

that there was a possibility that "if the Union comes in, and management and the Union cannot get together, and there would be a long strike, that eventually the plant could leave." I find that Smith had a better recollection of this statement, and credit his version. In the absence of any other indication that the Company might move the plant, I find no threat of retaliation in these remarks.

III. OBJECTIONS TO THE ELECTION

On January 20, the Union filed timely objections to conduct affecting the results of the election alleging, *inter alia*, that the Company threatened employees if they voted for the Union. In ruling on these objections, I shall consider only conduct occurring between December 6, when the petition was filed, and January 13, when the election was conducted.

Having found that the Company engaged in violations of Section 8(a)(1) by the threats of retaliation if they voted for the Union, it follows, as the Board has consistently held, that such conduct *a fortiori* interfered with the exercise of a free and untrammelled choice in the election. I therefore find merit in the Union's election objections. I recommend that the representation election held herein be set aside and that a new election be held at an appropriate time to be fixed by the Regional Director.

CONCLUSIONS OF LAW

1. By interfering with, restraining, and coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act, the Company has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

2. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has committed certain unfair labor practices (including the serious threat to eliminate paid downtime), I shall recommend that it be ordered to cease and desist from such conduct and from any like or related invasion of its employees' Section 7 rights, and to take certain affirmative action, which I find necessary to remedy and to remove the effect of the unfair labor practices and to effectuate the policies of the Act.

[Recommended Order omitted from publication.]

Apex Record Corporation and United Electrical, Radio and Machine Workers of America (UE), Local 1421, affiliated with United Electrical, Radio and Machine Workers of America (UE) and Allied Industrial Workers, Local 976, affiliated with International Union, Allied Industrial Workers of America, AFL-CIO (AIW). Case 31-CA-13 (formerly Case 21-CA-5846). December 22, 1966

DECISION AND ORDER

On April 19, 1966, Trial Examiner E. Don Wilson issued his Decision in the above-entitled proceeding, finding that Respondent 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, and the Respondent filed an answering brief.

The National Labor Relations 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 briefs, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.¹

[The Board dismissed the complaint.]

MEMBER BROWN, dissenting:

Unlike my colleagues, I would find the 8(a)(1), (2), (3), and (5) violations alleged in the complaint; for, in my view, the Trial Examiner committed clear error in refusing to rely upon the testimony of Frank Sherwood, Respondent's former general manager. There can be no question that Sherwood's account of Respondent efforts to avoid dealing with the UE and its relationship with the AIW fully substantiates the unfair labor practices attributed to Respondent. However, the Trial Examiner, in recommending dismissal of the complaint, viewed this testimony as unworthy of belief because, in his opinion, Sherwood, having been terminated by Respondent, was guided by bias in testifying. I would reverse the Trial Examiner in this regard because his analysis was premised on standards, which, though traditionally employed in evaluating testimony, were improperly applied as the absolute measure of Sherwood's veracity herein.

A realistic evaluation of the record requires that possible bias be taken into account with all other factors bearing upon the truthfulness of the matters related by the particular witness. And in this case, when full interplay is given to those matters bearing upon the validity of Sherwood's testimony, the conclusion is inescapable that his narrative is reflective of the events as they actually occurred. Thus, his uncontradicted testimony was candid, totally plausible, detailed, and bore no symptoms of coloration. His complete objectivity was marked by a general failure to give greater emphasis to Respondent's animus against the UE than to its economically oriented dissatisfaction with the personnel and operations of United. That his testimony was not tainted or improperly influenced by his supervening termination is further underscored by his identification of at least

¹ We concur in the Trial Examiner's conclusion that findings of violations of the Act in this case are dependent upon the acceptance of the testimony of Respondent's general manager, Sherwood. In rejecting Sherwood's testimony as not credible, the Trial Examiner relied on the fact that Sherwood's testimony at the hearing was inconsistent with his pre-hearing affidavits; that it was evident that Sherwood was biased against Respondent who had subsequently discharged him; and that he was "unfavorably impressed by Sherwood's demeanor." Contrary to our dissenting colleague, therefore, we find no basis for disturbing the Trial Examiner's credibility resolutions. *Standard Dry Wall Products, Inc.*, 91 NLRB 544, enfd. 188 F.2d 362 (C.A. 3). Accordingly, we affirm the Trial Examiner's dismissal of the complaint.

20 individuals who had knowledge of Respondent's scheme to refuse employment to UE "agitators" and/or its assistance to the AIW. Respondent nevertheless did not cross-examine Sherwood concerning much of this testimony. Nor, except for one individual, did Respondent call witnesses clearly within its control to contradict Sherwood's account, and it did not even question that one witness concerning many significant matters to which Sherwood testified.

While there may be surface contradictions in Sherwood's testimony in individual cases of discrimination, there is no inconsistency and no contradiction or other impeachment of his testimony concerning the evidentiary key to this case. Thus, the record establishes beyond peradventure, in my opinion, that Respondent did not want to deal with the UE which represented United's employees; it preferred the AIW. Respondent knew it would have to deal with the UE if it hired the UE-represented employees of United and that this could be avoided only by not taking over a majority of its employees from United; and it further knew that it could establish AIW's position in the plant by obtaining such majority from AIW. Respondent admitted, as even the Trial Examiner acknowledged, that Respondent had in fact "discussed the procurement of employees with AIW prior to beginning operations. . . ."

Upon consideration of the entire record in this case, I would reverse the Trial Examiner and sustain the complaint against Respondent.

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

Upon a charge filed by United Electrical, Radio and Machine Workers of America, Local 1421, herein called UE on March 19, 1964, and amended on April 13, 1964, the General Counsel of the National Labor Relations Board, herein the Board, issued a complaint on July 15, 1965, alleging Section 8(a)(1), (2), (3), and (5) violations by Apex Record Company,¹ herein Respondent, and Section 8(a)(1) and (5) violations by United Superior Record Manufacturing Company, herein United, and Cadet Records, Inc., d/b/a Continent Records Manufacturing Company and Custom Record Manufacturing Company. The hearing in this matter was held pursuant to due notice, before Trial Examiner E. Don Wilson on October 25 and 26, 1965. At the hearing, the complaint, including its caption, was amended so as to delete all allegations with respect to respondents other than Apex, the sole Respondent herein. This amendment was based upon an all party informal settlement involving all but Respondent.

General Counsel, the Charging Party, and Respondent fully participated in this hearing. Briefs of General Counsel and Respondent have been received. They have been fully considered.

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

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

At all material times Respondent has been a corporation engaged in the manufacture of phonograph records, and annually sells goods valued in excess of \$50,000 directly to customers located outside the State of California. At such times it has

¹ Name corrected upon motion at hearing.

been an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATIONS

The UE and the AIW are each a labor organization within the meaning of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The issues*

1. Did Respondent violate Section 8(a)(5) of the Act by refusing to bargain with the UE?
2. Did Respondent violate Section 8(a)(5) of the Act by refusing to be bound by a contract between United and the UE?
3. Did Respondent violate Section 8(a)(3) and (1) of the Act by failing to hire former employees of United because they were members of the UE?
4. Did Respondent violate Section 8(a)(3) and (1) of the Act by rendering unlawful assistance to the AIW?
5. Basic to a resolution of 1 and 2, above, is Respondent a "successor" to United?²

B. *The facts*

United was owned and controlled by Jules Bihari who also owned the other companies whose names were deleted from the complaint at the hearing. On February 27, 1964,³ United by an agreement of sale sold a substantial part of its machinery and equipment to Robert E. Blythe for \$80,000. During the escrow, Blythe and three others⁴ formed Respondent so that it could assume Blythe's agreement with United. Blythe controlled one-half interest and the other three jointly controlled the remaining one-half. On March 17, United assigned its leasehold interest to Respondent.

Prior to the sale, United had engaged in the "custom" processing of records under contract. Approximately 80 percent of United's production was for Sutton Enterprises (including Promo Sonic), a business owned by Blythe. All of Sutton's needs for record processing were filled by United.⁵ Bihari transferred the equipment and machinery he hadn't sold to Respondent and transferred his remaining operations to Custom Records Manufacturing Company, one of the Respondents whose name was deleted from the complaint herein. At times not specified, Custom employed a substantial number of employees who had been laid off by United when it sold machinery and equipment to Blythe, or Respondent.

Respondent, unlike United, did not engage in "custom" processing of records but rather supplied Blythe and his various corporations with records solely for them.⁶ It was the manufacturing means of an integrated enterprise. The integrated business conducted its manufacturing for itself at the plant, the lease for which had been assigned by United to Respondent. Respondent manufactured its records in substantially the same manner as had United.

United had as its top supervisor, James Beard. He was the overall supervisor of all of Bihari's operations. James Takeda was United's plant manager. Each of these men went with Bihari to Custom, after the sale to Respondent.⁷ Under Takeda at United was Fred Martin whom Takeda described as pressroom foreman. He assigned work to employees.⁸ When asked if Martin did this on a regular basis, Takeda said Martin consulted him a lot of times. Takeda prepared the schedule and Martin would see that the schedule went through "as we needed them." I understand this to mean that Martin saw to it that the presses Takeda thought were needed, were used. Martin only granted time off to employees on his own when Takeda was absent. Takeda was "generally present most of the time." United's employees varied in number from 10 to 65. I find General Counsel has not established by a preponderance of the probative evidence that Martin, when employed

² If the answer is in the negative, I see no need to discuss the so-called rule in *John Wiley v. David Livingston*, 376 US 543.

³ Hereinafter all dates refer to 1964.

⁴ Collins, Caldwell, and Dague

⁵ Sutton was free to contract with whom he chose.

⁶ Proprietary rather than custom.

⁷ They were not employed by Respondent.

⁸ The record does not establish that such assignment was other than routine.

by United, was a supervisor within the meaning of the Act.⁹ The probative evidence establishes no more than that he was a leadman who exercised supervisory authority only sporadically. When Respondent commenced its operations, Martin left United and became Respondent's pressroom foreman and plant superintendent. At Respondent he was a supervisor within the meaning of the Act. He was responsible to Respondent's general manager,¹⁰ Frank Sherwood, and to one Bert Seifer.

While United was operating it had a collective-bargaining agreement with the UE covering an appropriate unit of Respondent's plant employees.

It is undisputed that at all times material, Respondent has refused to recognize the UE as the bargaining representative of its employees.¹¹ The UE demanded recognition by Respondent on various occasions in March.

General Counsel bottoms his claim of discriminatory refusal to hire former United employees because they were members of the UE and his claim that Respondent illegally assisted the AIW, on the testimony of Frank Sherwood, one time general manager of Respondent. For reasons to be discussed hereinafter, I do not credit Sherwood's testimony. I, nonetheless, believe his testimony should be summarized in this Decision. The summary follows.

About February 26, following a statement by Blythe and Sherwood to United's Beard that they did not wish to deal with the UE, Beard suggested that they deal with Mr. Cortez, an AIW representative. Beard said he would arrange to have Cortez get in touch with Respondent. Cortez called the next day and lunched with Blythe and Sherwood. Cortez was told Respondent did not wish to deal with the UE. Cortez said he'd be easy to get along with. They discussed Respondent's employee needs and agreed that they would have further talks. A few days later Cortez called Sherwood on the phone. They "agreed to do business."¹² Sherwood told Cortez he soon would need employees. About March 15, Sherwood asked Cortez for employees in certain classifications. Cortez gave Sherwood the names of employees Cortez would send. On March 19, Respondent, pursuant to its arrangement with Cortez, hired three employees referred by the AIW and in following weeks hired about nine more referred by the AIW. Sherwood did not wish to hire any former employees of United because they were members of the UE.

Respondent, in its brief, admits that it discussed the procurement of employees with the AIW prior to beginning operations, because Respondent's officers had previously dealt with the AIW when they were active in other record companies. I find this to be true.

I credit none of Sherwood's testimony unless corroborated by Respondent's admissions or otherwise credited testimony. I was unfavorably impressed by Sherwood's demeanor.

Sherwood endeavored, by his testimony, to prove that he, as the one completely in control of Respondent's hiring practices, systematically refused to hire any former United employee because of UE membership. Nonetheless he admitted he hired at least four former United employees. While he testified he refused to hire former United employees because they were members of the UE, he stated in a pretrial affidavit that the basis for his hiring was experience and recommendations.¹³ In the same affidavit he said "I did not hire because a person was or was not a Union member." In another affidavit,¹⁴ he went into considerable detail in explaining that particular refusals to hire were based on nondiscriminatory reasons. In still another affidavit, dated November 5, 1964, after he had been discharged by Respondent,¹⁵ Sherwood stated he "did not hire United employees because United, in my estimation had not been a good operation, and I did not want the employees who had worked in such an operation. Had there been no Union in United, I still would not have hired United employees. There were exceptions to this, and where I could hire United employees whom I knew were excellent workers, I did so. . . . I did not refuse employment to any employee because he was a UE member. I knowingly hired such persons." [Emphasis supplied.]

⁹ Martin did not testify.

¹⁰ For several months.

¹¹ Unlike United which had a peak of about 65 employees, Respondent has not had more than 19 employees.

¹² Respondent subsequently refused to recognize the AIW without a Board election.

¹³ May 6 affidavit.

¹⁴ May 1.

¹⁵ He is suing Respondent because of an alleged unlawful discharge.

It is abundantly clear to me that no credence can be given to Sherwood's testimony that he refused employment to United employees because they were UE members. It is evident to me that when Sherwood testified, he was biased against Respondent who had discharged him.

I find insufficient probative evidence that Respondent failed to hire employees because they were members of or active in the UE.

Having found that Sherwood's testimony is not to be believed, I find no credible evidence of assistance by Respondent to the AIW other than the admitted procurement of employees through the AIW. In the circumstances of this case, I find no violation of the Act in such hiring.

I further find insufficient probative evidence that Respondent is a successor to United or in anyway obligated to United's contract or to bargain with the UE.¹⁶

Respondent's business was not the same employing enterprise as United. In the record making field a "custom" manufacturer differs substantially from a "captive" manufacturer. Of course, this is not controlling but it is indicative of the fact that Respondent's "industry" was not substantially the same as the "industry" of United. Respondent had the same location and a substantial portion of the same machinery and equipment as United. It had substantially the same method of operation. It did *not* have either the same supervisory staff or the same work force. Assuming, *arguendo*, that Martin was a supervisor at United, he was at best a minor one. I understand the Board indicia for a finding of successorship to require more than the mere continuance of minor supervision. Of course, I find insufficient evidence that Martin was a supervisor for United. It is clear that a substantial part of Respondent's work force did *not* come from United. Respondent did no more than purchase substantial assets and take an assignment of a lease from United. It assumed no obligations. It provided new supervision for new employees. While it made records, as did United, it did so for a different purpose. Again, it was not United's "successor."

General Counsel, in his very able brief, emphasizes that most of Sherwood's testimony is uncontradicted. Uncontradicted incredible testimony is still incredible.

I conclude that General Counsel has failed to establish any part of his case by a preponderance of the substantial evidence.

CONCLUSIONS OF LAW

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

1. Respondent is, and at material times has been, an employer engaged in commerce within the meaning of the Act.
2. The UE and the AIW are labor organizations within the meaning of the Act.
3. The record does not establish that Respondent has engaged in the unfair labor practices, or any of them, alleged in the amended complaint.

RECOMMENDED ORDER

Upon the basis of the foregoing findings of fact and conclusions of law and the entire record, it is recommended that the Board enter an order dismissing the complaint, as amended.

¹⁶ I do not pass upon the question of whether one or more of Bilari's companies is a successor to United.

Amerace Corporation, E.M.C. Plastics Division and United Textile Workers of America, AFL-CIO. *Case 25-CA-2453. December 22, 1966*

DECISION AND ORDER

On September 9, 1966, Trial Examiner James V. Constantine issued his Decision in the above-entitled proceeding, finding that Respondent had engaged in and was engaging in certain unfair labor