A–1 Excelsior Van & Storage Co., Inc. *and* Local 544, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case 18–CA–2246

June 15, 1967

DECISION AND ORDER

BY CHAIRMAN MCCULLOCH AND MEMBERS FANNING AND ZAGORIA

On November 29, 1966, Trial Examiner Arthur M. Goldberg issued his Decision in the above-entitled case, finding that the 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. The Respondent filed an answering 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.

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 briefs, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner only to the extent they are consistent with its Decision herein.

The complaint alleges that A–1 Excelsior Van & Storage Co., Inc., Respondent herein, violated Section 8(a)(1), (3), and (5) of the Act by interrogating and threatening employees, by subcontracting its local moving and storage work and discharging employees engaged in such work, and by refusing to bargain with Local 544, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, the Union herein, as exclusive representative of a majority of its employees in an appropriate unit. The Trial Examiner recommended that the complaint be dismissed in its entirety.[1] We disagree, for the reasons stated below.

The basic facts, to the extent they are uncontroverted, are as follows: the Respondent, a Minnesota corporation, has been engaged in long-distance and local moving and storage in the Minneapolis, Minnesota, area, since around January 1, 1966. At all pertinent times, the sole officers and owners of the Respondent were Larson, Johnson, and Proctor. Proctor hired Becker and Ellwanger in February 1966, and Johnson hired Jenkins in April 1966, to do local moving from Respondent's Excelsior, Minnesota, location, which is the only one involved in this proceeding. This work was done with the use of two trucks owned by the Respondent. Respondent also used owner-truck operators to do long-distance moving. In early May, apparently because of an increase in local moving, Respondent advertised in the Minneapolis newspapers for employees to do such work. In the middle of May, Becker told Proctor that the men should get a salary increase and, if not, he and the men felt they should go to the Union. Proctor replied: ". . . don't do that; you know we would rather close our doors than have the union in there."

On June 3, 1966, Becker, Jenkins, and Ellwanger signed cards authorizing the Union to represent them. In the afternoon of Monday, June 6, the Union wrote Larson, enclosing copies of the three signed authorization cards, and a proposed contract, and requesting recognition in a unit of local drivers and warehousemen at the Excelsior, Minnesota, location.[2] Becker and Jenkins met Proctor in the evening on June 7 and Proctor advised them that they could only work through Friday, June 11,[3] as Respondent was giving up its local business because it was losing money. However, Proctor promised to help the men find work, suggesting that they contact Larson Transfer for work.[4] Becker then told Proctor that he knew that Respondent had received notice from the Union; Proctor did not reply.

When Becker reported for work on June 8, he noticed in the workbook in which local moving jobs were listed, and from which employees took their assignments for the day, that a number of local moving jobs had been crossed through and marked as leased to Austin Transfer. For the balance of the week, employees worked fewer hours than in the past. On June 10, Becker applied for a job with Larson Transfer; Larson, in rejecting Becker's application, said that he did not want trouble with the Union and that his men were happy. The employees reported to the Respondent for work on June 13. Ellwanger was put to work helping in loading, but Becker was advised to go to Larson Transfer, and Jenkins was advised there was no work for him. The next day, the Union filed the charges in the instant case.

The Trial Examiner recommended that the Section 8(a)(3) allegations of the complaint be dismissed. He concluded that Respondent's decision to subcontract local hauling work and to terminate its employees was motivated solely by valid

[1] In the absence of exception thereto, we adopt, *pro forma*, the Trial Examiner's recommendation that the complaint be dismissed insofar as it alleged that Respondent interrogated and threatened employees on or about June 6, 1966

[2] The Trial Examiner found, and the Respondent does not deny, that this was an appropriate unit

[3] Respondent's workweek begins on Thursday and ends on Wednesday Friday is payday

[4] Larson, one of Respondent's owners, also owns Larson Transfer However, Larson and Respondent are separate corporations, it is not alleged that they constitute a single employer

economic reasons, and was undertaken prior to the advent of the Union.

The Trial Examiner initially found that Respondent arranged to subcontract the local hauling work on May 30, before it knew of the advent of the Union. The Trial Examiner in this connection noted that there was no evidence that Respondent received the Union's demand for recognition, mailed on June 6, before the evening of June 7, when Respondent notified employees that it was giving up its local business.

However, the Trial Examiner gave no weight to the fact that in the middle of May, before the subcontracting arrangement was allegedly made, Respondent was made aware that employees were considering going to the Union. Respondent's response to this information was that it would shut down the business rather than recognize the Union. There is no direct evidence that Respondent knew that its employees signed union authorization cards on May 3. However, when Becker asserted that Proctor knew that the Union had demanded recognition, Proctor did not reply; this further suggests that when Proctor announced to employees that the work was being subcontracted, he knew that employees had joined the Union.

Respondent's antiunion animus is evidenced by Proctor's threat that he would shut down rather than recognize the Union, and by Larson's statement on June 10 to Becker that he didn't "want any trouble with the Union."[5]

Also supporting the General Counsel's *prima facie* case that the subcontracting was discriminatorily motivated is Respondent's assertion that the decision to subcontract was made on May 30, less than 2 weeks after Respondent learned that its employees were interested in the Union; and the fact that this decision was for the first time transmitted to employees on June 7, 3 days after they signed authorization cards and 1 day after the Union mailed its recognition demand.

Respondent's claim, which the Trial Examiner accepted, is that the subcontracting was for valid economic reasons; more specifically, Respondent's officials testified that it had undertaken to use its own employees for local trucking on a trial basis; that early in May they had received an auditor's report showing that in the January to April period it was paying excessively high labor costs in its local moving operation; that the three owners discussed the report and decided to contract out the local business or to eliminate as much of the business as possible; and that, on May 30, Johnson arranged with Warren Austin, a local trucker, that Austin would handle Respondent's local trucking operations.

We find this explanation for the subcontracting unconvincing for a number of reasons.

The Trial Examiner is in error in stating that Larson testified without contradiction that Respondent was utilizing its own employees for local hauling on a trial basis; the three employees testified that they in effect were told at various times that their jobs were permanent.[6] We consider highly significant the fact that in early May, at the very time Respondent, according to its assertion, had received an unfavorable financial report from its auditors and was allegedly discussing the elimination of its local operations, Respondent was advertising in the newspapers for employees to do local moving, a fact not alluded to by the Trial Examiner.

We are also unpersuaded by Respondent's self-serving testimony as to the contents of the auditor's report. The auditor's report was not introduced in evidence, nor did Respondent introduce any other documentary proof showing that the local operations were unprofitable. Also, Respondent failed to produce any documentary evidence of the arrangement allegedly made with Warren Austin at the end of May. Respondent's claim that it made the decision to subcontract for economic reasons is further undermined by the fact that the subcontracting took place in June, which is at the beginning of its busy season; indeed, at the hearing, Larson admitted that he executed a pretrial statement stating that the fact that the "men had gone to the Union hastened [his] decision to subcontract out the work."

In view of the foregoing, and upon the record as a whole, we conclude that Respondent knew or suspected that its men were for the Union before the decision to subcontract was made, and that this decision was made in order to destroy the unit in which the union activity was taking place. We therefore find, in disagreement with the Trial Examiner, that Respondent violated Section 8(a)(3) by subcontracting its local hauling work and by discharging its employees in order to discourage union activity among its employees.[7]

The Trial Examiner found, and we agree, that on and after June 3 the Union was the representative of a majority of the employees of the Respondent in the

[5] The Trial Examiner found that Larson was speaking in his role as owner of Larson Transfer, however, the issue is not whether Larson Transfer, not a respondent herein, violated the Act, but rather whether Larson, an owner of Respondent, had shown union *animus* We find that this statement clearly establishes that he had The complaint does not allege that the statements by Proctor or Larson violated Section 8(a)(1)

[6] These employees testified that Proctor or Johnson told them that their work would be steady and would last at least through the summer, and Becker testified that he was promised a promotion by Proctor

[7] In view of this finding, and as it would not affect the remedy herein, we find it unnecessary to decide whether Respondent also violated Section 8(a)(5) by unilaterally subcontracting its local operations

appropriate unit: The record discloses that all three of Respondent's local drivers had signed union authorization cards on June 3.[8] However, since the Trial Examiner found that Respondent lawfully decided to subcontract its local hauling work and to terminate its employees, he also recommended that the 8(a)(5) allegations of the complaint be dismissed. Contrary to the Trial Examiner, we have found that the subcontracting and the discharges violated the Act; to remedy these violations, we shall order Respondent to reopen the local moving and warehouse department and to reinstate the discharged employees. Although Respondent admits that it received the Union's request for recognition on June 10, at all times since that date it has failed to bargain collectively with the Union. That such failure to bargain was not in good faith, but rather was designed to destroy the Union's majority status, is made plain by Respondent's unlawful conduct in discriminatorily subcontracting local hauling work, thereby eliminating the unit in which the Union sought to bargain. We therefore find, contrary to the Trial Examiner, that Respondent violated Section 8(a)(5) by failing to bargain on and after June 10 with the Union as exclusive representative of its employees in an appropriate unit.

THE REMEDY

Having found that the Respondent has engaged in conduct violative of Section 8(a)(1), (3), and (5) of the Act, we shall order it to cease and desist therefrom and take certain affirmative action to effectuate the policies of the Act. Having found that Respondent discriminatorily subcontracted its local hauling operations and discharged its local drivers, we shall order the Respondent to resume its local hauling operations, and offer to all local drivers and warehouse employees discharged on June 7, 1966, reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges.[9] We shall also order that Respondent make these employees whole for any loss of earnings suffered because of its discrimination against them. Backpay shall be based upon the earnings which they normally would have received from the date of their discharge to the date of Respondent's offer of reinstatement, less any net interim earnings, and shall be computed on a quarterly basis in the manner set forth in *F. W. Woolworth Company;*[10] such earnings shall also bear interest at the rate of 6 percent per annum.[11]

We have also found that Respondent unlawfully refused to recognize and bargain with the Union as representative of its local warehousing and hauling employees on and after June 10. We shall therefore order the Respondent to bargain collectively with the Union as the exclusive representative of those employees and embody any understanding reached in a signed agreement.[12]

Upon the basis of the foregoing and upon the entire record in this case, the National Labor Relations Board hereby makes the following:

ADDITIONAL AND AMENDED CONCLUSIONS OF LAW

3. By subcontracting its local warehouse and moving operations and discharging its employees engaged in such operations in order to discourage union and other concerted activity, the Respondent has discriminated, and is discriminating, in regard to hire and tenure and terms and conditions of employment of said employees, and is thereby discouraging concerted activities of its employees, and thereby has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.

4. All local drivers and warehousemen employed by the Respondent at its Excelsior, Minnesota, location, excluding office clerical employees, guards, professional employees, and supervisors, as defined in the National Labor Relations Act, as amended, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

5. At all times since June 3, 1966, Local 544, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, the labor organization herein, has been, and now is, the exclusive representative of all the employees in the above appropriate unit, for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

6. By refusing to recognize and bargain with the above Union on and after June 10, 1966, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

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

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, A-1 Excelsior Van & Storage Co., Inc., Excelsior, Minnesota, its officers, agents, successors, and assigns, shall:

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[8] While the appropriate unit allegedly included warehouse employees, the record shows that at relevant times Respondent employed no warehouse employees, except that local drivers apparently also did warehouse work. The record contains no specific evidence as to the subcontracting of warehouse work.

[9] *Herman Nelson Division, American Air Filter Company, Inc.*, 127 NLRB 939, 940. *American Manufacturing Company of Texas*, 139 NLRB 815, 819.

[10] 90 NLRB 289.

[11] *Isis Plumbing & Heating Co.*, 138 NLRB 716.

[12] *Town and Country Manufacturing Co., Inc.*, 136 NLRB 1022, 1030.

1. Cease and desist from:

(a) Subcontracting its operations or discharging its employees for discriminatory reasons, or in any other manner discriminating against employees because of concerted or union activities.

(b) Refusing to bargain collectively concerning wages, hours, and other terms and conditions of employment with Local 544, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive representative of all its employees in the following appropriate unit.

All local drivers and warehousemen employed by the Respondent at its Excelsior, Minnesota, location, excluding office clerical employees, guards, professional employees, and supervisors as defined in the National Labor Relations Act, as amended.

(c) In any other manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed in Section 7 of the Act, except to the extent that such rights may be affected by an agreement conforming to the provisions of Section 8(a)(3) of the National Labor Relations Act, as amended, requiring membership in a labor organization as a condition of employment.

2. Take the following affirmative action designed to effectuate the policies of the Act.

(a) Reopen its local warehouse and moving department and offer to Bernard H. Becker, David C. Ellwanger, and Harry Jenkins reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole in the manner set forth herein in the section entitled "The Remedy."

(b) Upon request, bargain collectively with the above-named Union as the exclusive representative of the employees in the above-described unit, and, if an agreement is reached, embody such understanding in a signed agreement.

(c) Notify the above-named 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.

(d) Preserve and, upon request, make available to the 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 to analyze the amount of backpay and other benefits due and the rights of employment under the terms of this Order.

(e) Post at its establishment at Excelsior, Minnesota, copies of the attached notice marked "Appendix."[13] Copies of said notice, to be furnished by the Regional Director for Region 18, after being duly signed by an authorized representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director for Region 18, in writing, within 10 days from the date of this Order, what steps have been taken to comply herewith.

[13] In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "a Decision and Order" the words "a Decree of the United States Court of Appeals Enforcing an Order."

APPENDIX

NOTICE TO ALL EMPLOYEES

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

WE WILL NOT subcontract any of our operations or discharge employees for discriminatory reasons, or in any other manner discriminate against employees because of concerted or union activities.

WE WILL reopen our local warehouse and moving department and offer to Bernard H. Becker, David C. Ellwanger, and Harry Jenkins reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any losses suffered because of our discrimination against them.

WE WILL, upon request, bargain collectively with Local 544, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and, if an understanding is reached, embody such understanding in a signed agreement.

The bargaining unit is:

All local drivers and warehousemen employed at our Excelsior, Minnesota, location, excluding office clerical employees, guards, professional employees and supervisors as defined in the National Labor Relations Act, as amended.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed in Section 7 of the Act, except to the extent that such rights may be affected by an agreement conforming to the provision of Section 8(a)(3) of the National Labor Relations Act, as amended, requiring

membership in a labor organization as a condition of employment.

A–1 EXCELSIOR VAN & STORAGE CO., INC.
(Employer)

Dated By
(Representative) (Title)

Note: We will notify the above-named 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, 316 Federal Building, 110 S. 4th St., Minneapolis, Minnesota 55401, Telephone 334–2618.

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

ARTHUR M. GOLDBERG, Trial Examiner: Upon a charge filed on June 14, 1966, by Local 544, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (herein called the Union or the Teamsters), the complaint herein issued on August 31, 1966, alleging that A–1 Excelsior Van & Storage Co., Inc. (herein called Excelsior or the Respondent), violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act, as amended (herein called the Act). The alleged 8(a)(1) violations included interrogation of employees as to their protected activities and the threat of subcontracting the employees' work because of their affiliation with the Union. Section 8(a)(3) was alleged to have been violated by reduction of the employees' hours of work and subsequent discharge because of their union adherence. Finally, by refusal to bargain with the Union following its demand for recognition and by its unilateral subcontract of the unit work and discharge of the employees, Respondent is alleged to have violated Section 8(a)(5). Respondent denied the commission of any unfair labor practices.

All parties participated in the hearing conducted by Trial Examiner Arthur M. Goldberg at Minneapolis, Minnesota, on October 11, 1966, and were afforded full opportunity to be heard, to introduce evidence, to examine and cross-examine witnesses, to present oral argument, and to file briefs. Oral argument was waived and briefs were filed by Respondent and General Counsel. Motions by Respondent to dismiss the complaint and by General Counsel for summary judgment, on which I reserved ruling until issuance of this Decision, are disposed of in accordance with my findings below.

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

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

The complaint alleged, the answer did not controvert, and I find that A–1 Excelsior Van & Storage Co., Inc., is and has been at all times material herein a Minnesota corporation with its principal place of business at Minneapolis, Minnesota, where it is engaged in long-distance and local moving. During the 12-month period ending July 31, 1966, in the course and conduct of its business operations, Respondent furnished interstate freight transportation services from which it received in excess of $50,000 gross revenue.

Respondent is and has been at all times material herein an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and meets the Board's standards for asserting jurisdiction.

II. THE LABOR ORGANIZATION INVOLVED

Local 544, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

Prior to the summer of 1965, William Don Larson, owner of Larson Transfer Company, a commercial trucker in Minneapolis, operated as well a one-man local moving business on weekends and during the evening hours. In the middle of 1965 Larson became associated with Harlan Johnson and Fred Proctor, obtained the Greyhound franchise for long-distance moving, and established Respondent company, which was incorporated in January 1966,[1] to perform both long-distance and local moving. In February, Excelsior hired Bernard H. Becker and David C. Ellwanger to work on local moving and in the warehouse. Prior to their employment, Excelsior contracted out some local hauling work to various trucking companies and used part-time employees for the balance. Harry Jenkins was added to the local moving work force in April. Larson testified without contradiction that Excelsior's use of its own employees, rather than contracting out the local hauling work, was undertaken on a trial basis. Labor for the long-distance moving was supplied by the owner-operators of the moving rigs.

Although Respondent corporation never issued stock, it appears that Larson, Johnson, and Proctor were equally interested in the operation.[2] It was Excelsior's original purpose to do long-haul moving which is more profitable

[1] Unless otherwise indicated all dates hereinafter were in 1966

[2] Apart from any proprietory interest in Excelsior, Proctor was clearly Respondent's agent and/or supervisor at all times material herein Proctor hired Becker and Ellwanger and it was he who informed the employees of the pending termination of their services In addition, Proctor appears to have been Excelsior's "outside" or "front" man. Though not president of the Company (Larson was president), Proctor assumed the title and role with Larson's knowledge Larson agreed to this as he felt Proctor might have need for the title of president when calling on an account By the time of the hearing herein any interest Proctor might have had in Excelsior had been purchased by Larson, and Proctor had left town leaving no known forwarding address Respondent's counsel stated for the record that he had sought unsuccessfully to locate Proctor to secure his testimony for this proceeding

than local work. However, short haul breeds long haul[3] and in addition, Excelsior is required to do local moving, not only to generate long-distance jobs, but also as Larson testified, to fulfill its obligation to see that the long-haul jobs were delivered locally. For its local short-haul moving business, Excelsior owns two rigs.

Over the course of time, the employees became dissatisfied with the lack of paid holidays and what they felt were low wages and long hours. It was customary for some of the employees, Proctor and Respondent's salesmen, to meet for breakfast at a local restaurant. On one such occasion in the middle of May, Becker said that if the men did not get a salary increase he felt they should go to the Union in their search for higher wages and less hours. Proctor told Becker not to do that because "[y]ou know we would rather close our doors than have the union in there."[4]

On Friday, June 3, employees Becker, Jenkins, and Ellwanger, while out on a local moving job, determined to contact the Union. In response to the employees' call, the Teamsters sent out two representatives who met with the employees during their lunchbreak. After discussion of their gripes, the employees, in each others presence, signed cards authorizing the Union "to represent [him] in all matters relating to wages, hours and working conditions." I find that at all times, on and after June 3, the Union was designated as the collective-bargaining representative of all of Respondent's employees in an appropriate unit.[5]

The following Monday, June 6, the employees paid initiation fees to the Union. That same afternoon the Teamsters sent to Excelsior an unequivocal demand for recognition, enclosing in the same envelope photocopies of the three authorization cards and copies of a collective-bargaining agreement for Respondent to sign.[6]

Becker called the Union on June 7 to see if the demand for recognition had gone out because nothing had been heard from the Teamsters in Excelsior's office.

Tuesday evening, June 7, on their way home from work, Becker and Jenkins, using the latter's car, dropped off packing material at a customer's home. There Becker found a message to call Proctor. Pursuant to Proctor's request, Becker, together with Jenkins, met with Proctor at a local restaurant. After explaining that Excelsior was losing money on the local moving operation, Proctor told the men that Respondent was giving up the local business. Proctor offered to help the men find work with another moving concern or opined that Don Larson might hire them. Becker told Proctor he knew that Excelsior had received notice from the Union. Becker recalled that Proctor had nothing to say in reply. It was Jenkins' testimony that Becker said the men were going to the Union and Proctor replied he already knew about it. Additionally, Jenkins quoted Proctor as saying that "[m]ore or less it was a foolish move to make" as they would never get the union in at Excelsior. As between Becker's and Jenkins' versions of the conversation, I credit that of Becker. Becker, who had been the leading spirit in the union activity, was the more articulate and gave a more detailed account of his activities. Jenkins was led by General Counsel during most of his testimony, including that pertaining to this incident. Moreover, Jenkins' version of Proctor's remarks on June 7 does not appear responsive to the occasion but seems instead to corroborate Becker's account of the mid-May breakfast conversation. Accordingly, I do not find that on June 7 Proctor acknowledged that Excelsior had by then received the Union's demand for recognition.

Upon reporting for work on June 8, Becker noticed in the workbook, in which Excelsior listed moving jobs to be performed and from which the employees took their assignments for the day, that a number of local moving jobs had been crossed through and marked as leased to Warren Austin Transfer. For the balance of that week the employees worked fewer hours than in the past, though all parties agreed at the hearing, June is the busy moving season.[7]

On June 8, Proctor again offered to secure employment for the employees with another mover. This time Becker turned down the offer, saying he was pushing for the Union at Excelsior.

Becker and Jenkins were sent to Larson Transfer on June 10 to pick up a truck to be delivered to an over-the-road driver waiting uptown for the equipment. While there, Becker told Larson he would like to work for Larson Transfer. Larson rejected Becker saying, "I don't want any trouble with the union. My men are happy."[8]

Though Proctor had only asked the men to work through Saturday, June 11, all three reported to Excelsior on Monday, June 13. At that time, Ellwanger was put to work helping a local driver load; Becker was told to go to Larson Transfer; and Jenkins was advised there was no work for him. Thereafter, the instant charge was filed.

Johnson and Larson testified that early in May they had received from Excelsior's auditor a profit-and-loss statement covering the 4-month period, January through April, which showed that 75 percent of each revenue dollar derived from local moving was being paid out for labor as against an industry expectation of 45 percent. This auditor's report was not introduced at the hearing. The three partners discussed the auditor's report and, Johnson testified, decided to contract out the local business or

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[3] Testimony of Larson

[4] The account of this incident is based on Becker's uncontradicted testimony

[5] The complaint alleged, the answer admitted, and I find that all local drivers and warehousemen of Respondent at its Excelsior, Minnesota, location, excluding office clerical employees, professional employees, guards, and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act

[6] Pamala Chappie, secretary to the Union's secretary-treasurer, credibly testified that at approximately 2 p.m. on June 6, she typed, signed, and personally mailed the demand for recognition

[7] On the basis of the employees' worksheets, from which they were paid, it appears that each worked the following hours on each day of their last 2 weeks of employment:

	5/31	6/1	6/2	6/3	6/6
Becker	9½	15	13	12	10
Jenkins	9½	15	13	12	10
Ellwanger	9½	12	12	8½	2½
	6/7	6/8	6/9	6/10	6/11
Becker	10	7	8	4	7½
Jenkins	10	7	8	4½	7½
Ellwanger	7½	7	8	4½	7

[8] Jenkins testified that he had seen Becker and Larson engaged in conversation but had not overheard what had been said. Larson testified but did not controvert Becker's account of the conversation.

eliminate as much of such business as possible. On May 30, Memorial Day, in a series of telephone conversations, Johnson, subject to approval from Larson and Proctor, arranged for Warren Austin[9] to handle Excelsior's local hauling for 70 percent of the billed price, Excelsior to retain 30 percent of the sale. The two rigs which Excelsior owned for use in the local moving business were leased to Warren Austin. Thus, Respondent argues, the decision to subcontract the local business was motivated solely by economic considerations and was arranged before the Union appeared on the scene.[10] Indeed, Johnson testified, the Union's demand for recognition was not received until June 8 or 9 and not opened until June 10 because the Union's letter was addressed to Don Larson at Excelsior.

Conclusions and Findings

I find that General Counsel has failed to prove the alleged unfair labor practices by a preponderance of the evidence. Essentially the evidence disclosed two unrelated series of events from which, because of their connection in time, General Counsel urges a finding of violation. However, the testimony of Excelsior's witnesses as well as that of General Counsel stands uncontradicted on the record. Neither Larson nor Johnson, either by their demeanor or by any inconsistency in the evidence they presented, gave me reason to discredit their unrebutted testimony. Nor do I discern any inherent incredibility in their account of the events leading to the contracting out of Excelsior's local moving work to warrant substituting inference of an illegal conspiracy for uncontradicted evidence of economic motivation. *Atlantic Metal Products, Inc.*, 161 NLRB 919.

The complaint alleged as violations of Section 8(a)(1) Proctor's interrogation of employees on or about June 6 concerning their union membership and activities and his threats of subcontracting the unit work because of employee protected activities. As to these allegations, Becker and Jenkins testified to their restaurant meeting with Proctor after work on June 7. However, their evidence thus offered was that Proctor announced the decision to contract out the work and the resulting termination of their employees. Neither Becker nor Jenkins recalled that Proctor related this announcement to their union activities or that he even indicated awareness of the Union's existence when discussing the planned elimination of the bargaining unit. Proctor's disclosure was of an accomplished fact not of a threat of future action. Moreover, no evidence was offered of interrogation at that time or on any other occasion. It was after Proctor had apprised the men of their impending job loss that Becker brought up the subject of the Union. It was Becker's testimony[11] that Proctor did not even reply to this injection of the union issue. Accordingly, I shall recommend dismissal of the 8(a)(1) allegations of the complaint for the failure of proof.

The alleged 8(a)(3) and (5) violations turn on whether the contracting out of the local hauling work was impelled by the employees' union adherence and the Teamsters demand for recognition. To find that Excelsior was so motivated, I must discredit the uncontradicted evidence that Respondent was faced with a losing operation in its local hauling business.[12] In addition, to reach this result I must discredit the equally unrebutted evidence that the arrangement for Warren Austin to take over the unit work was settled on May 30, days before the employees first contacted the Union. In this connection, I note that General Counsel had during his investigation of this case taken an affidavit from Austin but failed to call Austin to testify to rebut Respondent's recital of the circumstances of the contract to subcontract.[13] It would then be necessary for me to pile inference on inference to find the violations alleged. First it would be necessary to infer that Excelsior received the Union's demand for recognition on June 7. While the Union's office girl credibly testified she had placed the envelope with the demand in the mail about 2 p.m. on June 6, no evidence was offered as to when, in the normal course of events, the Union's letter would have been received by the Respondent in Excelsior, Minnesota. It would then be necessary to infer, based on an inference that the letter was received on June 7, that Excelsior then contacted Warren Austin and made the agreement to subcontract to him the unit's work, all in time to announce this to the employees that very evening and to implement

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[9] Also referred to in the record as Shorty & Swedes, a local trucker

[10] General Counsel sought to establish during his examination of Larson that the advent of the Union hastened the decision to contract out the work This was done by means of questions relating to Larson's affidavit given during investigation of the underlying charge The exchange follows:

> Question by General Counsel Also on this date that I interviewed you, Mr. Larson, didn't I ask you about the financial structure of the company when you said that because of this accountant's report that you received that you told Proctor he had to do something, move the company or you would have to subcontract out the work? Didn't you also say at that time that that plus the fact that the men had gone to the union hastened your decision to subcontract out the work?
>
> Answer by Larson Well, that wasn't my decision to subcontract This was Proctor deciding, and I am just reading what is going on in Proctor's mind
>
> Q I am only asking you now, did you tell me that on June 29th?
>
> A Well, whatever my statement says, yes.
>
> Q You are not denying that?
>
> A. I am not denying my statement
>
> Q. And you said that on June 29th when I asked you?
>
> A. I probably did, yes

Larson was not shown his statement and asked to adopt its contents nor was the statement introduced into evidence On this equivocal exchange alone, I cannot find that union considerations accelerated Excelsior's subcontract of its local hauling work

[11] As hereinabove noted, I credit Becker's account of this conversation rather than that of Jenkins for the reasons stated.

[12] I do not find that in the circumstances of this case Excelsior's failure to introduce the actual profit-and-loss statement warrants an inference that its contents would gainsay the otherwise unrebutted evidence of loss. Had General Counsel in any way rebutted Larson's and Johnson's testimony on this point, Excelsior's subsequent failure to come forward with the auditor's report would then have supported an inference that its contents were contrary to the oral evidence of its purport However, General Counsel did not controvert their testimony Moreover, General Counsel was aware of the financial statement's existence long before the hearing herein and with his subpena powers could have required its production to challenge Respondent's presentation

[13] In his brief counsel for Respondent points out that Austin was present in the hearing room during trial of this matter and thus available for rebuttal if rebut he could

the arrangement the following day.[14] Having found nothing in the record or the demeanor of the witnesses to discredit the unrebutted evidence that the decision to subcontract the local hauling work and to terminate the employees was motivated solely by valid economic considerations and undertaken prior to the advent of the Union, I shall recommend dismissal of the allegations that Excelsior violated Section 8(a)(3) and (5) of the Act.

There remains for consideration Proctor's breakfast statement to the employees made in mid-May and Larson's comment to Becker when the latter applied for employment at the Larson Transfer Company. As to Larson's remark that he did not want trouble with the Union, it appears that he spoke in his role as owner of Larson Transfer and Becker was at that time applying for employment with that company. Larson Transfer is not a party to these proceedings and there is no allegation or evidence that Excelsior and Larson Transfer are a single employer. Accordingly, as a remedial violation, this incident is beyond the scope of these proceedings. Proctor's comment that the Respondent would rather close its doors than have the Union, appears to be beyond the averments of the complaint and is in any event an isolated remark not warranting a finding of violation and insufficient for a remedial order, particularly in view of the lawful dissipation of the bargaining unit.

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

CONCLUSIONS OF LAW

1. A–1 Excelsior Van & Storage Co., Inc., is engaged in, and during all times material herein has been engaged in, commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is, and at all times material has been, a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent has not engaged in unfair labor practices within the meaning of Section 8(a)(1), (3), and (5) of the Act.
4. The complaint should be dismissed in its entirety.

RECOMMENDED ORDER

It is recommended that the Board enter an order dismissing the complaint in its entirety.

[14] One could as easily infer from the small number of employees involved and the close working relationship between the employees and their employer that the employees had obtained information of the plan to subcontract their work and had thereafter gone to the Union in an effort to enlist its support to preserve the status quo Cf *Wiese Plow Welding Co , Inc* , 123 NLRB 616