

Zebra Service Corp. and John M. Canonico. Case
29-CA-848

February 13, 1968

DECISION AND ORDER

BY MEMBERS BROWN, JENKINS, AND ZAGORIA

On October 18, 1967, Trial Examiner John P. von Rohr issued his Decision in the above-entitled proceeding, finding that the Respondent had not engaged in unfair labor practices as 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.

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, conclusions, and recommendations of the Trial Examiner.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order of the Trial Examiner and hereby orders that the complaint herein be, and it hereby is, dismissed.

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

JOHN P. VON ROHR, Trial Examiner: Upon a charge duly filed, the National Labor Relations Board, by the Regional Director for Region 29 (Brooklyn, New York), issued a complaint on April 14, 1967, against Zebra Service Corp., herein called the Respondent or the Company, alleging that it had engaged in certain unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) of the National Labor Relations Act, as amended, 61 Stat. 136, herein called the Act. Thereafter the Respondent filed an answer denying the allegations of unlawful conduct alleged in the complaint.

Pursuant to notice, a hearing was held before Trial Examiner John P. von Rohr on June 1, and 2, 1967, in Brooklyn, New York. All parties were represented by counsel and were afforded opportunity to adduce evidence, to examine and cross-examine witnesses, and to file briefs. Briefs have been received from the General

Counsel and the Respondent and they have been carefully considered.

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

FINDINGS OF FACTS AND CONCLUSIONS

I. THE BUSINESS OF THE RESPONDENT

The Respondent is a New York corporation with its principal office and place of business located in Brooklyn, New York, where it is engaged in operating a fleet of taxicabs and performing related services. During the year preceding the hearing herein, the Respondent, in the course and conduct of its operations, derived gross revenues therefrom in excess of \$500,000. During the same period, it purchased gasoline and other goods and materials valued in excess of \$50,000, which were transported and delivered to it and received from other enterprises located in the State of New York, each of which other enterprises received the said goods and materials in interstate commerce directly from States of the United States other than the State in which it is located.

The Respondent conceded, and I find, that it is engaged in commerce within the meaning of the Act.

II. THE LABOR ORGANIZATION INVOLVED

New York City Taxi Drivers Union, D.A.L.U. No. 36, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Issue*

The issue in this case is whether the Respondent discriminated against John M. Canonico, its employee, in violation of Section 8(a)(1) and (3) of the Act by: (1) transferring him to an allegedly less desirable work shift on October 13, 1966, and by, (2) discharging him on October 28, 1966.

B. *The Facts*

The Respondent is a taxicab company serving the New York and Brooklyn areas. Prior to October 1, 1965, John M. Canonico, the alleged discriminatee herein, was employed as a foreman mechanic with the Fleet Operating Corporation, also engaged in the taxicab business. Canonico came with the Respondent when Fleet merged with Zebra on the latter date. It is undisputed that when Canonico was hired by the Respondent it was understood that his principal function was to repair transmissions. Although not hired as a foreman or in any supervisory capacity, the Respondent continued to pay Canonico the same rate of pay which he received while working as foreman for Fleet.

In the year 1966, the New York City Taxi Drivers Union, D.A.L.U. No. 36, AFL-CIO, became the collective-bargaining representative for the taxi drivers and "inside personnel" employed by a number of taxicab companies, including the Respondent. A contract, to which the Respondent became a party, became effective on May 17, 1966. It is significant to note that at all times material herein this contract between the Respondent and the Union contained a no-strike clause.

Canonico became a member of the Union in May 1966, and he was appointed acting steward in June.¹ However, in view of the General Counsel's apparent position that the Respondent was motivated in allegedly discriminating against Canonico because he was active in the processing of grievances, it should be noted here that employee John Hoffman was the chief shop steward for Respondent's employees during the period relevant hereto. I credit the testimony of William Carlton, Respondent's president, that Hoffman in fact processed more grievances during this period than did Canonico.

On June 11, 1966, President Carlton advised the mechanics that their hours would be reduced in accordance with the new union contract. He also announced some reduction in pay, although the record is not clear as to the extent of or basis for such reduction. In any event, when the mechanics displayed dissatisfaction over the announcement, Shop Steward Hoffman called the Union and the Union responded by sending the Local's secretary, Al Conforti, to the garage to speak to the men. Conforti suggested that the mechanics file grievances with the Union over the matter, but urged them to return to work with the comment that the Union should be given a chance to work and that they should not go out on strike. According to Canonico, the men returned to work but at the same time requested him (Canonico) to make out grievances for them. Canonico thereupon drafted written grievances, in duplicate, for seven employees, including himself. He submitted the originals to the Union and gave copies to President Carlton.²

Canonico testified that in July or August he filed grievances on behalf of some taxi drivers regarding breakdown pay and that during this period he also told the drivers to talk to Carlton about their problems in this regard. Canonico said that on one occasion Carlton asked him why he was sending the drivers into his office and that he replied that "the men were entitled to breakdown time pay for being broke down over an hour." According to Canonico, Carlton thereupon stated, "You and Harry Hoffman are always sending these men in and giving me more trouble than anything else."

In latter August 1966, the mechanics again became upset over some wage dispute with the Company.³ Canonico testified that one morning he came to the shop and found that the night shift had put up signs on the walls which stated that the mechanics intended to strike over the matter of the pay dispute. Canonico testified that during the morning President Carlton asked him if there would be a wildcat strike and if the Union would support any such strike. Canonico said that he told Carlton the Union would not back the strike, that it would be a wildcat strike. Later in the day, according to Canonico, Carlton came up and accused him of putting up additional signs around the shop, adding that he would be discharged if he did not refrain from doing so. Canonico

testified that he responded by telling Carlton, "You better have proof before you fire me because I wasn't putting them up." Concerning this incident, Carlton merely testified that he asked Canonico if he had put up the signs and that Canonico responded that he had not. He testified further, however, that at this point he yelled out to the entire shop, "If I catch anybody putting up signs inside my building, I'm going to fire them."⁴

Canonico further testified that a day or two later Carlton asked him if the men still intended to strike. Canonico replied that he thought they did. According to Canonico, Carlton then stated that other garages "had cut men's pay and gotten away with it." When Canonico asked for examples, Carlton gave him the name and address of a garage in Flatbush. Canonico made a trip to the garage in question, following which he reported to Carlton that "the other garage had straightened out their problem and that the men were receiving their rightful pay."

It is undisputed that on August 29, 1966, the Respondent's mechanics engaged in a strike in violation of the contract. Although the day on which the strike began coincided with the beginning of Canonico's vacation, Canonico came to the garage to get his check. Canonico testified that he and the others ascertained "that we were still getting short one day's pay" and that the men thereupon decided to strike. Canonico thereupon obtained material and himself constructed picket signs away from the shop. Although the record is clear that Canonico gave the employees the picket signs and directed the picketing, he did not personally engage in the picketing.⁵ The strike ended a day and a half later upon the intervention of union officials who persuaded the men to return to work after having reached agreement with Carlton that the mechanics would receive their full salary until the issue was determined by arbitration.

A hearing before an arbitrator on the above wage dispute was held about the first part of October 1966. Canonico and two other respondent "inside" employees, Robert Richardson and Noel Muniz, testified at this hearing on behalf of the Union.

Canonico's work hours were changed on October 5, 1966, this occurring approximately 2 days after the arbitration hearing. It is undisputed that on this date Robert Goode, a mechanic whose work hours were from 11 a.m. to 9 p.m., went on vacation. Canonico, who prior to this time worked a shift, from 7 a.m. to 5 p.m., was transferred to take Goode's place on the later shift.⁶ This change in hours was later made permanent and he remained on the later shift until the time of his discharge. In testifying as to the reason for this change in Canonico's hours, President Carlton explained that the busiest hours at the garage were during the day; and that during this period Canonico frequently would be interrupted from his principal job of repairing transmissions by the necessity of his having to assist in the repair of breakdowns of taxicabs

putting up the signs, I need not decide which of the above versions is the more accurate. There is no allegation that Carlton unlawfully threatened Canonico at this time. Moreover, assuming Canonico's version to be true, this would not affect my ultimate decision herein.

⁵ Canonico testified that he stood outside the shop, but that he did not carry a picket sign because he was instructed to do so by Union Representative Hy Schapiro. Canonico testified that insofar as he knew the Respondent's officials were not aware that he had furnished the picket signs.

⁶ Canonico's hours were changed so that he worked from 12 p.m. to 10 p.m. The Respondent operates its garage on a 24-hour basis with staggered shifts.

¹ Canonico was elected to the position of shop committeeman in August or early September 1966.

² There is no explanation in the record as to why the employees requested Canonico, rather than Steward Hoffman, to take the grievances at this time.

³ The record is not clear as to the details of this dispute, nor is this relevant to a determination of this case. Although Canonico testified that an arbitrator's decision concerning wages issued at this time, the only arbitration award in evidence was not issued until November 1966.

⁴ The testimony concerning this incident was adduced by the General Counsel as evidence that Carlton was aware of Canonico's activity in the shop. Since Carlton conceded that he individually asked Canonico about

which continually came into the garage for minor repairs during the daytime hours. He therefore took the occasion of Goode's vacation to change Canonico's hours so as to thus enable Canonico to perform more work and to concentrate more freely on his principal and more skilled job of rebuilding transmissions. My findings with respect to the allegation that this change in Canonico's hours was violative of Section 8(a)(1) and (3) of the Act are noted in the succeeding section hereof.⁷

Canonico was discharged on October 28, 1966. Since it is undisputed that the facts surrounding his discharge involve a refusal by him to assist in the performance of body repair work, I shall first consider the evidence with respect to Canonico's involvement in body repair work prior to the time of his discharge. First, it is undisputed that Canonico was qualified to perform body repair work. Indeed, he conceded that he performed such work while employed with the Fleet Operating Corporation before it merged with the Respondent. I credit the testimony of President Carlton that when he hired Canonico at the time of the merger he told Canonico that although his principal job would be that of rebuilding automatic transmissions, he would also be required to perform bodywork and other types of repair work if needed.

Canonico testified that shortly after he was hired he heard a rumor from another employee that he would be asked by the foreman to assist employee Lopez (Fernando Fausto),⁸ Respondent's bodyman, in body repair work. Canonico thereupon asked Shop Steward Hoffman if he would be required to do any such work. Hoffman, in turn, called the Union and the Union sent two of its representatives, Hy Schapiro and Mike Scibelli, to the shop to investigate the matter. According to Canonico, the union officials discussed the matter with management, following which Scibelli advised him "that I was to do light body work, more or less as a helper, and if I didn't want to do it, to put in a grievance on it and the Union would find out if I had to do it." Canonico testified that he filed a grievance with the Union over the matter on the following day. Peculiarly, although Canonico testified on cross-examination that he did not receive an answer from the Union on the grievance, he at this point added, "I asked [union representative] Schapiro a couple of times [concerning the grievance] but there was never again any time where I was pressed into doing body work, so nothing was said about it."⁹ This testimony is not in accord with the facts nor is it consistent with further of his own testimony. Thus, in his direct testimony, Canonico testified that following his employment with the Respondent it was his custom to voluntarily help Lopez when his

own work was finished. This, he said, occurred "maybe once a week or so" and included heavy bodywork as well as light bodywork. This he said he did notwithstanding the fact that Foreman Ralph Carlton had told him not to assist Lopez because "it only made Lopez lazier." However, Canonico's testimony on the subject became all the more confused when he later conceded that he did perform bodywork with Lopez after the union officials advised him to do so, but, he said, from this point forward he did not volunteer his services, but only assisted Lopez on those occasions when Ralph Carlton requested him to do so. Upon the entire testimony on the subject, I am satisfied and find that the work for which Canonico was hired by the Respondent included that he assist in the performance of bodywork when the situation required. In commenting upon this aspect to Canonico's duties up until his discharge, I have no doubt but that Foreman Ralph Carlton accurately summed up the situation by stating, "When Lopez was overloaded with work and could not complete it I would always ask John [Canonico] to assist him and it was very seldom a problem."

Turning now to the circumstances of Canonico's discharge on October 28, 1966, there are certain basic facts involving his refusal to perform bodywork on this date which are not in dispute. On the other hand, the testimony is complicated by the fact that witnesses from both sides in varying degrees gave different versions as to just what occurred at the time of the discharge. I set forth below the relevant testimony of all the witnesses.

First, it is undisputed that in the afternoon of October 28, Lopez came over to Canonico and asked Canonico to assist him in the body repair of one side of a damaged taxicab.¹⁰ I shall continue here with the testimony of Canonico. Thus, Canonico testified that when Lopez made this request, "I told him I was busy doing my own work and that I wasn't hired as a body man." According to Canonico, Lopez thereupon left and went into the office. He promptly returned and this time told Canonico, "The boss wants you to do body work. You take one side of the job, the car, and I'll take the other side." According to Canonico, he at this point again told Lopez, "I have my own work to do. I wasn't hired as a body man." Canonico said that Lopez thereupon returned to the office and that Carlton then came out and asked that he and Shop Steward Harry Hoffman step into the office. Canonico said that when he and Hoffman entered the office Carlton stated, "I want you to do body work on that car; otherwise punch your card and go home." Canonico said that he responded, "Bill, the men in the shop know you are looking to fire me, that if you do you will have a walk-

⁷ Canonico testified that he was notified of this change in hours by Ralph Carlton, the garage foreman and a brother of President William Carlton. He said that Carlton told him that the change was made so that he could rebuild transmissions at night. Canonico protested the change of hours to both Carltons and then filed a complaint about the change with Charles Petses, the vice president of the Union. According to Canonico, Petses advised him that "according to the contract the boss had the right to switch you to any hours he wanted you to work."

⁸ Fernando Fausto is also known as Lopez. Since the latter name was most frequently used in the testimony, I shall refer to him by this name hereinafter in this Decision.

⁹ Sebastian Scibelli, a shop committeeman employed by the Respondent as a taxicab driver, was called as a witness by the General Counsel.

Scibelli testified that he received a complaint from Canonico to the effect that Canonico heard a rumor that he would be discharged if he refused to do bodywork. Scibelli testified that he and another union representative took this up with President Carlton and that Carlton denied that he had any intentions of firing Canonico or anyone else. Scibelli testified that Carlton also remarked that he did not know how such rumors got started around the shop.

¹⁰ Lopez testified that in the morning he requested permission from Foreman Ralph Carlton to have Canonico help him in this work, but that the foreman at this time told him that "Johnnie wasn't supposed to do body work." Lopez further testified that in the afternoon he went to President William Carlton and made the same request. Lopez said that the President approved this request and told him to ask Canonico to assist him in the bodywork.

out.”¹¹ Carlton thereupon stated, “Are you threatening me?” Canonico said that he replied, “No, I’m just telling you what the men had told me.” Canonico’s testimony reflects that the conversation thereupon became heated, with Carlton stating that he would have his attorney obtain an injunction if the men went on strike. Canonico stated that at this point Hoffman spoke up and said that they should cool down and that he would call down a union representative “to see who was right and who was wrong.” Hoffman thereupon made a telephone call to the Union and he and Canonico left the office. Canonico testified that outside the office he went over to Sebastian (Mike) Scibelli, a taxicab driver employed by the Respondent, and advised him of what had occurred. Canonico said that it was Scibelli’s suggestion that he “make out a grievance and do the work in the meantime until the Union gets down here and settles it.” Canonico testified that he and Scibelli then went over to Hoffman and that “Hoffman agreed to this, that I should make out the grievance and do the work.” Canonico testified that Carlton was standing nearby and overheard this conversation. According to Canonico, Carlton thereupon stated, “No, its too late, you’re fired, your suspended.” Continuing, Canonico testified that Carlton started to walk away, at which point Charles Copperman, a partner in the Respondent Company, came up to Carlton and said something to him. Canonico said that he then overheard Carlton say to Copperman, “No, its too late; he is a troublemaker; he caused me more trouble than anything else. . . . He won’t even listen to me and take my orders.” Canonico testified that at this point he spoke up and said that he wanted to find out from the Union whether he had to do the bodywork. According to Canonico, Carlton thereupon said, “I’m the boss here.” to which he said he replied, “Your are my boss but the Union is also my boss, too. I have a right to know whether I have to do this or not.” Canonico said that Carlton then remarked, “See, I am not even the boss.”¹²

Scibelli, who was called as a witness for the General Counsel, testified that he was in the waiting room at the garage at the time of Canonico’s discharge. He said that while inside he overheard a loud conversation taking place between Canonico and President Carlton outside of the office. He testified that he thereupon came out of the waiting room and heard Carlton say to Canonico, “When I give you an order you are supposed to listen and if you don’t want to do it you are fired.” Scibelli testified that Canonico replied to the effect, “You fire me and we will pull out the garage.” Scibelli said that at this point he “interceded” by taking Canonico to one side and telling him, “When the boss gives you an order, do the job and comply afterwards. Don’t make threats, because it’s not the

Union’s policy to make threats.” However, Scibelli testified, Carlton at this point came over and said, “I’m suspending him. Let him take it up with arbitration.”

President William Carlton testified that upon being advised by Lopez that Canonico refused to help with the bodywork, he went out to the floor and took the matter up with Canonico. He said that Canonico in a loud voice refused to do the work, whereupon he had Canonico come into his office.¹³ Inside the office he again asked Canonico to do the work and Canonico again refused. According to Carlton, he thereupon told Canonico, “If you don’t do the work, I will dismiss you.”¹⁴ he said that Canonico responded by threatening to pull the men out on strike if he was fired and that he (Carlton) thereupon stated that the men would not go out for that reason. Continuing with Carlton’s testimony, he said that at this point Canonico left the office, but that he followed him out to the floor and again tried “to talk him into going to work,” telling him that he was “finsished” unless he did. Carlton said that Canonico again refused, repeated the statement that he would pull the shop out on strike if he was discharged, and then shouted to him “You’re not my boss, the Union is my boss.” Terminating the conversation, Carlton merely stated, “If the union is your boss, let them pay you your salary.”

Nathan Copperman, a partner in the Company, was present in the office when Canonico was discharged. Copperman testified that after Lopez came to the office and requested assistance, Carlton left the office and asked Canonico to give him a hand. Copperman said this took place just outside the office and that Canonico told Carlton in a loud voice “that he wasn’t supposed to do body work, that the Union had told him not to do body work.” Copperman testified that Carlton thereupon brought Canonico into the office; there he again asked Canonico to do the bodywork; Canonico refused; and Carlton then ordered him to perform the work or be subject to dismissal. Copperman said that Canonico responded, “You can’t fire me, I will pull the whole garage out on strike. The mechanics and the men.” According to Copperman, Carlton then stated that this would be against the union contract, but that Canonico responded, “I have been told by my union that I didn’t have to do body work, and if you fire me, I’ll pull the garage out on strike.” Continuing, Copperman testified that at this point Carlton told Canonico he was dismissed, he was suspended, and he should get his timecard and punch out. Copperman said that he and his son followed Canonico to the door, at which point he overheard Canonico shout in the presence of other employees, “I’m going to pull this garage out on strike, he can’t fire me. . . .”

¹¹ On cross-examination Canonico admitted that he “refused to do the body work.” He testified that there were two reasons for his refusal, his testimony, being as follows.

One, because I did not want to do body work first of all, and second . . . because [Lopez] had been harrasing [sic] the men, trying to make them do bodywork. He was slowing down in his work and he knew that nobody wanted to help do body work and he was doing this on purpose where he would make me or Bob or somebody else in the shop have to go over and help me

Still later in his testimony, Canonico indicated that his refusal was based upon a personal dislike for Lopez because Lopez had testified adversely to the mechanics in an arbitration hearing. This, of course, did not justify Canonico’s refusal to comply with a valid work order of his employer. Canonico also said he refused to work with Lopez because the

work involved “heavy” bodywork rather than “light” bodywork. However, I must regard this testimony as speculative, since Canonico never reached the point of assisting Lopez. In any event, Canonico conceded that in the past he had performed heavy bodywork with Lopez as a part of his duties.

¹² Although Canonico was discharged, he did not leave the shop until after two union representatives came down and discussed his termination with President Carlton. Canonico, however, did not speak to Carlton further after the above conversation in which he was terminated.

¹³ Carlton did not testify whether Hoffman came into the office with Canonico. Hoffman was not called as a witness by the General Counsel and he did not testify in this proceeding.

¹⁴ Carlton testified that he was not sure whether he should use the word “dismiss” or “fire,” and that he changed the word to “suspend.”

C. Conclusions

Starting with Canonico's change of hours on October 5, 1966, I am persuaded and find that the General Counsel has not established by a preponderance of the evidence that this action was taken by the Respondent in violation of Section 8(a)(1) and (3) of the Act. I have no reason to doubt President Carlton's explanation for this action, as heretofore set forth, and I do not believe that such action was motivated, as the General Counsel contends, by reason of the fact that Canonico testified in the arbitration hearing. Indeed, Canonico's testimony, as well as the General Counsel's brief, is somewhat misleading in that both alluded only to the fact that Canonico had testified before the arbitrator. An examination of the arbitrator's decision, however, reveals that two other employees, Robert Richardson and Noel Muniz, also testified at this hearing.¹⁵ There is no indication that Canonico testified any more extensively than did these other two employees. At any rate, although Canonico was disadvantaged by the change in hours which came about when another employee went on vacation, I am not satisfied that the evidence establishes that such action was motivated by Respondent's desire to retaliate against him because of any protected activities in which he may have engaged. If it had not been Canonico, undoubtedly another employee would have been inconvenienced by an assignment to the later shift. Absent an intent to discriminate, which I find lacking here, the Respondent had a right to utilize its employees in the manner it best saw fit. Accordingly, I shall recommend that this allegation in the complaint be dismissed.¹⁶

I also find and conclude that Respondent discharged Canonico on October 28, 1966, for cause, not because of his engaging in any activities protected under the Act or for the purpose of discouraging membership in the Union. Although there is some variance in the testimony as to certain details surrounding Canonico's discharge, the salient facts are undisputed and admitted by Canonico himself. Thus, Canonico admitted that President Carlton ordered him to assist Lopez with bodywork (which I have found to be a part of his duties) and that he refused.¹⁷ Canonico further admitted that during the discharge conversation he told Carlton that the men would engage in a strike if he were discharged. Finally, on cross-examination, Canonico conceded that he told Carlton in front of the employees "you are my boss but the Union is also my boss." As to this latter remark, I credit the testimony of Carlton that Canonico phrased the remark as he (Carlton) testified, i.e., "You're not my boss, the Union is my boss." On the entire record, I have no hesitancy in finding that the Respondent had ample cause to terminate Canonico. Specifically, I credit the testimony of Carlton that he discharged Canonico because of his refusal to obey a valid work order, in addition to which Canonico further aggravated the situation by contemporaneously

threatening to call a walkout in violation of the contract's no-strike clause and by telling him that the Union, rather than he, was his boss. Since Canonico's ill-advised remarks to Carlton (including his refusal to do bodywork) occurred in the presence of other employees, I find that his entire conduct not only constituted rank insubordination which fully warranted his discharge, but that in fact it provoked Carlton into discharging him. This conclusion is buttressed by the fact that Canonico's conduct caused Carlton to become highly upset when he finally terminated Canonico outside of the office. Thus, Canonico testified that when Carlton at this point walked away the drivers went up to Carlton and "tried to calm him down." Canonico further testified that later in the afternoon two union officials came to the premises and that after speaking to Carlton they reported "that the boss was still pretty mad, that he was starting to cool down a bit, that they would go back and talk to him again in a couple of minutes." I think it thus clear that Carlton's termination of Canonico was not based upon any premeditated intent to discharge this employee for discriminatory reasons, but rather came about as a heated and spontaneous reaction to Canonico's immediate conduct in refusing to comply with his order, including Canonico's entire deportment in connection therewith.

There is one further aspect of the case which requires comment, this arising from the Union's negotiations with the Respondent to have Canonico reinstated. Thus, later in the same afternoon when Canonico was discharged (Friday, October 28), Union Representative Anthony Villani and Charles Petses came to the shop and held a discussion with President Carlton in an effort to have Carlton rescind the discharge. They returned and spoke to him on Saturday and again on the following Monday. Although Carlton discussed the matter with the union officials and agreed to give consideration to their arguments that Canonico be reinstated, he finally advised them on Monday that he and Copperman had decided that the discharge would stand. Pertinent here is testimony that at one point during the discussions with the union officials Carlton made a proposal to the effect he would give consideration to taking Canonico back if the Union would agree that Canonico's salary be reduced. Thus, Villani testified that this proposal was made on Friday, at which time he said that Carlton stated "that he would take him back on a reduction in salary because he was getting more than the foreman of the shop." Villani testified that he thereupon told Carlton "that the Union would not go for any reduction at this time." Petses testified that a proposal of this nature was made during their meeting with Carlton on Saturday, at which time Carlton said that he would "think about" taking Canonico back if the Union agreed to a reduction in pay. Petses testified, "Right away I dismissed the idea." Carlton testified that during one of his discussions with the union officials, they asked whether he would consider taking Canonico back

¹⁵ This decision was introduced for a different purpose than to show who testified at the hearing. I do not infer, however, that the General Counsel intended to be misleading.

¹⁶ As heretofore indicated, the Union found no merit to the grievance which Canonico filed over this matter. Canonico testified that he subsequently told Ralph Carlton that the Union was not standing behind him. He said that Carlton on this occasion told him that although he could not prove it, he thought that "the boss" had made the change in hours for harassment purposes. While Ralph Carlton did not specifically deny this testimony, he corroborated President Carlton, whom he said consulted

with him concerning the change in Canonico's hours, as to the reason this action was taken. In any event, assuming that Ralph Carlton voiced a suspicion in the manner testified to by Canonico, this would not alter my conclusion that a preponderance of the evidence does not support this allegation of the complaint.

¹⁷ I credit Carlton's testimony that he requested Canonico three times to do the work and that Canonico refused on each occasion. This occurred first outside the office and for the second time inside the office. I also believe that Carlton gave him a third opportunity after he left the office.

“under any consideration.” Carlton said that in response, and after first pointing out that Canonico was receiving higher wages than the foreman, he offered to discuss with his partner the possibility of taking Canonico back on the basis that his salary be reduced “to \$2 below the foreman.” Carlton testified that the Union promptly rejected the idea and that it was not discussed further.

Upon consideration of all the testimony, I find that Carlton did not make a definite offer to take Canonico back at a reduced rate, but that he merely proposed this as a basis for giving further consideration to the Union’s request that Canonico be reinstated. The General Counsel argues that by this proposal the Respondent “condoned” Canonico’s conduct and that “therefore the insubordination of Canonico was not so heinous to the Respondent as to warrant a dismissal and that the reasons alleged for the dismissal of Canonico were pretexts.” Under all the circumstances of this case, I find no merit to this argument. Carlton’s proposal was made during the course of his bargaining with the Union over the matter and I think that he gave the union representatives a valid reason for making the proposal. Nor did Carlton’s proposal for possibly reinstating Canonico at a lesser rate constitute condonement of Canonico’s conduct. Thus, in cases involving discrimination, condonation in the legal sense is found to occur where an employer first forgives

an employee for some misconduct, but upon later discovery that the employee had engaged in union or protected activity then utilizes such condoned misconduct as a pretext for discrimination. Clearly, such was not the case here.

Having found that the General Counsel has not established by a preponderance of the evidence that the Respondent discriminated against Canonico, it shall be recommended that the complaint be dismissed in its entirety.

CONCLUSIONS OF LAW

1. Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The Respondent has not engaged in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

RECOMMENDED ORDER

It is recommended that the complaint herein be dismissed in its entirety.