

R. J. Lison Company, Inc. and Teamsters Automotive Workers, Local 495, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America. *Case No. 31-CA-39 (formerly 21-CA-6446). March 29, 1966*

DECISION AND ORDER

On December 29, 1965, Trial Examiner Howard Myers 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, 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 Act, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel [Members Fanning, Brown, and Zagoria].

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 brief, and the entire record in the case, and hereby adopts the findings,¹ conclusions, and recommendations of the Trial Examiner, with the following modifications.

We agree with the Trial Examiner's finding that Respondent violated Section 8(a) (1) and (3) of the Act by discharging employees Curtis Reed and Stewart Taber. However, contrary to the Trial Examiner, we find that the evidence in the record is insufficient to support his finding that Respondent discriminatorily eliminated employee Taber's overtime work because there is nothing to show that Respondent had any knowledge of Taber's union activity prior to the elimination of the overtime work. Accordingly, we will dismiss this allegation of the complaint.

[The Board adopted the Trial Examiner's Recommended Order, with the following modifications:

[1. Substitute the following for paragraph 1(a) of the Trial Examiner's Recommended Order:

["(a) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form, join, or assist Teamsters Automotive Workers, Local 495, Inter-

¹ The election was held on November 4, 1964. The Trial Examiner inadvertently stated in footnote 12 of his Decision that the election was held on November 14, 1964.

national Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, or any other labor organization of its employees, to bargain collectively through representatives of their own choosing, and to engage in concerted protected activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities, 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, as modified by the Labor-Management Reporting and Disclosure Act of 1959.”

[2. Substitute the following paragraph for 2(b) :

“(b) Make whole Curtis Reed and Stewart A. Taber for any loss of wages they may have suffered because of Respondent’s discrimination against them, in the manner and to the degree set forth in the section above entitled ‘The Remedy,’ except as modified herein.”²

[3. Substitute the following for the first indented paragraph in the notice attached to the Trial Examiner’s Decision to read :

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of the right to self-organization, to form, join, or assist Teamsters Automotive Workers, Local 495, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, or any other labor organization of our employees, to bargain collectively through representatives of their own choosing, and to engage in concerted protected activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities, 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, as modified by the Labor-Management Reporting and Disclosure Act of 1959.

[The Board dismissed the complaint insofar as it alleges violations of the Act not found herein.]

² Insofar as the Trial Examiner’s “remedy” (footnote 16) provides for backpay for the loss of overtime work, we do not adopt this recommendation.

TRIAL EXAMINER’S DECISION

STATEMENT OF THE CASE

This proceeding, with all parties represented by counsel, was heard before Trial Examiner Howard Myers at Los Angeles, California, on a complaint of the General Counsel of the National Labor Relations Board, herein called the General Counsel¹ and the Board, dated July 16, 1965, and the answer of R. J. Lison Company, Inc., herein called Respondent, dated August 10, 1965. The complaint, based upon a charge duly filed on February 2, 1965, by Teamsters Automotive Workers, Local

¹ This term specifically includes counsel for the General Counsel appearing at the hearing.

495, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, herein called the Union, alleged, in substance, that Respondent violated Section 8(a)(1) and (3) of the National Labor Relations Act, as amended, from time to time, herein called the Act.

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

FINDINGS OF FACT

I. RESPONDENT'S BUSINESS OPERATIONS

Respondent is, and at all times material has been, a California corporation with its offices and place of business in Burbank, California, where it is engaged in the sale and the servicing of Wayne Power Sweepers.² Over 50 percent of its service business is with industrial firms³ and the balance is fairly equally divided between California municipalities and contract sweepers. As part of its service business Respondent provides maintenance service⁴ to over 1,000 customers, including Prudential Insurance Company.

In the course and conduct of its business operations, Respondent annually performs services valued in excess of \$50,000 for firms which, in turn, annually purchase goods valued in excess of \$50,000 directly from firms located outside the State of California.

Upon the basis of the foregoing undisputed facts, I find, in line with established Board authority, that Respondent is engaged in, and during all times material has been engaged in, a business affecting commerce within the meaning of Section 2(6) and (7) of the Act and that its operations meet the standards fixed by the Board for the assertion of jurisdiction.

II. THE LABOR ORGANIZATION INVOLVED

Teamsters Automotive Workers, Local 495, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America is a labor organization admitting to membership employees of Respondent.

III. THE UNFAIR LABOR PRACTICES

A. *Interference, restraint, and coercion; the discharges of Curtis Reed and Stewart Taber*

1. The pertinent facts⁵

On August 13, 1964, the Union filed a petition⁶ seeking to be certified as the collective-bargaining representative of Respondent's production and maintenance employees, including all parts service mechanics, helpers, and truckdrivers.

On October 26 the Regional Director for Region 21 approved the consent-election agreement which Respondent and the Union had executed.

On October 30 Respondent posted in its plant the usual notices of an election which was to be held under the auspices of the aforementioned Regional Director. Each of the six eligible voters cast his vote for the Union.

On November 13 the Union was certified as the statutory collective-bargaining representative of the employees in the agreed-to appropriate unit.

² Respondent is a franchise dealer of Wayne Sweeping Equipment.

³ Such as General Motors Corporation and Ford Motor Company.

⁴ This service consists of lubricating the sweepers which Respondent either rents or sells, changing oil, motor tuneup, aligning, and tightening belts and chains.

⁵ In the light of my observation of the conduct and deportment at the hearing of all the persons who testified herein, and after very careful scrutiny of the entire record, all of which has been carefully read and parts of which have been reread and rechecked several times, and being mindful of the contentions of the parties with respect to the credibility problems here involved, of the fact that in many instances testimony was given regarding events which took place months prior to the opening of the hearing, and of the fact that very strong feelings have been generated by the circumstances of this case, coupled with the fact that it would unnecessarily protract this Decision to summarize all the testimony or to spell out fully the confusion and inconsistencies therein, the following is a composite picture of all the factual issues involved and the conclusions based thereon. The parties may be assured that in reaching all resolutions, findings, and conclusions herein, the record as a whole has been carefully considered; relevant cases have been studied; and each contention advanced has been weighed, even though not specifically discussed.

⁶ Case No. 21-RC-9241.

On December 21 Richard Lee, a union organizer, called at Respondent's offices and conferred with Robert J. Lison, his wife Helen, and Peter McGrath, Respondent's general manager. After some pleasantries had been had, Lee handed them a proposed collective-bargaining agreement. The parties discussed, in general terms, the various clauses of the proposed contract, but no agreement was reached as to any of them.

During the course of the conference referred to immediately above, Lison⁷ turned to McGrath and said, to quote from Lee's testimony, "If Curt Reed and Stewart Taber hadn't been around why, there wouldn't be any union. If it wasn't for them, why, [we] wouldn't be sitting here today."⁸

Curtis Reed was first employed as a mechanic in August 1963 at \$2.25 per hour. During the course of his employment with Respondent he received three wage increases of 10 cents per hour each. At the time of his discharge on December 31, 1964, Reed was earning \$2.55 per hour.

Reed was the oldest mechanic, in point of service, at the time of his discharge. In addition to his regular job of rebuilding sweepers, as did other mechanics, he also rebuilt sweeper motors. The other mechanics also had been assigned, from time to time, to rebuild sweeper motors but they were unable to do the work properly and Reed was called upon to finish the jobs properly.

The credited evidence discloses Reed was never advised by any supervisory personnel that his workmanship was below par and needed to be improved nor was he ever reprimanded for turning out poor work. In fact, according to Lee's credible testimony, Lison stated at the December 21, 1964, bargaining session, which was attended by Mr. and Mrs. Lison, McGrath, and Lee, "The people he had working for him he didn't consider as really full-fledged mechanics because one of them . . . had come from a pet shop, another one was having financial troubles, and that they had been having to help them out, and that Curt Reed was probably their only qualified mechanic."

At or about 3:30 p.m. on December 31, 1964,⁹ Dick Sheldrick, plant service manager and Reed's immediate supervisor, handed Reed his paycheck, and then remarked, to quote from Reed's credited testimony, "This is either good news or bad

⁷ For the purposes of brevity, Robert J. Lison will be referred to herein as Lison.

⁸ Lison denied making the above-quoted statement. Upon the entire record in the case and from my observation of Lee and Lison, while each was testifying, I find Lee's version of what Lison said on that occasion regarding Reed and Taber to be substantially in accord with the facts. This finding is based mainly, but not entirely, on the fact that Lison gave me the impression that he was studiously attempting to conform his testimony to what he thought was to the best interest of Respondent. On the other hand, Lee impressed me as being a person who is careful with the truth and meticulous in not enlarging his testimony beyond his memory of what was actually said on that occasion. This is not to say that Lee was not confused on certain matters or that there were no variations in his objectivity and convincingness. But it should be noted that the candor with which Lee admitted that he could not be certain as to the exact words used, only serves to add credence to what a careful study of this testimony shows what he honestly believed to be the facts. Regarding the aforesaid meeting, McGrath's entire testimony with respect thereto is as follows:

Q. (By Mr. DIEDERICH) [Respondent's counsel]. Now, after the election, did you have some bargaining sessions with the union?

A. After the election?

Q. Yes.

A. Yes.

Q. And how many sessions did you have, approximately?

A. Five or six.

Q. During the course of those, and when was the first one held, approximately?

A. Middle of December, I believe.

Q. And during the course of those sessions, and first of all, who conducted the negotiations on behalf of the union?

A. Dick Lee.

Q. And who participated in the negotiations on behalf of the company?

A. I was in the room, however, Mr. Lison did the bulk of the talking, and Mrs. Lison was occasionally present.

Q. How long did these sessions last?

A. One to two hours.

⁹ This was approximately quitting time.

news; however [sic] I wanted to take it, but this was my last check from this company"; and that when he asked Sheldrick why he was being discharged, Sheldrick said he reported for work "late too many times."

Shortly after being discharged, Reed met McGrath in the plant parking lot. Reed testified, and I find, that the following then ensued between McGrath and him:

Q. Would you explain what was said or discussed in your conversation?

A. I asked him [McGrath] why I was being fired, and he said it was inability to do what—to do the work. So I asked him for a written statement to this fact, and we were—we went to the office to get the statement where he said he would type it up. So I returned to the shop to load my tools, and I had Stu Taber help me. Then Mr. McGrath came back to the parking lot, where I was loading my tools, and he told me that he had talked—

TRIAL EXAMINER: Who talked?

The WITNESS: Pete McGrath told me that he had talked to Mr. Lison, that Mr. Lison said that he would not give me a written statement of why I was fired.

On January 4, 1965, Lee telephoned McGrath and asked the reason for Reed's discharge. McGrath replied that Reed was discharged because he had been caught shaving in the plant during working hours. After Lee had remarked that Reed had been referred to by Lison at the December 21 negotiation meeting as being one of the Company's best mechanics and that Reed had been with the Company for a "fairly lengthy time" and "seeing as this was probably one of his first infractions," Lee asked if McGrath would not reinstate Reed, McGrath replied in the negative.¹⁰

Sheldrick testified that in the latter part of November 1964 it became apparent to him that "work was falling off," and he suggested to McGrath that Reed be laid off; that he based his recommendations to terminate Reed on the fact that (1) he had received complaints from some 30 or 35 customers about Reed's poor workmanship and/or the fact that on some occasions Reed would go to a customer's establishment and merely "stand around and stay there ten minutes, possibly, and leave"; that of the said 30 or 35 customers who complained about Reed, he could recall only that (a) early in 1964 Prudential Insurance Company requested that Reed not be dispatched to its establishment because Reed "didn't do any work," (b) that Simi Drive-In complained, during the forepart of the summer of 1964, that Reed came to its place of business, had the regular monthly service slip signed and then left without doing any work, (c) that the firm of Turner, Webster & Johnson complained, during the forepart of the summer of 1964, that Reed did not do any work when he came to its establishment, and (d) that Safeco complained that Reed stopped at its place of business, slept for 2 hours, and then left; and (2) that during the summer of 1964, he found Reed asleep on two separate occasions in the plant during working hours.

With respect to the Prudential complaint, Sheldrick testified that he "reprimanded" Reed but could not recall whether he had dispatched another employee to Prudential to do the work Reed purportedly had failed to do properly; he could not recall ever informing McGrath about Prudential's complaint against Reed; he could not recall whether he had ever dispatched Reed to Prudential after the early 1964 Prudential complaint; he could not recall ever talking to Reed about the Simi complaint; he talked to Reed about the Safeco complaint, but Reed denied the accusation made against him; and he could not recall talking to Reed about the Turner, Webster & Johnson complaint.

With respect to finding Reed asleep in the plant on two separate occasions during the summer of 1964, Sheldrick testified that each time he awakened Reed; he merely said to Reed, to quote from Sheldrick's testimony, "If he wanted to sleep, to punch out and go home"; and he never reported the two plant sleeping incidents to either Lison or McGrath.

Sheldrick also testified that Reed's frequent lateness for work was also a factor which he considered when he decided to recommend Reed for discharge, but that Reed's "unionism or union activity" was not a contributing factor.

McGrath testified that: During the summer of 1964 La Marche, who has been in Respondent's employ since 1961 as a salesman, asked him several times not to assign Reed to him when he was making a sales call because Reed "had a surly insolent attitude and was . . . uncooperative"; about a month after Reed had been discharged he tried to collect for the service work Reed had performed for Beck's

¹⁰ McGrath testified that in response to Lee's inquiry as to why Reed was discharged, he replied, "Because we felt that he was the least efficient, and we had more complaints about him." Upon the basis of the entire record in the case and from my observation of McGrath and Lee while each was on the witness stand, I find Lee's version of what was said during the above telephone conversation to be substantially in accord with the facts.

Trailer Park in August or September 1964; Beck's refused to pay "because [it] felt that the man who had been on the job had not done it properly, or the sweeper was not functioning properly"; early in December 1964 Sheldrick and he came to the conclusion that, because business was falling off, an additional employee should be laid off;¹¹ he thereupon conveyed this decision to Lison; Lison said, to quote McGrath, "He did not want to lay off this close to Christmas, and we would [sic] wait until immediately after the Christmas holidays"; he told Sheldrick of Lison's decision not to fire anyone prior to Christmas; and when he asked Sheldrick who should be selected for layoff, Sheldrick replied, "Curtis Reed, because we had complaints about his work."

Stewart A. Taber was first hired by Respondent as a stockboy on January 11, 1963. During his employment with Respondent, Taber received five pay increases; three of 10 cents per hour each; one of 5 cents per hour; and the final one of 25 cents per hour.

Taber, with Reed's assistance, spearheaded the Union's organizational drive in Respondent's plant.¹² He was the one who first contacted the Union, secured union authorization cards, and solicited his fellow workers to sign them, and held about six union meetings at his home prior to his discharge on January 22, 1965.

During the course of Taber's employment his duties became greatly increased as did his salary. His latest assignment was the taking over of the inventory control system in June 1964, with a 25-cent-per-hour wage boost, at the time Respondent dispensed with the services of its bookkeeper.

At the time of this new assignment, Taber told McGrath that he would have to be relieved of his shop duties, such as assembling flaps and chains, because the newly assigned duties consisted mainly of handling paperwork whereas his shop duties brought him frequently in contact with grease. McGrath agreed to assign someone else to Taber's shop duties.

About 3 weeks after assuming the inventory control job, Taber reminded McGrath that since "paper work and grease did not mix" he would like to be relieved of his shop duties. McGrath said that as soon as the plant and service facilities were moved to the newly acquired building, Taber's shop duties would be given to one of the shop men.

In July 1964 the parts, service, and certain other facilities were moved to the new building at which time Taber was given certain additional jobs. These additional jobs, for which Taber was to be paid at overtime rates, were to be performed by him before or after his regular scheduled hours of work. One of these added jobs was to water the newly planted landscaping. This watering job took about 2½ hours a week. The other added job was performed in the parts department.

In or about September 1964 Taber again asked McGrath to be relieved of the shop duties. McGrath promised to do so, but did not.

In October 1964 Taber asked McGrath for a helper to aid him in setting up the inventory bins and carts in order to take care of the three new dealerships which Respondent had acquired that month. McGrath agreed that Taber needed a man to help him and promised to speak to Lison about the matter; but no helper was assigned to Taber.

In October 1964 Taber told Sheldrick that he could not keep proper inventory records because the mechanics came into the parts department when it was unattended and took various parts without permission and that he would have "to chase these guys down to get the parts" back. He also told Sheldrick that it was difficult enough to keep proper records without having the mechanics taking unauthorized parts.

¹¹ Holeman Cluck, a truckdriver, was laid off about mid-November 1964.

¹² The fact that Respondent knew prior to their respective discharges that Taber and Reed actively supported the Union is not open to question. This finding is buttressed by the fact that at the November 14 Board-conducted election Taber and Reed and the four other eligible voters all cast their ballots for the Union; at the December 21 bargaining meeting between Lee, Lison, Helen Lison, and McGrath, at which time Robert Lison remarked, "If Curt Reed and Stewart Taber hadn't been around, why, there wouldn't be any union. If it wasn't for them, why, [we] wouldn't be sitting here today"; Sheldrick's remark to Reed made about 3 days after the aforementioned Board-conducted election, in Taber's presence, that the employees "should get the right colored picket signs, so it [sic] wouldn't clash with the building"; and Reed's statement to his coworkers around the end of November 1964, in Sheldrick's presence, that a union meeting was scheduled for that evening after work at Taber's house.

On one or more occasions Taber told Sheldrick about the mechanics taking parts without his knowledge or permission. Each time Sheldrick agreed that the situation was intolerable but did nothing about it.

On October 30 McGrath, in Lison's presence, told Taber that there was no further need for him to water the landscape, adding that Taber would not receive any further overtime. McGrath then requested Taber to give him the keys to the plant which had been given to Taber because he worked before and after the other employees' normal work schedules. Taber handed over the keys. Thereupon, the notices announcing the forthcoming Board election were posted in the plant.

Because of the failure to eliminate his shop duties, coupled with the fact that no helper was assigned to him and that he was not permitted to work overtime, plus the added duties occasioned by the acquisition of three new dealerships, Taber fell behind in his inventory control work. This fact that Taber was falling behind in this job was well known to McGrath because on many occasions Taber told McGrath of his inability to keep abreast of the inventory and each time McGrath promised to do something about it but never did.

On January 22, 1965, Lee visited the shop about 9 a.m. and spoke to Taber. Sheldrick, who was standing about 8 or 10 feet away, saw Lee talking to Taber. After Lee had concluded his conversation with Taber he left the plant and proceeded to Respondent's office.¹³ Upon arriving at the office, Lee saw Sheldrick sitting at the receptionist's desk. Lee then informed the receptionist that he would like to see McGrath. Upon being announced, Lee was asked into McGrath's office. During the course of the conversation which ensued between McGrath and Lee, the latter mentioned, to quote from Lee's credited testimony, "The boys were real anxious to get a contract, and that they were thinking seriously of a strike situation if we couldn't get together and negotiate a contract."

About 30 or 45 minutes after Lee had left Taber, McGrath went to the parts department and asked Taber if he had been keeping accurate inventory control records. When Taber replied that he had not, that he had told McGrath a long time ago that he could not keep accurate records without a helper, McGrath took the inventory control cards saying that they would be handled in the office.

About 2:30 that afternoon, January 22, McGrath and Lison entered the parts department. What then transpired, Taber credibly testified as follows:

Q. All right, now. Tell us to the best of your recollection what the people in this conversation said, including yourself.

A. Yes.

Mr. Lison, Mr. McGrath—they walked into the parts department, and Mr. Lison handed me my check, and he says to me, "This is your final check. We don't need your assistance any longer."

I asked him why. Mr. Lison replies that I hadn't been keeping proper records of inventory control.

At that time, I pointed at Mr. McGrath, and I asked him, "Didn't I ask you for an assistant to give me a hand with inventory control, or give me a hand in the parts department, generally?"

And he said, "Yes, you did." Mr. McGrath continued on telling me, "You have had plenty of time in the last few months to catch all this back inventory control up."

Q. Continue.

Anything else said?

A. Yes, Mr. Lison said, "Pack your personal belongings and get out, and never come back on the premises again."

On January 29, 1964, Respondent hired Gary M. Bachle on a full-time basis. Bachle introduced a new type of inventory control system which was not put into effect until March 29. In short, Respondent "kept no bookkeeping system as far as inventory was concerned" from January 22 through March 29, 1965.

Concluding Findings

This case presents the comparatively rare situation where the recitation of the facts leading up to the discharges vividly reveals their discriminatory character.¹⁴

¹³ The two locations are a block apart.

¹⁴ Compare the oft-quoted observation of Chief Judge Parker in *Hartsell Mills Company v. N.L.R.B.*, 111 F. 2d 291, 293 (C.A. 4). ". . . direct evidence of a purpose to violate the statute is rarely obtainable." Accord: *N.L.R.B. v. Bird Machine Company*, 161 F. 2d 589, 592 (C.A. 1); *N.L.R.B. v. Dan River Mills, Incorporated, Alabama Division*, 274 F. 2d 381 (C.A. 5); *Northern Virginia Steel Corp. v. N.L.R.B.*, 300 F. 2d 168 (C.A. 4).

In support of its contention, expressed at the hearing and in its brief, that Reed's union activities played no part in its decision to discharge him, Respondent advanced various and sundry reasons for the discharge. Respondent first took the position that Reed was discharged because of his poor attendance record. It then took the position that Reed was discharged because of his inability to do the work. It then took the position that Reed was discharged because he had been caught shaving in the plant during working hours. It then took the position that Reed was discharged for economic reasons. It then took the position that Reed was discharged because of customer complaints and for sleeping on the job.

The shifting and unsupported grounds assigned by Respondent for terminating the employment of Reed are persuasive indications that antiunion reasons, rather than the reasons advanced by Respondent, accounted for the action taken against him.¹⁵

The record is abundantly clear, and I so find, that the reasons advanced by Respondent for Taber's discharge are pretextuous. Respondent seized upon the fact that the inventory control system was not up to date as an excuse to rid the plant of another union leader. Taber's purported unsatisfactory work became insurmountable in Respondent's eyes when Lee mentioned to McGrath that the employees were thinking about striking the plant.

Upon the entire record in the case, I find that Respondent discharged Reed and Taber, and thereafter refused to reinstate them, because each had engaged in protected union activities. By so doing, Respondent violated Section 8(a)(3) of the Act and since such conduct necessarily interfered with, restrained, and coerced Reed and Taber and their coworkers in the exercise of the rights guaranteed in Section 7 of the Act, Respondent also violated Section 8(a)(1) thereof. I further find that the elimination of Taber's overtime work at premium pay on and after October 30, 1964, was also violative of Section 8(a)(3) and (1) of the Act.

I recommend that the complaint be dismissed insofar as it alleges unfair labor practices not specifically found herein.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

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

V. THE REMEDY

Having found that Respondent has engaged in unfair labor practices violative of Section 8(a)(1) and (3) of the Act, it is recommended that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

¹⁵ The courts have frequently recognized that shifting explanations by an employer for the discharge of an employee may warrant an inference that the true reason was the employer's hostility to the union. See *N.L.R.B. v. International Furniture Company*, 199 F. 2d 648 (C.A. 5); *N.L.R.B. v. Crystal Spring Finishing Company*, 116 F. 2d 669 (C.A. 1); *N.L.R.B. v. Yale & Towne Manufacturing Company*, 114 F. 2d 376 (C.A. 2); *N.L.R.B. v. Condenser Corporation of America*, 128 F. 2d 67 (C.A. 3); *N.L.R.B. v. Eclipse Moulded Products Company*, 126 F. 2d 576 (C.A. 7). And this is so even where the employer had "plausible grounds" for the discharge. *United Biscuit Company of America v. N.L.R.B.*, 128 F. 2d 771 (C.A. 7). See also *N.L.R.B. v. C. W. Radcliffe, et al., d/b/a Homedate Tractor & Equipment Company*, 211 F. 2d 309 (C.A. 9), which holds that the giving of implausible, inconsistent, or contrary explanations of a discharge may be considered in determining the motive therefor; it is, as here, a circumstance indicative of antiunion motivation.

Of course, disbelief of the reasons advanced by Respondent does not in itself make out a violation. Unquestionably, as Respondent's counsel points out in his brief, the burden is on the General Counsel to establish discriminatory motive, not on Respondent to disprove it. *Miller Electric Manufacturing Co. v. N.L.R.B.*, 265 F. 2d 225 (C.A. 7); *N.L.R.B. v. Rockwell Manufacturing Company (DuBois Division)*, 271 F. 2d 109 (C.A. 3); *N.L.R.B. v. Minnotte Manufacturing Corp.*, 299 F. 2d 690 (C.A. 3); see also *The Staver Company, Incorporated*, 154 NLRB 1289; *Da-lite Screen Company, Inc.*, 154 NLRB 926. Here the General Counsel has more than met that burden.

Having found that Respondent has discriminated in regard to the hire and tenure of employment, and the terms and conditions of employment of Reed and Taber, it is recommended that Respondent offer them immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges. It is also recommended that Respondent make Reed and Taber whole for any loss of pay each of them may have suffered by reason of Respondent's discrimination against them, by payment to each of a sum of money equal to the amount each normally would have earned as wages from the date of his discharge to the date of Respondent's offer of reinstatement, less his net earnings during that period.¹⁶ Backpay and interest thereon at the rate of 6 percent per annum are to be computed and paid in accordance with and in the manner set forth in *F. W. Woolworth Company*, 90 NLRB 289, and *Isis Plumbing & Heating Co.*, 138 NLRB 716.

The unfair labor practices found to have been engaged in by Respondent are of such a character and scope that in order to insure Respondent's employees of their full rights guaranteed them by the Act, it will be recommended that Respondent cease and desist in any manner from interfering with, restraining, and coercing its employees in their exercise of the rights to self-organization.

Upon the basis of the foregoing findings of fact and upon the record as a whole, I make the following:

CONCLUSIONS OF LAW

1. Respondent is, and during all times material was, an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is, and during all times material was, a labor organization within the meaning of Section 2(5) of the Act.
3. By discriminating in regard to the hire and tenure of employment and the terms and conditions of employment of Reed and Taber, thereby discouraging membership in the Union, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(3) of the Act.
4. By discriminatorily discontinuing Taber's overtime work at premium pay, Respondent engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(3) of the Act.
5. The aforesaid unfair labor practices are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.
6. Respondent has not engaged in other violations of the Act alleged in the complaint.

RECOMMENDED ORDER

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the record as a whole, it is recommended that R. J. Lison Company, Inc., Burbank, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

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

(b) Discouraging membership in the Union, or in any other labor organization of its employees, by discriminatorily discharging or refusing to reinstate its employees, or by discriminating in any other manner in regard to their hire and tenure of employment or any term or condition of employment.

2. Take the following affirmative action which it is found will effectuate the policies of the Act:

(a) Reinstated Curtis Reed and Stewart A. Taber to their former or equivalent positions without prejudice to their seniority and other rights and privileges.

(b) Make whole Curtis Reed and Stewart A. Taber for any loss of wages they may have suffered because of Respondent's discrimination against them, in the manner and to the degree set forth in the section above entitled "The Remedy."

¹⁶ Respondent should also be ordered to make Taber whole for any loss of overtime premium pay he suffered as a result of Respondent's discriminatorily eliminating his overtime.

(c) Preserve and, upon request, make available to the National Labor Relations Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary for the determination of amounts of pay due under these recommendations.

(d) Notify Curtis Reed and Stewart A. Taber 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, as amended, after discharge from the Armed Forces.

(e) Post at its establishment in Burbank, California, copies of the attached notice marked "Appendix."¹⁷ Copies of said notice, to be furnished by the Regional Director for Region 31, shall, after being duly signed by Respondent's representative, be posted for 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 such notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director for Region 31, in writing, within 20 days from the receipt of this Decision, what steps Respondent has taken to comply herewith.¹⁸

It is further recommended that unless on or before 20 days from the receipt of this Decision, Respondent notifies the said Regional Director that it will comply with the foregoing recommendations, the National Labor Relations Board issue an order requiring said Respondent to take the action aforesaid.

It is also recommended that the complaint be dismissed insofar as it alleges unfair labor practices not specifically found herein.

¹⁷In 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."

¹⁸In 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 the 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 in any manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form labor organizations, to join or assist Teamsters Automotive Workers, Local 495, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, or any other labor organization of our employees, 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 and all of such activities.

WE WILL offer to Curtis Reed and Stewart A. Taber immediate and full reinstatement to their former or substantially equivalent positions without prejudice to any seniority or other rights and privileges previously enjoyed.

WE WILL make Curtis Reed and Stewart A. Taber whole for any loss of pay they may have suffered by reason of our discrimination against them.

All our employees are free to become or remain members of the above-named Union or any other labor organization. We will not discriminate in regard to hire or tenure of employment or any term or condition of employment against any employee because of membership in or activity on behalf of any such labor organization.

R. J. LISON COMPANY, INC.,
Employer.

Dated_____ By_____ (Representative) (Title)

NOTE.—We will notify the above 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, as amended, 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.

If employees have any question concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, U.S. Post Office and Court House, 312 North Spring Street, Los Angeles, California, Telephone No. 688-5840.

Overnite Transportation Company, Inc. and Chauffeurs, Teamsters and Helpers Local No. 171, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.
Case No. 5-CA-3029. March 29, 1966

DECISION AND ORDER

On December 23, 1965, Trial Examiner Alba B. Martin 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, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent filed exceptions to the Decision and a supporting brief. The Charging Party filed cross-exceptions, supporting brief, and an answering brief to Respondent's 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 Zagoria].

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, cross-exceptions, briefs, and the entire record in the case,¹ and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.²

¹ The Respondent's exceptions to the Trial Examiner's Decision and supporting brief are directed in large part to the credibility resolutions of the Trial Examiner, alleging that he was biased and prejudiced. We find these allegations without merit. Our review of the entire record in this case leads us to the conclusion that the Trial Examiner's credibility findings are not contrary to the clear preponderance of all the relevant evidence; and, accordingly, we find no basis for disturbing them. *Standard Dry Wall Products, Inc.*, 91 NLRB 544, enfd. 188 F. 2d 362 (C.A. 3).

² We find no merit in Respondent's exceptions to the Trial Examiner's rejection of certain of its exhibits. Contrary to the contention of the Respondent, the record shows that either the Union and/or the General Counsel objected to the admission of each of the exhibits in question.

Respondent also contends that we are bound by an order of the Interstate Commerce Commission in *Overnite Transportation Company—Purchaser—Rutherford Freight Lines*, 97 M.C.C. 568, which recites certain wages, hours, and other conditions of employment which the purchaser intended to adopt. However, in its decision, of which we take official notice, that Commission specifically made no findings or recommendations concerning the labor relations matters involved in the instant case, *supra*, at 574, 576, 577. Further-