

Alterman Transport Lines, Inc. and Freight Drivers, Warehousemen and Helpers, Local Union No. 390, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.
Case 12-CA-4063-3

October 29, 1968

DECISION AND ORDER

BY CHAIRMAN McCULLOCH AND MEMBERS
BROWN AND JENKINS

On July 29, 1968, Trial Examiner Jerry B Stone issued his Decision in the above-entitled proceeding, finding that Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed, 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. Respondent filed a brief in answer 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 and the entire record in this case, including the exceptions and briefs, 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 the complaint herein be, and it hereby is, dismissed.

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

JERRY B STONE, Trial Examiner. This proceeding, under Section 10(b) of the National Labor Relations Act, as amended,

was tried pursuant to due notice on May 2, 1968, at Miami, Florida

The original charge and an amended charge were filed on February 1 and April 1, 1968, respectively. The complaint in this matter was issued on April 5, 1968.

The issues in this case concern whether or not the Respondent discriminatorily discharged Johnnie L. Jeffers on January 25, 1968, because of his union and/or protected concerted activities and/or his participation and the giving of testimony in a hearing before the National Labor Relations Board. The issues are thus whether the Respondent has violated Section 8(a)(4), (3), and (1) of the Act

All parties were afforded full opportunity to participate in the proceeding. The Respondent has filed a brief in this matter which has been considered

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

FINDINGS OF FACT

I THE BUSINESS OF THE EMPLOYER¹

Alterman Transport Lines, Inc., the Respondent, is a Florida corporation, having its principal place of business at Miami, Florida, where it is engaged in the business of motor freight transportation. Respondent operates terminals in several cities located in Florida and in several cities outside the State of Florida. Respondent is licensed by the Interstate Commerce Commission and the Florida Railroad and Public Utilities Commission. Respondent annually derives gross revenues in excess of \$50,000 from such interstate transportation.

Considering the foregoing, it is found and concluded that Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act²

II. THE LABOR ORGANIZATION INVOLVED³

Freight Drivers, Warehousemen and Helpers, Local Union No. 390, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is now, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act

III. THE ALLEGED UNFAIR LABOR PRACTICES

A The Facts⁴

The facts for consideration as to the issues herein may be simply stated as.

1. It is established in *Alterman Transport Lines, Inc.*, 170 NLRB No. 12, (1) that the Respondent at its Tampa Terminal discriminatorily and pretextuously discharged an employee named Karl Duane Hicks, on March 24, 1967, because of its belief that Hicks was pro-union (pro-International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America) and (2) that Robert Burger, director of industrial relations for Respondent, was Respondent's agent responsible

¹ The facts are based upon the pleadings

² *Alterman Transport Lines, Inc.*, 170 NLRB No. 12

³ There is no real issue. The credited testimony of Kane overwhelmingly reveals the Charging Party to be a labor organization within the meaning of Section 2(5) of the Act. The facts found herein are based upon Kane's credited testimony.

⁴ The facts are virtually undisputed and are based upon the credited aspects of the testimony of Burger, Musial, Kane, stipulations of the parties, a fair inference therefrom, and official notice of the Board's decision in *Alterman Transport Lines, Inc.*, 170 NLRB No. 12.

for the decision to discriminatorily and pretextuously discharge Hicks

2 The Respondent has a policy which is (1) against hiring employees who have records of conviction for serious criminal offenses, and (2) against retaining as employees those who have records of conviction for serious criminal offenses

3 Apparently sometime in 1966 the Respondent commenced utilizing the services of the Miami Police Department Records and Identification Division in running criminal record checks on new employees. Around June or July 1967 the Respondent commenced sending older employees, who had not previously been checked through the Miami Police Department Records and Identification Division, to such department for a criminal record check.

4 Johnnie Lee Jeffers was initially hired at a date approximately 4 years before January 27, 1968. Approximately around the time of his initial hiring, Jeffers completed or caused to be completed an employment application form. Jeffers' employment application form contained questions designed to elicit information as to prior criminal convictions. Jeffers' completed employment application form falsely indicated that he had no prior criminal convictions when in fact Jeffers had a record of prior criminal convictions.

5 The Union, Freight Drivers, Warehousemen and Helpers, Local Union No. 390, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, commenced union organizational activities among Respondent's employees in August or September 1967.

6 During the union campaign (August or September 1967 to January 25, 1968) Jeffers and several other employees engaged in union organizational activity among Respondent's employees. The evidence does not reveal precisely when Jeffers' union activity started or precisely when Respondent acquired knowledge of Jeffers' union activity. The facts clearly reveal, however, that around November 15, 1967, that the Respondent knew of Jeffers' union activity.

7. On September 26, 1967, the Respondent sent Jeffers and several other employees to the Miami Police Department Civilian Identification unit for fingerprinting, identification card, and criminal record check.

8. On November 3, 1967, Freight Drivers, Warehousemen and Helpers, Local Union No. 390, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America filed a representation petition in Case 12-RC-2955 relating to representation rights as to certain employees of the Respondent.

9. Sometime between October 27 and November 15, 1967, the Miami Police Department notified Alterman Transport Lines, Inc., of its information concerning Jeffers' past criminal record.⁵

⁵ The information was of such a nature as to cause Respondent to believe that Jeffers had been charged with a number of crimes and had been convicted of aggravated assault, of breaking and entering, of attempted rape, of assault with intent to commit murder, and of carrying a concealed weapon.

⁶ I note with respect to Burger's credibility and to the question of motivation that Burger's affidavit given to the NLRB in the investigating stage, and Burger's testimony at the hearing with respect to his discussion with Alley as to the reasons Jeffers was not to be discharged at this time tend to reveal that Respondent and Burger were attempting to present a stronger case against Jeffers than existed. I am persuaded, however, from the weight of the evidence relating to company policy

10. Sometime between November 3 and 15, 1967, Robert Burger became aware of the information concerning Jeffers' past criminal record as referred to in 9 above.

Around the time that the Union had filed its representation petition in Case 12-RC-2955 (on November 3, 1967) Respondent's attorney, Granville Alley, advised Burger in effect that during the pending union organizational effort that Burger should consult with him before discharging any employees, that if anyone were discharged during such a time that, regardless of the reason, the Respondent could pick up a charge of unfair labor practices.

Upon becoming aware of Jeffers' criminal record, Burger determined that in accordance with company policy concerning employees with such criminal records Jeffers should be discharged. However, because of Alley's instructions, Burger contacted Alley. Burger told Alley in effect that he had determined to discharge Jeffers because of Jeffers' criminal record and because of company policy relating to employees who had criminal records of a serious nature. Burger also told Alley in effect that Jeffers was one of the employees engaging in activity on behalf of the Union. Alley told Burger that he should not discharge Jeffers at this time because the Respondent might "pick up" an unfair labor practice charge. Alley told Burger in effect that there were other reasons why he did not want Jeffers discharged, but Alley did not disclose such reasons to Burger.⁶

11. On November 27 and 28, 1967, Jeffers appeared at the representation hearing in Case 12-RC-2955⁷ and assisted the Union in the handling of its case.

12. Around December 13, 1967, Jeffers and a number of other employees of the Respondent were subpoenaed by the Union to appear as witnesses in the hearing in Case 12-RC-2955 to be resumed. On December 18, 1967, Jeffers and a number of the employees appeared at the hearing in Case 12-RC-2955 as witnesses available to the Union.

Sometime around December 18, 1967, apparently shortly thereafter, Sidney Alterman (Respondent's president), Attorney Alley, and Burger discussed the employees who were subpoenaed as witnesses. Burger told Alterman that Jeffers had a criminal record, that he had called Alley about this matter in November. Alterman asked in effect why Jeffers was still employed in view of the Company's policy to get rid of employees with serious criminal records. Burger told Alterman that he had been told by Attorney Alley not to discharge Jeffers at the time and that Alley had not given him any further instructions with regard to discharging Jeffers. Alley then told Alterman and Burger that he did not want Jeffers to be discharged at this time, that he intended to impeach Jeffers on the basis of Jeffers' criminal record if he were used as a witness in the representation proceeding.⁸ Alley told Burger to

concerning employees with criminal records, the logic of reasons advanced, and the logical consistency of all of the evidence that the facts are as set out and that the motivation for Jeffers' discharge was because of his criminal record and not because of his union activity, assistance to the union at representation hearing, or the giving of testimony at the representation hearing.

⁷ Involving the Charging Party (Union) and Respondent. The facts are based upon a composite of the credited testimony of Kane and the stipulations of the parties relating to the timing of the representation hearing in Case 12-RC-2955.

⁸ Apparently to be resumed on January 11, 1968

get certified copies of Jeffers' criminal record for his use in the hearing.

Thereafter, during the next week or the first few days of January 1968, Burger contacted by telephone Musial of the Miami Police Department⁹ Musial and Burger discussed the information that Musial had relating to Jeffers. Apparently Burger, by this time, was not exactly sure of what records Alley desired. Burger then telephoned Alley's law firm and asked exactly what was desired. Alley's law firm then sent, on January 5, 1968, a letter to Burger setting forth in effect that what was desired was a certified copy of the "Judgment of Conviction" and the manner of correct certification. Burger thereafter again telephoned Musial and ascertained where he could obtain the Judgments of Convictions. Burger thereafter, around January 8, 1968, obtained certified copies of Judgments of Convictions relating to Jeffers and furnished them to Attorney Alley.

14. Jeffers appeared at the representation hearing in Case 12-RC-2955 on January 11 and 22, 1968. On January 22, 1968, Jeffers testified as a witness in the aforesaid representation hearing. On this date Attorney Alley attempted to impeach Jeffers as a witness by use of the certified copies of Judgments of Convictions. The hearing officer at the representation hearing ruled that the certified copies of Judgments of Convictions (of Jeffers) were not admissible for such purpose and the said certified copies of Judgments of Convictions were placed into the rejected exhibit file of said case.

15. Apparently between January 22 and 25, 1968, the Respondent decided to discharge Jeffers. On January 25, 1968, Burger called Jeffers into his office for the purpose of terminating him. A transcription was made of the statements made and the parties stipulated that a written copy of the transcription attached to Burger's affidavit constituted the facts as to what was said and done. The transcribed facts are as revealed by the excerpts of such transcript attached to Burger's affidavit and herein set out.

*B Interview with John Jeffers by
R.H. Burger, January 25, 1968*

B: John, there are a couple of things that have come up I would like to ask questions about. The other day down at the hearing, correct me if I am wrong, but I believe you testified that you guessed at the questions on this written test you took. Now was that a true statement or not?

J: You have no right to ask me that.

B: I don't?

J: No you don't.

B: If we make you an A Driver on the basis you answer these questions of your own knowledge, I think that we do have a right to ask you that. In other words, if we are paying you money for being an A Driver and you got that classification on false pretenses, then maybe you are not an A Driver. I think that when we give you an evaluation test you—

J: Are you aware I am still under oath and you are having her write it down? I ain't going to talk to you (and rises and walks to door).

B: I don't want any misunderstanding or any hearsay about what's going on.

J: I ain't talking to you.

B: Now, wait a minute. You are still in our employ.

J: You can go ahead and fire me or tell me to go home. I won't talk to you in front of this lady writing down everything I say. I'd rather go and talk with Mr. Sidney first and then come in and try to explain. (Comes back and sits down) If you insist, I will tell you.

B: Did you guess at the questions?

J: Don't everybody guess at the questions? Some you know and some you don't know.

B: You said you can't read.

J: I said I couldn't read everything.

B: You can't read the application you signed with the company?

J: I don't know. I read it enough to pass it, didn't I?

B: I am talking about the application for employment you filled out when you came to work for us. Yet you said you didn't fill in the application for employment.

J: I didn't tell you that.

B: Is that your signature on the application?

J: Let me see it. (Looks it over) Yes, it's my signature.

B: Did you fill out this?

J: I can't answer that. I don't remember that far back (application dated 1/21/64).

B: You don't remember who filled it out?

J: I said I can't remember that.

B: Did somebody ask you the questions and then you answer them?

J: I don't remember. That's been a long time ago. What's the point whether I can read or not? I do my work.

B: That's not all that is necessary in working for the company. We have on the application the question asking whether you have ever been convicted of a crime, and you said no, and you signed it saying everything you said was true. And recently I found out this is a false application.

J: Maybe it is false.

B: Is it or isn't it?

J: How do I know. Only thing I know is being convicted of a felony. Wasn't a crime. I never went to a prison like Raiford. That's what I was under the impression of as a "crime." When they take the right from me to vote, then I figured that was a crime.

B: You don't understand or you just don't want to cooperate.

J: I gave you an answer.

B: When you say you don't remember, you certainly recognize your writing don't you?

J: Not necessarily. No.

B: You don't recognize your own writing?

J: Not necessarily.

B: You don't remember what happened when you came to work for the company, you don't remember signing and filling out the application?

J: At least I had to sign it.

B: You do remember that?

J: Yes.

B: Do you think anyone in this company would fill out something that was false?

J: I don't know that.

B: Well, John, every bit of evidence here shows you

⁹ Apparently Burger made a telephone call to the Miami Police Department for Musial in which he ascertained that Musial was not in

Apparently Burger left word for Musial to call him back and Musial later called Burger back.

didn't answer these questions truthfully, and if we had known you were convicted of a crime, chances are you would not be working here

J: Then who would you have working here? I'm not the only guy who's been in jail. Everybody in Miami's been in jail. Who's ashamed about going to jail? Anytime you're put in jail doesn't necessarily mean you were guilty.

B: You have a record of several things against you.

J: You got to be kidding.

B: The only thing is, we have the certified records of the court and there are 4 of them, and because of the fact you did not tell us about them at the time you came here and we just found out about it, I have no alternative but to let you go.

J: Okay then I want my pay, and I want a written statement why I have been fired—because I was in jail, in prison for carrying a concealed weapon. I did all those dirty things. And if necessary, I would do it again, not some of the things I did, but as far as carrying a concealed weapon, etc., I would do that again. If you don't mind, just give me a written statement why you let me go and I will be happy to go and punch out.

B: Did you punch in this morning?

J: Yes.

B: Well the only thing I would give you a written statement for is that you were discharged for falsifying the facts on your application that you had been convicted of a crime, since if we had known you had a criminal record, we would not have hired you. That is the reason I am letting you go.

J: I don't think that's it at all. I think it is because I am going to testify at the hearing. If you let persons go because they have been in jail, you would have only about three persons up there who had not been in jail.

B: We are not letting you go because of that, but because of your lying about it on your application, and because you have been convicted of a crime—four of them—you pleaded guilty to them. This is different than just going to jail.

J: I think you are firing me for my Union activities instead of my mistake. My record has been in your office ever since the time it came in; from the time you had the police card, you had my police record. When I got my picture and got fingerprinted, you got my police record, and all of a sudden you're going to let me go because I am in court. I am still under oath.

B: I understand that you are under oath. There are also other people in the same circumstances who are still working.

J: You go through all the applications and you will find out you will find a mistake somewhere on all of them. Far as I am concerned, it could have been an honest mistake. The best of my knowledge don't tell me what's a crime or what's a felony, or what. I was under the impression I never committed a crime until I went to a state prison. Just spending some time in jail I thought was a felony. I just wish you would give me a statement why you are letting me go. Give it to me in writing so I can show my next bossman.

B: I think the customary procedure is you would want a letter of recommendation. I don't think you would want to take one saying why you were discharged.

J: I think it would be better to have it that way then.

B: I will not give you a statement but I will not do anything to keep you from getting a job.

J: That's what you say, but I want a statement to show that I stole if I stole, or what, so I can show to the next man. He can say whether he would use me or not under those conditions.

B: What would you do if you were an employer and you hired someone and put him to work and when you checked around later you found the man had stole from you? Would you keep him or fire him?

J: It would have to be proved. What you are doing is firing me and trying me all over again about my past jail record. Everybody in Miami has been in jail at one time or another.

B: There is a possibility lots of people have been arrested, but don't say everybody in Miami.

J: Just about, if they've been here any length of time.

B: Well, as I said, the reason we're letting you go is because you did not tell the truth on your application.

J: Let me see the part where I don't tell the truth on the application.

B: (Shows application and reads to him question re having ever been convicted of a crime.) (Explains what is a crime.)

J: When I went to court, the lawyer didn't explain it that way to me. He said that unless they took away my right to vote then I had not committed a crime.

B: Do you have anything else you want to ask or say?

J: I just want a recommendation, not matter what kind it is.

B: As I told you before, I won't do anything or say anything to stand in your way.

J: I want a copy of that what she is writing.

B: You can't, it's a company record.

J: How about my application, is it company record too?

B: Yes, it's a company record. (After more pause): Do you have anything else you want to add?

J: No, nothing else. If I am fired, I guess you're going to pay me.

B: We'll have your check ready in about an hour.

J: I want it now.

B: (To Dave Levine) Go out and punch him out and let me have his time card.

B: Do you owe the Credit Union anything, John?

J: That's my problem. Whether I owe anything or not, you don't get any. I wish I owed the Credit Union something, then you would not get nare nickel. You wouldn't get nothing. I haven't signed nothing for you to take out.

B: If you did owe the Credit Union something, you would have it taken out of the check.

J: 'at's something. About 5 years ago, and you come ask me if I filled my record out. (Dave comes in with time card. Jeffers wants to see it.)

B: Show it to him. (As Dave hands to Jeffers, Jeffers folds it up and refuses to return it.)

B: If you want a copy, we can make you one, but that is company record. In other words, you are trying to keep a company record.

J: It's the only proof I have that Dave Levine punched me out. Don't make no difference about the time, just a

half hour. Dave Levine is not supposed to punch me out.

B: A supervisor has the right to punch someone out

J: He don't have no right to punch me out. If he signs he punched me out, I will give it back.

B: Are you going to take the card?

J: He handed it to me.

B: He did not hand it to you to keep but to see, and you know it.

J: Are you going to give me a copy of it (and hands it to RHB).

B: If you want, we will give you a copy but the original is for our company records.

J: Alright, I'm not afraid of any records. If I begin to think about it more, I will think of who filled that application out for me

B: Well, I hope so.

J: You know that's not my writing. I signed it on the bottom, but I can't even print. (Another pause)

B: If you want a copy of the time card, we will be happy to give it to you.

J: I want the card.

B: Will give you a copy later.

J: I wouldn't want to come back here and have you arrest me for stealing something, so will sit here until you give me a half-hour's pay.

B: Do you have a hand truck?

J: No I don't. It's up on the dock. (Pause) If I am fired, why are you taking insurance out? I wouldn't have any of that prepaid insurance; it's a fraud. Doesn't do working man any good. Just serves the company purpose just to say they have insurance.

B: Well, a lot of people have collected a lot of money for it.

J: It's not worth what they put into it.

B: We don't take out insurance money unless you authorize it.

J: If you fire me, it's prepaid. That means I am over-covered, so I want my money. If I desired to keep paying my insurance, how long would it last?

B: When you are terminated, your insurance is terminated.

J: Not explained in insurance.

B: Yes it is. You can keep life insurance but not the hospitalization insurance.

J: How high is it paid up to? How many days I got left before this insurance is dropped? (RHB explains period for transfer of life insurance) My insurance is paid up until Friday.

B: Do you want me to explain it to you or are you going to explain it to me?

J: Unless you won't give me the \$2.25, my insurance is covered until next Friday. This is the check where I get paid this week. This insurance business counts for this week.

B: No, it counts for last week.

J: The check I got last week counts for last week, this one is for this week. The whole thing is a technicality anyway. I'll find out whether I'm supposed to get it back.

B: Anything you have honestly got coming to you, I will pay you.

J: You already have deprived me of my job because you say I made a mistake. Because I was unable to write or print, someone else filled out my application. You asked me who, and I can't remember who filled it out, but I know I

signed it and I didn't try to read it because I knew it was impossible. Are you going to give me a copy of my time card?

B: We will keep the card, but if you want a copy, we will check with our legal department and will be happy to do it.

J: I thought this was the legal department.

B: No, this is the personnel department. If you are entitled to it, we will give it to you.

J: Dave Levine did punch me out, didn't he?

B: Yes, he did, because I told him to.

J: A supervisor has the right to punch the time card? I thought only the individual has that right.

B: Supervisors do, too. (Hands Jeffers check which has been brought in.) There, John, is the check for the half hour.

J: You took out my tax. I wanted it taken out. So—I won't get a copy of my time card?

B: You put a request to me in writing and we will send it to you. I will check and send you an answer and let you know

J: You sure you don't want me to come by and pick it up?

B: If there is any question about it right now, I will say that Dave Levine punched you out and I told him to. And these people in this room can vouch for that

J: Yes, they're all company people. I know they will lie, too. I know this man here has lied, and you have lied.

B: Have I? When?

J: When Don Milton was here. But I've said too much already. Why should I give you something to take to court.

B: I am sorry, John (as Jeffers leaves).

J: Don't be sorry. *I was only here for a reason anyway.*

RHB:JJ·JWS
Those present.
R. H. Burger
B. F. Stein
Dave Levine
Watefield Gerald
Juanita Simms (secretary)

16. Burger credibly testified to the effect that the Respondent had been involved in other National Labor Relations Board hearings and had never fired any employee because he had appeared as a witness or testified in such a proceeding.

Conclusions

Considering all of the foregoing, I am convinced that the evidence preponderates for a finding that the Respondent discharged Jeffers on January 25, 1968, for nondiscriminatory reasons within the meaning of Section 8(a)(3) and (1) of the Act.

The General Counsel's case essentially depends upon an evaluation of past evidence of Respondent's discriminatory motivation, of union and protected activity of Jeffers known to the Respondent, of the timing of the events, of instances of Burger's affidavit in the precomplaint investigatory stages of this proceeding and of Burger's testimony in this proceeding indicating a lack of frankness and forthrightness. The Respondent's case in defense essentially consists of Burger's testimony relating to company policy and motivation and in explanation of the chronology (timing) of events

Considering all of the evidence and the foregoing, I am

convinced that the weight of the evidence as to company policy persuades that a preponderance of the evidence militates for a crediting of Burger's testimony as to motivation and that the credited evidence reveals that Jeffers was discharged on January 25, 1968, because of company policy not to hire or retain in employment employees who had been convicted of serious crime. Accordingly, I conclude and find that the Respondent has not violated Section 8(a)(1), (3), and (4) of the Act by the discharge of Jeffers on January 25, 1968, as alleged.

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

CONCLUSIONS OF LAW

1. Freight Drivers Warehousemen and Helpers, Local Union No 390, International Brotherhood of Teamsters, Chauffeurs,

Warehousemen and Helpers of America is a labor organization within the meaning of Section 2(5) of the Act.

2. Alterman Transport Lines, Inc, the Respondent, is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

3. The evidence does not establish that the Respondent has engaged in conduct violative of Section 8(a)(4), (3), and (1) of the Act, as alleged.

RECOMMENDED ORDER

Upon the basis of the foregoing findings of fact and conclusions of law and the entire record, and pursuant to Section 10(c) of the Act, it is recommended that the complaint in this matter be dismissed in its entirety.