Winkel Motors, Inc. *and* International Association of Machinists and Aerospace Workers, AFL-CIO, Local Lodge No. 801; and Teamsters, Chauffeurs, Warehousemen and Helpers, Local Union No. 533, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case 20-CA-5265

September 25, 1969

DECISION AND ORDER

BY CHAIRMAN MCCULLOCH AND MEMBERS JENKINS AND ZAGORIA

On June 30, 1969, Trial Examiner Herman Marx issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain 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. Thereafter, the Respondent filed exceptions to the Trial Examiner's Decision and a supporting brief. The General Counsel filed a brief in support of 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 briefs, and the entire record in this case, and hereby adopts the Trial Examiner's findings,[1] conclusions, and recommendations.

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 Respondent, Winkel Motors, Inc., Reno, Nevada, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.

[1]The Respondent's exceptions, in large part, are directed to the credibility findings made by the Trial Examiner. It is the Board's established policy not to overrule a Trial Examiner's resolutions as to credibility unless, as is not the case here, a clear preponderance of all the relevant evidence convinces us that they are incorrect *Standard Dry Wall Products, Inc.*, 91 NLRB 544, enfd. 188 F 2d 362 (C A 3) Nor do we find merit in the Respondent's contention that because the Trial Examiner uniformly credited the General Counsel's witnesses and generally discredited the Respondent's witnesses, his credibility resolutions are erroneous or attended by bias or prejudice *N L R B v Pittsburgh Steamship Co.*, 337 U S 656 Accordingly, we find no basis for disturbing the Trial Examiner's credibility findings in this case

DECISION OF THE TRIAL EXAMINER

STATEMENT OF THE CASE

HERMAN MARX, Trial Examiner The complaint alleges that an employer, Winkel Motors, Inc. (herein the Respondent or Company), has violated Section 8(a)(1) and (3) of the National Labor Relations Act[1] (herein the Act) by discharging an employee, Homer Davis, because of his membership in, or activities on behalf of, two labor organizations (herein the Machinists Union and the Teamsters Union and, collectively, the Unions).[2]

The Respondent has filed an answer denying the commission of the unfair labor practices imputed to it in the complaint.[3]

Pursuant to notice duly served by the Board's General Counsel upon the Respondent and Charging Parties, a hearing on the issues was held before me, as duly designated Trial Examiner, in Reno, Nevada, on May 13 and 14, 1969. The General Counsel and the Respondent appeared through respective counsel, and all parties were afforded a full opportunity to adduce evidence, examine and cross-examine witnesses and submit oral argument and briefs

Upon the entire record, from my observation of the demeanor of the witnesses, and having read and considered the briefs filed with me since the close of the hearing, I make the following findings of fact·

FINDINGS OF FACT

I. NATURE OF THE RESPONDENT'S BUSINESS; JURISDICTION OF THE BOARD

The Company is a Nevada corporation; maintains its principal place of business in Reno, Nevada, where it is engaged in the business of selling new and used automobiles and trucks at retail: and is, and has been at all material times, an employer within the meaning of Section 2(2) of the Act.

During the year preceding the issuance of the complaint, the Company's income from retail sales exceeded the sum of $500,000. In the course and conduct of its business operations during the said year, it purchased goods valued in excess of $50,000 from suppliers in other states, who shipped such goods directly to the Company in Nevada from locations outside that state. By reason of such purchases and receipt of such shipments, the Company is, and has been at all times material to the issues, engaged in interstate commerce, and operations affecting such commerce, within the meaning of Section 2(6) and (7) of the Act Accordingly, the National Labor Relations Board has jurisdiction over the subject matter of this proceeding.

II THE LABOR ORGANIZATIONS INVOLVED

Each of the Unions admits employees to membership:

[1]29 U S C 151, *et seq*

[2]The full name of the Machinists Union is International Association of Machinists and Aerospace Workers, AFL-CIO, Local Lodge No 801, and that of the Teamsters Union is Teamsters, Chauffeurs, Warehousemen and Helpers, Local Union No 533, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America

[3]The complaint was issued on February 28, 1969, and is based upon a charge filed by the Unions on October 25, 1968, and an amendment thereof filed on June 6, 1969 Copies of the charge, the amendment thereof, and the complaint have been duly served upon the Respondent

exists for the purpose of collective bargaining on behalf of employees with employers concerning terms and conditions of employment; and is, and has been at all material times, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Prefatory Statement*

The Company employs approximately 30 persons, excluding sales personnel, and its facilities include a service department for the repair and maintenance of new and used cars. Department personnel include general and specialized mechanics. These work under the supervision of a departmental manager who is vested with authority to hire and discharge employees, and is subject, in turn, to supervision by the Company's corporate secretary and treasurer, Robert Winkel.

Homer Davis entered the Company's employ as a "general mechanic" on January 19, 1968, and worked in that capacity until his employment was terminated on October 21, 1968.[4] His duties consisted, in the main, of the repair and maintenance of automobile engines, rear end assemblies, and transmissions. He was paid by the job on a "flat rate" or "piece work" basis, but was guaranteed payment for a minimum of 31 hours each workweek at a prescribed hourly rate. The service department manager throughout his employment was Elvin L. Swim, who is no longer in the Company's employ.[5]

In July 1968,[6] Davis began to advocate union representation in individual and group discussions with employees of the Company and other Reno automobile dealers, and discussed the procedure for organizing them with an officer of the Machinists Union, who gave Davis some "authorization cards" which, when executed, signify the signatories' support of union representation. Davis gave some of the cards to others in the Company's employ for solicitation of signatures of employees of the Company and other automobile dealers, with the result that about 14 cards were executed. Davis turned them over to the Machinists Union.

He met on subsequent occasions in July and August with various functionaries of the organization and was instrumental in arranging a meeting toward the end of the latter month, attended by representatives of the Machinists Union, an official of the Teamsters Union, and most of the mechanics in the employ of the Company and another Reno automobile dealer. The subject was organization of automobile mechanics in the Reno area. The meeting was followed by another on September 11, and thereafter by biweekly meetings, attended by representatives of the Unions and mechanics employed by automobile dealers in the area, and centering on organization of such employees. Davis attended each of the meetings, and with another of the Company's mechanics, Jack Stafford, volunteered at the meeting of September 11 to serve on a two-man committee to disseminate organizational information among the employees in their shop, and functioned in that capacity thereafter. Similar committees served the same purpose in the other automobile shops in the area.

B. *The Discharge*

There was no work available for Davis on the afternoon of Friday, October 18, and shortly after lunch, he asked Swim for permission to take the afternoon off. Swim gave his consent, telling Davis during the course of discussion that he had an assignment for Davis for the following Monday to overhaul a transmission. Davis left shortly after 1 p.m., as the Company's records (R. Exh 2) attest. He was regularly paid each Friday for the workweek ending the day before, but he did not draw his paycheck before he left because of his early departure.

Either that same day or the next — more likely the latter, according to Robert Winkel — a letter from the Unions, dated October 17, 1968, addressed to "Chet" (Chester) Winkel, Robert's brother and president of the Company, was delivered to its premises and came to Robert Winkel's attention.[7] The letter, in substance, stated that the Unions represented a majority of the Company's employees in specified categories; offered to prove the majority status; and requested a meeting with Chester Winkel for "contract negotiations" at a specified time on Tuesday, Ocotber 22, or, if not convenient to him, on another date to be suggested by him.

Davis reported for work shortly before his regularly scheduled starting time on Monday, October 21, but as he was getting ready for duty, Swim summoned him to his office, and stated that he would "have to let (Davis) go" because he had "to cut down in personnel." Davis remonstrated that he was senior to some other employees, but Swim replied that he had "been all through this Saturday and this is the way I have to do it." Davis was then given his terminal pay in the form of two checks, one for the workweek that had ended on the preceding Thursday, and the other for his partial workday on Friday; and he left the premises.[8] With his termination, the Company's force of mechanics was reduced to 12.[9]

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[4]Davis had a prior employment with the Company, to which later reference will be made.

[5]By force of his authority to direct employees, and to hire and discharge them, Swim was a supervisor within the meaning of Sec 2(11) of the Act at all material times during his managerial tenure. Needless to say, Robert Winkel has also had that statutory status at all times material here

[6]Unless otherwise stated, all dates material here occurrred in 1968

[7]Mail addressed to the Company at its business premises is usually delivered to its post office box and picked up there each weekday and Saturday by Chester Winkel. Stating that he was "not altogether sure" about the matter, Robert Winkel intimated that Chester picked up the Union's letter at the post office and brought it to the Company's office on Saturday, October 19. Whether that was done on that or the previous day does not materially affect the ultimate results in this proceeding.

[8]I do not believe testimony by Swim that he informed Davis of his layoff "just before quitting time (4:30 p.m) on Friday, October 18," or, as Swim put it elsewhere, at about 4:15 or 4 30 on "Friday evening". For one thing, testimony by Davis to the effect that he was given the afternoon off by Swim on Friday and left shortly after 1 p.m. is corroborated by the Respondent's time records (R. Exh. 2) which show that Davis left at 1 10 p m For another matter, Swim admitted at one point that he has no "real independent recollection" that he laid off Davis on "Friday evening", testifying that "it would probably have been on a Friday evening" because "we generally terminate people" then Moreover, the Respondent does not, in terms at least, contradict Davis' testimony that he was given the two terminal paychecks on Monday. The findings as to Davis' conversations with Swim on Friday and Monday are based on Davis' testimony, which I credit

[9]According to an exhibit offered by the Respondent (R. Exh. 4), its force of mechanics was further reduced and stood at 11 in November and December 1968, but an attachment to the exhibit indicates that 12 mechanics of various classifications were in the Respondent's employ throughout both months, and that a thirteenth (La Pointe) was employed from November 29 to December 6 In any case, even if one assumes that the Respondent decided on an economic force reduction in October, and that the force fell to 11 some time after Davis' termination, the question of the motivation for the choice of Davis, rather than another, still remains.

The Company has not reemployed him, although, according to Swim, he told Davis at the time of the layoff notification that "if business picks up," it would reemploy him.

The General Counsel, maintaining that the management was aware that Davis was a union activist, and stressing the timing of the purported layoff in relation to the Company's receipt of the Union's claim of representation and bargaining request, asserts that Davis was discharged for union activity.

The Respondent, on the other hand, asserting in its brief that there is no evidence that the management was "aware" of any union activity by Davis, and disclaiming any antiunion motivation for his termination, contends that he was laid off because of a seasonal decline in service department business, and that he was selected for layoff by Swim because the decline coincided with the introduction of the new car models for 1969, and most of the mechanical work required was of a "predelivery" or otherwise "light" nature on new cars, and not, as Swim put it, Davis' "cup of tea," since he was a "a heavy duty . . . and medium man": and because of "problems" with Davis (to which reference will be made later.)

There is no dispute that the Company's income from its service department underwent a seasonal decline in the fall of 1968 and the succeeding winter months,[10] and that Davis' termination coincided with the start of the new car season, but, even if one assumes that the Respondent decided on a force reduction of one mechanic in October for economic reasons, it is quite another matter to accept the Respondent's proffered reasons for choosing Davis.

As a preliminary matter, it may be useful to clarify the General Counsel's burden. If the Respondent's claim that the record does not establish that it was "aware" of Davis' union activity means that the General Counsel must prove that the Company had first hand knowledge of such activity, it misconceives the burden. It is enough if he proves that the Respondent believed that Davis had engaged in union or other activity protected by Section 7 of the Act, and discriminated against him because of such belief.[11] Moreover, if its motivation was unlawful, it matters not whether the Respondent discharged him, or, having need for a reduction in force for economic reasons, served its unlawful motivation by designating him for layoff to fill the need. For reasons to be stated later, I am convinced that the purported layoff was a discharge, and shall thus refer to Davis' termination below.

There are ample indications in the record that the Company had information prior to Davis' discharge that he had engaged in organizational activity. Both Swim and Robert Winkel admittedly became aware as early as the summer of 1968 that efforts were under way to organize the Company's service department employees. Its "body shop manager," Lavern Harper, who, although supervising only four employees, and subordinate to Swim, had authority to hire and discharge employees,[12] repeatedly discussed unionization with Davis; and, according to his own testimony, "had heard rumors" that Davis had been "signing people up for the "union." Moreover, as Davis testified, without contradiction, Harper asked him in July whether he would become a union business agent "after we got the union", and Davis replied that that was "likely."[13] The very tenor of Harper's question indicates that he regarded Davis as an active proponent of unionization of the service department employees.

Harper, to be sure, was a minor supervisor (he is now service department manager, having succeeded Swim in that post), but managerial knowledge or belief that Davis was a union activist did not stop with him. Swim was evasive about the matter, testifying, in equivocal vein, that he did "not directly" know the identity of those with a major role in organizing the Company's shop; and that he did "not definitely" know that Davis "was a prime organizer or . . . a member of the (shop) organizing committee." Moreover, I think it implausible that Swim, as he testified, "had heard" that Davis had been "organizing or trying to organize" employees of another Reno automobile dealer (Scott Motors), but, as he claims, had never heard "a rumor" that Davis had tried to do the same in the Company's service department. More to the point, this disclaimer is directly at odds with testimony by Harper that he told Swim that he "had heard (that Davis) was organizing union in the [Company's] shop."

Swim, as previously indicated, evinced a disposition to evade or fence with pertinent inquiry into his knowledge of Davis' union activity, but in addition, as will presently appear, there is much amiss with his testimony on other material matters, notably his proffered justification for Davis' termination. I do not credit Swim's claim to the effect that he had no information that Davis had engaged in organizational activity among the Company's service shop employees, but find, instead, that he knew or believed prior to Davis' termination that Davis had engaged in such activity. In the light of that conclusion, and of substantial evidence, to be described later, pointing to an unlawful motivation for the discharge, I am unable to accord any weight to self-serving denials by Chester and Robert Winkel that they had any knowledge that Davis had engaged in any effort to organize the employees

The timing of the dismissal does much to illuminate its motivation. It is an important fact that the layoff notification came on Davis' very next workday after the Company's receipt of the Unions' claim of representation and bargaining request; and that the Company fails to explain why Davis was informed of the purported layoff on Monday morning instead of the preceding Friday, which, according to Swim himself, is the day "when we generally terminate people." Instead of a rational explanation, what one finds is an untenable claim by Swim that he laid off Davis about 4.15 or 4:30 p m., "just before quitting time," on "Friday evening"— a contention which is refuted by one of the Respondent's own exhibits (R. Exh. 2), based on its time records, which show that Davis "left early," at 1 10 p m., on Friday; and testimony by Robert Winkel that he is "not sure" whether Davis was discharged on "Friday afternoon or . . . Monday morning " This professed uncertainty has the earmarks of equivocation in view of evidence that Swim received instructions for the layoff on Saturday; and of the fact that Winkel himself directed the preparation of the exhibit, which was offered to prove that Davis was absent, tardy or "left early" on specified dates.

Moreover, Chester Winkel, although a witness, tells us little about the layoff decision beyond a claim that the

[10] $16,252 in August; $13,065 in September; $12,344 in October, $11,261 in November, $10,220 in January 1969, and $9,387 in February 1969.

[11] See, for example, *Continental Nut Company*, 91 NLRB 1058, 1100, *Ridge Tool Company*, 102 NLRB 512

[12] As body shop manager, Harper was a supervisor within the meaning of Sec 2(11) of the Act

[13] Harper does not deny that he put the question to Davis, stating merely that he does not "recall" whether he did so

management decided on a force reduction in October, and that Swim was the one who chose Davis; and Robert Winkel's testimony is markedly deficient on the subject of the date of the decision and his role in it. At one point, Robert testified that at a meeting attended by himself, Chester, Swim and the "parts manager" on October 15 or 16, "it was just on my recommendation" that Davis was chosen for layoff, and that he "assumed that the service manager (Swim) concurred in that because we did not get in an argument." This would indicate that Swim's role was mere passive acceptance of Robert's "recommendation", but it is not quite in harmony with later testimony by Winkel that it was "basically the service manager" who made the decision after consultation with the Winkel brothers, nor with Swim's claim that it was he who made it, nor with Chester's testimony that Swim made it; and is manifestly at odds with the undisputed evidence that when Davis protested his selection for a force reduction to Swim on Monday because he was senior to other employees, Swim replied that he had "been all through this Saturday and this is the way I have to do this", thus clearly indicating that he was acting upon instructions given to him on Saturday, October 19, by one or the other, or both, of his superiors, the Winkel brothers.

To cap the matter, Swim told Davis before the latter's early departure on Friday that a transmission overhaul job was expected on Monday, and that Davis was to do the work, and it is clear from that and Swim's remarks on Monday that the decision to terminate Davis was made on the previous Saturday.

There is good reason to conclude, moreover, that it came after the arrival of the Union's letter. Robert Winkel was noticeably vague and tentative on the question of the date when the letter came to his attention. Asked when he first saw it, he testified, "Well, I am not altogether sure whether I personally — and yet it's only assuming — in my mind that it was Saturday morning instead of Friday morning." Then, he gave testimony, much of it volunteered, that he and his brother "have a specific routine," that his brother "doesn't work Saturday", and that "I can recall him somewhat being in slippers bringing in the mail. He stops off with the mail and well — that there isn't anything that we can do about it today" (that is, Saturday, according to the sense of the testimony). Chester Winkel, it may be noted, did not touch on the subject in his testimony although it is he, so Robert Winkel asserts, who "daily" picks up the Company's mail at the post office. And I formed the impression from Robert Winkel's demeanor and the text of his testimony that he was equivocating on the subject, as on much else, including the timing of the decision to terminate Davis, his role in it, and the date of the termination. In sum, taking into account the Respondent's failure to explain the unusual timing of the layoff notification, the absence of any dependable testimony from it as to the date of receipt of the bargaining demand — a matter peculiarly within its knowledge, the lack of candor by Swim and Robert Winkel as to the date and origin of the discharge decision, and of the date of the discharge itself, and Swim's intimation on Monday morning to the effect that he had been instructed by superior authority in the management on Saturday to effect the layoff, I am convinced, and find, that the decision was made by the management on Saturday, at some point after the receipt of the Unions' bargaining demand either on that day or the day before.

The unexplained timing of the layoff notification in relation to the receipt of the letter, against the background of Davis' organizational activities, points persuasively to a causal link between the letter and Davis' termination, and that conclusion becomes inescapable upon consideration of the Respondent's proffered justification for Davis' dismissal.

The Respondent did not follow seniority of service in choosing Davis for the alleged economic force reduction, as is evident from the fact that Davis was senior to at least one general mechanic, Cockerham,[14] and significantly enough, the alleged justification for choosing Davis rather than Cockerham comes apart upon examination. According to Robert Winkel at one point, Davis was chosen "basically because of . . . (his) absences." But if Swim is to be believed, it was he who made the choice, and the reasons he gives, as a witness for the Respondent, provide an instructive guide to an assessment both of his credibility and that of Robert Winkel.

Davis had worked for the Company in a previous period, and according to both Swim and Robert Winkel, the latter, shortly after Davis reentered the Company's employ in January 1968, told Swim that Davis had had a "problem" of "alcoholism." Swim testified, too, that both Winkel brothers often complained to him that he did not keep his work area clean, that he frequently voiced similar complaints to Davis, and that the latter "was off quite a bit," and frequently tardy.

Following his references to these "problems," Swim was asked on direct examination to give his reasons for choosing Davis for force reduction, and, in reply, he said nothing about such "problems," stating, in substance, that Davis was not qualified to do the work primarily required in the shop with the advent of the new car season It was only after he was asked a leading and suggestive question whether the "problems that you had encountered with Mr. Davis" entered into his choice that he gave any indication that they were factors, answering, "Somewhat, yes," without giving any elaboration, or removing the possibility of an impression, resulting from the prior references to alcoholism, that it was among the "problems" that led to the layoff choice.

If Swim is telling the truth, it is evident that his primary reason for choosing Davis was the type of work required for the new car season, and this is a substantial departure from Robert Winkel's claim that the basic reason was Davis' absenteeism. But more to the issue, I do not believe the reasons given by either. What there is on the subject of alcoholism is that Winkel allegedly told Swim at the inception of Davis' employment, some 10 months before his termination, that Davis had had a drinking "problem," and there is not a scintilla of evidence that Davis took even so much as one alcoholic drink during the period of his employment (or for that matter prior thereto, apart from the testimony of Winkel and Swim that the former told the latter many months before the discharge that Davis had had such a "problem"). The Respondent knows best why it introduced the references to alcoholism into the record, and it will suffice for present purposes to say that the subject of alcoholism had no connection with Davis' discharge.

[14] Davis was also senior to four other mechanics of varying classifications, identified (R Exh 4) as Lilly, Tankersley, Walton (classified as a general mechanic and for "light service"), and Griswold I see no need to canvass the types of work they respectively performed, for the end result on the discrimination issue is the same whether or not Davis was capable of performing such work

The charge of absenteeism, which the Respondent divides into three categories (early departures, tardiness, and "missed" days) has earmarks of exaggeration and afterthought. The management never voiced any complaint to Davis that he was undependable or excessively absent;[15] and so far as appears, the claim is given expression for the first time in this proceeding. This of itself renders the claim suspect, but any doubt about the matter is dissipated upon examination of details of the contention

Thus, although Davis concededly "left early" some 36 times in the 10 months of his employment, it is a fact that he did so each time with Swim's permission, as the latter admitted. There is no evidence that Davis had any work to perform on any of these occasions, and especially in the absence of such evidence, it escapes one how one can fault Davis, who was compensated on a piece work basis, for leaving early with his supervisor's permission. The brittle and feeble quality of the claim is perhaps best exemplified by the fact that it includes Davis' early departure on Friday, October 18, with Swim's consent, because he had no work to do that afternoon

As for the tardiness claim, although it is true that Davis' timecards show that he punched in after 8 a.m., the usual reporting time, some 30 times, the contention loses its force in the light of other facts The majority of the late punches were only 10 mintes past 8 a.m., but passing that, these do not necessarily reflect late arrivals. Although mechanics are paid by the job, they maintain a record of the time they spend on it on a job card (presumably, for such purposes as customer charges), and, as Davis testified, without dispute, they customarily punch their timecards and their job cards together at the time of assignment of a project at or after their arrival in the morning, with the result that if a mechanic has no job pending at the time of his arrival and must wait for assignment, as is the case on occasion, his timecard will reflect a late starting time, notwithstanding a punctual earlier arrival. In short, the evidence does not establish that Davis was excessively tardy, and, particularly bearing in mind that the management never mentioned the matter to him during his employment, I am persuaded that it has seized upon the record of late punches, after the fact of Davis' termination, to give color to its claim of lawful justification

The claim that an excessive number of "missed" days was a factor in Davis termination is similarly unpersuasive The Respondent asserts that there were 37 of these, but 5 are not established, the Respondent resting its position regarding the 5 on its inability to locate timecards for Davis for such days among its records. (It does not appear that it endeavored to establish the relevant facts from any job records.) The claim that Davis was absent on the 5 days amounts to a guess. Of the remaining 32 days, Davis was absent because of a fractured arm for a period of 25 days, ending about 3 months before his termination, and of the 7 days that remain, only 3 occurred in the 3-month period.

That the Respondent should journey a substantial distance into Davis' employment history to make a point of the 25 days he missed because of his misfortune does nothing for the image of legality it would give itself. Indeed, the journey, like the evidence of the early departures and alleged tardiness, is nothing but an afterthought makeweight for the Respondent's claim that Davis was laid off for lawful cause. That view of the matter rests not only on the indicia that Swim and Robert Winkel lacked candor on significant subjects, including the important matter of the date of the discharge; the flimsiness of the claim that early departures and tardiness were factors in Davis' termination, and the fact that the management never complained to Davis about his attendance record, but upon the hard evidence of a letter of commendation given Davis by Swim after the latter left the Company's employ as service manager. The letter, dated December 12, 1968, and addressed "To Whom It May Concern," states that Swim had "found his (Davis') workmanship good and above average"; that his "dependability and cooperation was excellent"; that Swim would "highly recommend him (Davis) as an excellent man in his field", and that should Swim become a service manager again he "would readily hire" Davis. Swim now claims that he gave Davis the letter "to help the man" and would "rehire him with reservations," but this, in my judgment, is but another of Swim's afterthoughts, and in view of the lack of candor which marks so much of his testimony, I am unable to accord his qualification any weight.

The allegation of uncleanliness rests solely on subjective claims of two interested witnesses, Swim and Robert Winkel, and what there is in the record of an objective nature pertinent to the subject leads me to conclude that the claim is afterthought puff and exaggeration aimed, like the rest of the alleged "problems" with Davis, at cloaking his discharge with an aura of legality Swim's letter of commendation, particularly his statement that Davis' "dependability and cooperation was excellent", runs directly counter to his portrayal of Davis as maintaining a dirty work area in disregard of repeated admonitions to keep it clean, and of itself goes far to preclude reliance on his claim that the alleged uncleanliness played a role in the decision to terminate Davis. In addition, although Robert Winkel now professes dissatisfaction with the allegedly unclean condition of Davis' work area (and work clothes, a matter not mentioned by Swim in his testimony), he never said anything about the subject to Davis on any of the daily occasions when he walked through the service shop in the entire period of Davis' employment. He claims now that he "complained" to Swim, relying on him to look after the matter, but this appears to me to be of a piece with the self-exonerating claims of both Chester and Robert Winkel that they left the choice of the nominee for layoff to Swim. I place no credence in the claim that uncleanliness of Davis' work area was a consideration in his termination

Nor is there any objective evidence to support Swim's generalizations to the effect that "predelivery" and other "light" work on new cars was not Davis' "cup of tea," and that Cockerham was "more of a qualified mechanic" than Davis in such areas as automobile "tune up" and air-conditioning work, and in servicing carburetors. The letter of commendation and the lack of candor that runs through major aspects of Swim's testimony strips these generalizations of any value they might otherwise have, and I am unable to rely on them in assessing the motive for Davis' termination.

The real motivation is to be found in the evidence of Davis' activity in organizing the service shop employees, and in the timing of his termination in relation to the

[15] Davis' testimony that no such complaint was made to him is, to be sure, self-serving, but it is uncontradicted, and what is more, is given corroborative weight by a written commendation from Swim (G C Exh 6), to which added reference will be made later

receipt of the Union's letter. Against the background of Davis' organizational activity, and of the Company's *knowledge or belief* that he had engaged in efforts to organize its service department employees, the fact that his termination followed, without any prior warning to him, on his very next workday after the Company received the Unions' letter, and that the day chosen for the purported layoff was contrary to the management's customary practice, warrants an inference that the letter triggered the decision to terminate Davis, in the absence of a credible explanation by the Respondent of its course.

Such an explanation is lacking, granting the existence of an economic justification for a force reduction of one mechanic in October. Swim's claim that he laid off Davis on Friday, October 18, is untrue, and Robert Winkel equivocated about the day. The unnatural choice of the following Monday is not explained. The alleged "problems" with Davis are afterthought props for the Respondent's claim of lawful motivation.[16] And the very fact that the Respondent has resorted to them bolsters a conclusion that its motive for the termination was unlawful.[17] It is clear, moreover, that Davis was discharged rather than temporarily laid off. Swim gave Davis no reason for disregarding his seniority over other mechanics retained, brushing aside his protest with the comment that he had "been all through this Saturday and this is the way I have to do it." Significantly, although Swim now claims that Davis was "subject to rehiring if business picks up," toward the end of November, the Respondent hired a "general mechanic" named La Pointe who, like Davis, did "heavy duty" work.[18]

In sum, the record, taken as a whole, leads me to conclude and I find, that the Company linked Davis' organizational activity among its employees to the Unions' claim of representation and bargaining request contained in their letter of October 17, 1968, held him accountable for the letter, and discharged him because of it; and that by thus discharging him, the Company violated Section 8(a)(3) of the Act, and interfered with, restrained and coerced employees in the exercise of rights guaranteed them by Section 7 of the Act, thereby violating Section 8(a)(1) of the statute.[19]

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 operations of the Respondent described in section I, above, have a close, intimate, and substantial relation 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 the Company has engaged in unfair labor practices violative of Section 8(a)(1) and (3) of the Act, I shall recommend below that the Company cease and desist from the unfair labor practices found, and take certain affirmative actions designed to effectuate the policies of the Act.

In view of the nature of the unfair labor practices committed, I shall recommend an order below which will in effect require the Company to refrain in the future from abridging any of the rights guaranteed employees by said Section 7.[20]

Having found that the Company discriminatorily discharged Homer Davis in violation of Section 8(a)(1) and (3) of the Act, I shall recommend that the Company offer him immediate and full reinstatement to his former, or a substantially equivalent, position,[21] without prejudice to his seniority and other rights and privileges, and make him whole for any loss of pay he may have suffered by reason of the said discharge by payment to him of a sum of money equal to the amount of wages he would have earned, but for his discharge, for the period between the date of his discharge, as found above, and the date on which he is offered reinstatement, together with interest on said amount at the rate of 6 percent per annum; and that the loss of pay and interest thereon be computed in accordance with the formula and method prescribed by the Board in *F. W. Woolworth Company*, 90 NLRB 289 and *Isis Plumbing & Heating Co.*, 130 NLRB 716, to which the parties to this proceeding are expressly referred.

CONCLUSIONS OF LAW

Upon the basis of the foregoing finding of fact, and upon the entire record in this proceeding, I make the following conclusions of law:

1. Winkel Motors, Inc. is, and has been at all material times, an employer within the meaning of Section 2(2) of the Act.
2. Each of the Unions is, and has been at all material times, a labor organization within the meaning of Section 2(5) of the Act.
3. By discriminatorily discharging Homer Davis, as found above, the Company has engaged, and is engaging, in unfair labor practices within the meaning of Section 8(a)(3) of the Act.

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[16] The Respondent adduced evidence that in his written application for his second employment by the Company in January 1968, Davis failed to list his first employment in a space reserved for the listing of previous employers The omission amounted to a misrepresentation, although it may be noted that Robert Winkel was admittedly aware of the prior employment at the inception of the second, and communicated the information to Swim. In any case, the misstatement some 10 months before the discharge obviously had no connection with it. I have taken the misrepresentation into account in evaluating Davis' credibility, noting, also, in that regard, that the fact that Davis' application contained a misstatement does not endow Swim, the Winkel brothers, and the justification offered for Davis' termination with credibility.

[17] *Shattuck Denn Mining Co.* v. *N L R.B.*, 362 F.2d 466, 469 (C.A. 9), and cases cited.

[18] Without identifying him by name, Stafford testified that a "heavy duty" mechanic was hired about the beginning of December and worked for about a week. The mechanic, obviously, was La Pointe.

[19] The findings of violation are in no way based on evidence adduced by the General Counsel to the effect that during the organizational campaign the management expressed views purporting to refute "promises" made by the Unions to employees, and that the employees would not benefit from union organization Similarly, I base no findings on evidence that the Company, during the period, posted a bulletin dealing with solicitation of employees (or distribution of literature) in the service area The record does not precisely establish the contents of the bulletin, and, in any case, its legality is not in issue.

[20] "We believe that a discriminatory discharge of an employee because of his union affiliations goes to the very heart of the Act." *N L R.B* v *Entwistle Manufacturing Co*, 120 F 2d 532, 536 (C A 4) See also *May Department Stores* v. *N L.R B*, 326 U S 376; *Bethlehem Steel Company* v *N L.R B*, 120 F.2d 641 (C.A D.C)

[21] In accordance with the Board's past interpretation, the expression "former, or a substantially equivalent, position" is intended to mean "former position wherever possible, but if such position is no longer in existence, then to a substantially equivalent position." *Chase National Bank of the City of New York*, 65 NLRB 827.

4. By interfering with, restraining, and coercing employees in the exercise of rights guaranteed them by Section 7 of the Act, as found above, the Company has engaged, and is engaging, in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

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

RECOMMENDED ORDER

Upon the basis of the foregoing findings of fact, and conclusions of law, and upon the entire record in this proceeding, I recommend that Winkel Motors, Inc., its officers, agents, successors, and assigns, shall.

1. Cease and desist from:

(a) Discouraging membership of any of its employees in either International Association of Machinists and Aerospace Workers, AFL-CIO, Local Lodge No. 801 or Teamsters, Chauffeurs, Warehousemen and Helpers, Local Union No. 533, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization, by discharging any employee, or in any other manner discriminating against any employee with respect to his hire, tenure of employment or any term or condition of employment.

(b) Or in any other manner interfering with, restraining, or coercing employees in the exercise of any rights guaranteed them by Section 7 of the said Act.

2. Take the following affirmative actions which, I find, will effectuate the policies of the Act:

(a) Offer Homer Davis immediate and full reinstatement to his former, or a substantially equivalent, position, without prejudice to his seniority and other rights and privileges, as provided in section V, above, entitled "The Remedy," and make him whole according to the formula and method prescribed in said section V

(b) Preserve until compliance with any offer of reinstatement or backpay made by the National Labor Relations Board in this proceeding is effectuated, and make available to the said Board and its agents, upon request, for examination and copying, all payroll records, social security records, timecards and personnel records, which may be relevant to a determination of the amount of backpay due, and to the reinstatement and related rights provided by such order.

(c) Notify Homer Davis if presently serving in the Armed Forces of the United States of his right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

(d) Post at the Company's place of business in Reno, Nevada, including all places where notices to employees are customarily posted, copies of the attached notice marked "Appendix"[22] Copies of the said notice, to be furnished by the Regional Director for Region 20 of the National Labor Relations Board, shall, after being duly signed by an authorized representative of the Company, be posted by it immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter, in such conspicuous places Reasonable steps shall be taken by the said Company to insure that said notices are not covered, altered, or defaced by any other material.

(e) Notify the said Regional Director, in writing, within 20 days from the receipt of this Decision, what steps the Respondent has taken to comply therewith.[23]

[22]In the event that this Recommended Order is adopted by the National Labor Relations Board, the words "a Decision and Order" shall be substituted for the words "the Recommended Order of a Trial Examiner" in the notice In the additional event that the Board's order is enforced by a decree of a United States Court of Appeals, "a Decree of the United States Court of Appeals Enforcing an Order" shall be substituted for the words "a Decision and Order"

[23]In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify the said Regional Director, in writing, within 10 days from the date of this Order, what steps the Respondent has taken to comply therewith."

APPENDIX

NOTICE TO ALL EMPLOYEES

Pursuant to the Recommended Order of a Trial Examiner of the National Labor Relations Board and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, and ordered us to post this notice.

The Act gives employees the following rights

To engage in self-organization,

To form, join or assist any union,

To bargain collectively through representatives of their own choice,

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection;

To refrain from the exercise of any or all such rights.

WE WILL NOT discharge, lay off, or otherwise withhold any work from any employee, because any employee has exercised any of such rights.

WE WILL NOT in any other manner interfere with any employees' exercise of any of such rights

The National Labor Relations Board has found that we discriminated against Homer Davis by discharging him, in violation of the Act, because he engaged in union activity, and has ordered us to offer him full reinstatement to his former, or a substantially equivalent job, and to reimburse him for any loss of pay he may have suffered because of such discrimination.

WE WILL offer Homer Davis such reinstatement, and reimburse him for his loss of pay, together with interest thereon, in accordance with the Board's order.

WE WILL notify Homer Davis if presently serving in the Armed Forces of the United States of his right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

WINKEL MOTORS, INC.
(Employer)

Dated By
(Representative) (Title)

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 13050 Federal Building, 450 Golden Gate Avenue, Box 36047, San Francisco, California 94102, Telephone 556-0335.