

**Mitchell Transport, Inc. and Charles L. Hawkins.** *Case No. 25-CA-1760. April 26, 1965*

### DECISION AND ORDER

On June 23, 1964, Trial Examiner William J. Brown 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 Trial Examiner's Decision and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations 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 made by the Trial Examiner and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Decision, the exceptions and brief, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner except as modified herein.

The Trial Examiner found that Respondent discharged Charles L. Hawkins, the Charging Party, because he filed grievances under a contract between Respondent and the collective-bargaining representative, and thereby violated Section 8(a) (3) of the Act. We are unable to concur in this finding.

As more fully chronicled in the Decision, Respondent and the Union were parties to a collective-bargaining agreement which contained a clause setting forth a grievance procedure, as well as a clause which made it a dischargeable offense for any employee to refuse to perform an assigned driving run. Hawkins had been employed by Respondent for many years. In mid-1961 and again in early 1962, he had been characterized by certain of Respondent's supervisors as a "troublemaker" and, on the latter occasion, Respondent's regional manager, Tregoning, instructed Terminal Manager Burgess to inform Tregoning if Hawkins thereafter indulged in misconduct of such sufficient gravity as to establish a basis for a discharge that would be upheld by the grievance committee. Between December 4, 1962, and February 7, 1963, Hawkins filed seven grievances under the contract and also complained to the Interstate Commerce Commission concerning the condition of Respondent's equipment. The Trial Examiner found that, during January 1963, Burgess informed an employee that Hawkins would be discharged if he persisted in grieving and instructed another employee to convey this intelligence to Hawkins.

On March 21, 1963, Hawkins was dispatched on a run by Respondent's female office manager. Hawkins adamantly refused to perform this assignment. The Trial Examiner found that the refusal was predicated upon Hawkins' unwillingness to take orders from a woman, and that Hawkins remarked that he expected to be disciplined or discharged for this insubordination and that he needed a vacation anyway. Hawkins was in fact discharged for insubordination. Thereafter, Hawkins filed a grievance concerning this discharge, a hearing thereon was held on April 23, and the grievance committee upheld the discharge on the ground that Hawkins' refusal to make the run warranted his termination under the contractual provision pertaining to this misconduct. Based on the testimony of employee Thomas Reid, the Trial Examiner found that, on the following day, Burgess and Reid engaged in a conversation concerning the reason for Hawkins' discharge, during which Burgess stated that "it wasn't only turning down the load that got him, it was what he had done before." Relying principally upon this statement, the Trial Examiner inferred that what Hawkins "had done before" had reference to his grievance activity and therefore concluded that the discharge was impelled by this activity. We do not believe that this inference is warranted in light of Reid's further testimony concerning his conversation with Burgess. Thus, Burgess stated that he appeared at the grievance proceeding "with a brief case full of stuff on [Hawkins] and *it happened a long time ago.*" [Emphasis supplied.] In our opinion, it seems most unlikely that Burgess could have been referring to Hawkins' prior grievances inasmuch as such "stuff" could hardly serve as a basis under the contract for Hawkins' termination.

Engaging in protected, concerted activity, such as the filing of contractual grievances, does not perforce immunize employees against discharge for legitimate reasons. Hawkins had clearly and deliberately engaged in an act of misconduct, and there is no showing on this record that the misconduct was provoked by Respondent. We are satisfied from all the evidence that his punishment for insubordination was no different from that which any other employee, similarly situated, would have received under like circumstances. Viewing the record as a whole, we are not convinced that a preponderance of the evidence supports the Trial Examiner's finding that Hawkins was discharged because he had filed grievances. Accordingly, we shall dismiss the complaint insofar as it alleges that the discharge was violative of Section 8(a)(3) of the Act. However, we do not disturb the Trial Examiner's findings that Respondent independently violated Section 8(a)(1).

#### ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the

Respondent, Mitchell Transport, Inc., Cleveland, Ohio, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Threatening employees with discharge if they file grievances under a contract between Respondent and their collective-bargaining representative.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their right to self-organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities.

2. Take the following affirmative action which the Board finds necessary and appropriate to effectuate the purposes of the Act:

(a) Post at its terminal at Mitchell, Indiana, copies of the attached notice marked "Appendix."<sup>1</sup> Copies of said notice, to be furnished by the Regional Director for Region 25, shall, after being duly signed by Respondent's authorized representative, be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to its employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director for Region 25, in writing, within 10 days from the date of this Order, what steps Respondent has taken to comply herewith.

<sup>1</sup> In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "a Decision and Order" the words "a Decree of the United States Court of Appeals, Enforcing an Order"

## APPENDIX

### NOTICE TO ALL EMPLOYEES

Pursuant to a Decision and Order of the National Labor Relations Board, and in order to effectuate the purposes of the National Labor Relations Act, as amended, we hereby notify our employees that:

**WE WILL NOT** threaten our employees with discharge if they file grievances under a contract between our Company and their collective-bargaining representative.

**WE WILL NOT** in any like or related manner interfere with the rights of our employees under the National Labor Relations Act, as amended.

MITCHELL TRANSPORT, INC.,  
*Employer.*

Dated \_\_\_\_\_ By \_\_\_\_\_

(Representative)

(Title)

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 ISTA Center, 150 West Market Street, Indianapolis, Indiana, Telephone No. Melrose 3-8921, if they have any question concerning this notice or compliance with its provisions.

## TRIAL EXAMINER'S DECISION

### STATEMENT OF THE CASE

This proceeding under Section 10(b) of the National Labor Relations Act, as amended, hereinafter referred to as the Act, was heard before Trial Examiner William J. Brown at Bedford, Indiana, on March 17, 1964. The underlying charge of unfair labor practice had been filed May 31, 1963,<sup>1</sup> and on October 14, the Acting Regional Director for Region 25 communicated to the Charging Party his decision to refuse to issue a complaint thereon. Thereafter, following request for review of the Acting Regional Director's decision, the General Counsel by the Director, Office of Appeals, set aside the Acting Regional Director's decision and instructed him to issue the complaint herein. The complaint issued February 6, 1964. It alleged, and Respondent's duly filed answer denied, the commission of unfair labor practices defined in Section 8(a)(1) and (3) of the Act. The principal issue concerns the discharge of Charles Hawkins; a related issue concerns alleged threats of discharge.

At the hearing all parties appeared and participated; they were accorded full opportunity to present evidence and argument on the issues. After the hearing the General Counsel and the Respondent filed briefs which have been fully considered.

Upon the entire record herein,<sup>2</sup> and on the basis of my observation of the witnesses, I make the following:

### FINDINGS OF FACT

#### I. THE BUSINESS OF THE RESPONDENT EMPLOYER

The pleadings and evidence herein indicate and I find that the Respondent, Mitchell Transport, Inc., is a corporation organized under the laws of the State of Indiana with its principal office in Cleveland, Ohio, and terminals in the States of New York, Maryland, Iowa, and Illinois and one in Mitchell, Indiana. At these terminals it is engaged in interstate transportation of goods and merchandise. During the year 1963 Respondent's revenues exceeded \$500,000 of which more than \$50,000 were derived from services performed outside the State of Indiana. The issues involved in the instant case concern events occurring at the Mitchell, Indiana, terminal. I find, as Respondent concedes, that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that it would effectuate the policies of the Act for the Board to assert jurisdiction in this proceeding.

#### II. THE LABOR ORGANIZATION INVOLVED

The pleadings and evidence herein indicate and I find that Local 135, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, the labor organization involved herein and hereinafter sometimes referred to as the Union, is a labor organization within the purview of Section 2(5) of the Act.

#### III. THE UNFAIR LABOR PRACTICES

##### A. Introduction to the issues

The principal issue herein relates to the discharge of Charles Hawkins on March 21. On that date Hawkins was discharged by Terminal Manager Dennis Burgess who acted at the instruction of Maurice Tregoning, Respondent's mid-west regional manager in charge of seven terminals including that at Mitchell, Indiana.

<sup>1</sup> Dates hereinafter refer to the year 1963 unless otherwise indicated

<sup>2</sup> Subsequent to the filing of briefs, counsel for Respondent filed a motion to clarify factual assertions in General Counsel's brief. The motion essentially directs my attention to a paragraph of the report of decisions of a joint grievance committee concerning abstention of interested members. The motion, unopposed by the General Counsel, appears to be a superfluity. Absent opposition, it is granted and the moving papers are hereby ordered incorporated into the record hereof.

In connection with his discharge, Hawkins was given a letter dated March 21, signed by Burgess and assigning as the reason for the discharge Hawkins' refusal to haul a load.<sup>3</sup> Thereafter, on March 22, Hawkins filed a grievance protesting his discharge. On April 23, the Multi-State Cement Grievance Committee, acting by majority vote of the three employers and three union representatives, upheld the discharge. Subsequent efforts by Hawkins to reopen the matter for further grievance discussions on ground of newly discovered evidence were unavailing.

In addition to the discharge of Hawkins, the instant case involves allegations of the complaint that Burgess, on several occasions in the period November 1962 to June 1963, threatened employees with discharge if they persisted in filing grievances.

The General Counsel's position asserted throughout the hearing and in his brief is that Hawkins was in fact discharged because of his grievance filing, asserted to be a concerted activity protected under Section 7 of the Act, and that the Joint Committee decision cannot or should not preclude remedial action at the hands of the Board because of Tregoning's failure to disclose to the Joint Committee his pre-arrangement with Burgess to discharge Hawkins for his grievance filing.

Respondent, on the other hand, asserts that in accordance with Board policy outlined in *Spielberg Mfg. Co.*, 112 NLRB 1080, the Joint Committee's disposition of the discharge should be upheld particularly in view of presentation to the Committee of evidence bearing on the matter of uniformity of treatment of drivers for the offense of refusal of a run. Respondent further contends that in the event the Joint Committee disposition is not accepted and the matter is considered *de novo*, the evidence in the instant proceeding fails to preponderate in favor of a finding that Hawkins' discharge was in reprisal for his grievance filing but rather supports the view that he was discharged pursuant to the uniform rules and regulations for refusal of a run. The uniform rules and regulations, General Counsel's Exhibit No. 10, appears to have bilateral approval and to be recognized in the collective-bargaining agreement, General Counsel's Exhibit No. 9, article XII.

With respect to the allegations in the complaint of threats on the part of Burgess, Respondent in its brief contends that there is no credible evidence substantiating the charges.

#### B. *The discharge of Charles Hawkins*

Charles Hawkins, the Charging Party herein, was employed as an over-the-road truckdriver at the Mitchell terminal since 1953.<sup>4</sup> He first worked for Mitchell Transport's predecessor, Martin Bros. which was acquired by Mitchell Transport sometime in 1959. The trucking operations involved are confined to the hauling of powdered cement for Lehigh Portland Cement Company from the latter's mill in Mitchell, Indiana, to purchasers served by Lehigh out of its Mitchell plant. Respondent's terminal adjoins Lehigh's mill.

The terms and conditions of employment for Respondent's operating employees at the Mitchell terminal are established by a collective-bargaining agreement entered into between Mitchell and The Central and Southern Conference of Teamsters and Local Union No. 135, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. The parties to the agreement have also jointly established and published a set of uniform rules and regulations effective October 1, 1960, and governing the types of misconduct subject to discipline and the extent of discipline applicable for each proscribed offense. Among the offenses listed under the compendious category of "Miscellaneous" in section 7(e) of the uniform rules is "Refusal of run" for which the penalty prescribed therein is "Subject to discharge."

The agreement contains a grievance procedure providing for discussion of grievances between employer and union representatives with resort to Joint Committee arbitration in the event the grievance is not resolved at earlier discussions. While there is no direct evidence of grievance activity on the part of Hawkins prior to December 1962, testimony was offered tending to establish that prior to that time Respondent's supervisory officials regarded Hawkins as a troublemaker because of his activity in this connection.

<sup>3</sup> There is evidence bearing on the varying degrees of responsibility of a driver in relation to loading, accepting load ticket, and accepting bill of lading. This evidence is considerably vague and, as I see the case, not conclusive.

<sup>4</sup> Hawkins appears to have been high on the seniority list of Respondent's drivers inasmuch as the evidence indicates that the steward and No. 1 driver, Robert Edwards, was hired only 2 months before Hawkins.

Burgess, who impressed me as credible notwithstanding Respondent's attack on him as a disgruntled ex-supervisor,<sup>5</sup> testified that when he assumed the post of terminal manager at Mitchell in July of 1961, he was informed by his predecessor, Dworzniak, that Hawkins was a troublemaker and that Burgess should get rid of him. Later, early in 1962, when Tregoning became mid-west regional manager with control of the Mitchell terminal among others, Tregoning, according to Burgess' testimony, informed Burgess that Hawkins was a troublemaker and if Burgess ever got anything serious enough against Hawkins to stand up before a joint committee, he should call Tregoning for instructions. Although Tregoning denied ever threatening Hawkins with discharge for filing grievances, he did not deny the testimony of Burgess attributing to Tregoning the instructions concerning Hawkins referred to above. I find in accordance with the credited testimony of Burgess, undenied by Tregoning, that Burgess had instructions from Tregoning to report to him for further instructions in the event of a major provable offense committed by Hawkins and that the reason for the issuance of such instructions was Tregoning's appraisal of Hawkins as a troublemaker.

There is, in addition, other testimony tending to establish Respondent's dissatisfaction with Hawkins as a troublemaker. Thus, company driver George Pruett testified that Burgess stated to him in January 1963 that if Hawkins did not quit filing so many grievances he was going to be fired. I credit Pruett's testimony in this regard. Additionally, Harley Childers, a recently hired driver for Mitchell on layoff at the time of the hearing, credibly attributed to Burgess the statement in January of 1963 to the effect that Childers should advise Hawkins to quit filing grievances or he would be fired. Also Edwards, the union steward and top driver, testified credibly that in January Burgess informed him that Hawkins would be fired and would take others with him. This conversation, according to Edwards, whom I credit, also involved the admission of Burgess that a reprimand issued to Edwards was really motivated by the Company's belief that Edwards was closely sympathetic with Hawkins in the latter's grievance filing.<sup>6</sup>

There is direct evidence establishing the substantiality of Hawkins' grievance filing in the months immediately preceding his discharge. General Counsel's Exhibit No. 2 includes copies of seven grievances filed in the period December 4, 1962, to February 7, 1963. They include his protests over such a heterogeneity of subjects as vacation and holiday pay, reprimands respecting call-in, Thanksgiving Day pay, refusal (by the Company) of a run, alleged falsification of log, gassing of trucks, and shuttle-driving. In addition to these, there is testimony of Hawkins, undenied and credited, that in January 1963 he communicated with the Interstate Commerce Commission's Regional Office concerning his complaints as to the condition of the equipment.

We now turn to testimony relating to events occurring on March 21, the date of Hawkins' discharge. As a prelude to consideration of those events and as element involved in consideration of the issues herein, it is important to consider certain provisions applicable to company drivers. In the first place, according to the undenied and credited testimony of Tregoning, Interstate Commerce Commission regulations applicable to the driving operations concerned herein permit drivers to work up to maximum of 16 hours in any one day subject to a maximum of 10 hours in driving operations in any one day. Furthermore, under the provisions of the collective-bargaining agreement covering the Mitchell terminal, drivers called and put to work are guaranteed 6 hours' pay at their applicable rate; it is thus to the Company's advantage in certain circumstances to work a driver overtime even at a premium rate rather than call in and put to work a replacement driver.

The bilaterally adopted uniform rules and regulations also govern company drivers and advise them as to the "duties . . . required of them in the general conduct of the company's business." Paragraph 7(e) of the uniform rules provides for the offense of "refusal of run" that the offender is "subject to discharge." The penalty of "subject to discharge" is also prescribed for numerous other listed offenses ranging from major chargeable accident through fourth occasion of reporting for work unclean or in filthy clothing. There is no indication in the evidence nor is it contended in argu-

<sup>5</sup> Respondent's brief asserts that Burgess "holds no affection" for the Company, yet his examination and cross-examination reveal no partisanship or interest in the outcome of the case. He was not interrogated as to circumstances under which he left the Company's employ.

<sup>6</sup> Thomas Reid, a company driver, testified for the General Counsel concerning like statements of Burgess. He impressed me as thoroughly credible but, apparently through mistake, placed the time thereof as occurring in the *fall* of 1963. I therefore do not regard his testimony as probative in this particular.

ment that the words "subject to discharge" mean anything other than their normal import, viz, that for refusal of a run (and offenses also "subject to discharge") the Company may but need not invoke the penalty of discharge.

At 3:30 a.m. on the morning of March 21, Hawkins left on a run to Shelbyville, Indiana. On his return, through the fault of another driver, he had a near collision at an intersection between Bedford and Mitchell <sup>7</sup> and averted collision only by hasty braking with resulting near jackknifing of his equipment. As appears from a stipulation of the parties Hawkins, on his return to the Mitchell terminal, had worked 8 hours of which 7 had been spent in driving.

Shortly before Hawkins' arrival at Mitchell, terminal dispatcher Noble Williams had left for lunch and had instructed the office manager, Miller, to watch the dispatch, further informing her that Hawkins was dispatched for the last load to Bloomington. According to her testimony she handed Hawkins his dispatch orders and Hawkins said that he would not take the load, a statement which he repeated after Miller informed him that Williams had assigned him to take the load in question. Miller testified that she then called Williams for instructions and Williams directed her to inform Hawkins that if he did not haul the load his action would be considered a refusal of a run under the uniform rules and regulations. Miller, did, according to her account, then inform Hawkins of Williams' statement and Hawkins persisted in his refusal. At this point Williams called the office to inquire as to Hawkins' position and, when informed by Miller that Hawkins persisted in his refusal, instructed Miller to have a union member verify the refusal. Gene Munday, a company driver, thereupon witnessed a final refusal of Hawkins to take the load and a statement that he did not care whether or not it was considered a refusal of a run under the uniform rules and regulations. Munday was then assigned to and hauled the load to Bloomington. According to Miller, Hawkins made no mention of a reason for refusing the load until after Munday's appearance when he mentioned, more or less as an afterthought, that he had a headache.

Hawkins' account is essentially no different from Miller's except that he apparently places his announcement of his headache somewhat earlier in this contretemps. I credit Miller's account which would indicate that his reference to a headache was an afterthought. In any event I see the evidence as insufficient to establish any substantial disability on the part of Hawkins of a degree that would impair safety of operation or his own health. The evidence furthermore would not support the conclusion that any claim of physical disability was reported to Burgess or Tregoning at the time, or that Hawkins requested that it be so reported.

The incident of Hawkins and the Bloomington run was reported by Williams and Miller to Burgess who telephoned Tregoning for instructions. Tregoning, according to Burgess' uncontradicted account, informed Burgess he would call him back with instructions, and almost immediately thereafter he instructed Burgess to discharge Hawkins. Burgess called Hawkins at home and left word for Hawkins, who was not there, to come to the office.

In the meantime Hawkins had gone home, rested, and taken some medicine, and then returned to the office where he informed Williams that he felt better and would take a load out if necessary. There were no loads available however. Hawkins then again returned home and went about some personal affairs. He also visited the union office where he conversed with Teamsters' Union Representative John May and May's secretary, Dolores White. According to May this visit occurred about 4 p. m. and, in the course of it, Hawkins stated that he expected to be discharged because of his refusal to take orders from a woman, explaining to May, according to May's account, that he had turned a load down because the order to take it came from a woman.

White placed the time of Hawkins' visit as about 2 or 2:30 p.m. and testified that Hawkins said that he had refused to take an order from a woman and he hoped he was fired because he needed a paid vacation. According to White, Hawkins had been working on his pond.

Hawkins was not called in rebuttal of this testimony of May's and White's and, making due allowance for minor discrepancies in their accounts as to the time of his visit to the union office, I credit their testimony to the extent it establishes that Hawkins admitted refusing an order for which he expected discipline or discharge.

As noted above Tregoning directed Burgess to discharge Hawkins. When Hawkins again returned to the company office late in the afternoon (about 5:45 p.m. according to his estimate) he was handed a sealed envelope by Burgess which, according to Hawkins' own account, he did not open until he reached home. The envelope contained a letter signed by Burgess and discharging him for refusal to haul the Bloomington

<sup>7</sup> I take judicial notice that the distance between the near collision and the terminal is less than 15 miles (9 Wigmore, *Evidence* §§ 2580, 2581 (3d ed.)).

ton load. I do not view Hawkins' failure to indicate any interest in the contents of the envelope as in itself indicating necessarily that he was resigned to discharge, since he was, simultaneously with delivery, told by Burgess that he was discharged and given his terminal checks. There are, however, other indicia above noted showing that Hawkins expected discipline or discharge.

### C. Events subsequent to Hawkins' discharge

On March 22, the day following his discharge, Hawkins and his steward, Edwards, filed a grievance alleging that the discharge was violative of the collective-bargaining agreement and requesting reinstatement and backpay. The grievance was processed through the business representative's office and ultimately led to the Joint Committee decision of April 23 referred to above.

Also, on the day following Hawkins' discharge, there was, according to the uncontradicted and credited testimony of company driver Pruett, a conversation in the company office between himself and Burgess in which Pruett asked why Hawkins had been discharged and Burgess replied that the Company had been waiting for Hawkins to slip up but they were surprised that he had made it so easy for them to discharge him.

In similar vein, there was according to Pruett and fellow employee Batchellor a conversation on a day about 2 weeks following Hawkins' discharge between the two and Burgess. On that occasion according to testimony of Pruett and Batchellor, there was a chance meeting in a tavern in which Burgess stated that he had repeatedly warned Hawkins that if he did not quit filing so many grievances the Company would fire him. According to Pruett, Burgess added the statement that that was just what had happened.

Finally, according to the testimony of Thomas Reid, Burgess told him on the day following the Joint Committee decision, viz, April 24, that "it wasn't only turning down the load that got him, it was what he had done before."<sup>8</sup>

Reference has been made, above, to the Multi-State Cement Grievance Joint Committee decision of April 23. The minutes of that session are in evidence as General Counsel's Exhibition No. 4 and indicate that Hawkins was accompanied at the hearing by Union Committeeman Munday while Mitchell Transport was represented by its vice president, Bernie Collins, and by Terminal Manager Burgess. The tribunal panel consisted of three union and three employer representatives. Chairman of the union delegates was Lloyd Reisner of Local Union 135 while the employer group was chaired by Tregoning. The minutes state that principals involved in cases on an individual basis left the room during the decision-making process on cases in which they were so involved. There is no indication that the minutes were in any way inaccurate and I conclude that, as the minutes indicate, Tregoning did not sit on the Hawkins case. I find that the proceedings are not shown to have been anything other than fair and regular on their face. The result of the deliberation was to uphold the company action in discharging Hawkins. In so deciding the majority of the Committee ruled that Hawkins had accepted a load and thereafter refused it and hence became subject to discharge within the purview of article 7(e) of the uniform rules and regulations. The minutes indicate that the Committee considered and rejected contentions on behalf of Hawkins that in other instances other drivers had refused loads and had not been discharged.

Thereafter on May 31, as noted above, Hawkins filed the charge in the instant case. Further, on July 17 Hawkins filed a grievance seeking the reopening of his case before the Joint Committee on the ground of newly discovered evidence. Pursuant

<sup>8</sup> Reid, who by his demeanor while testifying impressed me as more trustworthy than any other witness in this proceeding, testified concerning a statement of Burgess to him on the day following the Joint Committee decision and was then asked by the General Counsel, "What else was said," his reply being, "I don't recall anything else right at the time." General Counsel then commenced what appeared to be a leading question to which Respondent objected before the question was completed, and then asserted that General Counsel could not refresh the recollection of his own witness. At this point, the Examiner inquired as to whether a pretrial statement was in existence and when informed that there was one, ruled that after first being shown to Respondent's counsel, it could be shown to Reid. This was done and Reid testified that it refreshed his recollection and that he then recalled the statement quoted above.

Respondent's brief refers to the refreshing of Reid's recollection as "unusual procedure to say the least" and valueless, even under "abnormal rules of evidence." I rely, at least in part, on Reid's testimony. See 3 Wigmore, *Evidence* §§ 758 (3d ed.), *et seq.*; 4 Jones, *Evidence*, §§ 964 (5th ed.), *et seq.*

to this request the Joint Committee considered Hawkins' application, in which he was supported by union grievance committeemen, at a meeting on September 30. At this session Tregoning and Burgess represented the Company and Collins acted as chairman of the employer delegation on the Joint Committee. The Joint Committee, by majority decision, ruled that there was insufficient evidence to reopen the case

#### D. Conclusions respecting Hawkins' discharge

Consideration must be given at the outset of Respondent's primary position in this matter, namely that the Board should, in accord with the policy enunciated in *Spielberg Manufacturing Company*, 112 NLRB 1080, and applied to Joint Committee proceedings of the type here involved in *Denver-Chicago Trucking Company, Inc.*, 132 NLRB 1416, refuse to consider imposition of its sanctions where arbitration procedures established and resorted to by the parties to a collective-bargaining agreement have disposed of the discharge by sustaining management action.

The problem is one of accommodating *Spielberg* to the statutory obligations imposed upon the Board by Section 10 of the Act. Prior to the Taft-Hartley amendments of 1947, Section 10 provided that the Board's power to prevent persons from engaging in unfair labor practices listed in Section 8 should be exclusive and not affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise. The Taft-Hartley amendments of 1947 deleted the earlier provision that the Board's preventive powers should be "exclusive" but the Conference Report (H. Rept. No. 510, 80th Cong., 150 sess.) reveals that the deletion was in deference to new provisions respecting Federal court injunctions and suits against unions; the Report also indicates that the retention of the language relating to the fact that the Board's powers should not be affected by other means of adjustment makes it clear that when two remedies exist the Board remedy should be in addition to and not in lieu of other remedies.

In determining whether or not the Board should withhold its adjudicatory hand in accordance with the abstention policy enunciated in *Spielberg*, account must be taken of the nature of the issues ruled on in the arbitration proceedings. In this regard the record clearly establishes that the question of whether excessive grievance filing had anything to do with the discharge of Hawkins was neither alleged nor discussed in the arbitration proceedings. In fact, the Company asserted at the hearing in the instant case, as an indication of a lack of merit in the charge, that it was not raised until sometime after the discharge had been sustained in the arbitration proceedings.<sup>9</sup>

In *Spielberg* the issue before the Board was whether or not the company engaged in an unfair labor practice by refusing to reinstate several strikers following the termination of a strike. The company based its refusal on grounds of their alleged misconduct on the picket line during the strike. The issue as to their participation in such misconduct and the propriety of the sanction invoked was submitted to arbitration panel. A majority ruled that management was justified in refusing reinstatement. The Board found that all alleged discriminatees participated, that the proceedings were fair and regular on their face, and that the decision was not clearly repugnant to the purposes and policies of the Act. It accordingly dismissed the complaint in accordance with the desirable objective of encouraging the voluntary settlement of labor disputes.

As Respondent points out, the Board has regarded the *Spielberg* policy as applicable to joint committees of the type prevalent in the trucking industry. *Denver-Chicago Trucking Company, Inc.*, *supra*. The General Counsel has asserted in his brief, however, that the requisite standards of fairness and regularity are not met in the instant case due to Tregoning's alleged failure to acquaint fellow members of the Joint Committee with his predisposition to discharge Hawkins because of the latter's grievance filing. In view of the absence of indications that the minutes are incorrect in their notation that interested panel members refrained from discussing or voting on cases in which they were involved on an individual basis, I reject this contention of the General Counsel. There is no basis on the record of this case, for concluding that the standards of fairness and regularity were not met with respect to the issue presented to the Joint Committee.

But it is of the utmost significance that the issue presented before the Joint Committee involved solely the allegation that Hawkins was treated unfairly under the contract standards; and it was in this connection that consideration was given as to whether or not Hawkins was accorded treatment different from that accorded in other

<sup>9</sup> It should be noted, however, that Hawkins' charge filed May 31, 1963, preceded the second session of the Joint Committee on September 30

cases of refusals of runs. There was no evidence, argument, or discussion, however, as to whether or not Hawkins was discharged in truth and in fact because of his volume of grievance filings.

The present case involves the question as to whether or not Hawkins was discharged for filing grievances. As Respondent concedes, that was in no conceivable manner presented to or considered by the Joint Committee. Accordingly, we turn to the merits of the allegations of the complaint. In this respect I accept the General Counsel's assertion that *Ford Motor Company (Sterling Plant, Chassis Parts Division)*, 131 NLRB 1462, is applicable and *Spielberg* is not.

The evidence to be considered in determining whether or not it preponderates in favor of the conclusion that Hawkins was discharged because he engaged in grievance filing has been set forth fully above. It includes undenied evidence that Hawkins filed several grievances and shortly before his discharge filed written complaint with the Interstate Commerce Commission concerning the safety of the equipment.

The filing of the grievances herein appears to have been an activity protected under the Act such that if the discharge were motivated in whole or in part as a reprisal on account of such filing, the discharge would be an unfair labor practice within the meaning of Section 8(a)(3). *Farmers Union Cooperative Marketing Ass'n*, 145 NLRB 1; *Red Top Cap & Baggage Co., et al.*, 145 NLRB 1433. The grievances appear to have been numerous and forcefully presented.

Although there is no direct evidence that Hawkins was the only or the outstanding thorn in the side of the Company in this matter, I infer that he was a major irritant, this appearing from the evidence indicative of strong company displeasure with Hawkins and the absence of evidence that other drivers filed as many as Hawkins or were targets of remarks showing resentment as was the case with Hawkins. In this regard I view the evidence of references to Hawkins as a "troublemaker" as plainly having reference to his militancy in the grievance field. Also, as I have indicated above, Burgess and Tregoning were parties to an understanding that, as part of their concern over Hawkins' troublemaking, Tregoning would instruct Burgess what to do if Hawkins ever committed a dischargeable and provable offense.

The evidence reveals that Hawkins did commit a dischargeable offense. He arrogantly refused a run because, the evidence indicates, he would not take orders from a woman. The question is whether he was discharged for this offense or because Tregoning and Burgess had at last got something on him. In determining whether or not the preponderance of evidence indicates that grievance filing at least in part entered into the Company's action I rely principally on Reid's testimony attributing to Burgess the statement, the day after the hearing of the Joint Committee, that it was not only the turning down of the load that had produced Hawkins' discharge but what he had previously done. In the circumstances of the case the reference to what he had previously done plainly refers to grievance activity.

Accordingly, I find that the evidence preponderates in favor of the conclusion that Hawkins was discharged, at least in part, because of his participation in the protected activity of grievance filing. This was an unfair labor practice under Section 8(a)(3). See *Farmers Union Cooperative* and *Red Top Cap & Baggage, supra*.

The complaint also alleges as unfair labor practices within the scope of Section 8(a)(1) of the Act, threats on the part of Burgess in the period November 1962 through June 1963 directed against employees and threatening discharge for filing grievances. These threats allegedly were uttered by Burgess at the Mitchell terminal except for one allegedly uttered on January 17 at Indianapolis.

In this area of the case there is evidence consisting of testimony of several drivers as to utterances by Burgess. Thus Hawkins asserted that shortly after Burgess became terminal manager at Mitchell he took Hawkins aside and after referring to the "lot of grievances" Hawkins had theretofore filed, advised Hawkins to "simmer down" to avoid trouble. To this Hawkins appears to have rejoined that if Burgess complied with the contract he would file no grievances. This cannot be regarded as a threat of discharge of the type alleged in the complaint.

Subsequent statements of Burgess appear, however, to be coercive in character. Thus Reid testified that in October or November Burgess told him that he should inform Hawkins that the latter was going to file one grievance too many and the Company would get him. Although the object of this threat was nominally Hawkins, its inherent capacity for effect on Reid to whom the words were spoken seems obvious.

Edwards testified concerning a discussion with Burgess in January of 1963 in which, after acknowledging that a reprimand he had issued to Edwards was based on his belief that Edwards was "in full partners" with Hawkins, Burgess stated to Edwards that if Hawkins did not quit grievance filing he would be fired and take others with him. I credit Edwards and find this statement to be a threat of the type alleged in the complaint.

Pruett also related a conversation with Burgess occurring sometime in January of 1963 in which, according to Pruett, Burgess said that if Hawkins did not quit filing so many grievances and causing so much trouble, he was going to fire him. I credit Pruett's testimony and find this to be a threat of the type alleged in the complaint and an unfair labor practice of the type defined in Section 8(a)(1) of the Act.

There is one final item in this area and that relates to a conversation occurring among Burgess, Pruett, and Batchellor in a luncheon meeting in Mitchell sometime apparently in April 1963. Appraising the evidence concerning any threats uttered by Burgess at this meeting, it appears too indistinct to warrant a conclusion that it preponderates in favor of a finding that threats were uttered by Burgess on that occasion.

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

The activities of the Respondent Employer set forth in section III, above, and therein found to constitute unfair labor practices defined in the Act, occurring in connection with the operations of the Respondent Employer as outlined in section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

#### V. THE REMEDY

In view of the findings herein that Respondent has engaged in unfair labor practices as alleged in the complaint, I shall recommend that it be required to cease and desist therefrom and take certain affirmative action as appears necessary and appropriate to effectuate the purpose and policies of the Act. In view of my finding that Respondent discharged Charles Hawkins because of his participation in concerted activities I shall recommend that Respondent be required to offer him reinstatement to his former or a substantially equivalent position and make him whole for loss of earnings in accordance with the remedial policies outlined in *F. W. Woolworth Company*, 90 NLRB 289, and *Isis Plumbing & Heating Co.*, 138 NLRB 716.

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

#### CONCLUSIONS OF LAW

1. The Respondent Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the purview of Section 2(5) of the Act.
3. By the statements of its terminal manager that discharge could or would be visited upon employees for filing grievances, Respondent engaged in unfair labor practices defined in Section 8(a)(1) of the Act.
4. By discharging its employee Charles Hawkins because he engaged in filing grievances under the collective-bargaining agreement and complaints as to equipment with the Interstate Commerce Commission, Respondent engaged in unfair labor practices defined in Sections 8(a)(3) and 2(6) and (7) of the Act.

[Recommended Order omitted from publication.]

**Sullivan Surplus Sales, Inc. and Local 1687, Retail Clerks International Association, AFL-CIO.** *Case No. 3-CA-2280. April 27, 1965*

#### DECISION AND ORDER

On January 11, 1965, Trial Examiner Owsley Vose 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 National Labor Relations Act, as amended,

152 NLRB No. 12.