

**Inland Motors and Automobile Salesmen's Union,
Local Lodge 2327, International Association of
Machinists, AFL-CIO. Case 31-CA-1206**

June 30, 1969

DECISION AND ORDER

BY MEMBERS FANNING, BROWN, AND JENKINS

On April 28, 1969, Trial Examiner Eugene E. Dixon issued his Decision in the above-entitled proceeding, finding that 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 Decision and a supporting brief. The General Counsel filed cross-exceptions and a supporting brief.

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

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions, cross-exceptions and brief, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner,¹ except as modified herein.

The Trial Examiner found that Counce's discharge was motivated in part by his announced intention to comply with a Board subpoena and to testify pursuant to it. He, however, deemed it unnecessary to pass on the alleged 8(a)(4) violations. The General Counsel has excepted.

The record supports the Trial Examiner's finding that the Respondent did in part discharge Counce because of his intention to testify pursuant to the subpoena. A discharge partly motivated by such considerations is clearly violative of Section 8(a)(4) and we so find.

THE REMEDY

Having found that the Respondent violated Section 8(a)(4) by discharging Robert Counce, we shall order Respondent to cease and desist from discharging or otherwise discriminating against any

¹Subsequent to the issuance of the Trial Examiner's Decision in the instant case the Board issued its Decision in the case of *Inland Motors*, 175 NLRB No. 139, wherein it was found that Respondent herein, violated Sec. 8(a)(1) of the Act by threatening two employees, one of whom was Counce the dischargee herein, with discharge if they engaged in union activity. The General Counsel in his cross-exceptions has requested the Board to take judicial notice of such finding. In adopting the Trial Examiner's Decision in the instant case we have done so.

employee because he has evidenced an intent to testify in a Board proceeding.

AMENDED CONCLUSIONS OF LAW

The Trial Examiner's Conclusions of Law 4 is hereby amended to read as follows:

4. By discharging Robert Counce because of his union membership and because of his intent to testify in a Board proceeding thereby discouraging membership in the aforesaid labor organization, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(3) and (4) of the Act.

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, as modified herein, and orders that Respondent, Inland Motors, Redlands, California, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order, as modified herein:

Insert the following paragraph as 1(b) and reletter the present paragraph 1(b) as 1(c):

"(b) Discharging or otherwise discriminating against an employee because he has evidenced an intent to give testimony pursuant to a Board proceeding under the Act."

Insert the following as the third indented paragraph in the notice:

WE WILL NOT illegally discharge or discriminate against any of our employees because he is about to give testimony in a Board proceeding pursuant to the Act.

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

EUGENE E. DIXON, Trial Examiner: This proceeding, brought under Section 10(b) of the National Labor Relations Act, as amended (61 Stat. 136), herein called the Act, was heard at Redlands, California, on March 12, 1969. The complaint, dated January 2, 1969, and based upon charges filed and served on September 27, 1968, was issued by the Regional Director for Region 31 (Los Angeles, California), on behalf of the General Counsel of the National Labor Relations Board (herein called the General Counsel and the Board). It alleged that Respondent had engaged in and was engaging in unfair labor practices by discharging its employee Robert E. Counce on or about September 19, 1968, and by interrogating employees about their union membership, activities, and sentiments, all in violation of Section 8(a)(1), (3), and (4) of the Act.

In its duly filed answer, Respondent denied the commission of any unfair labor practices and affirmatively alleged that Counce was terminated for reasons motivated by business judgment solely and denied any knowledge of union activity on the part of Counce.

Upon the entire record and from my observation of the witnesses I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent is a California corporation having its principal place of business at Redlands, California, where it is engaged in the retail sale of new and used cars. During the year preceding issuance of the complaint Respondent in the course and conduct of its operations received in excess of \$500,000 from the sale of automobiles. During that same period of time Respondent purchased and received goods valued in excess of \$50,000 directly from suppliers located outside the State of California. At all times material Respondent has been an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

II THE LABOR ORGANIZATION

At all times material Automobile Salesmen's Union, Local Lodge 2327, International Association of Machinists, has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

Early in 1968 the Union began a campaign to organize automobile salesmen in Los Angeles and Orange counties and later expanded the campaign to take in all of southern California. In late April one of Respondent's salesmen, Forest E. Michaels became active in this campaign. On May 7, 1968, he was discharged. His discharge resulted in the filing of unfair labor practice charges by the Union and the issuance of a complaint (Case 31-CA-1104) alleging that the discharge was discriminatory within the meaning of Section 8(a)(3) of the Act. The case was heard on September 25, 1968, by Trial Examiner George H. O'Brien who issued a decision finding an 8(a)(1) threat by Respondent but recommending dismissal of the 8(a)(3) allegation. In that case Robert Counce, the alleged discriminatee herein, was subpoenaed by the General Counsel and gave testimony (which Trial Examiner O'Brien credited) damaging to Respondent.

Counce was employed by Respondent as an automobile salesman for about 6 months prior to September 19, 1968, when he was terminated. During the first part of September 1968, according to Counce's testimony he walked into the used car office and "got to talking about . . . business . . . one thing and the other" with the then Assistant Sales Manager Charles Hall who was eating his lunch at the time. During this conversation Hall asked Counce if he belonged to a union. Counce replied, "Yes, don't you?" Hall "made some kind of answer" but Counce could not remember what it was. The conversation lasted only a few minutes and Hall, finishing his lunch, went across the street to the main office.

A day or so later, according to Counce's further testimony, he had a conversation with the then Sales Manager William Baldwin in the latter's office. In the course of their "talking back and forth" Baldwin told him that Respondent's president Lee Guggisberg, "was figuring on putting in a profit-sharing plan which would do . . . the employees a lot more good than the Union would. . . ." When he started to explain the details of the

plan to Counce the latter said that he "had been in a couple of profit sharing deals like that before . . . and didn't think much of them." The conversation then turned to some other subject.

On the evening of September 14, when he got home from work Counce found that his wife had accepted a Board subpoena requiring him to appear and testify on September 25, in the then pending case against Respondent. Earlier that day when Counce had been engaged in a conversation with Sales Manager Baldwin and fellow salesman Makowski, the latter volunteered the information that he had been served with a Board subpoena that day. Baldwin asked Counce, "Did you get yours?" Not knowing that one was waiting for him at home Counce replied, "No, I didn't get any." The following Monday Counce informed Baldwin in the showroom that he had received his subpoena. Baldwin said, "Well are you going to testify?" Counce answered, "With a subpoena, under oath, you have to tell the truth. That is what I am going to do."

On the following Thursday, September 19, at the close of the workday Baldwin suggested to Counce that they stop in at Hudlow's Cocktail Lounge — that he had something he wanted to tell Counce. About this Counce testified as follows:

So we went on up to the Cocktail Lounge and ordered a drink, and when the drink came, Mr. Baldwin said, "I don't hardly know how to tell you this," he said, but, he said, "I have got to let you go." He said, "You are fired." I said, "Why?" He said "I don't know why." He said, "I didn't get any explanation." He said, "Lee said to let you go." I said, "Well, he must have had a reason." Bill said, "No," he said, "I don't know why."

* * * * *

Well, there wasn't much I could say after he told me I was fired. He just talked about different things for a little bit, and then I got a call from Mr. Helms wanting to know if Mr. Baldwin was still there because he had to have some help with the customer, so I told him yes, and I told Bill that Mr. Helms had to have some help.

* * * * *

We went on back to the showroom and after Bill helped Helms with his customer, he turned to me and said, "Well," he said, "You go ahead and drive your demonstrator home." and he said, "Come back tomorrow and we will get everything squared away tomorrow." And so that is it. That is what I done.

On cross-examination Counce denied that Baldwin told him on the 19th at the Cocktail Lounge "that he was realigning the sales department to get ready for the new model year."

Baldwin, who was no longer employed by Respondent at the time of the hearing, testified as follows: He was new car sales manager when Counce was working for Respondent. Besides not being "productive enough" Counce "had a bad attitude . . . he was a chronic complainer." He "didn't sell enough to make a living" making consistently about "three hundred; three fifty a month." The decision to terminate Counce was made by Baldwin. He could not say exactly when it was made but "would say prior to the 14th." When asked if this was about the time the new models were coming out Baldwin replied that "this was before the 1969 models were coming out." Nevertheless, on the basis of a leading question by

counsel, Baldwin then testified that he was "in the process of shaping up (his) sales force for the new model run." It developed that this involved discharging those he considered to be the weakest salesmen at the time. In this connection he named two other salesmen that he had discharged — a Nick Sheckgrove and Michaels.¹ They were also low production men and he "didn't feel that with the new cars coming out shortly it would be good to go into the new year" with them. He had "studied" and given it "a lot of thought" prior to September 14.

According to Baldwin the decision to discharge Counce was made by Baldwin alone. He did not discuss it with Guggisberg or anyone else. Although he had been thinking about it for some time he kept putting it off in anticipation of possible improvement. Baldwin further testified that he had no knowledge at the time of Counce's discharge that Counce was interested or active in a union. When asked if he had "any knowledge whatsoever" that Counce had received a Board subpoena he answered, "No, not to my knowledge." He also testified, "No," when I had knowledge that he had received a subpoena was after I let him go that evening, and after I had let him go, he said to me in these words: "I suppose you know I got a subpoena?"

According to Baldwin's direct testimony Counce "was quite hostile and angry" when informed of his termination. Baldwin was trying to be kind in handling the discharge, nevertheless he did not tell Counce why he was being terminated. Nor did he tell Counce that he was "aligning a sales force for the new model, or anything like that." He just told Counce that he was going to let him go. He also specifically denied telling Counce that he had to let him go on the order of Guggisberg and that he did not know the reason for it.

On cross-examination Baldwin contradicted this direct testimony now claiming that he thought he had told Counce at the Cocktail Lounge that he was going into the new model year and had to make a decision as to which salesmen to keep and that Counce was one of those he had decided not to keep.² He further testified that Counce "was quite hostile" and had indicated "that he had been subpoenaed to testify and would do anything he could to hurt Inland Motors" in his testimony.

When asked if, as testified by Counce, a conversation took place between him, Makowski and Counce on September 14 he testified, "Not to my knowledge. I don't remember. I don't recall any such conversation." Nor could he remember if Makowski had told him on September 14 that he had received a Board subpoena.

The inconsistencies in Baldwin's testimony brands it as unreliable. I credit Counce's versions as they conflict with Baldwin's.

In his testimony Sales Manager Hall³ in effect admitted having had a conversation or conversations with Counce about the Union but was vague and uncertain as to any specifics. Thus when asked on direct examination if at any time in September 1968, or at any other time he had had a conversation with Counce "regarding the Union, or any

¹On cross-examination Baldwin at first testified that he had terminated these people the same week as he did Counce. As shown, Michaels was terminated on May 7, 1968. As for Sheckgrove, Baldwin at first could not recall the date of his termination placing it sometime between Michaels' and Counce's terminations. Later he testified that it was his belief that Sheckgrove was one of the six salesmen who were working in early September.

²Later in his cross-examination he contradicted this testimony again now reverting to his original version that he gave Counce no reason or explanation for his discharge.

union?" his answer was, "Only that I think we had this other thing before about if he would join, or what I thought; nothing specific at all." And when the General Counsel asked on cross-examination, "Mr. Hall, you say that you did have a conversation with Mr. Counce involving the other case? Is that what you testified?" He answered, "I am sure that we did. I can't remember if he even talked about — well, maybe not. I guess he wasn't even working there then. I can't remember for sure. You know, it would be a normal thing after you leave something like this to get to talking about it, and I am not going to say we didn't, but what it was, it was nothing important." Pressed further as to whether he had a conversation with Counce about a union he answered, "I am just saying that if I did — I am not saying that I didn't talk about it, because, like I said before, it would be a normal thing to talk about." Notwithstanding this vagueness and uncertainty about the matter, when asked on direct examination if he had ever asked Counce if he belonged to a union Hall answered, "No, I had no reason to." I credit Counce's testimony.

In his further testimony Hall claimed (contrary to Baldwin's testimony) that on the day of Counce's discharge he and Baldwin had discussed it. About this he testified as follows:

The basis of the conversation about Counce was about the fact that his production was real poor, and Bill wanted to know if I thought that as long as we went back through the sales, and he asked if I thought he should be let go because of this, and I said, "If you had the feeling he should be let go, I will go along with the same way you feel, because we could have somebody here that would do a better job." I asked him if I should talk to Red about it and he said "No, I will handle that myself."

According to Guggisberg's testimony he did not participate "in the final decision" to terminate Counce.⁵ Baldwin made that decision and did not confer with him about it. In his testimony he also claimed that he did not know at any time prior to the discharge that Counce was or was not a union member or had received a Board subpoena. He further testified that Sales Manager Baldwin was terminated on January 15, 1969, because of low sales production. He also testified that because of the overhead in his industry, the rule is that men hired to produce are terminated if they fail to do so.

Conclusions

From the foregoing credited testimony it is clear and I find that Hall was informed by Counce in early September that he was a union member and further that on September 16 Baldwin was informed by Counce that he had received a Board subpoena and in answer to Baldwin's query had informed Baldwin that he intended to testify and intended to tell the truth. Such knowledge on the part of company officials is imputable to Respondent. Moreover, there is no question in my mind that this information was conveyed to Guggisberg and that contrary to his testimony he was aware of it prior to

³After Baldwin's termination Hall apparently was promoted from assistant sales manager to sales manager.

⁴Respondent's motion to correct the record in this respect is hereby granted.

⁵On cross-examination Guggisberg explained that he reviewed each salesman's performance monthly. This he did with respect to Counce at the end of August but no decision was made at that time to terminate him

Coonce's discharge.⁶

In the light of this knowledge and considering (1) that Coonce had never had any criticism or complaint about his production; (2) that he was terminated abruptly and shortly after he got the subpoena; and (3) that his discharge was without any explanation when a perfectly plausible one could have been given him, I am convinced and find that his discharge was motivated at least in part by his union membership and his announced intention to comply with the subpoena and to testify pursuant to it.

In reaching this conclusion I have considered Respondent's claim that Coonce was discharged solely because of his inadequate sales record. While there may be some logic in starting a new model year with a realigned sales force the evidence seems to indicate that here the realigning was largely confined to the elimination of Coonce. Admittedly his sales record was not the best. On the other hand the sale of three to four cars a month producing gross profits for Respondent of \$10,000 to \$12,000 a year does not seem to be too bad a record.⁷ In any event assuming that Coonce was not as productive as Respondent might have wished I am convinced that but for his union membership his record was not so bad that he would have been discharged for it. Interestingly enough Baldwin testified that he had nothing against unions and that he would not "discharge a man because he wanted to belong to a union or join a union . . . if he was productive . . ." In the light of the entire record I draw the obvious inference from Baldwin's testimony, i.e., that union membership would be cause for discharge where the individual was not a good producer. Such I find was the situation here and that Coonce was discharged because he belonged to a union and that his discharge was discriminatory within the meaning of Section 8(a)(3) of the Act.⁸

In the context of this 8(a)(3) violation of the Act I also find that Hall's question to Coonce about whether he belonged to a union amounted to interference with Coonce's rights under the Act in violation of Section 8(a)(1).

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with the operations of 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.

⁶It makes no difference on the facts here whether the decision to discharge Coonce was made by Baldwin or Guggisberg or both since the defense here is no more valid either way. However, it is difficult to believe that Guggisberg (who was concerned enough about his salesmen to go over their records periodically) was not consulted as to the discharge. Indeed, his testimony about it is at best equivocal. Just what did he mean when he testified that he did not participate "in the final decision" to discharge Coonce? That he left the timing up to Baldwin?

⁷In this connection the only definite figures in Coonce's production appear in Trial Examiner O'Brien's decision in Case 31-CA-1104. Figures there show that for the entire month of April 1968 (the only full month for which production figures were shown) Coonce was third highest in sales and gross profits out of a group of seven salesmen.

⁸In this light I find it unnecessary to determine whether Sec. 8(a)(4) of the Act has been violated since the remedy will be the same in any event.

V. THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I will recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent discharged Robert Coonce for engaging in activity protected by the Act, I will recommend that Respondent be ordered to offer him immediate and full reinstatement to his former or substantially equivalent position, without prejudice to his seniority and other rights and privileges, and make him whole for any loss of earnings he may have suffered by payment to him of a sum of money equal to the amount he normally would have earned as wages from the date of his discharge to the date of an offer of reinstatement, less net earnings during said period, with backpay computed on a quarterly basis in the manner established by the Board in *F. W. Woolworth Company*, 90 NLRB 289, 291-294, including interest as held in *Isis Plumbing & Heating Co.*, 138 NLRB 716.

I shall also recommend that Respondent preserve and make available to the Board, upon request, payroll and all other records necessary to facilitate determination of the amount due under this Recommended Order.

In view of the nature of the unfair labor practices committed, I am of the opinion that the commission of similar unfair labor practices may be reasonably anticipated. I shall therefore recommend that Respondent be ordered to cease and desist from infringing in any other manner upon the rights guaranteed its employees by Section 7 of the Act.

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

CONCLUSIONS OF LAW

1. Inland Motors is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. Automobile Salesmen's Union, Local Lodge 2327, International Association of Machinists, is a labor organization within the meaning of Section 2(5) of the Act.
3. By interfering with, restraining, and coercing its employees in the exercise of rights guaranteed in Section 7 of the Act, Respondent engaged in unfair labor practices proscribed by Section 8(a)(1) of the Act.
4. By discharging Robert Coonce because of his union membership thereby discouraging membership in the aforesaid labor organization, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(3) of the Act.
5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

RECOMMENDED ORDER

Upon the foregoing findings of fact and conclusions of law, upon the entire record in this case, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, it is hereby ordered that Respondent, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:
 - (a) Discouraging membership in, or activities on behalf of Automobile Salesmen's Union, Local Lodge 2327, International Association of Machinists, or by any other labor organization, by discharging or in any other manner discriminating against them in regard to their hire or

tenure of employment or any term or condition of employment.

(b) In any other manner interfering with, restraining, or coercing employees in the exercise of their rights to self-organization, to form labor organizations, to join or assist Automobile Salesmen's Union, Local Lodge 2327, International Association of Machinists, or any other labor organization to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from engaging in such activities.

2. Take the following affirmative action to effectuate the policies of the Act:

(a) Offer Robert Coonce immediate and full reinstatement to his former or substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of pay he may have suffered as a result of the discrimination against him in the manner provided in the section of this Decision entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents for examination and copying all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze and determine the amount of backpay due under the terms of this Recommended Order.

(c) Notify Robert Coonce 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 and Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

(d) Post at its place of business in Redlands, California, copies of the attached notice marked "Appendix." Copies of said notice on forms provided by the Regional Director for Region 31, shall be posted by it, immediately upon receipt thereof, after being duly signed by Respondent, and be maintained for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 31, in writing, within 20 days from receipt of this Decision, what steps the Respondent has taken to comply herewith.¹⁹

¹⁹In the event that this Recommended Order is adopted by the 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 further event that the Board's Order is enforced by a decree of a United States Court of Appeals, the words "a Decree of The United States Court of Appeals Enforcing an Order" shall be substituted for the words "a Decision and Order."

¹⁹In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify the Regional Director for Region 31, in writing, within 10 days from the date of this Order, what steps Respondent has taken to comply herewith."

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:

WE WILL NOT discourage membership in or activities on behalf of Automobile Salesmen's Union, Local Lodge 2327, International Association of Machinists, or any other labor organization, by discharging employees or in any other manner discriminating against them in regard to their hire or tenure of employment or any term or condition of employment.

WE WILL NOT illegally interrogate our employees concerning their union membership or activities.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of the rights to self-organization, to form labor organizations, to join or assist the above-named Union, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and to refrain from any or all such activities.

WE WILL offer Robert Coonce immediate and full reinstatement to his former or substantially equivalent position, without prejudice to his seniority or any other rights and privileges previously enjoyed, and make him whole for any loss of pay he suffered as a result of the discrimination against him.

WE WILL notify Robert Coonce 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.

All of our employees are free to become or remain, or refrain from becoming or remaining members of Automobile Salesmen's Union, Local Lodge 2327, International Association of Machinists, or any other labor organization.

INLAND MOTORS
(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, Tenth Floor, Bartlett Building, 215 West Seventh Street, Los Angeles, California 90014, Telephone 213-688-5850.