

Ira S. Bushey & Sons, Inc. and Waldron C. Watson United Marine Division, Local 333, National Maritime Union, AFL-CIO (Ira S. Bushey & Sons, Inc.) and Waldron C. Watson. Cases 29-CA-1142 and 29-CB-424

May 15, 1969

DECISION AND ORDER

BY MEMBERS FANNING, BROWN, AND ZAGORIA

On November 14, 1968, Trial Examiner Paul Bisgyer issued his Decision in the above-entitled proceeding, finding that Respondents had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety, as set forth in the attached Trial Examiner's Decision. Thereafter, the Charging Party filed exceptions and Respondent Company filed cross-exceptions to the Trial Examiner's Decision.

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 the entire record in this case, and hereby adopts the findings,¹ 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 in its entirety.

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

PAUL BISGYER, Trial Examiner: This proceeding, with all parties represented, was heard on September 3, 4, and 5, 1968, in Brooklyn, New York, on the consolidated complaint of the General Counsel issued on December 29, 1967,¹ and the separate answers of Ira S. Bushey & Sons, Inc., herein called the Respondent Company or Bushey, and United Marine Division, Local 333, National Maritime Union, AFL-CIO, herein called the Respondent Union or Union. The substantive issues raised by the pleadings are (1), whether since May 17, 1967, the

Respondent Company, through its wholly owned subsidiary, Diesel Vessel Operators, Inc., herein called DVO, discriminatorily refused to reinstate the Charging Party, Waldron C. Watson, on vessels serviced by DVO and to grant him seniority rights because he was not a member of the Union or did not have union clearance and thereby violated Section 8(a)(3), (2), and (1) of the National Labor Relations Act, as amended; and (2), whether on May 19, 1967, the Respondent Union's business agent, John D. Jansen, threatened Watson to prevent him from working and to cause employers generally to discharge him, unless and until he secured approval of the Union's Executive Board, thereby involving the Union in a violation of Section 8(b)(1)(A) of the Act.² At the conclusion of the hearing, the parties argued their positions orally and thereafter filed supporting briefs. The motions made by the Respondents at the hearing to dismiss the complaint on procedural and substantive grounds, on which ruling was reserved, are granted to the extent indicated in my decision below.

Upon the entire record, and from my observation of the demeanor of the witnesses, and with careful consideration being given to the arguments advanced by the parties, I make the following:

FINDINGS AND CONCLUSIONS

I. THE BUSINESS OF THE RESPONDENT COMPANY

Bushey, a New York corporation with its principal office and place of business in Brooklyn, New York, is engaged in ship repair and construction and the performance of related services. In the course and conduct of these operations, Bushey annually purchases goods and materials valued in excess of \$50,000, which are shipped directly to its Brooklyn shipyard from sources located outside the State of New York.

It is conceded, and I find, that Bushey is engaged in commerce within the meaning of Section 2(6) and (7) of the Act. I further find that effectuation of statutory policies warrants the Board's assertion of jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

It is admitted that the Respondent Union is a labor

¹The consolidated complaint is based on separate charges filed in Cases 29-CA-1142 and 29-CB-424 on November 3, 1967. Copies of the respective charges were duly served on the Respondent named therein by registered mail on the same day.

²Insofar as relevant, Sec 8(a) makes it an unfair labor practice for an employer

- (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7,
- (2) to . . . contribute financial or other support to [any labor organization] . . . ;
- (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage membership in any labor organization . . .

Sec 8(b), in relevant part, makes it an unfair practice for a labor organization or its agents —

- (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in Section 7.
- Sec. 7 provides, among other things, that

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, . . . and . . . to refrain from any or all such activities . . .

¹There appears a typographical error in the first line of the last par. of III, B, 2, of the Trial Examiner's Decision. The date, October 31, 1968, should read October 31, 1966.

organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Procedural Questions

Before considering the merits of the alleged unfair labor practices, it may be appropriate first to dispose of the contention vigorously urged by the Respondents that the complaint should be dismissed for the reason that the Regional Director acted arbitrarily in reinstating it and scheduling a hearing, *ex parte*, after he had previously dismissed the complaint because of the Charging Party's failure to cooperate with the Regional Office in its prosecution. Specifically, the Respondents argue that, not only was it unfair and a denial of due process to reopen this case without giving them prior notice and an opportunity to be heard before action was taken, but also the General Counsel has not shown sufficient facts to justify the reinstatement of the complaint. In support of their position, the Respondents cite the Board's decision in *Forrest Industries, Inc.*,³ where it was held, under the special circumstances of that case, that the General Counsel's denial of the charging party's first motion for reconsideration of the General Counsel's ruling which sustained the Regional Director's refusal to issue a complaint was dispositive of that proceeding and that it would not effectuate the policies of the Act to proceed further with the matter. The Board, accordingly, dismissed the complaint without reaching the merits. I find that the situation in the present case is entirely different from that in *Forrest Industries* and that the principle of exhaustion of procedural remedies therein enunciated is not applicable here.

The facts in the present case may be summarized, as follows: On August 14, 1967, the charging party, Watson, filed an 8(b)(2)⁴ and 1(A) charge (Case 29-CB-394) against the Union alleging, in substance, that since about May 17, 1967, it caused Bushey discriminatorily to terminate Watson's employment for reasons other than his failure to tender periodic dues or initiation fees and for his activities in criticizing the Union's hiring policies and by these and other acts restrained and coerced Watson in the exercise of his statutory rights. No charge, however, was filed against Bushey at this time. On September 14, 1967, the Regional Director approved Watson's request to withdraw the charge against the Union and so notified that organization and DVO. Seven weeks later, November 3, Watson instituted the present proceedings by filing separate charges against the Union and Bushey and a complaint issued on December 29, 1967.⁵ The charge against the Union contained the same allegations as those in the prior one, while the charge against Bushey alleged that since on or about May 17, 1967, Bushey, at the request of the Union, refused to reinstate Watson for reasons other than his failure to tender periodic dues and initiation fees and thus violated Section 8(a)(1) and (3) of the Act.⁶

³168 NLRB No 98.

⁴Sec. 8(b)(2) of the Act makes it an unfair labor practice for a labor organization or its agents

to cause or attempt to cause an employer to discriminate against an employee in violation of . . . [Section 8](a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership

⁵I find no merit in the Respondents' affirmative defense that the

On April 4, 1968, the Regional Director issued an order dismissing the complaint and cancelling the hearing scheduled for April 22, 1968, for the stated reason that the Charging Party failed to cooperate in these proceedings.⁷ A copy of this Order was served on all the parties. Thereafter, on May 29, 1968, the Regional Director, also on his own motion, issued an Order in which he stated that it appeared that the Charging Party's failure to cooperate in these proceedings "was due to his serving in the United States Merchant Marine in Vietnam during the pendency of these proceedings and his inability to communicate with said Regional Director because his vessel was the subject of enemy action." Accordingly, the Regional Director rescinded his April 4 dismissal of the complaint and rescheduled the case for hearing. A copy of this Order was served on all the parties the same day by registered mail and, as far as the record is concerned, there is no indication that either Respondent objected to the Regional Director's action until the hearing in this case, which was held 3 months later.

Watson's testimony concerning his asserted noncooperation, which is uncontradicted and credited, is, as follows: On December 8, 1967, prior to the issuance of the complaint herein, he signed up on the U. S. *Tourist*, a vessel owned by Clipper Marine Corporation, going to Vietnam with a full cargo of ammunition. Before leaving the country, he notified the Union and the Regional Office investigator handling this case of his intentions and furnished the investigator with his local mailing address. On March 27, 1968, Watson returned to the United States.

There can be little question that the Regional Director acted within his authority in reinstating the complaint and rescheduling the hearing. The possession of such authority is clearly implicit in Section 102.19 of the Board's Rules and Regulations, which provides for an appeal to the General Counsel from a Regional Director's refusal to "reissue" a previously withdrawn complaint. Perhaps it might have been better practice had the Regional Director given the Respondents advance notice of his proposed action to reinstate the complaint and reopen the proceedings and to afford the parties an opportunity to be heard. However, although the Respondents were promptly

allegations of the complaint were barred by Sec. 10(b) which provides that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made . . ."

It is quite clear from the dates of the alleged violations and the filing and service of the respective charges, previously noted, that the issuance of the complaint was not barred. Nor was the Regional Director precluded from proceeding on these charges simply because the Charging Party was permitted to withdraw his earlier charge against the Union Cf *Jackson Tile Manufacturing Company*, 124 NLRB 218, 220, fn. 1, enf'd 282 F.2d 90, 92 (C.A. 5).

⁶As previously indicated, the complaint alleges that the Company unlawfully denied Watson reinstatement and seniority rights because he was not a member of the Union or did not have union clearance and that the Union unlawfully threatened Watson with loss of employment. It, however, does not allege that the Union caused Bushey to discriminate against Watson. I find, contrary to the Respondents' contention, that the unfair labor practices alleged in the complaint are related to those alleged in the charges. Additionally, with respect to the Union, the allegation in the applicable charge that the Union coerced and restrained Watson in the exercise of his Section 7 rights by "these and other acts" clearly encompasses the 8(b)(1)(A) allegations in the complaint. I therefore find that the charges are sufficient to support the complaint herein. *N.L.R.B. v Fant Milling Company*, 360 U.S. 301, 306-309.

⁷Sec. 102.18 of the Board's Rules and Regulations authorizes the Regional Director, on his own motion, to withdraw a previously issued complaint before hearing

served with a copy of the Regional Director's Order reinstating the complaint and rescheduling the hearing, there is no evidence that they protested his action until the hearing in this case. Moreover, the Trial Examiner offered the parties an opportunity to present all the facts relevant to the propriety and fairness in reopening these proceedings so that whatever prejudice the Respondents suffered was inconsequential. After all, the "Constitution protects procedural regularity, not as an end in itself, but as a means of defending substantive interests."⁸

On the basis of all the facts and circumstances surrounding the dismissal of the complaint and its reinstatement, I find that the Regional Director did not act arbitrarily in reopening these proceedings and that the Respondents were not deprived of a fair and adequate opportunity to demonstrate the impropriety of the Regional Director's action. On the contrary, I find that the reinstatement of the complaint well served the interests of justice and effectuation of the policies of the Act.

B. The Merits

1. Introduction; Issues

DVO is a wholly owned subsidiary of the Respondent Bushey, both of whom the General Counsel contends constitute a single, integrated employer. It is engaged in the business of furnishing various services to vessels owned and operated by the Bushey industrial complex and other unrelated independent enterprises, such as Liquid Carriers Corp.,⁹ which owns and operates three chemical barges, including the *Atlantic*, involved herein. Among other things, DVO hires, discharges, and pays the wages of, the crews that man the vessels it services and maintains the payroll records for the shipowners. The licensed and unlicensed personnel on board these vessels are represented by the Union pursuant to three multiemployer collective-bargaining agreements, each separately covering seamen employed by named employers on the following types of vessels: (a) self-propelled oil tankers; (b) non-self-propelled oil tankers; and (c) tugboats and self-propelled lighters.¹⁰ DVO is named as an employer in all the contracts while Liquid Carriers is named only in the non-self-propelled oil tankers contract.¹¹ These contracts have valid union security provisions requiring membership in the Union within 31 days after being hired, as a condition of employment. However, noncompliance with these provisions is not urged as a defense to the alleged unfair labor practices.

Two questions are presented for determination, one involving the credibility of Watson's testimony that he had a conversation with DVO's personnel manager, William A. Watt, in which Watt stated that he would not reemploy him because he was not a union member and therefore had no seniority rights and another conversation

with the Union's business agent, John D. Jansen, who allegedly threatened to keep him from working unless he obtained approval from the Union's Executive Board. Watt and Jansen categorically denied ever having had such conversations. To place the alleged conversations in proper context, the events preceding and following these incidents will be discussed below. The second question relates to Respondent Bushey's responsibility for Watt's, alleged discrimination and is reached only if Watson's testimony is found to be trustworthy.

2. Watson's employment by DVO; his application for union membership

In September 1966, Watson sought employment with DVO.¹² After filling out an application, Personnel Manager Watt, whose function it was to hire the deck crews, informed Watson to keep in touch with him on October 3, when a deckhand job opened up on a self-propelled motor tanker, the *Philip Lemler*, owned by a corporation by that name, Watt offered it to Watson who accepted. Six days later Watson asked for a transfer to another vessel. Watt granted the request and assigned him to the *George Whitlock, The Second*, also owned by a corporation by that name. Watson worked on this vessel until December 15, 1966, when he either quit or was involuntarily replaced. Apparently, these vessels were Bushey enterprises.

On October 31, 1968, while Watson was still employed on the *George Whitlock*, the vessel was visited by Union Business Agent Jansen whose duties included, among others, enforcing the union security provisions of the bargaining agreements applicable to the vessels serviced by DVO. Upon learning from Watson that he was not a member of the Union, Jansen informed him that he was required to join that organization under the governing contract — something that Watt had also told him when he was first hired. Watson expressed his willingness to do so and paid \$40.50 requested by Jansen in payment of 3 months' dues and certain assessments. Jansen also advised him that he would receive a notice from the Union to appear before its Executive Board for approval of his membership application,¹³ at which time or within 31 days after his employment, whichever was later, he would have to pay a \$250 initiation fee. Clearly, Jansen acted properly in informing Watson of his contractual obligation to join the Union.¹⁴ As will later appear, Watson's application was ultimately rejected by the Executive Board and the monies he had paid to Jansen were refunded.

3. Watson's employment on the *Atlantic*; his physical disability; his first notice to appear before the Union's Executive Board

After Watson left his job on the *George Whitlock*, Watt next heard from Watson about the middle of

⁸*Fay v Douds*, 172 F.2d 720, 725 (C.A. 2).

⁹Although Bushey owns 50 percent of the stock of Liquid Carriers Corp., it is not contended that it is an integral part of the Bushey industrial complex.

¹⁰Specifically, these agreements are between the Union and Marne Towing and Transportation Employers' Association for and on behalf of its members operating the indicated type of vessels and have the same term running from January 29, 1967, to January 31, 1970.

¹¹Bushey, which operates a shipyard, is not named as an employer in any of the three contracts. Its shipyard employees, however, are covered by a collective-bargaining agreement with Local No. 13 of the Industrial Union of Marine and Shipbuilding Workers of America, AFL-CIO.

¹²It appears that in August 1966, Union Business Agent Jansen had referred Watson to a job on a barge owned by Sears Oil Company and informed him of his obligation to join the Union within 31 days under the terms of the prevailing bargaining agreement. Employment on that barge did not last long.

¹³This finding is based on Jansen's testimony, which I credit. Although in the course of his direct examination Watson testified that Jansen told him that his membership was subject to "ratification" by the Executive Board, he, however, indicated during his cross-examination that the Executive Board was not mentioned.

¹⁴*N.L.R.B. v Hotel Employees Local 568*, 320 F.2d 254, 258 (C.A. 3), enfg. 136 NLRB 888, 896.

January 1967, when Watson called him on the telephone for employment on a barge. As Watt expected a job on a chemical barge to open up in a day or two, he told Watson to call back at that time. On January 20, Watt rehired Watson as a mate on the *Atlantic*, one of three barges owned and operated by Liquid Carriers Corp., a company unrelated to the owners of the two other vessels to which he was previously assigned. Watson worked on the *Atlantic* until Saturday, January 28, 1967, when it docked at Providence, Rhode Island. Because of an impending strike by the Union, he was temporarily ordered off the barge by the captain.

While working on the *Atlantic* before his employment was interrupted by the strike, Watson sustained a painful shoulder injury. On February 3, 1967 (Friday) Watson went to the Bushey shipyard where DVO's offices were located to secure a master's certificate of service which would entitle him to medical treatment at the U. S. Public Health Service Hospital in Staten Island, New York. At the shipyard gate he met Watt who told him to stand by his telephone because he expected the strike to be settled in the next 2 or 3 days. At this time Watson informed him of his injury and requested a master's certificate. Watt referred him to DVO's port engineer, Joseph Place, who issued it. On February 5, Watson visited the hospital and became an outpatient for some 3 months, receiving treatment during that period. On each hospital visit Watson was given a Medical Report of Duty Status in quadruplicate which, until his final treatment, noted that he was "Not Fit for Duty." Watson regularly filed a copy of these reports with Whitehall Brokerage Company, an insurance carrier to which Watson had been referred by Watt.¹⁵ On the basis of these medical reports Whitehall Brokerage made periodic payments for maintenance and cure to Watson.¹⁶

During Watson's period of disability he received a notification from the Union dated March 16, 1967, to appear before the Executive Board on April 5, in connection with his membership application. This letter also advised Watson that his initiation fee had to be paid at or before the time of his appearance and that his failure to do so would result in the termination of his employment. Watson, however, did not come before the Executive Board on the scheduled date but telephoned the union office and informed "the girl" who answered that he would be unable to keep the appointment. Although Watson testified that the reason he did not appear before the Board was his disability, it appears that during this period, in addition to making periodic visits to the hospital for treatment, he made occasional visits to the insurance carrier to pick up his maintenance and cure checks, to places away from home to obtain his mail, and to see friends.

4. Alleged discrimination and threat of loss of employment

On May 16, 1967, Watson was discharged as an outpatient by the U.S. Public Health Service Hospital, receiving a final medical report that he was fit for duty. The next morning, May 17, he presented this report to the

¹⁵On February 24, 1967, in Watt's presence, Watson prepared an accident report which Watt mailed to Whitehall Brokerage Company.

¹⁶The applicable bargaining agreement makes provision for such allowances to injured seamen. It is not particularly important to the issues in the case whether Watson also furnished Watt with copies of these medical reports which, according to Watt's testimony, he had instructed Watson to do.

insurance carrier and was given his last maintenance and cure allowance.

Watson testified that he thereupon made a call to Watt from a public telephone in the lobby of the building in which the insurance company was located and the following conversation ensued: Watson informed Watt that he was fit for duty, that he had submitted the hospital medical report to that effect to Whitehall Brokerage Company, and that he wanted to return to work. When Watt replied that he could not rehire or help him, Watson protested that he was in the employ of Liquid Carriers and at the time of his injury was number 11 on the seniority list consisting of 16 employees working on Liquid Carriers' four boats.¹⁷ Watt disagreed with Watson that he had any seniority rights for the reason that he was not "a full member" of the Union, adding that the seniority list included only "full members" of that organization. The conversation ended with Watt advising Watson to straighten out his membership problem before he would be rehired.

Watt emphatically denied that he ever had a conversation with Watson of the nature related above, either over the telephone or in person. Moreover, as previously discussed, Watt at the hearing disputed Watson's claimed seniority and his assertion that Liquid Carriers' total crew complement exceeded nine men.

Continuing with his experience on May 17, Watson testified that immediately after his telephone conversation with Watt, he proceeded to the union offices, which were on the same floor as Whitehall Brokerage's offices, "to get a clarification [of his rights] from the Union." In the hallway he met Captain Joseph O'Hare, the Union's president. According to Watson's uncontradicted testimony, he briefly explained his conversation with Watt. Specifically, he told O'Hare that he had been working "in Bushey" and had been "off sick" because of an injury and that he could not return to his boat because he had no seniority in the "company" and was not a union member. In answer to Watson's inquiry as to when seniority began, O'Hare replied without equivocation that it commenced the "minute" he started to work for the "company," regardless of his union status. O'Hare was not produced as a witness nor was his absence explained.

Despite the fact that it assertedly became apparent to Watson that Watt's refusal to rehire him violated his seniority rights whose existence was confirmed by O'Hare's views,¹⁸ and despite Watson's expressed desire to resume his former employment, he admittedly did not communicate with Watt to apprise him of his discussion with O'Hare in an effort to persuade Watt to change his mind and rehire him. Instead, Watson testified, he waited until May 19, a Friday, when Business Agent Jansen was regularly scheduled to be in the office, to telephone Jansen regarding his inability to get his job back. Watson gave this account of his conversation with Jansen: He told Jansen that he was fit for duty and wanted to return to

¹⁷According to Watt's testimony, which appears to be more reliable and I credit, Liquid Carriers had only three boats, each of which employed three men, and Watson was "at the bottom of the [seniority] list." Moreover, Watt credibly testified, without contradiction, that during the period from May 17 to November 1, 1967, only one deckhand (Roald Aune) was hired on a Liquid Carriers boat about September 25, 1967, and that that employee's initial employment with Liquid Carriers antedated Watson's. It is also undisputed that seniority acquired on the vessels owned by one company does not carry over to employment on vessels owned by another company.

¹⁸On cross-examination Watson conceded that, after speaking to O'Hare, he understood he had a right to return to work.

work on "that boat"; that he had called the "company" up and was told that he had no seniority rights and could not be rehired because he did not have "full membership" in the Union; and that he had spoken to O'Hare who told him that he did have seniority rights with the "company." Jansen, however, answered that he could do nothing for Watson and informed him that he would have to appear before the Executive Board, which was scheduled to hold a meeting in 3 weeks, before he "could be ratified or rehired." Jansen also warned Watson that in the meantime he had orders to pull him off any boat in the harbor under the Union's jurisdiction on which Watson was found. Although the statements thus attributed to Jansen concerning Watson's employment rights could not be reconciled with those of O'Hare who was Jansen's superior, Watson did not challenge Jansen's authority to keep him from working because "there is a chain of command" that he was observing and he was "not going out here and raising hell on . . . [his] own." Concededly, Watson did not report to O'Hare either that Jansen was disregarding O'Hare's views regarding "the law or the rules."

Jansen denied that he engaged in the telephone conversation in question or that he at any time made any threats to Watson of the nature related above. Jansen also testified that he never requested DVO to withhold employment from Watson. Watt corroborated Jansen in this latter respect, testifying further that no union representative or official discussed Watson's membership status with him.

5. The June 7 Executive Board meeting; denial of membership to Watson; the first unfair labor practice charge against the Union

About 2 weeks prior to the Executive Board meeting scheduled for June 7, 1967, to consider some 10 membership applications, Watson told Jansen that he did not have the money to pay the \$300 initiation and other fees required for membership. Jansen suggested that he discuss the matter with Captain O'Hare or Union Secretary-Treasurer Willard Quick. A few days later Watson spoke to O'Hare who advised him that when he appeared before the Executive Board to explain his financial difficulty and expressed his belief that the Board would probably "clear" him so that he could return to his job. Watson, however, did not mention his alleged May 19 conversation with Jansen.

Watson attended the Executive Board meeting at the stated time. O'Hare, as union president presided. Of all the applicants only Watson was turned down on O'Hare's recommendation after O'Hare accused him of being part of an insurgent group in a sister local of the Union, now defunct, which group was supported by a competing labor organization, and that he had cussed O'Hare out at one of the meetings.¹⁹

On August 14, 1967, Watson filed his first unfair labor practice charge against the Union, alleging that the Union, in violation of Section 8(b)(1)(A) and (2) of the Act, caused Bushey discriminatorily to terminate his employment. However, no charge was filed against Bushey at that time. In reply to the Regional Director's written request for a statement of position, O'Hare sent a letter

dated August 22 in which he denied the truth of the charges. Explaining the Union's refusal to grant Watson membership, O'Hare stated:

Mr. Watson was formerly a member of the now defunct Local 335 of the United Marine Division, National Maritime Union, AFL-CIO, which local was an affiliate of this Local (Local 333). Mr. Watson recently made an application for membership in this Union, but his application for membership was denied because of his history of disloyalty to the United Marine Division of the National Maritime Union when he was a member of Local 335. However, the denial of his application for membership to this Local was in no way related to, affected or influenced the termination of his employment, or his continued unemployment with his previous employer or any potential employer.

On September 14, 1967, the Regional Director permitted Watson to withdraw these charges. At some undisclosed time the Union refunded to Watson the \$40.50 he had paid Jansen on October 31, 1966.

6. Watson's August 22, 1967, request for reemployment; subsequent events

After his alleged May 17 conversation with Personnel Manager Watt, Watson made no further effort to seek employment at DVO until about August 22 when he made a telephone call to Watt. At this time Watson's original unfair labor practice charge against the Union was under investigation by the Regional Office.²⁰ Watson testified that on this occasion he again asked Watt for a job and that Watt's reply was simply, "No, out," that he could not rehire him. Watson further testified that he made no response. On cross-examination, Watson added to his testimony that, when Watson rejected his request, Watt also remarked that "you [Watson] had a labor suit against us with the National Labor Relations Board and now you have withdrawn it. No . . . I will not rehire you." Obviously, the additional remarks attributed to Watt could not possibly have been made because the only unfair labor practice charge filed by Watt at this time was against the Union and was withdrawn 3 weeks *after* the telephone conversation in question.

Watt admitted that on August 22 Watson telephoned him, inquiring whether there were any job openings and that he (Watt) replied in the negative. However, according to Watt, he also informed Watson that he had previously tried to reach him by telephone at a number which Watson had once given to him in order to offer him a job²¹ but that the telephone company advised him that there was no such number listed. Watt further testified that Watson either made no reply or mumbled something that he did not hear. This conversation closed, Watt testified, with the customary suggestion he makes to job applicants, that Watson keep in touch with him every few days to check whether a vacancy was available. Watt also testified that he had not seen or spoken to Watson since the date of this conversation.

¹⁹It appears that following the Union's rejection of his membership application Watson applied for, and was receiving, unemployment insurance benefits. According to Watt's uncontradicted testimony, no individual connected with the State Unemployment Insurance Department communicated with him personally with respect to Watson's employment status.

²¹Watt testified that he tried to communicate with Watson in the beginning of June and again in the summer to offer him a job which, as is usual in the maritime industry, had to be filled immediately. If such were the case, the job would have been on a vessel not owned by Liquid Carriers

¹⁹The foregoing account reflects the sum and substance of Watson's uncontradicted testimony. Jansen, who was not present at the Executive Board meeting, testified that he knew of no other membership application which was rejected by the Union in the past 10 years

Although Watson conceded on cross-examination that it was a general practice for temporarily laid off employees to communicate with Watt to ascertain whether any job vacancies opened up, there is no evidence that he did since August 22.²² However, on September 14, 1967, the day the Regional Director approved Watson's request to withdraw his unfair labor practice charge against the Union, Watson, at the suggestion of the Regional Office, filed with the Union a grievance against DVO, complaining about DVO's refusal to reemploy him. On November 3, while the Union was still in the process of making arrangements for a hearing before a grievance committee of employee and union representatives, as provided in its collective-bargaining agreement,²³ Watson filed the charges against Bushey and the Union which initiated the instant proceedings.

On December 8 Watson appeared at the union office and advised Office Manager Edward Olsen that he was shipping out to Vietnam on a vessel under the jurisdiction of another labor organization. Olsen thereupon conveyed this information to Business Agent Jansen who, on December 12, wrote a letter to Watson. After alluding to Watson's conversation with Olsen in which Watson advised Olsen of his new employment, Jansen stated:

We assume that in view of your new employment that you do not wish to pursue your grievance for re-employment with Diesel Vessel Operators.

You also advised Mr. Olsen that you have vacation coming to you from Diesel Vessel Operators and if you will be good enough to write us and give us the details of your claim for vacation pay, we will pursue that matter further.

Although Watson returned to the United States on March 27, 1968, he did not answer this letter until on or about August 5, 1968. In his reply, Watson referred only to Jansen's offer to pursue his claim for vacation pay from DVO, making no comment concerning Jansen's assumption that Watson wished to drop his grievance to seek reemployment with DVO. Respecting vacation pay, Watson stated that "[s]ince my employment there was terminated against my own will and neither the Company nor the Union has given me any kind of explanation as to why," he was entitled to vacation pay for the time he worked for DVO.²⁴ When confronted on cross-examination with the discrepancy between this statement and his testimony that Watt on May 17, 1967, had told him that he could not be rehired because of his nonmembership in the Union, Watson testified that the statement in the letter was true insofar as his claim for vacation pay was concerned. As a rebuttal witness, however, Watson indicated that the statement in his letter was intended to convey the idea that he was "discharged without cause."

Corp. in view of the fact that, as Watt also testified, during the period from May 17 to November 1, 1967, he had hired only one individual, Roald Aune, for work on a Liquid Carriers vessel about September 25, 1967

²²However, there is a conflict in testimony, which need not be resolved, as to whether Watson had several conversations with Watt beginning in November 1967 concerning Watson's claim for reimbursement for travel expenses incurred when he was ordered off the *Atlantic* the preceding January 28, and for vacation pay he allegedly earned during the period of his employment with DVO.

²³No question is raised that the Union violated Sec. 8(b)(1)(A) of the Act in failing to assist Watson in securing employment with the Company through the contract grievance procedure. Cf. *Chauffeur's Union Local 923*, 172 NLRB No. 248

²⁴Watson also stated in the letter that he did not answer sooner because

C. Concluding Findings

As indicated above, dispositive of the factual issues whether Personnel Manager Watt discriminatorily refused to rehire Watson and recognize his seniority rights and whether Business Agent Jansen unlawfully threatened to prevent Watson from working without the Union's Executive Board's approval, is the reliability of Watson's testimony concerning the separate telephone conversations he claimed to have had with Watt and Jansen on May 17 and 19, respectively, in the face of their unequivocal denial that such conversations ever occurred. To resolve this irreconcilable conflict is not a simple matter. Obviously, the search for truth is not always rewarding and the most the trier of the facts can derive is an honest conviction as to where the truth probably lies.

From a careful evaluation of the testimony of these witnesses, in light of their demeanor, their demonstrated attitudes and the surrounding circumstances, I am not convinced that greater credence should be accorded to Watson's account of the conversations in question than to the contradictory testimony of Watt and Jansen. If, as Watson testified, Watt told him that he could not rehire him or recognize his seniority because he was not "a full member" of the Union,²⁵ but would reemploy him when he straightened out his status with the Union, I find it difficult to understand why Watson did not immediately communicate with Watt after speaking to Union President O'Hare to apprise him that O'Hare had advised him that an employee could not be deprived of seniority because of lack of union membership. Certainly, Watson's failure to convey O'Hare's views to Watt cannot be squared with his asserted desire to resume work or with his visit to the union offices to secure a "clarification" of his job rights after Watt declined to rehire him. Of course, Watson's uncontroverted testimony of his discussion with O'Hare might suggest that Watson was prompted to talk to O'Hare because of Watt's action. However, such evidence is purely self-serving as far as the Respondent Bushey is concerned and hence without probative value in establishing a case against Bushey. Moreover, it can just as reasonably be inferred that Watson made the inquiry in order to ascertain his rights before seeking reinstatement because of his default in appearing before the Union's Executive Board on April 5, 1967, in connection with his October 1966 membership application.

Another factor which militates against crediting Watson's testimony is the fact that in his August 1968 letter to Jansen, Watson stated that he was involuntarily terminated by "the company" without being given "any kind of explanation as to why." This plainly contradicts his testimony that Watt assigned Watson's lack of union membership as the reason he was not reemployed. I am not persuaded by Watson's justification for the contradiction given under cross-examination that the letter was only concerned with securing vacation pay nor by his later explanation given as a rebuttal witness that he intended to say in the letter that he was discharged

he had only recently received Jansen's letter and had not been fit for duty since his return to the United States. The letter discloses that it was written at the U S Public Health Service Hospital in Savannah, Georgia.

²⁵In view of the fact that Watson was at the bottom of Liquid Carriers' seniority list and that apparently there was no opening on any of its vessels until employee Aune was hired on September 25, 1967, it is highly unlikely that, in response to Watson's asserted claim that he was entitled to his job on the basis of his seniority, that Watt would state that Watson had no seniority because he was not "a full member" of the Union, as Watson testified.

without cause.

Also detracting from Watson's testimony is the absence of any evidence that at the time of the purported May 17 conversation, Watson had become *persona non grata* to the Union and specifically to O'Hare. Indeed, there is nothing in the record to show that O'Hare was other than friendly to Watson on that date. Furthermore, except for the purported May 17 conversation, there is no evidence that Watt knew that Watson had not acquired membership in the Union or was not acceptable to the organization.²⁶ In this context, and without more persuasive evidence or corroborating circumstances, it would border on speculation to conclude that Watt had imposed union membership as a condition of Watson's employment.

Watson's reliability as a witness is also not aided by his testimony concerning his telephone conversation with Watt on August 22, 1967, 2 1/2 months after the Executive Board rejected his membership application.²⁷ Although on direct examination Watson testified that Watt merely told him that he could not rehire him, under cross-examination he added that after Watt declared that he (Watson) had instituted a "labor suit against us" before the Board, which was withdrawn, Watt said that he would not rehire him. As indicated above, the additional remarks attributed to Watt could not possibly have been made since the unfair labor practice charge which had then been filed was against the Union only and was actually withdrawn 3 weeks *after* the August 22 telephone conversation.

Finally, the reliability of Watson's testimony concerning his conversation with Watt is not enhanced by the 5 1/2-month delay in filing the unfair labor practice charge against Bushey, although, to be sure, it was timely under the statutory 6-month limitation period. This is especially so since it is quite obvious that the ground for the charge against Bushey was not newly discovered and no plausible excuse for the delay appears in the record. In making my foregoing appraisal of Watson's testimony, I have taken into consideration the fact that Watt, initially in his testimony, only recalled one occasion in early February 1967 when he spoke to Watson, although he had a second conversation on February 24 when Watson prepared an accident report in Watt's presence. This temporary lapse of memory, which Watt subsequently

corrected on the witness stand, is too trivial to warrant discrediting Watt's denial that he had the May 17 telephone conversation, as the General Counsel would have me do.

With respect to Watson's testimony, disputed by Business Agent Jansen, concerning their conversation on May 19, 1967, in which Jansen allegedly threatened to keep Watson from working unless he was approved by the Executive Board, it is certainly conceivable that this could have happened in view of the fact that it was Jansen's duty to enforce the contractual union security provisions and Watson's failure to appear before the Union's Executive Board on April 5, 1967, for approval of his previously initiated membership application. On the other hand, I find it hard to believe that, if that conversation had taken place, Watson would not have challenged Jansen's authority to keep him from working or complained to Union President O'Hare that Jansen was violating his job rights in disregard of O'Hare's views. However, Watson did not do it. Moreover, in the August 1968 letter to Jansen, mentioned above, Watson protested that the Union, like the Company, did not give him "any kind of explanation" for his termination.²⁸

In sum, I conclude that Watson's testimony is not sufficiently convincing or reliable to satisfy the General Counsel's burden of proving by a preponderance of the credible evidence that Bushey discriminatorily denied Watson employment in violation of Section 8(a)(1), (2), and (3) of the Act and that the Union threatened to prevent him from working unless approved by its Executive Board, thereby violating Section 8(b)(1)(A) of the Act. In view of my determination, I find it unnecessary to consider whether Bushey, as a single integrated employer with DVO, was responsible for the alleged discrimination committed by DVO. Accordingly, I recommend dismissal of the consolidated complaint in its entirety.

RECOMMENDED ORDER

Upon the basis of the foregoing findings and conclusions, and upon the entire record in the case, and pursuant to Section 10(c) of the National Labor Relations Act, as amended,

It is ordered that the consolidated complaint issued herein against the Respondents, Ira S. Bushey and Sons, Inc., and United Marine Division, Local 333, National Maritime Union, AFL-CIO, be, and it hereby is, dismissed.

²⁸Although there is some testimony regarding Watson's subsequent effort to seek employment through the union hiring hall, it is noted that the Union is not charged with discriminating against him in its use

²⁶On the contrary, as previously noted, Watt and Jansen testified that no union official or representative communicated with Watt concerning Watson's membership status or requested DVO to withhold employment from Watson because of his lack of union membership or for any other reason.

²⁷It is not, nor could it be, contended that the Union was not within its statutory rights to deny Watson membership in its organization so long as he was not deprived of his job or employment opportunities because he was not a member