

are customarily posted, and shall be maintained by it for 60 consecutive days thereafter, Respondent taking reasonable steps to assure that said notices are not altered, defaced, or covered with any other material.

(d) Notify the said Regional Director, in writing, within 20 days from the date of receipt of this Decision what steps Respondent has taken to comply herewith.¹⁶

¹⁶ In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify the 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 discharge any of our employees who are nonmembers of Jewelry Workers Union, Local No. 23, International Jewelry Workers Union, AFL-CIO, or of any other labor organization because of the fact that they maintain friendly personal relations with members of said Union, whether or not said members are, or are not, at the time, on strike against this Company and WE WILL NOT discriminate in regard to hire and tenure of employment of any employee to discourage membership in any labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our 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, or to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or refrain from any or all such activities except to the extent that membership in a labor organization is made a condition of employment under the terms of an agreement permitted under the proviso to Section 8(a)(3) of the Act, as modified by the Labor Management Reporting and Disclosure Act of 1959.

WE WILL offer Beatrice Misenar immediate and full reinstatement to her former or substantially equivalent position, without prejudice to her seniority or other rights and privileges previously enjoyed, and WE WILL make her whole for any loss of pay suffered by paying the sum calculated in the manner recommended in the Decision and Recommended Order of the aforesaid Trial Examiner.

BAUSCH & LOMB 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, 312 North Spring Street, Los Angeles, California 90012, Telephone 688-5850.

Killard Printing Company, Inc. and Local 1, Amalgamated Lithographers of America, International Typographical Workers and Michael Stephan. *Cases 29-CA-402 and 455. June 13, 1966*

DECISION AND ORDER

On April 18, 1966, Trial Examiner Thomas A. Ricci issued his Decision in the above-entitled proceeding, finding that the Respondent-
159 NLRB No. 33.

ent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety, as set forth in the attached Trial Examiner's Decision. Thereafter, the General Counsel filed exceptions to the Trial Examiner's Decision and a supporting brief.

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 and the entire record in this case, including the exceptions and brief, and hereby adopts the findings, conclusions, and recommendation of the Trial Examiner.¹

[The Board dismissed the complaint.]

¹ In adopting the Trial Examiner's Decision herein, we do not rely upon his conclusion that there was "not a scintilla of evidence" of illegal motivation in Composto's discharge. Rather, we base our affirmation of the Trial Examiner's dismissal upon the failure of the General Counsel to establish the alleged unfair labor practices by a preponderance of the evidence.

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

A hearing in the above-entitled proceeding was held before Trial Examiner Thomas A. Ricci on March 8 through 11, 1966, at Brooklyn, New York, on complaint of the General Counsel against Killard Printing Company, Inc., herein called the Respondent or the Company. The sole issue litigated is whether the Respondent violated Section 8(a)(3) of the Act in the discharge of Joseph Composto. The General Counsel filed a brief after the close of the hearing.

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

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

The Respondent, a New York corporation, maintains its principal office and place of business in Hempstead, Long Island, New York, where it is engaged in the manufacture, printing, sale, and distribution of business cards, technical manuals, special announcements, and related products. During the year 1964, a representative period, in the conduct of its business the Respondent manufactured, printed, sold, and distributed at its said plant products valued in excess of \$50,000, of which products valued in excess of \$50,000 were furnished to, among other customers, F.M.C. Corporation, Academic Press, Inc., and the Sperry and Hutchinson Company, each of which enterprises annually produces goods or provides services in interstate commerce valued in excess of \$50,000, which goods are shipped or services are performed directly outside the State in which said enterprises are located. I find that the Respondent is engaged in commerce within the meaning of the Act and that it will effectuate the policies of the Act to exercise jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

Local 1, Amalgamated Lithographers of America, International Typographical Workers, herein called the Union, is a labor organization within the meaning of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICE

A. *The sole question*

On August 27, 1965, the Respondent discharged Joseph Composto, a combination cameraman in its lithographic shop; Composto had been hired in February and he did work preparatory to printing, including stripping, camera, and platemaking. It was a small shop, with, apparently, only three full-time production workers besides John Usis, the owner. The other two regulars were Michael Stephan and Paul Wirth. Stephan was discharged 2 months later, on October 29. The sole question to be decided in this decision is whether the General Counsel has proved that the discharge of Composto was motivated, as alleged in the complaint, by an intent to discourage union activities among the employees and was therefore an unfair labor practice in violation of Section 8(a)(3) of the Act. The complaint as issued also charged the later dismissal of Stephan as having been similarly illegal, but that allegation was dismissed by me at the close of the General Counsel's case in chief on motion by the Respondent.

If the idea of evidence in its basic, classic concept be kept in mind, this is that rare case where the oft used but seldom apt phrase "not a scintilla of evidence" is literally fitting. Without chance of contradiction it can be said there is not a scintilla of evidence that the Respondent intended to discourage union activities by its discharge of Composto. Indeed, the General Counsel frankly conceded on the record that he does not claim otherwise. His theory of proof for illegal motivation is simple and plain. There were union activities among the employees during the week ending Friday, August 27; Usis, the owner and sole actor on behalf of the Respondent, knew this fact by the afternoon of that day; he released Composto at 5 p.m.; and his asserted reason for discharge—offered voluntarily in the answer to the complaint and investigated exhaustively by the General Counsel during examination of witnesses he called before resting his case—is false. From these four facts—union activity, knowledge by the employer, close timing of the discrimination, and lie in the asserted reason—all of which the General Counsel contends have been proved, it must be inferred that the Respondent's true motivation was union animus.

There was some equivocation in the General Counsel's argument of position at the hearing. He conceded the total absence of any evidence whatever indicating opposition to the Union by the Respondent, nor indeed even any expression of opinion on the subject at all by any of its agents. Counsel for the Respondent objected to evidence respecting the affirmative defense before the General Counsel rested, contending this was a matter of defense, and could only be open for testimony after ruling upon a motion to dismiss for failure to prove a *prima facie* case. The question was asked whether, when union activity and knowledge have been shown, the discharge of an employee immediately thereafter places an onus of proof upon the employer to justify his action affirmatively on other than union grounds, at the risk of being found guilty of an unfair labor practice if he fails to establish just cause. At one point the General Counsel seemed to argue in favor of such a proposition. In his oral argument at the close of the hearing he said: ". . . we feel that the testimony adduced by Respondent concerning the qualifications of Mr. Composto were riddled with inconsistencies and on occasion was shown to be completely unfounded on any logical evidence. We feel that Respondent has not in any way shown that Mr. Composto was not a fully qualified preparation man."

If this is the theory of complaint, it means the Respondent bore the burden of proving either affirmatively that it disciplined Composto for a business reason, or negatively that it did not release him because of the union activity. The possibility that the employer, in these circumstances, might have the right to discharge a man for no reason at all ceases to exist. *Jones & Laughlin Steel Corporation*, 301 U.S. 1. Withal, perhaps it would not be fair to hold the General Counsel to so narrow an argument, for he did also insist that he has in fact proved affirmatively the falsity of the asserted basis of discharge for cause. Be that as it may, I do not believe that on the basis solely of the first three subsidiary facts—union activity, knowledge, and contemporaneous discharge—an inference of illegal motivation is warranted. I view this case, therefore, as leaving the affirmative burden of disproving the merits of the defense of discharge for cause upon the General Counsel. If he has not—by a preponderance of the substantial evidence on the

record as a whole—affirmatively established this negative proposition, his complaint must be dismissed. And as I find that the General Counsel has not proved the falsity of the asserted grounds for discharge, I do not reach the question whether, had he done so, an unfair labor practice finding could be made on this record. The fact there is not a scintilla of evidence of illegal motivation would give me pause in any event.

B. *Union activity, knowledge, and timing*

On Tuesday, August 24, Howard Glassman, union organizer, appeared in front of the shop before starting time and delivered an envelope with union literature to Composto and Stephan as they arrived; he gave a third one to Composto, who handed it to Wirth. Glassman also inserted one of these envelopes in the mail slot of the door to the shop. That same day both Composto and Stephan left the contents of their envelopes—a hospital insurance benefits brochure, an analysis of union contract benefits, and a statement of reasons why lithographers should join the Union—lying openly on their worktables, where they remained in view for the next few days. The envelopes also contained union authorization cards; all three of the men signed cards and at noon that day Stephan mailed them to the Union. Usis, the owner, regularly walks through the shop many times each day, and there is nothing to indicate his regular activities were other than usual that week. On Thursday, August 26, the Union filed a petition for a representation election with the Board's Regional Office, and that same day the Regional Director sent a letter to the Respondent advising it of the fact. The letter, received in evidence, bears the date August 26; Usis admitted he received the letter, but testified he did not look at his mail Friday, and therefore first read it Saturday, the day after Composto was discharged.

This is a small shop; only Usis and a Mrs. Herman, the office secretary, worked full time besides the three production men. A strong inference arises that Usis saw the union literature displayed without concealment on the employees' worktables. He was in his office Friday morning and he returned there in the afternoon. He normally looks at his mail, and the story that in this particular instance he did not do so is unpersuasive. It may also be presumed that the letter dated August 26 did reach the company office the next day. I think all of this warrants a finding that by 3 or 4 o'clock on the afternoon of Friday, when Usis said he returned to his office from a New York City meeting with his brother, he knew the question of forming a union was in the minds of his employees.¹

Shortly before 5 o'clock he called Composto to his office and discharged him. The testimony of the two men differs as to the terminal conversation. According to Composto, Usis said "he had decided to discontinue his preparation department, that his accountant had told him it was costing him too much money and that he could do better to have it done on the outside." As Usis recalled it, he said "I was losing money and I could not afford to maintain him."

C. *Has it been proved Composto was not discharged for business reasons?*

The Company did not discontinue the preparation work after Composto left, but I do not believe the substantive question of whether he was discharged for cause can be decided purely on the basis of the precise words used in a discharging conversation. Usis also told Composto that moment he was a good man and should not have trouble finding another job. But these are things an employer would tell a man at such a time. Certainly the special phrasing of the bad news cannot alone preclude consideration of other real evidence about the man's worth and the financial condition of the business then. And Usis did say, as even Composto recalled, that he was losing money and that this too was a reason for his action.

The answer says Composto was released "because of incompetency— . . . and failure to properly perform his assigned duties." At the hearing the Respondent's witnesses gave body to these words by adding that the Company was in poor financial condition and the quality of Composto's work was a major contributing factor. I think a fair reading of the record as a whole—including testimony, exhibits and perhaps inartful pleadings—justify saying the asserted cause for discharge was that Composto's craftsmanship was poor and, in the opinion of the Company, largely responsible for adverse business conditions. The bulk of the oral testimony, extending over 4 days of hearing, deals with his performance, and contains much that is vague, inconclusive, argumentative, and evasive, by witnesses for both sides.

¹ *Quest-Shon Mark Brassiere Co.*, 185 F 2d 285 (C A 2).

However, certain objective facts, which bear a direct relation to the heart question of Composto's worth as an employee, and the labor cost condition of the Company at the end of August, are clear.

He was not a very expert cameraman when he started; his training and experience had included other aspects of lithographic work. He was hired to replace a man named McAndrews, who had done all the Company's preparation work for 2½ years and who quit in January of 1965 to accept a teaching post, on that same subject, in a trade school. Composto started at \$146 per week, and ended at the same pay. He once asked for a raise but was refused. On August 21 the Company replied to a "job wanted" ad in the Printing News magazine, seeking to interview another cameraman as a possible replacement. The same day it placed a "help wanted" ad in the same trade journal hoping to locate such a man. On August 15, the Respondent placed a notice in the New York Times newspaper, searching for a customer to lease and operate its entire camera department. Composto also recalled that early in August Usis told him he was considering sending preparation work out under contract because the "costs inside the shop were too much." In the 6 months of his employment—February to August—Composto was *the* cameraman in the shop; at times he was assisted by Stephan and Wirth, or even by one or two others who worked here only short periods, but it is clear that what preparation work others did was only incidental to their other duties and when they had free time. Wirth was the number 29 printing pressman and Stephan operated the Multilith press. Essentially, therefore, the foregoing indicates it was Composto the Respondent wished to replace long before the advent of union activity.

On August 9 Usis spoke to his accountant because he could not understand why he was strapped for cash. The accountant showed him how while the normal experience of the shop had been that gross profits—the amount available for overhead, office salaries, expenses, and profits—was 45 percent of overall business volume, for June it had been 37 percent and in July was 30 percent. The August figure emerged as 31.5 percent and for September it mounted again to 46 percent.

The general phrases offered by John Usis, the present owner, and by his brother Joseph Usis, who was partner and president of the Respondent until May 31 and thereafter only sent work to this shop on a contract basis, prove little of substance concerning the quality of Composto's work. They said he was "slow," "no good," gave them "headaches," caused much "loss" of stock and machine time, his work was not "commercially acceptable." There is also concrete evidence of mistakes.

Composto conceded he stripped negatives "wrong," "there were occasions where I had to make new plates . . . take a guess and say ten times." In July a computer advertising folder was prepared incorrectly; the job had to be rerun with a loss to the Company. Composto said Usis was aware of the error and decided to risk acceptance by the customer; Usis denied such words. Another job, for Mohawk Tires, was stripped incorrectly; Composto said he had "flopped" the negatives the wrong way. He had to redo it. Still another was printed with the picture captions in the wrong places; 500 printed books were wasted, costly paper had to be repurchased and the job done over. Usis testified that these, as well as other jobs he identified, caused him to lose hundreds of dollars. At times he was certain the work had been assigned to Composto and that he saw him do it; at others he "assumed" Composto had done the work, or said Composto was responsible for supervision because he was "in charge" of all preparation work. Composto, in turn, argued that some of the errors resulted from improper art work submitted originally by the customer, or that someone else had worked on the particular job. Somewhere between the exaggerations of Usis and the denials of the employee, the truth must lie. But that Composto was the mainstay of the preparation department, and therefore charged with the bulk of the work performed is clear.

During the last week he worked Composto did the blueprint photography on a two-booklet job. These were proofs for the customer to approve before final printing. There were errors in shading by Composto in the blueprinting, and Composto admitted he had been at fault. The exhibits indicate other changes made in the proof, but it is by no means clear which were occasioned by the preparatory work of others, or which were simply revisions desired by the customer as afterthoughts. The proofs reached the customer, an advertising agency, on Thursday, August 25, and were rejected as unsatisfactory. The next day the customer wrote to Joseph Usis, who had sold the job, and contracted it to his brother's shop, speaking very critically of the job and indicating no other work

would be permitted in this shop. In consequence Joseph conferred with his brother John Usis early on the afternoon of August 27 and told him the account had been lost. When he returned to his place of business later in the day, Usis discharged Composto. The Respondent has received no work from that customer since that day. McAndrews, the former cameraman since turned teacher, was called the next day to redo the blueprint correctly.

On this record I cannot find that the General Counsel has successfully satisfied the burden of proof, resting upon him, to establish convincingly that the quality of Composto's work, and the simultaneous decline in the gross margin of profits reflected monthly in the Company's books, was *not* the reason for his discharge. Considering the evidence in its entirety I find that the General Counsel has not proved a *prima facie* case in support of the complaint allegation that Joseph Composto was discharged because of his, or the union activities of others. I shall accordingly recommend dismissal of the complaint.

RECOMMENDED ORDER

It is hereby ordered that the complaint be dismissed in its entirety.

Southern Cab Corporation, Yellow Cab of Memphis Division and General Drivers, Salesmen and Warehousemen's Local No. 984, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Petitioner.¹ *Case 26-RC-2588. June 13, 1966*

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before Hearing Officer James D. Walpole on February 24, 1966. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. Briefs have been filed by the Employer and the Petitioner.²

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 [Chairman McCulloch and Members Brown and Zagoria].

Upon the entire record in this case, including the briefs filed by the parties, the Board finds:

1. The Employer is engaged in the business of furnishing taxicab service in Memphis, Tennessee, and owns more than 70 taxicabs. It contends that the Board should not assert jurisdiction herein on the ground that the drivers sought by the Petitioner are independent contractors, and that the Employer's operations do not meet the Board's jurisdictional standards. We find, however, for the reasons set forth below, that the drivers are employees and not independent contractors. Moreover, the record establishes that the Employer's gross revenue, including amounts received for taxicab rentals and

¹ The names of the parties appear as amended at the hearing.

² The Employer's request for oral argument is hereby denied because the record, including the briefs, adequately presents the issues and the positions of the parties.