Montgomery Ward & Co., Incorporated *and* Larry Taylor. *Case No. 28–CA–1109. September 27, 1965*

DECISION AND ORDER

On April 21, 1965, Trial Examiner Martin S. Bennett 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. The Trial Examiner also found that the Respondent had not engaged in certain other unfair labor practices alleged in the complaint, and recommended that these allegations be dismissed. Thereafter, the Respondent and the General Counsel, respectively, filed exceptions and cross-exceptions to the Trial Examiner's Decision, and supporting briefs, and the Respondent filed an answering brief to the General Counsel's cross-exceptions.

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 [Members Fanning, Brown, 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 proceeding, and hereby adopts the findings,[1] conclusions, and recommendations of the Trial Examiner.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby adopts as its Order the Recommended Order of the Trial Examiner, and orders that the Respondent, Montgomery Ward & Co., Incorporated, Albuquerque, New Mexico, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.

[1] The Respondent excepted to the Trial Examiner's rulings admitting into evidence, and his subsequent denial of Respondent's motion to strike, the affidavit of Cecil Chandler as past recollection recorded We need not consider Respondent's exceptions to those rulings. The record shows that employee Johnson testified regarding the same incidents that Chandler was unable to recall clearly. Johnson's testimony is clear and undisputed. Therefore, even without the affidavit, the testimony in the record is undisputed, and we hereby affirm the Trial Examiner's findings concerning Respondent's unfair labor practices.

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

This matter was heard before Trial Examiner Martin S. Bennett at Albuquerque, New Mexico, on October 15, 1964, and February 9, 1965. The amended complaint [1]

[1] Issued August 14, amended October 15, and based upon a charge filed June 29, 1964.

alleges that Respondent, Montgomery Ward & Co., Incorporated, has engaged in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act. Briefs have been submitted by the General Counsel and Respondent

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

FINDINGS OF FACT

I. JURISDICTIONAL FINDINGS

Montgomery Ward & Co, Incorporated, is an Illinois corporation maintaining its principal office in Chicago, Illinois, and various retail stores and mail-order houses in other States of the United States, including the store involved herein at Albuquerque, New Mexico. Respondent annually sells products valued in excess of $500,000, and causes merchandise valued in excess of $50,000 to be shipped to its Albuquerque store from points outside that State. I find that the operations of Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE UNFAIR LABOR PRACTICES

A. *The issues; introduction*

The service department of Respondent's Albuquerque store is unorganized by any labor organization and there is no evidence of union activities during the period under consideration herein The General Counsel basically alleges that Larry Taylor, a repairman in the television department, was discharged on January 24, 1964, because he made a prounion comment on the previous day and, further, that during the same month Respondent engaged in various types of conduct within the meaning of Section 8(a)(1) of the Act. Respondent contends that Taylor was discharged for failure to carry out an assignment, this against a background of poor performance on service calls. The allegations of interference, restraint, and coercion are either denied or attacked for failure of proof.

B. *The discharge of Larry Taylor*

Larry Taylor entered the employ of Respondent as a bench television repairman on August 10, 1963, and was discharged on January 24, 1964 In November or December 1963, he requested and received a raise of $5 per week, this reflecting the completion of a 3-month probationary period. In addition to his bench work, he made outside service calls when the regular outside serviceman enjoyed his weekly day off and also in case of emergency or illness. Taylor testified that his work had been complimented on a number of occasions.

Taylor and Robert Johnson, then an outside television service repairman, presented testimony concerning an incident in the store's service area on January 23 which the General Counsel relies upon as evidence of Respondent's discriminatory motivation in discharging Taylor. Johnson, it may be noted, was promoted to assistant service manager on or about September 1, 1964.

The size of this service area is approximately 30 by 23 feet. Johnson entered the room, complaining about the poor quality of the work performed on a television set which he, Johnson, was returning to the shop to be re-repaired At this point, according to Taylor, he, Taylor, yelled "What we probably should have is a good union." According to Johnson, Taylor stated, "What we need in here is a good Union." Whatever link there may have been between the returned television set and a labor organization is not explained.

The General Counsel relies upon the presence in the room of two representatives of management. That they were there is undisputed. Richard Blaich was then regional field service specialist working out of Respondent's office in Denver, Colorado. He visited the store once or twice monthly and was in Albuquerque between January 22 and 24, 1964. Donald McNutt was then customer service manager in the Albuquerque store. The two men were engaged on January 23 in shifting metal storage bins about the service area. These are large steel bins which are used to hold parts and customer merchandise.

It is undisputed that Blaich and McNutt were physically engaged in moving and rearranging these bins at the time of Taylor's remark, that the bins made noise as they were moved, that the two men were substantially turned away from Taylor, and that, according to Taylor, "They were talking among themselves." Taylor variously estimated that he was 15 to 20 feet distant from Blaich and McNutt. Both Blaich and McNutt denied hearing the statement. It is further noted that Johnson, as he testi-

fied, was 25 to 30 feet distant from Blaich and McNutt and only 5 or 6 feet from Taylor. This decreases the likelihood that Taylor spoke loudly enough to be overheard by the two supervisors.

As the immediate cause of the discharge, Respondent contends that Taylor was directed on the afternoon of January 23 to deliver a television set, that he failed to do so, that his dereliction was discovered on the morning of January 24, and that he, therefore, was discharged later that morning after delivering the set As an underlying cause, Respondent contends that Taylor was the poorest performer in the shop with respect to sales of detergents and warranties to customers when he made service calls The reference to warranties is to the sale of a 1-year warranty of the performance of a television set. It is undisputed that Taylor made no sales in either of these categories.

The record discloses the following, even on the face of Taylor's testimony. He originally testified that he was told on January 23 "In a round about way" to deliver a repaired television set to a customer. The fact is that Customer Service Manager McNutt gave him a written work order. This, it is clear, was tantamount to an instruction to deliver the ostensibly repaired set. Indeed, Taylor testified that "probably at that time is when he said to deliver it."

Taylor further testified that the set was not repaired, implying that it could not be delivered However, he did repair the set, completing it by 3 or 4 p.m. that day. He testified also that he was not instructed to deliver the set that evening and he did not recall that he was told to deliver it in his own station wagon and collect mileage. He went directly home at 5.30 p.m.

McNutt, who left this store on February 12, 1964, testified that a customer called him that afternoon, seeking the return of her set; that he ascertained it had been repaired, and that he told Taylor to deliver the set, giving him the work order. McNutt also told Taylor that all the trucks were out and directed him to deliver it on the way home with his own car in the event a truck did not return by closing time. The following morning, the customer telephoned McNutt and complained strongly about the failure to deliver the set. McNutt became angry and directed Taylor to deliver it forthwith. Taylor did so, assisted by employee Jonnet

I credit McNutt herein. Taylor ultimately admitted most of the facts alleged herein by McNutt. And, even on the face of Taylor's testimony that the set was not repaired, the fact is that it was repaired by 3 or 4 p m. that day. I find, therefore, that McNutt's concern over the failure to deliver the set on January 23 was genuine.

There is a conflict between the two as to the circumstances surrounding Taylor's discharge. According to McNutt, after sending Taylor on his delivery on January 24, he went to his superior, Assistant Store Manager Porter, related the incident, noted that they had an unhappy customer, stated that Taylor's attitude had deteriorated, and recommended his discharge. This was the only topic discussed, although there had been previous discussions over Taylor's poor performance in the sale of detergents and warranties, discussed below. Porter agreed with the recommendation. When Taylor returned, McNutt told him that he was discharged for failure to deliver the television set the previous day and that his pay would be ready at noon.

Taylor gave a substantially different version of the events that morning. As he was leaving with the set at 9 or 9·30 a m , McNutt said "As soon as you deliver this set, they are going to fire you " Taylor asked the reason and McNutt replied that it was because of low job output, that he would attempt to save his job, and that if Taylor were discharged "I'm going to go out the door with you " McNutt also said something "about three of them getting behind his back and causing this discharge to take place", the three were not identified. Taylor placed employee Jonnet on the scene; the latter, no longer in Respondent's employ, was not called as a witness herein.[2]

McNutt, in essence, denied all of the foregoing He did not tell Taylor that he was to be discharged because he, McNutt, had not as yet discussed the matter with Porter. He denied making any reference to three persons going behind his back and denied stating that he had nothing to do with the discharge. To the contrary, he insisted, "I had everything to do with his discharge." McNutt is corroborated by Blaich who was present in Porter's office at the time but did not participate in the discussion when McNutt came in to talk with Porter. Here, as well, I credit McNutt. Taylor, as indicated, displayed some tendency to gloss over the matter and then admitted receiving instructions to deliver the television set the previous day.

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[2] Taylor now lives in Toledo, Ohio Whether Jonnet is still in the Albuquerque area is not disclosed

The General Counsel stresses another item, allegedly occurring shortly after Taylor made the statement on January 23 that a union was needed. Late that afternoon, according to Assistant Service Manager Robert Johnson, Blaich or McNutt asked Taylor to assist them in moving the metal bins in the television service area. Taylor allegedly then stated, "We're going to have to see the steward about this kind of stuff."

Johnson admitted, however, that this was said in a joking manner. Moreover, he later testified that this remark was made to him, Johnson, and that "I don't know what he said to Blaich, no. I didn't hear his conversation with Blaich." Taylor did not testify concerning this conversation. I find that there is no evidence to support a finding that Blaich and McNutt heard this statement.

The General Counsel, in addition to relying on the two statements by Taylor treated above, lyrically stresses other conduct by Taylor on January 23 and terms it "not the bud of union activity but the ungerminated seed that was crushed before planting." Thus, according to Taylor, he and District Manager Blaich were chatting about a job problem and Blaich, previously a television repairman, complimented Taylor on several difficult repairs he had made on the previous day.

During or at the end of this discussion, Assistant Store Manager Porter appeared on the scene and Taylor, admittedly joking, asked why Blaich, who was smoking, should be permitted to do so whereas the rest of the men were not. Porter, according to Taylor, "was in sympathy with my feelings" and instructed Blaich to extinguish his cigarette, the latter promptly did so. Later that day, Porter again chanced on the scene. Blaich again was smoking and Taylor again pointed this out both to Porter and Blaich. The record does not disclose whether Blaich extinguished his cigarette on the second occasion and, as Taylor put it, "we were joking at the time about it." He also testified that he complained daily to McNutt and others about not being permitted to smoke in the shop.

Assuming that Taylor's joking remarks constituted a concerted activity, as alleged by the General Counsel, I am not convinced on a preponderance of the evidence that they were the cause of his discharge. Something of a more substantial nature is needed to offset the fact that Taylor disregarded a normal and reasonable instruction, that as a result a customer became angry and complained and that Respondent accordingly decided to discharge him. See *N.L.R B.* v. *Park Edge Sheridan Meats, Inc.*, 341 F. 2d 725 (C.A. 2).

This is buttressed by certain other evidence. There were five, including Taylor, in the television service department during this period, excluding Jonnet who worked for 30 days and left for a better paying position on a date not revealed herein but subsequent to January 24. Taylor and two others were bench men and there were two outside men

Respondent was stressing that the service representatives should endeavor to sell service warranty policies as well as detergents on all house calls. While the evidence treats with the period from August 1963 through January 1964, according to Taylor the sales campaign started around December 1 In each call, the man was instructed to carry the box of detergent into the home. While Taylor was of course a relief man, he was the only man in the shop who never made a sale in either category and his record was the worst in the shop. This was a matter seriously regarded by Respondent, for McNutt kept a chart in his office on which a total of each man's sales in these two areas was displayed at daily meetings. McNutt would question them as to the preceding day's sales and this would be recorded under the individual's name

Every man in the shop but Taylor earned commissions and promotional allowances in varying amounts. Indeed, Taylor admitted that he never once brought a box of detergent into a customer's home And, as McNutt testified, he had previously discussed this poor performance with Assistant Store Manager Porter. While there is some evidence of union hostility, described below, I do not deem it sufficient to offset the foregoing. I find that the evidence preponderates in favor of Respondent's position herein and shall recommend that this allegation of the complaint be dismissed. See *N.L.R B.* v *Ace Comb Co.*, 342 F. 2d 841 (C.A. 8), and *Fort Smith Broadcasting Co.* v. *N L.R.B.*, 341 F. 2d 874 (C.A. 8).[3]

[3] The General Counsel points out that Taylor, as he uncontrovertedly testified, called upon Store Manager Adams on the day following his discharge, asked the reason for his termination, and was told that it was caused by "low job output." On the other hand, Respondent's records disclose that from August 1963 through January 1964, the term of Taylor's employment, Taylor had the lowest output in the department, averaging 2 2 sets per day whereas the other men had averages ranging between 3 and 5 6 sets per day

C. *Interference, restraint, and coercion*

About 2 weeks before the discharge of Taylor on January 24, 1964, according to Robert Johnson, he and another serviceman were punching in one morning and Johnson jokingly stated to the other, "We'll have a Union meeting in 10 minutes." Several office girls may have been nearby. As indicated, there had been no union activities and this preceded the remarks made by Taylor which were relied upon by the General Counsel.

Shortly thereafter, all service personnel were summoned to a meeting; this, it would seem, included personnel servicing all appliances and not only television sets. They were addressed by Store Manager Adams who told them that he had heard via the "grape vine" that a union meeting was to be held that day, that this was to be stopped immediately, and that anyone found "participating during store time would be immediately discharged."

Johnson further testified that a special meeting of the service department was called on the day following Taylor's discharge. Adams again addressed them. He stated that there had been talk of "Union participation, Union meetings" and that "the next man found or heard or seen talking Union would be immediately discharged." He further stated that "we" had no use for a union in the store and that the men needed no middle men to participate in store activities

On cross-examination, he admitted that it was his understanding that Adams was telling them, at the earlier meeting, "Not to talk about the Union on working time and on the company premises." [4]

Cecil Chandler testified for the General Counsel about the second meeting He originally testified that Adams said that they had job security in the store and that if they did "good jobs" they did not "need a Union there, that the store would take care of their employees." He was shown an affidavit given by him on October 14, 1964, which treated with the foregoing incident, but his recollection was not refreshed. It was offered and received in evidence as past recollection recorded subject to Respondent's motion to strike.[5]

In his affidavit, Chandler deposed that Adams stated "It's better not to have a union the store can do more for you without a union" Adams further stated that with a union in the picture there might be a strike and they would be out of work during the strike. He added that they had better "job security" without a union, that he had heard some of the men had spoken with union officials and that if he heard anything more about this "the man will be discharged." Adams did not testify herein.

Chandler further recalled that at a general meeting at an undisclosed date McNutt discussed the Union and said, "Well, let's don't be talking about Union." Again, he was similarly unrefreshed by reading his affidavit and the affidavit was received as past recollection recorded, as indicated. In the affidavit, he deposed that *McNutt* stated a few weeks before the later meeting, at a meeting of service department employees, "We'll have no more talk about the union, Mr. Adams doesn't like it." It would seem that this was the same meeting concerning which Johnson testified and it is noted that Johnson named *Adams* as the speaker of this earlier meeting rather than McNutt. This may be attributable to the time lag between the meeting, held early in January, and the date of the affidavit, October 14.

McNutt was replaced by one Brown as customer service manager on February 12. Johnson testified that about 1 week later Brown asked him what his views were on unions and Johnson replied that there were no union activities in the store. He added that it had been joked about from time to time and that, in his opinion, this was the reason Taylor had been discharged, a claim Brown promptly denied. On cross-examination, Johnson stated that the conversation pertained to "whether we had a

[4] The quoted material appears in the respective questions. As is readily apparent, the questions are identical except for the addition of the word "and" to the question treating with the earlier statement.

[5] That motion is hereby denied. Chandler suffered serious head injuries in an accident and underwent an operation shortly after giving the affidavit. He was to return to the hospital for further surgery on the day he testified herein and was appearing contrary to his doctor's orders. Respondent accordingly declined the opportunity to cross-examine him or to examine him on *voir dire* concerning the circumstances under which he gave the affidavit. This may be a heavy penalty for being a gentleman and respecting a manifestly ill person, but I am constrained to conclude that Respondent is required to make a further showing of medical evidence if the affidavit or Chandler's present capacity to recall the circumstances of giving the affidavit is to be attacked. Of course, the time lag from January to October is entitled to consideration in assigning weight to the affidavit.

Union or didn't have, is what it primarily pertained to" He then agreed that the question related to "whether there had been union activity in the store at some time in the past." Brown was not questioned concerning this conversation.

There is no evidence that any of the employees addressed concerning engaging in union activities on company time considered this statement to be ambiguous. There is also no evidence that any management representatives construed the statement of policy narrowly or broadly. See *N.L.R B.* v. *Harold Miller, et al, d/b/a Miller Charles & Co.*, 341 F. 2d 870 (C.A. 2), where the court noted that a rule similar to this was understood by a foreman to be a broad one.

Conclusions

Turning to the two comments concerning union activities on company time and/or company property, it is readily apparent that the later one restricting union activities to "working time on the company premises" is in the clear. I detect no ambiguity therein and it in no way restrains activity during nonworking time. In the statement made 2 weeks earlier, the conjunction "and" was present. But there is no evidence that any employees were misled and construed it more broadly than the later statement.

On the other hand, I do not construe the testimony on cross-examination as constituting all that Adams allegedly said on these occasions and therefore the remarks attributed to Adams are not refuted.

I see nothing coercive in the statements attributed to McNutt and to Brown when considered in the light of cross-examination. I do find that Respondent engaged in conduct violative of Section 8(a)(1) of the Act solely by stating that the next person discovered "talking Union" or talking with union officials would be immediately discharged, this taking place on or about January 25, 1964, as testified by Johnson and corroborated by Chandler. In other respects, the conduct set forth herein is not coercive or amounts only to a statement that working time is for work. See *N.L.R B.* v. *Park Edge Sheridan Meats, Inc.*, 341 F. 2d 725 (C.A. 2); *Aerodex, Inc.*, 149 NLRB 192, and *Mallory Plastics Company*, 149 NLRB 1649.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations set forth 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

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

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

CONCLUSIONS OF LAW

1 Montgomery Ward & Co., Incorporated, is an employer within the meaning of Section 2(2) of the Act.

2. By threatening employees with discharge for engaging in union activities, Respondent has engaged in an unfair labor practice within the meaning of Section 8(a)(1) of the Act.

3. The aforesaid unfair labor practice is an unfair labor practice affecting commerce within the meaning of Section 2(6) and (7) of the Act

4. Respondent has not otherwise engaged in unfair labor practices.

RECOMMENDED ORDER

Upon the basis of the foregoing findings of fact and conclusions of law and the entire record in this case, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, it is recommended that Respondent, Montgomery Ward & Co., Incorporated, Albuquerque, New Mexico, its officers, agents, successors, and assigns, shall.

1. Cease and desist from:

(a) Threatening employees with discharge for engaging in union activities.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing,

to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, and to refrain from any or all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as authorized in Section 8(a)(3) of the Act.

2. Take the following affirmative action which is deemed necessary to effectuate the policies of the Act:

(a) Post in its store at Albuquerque, New Mexico, copies of the attached notice marked "Appendix." [6] Copies of said notice, to be furnished by the Regional Director for Region 28, shall, after being duly signed by Respondent, be posted by it immediately upon receipt thereof, and be maintained for a period of 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director for Region 28, in writing, within 20 days from the date of receipt of this Decision, what steps it has taken to comply herewith.[7]

[6] In the event that this Recommended Order be adopted by the Board, the words "a Decision and Order" shall be substituted for the words "the Recommended Order of a Trial Examiner" in the notice. In the further event that the Board's Order be enforced by a decree of a United States Court of Appeals, the words "a Decree of the United States Court of Appeals, Enforcing an Order" shall be substituted for the words "a Decision and Order".

[7] In the event that this Recommended Order be adopted by the Board, this provision shall be modified to read: "Notify said Regional Director, in writing, within 10 days from the date of this Order, what steps Respondent has taken to comply herewith."

APPENDIX

NOTICE TO ALL EMPLOYEES

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

WE WILL NOT threaten employees with discharge for engaging in union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employeees in the exercise of their right to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, and to refrain from any or all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization, as authorized in Section 8(a)(3) of the Act.

MONTGOMERY WARD & CO., INCORPORATED,
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.

If employees have any question concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 1015 Tijeras Street, NW., Albuquerque, New Mexico, Telephone No. 247–0311.

Exeter Coal Company *and* Odis Ritchie, William Prater, Jr., Carter Hicks. *Cases Nos. 9–CA–2997–1, 9–CA–2997–2, and 9–CA–2997–3. September 27, 1965*

DECISION AND ORDER

On March 9, 1965, Trial Examiner Jerry B. Stone issued his Decision in the above-entitled proceeding, finding that Respondent had