

Wolverine Express, Incorporated and Chicago Truck Drivers, Chauffeurs & Helpers Union of Chicago and Vicinity (Independent) Case 13-CA-9067

April 20 1970

DECISION AND ORDER

BY MEMBERS FANNING BROWN AND JENKINS

On October 15 1969, Trial Examiner David S. Davidson issued his Decision in the above entitled proceeding finding that Respondent had engaged in and was engaging in unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. The Trial Examiner also found that Respondent had not engaged in certain other unfair labor practices alleged in the complaint, and recommended that such allegations be dismissed. Thereafter, Respondent and the General Counsel filed exceptions to the Trial Examiner's Decision together with supporting briefs, and Respondent also filed a reply to the General Counsel's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three member panel.

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 this 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 hereby adopts as its Order the Recommended Order of the Trial Examiner, and orders that Respondent, Wolverine Express, Incorporated, Oak Lawn, Illinois, its officers, agents, successors and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.

MEMBER JENKINS, concurring in part and dissenting in part

While I agree that Respondent violated Section 8(a)(1) of the Act by engaging in coercive interrogation, I do not agree with the Trial Examiner's conclusion, which my colleagues have adopted, that the evidence does not establish that Koval's discharge violated Section 8(a)(3) of the Act.

The record shows that for at least several months prior to Koval's discharge, Respondent had been dissatisfied with the sales operation at its Chicago terminal and that the matter had been discussed on several occasions, with possible courses of action ranging from cutting costs by reducing its three-man sales force by one to terminating and replacing all three salesmen. However, no decision in this regard had been reached

by the early part of the week of April 14, 1969, when union representative Cullatta requested Koval to sign a union authorization card thus kicking off the Union's efforts to organize Respondent's salesmen. A few days later Cullatta approached salesman Newell, informed him that the Union was trying to organize Respondent's salesmen, and knowing that Newell formerly had been with Respondent in a management capacity, wondered if Newell reported both the Union's approach to him and the organizational intent to Terminal Manager O'Connor who, in turn, relayed the information to Sales Manager Johns and Vice President Nykamp. On Friday, April 18 after Cullatta again had solicited Koval's signature, Koval met with the other two salesmen informed them that Cullatta had left union application cards with him, and, after an inconclusive discussion of the matter, also told them that he "had the applications should they be interested." On the following Monday, April 21 Respondent decided to reduce its sales force by one but made no firm decision as to which salesman would be released.

The next day, the three salesmen met with Cullatta and one of the Union's business agents. After discussing union benefits, the agent requested the salesmen to sign the application cards which he had handed to them. At this point Newell left the meeting in order to keep a previous engagement. Koval and salesman Berndt, however, remained and signed the cards. Later this same afternoon, Newell, who evidently felt an obligation to keep Respondent informed of the Union's activities, again sought out O'Connor to whom he related this latest incident. Newell also told O'Connor that he was now quite sure that the salesmen were being organized, and that, while he had not signed a card, he was of the definite opinion that Koval and Berndt had. Newell then repeated the foregoing, first to Johns, whom O'Connor had called into his office for this purpose, and later to Nykamp. According to Nykamp, the decision to terminate Koval was also made on this same afternoon. Koval was discharged on the following morning, which was in the middle of both a workweek and a pay period, assertedly because Respondent's review of the salesmen's records showed that he was the least productive salesman.

Berndt learned of the discharge from Koval while the latter was cleaning out his desk. Shortly thereafter, Berndt was summoned to Johns' office where Johns stated that he "supposed" Berndt knew "what had happened." Upon receiving an affirmative reply, Johns said he had to ask Berndt a question, specifically asked Berndt "If I had signed it [a union card] also," and upon receiving another affirmative reply, stated that "it was kind of sudden, wasn't it."

The Trial Examiner found, in effect, that despite the weakness of the evidence to support Respondent's contentions that it was economically motivated in reducing its sales force at that time by one, and that Koval was selected for discharge because he was the least productive salesman, the evidence adduced by the General Counsel nevertheless failed to establish the violation. I do not agree.

While Respondent may have been dissatisfied with its sales operation, that dissatisfaction was accompanied by months of indecision and was not resolved until after Respondent had learned from Newell that the Union was attempting to organize its salesmen. It was not until then that Respondent firmly determined to reduce its sales force by one. This reduction, moreover, was effectuated only after Newell had told Respondent that while he had not joined the Union, he believed that Koval and Berndt had. Koval was then immediately discharged without notice and in the middle of both a workweek and a pay period, contrary to normal business practice. The record discloses that the average daily revenues earned at Respondent's Chicago terminal had steadily increased during Koval's employment and continued to do so after his discharge, and additionally there was no substantive evidence establishing the need for Respondent's precipitous action.¹

I would find, therefore, that Respondent's assigned reason for discharging Koval is pretextual, and that it was motivated by antiunion and not economic considerations. I would further find that by discharging Koval, Respondent not only interfered with his Section 7 rights, but also engaged in a deliberate effort to undermine the Union's organizing campaign, and, since it knew at the time of Koval's discharge that Newell had not joined the Union, thereby effectively dissipated the Union's majority status. I would also find that Respondent's unlawful interrogation of Berndt was conducted in such a manner as to convey to him the impression that there was a distinct connection between the salesmen's union activity and Koval's discharge, thus further evidencing Respondent's true motivation. Inasmuch as I have concluded that Koval was discharged for engaging in union activities, I would also find that his level of productivity was not the motivating factor in his discharge.

Accordingly, I would find that the General Counsel has established, by a preponderance of the evidence, that Respondent discharged Koval because of his union activities, in violation of Section 8(a)(3) and (1) of the Act.

¹ The sole reason given by Respondent for abruptly discharging Koval is that Respondent's president previously had stated that he wanted the sales costs reduced and the sales program cut down.

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

DAVID S. DAVIDSON, Trial Examiner Pursuant to a charge filed on April 24, 1969, by Chicago Truck Drivers, Chauffeurs & Helpers Union of Chicago and Vicinity (Independent), referred to herein as the Union, the complaint in this case issued on June 11, 1969. The complaint alleges that on April 23, 1969, Respondent interrogated employees about their union activities and discriminatorily discharged Daniel Koval in violation of Section 8(a)(1) and (3) of the Act. In its answer,

Respondent denies the commission of any unfair labor practices.

A hearing was held before me in Chicago, Illinois, on July 22, 1969. At the close of the hearing oral argument was waived, and the parties were given leave to file briefs which have been received from the General Counsel and Respondent.

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

FINDINGS AND CONCLUSIONS

I THE BUSINESS OF RESPONDENT

Respondent, a Michigan corporation, maintains an office and terminal facility in Oak Lawn, Illinois, where it engages in motor truck transportation operations which constitute a link in the chain of interstate commerce from which it annually receives a gross revenue in excess of \$1,000,000. I find that Respondent is an employer engaged in commerce within the meaning of the Act and that assertion of jurisdiction herein is warranted.

II THE LABOR ORGANIZATION INVOLVED

The Union is a labor organization within the meaning of the Act.

III THE ALLEGED UNFAIR LABOR PRACTICES

A Introduction

Respondent, a general commodities carrier, has its home office at Muskegon, Michigan, and operates 14 trucking terminals. Its terminal located in Oak Lawn, Illinois, known as the Chicago terminal, is the only location involved in this proceeding. The Chicago terminal is managed by John O'Connor. Also located at the Chicago terminal are the offices of George Nykamp, vice president in charge of sales and traffic, and Ralph Johns, sales manager for the system. At the Chicago terminal, Respondent employs approximately 90 employees, most of whom are represented by the Union or Local 710 of the International Brotherhood of Teamsters. Respondent's past relations with the unions representing its employees have been good. In March 1969, the two dispatchers employed at the terminal, who had previously been unrepresented, signed applications for membership in Local 710, and Respondent granted recognition to Local 710 as their representative. In April 1969, the Union sought to organize the three salesmen then employed at the terminal. The issues herein arise out of that organizational effort.

B The Organization of Respondent's Salesmen

Early in the week of April 14, 1969, Tony Cullatta, the Union's steward at the Chicago terminal, spoke to Daniel Koval, one of Respondent's salesmen, near

Koval's desk in the general office.¹ Cullatta told Koval that the Union had signed up the sales representatives of another trucking line about a week earlier and asked if Koval and the other salesmen would be interested in signing with the Union. Koval told Cullatta that he would think about it.

On Thursday or Friday, April 17 or 18, Cullatta approached Robert Newell, another salesman, and told him that the Union was trying to organize the salesmen. Cullatta said that he knew Newell had been formerly employed in a management capacity by Respondent but wondered if Newell would be interested. Newell replied that he would be interested in talking about it.

Later that afternoon, Newell voluntarily went to Terminal Manager O'Connor and told him that he had been approached by the Union that morning and that in his opinion the Union was going to try to organize the salesmen. O'Connor relayed this information to Sales Manager Johns and Vice President Nykamp.

On Friday, April 18, Cullatta again spoke to Koval at his desk and again asked him if he and the other salesmen would be interested in signing with the Union. Koval replied that they were still considering it. Cullatta gave him an envelope with three blank application cards and asked him to consider it further and talk to the other salesmen about it. Later that afternoon, in the office area Koval talked to the other two salesmen about Cullatta's request. They indicated that they were still undecided about joining the Union.

On Tuesday morning, April 22, Cullatta again spoke to Koval at his desk. He asked Koval if he could meet Cullatta at a restaurant so that he could explain the union benefits. They agreed to meet later that morning at a nearby restaurant, and Cullatta asked Koval to invite the other salesmen to join them. Koval spoke to Newell and Berndt, and they agreed to accompany him to the restaurant.

During the conversation at the restaurant, some questions arose which Cullatta was uncertain he could answer, and Cullatta called Union Business Agent Motassa who joined the group shortly thereafter. After further discussion, Motassa handed the salesmen application cards which he asked them to sign. At about this time Newell left the meeting because of a luncheon appointment, taking the unsigned card with him. After Newell left, Koval and Berndt conversed briefly and decided to sign the cards. They signed them and returned them to Motassa. The meeting then ended.

Later that afternoon, Koval called Motassa to ask that notification of the salesmen's action be withheld from the Company until after their next payday because he believed that a pay increase might be forthcoming as a result of a periodic wage review.

Also that afternoon, between 4 and 5 p.m. Newell returned to the terminal and again on his own initiative spoke to O'Connor. Newell told O'Connor that he was quite sure the salesmen were being organized, that he

was of the opinion that two of them had signed, and that he felt an obligation to tell the Company what was going on. During their conversation Newell described the meeting which had been held that morning, and O'Connor asked Newell if he had signed a card. Newell told O'Connor he had not signed a card because of the conditions under which he had returned to the Company. O'Connor told Newell that he had better repeat to Sales Manager Johns what Newell told him, and O'Connor called Johns into his office for that purpose. After repeating to Johns what he had told O'Connor, Newell left the office, and after a few minutes went to Vice President Nykamp's office where he again repeated his report to Nykamp.²

C. *The Discharge of Koval*

On the following morning, April 23, Koval reported to the office about 8:30. Shortly after his arrival, he received a telephone call from Johns telling him to report to his office. Koval went and found Johns, Nykamp, and O'Connor there. Johns told him that they had to cut expenses in the Company, that they were going to let one of the salesmen go, and that he was chosen for dismissal. Koval asked if that was the only reason for his discharge. Johns replied that was all he could tell him. Koval persisted with his question, and Nykamp replied that they had taken a survey of individual revenues and that his was below par. Koval then said that he would drop his bombshell, or words to that effect, and said that he had signed with the Union the previous day and was going to report his discharge to them. Nykamp commented that this fact did not alter their decision and that the discharge still stood. O'Connor stated that they had not received notification from the Union. Koval said that Respondent would hear from them shortly, and he left.

Koval returned to his desk and then remembered that he had not been paid. He returned to Johns' office to ask for his pay, and Johns told him he would call the Company's home office in Muskegon and have his checks there the next day.

Employees were scheduled to be paid every other Friday for the 2-week period ending the previous Friday. However, the checks often arrived from Muskegon and

² These findings are based on the testimony of Newell, a former terminal manager, sales manager, and salesman for Respondent, who was reemployed as a salesman at the Chicago terminal in late 1967. O'Connor denied asking Newell whether he signed a card, and Johns and O'Connor both denied that O'Connor called Johns into his office so that Newell could tell Johns directly what he had reported to O'Connor, but they conceded that O'Connor advised Johns that afternoon of Newell's report. Newell impressed me as a forthright witness whose recollection of these events seemed clear and who had no reason to invent his testimony. On the other hand, O'Connor in his testimony, while ultimately conceding that Newell had told him his opinion that the other salesmen were going to sign with the Union, sought to minimize that part of the report as unimportant, and initially testified, as did Nykamp, that Newell did not tell him that the salesmen had signed. O'Connor did not add until cross-examined that Newell offered his opinion that the other salesmen would sign. Johns testified that he received no indication from O'Connor that anyone had signed a card. I have concluded that the testimony of O'Connor, Nykamp, and Johns was influenced by their desire to minimize Newell's report, and I have credited Newell's version as more accurate.

¹ Much of the testimony in this proceeding was uncontradicted. Except where otherwise indicated my findings are based on such testimony.

were distributed a day early Friday, April 25, was a scheduled payday

D *The Interrogation of Berndt*

When Koval returned to his desk to clean it out, Berndt was present, and Koval told him that he had just been fired. A few minutes later by telephone Johns called Berndt to his office. Berndt went there, where he found Johns alone. Johns said that he supposed Berndt knew what had happened. Berndt said that he did. Johns then said that he had to ask Berndt a question. Berndt said that he had figured that Johns asked him "Did you sign, also," or words to that effect. Berndt replied affirmatively, and Johns asked if it was not kind of sudden.³ Berndt told him he had been thinking about it for a while, and explained that the Union offered a good deal with respect to pensions and that it was a form of security. Johns said that he could not say anything one way or the other, and Berndt left.⁴

E *Respondent's Explanation for Koval's Discharge*

Respondent contends that it was pure coincidence that Koval's discharge occurred concurrently with the salesmen's union activities. Rather, according to its witnesses, the discharge was a result of a decision made on April 21 to lay off one salesman for economic reasons followed on April 22 by the selection of Koval for layoff as the least productive of its salesmen. Respondent's witnesses all testified that they had no knowledge that Koval or Berndt had signed cards for the Union until after Johns informed Koval of his discharge.

There are three elements to this explanation which require examination. First is the asserted economic basis for the decision to layoff a salesman. Second is the basis for the selection of Koval. Third is the sequence of management meetings and decisions culminating in the discharge.

1 The evidence as to the reason for the layoff

The evidence as to the basis for the decision to lay off a salesman is scant. Respondent's witnesses testified that the decision to lay off was made at a management meeting on the afternoon of April 21 attended by Nykamp, Johns, Respondent's President Diamond, and Vice President McElwde.⁵ Nykamp testified simply that they decided at this meeting to reduce the sales force in Chicago by one, but made no firm decision as to which salesman should be released. According

to Nykamp, he expressed his view that Koval's work was not satisfactory, but the decision to release him was left open because of O'Connor's absence. Johns also testified that the decision to reduce the sales force was made during the meeting, but that there was "really not" any discussion of particular individuals who might be selected for discharge at the time, and that the discussion focused on whether the department should be reduced based on need of sales and cost reduction, without reference to any individual salesman.

Neither Nykamp nor Johns was questioned further on direct or cross-examination as to the content of the discussion which culminated in the decision to reduce the sales force. However, in support of that decision evidence was adduced that, over the past few years, the sales force at Chicago had fluctuated and sales had steadily increased. At the time of Koval's hire in September 1966, one other salesman, Ed Newell, was employed. Ed Newell left about a month later but was shortly replaced by another salesman, Aiken. Aiken remained with Respondent for about a year, and, in the fall of 1967 about the time Aiken left, Robert Newell was hired. At around that time Nykamp came to Chicago and acted as sales manager along with his other duties. At that time Respondent was dissatisfied with the cost-revenue relationship at Chicago, and Nykamp sought to increase outbound loads to reduce the hauling of empty trailers away from Chicago and to increase revenues. In February 1968, Johns was hired as sales manager for Respondent's system with offices in Chicago. In late April or May 1968, Berndt was hired as a salesman, and the sales force remained at three for approximately a year until Koval was discharged. As of the time of the hearing Koval had not been replaced.

Nykamp testified that, from the time he came to Chicago in October 1967 until the hearing in this case, average daily revenues increased with some regularity from slightly less than \$6,000 to \$9,000 or slightly more. Nykamp testified that he believed that, in April 1969, the average daily revenue was in the area of from \$8,000 to \$8,700, and that it continued to increase after Koval's discharge. Nykamp expressed the opinion that the continuing increase was attributable to increased freight from old customers and the addition of new customers, but not from better efforts by the salesmen.

Apart from this evidence as to the reasons for the decision to layoff, Johns testified on cross-examination when asked why the decision to lay off Koval was implemented in the middle of a workweek, that Respondent's President Diamond had previously said that he wanted sales costs reduced and the sales program cut down. According to Johns the dismissal of a salesman had been discussed several times in the previous 4 or 5 weeks.⁶ O'Connor also testified that 2 or 3 weeks earlier, in a dinner conversation with Vice President McElwde, McElwde had indicated that he was not satisfied with the Chicago sales program. According to O'Connor no specifics were discussed, but McElwde

³ Berndt testified that he understood Johns to mean it was a surprise to him.

⁴ There is no essential dispute between the testimony of Berndt and Johns as to this conversation. According to Berndt Johns asked him "Did you sign also." According to Johns he asked "I just wondered if you had signed up with the union." He testified that Berndt also said he felt kind of bad about it and that he and Koval were going to tell him about it voluntarily that morning because they felt they owed it to him. Johns testified that he told Berndt that it was quite a surprise that they signed.

⁵ O'Connor was present for part of this meeting when other matters were discussed but left before the sales situation was discussed.

⁶ The content of these discussions was not further explored in the examination of Johns.

mentioned as possibilities termination and replacement of all the salesmen.

2. The evidence as to the reasons for selecting Koval for layoff

All three of Respondent's witnesses testified that they believed Koval was the appropriate man for release because his record of production was inferior to that of the other two salesmen. According to Nykamp, during the period that he served as sales manager he was dissatisfied with Koval's production, and at the time of Johns' hire he recommended to Johns that Koval be discharged. However, Johns indicated that he wanted to work with Koval to see if he could develop him into a desirable employee.

There is evidence that at that time Koval expressed concern over the possibility that he might be discharged. Newell testified that Koval told him he feared being discharged because he was not doing a good job. Koval conceded that he felt uneasy over his future prospects at that time. Initially he testified that he could not recall why but later testified that his uneasiness was caused by fear that Johns would come in with a new broom. I credit Newell.

It is conceded that, after Johns became sales manager, Koval's work improved.⁷ According to Nykamp in early 1969, he again began to feel that Koval was slipping and he discussed the matter with Johns. However, Nykamp conceded that he did not talk to Koval about it. Although Johns testified that Nykamp again spoke to him about Koval's work at that time, he conceded that he had not been critical of Koval's work on many occasions in the year before his discharge, and that it was perhaps more than 3 months before Koval's discharge when he last criticized his work.

In explanation of the selection of Koval, Nykamp testified that, between the Monday meeting and making the selection of Koval, he referred to records which showed the monthly and yearly amounts produced by the accounts of the three salesmen which Nykamp periodically reviewed. Nykamp testified that, based on the review and his business judgment, he concluded that Koval's accounts were not producing in accord with their potential. He explained that this conclusion did not necessarily mean that the dollar volume of Koval's accounts was less than that of other salesmen, but meant that they did not reflect the potential of which in his judgment the accounts were capable. Nykamp did not have the revenue records with him at the hearing and could not testify as to the figures they showed. He testified, however, that there were no records which reflected the potential of an account and there was no way to prove the potential of an account. Nykamp also testified that, although there had been a substantial

increase in Koval's accounts, in his opinion it was not at a level consistent with the overall increase in Respondent's business. Nykamp testified that he considered Newell a desirable salesman because of his background and Berndt excellent in performance and potential.

Johns and O'Connor also testified that they recommended Koval for discharge. Johns testified that from his review of revenue records he would say that Koval's accounts had not increased as much as those of the other salesmen, but that the potential of his accounts was as great as those of the others. He also testified that in his opinion Koval would not have been discharged absent a decision to reduce the work force. He testified that he agreed to Koval's selection for that reason. O'Connor was not questioned as to his reasons for recommending Koval.

3. The sequence of events

As set forth above, Nykamp and Johns testified that the decision to lay off was made during a meeting on the afternoon of April 21. According to Nykamp, he was uncertain when that meeting had been scheduled, but "guessed" that it had been scheduled the preceding Monday. O'Connor testified that he was notified of the meeting on the previous Friday by McElwde, who said that he and Diamond would be in Chicago on April 21 to talk about several items, including sales.⁸ Newell had spoken to him about the union activities before his conversation with McElwde, but O'Connor testified that he did not recall telling McElwde about it at that time. The meeting plans were made by telephone, and there was no written agenda for the meeting.

Nykamp testified that the decision to discharge Koval was made on Tuesday afternoon, after his review of the revenue records, discussion with O'Connor, and additional conversation by telephone with Diamond.

Johns exhibited some uncertainty in his testimony as to when the decision was made, and testified that he could not recall whether it was before or after he heard of Newell's report of the salesmen's meeting. Johns testified that "all of us" played an equal role in the decision to discharge Koval, that he talked to Nykamp and O'Connor about the decision, and that "we had a joint meeting together" on Tuesday when the final decision was made.⁹

O'Connor testified that he was first advised concerning the possibility of a reduction of the sales force on Monday evening in a telephone call from McElwde. According to O'Connor, McElwde started by reminding him that 2 or 3 weeks earlier they had discussed the sales problem or situation in Chicago and then said that at the meeting that afternoon "we got quite serious

⁷ Apart from direct concessions to this effect, it appears that annually in April or May, Respondent reviews wages. In 1968 a number of employees, including Koval, received increases, which according to Nykamp essentially reflected cost-of-living increases. A review was made in April 1969, but none of the salesmen were then given increases and it apparently was not completed until after Koval's discharge.

⁸ O'Connor testified that it was possible that plans for the meeting had been made earlier without his knowledge.

⁹ Initially Johns was asked on cross-examination if he "received" the decision from Nykamp and answered affirmatively. I do not regard as significant the inconsistency between that reply and his later testimony on redirect examination, set forth above, as to how the decision was made.

about this particular matter and we are going to make a change in Chicago." O'Connor testified that McElwde then asked him, "[W]hat is your opinion as to what we should do in Chicago if we decide to take one salesman out of there. Which man do you think it should be." According to O'Connor, he expressed the opinion that it should be Koval, and McElwde said that after he spoke with Johns and Nykamp that evening or on the following day to get their opinions the decision would be final.

O'Connor also testified that, during the telephone conversation, McElwde asked him questions about "anything that I might know about any problem that was arising" and that he mentioned that Newell had told him he had been approached by a union steward.

F. Conclusions

The evidence set forth above presents a close question as to Koval's discharge. There is evidence to support the contention that Koval was discharged to destroy the Union's possible majority among the salesmen, but is not overwhelming. The factors supporting that contention are Respondent's knowledge of the union activities, the timing of the discharge, the efforts of Respondent's witnesses in their testimony to play down their knowledge and interest in the union activities, and the interrogation of Berndt. Thus, before Koval was discharged, through Newell Respondent became aware that Koval and Berndt were likely to sign union cards but that Newell would not do so. Koval's discharge followed hard on the heels of Newell's report, without notice and in the middle of a workweek. While precipitous discharges and layoffs for cause are not unknown, the haste with which Respondent implemented the decision to layoff a salesman allegedly based on a desire to cut costs does raise suspicion. In several respects Respondent's witnesses in their testimony unconvincingly sought to minimize their interest and concern over the salesmen's union activities, indicating greater concern over the salesmen's activities than they cared to admit. Johns' interrogation of Berndt immediately after Koval's discharge can be construed as linking the discharge to the union activities¹⁰ as well as displaying Respondent's concern over them.

Yet there is not only an absence of evidence of antiunion animus, apart from that which may be drawn from the interrogation, but Respondent has a history of dealing with unions without any evidence of inclination to interfere with employee self-organizational rights. While the interrogation of Berndt may be construed as supplying the missing evidence of hostility, the incident is not without ambiguity. The testimony uniformly shows that during Koval's discharge interview, until he dropped his "bombshell," there was no mention of the Union, and that, when he did, Respondent's representatives disavowed that this information affected

his discharge. Perhaps they were merely good actors who had prepared themselves to respond to a likely "bombshell," but, if so, it seems unlikely that Johns would have jeopardized the success of their act by engaging in needless interrogation of Berndt and disclosing what had been deliberately concealed from Koval.

In these circumstances, resolution of the issue as to Koval depends substantially on the extent to which the General Counsel succeeded in supporting his contention that the reasons advanced for Koval's discharge by Respondent were pretextual. As I have indicated above, the evidence as to the economic cause for the decision to layoff a salesman was scant and conclusionary in nature. Evidence as to sales experience was oral and not supported with evidence from Respondent's records. Yet little attention was focused in cross-examination on the basis for the decision that costs and the sales program needed to be reduced. There was no objection to Nykamp's testimony based on his memory as to Respondent's sales experience, and there was no request made that Respondent produce records to document this aspect of its decision. In addition, both Johns and O'Connor testified that the matter had been discussed by them with headquarters' officials on earlier occasions before the union activities of the salesmen had begun. Although one could wish for greater detail to aid in analyzing the validity of Respondent's claims that the decision to reduce the work force was economically motivated, one cannot conclude that the testimony on its face was either so improbable or so inadequate as to warrant its rejection.

The testimony as to the reasons for selecting Koval as the salesman to be released is even less vulnerable. While it is true that a request was made for documentary support for Nykamp's testimony, the request was not pursued, and no reason was advanced to discount Nykamp's claim that sales records on their face would reveal little without subjective interpretation. Although Johns' testimony leaves in some doubt Nykamp's claim that he again became dissatisfied with Koval in early 1969, there is little doubt that Koval's work was regarded as unsatisfactory a year earlier when Johns became sales manager. Bearing in mind that Respondent does not claim that Koval would have been discharged for cause but only that he was selected for layoff as the poorest of the three salesmen, I find insufficient cause to reject the testimony in support of that claim.

There remains for consideration whether the testimony as to the sequence of events and decisions culminating in Koval's discharge gives support to the claim of pretext. Here there are superficial discrepancies in the testimony, but in my view they are insufficient to cause its rejection. Although both Nykamp and Johns testified that they discussed the selection of Koval with O'Connor before the decision to discharge Koval was made, O'Connor testified only that he discussed the matter by telephone with McElwde who said that he would speak further with Johns and Nykamp and make the decision final. However, O'Connor was never asked if he discussed the matter further with Nykamp or Johns after his

¹⁰ Johns first asked Berndt if he knew what had happened, apparently referring to Koval's discharge, and then asked Berndt if he had also signed a card

telephone conversation with McElwde.¹¹ Although Johns' testimony as to the final decision was not entirely consistent, it is difficult to attach weight to the inconsistencies.¹²

In sum, although I have found some factors to support an inference of discrimination in the circumstances surrounding Koval's discharge, in my view they are not sufficient to carry the General Counsel's burden of proof without a further showing that the explanation offered by Respondent for Koval's discharge disclosed its pretextual nature. While my view of Respondent's explanation might have differed had the other factors in this case been strong enough to shift the burden to Respondent, I conclude that weaknesses in its explanation were not so great as to cause me to reject the explanation and find support for the complaint in its rejection. For these reasons, I conclude that, while the circumstances surrounding Koval's discharge raise substantial suspicion as to Respondent's motivation, a preponderance of the evidence does not support the conclusion that his discharge was caused by his union activities.

There remains for consideration the interrogation of Berndt. Its lawfulness does not turn upon Johns' intent in questioning him but upon the tendency of Johns' conduct to interfere with, restrain, or coerce Berndt in his union activities. That the interrogation had such a tendency appears from its circumstances and its relation to Koval's discharge. Thus, the interrogation was not casual, but Johns, Respondent's sales manager, called Berndt to his office expressly for that purpose and only for that purpose. Johns prefaced his question by calling Berndt's attention to the discharge of Koval, and then asked if he signed a card also. Whatever Respondent's actual reasons for discharging Koval, the manner of Johns' questioning conveyed the impression that there was a connection between Koval's discharge and his signing of a union card. In view of Johns' position with Respondent, the locale and the deliberate nature of the interrogation, the impression conveyed that the interrogation was related to Koval's discharge, and the fact that Berndt was one of the two remaining salesmen among whom the union activities occurred, I conclude that the interrogation of Berndt violated Section 8(a) (1) of the Act.

IV THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Respondent set forth in section III, above, occurring in connection with the Respondent's operations described in section I, above have

¹¹ Although O'Connor in answer to one question stated that there was no meeting on April 22 in apparent conflict with Johns' testimony from the context in which the question was asked it appears that O'Connor was referring to a meeting with Diamond, McElwde, Nykamp and Johns and not a meeting of Respondent's local officials.

¹² Johns testified initially that the decision to discharge Koval was made in the late afternoon then testified that he didn't know what time it was made and finally testified that he could not recall but that it was made in late morning or early afternoon. After rereading Johns' testimony I am inclined to believe that these discrepancies were as likely to have flowed from a failure of recollection as any other source.

a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V THE REMEDY

Having found that Respondent violated Section 8(a) (1) of the Act, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. Having found that the discharge of Daniel Koval did not violate the Act, I shall recommend that the complaint otherwise be dismissed.

Upon the basis of the above findings of fact and the entire record in this case, I make the following

CONCLUSIONS OF LAW

1 Wolverine Express, Incorporated, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2 Chicago Truck Drivers, Chauffeurs & Helpers Union of Chicago and Vicinity (Independent) is a labor organization within the meaning of Section 2(5) of the Act.

3 By coercively interrogating an employee concerning his union activities, Respondent has engaged in and is engaging in unfair labor practices affecting commerce within the meaning of Sections 8(a) (1) and 2(6) and (7) of the Act.

RECOMMENDED ORDER

Upon the basis of the above findings of fact, conclusions of law, and the entire record in the case, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, I recommend that Respondent Wolverine Express, Incorporated, and its officers, agents, successors, and assigns, shall

1 Cease and desist from

(a) Coercively interrogating employees with respect to their union or concerted activities

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights to self-organization, to form labor organizations, to join or assist Chicago Truck Drivers, Chauffeurs & Helpers Union of Chicago and Vicinity (Independent), or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in any other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959.

2 Take the following affirmative action which is necessary to effectuate the policies of the Act

(a) Post at its Oak Lawn, Illinois, place of business copies of the attached notice marked "Appendix"¹³ Copies of said notice, on forms provided by the Regional Director for Region 13, after being duly signed by Respondent's 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

(b) Notify the Regional Director for Region 13, in writing, within 20 days from the receipt of this Decision, what steps have been taken to comply herewith¹⁴

IT IS FURTHER RECOMMENDED that allegations in the complaint not found to have been sustained in the Decision herein be dismissed

¹³ In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board the findings conclusions recommendations and Recommended Order herein shall as provided in Section 102.48 of the Rules and Regulations be adopted by the Board and become its findings conclusions and order and all objections thereto shall be deemed waived for all purposes In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals the words in the notice reading Posted by Order of the National Labor Relations Board shall be changed to read Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board

¹⁴ In the event that this Recommended Order is adopted by the Board this provision shall be modified to read Notify said Regional Director in writing within 10 days from the date of this Order what steps Respondent has taken to comply herewith

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT question employees about their union activities or membership

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights to self-organization, to form labor organizations, to join or assist Chicago Truck Drivers, Chauffeurs & Helpers Union of Chicago and Vicinity (Independent), or any other labor organization, to bargain through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959

WOLVERINE
EXPRESS,
INCORPORATED

(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone

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

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 881 U S Courthouse and Federal Office Building, 219 South Dearborn Street, Chicago, Illinois 60604, Telephone 312-353-7572