 7, 1962, pursuant to that petition, Local 25 filed its objections to conduct affecting the results of that election and seeking a new election. On January 11, 1963, the Board ordered the requested second election and it was conducted on February 26, 1963. At that second election, 108 votes were cast for Local 25 and 125 were cast against representation by that Union. On March 6, 1963, the Board issued its certificate of the results of that election.

On August 16, 1963,² Local 6 filed a petition with the Board in Case No. 14-RC-4678 seeking to be certified as collective-bargaining representative of Respondent's production and maintenance employees at the Trenton plant in which proceeding Local 25 was granted status as an intervenor. Hearings on that petition were conducted before the Board at St. Louis on September 9 and September 30.³

Employee Virdell Evans testified that on or about September 13 she had a conversation with Vincent P. O'Hara, Respondent's personnel director, during which he asked her what she had heard "from the Union." She denied having any information other than that Jerry Jackson, one of the alleged discriminatees, had a hearing on the following Tuesday which had "something to do with the Union."

O'Hara did not deny that he interrogated Evans as found above but contented himself with a denial that he unlawfully interrogated any employee "on or about August 30, 1963" and the further observation that because of his long experience in personnel work he had "better judgment than to question anyone whether they were active in union affairs." Based on my observation of the two witnesses as they testified pertaining to *this incident*, I credit the testimony of Evans, and conclude that by O'Hara's interrogation as found above Respondent violated Section 8(a)(1) of the Act.

On February 24, 1964, Respondent posted a notice on its bulletin board, bearing O'Hara's signature as personnel director, advising the employees that Respondent had been informed "that certain individuals [were] to act as so-called 'in-plant organizers.'" The notice further notified the employees that there was to be "no solicitation or discussion of union activity . . . on company time,—*this includes break time*, [and that] anyone violating these rules [would] be subject to immediate discharge." [Emphasis supplied.] The notice was still posted at the time of the hearing herein.

O'Hara testified that in January 1964 he received a communication from Local 25 listing the names of employees who were to act as in-plant organizers. He further testified that because there was "very decided, increased union activity" thereafter, and because supervisors complained that employees were "not getting

² Unless otherwise specified, all references to dates hereafter are to the year 1963.

³ The findings in this paragraph are based on the Board's official records in Case No. 14-RC-4678 of which I have taken official notice.

back to their work stations on time" and were being "bothered trying to get them to sign cards," Respondent decided "to restrict this activity during the break period."

Almost from the time of the enactment of the Wagner Act in 1935, "the Board has held, with court approval, that an employer may in the normal situation make and enforce a rule forbidding his employees to engage in such union solicitation during working time, but that a broad rule banning such activity during non-working time is presumptively invalid. *Peyton Packing Co., Inc.*, 49 NLRB 828, 843, cited with approval in *Republic Aviation Corporation v. N.L.R.B.*, 324 U.S. 793, 803." *Stoddard Quirk Manufacturing Co.*, 138 NLRB 615, 617. Though the Board has recognized limited exceptions to this doctrine, no credible, probative evidence was offered herein of special circumstances warranting a departure from the broad rule enunciated above. On the other hand, O'Hara admitted that one of the reasons for the rule was that employees were "being bothered trying to get them to sign cards."

Though Respondent in its brief states that since the close of the hearing it "has published a revised rule which does not prohibit solicitation during nonworking time," the fact nevertheless remains that for a period of at least 1 or 2 months the employees were under a threat of discharge for engaging in an activity protected by the Act. I therefore conclude that by maintaining the rule during such period, Respondent violated Section 8(a)(1) of the Act.

The Termination of Jerry Jackson

Jackson began working for Respondent at the St. Louis plant in October 1958 as a helper in the paint shop. After a period of 4 to 5 months, he was transferred to the tubing department. Thereafter, he progressed and was reclassified successively as a machine operator's helper, machine operator, and samplemaker, in which last classification he was engaged until transferred to Trenton as a setup man. He received a raise of pay in all these changes in classification.

Sometime in March 1963, David Welsh, Jr., Respondent's vice president, told Jackson that Respondent was opening a new plant in Trenton, Illinois, on July 1 and that he would like to have Jackson transferred to the new plant which would involve "a big raise and a big advancement." Welsh further told him that he would have to move to Trenton, a distance of about 34 miles from where Jackson was living in St. Louis, and Jackson agreed to do so.

"Just before" the transfer was to be made effective, Jackson asked Welsh what his new wage would be and was informed that he would receive \$1.80 an hour, an increase of 20 cents over what he was earning in St. Louis. Jackson expressed disappointment at the size of the increase because, if he moved to Trenton, his wife would have to quit her job in St. Louis. Accordingly, he told Welsh that he did not think he would move to Trenton, nor did he do so. Instead he commuted back and forth between his home and Trenton every day of his employment at Trenton until on or about October 4, when his services were terminated in the manner hereafter detailed.

At an otherwise undisclosed date early in September, Jackson's wife "called in" to report that he was sick and would not report for work. Jackson admitted at the hearing that the excuse given was a false one and that instead of being ill he went on an urgent visit to his brother. When he reported for work the following morning he was suspended indefinitely by O'Hara who had been advised earlier that the assigned reason for the absence was untrue. When Jackson appeared at the Board hearing in Case No. 14-RC-4678 on September 9, David Welsh told him to return to work on the following day and that it was because he had lied about his absence that "they had to make an example of him."

Because of a shortage of equipment that existed at Trenton prior to October 1, Respondent found it necessary to operate a night shift. When additional equipment became available on or about October 1, Respondent decided to eliminate the entire night shift thereby releasing, among others, the services of Ivan Sancoucie, the night shift setup man, and assigned him to the same job on the Trenton day shift.

David Welsh testified, and I credit his testimony, that Respondent had no need for two setup men on the Trenton day shift, and because Sansoucie had greater seniority, and Jackson had twice requested that he be transferred back to St. Louis because of the distance he had to drive, Welsh instructed O'Hara to transfer Jackson to the St. Louis plant as a helper on the Mize-O-Matic punch press machine,

the only available job at the wage Jackson was receiving at Trenton. O'Hara advised Jackson of the transfer on October 3 and told him there would be no reduction in pay.

At about 7:30 a. m. on Friday, October 4, when Jackson reported at the St. Louis plant, O'Hara accompanied him to William Teer, foreman of the punch press department, who, in turn, instructed him to work as a helper to Harold Cheatham, the operator of the Mize-O-Matic punch press, the largest such press at the St. Louis plant. After being at the machine for but a few minutes, Jackson told Cheatham he did not intend to be downgraded "and do the flunky work, he was going to quit." As he was leaving his post, he encountered Teer and also told him that "he was quitting, he didn't need the work that bad." Teer ordered him to report to O'Hara where Jackson told that official he did not "intend to do that job." When O'Hara told him it was the only job available at the rate he was receiving, Jackson replied that he did not intend to take a cut in pay, did not intend to take the job assigned to him, and "that he was leaving." Before departing, he asked O'Hara to try to find something else for him and stated he would call to ascertain if a better job was available. He called O'Hara on the following Monday at which time he was informed that no other job at his last rate of pay was available. It is not claimed that Jackson made any further contact with Respondent.

It is the contention of the General Counsel, as alleged in the complaint, that Respondent constructively discharged Jackson on October 4 "by assigning him to a disagreeable and more arduous job" because he engaged in union activity. Respondent, on the other hand, contends, that Jackson quit his job and that his transfer had nothing to do with any union activity. On the entire record, and my observation of the demeanor of the witnesses involved, I conclude that the General Counsel has not established by a preponderance of the evidence either (1) that Jackson was transferred to a job so "disagreeable and more arduous" as to bring about his decision to quit thereby constituting his constructive discharge, or (2) that the transfer was imposed because of his union activity.

The only evidence offered in support of (1) immediately above, other than Jackson's observation to O'Hara that he "thought [he] deserved a better job than that," was his testimony that the Mize-O-Matic "was too noisy, . . . it sounded like dynamite going off." The question of whether or not Jackson "deserved a better job" is not for either Jackson or the Board to decide. "The rule has often been announced that an employer has the right to discharge an employee for good reason, bad reason, or no reason, absent discrimination, . . . and the employer has the same right in assigning its employees. . . . [Work] assignments [are] matters peculiarly within the prerogative of management, and its reasonable business decision is of no legitimate concern either of the Board or the courts." *Steel Industries, Incorporated v. N.L.R.B.* 325 F. 2d 173 (C.A. 7).

In any event, I am not convinced that the proffered job as helper on the Mize-O-Matic was so "disagreeable and more arduous" as to justify Jackson's refusal to accept the new assignment.⁴ Though the Mize-O-Matic made more noise while in operation than the other machine presses, Jackson, while previously employed at the St. Louis plant, had worked "close" to that machine. Cheatham the operator of the Mize-O-Matic, apparently withstood its noise for "about 10 years" and never had any difficulty with other helpers who were engaged with him on that machine.

Even if it be assumed, *arguendo*, that Jackson's new assignment was to a job so "disagreeable and more arduous" as to characterize the transfer as a constructive discharge, I am not persuaded that the action was imposed because of his union activities. Not only was there a dearth of evidence with respect to the extent of his union activity and that Respondent had knowledge thereof,⁵ but the testimony is undisputed that sound economic reasons required the elimination of the job of one setup man and that Sansoucie's seniority entitled him to the only remaining job in that classification. In that state of affairs, Respondent could have completely

⁴ At the State unemployment compensation hearing, Jackson was denied relief on the ground that he left work without good cause

⁵ Jackson admitted he never told anyone in management that he was interested in the Union, and that he was "rather quiet about the whole thing." Indeed, his only union activity was to secure Sansoucie's signature to a card designating Local 6 as collective-bargaining representative.

terminated Jackson's employment. Not only did Respondent refrain from doing so, but because Jackson had complained about being required to drive 68 miles each day from and to St. Louis, Respondent offered him the only available job in St. Louis. And, though the wage classification of the helper's job at St. Louis was lower than that which Jackson enjoyed as a setup man at Trenton, he was told that he would suffer no loss in pay. The sum of all these circumstances cannot lead to, indeed, they foreclose a finding of discrimination. And when there is added to this record testimony my appraisal of the trust-worthiness of Jackson's testimony based on his demeanor while testifying,⁶ I am unhesitatingly led to the conclusion that the General Counsel has not established by a preponderance of the evidence that Jackson was constructively discharged for the reasons alleged in the complaint.

The Layoff of Norma Richards

Richards has been employed by Respondent for approximately 12 years as a sewing machine operator at the St. Louis plant. Except for complaints hereafter discussed, her work performance was satisfactory. Nevertheless, the entire record and my observation of the demeanor of Richards and Dorothy Richter, her supervisor, convinces me that there was a seriously strained relationship between the two women brought about by Richter's opinion that Richards had otherwise conducted herself improperly and had violated Respondent's working rules.⁷ Among these rules was one establishing two 10-minute break periods, one at 10 a.m. and another at 2:15 p.m., "eating and drinking beyond those times is prohibited."

Richards testified that at about 1:40 p.m. on January 22, 1964, she left her work, went to a drinking fountain to get some water to take with her medicine, and then proceeded to the ladies' room. As she left that room, Richter asked what she was doing there. Not receiving a satisfactory reply, Richter "got mad" and told her that he would report the incident to David Welsh. Richards replied that it would not be necessary for her to do so because she intended to do so herself, stating she "hadn't done anything wrong." She also added "that no one could make [her] sit . . . nine hours a day without moving, that would kill a person," whereupon Richter told her that if she "had any idea of continuing to go to the restroom or getting water that [she] just might as well pack [her] junk and leave right then and there."

Richards further testified that the incident made her "awful nervous" and that by reason thereof, at about 3:50 p.m., she asked Richter for a pass authorizing her to leave work at that time. Richter asked where she was going and Richards replied that she was going home. When Richter refused to give her a pass for that purpose, Richards "told her to put on [the pass] that [she was] going to a dentist." Richter asked whether she was actually going to a dentist and Richards replied she had no intention of doing so. She added, however, that she was a "nervous wreck," was going home, and "was not going to sit there and sew the hell out of [her] finger like [she] had back in May."

Richards then went to the floor below, where her husband worked, to get the keys to their car. In company with her husband, she proceeded to O'Hara's office where Richter also arrived a few minutes later. Richter appeared to O'Hara to be "quite agitated" and asked that she give him "her story." Richter stated that Richards "had consistently refused to observe the break periods, that she would eat and drink at her machine, that she would go to the dressing room shortly before her break, . . . was just generally not following, observing the time in the break periods." After a brief discussion, O'Hara suspended Richards for the following 2 working days of that week and instructed her to return to work at 7:30 a.m. on the following Monday. It is this suspension which the General Counsel alleges was imposed because of her union activity.

On the entire record I find and conclude that the General Counsel has not established by a preponderance of the evidence that Richards was suspended for the reasons alleged in the complaint. The only evidence in the record suggesting that Richards was engaged in union activity pertained to an incident which also occurred on January 22, 1964. She testified that during the noon lunch period on that day, another machine operator told her that "the Union was going to try to get back in, or have an election," and asked her if she wanted two cards. Rich-

⁶ Jackson displayed an offensive, cocky attitude which gave me the distinct impression that he believed that work assignments could be made only with his consent.

⁷ See Respondent's Exhibits Nos. 1-5, inclusive.

ards took the two cards and, after eating her lunch, placed the cards underneath the cushion of her chair at her machine. However, the record is devoid of any evidence that Richter or anyone in behalf of management saw or was aware of this incident. Except for this, Richards admitted that before she took the two cards, above mentioned, on January 22, 1964, she "had nothing to do with the Union whatsoever."⁸

By reason of all the foregoing I conclude that the General Counsel has not established by a preponderance of the evidence that Richards was suspended or laid off on January 22 for the reasons alleged in the complaint and will therefore recommend that the allegations pertaining thereto be dismissed.

IV. THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend the customary cease and desist order and the affirmative relief conventionally ordered in cases of this nature and designed to effectuate the policies of the Act.

CONCLUSIONS OF LAW

1. By interrogating its employees about union activity in its plant Respondent violated Section 8(a)(1) of the Act.

2. By posting a notice prohibiting its employees from engaging in union activities during their break time, and by threatening them with discharge if they did so, Respondent interfered with, restrained, and coerced its employees in rights guaranteed by Section 7 of the Act, thereby violating Section 8(a)(1) of the Act.

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

4. The Respondent did not violate Section 8(a)(1) or (3) of the Act by transferring Jerry Jackson from the Trenton plant to the job of helper on the Mize-O-Matic machine at the St. Louis plant and did not thereby cause the termination of his employment.

5. Respondent did not violate Section 8(a)(1) or (3) of the Act by laying off or suspending Norma Richards for two days on January 22, 1964.

[Recommended Order omitted from publication.]

⁸ Even if it be assumed, *arguendo*, that Respondent was aware that Richards accepted and hid the two union cards, I am not persuaded that Respondent suspended her for that reason. Were I required to find that Respondent had knowledge of this incident, I would nevertheless find that she was not suspended for that reason. Instead, I would find that her suspension was brought about for the reasons stated to O'Hara by Richter as heretofore detailed.

Truck Drivers and Helpers Local Union No. 728 International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and Brown Transport Corp. Case No. 10-CC-510. October 30, 1964

SUPPLEMENTAL DECISION AND ORDER

On September 16, 1963, the Board issued its Decision and Order in the above entitled proceeding, dismissing the complaint.¹ On July 9, 1964, the Court of Appeals for the Fifth Circuit issued its decision, setting aside the Board's order and remanding the case for the entry of an "appropriate injunctive order against Local 728."

¹ 144 NLRB 590.

149 NLRB No. 35.