

or to refrain therefrom except to the extent that 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.

YALE MANUFACTURING COMPANY, INC.,  
Employer.

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Representative) (Title)

NOTE.—We will notify the above-mentioned employees if presently 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, 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, Boston Five Cents Savings Bank Building, 24 School Street, Boston, Massachusetts, 02108, Telephone No. 523-8100, if they have any questions concerning this notice or compliance with its provisions.

**Almeida Bus Lines, Inc. and Antone O. Pontes and Gilbert Jesus.** *Case No. 1-CA-4634(1-2). January 18, 1965*

### DECISION AND ORDER

On November 12, 1964, Trial Examiner Thomas A. Ricci issued his Decision in the above-entitled proceeding, finding that Respondent had not engaged in unfair labor practices as alleged in the complaint, and recommending that the complaint be dismissed in its entirety, as set forth in the attached Trial Examiner's Decision. Thereafter, the General Counsel filed exceptions to the Trial Examiner's Decision and a supporting brief. The Respondent filed cross-exceptions and a brief in support of the Trial Examiner's Decision.

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 Fanning 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 cross-exceptions, the briefs, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendation of the Trial Examiner.<sup>1</sup>

[The Board dismissed the complaint.]

<sup>1</sup>In adopting the Trial Examiner's conclusions and recommendation, we do not adopt so much of his Decision as may appear to suggest that, in establishing whether conduct within 6 months of the filing of the charge is illegally motivated, Section 10(b) of the Act forecloses giving controlling weight to evidence of motivation arising from facts occurring outside the 6-month period.

## TRIAL EXAMINER'S DECISION

## STATEMENT OF THE CASE

This proceeding, with all parties represented, was heard before Trial Examiner Thomas A. Ricci at New Bedford, Massachusetts, on September 1 and 2, 1964, on complaint of the General Counsel against Almeida Bus Lines, Inc., herein called the Respondent or the Company. The issue litigated was whether the Respondent had violated Section 8(a)(3) and (4) of the Act by discharging Antone O. Pontes and Gilbert Jesus. Briefs were filed after the close of the hearing by the Respondent and the General Counsel. The General Counsel and the Respondent's counsel also filed motions to correct the transcript in a number of details; each served copies of his motion on the other. No objections were received to these motions and they are hereby granted. The motion papers are hereby made part of the record as Trial Examiner's exhibits.<sup>1</sup>

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

## FINDINGS AND CONCLUSIONS

## I. THE BUSINESS OF THE RESPONDENT

Almeida Bus Lines, Inc., is engaged in providing public transportation by bus and maintains its principal place of business in the city of New Bedford, Massachusetts. Its annual gross volume of business exceeds \$250,000, and in the normal course of its business the Company causes substantial quantities of gasoline, machine oil, vehicles, and automotive parts to be purchased and transported in interstate commerce through various States other than Massachusetts. The Respondent admitted, on the record, that the Board "has jurisdiction" over the Company, and that its operations fall within the Board's established standards for exercising its jurisdiction. I find that the Respondent is engaged in commerce within the meaning of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

## II. THE LABOR ORGANIZATION INVOLVED

Amalgamated Transit Union, AFL-CIO, herein called the Union, is a labor organization within the meaning of Section 2(5) of the Act.<sup>2</sup>

## III. THE ALLEGED UNFAIR LABOR PRACTICE

A. *The issue*

In October of 1961 Gilbert Jesus was an employee of the Respondent and suffered discrimination in employment—he was denied work assignments—because of his union activities. In a resultant proceeding the Board found the Respondent's such treatment of him at that time to have been a violation of Section 8(a)(3) of the Act, and its order to the Company to cease and desist from such practices, and to reinstate Jesus with backpay, was enforced in the court of appeals.<sup>3</sup> He testified for the Government before a Trial Examiner in that proceeding on May 15, 1962.

Following his return to work in April 1963 Jesus again left the Company, this time in October of that year, to accept employment as a police officer for the city of New Bedford. Several times thereafter he sought to be rehired, but the Respondent did not accept him. The essential allegation of the complaint now is that the Company "discharged" him in the course of these last events, and that its reason was to discriminate against him further, still because of his prouion sympathies, and especially because he had testified at the Board hearing in the earlier case, all in violation of Section 8(a)(3) and (4) of the Act. The Respondent defends on the ground that Jesus simply quit, and that in any event it has not been shown, by the preponderance of the substantial evidence on the record as a whole, that his eventual separation from the Company was caused by any illegal motive.

<sup>1</sup> After the close of the General Counsel's case-in-chief, the Trial Examiner granted a motion by the Respondent to dismiss the complaint with respect to Pontes on the ground that no *prima facie* case has been proven as to him. In his brief the General Counsel stated that he takes no exception to this ruling.

<sup>2</sup> This is the same labor organization previously called Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, AFL-CIO.

<sup>3</sup> *Almeida Bus Lines, Inc.*, 140 NLRB 280, *enfd.* in part 333 F. 2d 725 (C.A. 1).

B. *The facts*

The evidence presents a single but critical question of credibility between the testimony of Jesus and Mrs. Cecelia Almeida, the overall manager of the Company; this issue arises from their conflicting stories of what they told one another when Jesus left the Company to join the police force, and again when he asked her to put him back to work some months later and she refused. In all other respects there is no real question as to what the sequence of events was and what was said and done.

Gilbert Jesus first joined the Company in 1950 and quit in 1958. He returned in 1960 and early in 1961—he did not recall whether it was February or May—he again quit, this time because he did not like working in the garage and wanted bus-driving assignments instead. He says he was out 3 or 4 months, and came back again. In October 1961 came the illegal separation, and in April 1963 the Company reinstated him, following issuance of a Trial Examiner's Decision adverse to the Respondent.

In September 1963 Jesus decided to become a policeman and spoke of his desire to both Mrs. Almeida and her son, John Almeida III, also a manager of the Company. According to Jesus he asked John Almeida for a 5-month leave of absence, and was referred to the mother; John testified Jesus asked only for 1 month's leave. Jesus testified that he asked Mrs. Almeida also for a leave of 5 months, that she consented, that he then asked for part-time work while holding the police job, and that she agreed to give him that only if it was available without taking work away from the regular employees. According to Mrs. Almeida, Jesus told her he wanted to try the police job, and that if he liked it it was his intention to keep it, but that if he did not care for such work, he wished to return to the Respondent. She continued that she said he could have 30 days' leave. She did recall he asked for part-time work and that she agreed to give it to him if available. Mrs. Almeida flatly denied that Jesus asked for a 5-month leave of absence or that she gave it to him; she also denied there was any talk of Jesus giving 2 weeks' notice if he should choose to return.

On October 27 Jesus started to work as a policeman; for a month, up to the beginning of December, he did from 4 to 8 hours of work weekly for the Respondent, during what time he was free from the police job and when there were bus or oil truck runs available for him. Jesus never worked again for the Respondent thereafter, and at the time of the hearing, in September, was still on the police force.

Jesus spoke to John Almeida several times after December 1963 about leaving the police and returning to the Respondent, but without results. His last request was to Mrs. Almeida, on April 3, and, as I understand the contentions of the General Counsel, it was during this conversation that the principal manager of the Company, by her refusal to put him to work, "discharged" him because he had testified against the Respondent 2 years earlier in the prior proceeding. Again the two witnesses contradicted one another as to this terminal conversation. There is no explanation of why the complaint, not amended at the hearing, specified that Jesus was discharged on March 13.

According to Jesus he told Mrs. Almeida that he was giving her 2 weeks' notice and wished to return, and that Mrs. Almeida answered: "For my part I won't take you back because you cause me a lot of trouble. You fellows got up on the stand and you lied . . . for my part I won't take you back but I will tell you, I will talk to Mr. Waldron, and if he advises me to take you back I will take you back, and if not I won't take you back." (Mr. Waldron is the Company's local counsel.) Jesus then said, "I had taken a leave of absence with the understanding that I will give you a two week notice," and she replied that the "leave of absence was only good for thirty days." Before leaving, still according to Jesus, he offered to start as a new driver: "If you think that I am a troublemaker, hire me back as a new driver and if you think for one minute I am giving you trouble, lay me off . . ." but Mrs. Almeida then said the Company had a new policy of not rehiring persons who had once left its employ.

Mrs. Almeida's version of this conversation is that Jesus told her he wished to return as a full-time driver and that she replied he could not because the Company had a policy that any employee who "either quit or got through" would not be taken back. Asked if there had been any reference to a union, she said: "Mr. Jesus mentioned it, and I told him I didn't want to discuss it." She denied promising to talk to Waldron about the matter. She also said there was no mention during the conversation about a 30-day leave of absence.

Jesus added that a week or so later he called Mrs. Almeida on the telephone to ask what Waldron had advised and that Mrs. Almeida turned him down again. She could not recall whether he did make such a call to her later.

In this contradictory testimony about the two conversations between Jesus and Mrs. Almeida—the first in September and the second in April—two clear conflicts appear.

One is whether there was agreement upon a 1- or 5-month leave of absence; the other is whether in April, when she refused to put the man to work, Mrs. Almeida used language revealing a purpose to discriminate against him because of his testimony in the old case against the Company. The more important question is the latter, for it is clear that regardless of what promise may or may not have been made back in September, the Respondent did refuse to give work to Jesus in April. The discrimination in employment, therefore, cannot be questioned. What really matters, then, is whether there is good proof of the reason for the denial of employment.

Indeed, it is not clear in the record as a whole whether the theory of the General Counsel is to claim that Jesus never lost his employee status until April. The complaint says he was discharged "on March 13th." Yet when the Company ceased giving him part-time work in December, there was no charge made of illegal termination then. The realities are that at best Jesus can be viewed as an employee who left to try another job and was promised reemployment in the future. In the light of the real issue of the complaint, it is of little moment whether or not he was promised reemployment, for the breaking of such a promise, even assuming it was made, would be no different from outright rejection of an initial employment application, if in fact the motive was illegal.

There was mention of the Union in April, for Mrs. Almeida conceded as much. How the subject came up, however, and who first spoke of it, is more reliably revealed in Jesus' affidavit to a Board agent dated June 18, 1964, than in his testimony. At the hearing he said flatly that Mrs. Almeida's first response to his request for a job was to say she would not give it to him because he had lied on the witness stand, an unquestionable reference to his participation in the earlier proceeding. In his affidavit Jesus recalled the critical conversation as follows:

In March, in my presence at the garage Robert Tavares, a full-time driver gave a month's notice. I told Almeida III (who was present when Tavares gave the notice) that I would take Tavares' run. He said I had to speak to his mother. I went to see Mrs. Almeida at her home and I told her I wanted to come back and that I wanted to give a 2-week notice. She said that the leave of absence was only good for 30 days. She said "For my part I wouldn't hire you back, but I will speak to Mr. Waldron and whatever he says I will do." I said I was willing to come back as a new driver and start at the bottom. She said she would call. I hadn't heard anything so about 1½ weeks later I called her up. She said that she was sorry but Mr. Waldron had advised her not to take me back—because they made a policy that once a driver leaves he couldn't come back. I said that I didn't give her any trouble outside of the union. She said that we all lied on the stand. I never have spoken to her since.

That Jesus' recollection was faulty at the hearing is strongly indicated by substantial variances between his testimony and the affidavit. From the stand he positively related a March 10 incident of having been present in the office when a driver, Tavares, gave notice because he was going into the Army. Jesus said he promptly asked John Almeida for the job, and was told to see the mother. Before he could do this, Tavares changed plans and it became known he was not leaving. Jesus said he simply "let it go at that." From all of this he went on to describe the April request for reinstatement as a completely separate incident. In his affidavit, instead, there is no mention of any April incident or conversation at all. There Jesus states that the only conversation he had with Mrs. Almeida was part of his attempt to replace Tavares in March. In fact his original statement closes with the positive insistence that the only wrong done him was the refusal to give him a job in March.

More important, according to the affidavit, it was he, and not Mrs. Almeida, who first mentioned the Union at all in their conversation, and this not during their face-to-face interview as he said on the witness stand, but a week later when he telephoned with the hope she had changed her mind. His first story, therefore, comports with Mrs. Almeida's oral testimony generally about a 30-day instead of a 5-month leave arrangement. And of course it also corroborates Mrs. Almeida's testimony at the hearing that it was Jesus who mentioned the Union and not she. In these circumstances, I cannot credit Jesus' testimony putting such damaging words into Mrs. Almeida's mouth at the critical moment when she is alleged to have virtually admitted the very illegal objective which goes to the heart of the complaint.

### C. *Analysis, additional findings, and conclusions*

The record failing to reflect any significant evidence that Mrs. Almeida admitted an illegal purpose in either March or April, all that remains of the final conversation between Jesus and management is that he asked for work and was refused. The question therefore becomes whether the General Counsel has proved, on the record as a

whole, that Jesus was separated from his job against his will because of his union activity or his testimony in 1962. At this point the General Counsel's argument really is that because the Respondent punished Jesus to curb his union activities long ago it must be assumed any subsequent denial of work was based on the same animus. Suspicion apart, the conclusion is doubly difficult in this case because what evidence of illegal motive there may be long antedates the events and is essentially foreclosed by the limitations provisions of Section 10(b) of the statute.

To start with, it is a serious question whether the Respondent discharged Jesus at all. He spoke of telling the managers he intended only to "try" to be a policeman; that it was only a temporary position he was accepting. Inconsistently, however, he also admitted his intention at the start was to remain at it permanently if he liked it, to make a career there. The assertion in the General Counsel's brief that Jesus' appointment in October was a probationary one, subject to qualifying examination 5 months later, is not supported by the record.<sup>4</sup> And of course he never left the job. Moreover, he made no complaint when his requests for continued part-time work were ignored starting in December. According to his testimony, he not only "let it go" when his application for a regular job was turned down in March, but he had made a like request a month earlier. He testified that in January he spoke to John Almeida: "I told him that I was ready to come back to work and I wanted to give him my 2 weeks' notice." Almeida told him there were no runs, and Jesus "let it go at that." With so many requests for reemployment and successive offers of 2 weeks' notice ignored, all without Jesus complaining, with the pleadings and Jesus' affidavit insisting he was discharged in March and the oral testimony adding an April discrimination, the contention, if it is the contention of the General Counsel, that Jesus was still an employee in the spring has not been proved by persuasive evidence. A fair appraisal of his status at the end is rather that of a former employee seeking to be rehired. As stated above, it does not really matter whether he had been promised anything at all. He was not hired. And the inquiry here is not why was he not hired, but whether the real reason was in fact an illegal one.

Mrs. Almeida said her sole basis for rejecting Jesus was to carry out a company rule, first established after a recent strike, never to rehire a former employee. As an affirmative defense advanced by the Respondent this explanation of the manager's decision has not been proved. Antone Sousa, a management representative called by the Respondent, testified the rule is a broad one: "It applies to anyone that worked for the Company." Mrs. Almeida named several employees she said had quit or been discharged, and were later refused reemployment. The record also shows, however, that others who had left were returned to work. Millette, formerly a busdriver, who left in 1960, was taken on as an oil-truck driver in 1963 and 1964. Sylvia, a longtime driver, retired in January of 1964; he returned in the summer as a busdriver when more men are needed. More revealing, Mrs. Almeida herself testified unequivocally, and in total inconsistency with her generalization, that she regularly rehires for the summer months, drivers who have worked the previous season. The Respondent would except some of these cases on the ground that the men were "needed," or that Sylvia had been promised limited work even after his retirement. But Jesus' application also came in the spring, when concededly the demand for employees increases. In any event, it is clear that there is no absolute rule against reemployment, and that whatever the true reason for not rehiring Jesus it was not the one stated by Mrs. Almeida.

The record as a whole does not support the complaint allegation as to Gilbert Jesus. Apart from the fact that the Respondent discriminated against him illegally back in 1961, there is no evidence whatever tending to show illegal motivation in this record. He seems to have been on good terms with these people after his reinstatement. The manager was not obligated to agree to any period of leave, even 30 days, when he wanted the chance to change jobs. The very agreement with his request for part-time work was a courtesy which tends to belie any antagonistic attitude. He was friendly with the manager. "I used to go down for coffee with John and hang around the garage." And he did quit of his own accord.

If illegal treatment of Jesus in 1964 is to be found in this case, it can only be on the basis of the illegal conduct of the Respondent in 1961; that old evidence would have to be the "independent and controlling evidence" determining the case.<sup>5</sup> That element of the General Counsel's proof now is more than mere "background evidence";

<sup>4</sup> Jesus' total testimony indicates that it was not the public authorities which made his appointment conditional, but himself: "I agreed to take that job for 5 months temporarily and try it but with the understanding that I could return if I didn't like the job."

<sup>5</sup> See *News Printing Co. Inc.*, 116 NLRB 210.

it is the sole foundation supporting the essential element of union animus without which the complaint must fall. Even assuming that the events of 1964 present an ambiguous situation which requires a look backward to give a rational explanation to Mrs. Almeida's conduct, the old activities are too remote in time to be persuasive now.<sup>6</sup>

Accordingly, I shall recommend dismissal of the complaint in its entirety.

#### RECOMMENDED ORDER

Upon the basis of the foregoing findings and conclusions, it is recommended that the complaint herein be dismissed in its entirety.

<sup>6</sup> Compare *Inland Seas Boat Co.*, 131 NLRB 706.

**Lansing Automakers Federal Credit Union and Local 393, Office Employees International Union, AFL-CIO, Petitioner.** *Case No. 7-RC-6327. January 18, 1965*

#### DECISION AND DIRECTION OF ELECTION

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

1. The Employer, a Federal credit union operating under a charter from, and the supervision of, the Bureau of Federal Credit Unions of the Department of Health, Education, and Welfare, is a private nonprofit corporation engaged in the extension of consumer credit to employees of the Oldsmobile Division of General Motors Corporation in Lansing, Michigan, to whom its membership is restricted by charter.

As of the end of 1963, the Employer had 10,093 active depositors and total deposits amounting to approximately \$8,757,000. Its total outstanding investments or loans amounted to \$7,836,000. During 1963 it loaned approximately \$11 million to individual members and approximately \$300,000 to other Michigan credit unions. In the same year, it deposited \$550,000 in California savings and loan associations and invested \$150,000 in 90-day U.S. Treasury bills. Its profits during 1963 were derived as follows: \$827,000 from loans to individual members, \$17,150 from loans to Michigan credit unions, and \$24,500 from loans to California savings and loan associations. Its total income during 1963 amounted to \$869,000. The parties have deferred to the Board in the matter of the assertion of jurisdiction in this case.

Plainly, legal jurisdiction over the Employer exists. However, the Board has not asserted its jurisdiction to the legal limit but has, in 150 NLRB No. 105.