

ABC Freight Forwarding Corporation, Blue Ribbon Express, Inc., and Midland Forwarding Corporation<sup>1</sup> and Chicago Truck Drivers, Helpers and Warehouse Workers Union (Independent). Case 13-CA-10646

June 26, 1972

### DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND  
PENELLO

On November 8, 1971, Trial Examiner John F. Funke issued the attached Decision in this proceeding. Thereafter, counsel for General Counsel filed exceptions and a supporting brief, and Respondent filed an answering brief to the General Counsel's exceptions.

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

The Board has considered the record and the Trial Examiner's Decision in light of the exceptions and briefs and has decided to affirm the Trial Examiner's rulings, findings, and conclusions as modified below and to adopt his recommended Order as modified below.

We find, contrary to the Trial Examiner, that Respondent violated Section 8(a)(1) of the Act by its interrogation of John Burns on April 30, 1971. The record reflects that Michael De Franco, Respondent's sales manager at its Chicago terminal, asked Burns, one of the salesmen subsequently discharged, if he was strong for the Union and told him that he had heard that Burns had said things about the Union which were not true. This was the extent of the conversation. On these facts, the Trial Examiner concluded that there was neither coercion nor restraint in De Franco's inquiry directed to Burns, nor in his subsequent remark that Burns made remarks about the Union which were not true.

In the circumstances presented here, we find that De Franco's interrogation of Burns gives an impression of employer surveillance of him in interference with his Section 7 rights. The law is clear that an employer violates Section 8(a)(1) of the Act if he creates the impression among employees that he is engaged in surveillance, for by highlighting his "anxiety" concerning union activities, the employer tends to inhibit an employee's future union activities.

We agree with the Trial Examiner's conclusion that

Respondent violated Section 8(a)(3) and (1) of the Act by terminating the employment of John Burns, Kenneth Covnot, and Walter Gajewski on May 20, 1971, to discourage membership in a labor organization. Respondent alleged an economic defense as its reason for discharging the three employees at its Chicago terminal. While not crediting Respondent's economic defense, but accepting it as factual, the Trial Examiner, in effect, found the discharges to be discriminatory while finding an economic justification thereof to the benefit of Respondent.

We disagree with the Trial Examiner's finding of concurrent unlawful and economic reasons for the discharges. In our view, the evidence supports the conclusion that the discharges on May 20, the day the Union was certified occurred solely because of the employees' selection of the Union.<sup>2</sup> The record before us, as reflected in the following findings of the Trial Examiner, reveals Respondent's intent to exercise reprisals: (1) De Franco accurately predicted Respondent's reaction to union organization in November 1970, when he stated he would fire all the salesmen and he and employee O'Connell would divide the sales in Chicago;<sup>3</sup> (2) De Franco's remark to Covnot on or about May 4 that there might be repercussions from a union victory; (3) De Franco's remark to Covnot on or about May 6 that it would not be to his advantage to vote for the Union; and (4) De Franco's remark to Covnot after the discharges that a different vote might have made a difference (in the terminations which took place).

The record further supports our conclusion in view of Respondent's failure in the past, as part of its cost reduction program, to cut the staff in Chicago and the fact that the direction of April 2, 1971, which, in part, directed a cut of two employees at Chicago, was not implemented at all until May 20 and then only among the salesmen, although it did not in fact specifically require termination of salesmen rather than some other category, and no reason is shown for cutting back in that group or adding a third salesman for termination.

The Trial Examiner's remedy—full and immediate reinstatement of the discharged employees to their former jobs "if they exist"—and his statement in the remedy section of his Decision that losses be computed from the date when the jobs became existent after May 20, the date of the discharges, reflect his dual conclusion and, in effect, do not remedy the Section 8(a)(3) violations which the Trial Examiner has found.<sup>4</sup> We find, contrary to the Trial Examiner, no justification within the facts before us

work himself.

<sup>4</sup> Respondent did not except to the Trial Examiner's conclusion that the discharges were discriminatory.

<sup>1</sup> Herein collectively called Respondent.

<sup>2</sup> All five salesmen voted for the Union in the election.

<sup>3</sup> After the discharges, the Chicago area was redistributed and De Franco admitted that as a result of the firing he had to engage in more sales

to depart from our usual remedy in situations involving violations of this nature. That remedy, in fact, is to offer the discharged employees immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges, and to make them whole for any loss of earnings they may have suffered by payment to them of sums of money equal to the amount they normally would have earned as wages from the dates of their respective discharges. For the reasons set forth above, therefore, we shall modify the Trial Examiner's remedy so that it conforms with the above-stated remedy requiring immediate reinstatement and backpay computed from the date of discrimination in accordance with the formula set forth in *F. W. Woolworth Company*, 90 NLRB 289, and *Isis Plumbing & Heating Co.*, 138 NLRB 716, and we reject those paragraphs of the Trial Examiner's remedy that are inconsistent herewith.<sup>5</sup>

#### 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 as herein modified and hereby orders that ABC Freight Forwarding Corporation, Blue Ribbon Express, Inc., and Midland Forwarding Corporation, Chicago, Illinois, shall take the action set forth in the Trial Examiner's recommended Order, as modified below:

1. Substitute the following as paragraph 2(b):  
 "(b) Offer to John Burns, Kenneth Covnot, and Walter Gajewski immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make Burns, Covnot, and Gajewski whole for any loss of earnings they may have suffered by reason of the discrimination against them, in the manner set forth in the section of the Trial Examiner's Decision entitled 'The Remedy,' as modified in the Board's Order."

2. Substitute the attached notice for the Trial Examiner's notice.

<sup>5</sup> The impact of the economic situation upon the reinstatement rights and backpay of the discriminatees is normally determined in the compliance stage of the proceeding and will be left to be handled at that time in accordance with usual procedure.

#### APPENDIX

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

WE WILL NOT tell any employee it would be to his advantage to vote against the Union or tell him that there will be repercussions if the Union wins the election.

WE WILL NOT refuse to give any employee a wage increase because his testimony at a hearing before the National Labor Relations Board indicated that he wanted to belong to the Union.

WE WILL give John O'Connell a wage increase on the same basis we gave other salesmen wage increases in January 1971. We will pay John O'Connell the amount of said increase from April 1, 1971, with interest at 6 percent per annum.

WE WILL NOT terminate the employment of any employee or discharge any employee because he joined a union or voted for the Union in a Board election.

WE WILL offer to John Burns, Kenneth Covnot, and Walter Gajewski immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights or privileges, and make Burns, Covnot, and Gajewski whole for any loss of earnings they may have suffered by reason of the discrimination against them.

All our employees are free to become and remain members of any labor organization or not to become or remain members of any labor organization except as that right might be affected by a lawful union-security agreement in a collective-bargaining contract.

ABC FREIGHT  
 FORWARDING CORP.  
 (Employer)

Dated \_\_\_\_\_ By \_\_\_\_\_  
 (Representative) (Title)  
 BLUE RIBBON EXPRESS,  
 INC.  
 (Employer)

Dated \_\_\_\_\_ By \_\_\_\_\_  
 (Representative) (Title)  
 MIDLAND FORWARDING  
 CORPORATION  
 (Employer)

Dated \_\_\_\_\_ By \_\_\_\_\_  
 (Representative) (Title)

We will notify immediately the above-named individuals, if presently serving in the Armed Forces of the United States, of the right to full reinstatement, upon application after discharge from the Armed Forces, in accordance with the Selective Service Act and the Universal Military Training and Service Act.

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

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

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Everett McKinley Dirksen Building, Room 881, 219 South Dearborn Street, Chicago, Illinois 60604, Telephone 312-353-7572.

## TRIAL EXAMINER'S DECISION

### STATEMENT OF THE CASE

JOHN F. FUNKE, Trial Examiner: This case was brought before the National Labor Relations Board on:

1. A charge by Chicago Truck Drivers, Helpers and Warehouse Workers Union (Independent) herein the Union, against ABC Freight Forwarding Corporation, Blue Ribbon Express, Inc., and Midland Forwarding Corporation, herein ABC, Blue Ribbon, and Midland, or collectively as the Respondents, alleging Respondents violated Section 8(a)(1), (3), and (5) of the Act, filed May 24, 1971.

2. A complaint issued by the General Counsel against Respondents alleging violations of Section 8(a)(1) and (3) of the Act, dated August 6, 1971.<sup>1</sup>

3. An answer of Respondents denying the commission of any unfair labor practices, dated August 16, 1971.

4. Hearing held by me at Chicago, Illinois, September 15, 1971.

5. Briefs received from the General Counsel and Respondents, dated October 22, 1971.<sup>2</sup>

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

### FINDINGS AND CONCLUSIONS

#### I. THE BUSINESS OF RESPONDENTS

Respondents are corporations engaged in the freight forwarding business and have their principal place of business in New York City, New York. They maintain

<sup>1</sup> On August 6, 1971, the General Counsel issued an order severing Case 13-CA-10646 from Case 13-CA-10674. The General Counsel then moved for summary judgment in Case 13-CA-10674, a motion still pending before the Board. The complaint in Case 13-CA-10646 was amended at the hearing to allege that Respondents denied a wage increase to John O'Connell in violation of Section 8(a)(3) and (1) of the Act.

<sup>2</sup> The briefs received were succinct and lucid and free from distortion or exaggeration in treating the facts. The brief of counsel for the General

facilities at various locations in other States including a terminal at 1514 Canal Street, Chicago, Illinois, the terminal involved in this proceeding. During the past fiscal year ABC received a gross revenue of \$13,700,000, Blue Ribbon a gross revenue of \$1,900,000, and Midland a gross revenue of \$12,000,000 from their operations.

During the past fiscal year each of Respondents received a gross income in excess of \$50,000 from contracts or arrangements with various common carriers directly engaged in commerce.

Respondents are engaged in commerce within the meaning of the Act.<sup>3</sup>

#### II. THE LABOR ORGANIZATION INVOLVED

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

#### III. THE UNFAIR LABOR PRACTICES

##### A. Background and Issues

On May 20, 1971,<sup>4</sup> following a National Labor Relations Board election conducted May 12, 1971, the Union was certified as the exclusive bargaining representative of the employees in the following unit:

All freight salesmen employed by ABC Freight Forwarding Corporation, Blue Ribbon Express, Inc., and Midland Forwarding Corporation at its Chicago, Illinois location now located at 1514 South Canal Street, Chicago, Illinois, excluding office clerical employees, professional employees, guards and supervisors as defined in the Act.

On May 20, 1971, Respondent discharged three of the five salesmen employed in the bargaining unit.<sup>5</sup> These were Walter Gajewski, Kenneth Covnot, and John Burns. It was these discharges which prompted the filing of the charge by the Union.

The complaint and the answer frame three issues for determination by the Trial Examiner:

1. Did statements made by Michael DeFranco, sales manager at Respondents' Chicago terminal,<sup>6</sup> to employees in the bargaining unit restrain and coerce those employees in violation of Section 8(a)(1) of the Act?

2. Did Respondents' refusal to grant a wage increase to John O'Connell violate Section 8(a)(3) of the Act?

3. Did the discharge of the three above-named employees violate Section 8(a)(3) of the Act?

##### B. Violations of Section 8(a)(1)

All the allegations refer to four conversations between DeFranco and the salesmen, in which allegedly coercive remarks were made.

John Burns, one of the salesmen, testified that on or

Counsel could well serve as a model in all respects.

<sup>3</sup> Respondents deny that they constitute a single employer. The Regional Director for Region 13 found they constituted a single employer in his decision and direction of election in Case 13-RC-12356, dated April 14, 1971. No further evidence was taken on this issue.

<sup>4</sup> Unless otherwise noted all dated hereafter refer to 1971.

<sup>5</sup> All five salesmen voted for the Union in the election.

<sup>6</sup> The supervisory status of DeFranco is admitted.

about April 30, which would be between the direction of election and the election, DeFranco asked him if he was strong for the Union and told him he had heard that Burns had said things about the Union which were not true. When Burns asked him to be specific DeFranco only told him he had heard certain things and that ended the conversation.

On May 10 (2 days before the election) Burns and Covnot were called into DeFranco's office and in the presence of his secretary, Darlene, he asked them what benefits, apart from more money, would accrue from unionization. They replied that they would expect better vacations, pay for 50 hours rather than 40 per week, and better reimbursement for car expense. Covnot got a copy of what was presumably a standard salesman's contract from his car and gave it to DeFranco. Covnot corroborated Burns' testimony as to this conversation to the extent that after DeFranco asked them what benefits they expected he went to his car and returned with a union contract.

Covnot testified to two other conversations with DeFranco. On or about May 4 he and DeFranco had lunch at Berghoff's and DeFranco brought up the subject of unions by telling him he was a young man in the organization and that it was not to his advantage to vote for the Union—there would be repercussions if the Union won. Covnot made no comment.

About 2 days later DeFranco met Covnot in a corridor, called him to the dock, and again told him it would not be to his advantage to vote for the Union and also told Covnot that he (DeFranco) wanted to get an idea of how this was going to "shape up."

As to the April 30 conversation between DeFranco and Burns, the testimony is uncontradicted. Regarding the May 4 conversation in which Burns and Covnot were called into DeFranco's office and interrogated concerning union benefits which might be expected I do not find DeFranco's testimony substantially different. While it appears that DeFranco did recite certain benefits which had recently been granted the employees, including a wage increase in January, there is no testimony by any of the participants that Respondents would offer more benefits if the employees rejected the Union. DeFranco admitted that during the preelection period he was trying to get information from the employees and keep the home office in New York advised of what was going on.

DeFranco admitted telling Covnot at luncheon on May 4 that he was a young man in the organization and did not deny telling him that it was not to his advantage to vote for the Union. He did deny telling Covnot there would be repercussions if the Union won. On this issue I credit Covnot not only on his demeanor but also because it is a logical extension of DeFranco's obvious efforts to convert Covnot to Respondents' cause. The Union's victory was indeed followed by serious repercussions—the discharge of three salesmen.

DeFranco did not testify regarding the conversation with

Covnot which took place about 2 days later in which he told Covnot it would not be to his advantage to vote for the Union.

### Conclusions

Turning to the General Counsel's allegations I find neither coercion nor restraint in DeFranco's inquiry directed to Burns on April 30 nor his subsequent remark that Burns made remarks about the Union which were not true. Nor do I find that DeFranco's conversation with Burns and Covnot on May 10 in which they were asked about the Union and its benefits impermissible. DeFranco made no threats and promised no benefits and if the purpose was, in part, to ascertain the feeling of the employees I do not hold that, in itself, improper.<sup>7</sup>

On the other hand, I find DeFranco's two other conversations with Covnot unlawful since in one he clearly stated that Covnot might be jeopardizing his future by voting for the union and that unfortunate consequences could result from a union victory. A similar finding is made with respect to his statement that it would be to Covnot's advantage to vote against the Union.<sup>8</sup> While these statements were made to only one employee that employee represented 20 percent of the voting unit and could easily have been the determining vote.

### C. O'Connell and his Pay Raise

O'Connell was the senior salesman and had been employed by Respondents for over 10 years. In 1970 he suffered a coronary attack and was incapacitated from January until June 23, 1970, when he returned to work. He was paid his salary by Respondents for this period of time, full salary until May and half salary from May until June 23.

According to O'Connell his first approach to DeFranco concerning a wage increase after his illness occurred on October 19, 1970, when DeFranco told him he was not eligible because of his lengthy illness and its expense to Respondents. On November 24, 1970, he again had a discussion with DeFranco in which he showed DeFranco a list of new accounts to justify an increase which was not granted. In January, 1970, all the salesmen except O'Connell received wage increases as they had in January of 1970 (O'Connell had been included in that increase). On February 10, DeFranco asked O'Connell for a list of new accounts and, after receiving it, recommended O'Connell for a raise on February 24. This recommendation required approval from John Clark in the New York office, an approval which was never granted.

When O'Connell did not receive his increase he asked DeFranco about it and was told that DeFranco did not know what was holding it up. O'Connell fixes the conversation as March 12, a week after O'Connell had appeared as a witness at the hearing in the representation proceeding. O'Connell asked DeFranco to speak to Clark

<sup>7</sup> Granted that the Supreme Court has held that coercion and restraint are words of imprecision I doubted that they were intended to make unlawful every casual remark made by a lower echelon supervisor in which he used the word "union" in a context short of adulation in discussion with employees.

<sup>8</sup> This statement must be considered in context with the previous conversation between DeFranco and Covnot. In both conversations there was the implication that Covnot would obtain material advantages by voting against the Union.

about it and DeFranco not only refused but refused to give O'Connell permission to talk to Clark. On April 1 O'Connell had his last conversation with DeFranco about his increase and was given two reasons why it had been refused: (1) it might be alleged as an unfair labor practice since the election was pending and (2) O'Connell's testimony at the Board hearing indicated he wanted to be a member of the Union.<sup>9</sup>

There is little discrepancy between the testimony of DeFranco and O'Connell regarding their discussions concerning a wage increase except that DeFranco does not refer to any conversation between himself and O'Connell in which he told O'Connell that a wage increase could not be granted because of the pending election or that O'Connell's testimony at the hearing indicated he favored the Union. Neither does DeFranco deny that such a conversation took place as alleged. DeFranco did testify that O'Connell's illness and the leave pay he received for almost 6 months was the reason for refusing the increase when it was first recommended by him.

There is dispute as to whether O'Connell was eligible for a pay raise under Respondents' time requirements which were based on salary (like the federal government, higher salaries involved longer waiting periods) but no conclusion can be reached either from the testimony or the exhibits. Marvin Barsky, ABC vice-president, who testified to wage policy did not know what O'Connell's salary was. In any event this was not the reason given to DeFranco when his recommendation was refused.

The General Counsel does not allege that Respondents' refusal to approve the recommendation in February was an unfair labor practice but relies on DeFranco's testimony regarding the April 1 refusal.

#### Conclusions

Based upon O'Connell's uncontradicted testimony that he was told by DeFranco on April 1 that one of the reasons he was not given an increase was that his testimony at the Board hearing indicated he favored the Union I find Respondents violated Section 8(a)(3) of the Act. The discriminatory motive need not be the only or even the dominating motive, it is sufficient that it was a partial motive. (Citations unnecessary.)

#### D. *The Discharges*

On May 20 Respondents received notification that the Union had been certified as exclusive bargaining representative of the salesmen. On that day Burns and Covnot each received a letter reading (General Counsel's Exhibits 3 and 5):

You have been aware, as was confirmed in our recent meeting, that there has been a steady and chronic decline in the level of business with respect to our Chicago station over an extended and protracted period of time. This decline has in turn had a very serious adverse economic affect on the company, which has been continuing up to the present period of time. Management's latest assessment of the current decline

in business with respect to our Chicago station, and the serious adverse economic position it now finds as a consequence, had been obliged to conclude that there must be a further continuation of reducing forces to help alleviate the current situation.

In view of the above, I am obliged to advise, with regret, that your position is being terminated effective as of the close of business on May 21, 1971. Under separate cover you shall receive all salary and accrued vacation monies due you through such date of termination.

Both letters were signed by Alan H. Daly, director of sales, but the letter to Burns was on a Midland stationary, the letter to Covnot on ABC stationary. Gajewski received a letter signed by B. Feller, vice president and general manager of Blue Ribbon, reading (General Counsel's Exhibit 6):

You are cognizant of the fact that there has been a steady and uninterrupted decline in Blue Ribbon Express, Inc. tonnage over a lengthy period of time. This fall-off in business has caused concomitantly a serious and adverse affect on the economic status of the Company, which affect continues to the present moment.

In view of the adverse economic situation in which the Company finds itself, Management has no alternative but to continue its reduction in personnel to alleviate the current situation.

Therefore, it is with regret, that I must advise you that effective as of the close of business on Friday, May 21, 1971, your position is terminated.

Under separate cover you shall receive all salary and accrued vacation monies due you through such date of termination.

Neither the use of different stationary nor of different signatories was explained.

The General Counsel relies in part for evidence of discriminatory motive on a conversation between O'Connell and DeFranco in November 1970, when O'Connell told DeFranco that his remarks (made at a sales meeting) were driving the men toward a union again. (An effort to organize the salesmen had been defeated sometime in 1970.) According to O'Connell, DeFranco told him "didn't give a . . . if they did or didn't, but that if they did he would fire them all and that he and I would handle all of the sales for the City of Chicago, that he would take the territory south of Madison Street and I would handle everything north of Madison Street." O'Connell then left DeFranco's office.

DeFranco's version is that he told O'Connell that whatever happened "it doesn't really matter," that it was an "off the cuff conversation" and that "if there were only two left we split the territory and each take part of the territory." DeFranco could not recall how the conversation arose, testimony I find it impossible to credit. He did deny telling O'Connell he would fire all the salesmen, stating he had no such authority. I agree that the record is clear that DeFranco did not possess such authority but I still find that the statement or a substantially equivalent one was

<sup>9</sup> O'Connell's actual testimony was that he was told "he wanted to be a member of the unit or the Union." I see no significant distinction.

made since it ties in so closely with the suggested territorial distribution which would result only from discharges.

Covnot testified to a conversation with DeFranco which took place on May 24, after his discharge. Covnot was in Respondent's office waiting for the other salesmen and DeFranco told him he did not want any meetings. (There was no meeting.) A little later Covnot went into DeFranco's office and DeFranco told him it did not have to be that way. Covnot asked what difference the size of the vote would have made. DeFranco told him it could have made a lot of difference and that "we have to think of our family, our children and ourselves" and also told Covnot sales jobs were hard to find.

DeFranco's recollection of this conversation was vague but did state it was Covnot who made the statement about thinking of his family and admitted he may have told Covnot jobs were hard to find. DeFranco did deny that he had any knowledge of the decision to terminate the salesmen and that he was shocked when he heard it. Again I have to credit Covnot from both my recollection of the witnesses and DeFranco's testimony as recorded, which is not convincing.

Respondents' defense is that economic conditions necessitated a reduction in personnel. In support thereof Respondents offered its Exhibits 1 through 5 directing a reduction in costs, all issued during November, 1970.

Exhibit 1, from Marvin Barshky, vice president of ABC, directed a curtailment of expenses for purchases, telephone calls, and postage. Exhibit 2 ordered that there be no replacements hired and no new personnel hired, nor any overtime authorized without approval from the vice president responsible for the terminal. Exhibit 3, a memorandum from Leon Mitchell (ABC) to Barshky, required reevaluation of all personnel at all stations with a view to reducing office clerical, sales, supervisory, dock labor, and truckdriver categories. Exhibit 4 from Barshky to all stations limited sales expenses to 10 percent of all sales. Exhibit 5 directed a reduction of one employee at 10 designated stations, six at Elizabeth, New Jersey, and seven at S. Handelson, N.Y., Chicago, Milwaukee, Memphis, and New Orleans were to receive direct instructions.

Respondent's Exhibits 6, 7, and 8 showed a comparison of tonnage for the fourth quarter, 1969, against the fourth quarter, 1970; first quarter, 1970, against first quarter, 1971; second quarter, 1970, against second quarter, 1971, for Midland, Blue Ribbon, and ABC. These figures showed a decline at each company in tonnage from the corresponding quarter of the previous year.

On April 2, 1971, another memorandum from Barshky to Leon Mitchell (Respondent's Exhibit 9) requested a reduction of 16 employees at various designated terminals including two employees at Chicago. (The employees at Chicago were not designated by job categories.)

Respondents' Exhibit 10 shows a total reduction in personnel at all terminals from November 1970 through June 1971, of 26 employees against an acquisition of 11 employees, or an overall reduction of 15. The Chicago terminal shows no changes except for the loss of the three salesmen in May.

Thus Respondent by these and other exhibits has shown a decline in tonnage and a decline in total personnel at its terminals. The Chicago terminal, however, shows no change in personnel except for the termination of three employees, all in sales, in May 1971. During May 1971, the New York office showed a decline from eight to six salesmen, Elizabeth from five to four. No other terminal suffered such a decline in the sales department during May as Chicago with 60 percent of its force eliminated. (Respondent's Exhibit 11.) No replacements were hired for the Chicago sales department and the employees were terminated according to their seniority.

### Conclusions

While this issue is not free from doubt I think the General Counsel has sustained his burden of proof that the discharges were motivated, at least in part, by discrimination within the meaning of the Act. This finding is based largely on credibility issues between DeFranco and the salesmen who testified and which I have resolved against DeFranco for reasons stated above. I think that DeFranco accurately predicted the Respondents' reaction to union organization in November, 1970, when he stated he would fire all the salesmen and he and O'Connell would divide Chicago. Whether he stated he would fire them or stated they would be fired I regard as inconsequential for in any event three were fired and the Chicago area was redistributed.<sup>10</sup>

Nor do I find entirely cryptic DeFranco's remark to Covnot after the election that a different vote might have made a difference. If it had meaning, as I believe it did, the difference could only have been in the terminations which took place. This, together with DeFranco's previous warning to Covnot that there might be repercussions from a union victory, I find a revelation of Respondents' intent to exercise reprisals. Again I find some support for this conclusion in the fact that only salesmen were terminated at Chicago and that the percentage reduction in sales employees at Chicago was totally disparate with the reduction in sales at any other terminal. That Respondents were watching the progress of events closely is established by DeFranco's admission that any information he gained was relayed to New York. All of these factors point to discrimination as contributing to the decision made May 20.

In reaching the above conclusion I have accepted Respondents' exhibits relating to overall reduction in personnel and declines in tonnage as factual. More importantly, I credit Barshky's testimony that the Chicago terminal was, under the rates fixed by the ICC, not as profitable as the eastern terminals where long-haul runs under other rates were more profitable. It is not necessary, however, to find that a reduction in costs at Chicago was not due. All that I am finding is that by making such reduction Respondents were killing two birds with one stone—reducing costs and thwarting the rights of their employees under Section 7. This twin killing I find unlawful.

<sup>10</sup> DeFranco admitted that as a result of the firing he had to engage in more sales work himself.

Upon the foregoing findings and upon the entire record in this case, I make the following:

#### CONCLUSIONS OF LAW

1. By telling an employee that it would be to his advantage to vote against the Union and that there would be repercussions if the Union won the election Respondents violated Section 8(a)(1) of the Act.

2. By refusing an employee a wage increase because his testimony at a hearing before the National Labor Relations Board indicated he wanted to be a member of the Union, Respondent violated Section 8(a)(3) and (1) of the Act.

3. By terminating the employment of three employees on May 20, 1971, to discourage membership in a labor organization Respondents violated Section 8(a)(3) and (1) of the Act.

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

#### THE REMEDY

Having found the Respondents engaged in and are engaging in certain unfair labor practices it shall be recommended that they cease and desist from the same and take certain affirmative action necessary to effectuate the policies of the Act.

Having found Respondents denied John O'Connell a pay increase on April 1 for the purpose of discouraging membership in a labor organization I recommend that I grant him said increase and make him whole by paying him the sum of such pay increase from April 1, 1971, to the date of compliance herewith. Since the record does not disclose either the salary O'Connell was receiving nor the amount of the pay increase he was denied, I recommend that said increase be computed on the basis of the increase received by the other salesmen in January 1971. If said increase was based upon a flat increase granted all salesmen O'Connell's should receive the same increase; if granted on a percentage of salary, O'Connell's increase should be based on the same percentage of salary. Said amount due O'Connell shall be fixed on a quarterly basis with interest at 6 percent per annum.

Having found Respondents terminated or discharged Walter Gajewski, Kenneth Covnot, and John Burns on May 20, 1971, in violation of Section 8(a)(3) of the Act, it will be recommended that Respondents offer each of them full and immediate reinstatement, without prejudice to their seniority or other rights and privileges, to their former jobs if they exist. If such jobs no longer exist, and since Respondents' job categories indicate no substantially equivalent jobs exist, then Gajewski, Covnot, and Burns shall be placed on a preferential hiring list and be offered

full reinstatement if and when such jobs or any of them become existent, in accordance with their former seniority.<sup>11</sup>

I shall also recommend that each of them shall be made whole for any loss of earnings he may have suffered; said losses to be computed from the date when his job became existent after May 20 until full reinstatement is offered. Said losses shall be computed on a quarterly basis with interest at 6 percent per annum.<sup>12</sup>

Upon the foregoing findings of fact and conclusions of law and upon the entire record, I recommend, pursuant to Section 10(c) of the Act, issuance of the following:<sup>13</sup>

#### ORDER

Respondents ABC Freight Forwarding Corporation, Blue Ribbon Express, Inc., and Midland Forwarding Corporation, their officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Telling any employee it would be to his advantage to vote against the Union or that there would be repercussions if the Union won the election.

(b) Refusing an employee a wage increase because his testimony at a Board hearing indicated he wanted to be a member of the Union.

(c) Terminating, discharging, or otherwise affecting the hire, tenure, or condition of employment of any employee to discourage union activity.

(d) In any other manner interfering with, restraining, or coercing their employees in the exercise of the rights guaranteed by Section 7 of the Act.

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

(a) Make John O'Connell whole for the wage increase he lost because of the discrimination practiced against him, computed as set forth in "The Remedy."

(b) Offer Walter Gajewski, Kenneth Covnot, and John Burns full and immediate reinstatement to their former jobs if said jobs exist. If said jobs do not exist place Gajewski, Covnot, and Burns on a preferential hiring list and offer them reemployment on a seniority basis to their jobs before any other employee is hired for said jobs if and when they become available. Make said employees whole for any loss of earnings they or any of them may have suffered by reason of the discrimination practiced against them as set forth in "The Remedy."

(c) Notify immediately the above-named individuals, if presently serving in the Armed Forces of the United States, of the right to full reinstatement, upon application after discharge from the Armed Forces, in accordance with the Selective Service Act and the Universal Military Training and Service Act.

(d) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all

<sup>11</sup> For the reasons set forth (fn. 11) I have limited backpay.

<sup>13</sup> In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions and Order, and all objections thereto shall be deemed waived for all purposes.

<sup>11</sup> Accepting the statement made at the hearing that none of the three discharges had been replaced I am unwilling to recommend that Respondents reinstate them by reestablishing the jobs. This would, in effect, require a padding of Respondents' payroll by adding unneeded employees. In view of Respondents' economic posture as disclosed at the hearing I think it sufficient (although Respondents' have little claim to equitable treatment) to order reinstatement on the above terms.

payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its Chicago, Illinois, terminal copies of the attached notice marked "Appendix."<sup>14</sup> Copies of said notice, on forms provided by the Regional Director for Region 13, after being duly signed by an authorized representative of the Respondent, shall be posted by the Respondent immediately upon receipt thereof, and be maintained for 60 consecutive days thereafter, in conspicu-

<sup>14</sup> In the event that the Board's Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall be changed to read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

ous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director for Region 13, in writing, within 20 days from the receipt of this Decision, what steps Respondent have taken to comply therewith.<sup>15</sup>

IT IS FURTHER ORDERED that all allegations of the complaint not specifically found to be in violation of the Act be dismissed.

<sup>15</sup> In the event that this recommended Order is adopted by the Board after exceptions have been filed, this provision shall be modified to read: "Notify the Regional Director for Region 13, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith."