J. E. MacFarlane *and* Paul Johnson. Case 31-CA-2622

July 20, 1972

DECISION AND ORDER

BY CHAIRMAN MILLER AND MEMBERS JENKINS AND KENNEDY

On March 15, 1972, Trial Examiner Maurice Alexandre issued the attached Decision in this proceeding. Thereafter, General Counsel filed exceptions and a supporting brief, and Respondent filed cross-exceptions and a 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 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 and to adopt his recommended Order.[1]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Trial Examiner and hereby orders that Respondent, J. E. MacFarlane, an Individual, his agents, successors, and assigns, shall take the action set forth in the Trial Examiner's recommended Order.

CHAIRMAN MILLER, dissenting:

This is an unusual case. The General Counsel issued a complaint, charging that Respondent discharged Paul Johnson because he had joined or assisted the Union or engaged in other protected activity. The Trial Examiner has found a violation for almost exactly the opposite reason—i.e., he finds Johnson was terminated because he was *not* a member of the Union.

Such a state of affairs suggests that the Board, upon review, ought to scrutinize the record with care in an effort to discover what we really have before us. I have done so, and have concluded, for the reasons set forth below, that no violation of our Act has occurred.

I find the facts to be as follows:

Respondent purchased this small business, which involves transporting mail for the U.S. Postal Service, on July 1, 1971. The predecessor had a union contract; Respondent understood that, and assumed the contract.

The *modus operandi* under that agreement has to be pieced together here from a rather sketchy record. Respondent is a small businessman with little sophistication in these matters, and no union officer appeared as a witness to clarify the less than clear picture which must be put together from rather fragmentary evidence.

But, as best as I can make out, the Union requires small operators such as this one to apply the contract, including the union security clause thereof, only to regular full-time employees. Part-time and temporary employees are treated differently—they are paid the contract wage scale, but as Respondent understands the practice, at least, they are not entitled to receive certain fringe benefits, such as coverage by the pension and welfare provisions of the agreement. The union security clause is also applied differently as to them—they do not become regular union members, but they do remit a monthly service fee, which is deducted from their pay, under a separate kind of checkoff form from that applicable to regular, full-time employees who are required to become regular, full-fledged union members. There is no formal recognition in the contract of these arrangements, and also no formal or clear-cut definition of precisely where the line of distinction is drawn between regular full-time employees and temporary or part-time employees. Or, if there is, no one who testified at this hearing understood it with any degree of clarity.

It is the custom to refer to the part-time or temporary employees as "non-union" employees, and to use this same term to apply to employees who have not yet completed their probationary period.

When Respondent bought the business, it also took over, as the Trial Examiner found, seven employees who concededly were regarded as regular full-time employees. He also took over Johnson and Apodaca, who were regarded as part-time or temporary "non-union" employees.

At or about this time, however, Johnson had taken a step which, in the context of the *modus vivendi* of the parties, was unusual. He had gone to the union hall and sought, on his own, full-fledged membership in the Union. This was not customary, since usually employees waited until they became regular, full-time employees, at which time full-fledged union membership was both customary and required by the parties' interpretation of the contractual union security clause. Respondent had no knowledge of this and, when Johnson, on July 6, told Respondent

[1] We agree with the Trial Examiner that Johnson was laid off for discriminatory reasons However, we find no evidence in the record to support the Trial Examiner's comment in fn 12 of his Decision regarding the possibility that Johnson might in any event have been laid off on July 6 on the basis of nondiscriminatory criteria. As this comment appears to be pure speculation, we do not adopt it

he was a union member, Respondent, understandably in the light of the normal customs as to this, disbelieved him, as the Trial Examiner correctly found.

On July 3, Johnson complained about not receiving certain overtime benefits for work on a shift beginning June 30 and ending on July 1. The problem appeared to be one of whether the work week in question should be treated as a single workweek for purposes of computing overtime, or as two separate workweeks in view of a new employer having taken over as of June 1. Before having accepted the assignment to the June 30—July 1 long shift, on or about June 26, Johnson had inquired of the Union as to whether he would be entitled to overtime pay for the work in question, and had received an affirmative answer. When he was denied the overtime pay, despite his complaint, he again called the Union, and was told this time that he was not entitled to the overtime. Though the record is not complete on this point, it is quite probable that the circumstance of the advent of a new employer had not been mentioned at the time of his initial inquiry, and it was this changed circumstance which entered into the changed opinion of the union representative at the time of the later inquiry.

On July 6, Johnson made a second complaint—this time about his failure to receive holiday pay for the Fourth of July. On this occasion he was told that he was not eligible for this contractual fringe benefit because he was a "non-union" employee. In the context explained above, what was meant, of course, was that he was a part-time or temporary employee, who was both not required to join the Union and who, as Respondent understood it, was ineligible for the fringes applicable only to the regular full-time employees who are also required to be full-fledged union members. Johnson replied that he was a union member, and would complain to the Union about his holiday pay. He did so, and ultimately the Union successfully contended that he was entitled to holiday pay. This suggests that Respondent may not have been fully correct in his understanding that temporary part-time employees were not entitled to contractual fringe benefits, but the record leaves us to conjecture as to this point.

Johnson was also told on July 6 that he was being laid off. Respondent says that he had decided to operate with a total of eight employees—seven full-time, one temporary—and to do some driving himself. The Trial Examiner did not pass on the credibility of Respondent's testimony that this cutback was for business reasons. The record appears, however, to bear it out, as Respondent did thereafter operate with seven regular full-time drivers, plus one temporary or part-time employee—there being a succession of the latter type because of turnover.

The issue, then, becomes one of whether Johnson was discriminatorily selected for layoff. Respondent testified that he believed his only choice consistent with the contract was to lay off either Johnson or Apodaca, the two temporary or part-time "non-union" employees. He testified that as between these two, Johnson was least senior and also least competent, there having been some incidents which Respondent believed indicated Johnson was a less than totally satisfactory driver.

The Trial Examiner finds that this selection of Johnson because of his "non-union" status is, in effect, an admission of a discriminatory basis of selection. The difficulty with this finding is that the Trial Examiner does not seem to have understood the distinction which the parties had drawn between regular full-time, so-called "union" employees and temporary or part-time, so-called "non-union" employees. When viewed in that context, it is plain that Respondent's view that he had to choose a "non-union" employee, however discriminatory that term in its formal usage may sound, was not, in fact, discriminatory here. Instead, the choice comported with Respondent's understanding that temporary and part-time employees do not enjoy the same contractual protections as regular full-time employees, and thus that a regular fully covered employee would clearly be entitled to priority in the event of layoff.

That the Union may have joined in so construing the agreement seems evident from Johnson's testimony that after he filed a grievance regarding his termination, he discussed it with the union representative, and apparently immediately following that discussion embarked on an effort to determine the precise seniority date of the other part-time or temporary "non-union" employee, Apodaca. It seems reasonable to infer that the Union, too, was thus concerned only with the relative status of these two employees in determining the propriety of Respondent's action.

Respondent, who appeared *pro se* at the hearing, appeared baffled at the failure of General Counsel and the Trial Examiner to understand this distinction which, to his mind, was the way of life in this industry and in this area. Thus, Respondent protested at several points in the hearing to the effect that he *must* have used the correct basis of selection or the Union would have pursued the matter under the contract. And he kept asking why the Board had not pursued the Union if what had happened here was wrong, since he knew that Johnson had filed an 8(b) charge against the Union which General Counsel had dismissed.

Had Respondent been represented by experienced labor counsel at the hearing, probably the context of the distinction would have been sufficiently clearly brought out so that the Trial Examiner might better have understood it. Indeed, only the curious circumstance of a complaint alleging that Johnson was fired because of his union membership and a Trial Examiner's finding the opposite—i.e., that he was fired for nonmembership—prompted the close scrutiny of the record which had led me to this understanding.

But once one understands it, it also seems clear that Respondent was guilty of no discriminatory conduct in looking only to the so-called "nonunion," but really part-time temporary, employees for selection of the first employee to be laid off.

If he was in error as to his understanding of this construction of the agreement, the matter should have been pursued under the grievance and arbitration provisions of the contract, and our *Collyer* principles[2] would prevent our examining into it until those procedures had been fully utilized.

There remains the question of whether Johnson may have been selected, as against Apodaca, because of Johnson's concerted activity in pursuing his claims for overtime pay and for holiday pay, or whether, as Respondent asserts, he selected him because he had lesser seniority and was less competent. This issue is also one which should normally be deferred to the grievance and arbitration provisions of the governing agreement.

There is some evidence, however, which indicates that the union representative, although he actively pursued and ultimately satisfactorily adjusted Johnson's holiday pay grievance, and although he assured Johnson that the matter of his termination would be pursued to arbitration, if necessary to secure a favorable result, did not in fact pursue the termination grievance. We do not know why.

I would, under these circumstances, remand the case for a determination as to whether there subsequently developed hostility between Johnson and his Union of a nature which would indicate that this is not a proper case for deferral under *Collyer.* It is possible that such may be the case. Johnson obviously believes it is, since he has complained both to the Board and to the International Union about the Local's failure to more vigorously pursue his grievance. It is equally possible, however, that the Union investigated the matter of the termination and concluded that the selection of Johnson, rather than Apodaca, was a proper application of the contract, and was not motivated by improper reasons related to Johnson's advocacy of his grievance. The action of the General Counsel in dismissing the 8(b) charge herein tends to suggest the latter, but I do not believe we are justified in accepting such an inference as fact, in the present state of the record.

In any event, since the Trial Examiner did not address himself to the *Collyer* issue, I would remand for the taking of such further evidence as may be necessary for the Trial Examiner to rule on the proper application of our *Collyer* principle to this remaining issue.

[2] *Collyer Insulated Wire, a Gulf and Western Systems Co.,* 192 NLRB No. 150.

TRIAL EXAMINER'S DECISION

MAURICE ALEXANDRE, Trial Examiner: This case was heard in Los Angeles, California, on January 11, 1972, upon a complaint issued on October 26, 1971,[1] alleging that Respondent MacFarlane had violated Section 8(a)(1) and (3) of the National Labor Relations Act, as amended. In his informal answer to the complaint, MacFarlane in effect denied commission of the unfair labor practices alleged.

Upon the entire record, my observation of the witnesses, and the brief filed by the General Counsel,[2] I make the following:

FINDINGS AND CONCLUSIONS

I. JURISDICTION

By failing to deny, the answer admitted the following allegations of the complaint:

> Respondent is, and has been at all times material herein, a sole proprietorship, located in Inglewood, California where he is engaged in the transportation by motor vehicle of mail under contract with the United States Postal Service.
>
> Respondent in the course and conduct of his business annually performs services valued in excess of $100,000 for the United States Postal Service.
>
> In the course and conduct of its business operations, Respondent transports mail destined for delivery in states other than California and/or transports mail which has been received directly from states other than California.
>
> Respondent is, and at all times material herein 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.

I find the facts to be as admitted, and that MacFarlane is an employer engaged in commerce and in operations affecting commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

I find that Van Storage Drivers, Packers, Warehousemen and Helpers Local 389, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of

[1] Based on an original and amended charge, respectively filed on September 13, and October 20, 1971, by Paul Johnson.

[2] MacFarlane failed to file a brief.

America, herein called the Union, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The Evidence*

On May 6, 1971,[3] Paul Johnson was employed as a truckdriver by one E. C. Silvestri, the former owner of the business now owned and operated by Respondent MacFarlane. At that time, Silvestri and the Union were parties to a collective-bargaining agreement, containing a union-security provision which covered all of Silvestri's drivers. Silvestri informed Johnson that he would be required to join the Union within 31 days, and was required to execute a checkoff agreement to permit deduction of the union initiation fee and monthly dues. Johnson signed three copies of the checkoff authorization, retained one copy, and gave the other two to Silvestri, who was to transmit a copy to the Union.

Toward the end of June, Silvestri approached Johnson and informed him that he had forgotten to deduct union dues for May and June from his paycheck, but that he would make the deduction from the next paycheck. He also informed Johnson that he had subcontracted all but one of his mail routes, effective July 1, to MacFarlane; that he planned to retain two of his employees, Prewitt and Apodaca; and that the remaining employees, including Johnson, would be taken over by MacFarlane. On the following Monday, Johnson went to the union hall, learned that there was no record of any moneys having been deducted from his pay, filled out an application for membership, and was instructed by the Union to pay his initiation fee and dues as soon as he had the money.[4]

On or about June 26, Silvestri asked Johnson whether he would be willing to work overtime on July 1, which was not a regular workday for the latter. Johnson agreed. He then telephoned the Union to ask whether Silvestri would be required to give him overtime pay for such work. Sandouk, a union representative, answered affirmatively. On the evening of June 30, Johnson began working a shift which extended into July 1 and lasted a total of 25 hours.

On July 1, MacFarlane took over the routes which had been subcontracted to him together with all of Silvestri's employees, including Johnson, except the two employees retained by Silvestri.[5] He also assumed Silvestri's collective-bargaining agreement with the Union. Johnson was not scheduled to work on July 2, but worked a regular shift for MacFarlane on July 3. On that day, Johnson asked Silvestri why he had not received overtime pay for the 25-hour shift. Silvestri replied that since Johnson had worked for him for the part of the shift up to July 1, and for MacFarlane beginning on the latter date, he had worked for each employer separately and was not entitled to overtime pay. Johnson responded that he would complain to the Union.[6] Apparently, other employees encountered the same problem and, according to MacFarlane, they all complained to him and Silvestri about it. However, MacFarlane further testified that Johnson "was the only one that was very vocal."

Johnson worked a regular shift on July 4. On that date, MacFarlane told Johnson that he would have no work for him for a few days after July 5 because of his need to reorganize the business, and that he would receive his check on July 6. Johnson worked his regular shift on July 5. On that date, he called the Union to complain about his failure to receive overtime pay for the 25-hour shift. This time Union Representative Sandouk reversed his prior opinion.

Johnson worked a regular shift on July 6. On the latter date, MacFarlane gave him his check, and informed him that he had not given Johnson holiday pay for his work on July 4 because he was not required to do so in the case of a nonunion member. Johnson testified that he replied that he was a member of the Union, and that MacFarlane was required to give him the holiday pay as well as union medical and other fringe benefits; and that MacFarlane then stated that he had been informed by Silvestri that he was not required to hire a union driver, could not afford to pay union benefits, and was laying Johnson off permanently inasmuch as he was in the Union. According to Johnson, he responded that MacFarlane was obligated to pay him union benefits and that he would call the Union about the matter.

MacFarlane denied being told by Johnson that he was a member of the Union. With regard to his reasons for discharging Johnson, MacFarlane testified as follows. Silvestri had told MacFarlane that only eight employees were needed to operate the mail routes which the latter had acquired. He took over from Silvestri seven full-time employees, all of whom were members of the Union. In addition, he took over Apodaca and Johnson, both of whom were part-time nonunion employees.[7] He thus had nine employees. Since no vacations were scheduled between July 5 and 13, and since he needed only eight drivers to handle his routes, he decided to discharge one employee.[8] In determining which individual to select, he concluded that he could not discharge any of the full-time union employees and retain a part-time or temporary employee. This left him with only two candidates for discharge, Apodaca and Johnson. On the basis of his evaluation of their ability, performance, and seniority, he selected Johnson for discharge. On cross-examination, MacFarlane testified that it was his understanding that since Johnson was nonunion and had not completed the 60-day probationary period provided in the collective-

[3] All dates referred to hereafter relate to 1971 unless otherwise expressly stated.

[4] On July 2, Johnson purchased a $20 money order which he mailed to the Union in payment of his dues for May and June. On August 16, he sent a money order to the Union in partial payment of his initiation fee.

[5] MacFarlane gave conflicting testimony as to whether Apodaca worked for him during the period from July 1 through 8. The parties finally stipulated that Apodaca worked for MacFarlane for 2-1/2 hours on July 1, and that he then worked exclusively for Silvestri through July 8.

[6] Johnson testified that MacFarlane was in their vicinity during the conversation, but there is insufficient evidence to permit a finding that he overheard what they said.

[7] MacFarlane testified that Silvestri had told him that Johnson was a part-time employee; i.e., had been hired because one regular employee was ill and because the vacation season was approaching.

[8] MacFarlane testified that, if necessary, he could do some driving himself.

bargaining agreement, he could be discharged for "any reason at all."

Johnson reported the situation to Sandouk, who stated that MacFarlane had no choice but to retain Johnson and pay fringe benefits, that Sandouk would straighten out the matter, and that, if MacFarlane did not agree, Sandouk would call a general strike. On or about July 12, Johnson filed a grievance at Sandouk's suggestion. On or about July 14, following a conference with MacFarlane, Sandouk informed Johnson that MacFarlane would pay the holiday pay. However, Sandouk stated that the matter of Johnson's discharge was still unresolved. Not receiving any word from the Union regarding his discharge, Johnson filed an unfair labor practice charge on September 13. On September 15, MacFarlane mailed a check for holiday pay to Johnson.

B. *Concluding Findings*

The General Counsel contends that, in discharging Johnson MacFarlane was motivated by one of two considerations: his belief that Johnson had joined the Union or Johnson's attempt to enforce the holiday pay and fringe benefit provisions of the collective-bargaining agreement. From MacFarlane's answer to the complaint and his testimony, his position appears to be that he thought that Johnson was not a member of the Union, and that union membership and benefits had nothing to do with Johnson's discharge.

I credit Johnson's testimony that he told MacFarlane on July 6 that he was a member of the Union. The record establishes that he had filed an application for union membership at the end of June and had paid his May and June dues on July 2. Moreover, Johnson was a vigorous advocate of his union rights. It is thus entirely logical and reasonable to believe that he would and did inform MacFarlane of his union status. On the other hand, MacFarlane's credibility respecting this issue is weakened by his conflicting testimony regarding the date on which Apodaca began to work for him, and by his inaccurate statements, contradicted by Silvestri, regarding the place and circumstances in which the latter's prehearing affidavit had been taken.[9]

Nevertheless, despite MacFarlane's acquisition of information regarding Johnson's union status, I am not persuaded that he discharged Johnson for that reason, as alleged in the complaint. MacFarlane testified that he believed that Johnson was not a union member, and hence that he was free to select Johnson for discharge. I am inclined to credit this testimony for two reasons. First, the record shows that Silvestri had told MacFarlane that Johnson was not a member of the Union. MacFarlane so testified, Silvestri so stated in a prehearing affidavit, and he did not specifically deny the accuracy of that statement at the hearing. Second, it is clear from MacFarlane's testimony that he believed that he was not free to discharge a union member and that the Union would have protested had he done so. It is thus highly unlikely that he would have discharged Johnson if he had believed him to be a union member.

This is not to say that the discharge was lawful. MacFarlane testified that he selected Johnson rather than Apodaca for discharge because the former had less seniority and was less competent than the latter. However, MacFarlane admitted that he regarded only nonunion employees as candidates for discharge. I therefore find that one of his reasons for selecting Johnson for discharge was his belief that the latter was not a union member. I further find that MacFarlane was also motivated by Johnson's vigorous advocacy of his grievances. MacFarlane admitted that Johnson was the only employee who was very vocal about his claim for overtime based on his 25-hour shift. Moreover, I credit Johnson's testimony that he told MacFarlane on July 6 that he was entitled to holiday pay for work on July 4 and other union benefits, and that he informed MacFarlane that he intended to complain to the Union. At that point, MacFarlane discharged him. A discharge motivated by such considerations constitutes unlawful discrimination under the Act.[10]

The union-security provision furnishes no defense to MacFarlane. Johnson had become a member of the Union prior to his discharge, and there is no evidence that he was delinquent in his dues or that the Union had requested his discharge because of dues delinquency. Nor is MacFarlane exonerated by the fact that he acted in the mistaken belief that Johnson was not a union member and could be lawfully discharged for that reason. Cf. *N.L.R.B.* v. *Burnup & Sims, Inc.*, 379 U.S. 21.

It thus appears, and I find, that Johnson was not subject to discharge under the union-security provision of the collective-bargaining agreement on July 6, that he engaged in a protected activity in invoking what he believed to be his rights under the agreement, and that MacFarlane discharged him because of such activity, believing that Johnson was not a union member and that MacFarlane had the right to discharge him. Such a discharge violated Section 8(a)(3) and (1) of the Act.[11]

On the other hand, since I have found that MacFarlane did not believe that Johnson was a union member, I find, contrary to the General Counsel's contention, that he did not tell Johnson that he was being discharged because he was a member of the Union.

CONCLUSIONS OF LAW

1. By unlawfully discharging Johnson as found above, Respondent engaged in an unfair labor practice in violation of Section 8(a)(3) and (1) of the Act.
2. The aforesaid unfair labor practices affect commerce within the meaning of the Act.
3. Respondent did not violate the Act by any conduct not found herein to constitute an unfair labor practice.

[9] Although MacFarlane did not know the place and circumstances, he made representations about the facts relating thereto at the hearing

[10] To the extent that this finding is based on MacFarlane's admissions at the hearing, the issue involved may be regarded as having been fully litigated It is thus unnecessary to decide whether or not the complaint should be interpreted as including an allegation of an unlawful discharge motivated by MacFarlane's belief that Johnson was not a member of the Union

[11] In view of this finding, it is unnecessary to decide whether or not it was economically necessary for MacFarlane to reduce his staff by one employee, as he testified Even assuming his testimony to be true, the basis for selecting Johnson was unlawful.

THE REMEDY

In order to effectuate the policies of the Act, I find that it is necessary and recommend that Respondent be ordered to cease and desist from the unfair labor practice found and from in any like manner interfering with, restraining, or coercing its employees.

Affirmatively, I recommend that Respondent offer to Johnson immediate and full reinstatement to the job which he held at the time of his discharge or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority and other rights and privileges. I further recommend that Respondent make Johnson whole for any loss of earnings suffered because of the discharge, by paying to him a sum of money equal to that which he would have been paid by Respondent from the date of his discharge to the date on which Respondent offers reinstatement as aforesaid, less his net earnings, if any, during the said period. The loss of earnings under the order recommended shall be computed in the manner set forth in *F. W. Woolworth Company,* 90 NLRB 289, and *Isis Plumbing & Heating Co.,* 138 NLRB 716.[12]

Upon the foregoing findings of fact, conclusions of law, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[13]

ORDER

Respondent J. E. MacFarlane, his agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Unlawfully discharging employees or otherwise discriminating in regard to their hire, tenure of employment, or any term or condition of employment.

(b) In any like manner interfering with, restraining, or coercing employees in the exercise of any right guaranteed by the Act.

2. Take the following affirmative action:

(a) Offer to Paul Johnson immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, and make him whole for any loss of earnings he may have suffered by reason of Respondent's discrimination against him, in the manner and to the extent set forth in the section herein entitled "The Remedy."

(b) Notify the above-named employee, 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.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records and reports, and all other records necessary to analyze the amount of backpay due and the right of reinstatement under the terms of this recommended Order.

(d) Post at his place of business in Inglewood, California, copies of the attached notice marked "Appendix."[14] Copies of said notice on forms provided by the Regional Director for Region 31, after being signed by a representative of the Respondent, shall be posted immediately upon receipt thereof, and be maintained for 60 consecutive days thereafter, in conspicuous places. Reasonable steps shall be taken by Respondent to insure 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 the receipt of this Decision, what steps have been taken to comply herewith.[15]

IT IS FURTHER RECOMMENDED that the complaint be dismissed insofar as it alleges unfair labor practices not found herein.

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[12] It may be that Respondent had an economic need on July 6 to reduce his driver force by one employee, and that he continues to have no need for an additional driver. If so, Respondent is of course free, following reinstatement of Johnson, to discharge a driver on the basis of nondiscriminatory criteria. Again assuming that he had the need to lay off a driver, it is possible that Johnson would have been selected for discharge even if Respondent had utilized nondiscriminatory criteria. In such circumstances, that possibility should be considered in determining the amounts of backpay, if any, due to Johnson.

[13] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 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.

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

[15] 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 31, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith."

APPENDIX

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

The National Labor Relations Act gives all employees these rights:

To engage in self-organization
To form, join, or help unions
To bargain collectively through a representative of their own choosing
To act together for collective bargaining or other aid or protection
To refrain from any or all of these things.

WE WILL NOT do anything that interferes with these rights.

WE WILL NOT unlawfully discharge employees, or otherwise discriminate against them because of their union activities.

WE WILL offer to restore Paul Johnson to his job and pay him for all the wages, if any, which he lost because of the discrimination against him.

J. E. MACFARLANE
(Employer)

Dated By
(Representative) (Title)

We will notify immediately the above-named individual, 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, Room 12100, 11000 Wilshire Boulevard, Los Angeles, California 90024, Telephone 824–7357.