

**Wintle Delivery and Refrigeration Truck Service, Inc
and Chester G Lambert Case 9-CA-6879**

December 14, 1972

DECISION AND ORDER

BY CHAIRMAN MILLER AND MEMBERS
KENNEDY AND PENELLO

On September 5, 1972, Administrative Law Judge Harry H Kuskin issued the attached Decision in this proceeding. Thereafter, the Respondent filed 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 authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.

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 Administrative Law Judge and hereby orders that the Respondent, Wintle Delivery and Refrigeration Truck Service, Inc, Columbus, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in said recommended Order.

DECISION

STATEMENT OF THE CASE

HARRY H KUSKIN, Administrative Law Judge. This proceeding was heard at Columbus, Ohio, on July 13 and 14, 1972. A complaint issued herein on April 26, 1972, based on a charge filed by Chester G Lambert, an individual, against Wintle Delivery and Refrigeration Truck Service, Inc, herein called Respondent, on March 8, 1972. The complaint alleges that Respondent violated Section 8(a)(1) of the Act by offering reinstatement to an employee only if he would cease his sympathy for, membership in, and activities on behalf of Local Union No 413, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called the Union or Local 413, and also violated Section 8(a)(3) and (1) of the Act by discriminatorily laying off, and refusing to reinstate, two of its employees, namely Chester G Lambert, the charging party herein, and Charles Lambert, his son, because of their sympathy for, membership in, and/or their activities on behalf of the

¹ Taking care of the records and the payroll is the responsibility of Jack Wintle and his wife, Juanita.

Union, and/or because of their protected concerted activities. In its answer, Respondent denies that it has violated the Act in any respect alleged herein.

Upon the entire record, my observation of the witnesses, including their demeanor while on the witness stand, and, after due consideration of the briefs of the General Counsel and of Respondent, I make the following

FINDINGS OF FACT

I THE BUSINESS OF RESPONDENT

Respondent admits, and I find, that it is an Ohio corporation engaged in the refrigerated transportation of packaged meat products to government installations, retail supermarkets, and other distributors of food products, that, during the past calendar year, which is a representative period, it performed services in interstate commerce valued in excess of \$50,000 as an essential link in the transportation of meat products within the State of Ohio, having received such meat products directly from suppliers located outside Ohio. I find, upon the foregoing, as Respondent also admits, that Respondent is an employer as defined in Section 2(2) of the Act, 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

Respondent further admits, and I find, that Local Union No 413, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

III THE ALLEGED UNFAIR LABOR PRACTICES

A Some Background Facts

As already found, Respondent operates a delivery service in Columbus, Ohio. So far as appears, its facilities consist of a dock, warehouse, garage, and office. In its employ are primarily over-the-road drivers and dockworkers. Catherine Wintle is the president and sole owner of Respondent, Jack Wintle, one of her sons, is the vice president of Respondent, and Joseph Wintle, another son, is the secretary and treasurer of Respondent. Catherine Wintle is in overall charge of the daily operations at the facility, Jack Wintle is the manager,¹ and Joseph Wintle is the night shift foreman. Jake Wintle, still another son, actively joined Respondent in October 1971² as a dockworker and driver, prior thereto, although he occupied an office on the above premises, he did so in some capacity, not clearly defined in the record, for Hayden Motor Freight Company, another delivery service which handled "dry goods" freight and did not "carry any meats or anything like that," and did not use the docks at the facility.

The workday at Respondent's facility usually begins at 3 a.m. with the arrival of the dockworkers and their foreman, Joseph Wintle.³ It is the function of the dockworkers to unload the meat products which have come into the dock.

² All dates hereinafter are in 1971 unless otherwise indicated.

³ According to employee Allen Hedrick, a dockworker, there have been

and sort them and load them onto Respondent's trucks. Some of this merchandise handled by the dockworkers is picked up and brought to the dock in Respondent's trucks by its own drivers. However, when drivers are unavailable for this purpose, dockworkers may serve in that capacity. According to both alleged discriminatees herein, they spent about 6 to 8 hours a week, on average, making such pickups. Generally, the dockworkers work a 5-day week and about a 9- or 10-hour day, when the work is heavier than usual, their workday lasts about 12 hours, and on "an extremely heavy day" they have worked as many as 15 hours. Although the applicable contract referred to hereinafter provides for overtime pay for time worked in excess of 8 hours a day or 40 hours a week, they have not been paid for their overtime.

The workday of Mrs. Wintle and her son, Jack, begins between 6:30 and 7:30 a.m. The drivers come in at 7 or 8 a.m. On busy mornings, if their assigned trucks are not fully loaded, they will assist the dockworkers in such loading. At other times, the trucks are ready and waiting for the drivers when they arrive in the morning. On occasion, a driver will arrive at 3 a.m. to pick up his assigned truck. In those instances, his truck has been loaded the day before and is ready for him. Deliveries of merchandise, loaded onto their trucks as above described, appear to be the major function of Respondent's drivers. However, drivers also handled direct shipments from a customer's facility. Thus, a driver will pick up merchandise from a customer at the customer's facility, the loading onto Respondent's trucks being done by that customer's employees, and will then make delivery, without first stopping at Respondent's dock, to the designee of the customer.

The flow of business at Respondent's facility fluctuates throughout the year. Thus, business is generally slower during the summer months than the rest of the year, and, during the entire year, Respondent experiences an increase over the normal business flow upon the advent of the holidays, notably July 4, Thanksgiving, Christmas, New Years, and Easter. At these times, there is a traditional increased consumer demand for hams, turkeys, etc., the strongest such demand occurring around Thanksgiving and the period of increased business usually covers 1 to 2 weeks before each holiday.

With respect to Respondent's labor relations, the record shows the following. In early 1971, Respondent employed both union⁴ and nonunion help, and its employees were unrepresented by any union for collective-bargaining purposes. This situation changed on March 24 when several representatives of Local 413, including John J. Gordon, vice president and business agent of Local 413,

exceptions in on an extremely hard day when dockworkers reported at 1 a.m.

⁴ Some of Respondent's drivers as well as Jack and Joseph Wintle were members of the Teamsters Union.

⁵ The original date on the membership cards of both Chester and Charles Lambert in evidence as G.C. Exhs 3 and 4, respectively is obscured by the fact that they were scratched out and the date of November 19, 1971 was substituted therefor. I find credible Gordon's testimony thereon, including his explanation that he made the changes in order to excuse them from the payment of dues for the interim period.

As to the checkoff slips I am satisfied on the basis of testimony in this regard by Catherine Wintle, Hedrick, and Gordon, that although both

appeared at the facility in response to the request of employee Tony Riley, a truckdriver, who "had some trouble." After arriving at Respondent's premises, Gordon proceeded to call the drivers, dockworkers, and other employees together for a meeting in the warehouse. A vote was then taken by a show of hands as to whether the employees wanted Local 413 to represent them. Everyone in attendance raised his hand, including Chester and Charles Lambert. Present at the time were Catherine, Jack, and Joseph Wintle, of these, Joseph was standing among the assembled employees and Catherine and Jack Wintle were standing about 20 feet to the rear of them. Thereupon, Gordon passed out union membership application cards and slips authorizing the checking off from their pay of dues and initiation fees. Chester and Charles Lambert and other employees signed both the cards and the slips.⁵ Shortly thereafter, namely, on March 26, Respondent became a signatory to the National Master Freight Agreement and Central States Area Local Cartage Supplemental Agreement. By virtue of these agreements, Respondent recognizes Local 413 as the exclusive representative of "all truckdrivers, helpers, dockmen, warehousemen, checkers, power-lift operators, hostlers and such other employees as may be presently or hereafter represented by the Union, engaged in local pickup, delivery and assembling of freight within the area located within the jurisdiction of the Local Union, not to exceed a radius of 25 miles."

The critical developments herein as to the alleged discrimination against Chester and Charles Lambert span the period from Friday, November 12, until Wednesday, December 1, on the latter date, Catherine Wintle laid off both Lamberts, telling them that she was doing so because the work was slack. The layoffs occurred before the end of the pay period and during the middle of the shift. The details of these developments will be discussed hereinafter.

The independent 8(a)(1) allegation derives from a conversation between Charles Lambert and Joseph Wintle about 2 months after the aforesaid layoff, during which the former applied to the latter for reinstatement. This will also be detailed hereinafter.

There is mutually corroborative testimony in this record by Chester and Charles Lambert in which they attribute antiunion remarks to Catherine Wintle and to Joseph Wintle. Although what occurred antedated the 6-month period before the filing of the charge herein on March 8, 1972, and was not made and could not be made, consistently with Section 10(b) of the Act, the basis of unfair labor practices, this testimony of the Lamberts, if credited, is nevertheless available to the General Counsel.

Chester and Charles Lambert testified to the contrary they did not turn the employer copy of their signed checkoff slips over to Respondent on March 24. And although they testified further that they did the same with new checkoff slips which they assertedly signed on the day of the hereinafter described picketing by them on November 15, I note that Gordon testified that they were actually signed on November 19 and he thereupon took them to the union office and from there normal office procedure of sending out the employer copy was to take place. In the light of the above and other evidence in the record, I find further that Respondent had not received the employer copies of these checkoff slips by December 1, the date on which it terminated the Lamberts.

as background to the events occurring during the statutory limitation period.⁶ According to both Lamberts, on April 2, 1971, when they went into the office to get their paychecks, Catherine Wintle told them that she had heard that they were going to the union meeting and that, if they did, there was the front door and they could "hit it." Also according to both Lamberts, on the same day, Joseph Wintle told them, in effect, that he regards adversely an employee's going to the Union behind his back. Joseph Wintle did not testify in this proceeding, and Catherine Wintle did not specifically deny the above attribution to her by the Lamberts. Although Catherine Wintle denied generally ever having told any of her employees that, if they joined the Union, something would happen to them or their jobs, I do not credit her general denial. I credit, instead, the mutually corroborative testimony of the Lamberts in the foregoing respects and find that both Catherine Wintle and Joseph Wintle made the above remarks which the Lamberts attributed to them.⁷

B *The Employment History of the Lamberts*

Chester Lambert started his employment with Respondent on November 21, 1970, as a dockworker. During his entire employment tenure, he worked on the night shift, also referred to in the record as the early morning shift, under the supervision of Joseph Wintle, the foreman on that shift. His starting salary of \$180 per week was increased to \$190 the next month, and to \$200 two months after that. He was earning the latter amount at the time of his termination on December 1. Charles Lambert, his son, began to work for Respondent on March 17, 1971. Like his father, he was hired as a dockworker for the same shift, at the same starting salary, and under the same supervision. According to Charles Lambert's undenied testimony, he was then told by Joseph Wintle that his hours would be from 3 a.m. to 11:30 a.m. and that he would work a 40-hour week. However, the record shows that he, like the other dockworkers, worked longer hours. In this connection, Catherine Wintle admitted that the dockworkers would work until 1 p.m. to get the work done, adding that sometimes they would not have anything to do after 7:30 or 8 a.m.

As already noted, Respondent does less business during the summer months than during the rest of the year. Although the summer of 1971 followed the usual pattern, none of Respondent's dockworkers was laid off for lack of work, the only change in work schedules among the dockworkers was that both Lamberts were placed on a 4-day week during July, August, and September.

Except for one episode, the record is devoid of any evidence that Respondent faulted either of the Lamberts for his work performance. That episode occurred on Friday, November 12, and marks the commencement of

the critical period herein, which had its culmination on December 1, less than 3 weeks later, in their termination. On that Friday, the dockworkers, of whom there were four, namely, Jake Wintle, Allen Hedrick, and the Lamberts, were told by Joseph Wintle at the start of the workday that it was a "heavy day," and they were to do the loading as a two-man operation, i.e., with one of them on the floor and one on the truck. At one point, after the loading of the trucks had begun, both Lamberts were on the truck as they were loading it. Joseph Wintle came upon the scene and, upon noticing this, shouted, "I told one of you goddamn guys to get down and load one of the trucks. I'm getting sick and tired of telling you guys to do something." This led to an exchange of some angry words between Joseph Wintle and Chester Lambert, during which Chester Lambert complained about Respondent "working them like horses," with long hours, and no coffeekicks or overtime pay. It ended with Joseph Wintle telling Chester Lambert that he was discharged. At this, Charles Lambert appealed to Joseph Wintle to overlook the "blow up" and not discharge his father, telling him that the dockworkers had been putting in long hours and were all tired and worn out. Whereupon, Joseph Wintle relented and said that Chester Lambert could go back to work.

In the wake of the above, the following occurred. On Monday, November 15, both Lamberts reported for work at 3 a.m. Joseph Wintle lost no time in calling Chester Lambert into the office, where he told Chester Lambert that he was being discharged, and gave as the reason therefor, upon Chester Lambert's inquiry, "that this was not the first time that he (Chester Lambert) has blown up." Chester Lambert acknowledged having "got mad" on two prior occasions, and explained the reasons therefor, but to no avail. Chester Lambert thereupon left the office and informed his son of this development. At about 3:05 a.m., both father and son walked out of the facility. Shortly thereafter, they repaired to the home of James South, a truckdriver employed by Respondent and the unofficial steward for the Union at the facility.⁸ Upon South's advice, they returned to Respondent's warehouse at about 6 a.m. and picketed it with a sign bearing the legend "Wintle is unfair to labor," with Charles Lambert picketing in the front of the warehouse, and Chester Lambert picketing in the rear.

During the picketing which lasted only until about 10 a.m. that day, there were these developments: (1) Subsequent to her arrival at the facility at about 7 a.m., Catherine Wintle came out of the building and began to walk back and forth with the pickets. She acknowledged that she did so "just a couple of times" and that she told Charles Lambert that "that was a dirty trick [he] did" and

⁶ See *Local Lodge No 1424 International Association of Machinists AFL-CIO (Bryan Manufacturing Co.) v. NLRB*, 362 U.S. 411, in which the Supreme Court pointed out that earlier events may be utilized to shed light on the true character of matters occurring within the limitation period. See also *Axelson Manufacturing Company*, 88 NLRB 761, 766.

⁷ Catherine Wintle also did not specifically deny the further testimony by the Lamberts that on March 24, 1971, she told them that before she would allow the Union to come into the plant, she would close the doors and lay off all her employees and bring in brokers. However, I predicate no

finding on this testimony of the Lamberts for the following reasons. The Lamberts testified, too, that this statement was made by her at the time both of them handed her the employer copy of their union checkoff slips. Since I have been unable to find on this record that they did hand her such slips then or thereafter, I am not satisfied that the record preponderates in favor of a finding that these attributed remarks were made by her.

⁸ Charles Lambert said he had the information about South's unofficial status from the Union Man.

further that "regardless what happens [she] will not take [him] back under any circumstances"⁹ (2) Joseph Wintle approached Chester Lambert and said that he wanted Chester Lambert to go back to work Chester Lambert refused, saying that he "was going to wait and talk to the Union," and further that he had been there a year and he still had no insurance or retirement and wanted to get that straightened out (3) Thereafter, around 9 a.m., Joseph Wintle approached Charles Lambert and told him to go back to his job Chester Lambert refused to do so upon learning from Joseph Wintle that his father was not going back to work He referred at the time to the lack of job security and said that he would not return as "it has gone so far this time," and he wanted to get the matter of health and welfare and of taking lunch on time straightened out

The picketing succeeded in inducing drivers of Respondent not to go to work Gordon, the business agent of Local 413, apparently learned thereof and arrived on the scene at about 10 a.m. He asked the Lamberts to stop the picketing and they complied He then proceeded to have discussions with Catherine Wintle about the matter, looking toward the return of the Lamberts to work After one such effort by Gordon which failed,¹⁰ Catherine Wintle reluctantly agreed to their return In this connection, Catherine Wintle, who was examined by counsel for the General Counsel under section 43(b) of the Rules of Civil Procedure for the District Courts of the United States, volunteered that she then told Gordon, "Look, I'll take them back, but if I don't have work for them, I will have to lay them off" Significant as to her state of mind at the time are the following answers by her to the next several questions by counsel for the General Counsel

Q When you agreed to take the two Lamberts back, you told Mr Gordon at that time, "I will take them back, but if I don't have any work for those two Lambert boys in the future, I will lay them off" Those were the only two names you mentioned, is that right?

A Yes

Q You had in your mind at the time when you talked to Mr Gordon and when you informed him that if you didn't have work in the future you were going to lay off the Lamberts You had it in your mind for the future because they picketed you, did you not?

A Yes I did

Q And you had it in your mind when you made that statement about possibly laying off the Lamberts when you talked to Jack Gordon, didn't you?

A Yes I did

The Lamberts did then go back to work However, for the first time, as per instructions from Gordon, they punched in on Respondent's timeclock¹¹ Each one used a timecard which was available in blank in the vicinity of the timeclock and filled in his name¹² They continued to

⁹ I note that Charles Lambert testified that Catherine Wintle carried a piece of notebook paper upon which was written the legend Employees unfair to their employer as well as a newspaper over her head because it was raining, whereas Catherine Wintle testified that all she carried was a newspaper without any handwriting thereon However I find it unnecessary to and do not resolve this conflict in testimony as it suffices to find here as I do on the basis of Catherine Wintle's own testimony that she made the above remarks to Charles Lambert during this episode

¹⁰ Gordon believing that the return to work of the Lamberts had been

punch their respective timecards during the remainder of their employment tenure, notwithstanding the fact that the other dockworkers adhered to the old routine and did not punch a timecard During this interval, Catherine Wintle would tell the Lamberts to go home when 11 30 a.m. arrived However, the other dockworkers continued to work late hours

It is apparent from the record that on or about November 18, after the above picketing episode, Catherine Wintle posted a "sign" on Respondent's premises to the effect that the Lamberts were to be laid off Neither Chester nor Charles Lambert saw the sign but their testimony is undenied that Joseph Wintle told them of its contents and added that he had torn it down

The separation of the Lamberts became a reality on Wednesday, December 1 On that day, they came to work at the usual time At 7 a.m. they, their two fellow dockworkers, as well as Floyd Fields, a driver, and Joseph Wintle were in the latter's office when Catherine Wintle entered She inquired from the men "if the work was all done," and, upon receiving an affirmative response, she said to the Lamberts that they were being laid off because the work was slack At this, the Lamberts left the office and punched out It is clear from the record that Catherine Wintle intended to effect their permanent severance Thus, she testified that she laid them off rather than discharged them in order that they might obtain employment elsewhere, that the layoff "was a permanent layoff," and that as far as she was concerned they were no longer in her employ and would not be in her employ again In addition, by her own admission, the fact that the Lamberts had picketed was one of the reasons for this personnel action Thus, she testified as follows, in this connection, while being examined by counsel for the General Counsel under Section 43(b) of the Rules of Civil Procedure

Q Now, did I understand your testimony to be that the reason or one of the reasons why you laid off the Lamberts on December 1 was the fact that they had picketed you?

A Yes, it was

And at a later point, under further examination by counsel for the General Counsel, she gave testimony along the same lines as follows

Q (By Mr Verst) Isn't it a fact, Mrs Wintle, that the primary reason that you laid off the Lamberts was because of the fact that they picketed you?

A That is some of the facts

Q Wasn't that your primary reason, Ma'am?

A Let's put it this way It was one of the reasons then I didn't have no work for them

Q Wasn't that one of the primary reasons that you laid off those two because they picketed you?

MR REEVES She has answered the question

agreed upon directed them and the drivers who had abstained from working to go back in However Catherine Wintle interposed that she did not want the Lambert boys back Gordon's response thereto was to tell the men, Hold it Don't punch in

¹¹ Gordon's instructions to the Lamberts were that they should punch in, then punch out after 6 hours of work and go to lunch to punch in again when they return, and to punch out when they finish their day's work

¹² As of that time only Respondent's over-the-road truckdrivers had been punching timecards

THE WITNESS I will answer to that

TRIAL EXAMINER Was it one of the primary reasons?

THE WITNESS Yes I didn't have no work for them I can't spend money for them if I don't have work

The Lamberts have not worked for Respondent since December 1 There is undenied testimony by Charles Lambert that he had separate conversations thereafter with Joseph Wintle and Jack Wintle in which he requested reinstatement The last such conversation, according to him, occurred early in February 1972¹³ Joseph Wintle then told him that "if [he] had a chauffeur's license they might be able to get [him] on, or if [he] could get a signed statement from [his] father releasing them from all obligations to [his father] they might want him back They had the work for another man but not for [his] father"

C *The Evidence Bearing Upon the Asserted Claim of Slack Work at the Time of the Layoffs*

The record shows that, within the first month after their layoffs, and before Charles Lambert had applied for reinstatement, Respondent had, in effect, replaced him and his father Thus, it transferred Kenny Thompson from the job of mechanic to that of dockworker, where he stayed for about 5 months and then returned to his former job It also hired Mike Dixon, a relative of the Wintles, on a regular basis as a dockworker, which job he still held at the time of the hearing, Dixon had, during the prior 3 years been attending school and worked for Respondent only during the summer months as a janitor As dockworkers, both Thompson and Dixon worked full time on the same shift, and performed the same work tasks as the Lamberts before them Significant, too, in regard to Respondent's workload shortly before and immediately after these layoffs, are the stipulated gross income figures herein covering Respondent's operations for the period beginning January 1970 through December 1971 These figures show that, in 1970, business increased substantially in October and continued at a high level for the rest of the year, and that the same was true in 1971, which was a much better business year Also, whereas December 1970 showed a decline in gross income from November 1970, December 1971 showed a considerable increase in such income over November 1971, and, in addition, was the second best month of 1971¹⁴

D *Analysis and Conclusions as to the Separation of the Lamberts*

It is apparent from all the foregoing, and I find, that the

¹³ As already noted the charge herein was filed on March 8 1972

¹⁴ These figures are as follows

	1970	1971
Jan.	\$12,103.06	\$26,922.11
Feb	11,857 66	13,507 46
March	10,905 71	22,922 99
April	10,138 62	18,746.13
May	14,234.01	18,880 82
June	10,172.78	17,755 53
July	12,961 72	21,899 40
Aug	12,734 46	17,660 56
Sept	12,665 95	17,699 94
Oct	19,042.58	22,019.84
Nov	25,549.62	20,996 75
Dec	21,737.36	23,662 72

record does not support Respondent's contention that, at the time of the layoffs, it was experiencing a slack period in its operations Indeed, the opposite was true It was then in the middle of the yearend holiday season, a time when business shows an increase over the normal Furthermore, the year 1971 had up to that point been a better business year than 1970, and it does not appear that Respondent had any reason to believe that business would not maintain that pace Indeed, December proved to be the second best month of 1971 I am therefore persuaded from the foregoing, and from the fact that Respondent lost little time in replacing the Lamberts, albeit they were told at the time that they were being laid off because of slack work,¹⁵ that this asserted ground is lacking in merit and was not an operative factor in the discharge

I turn now to the testimony of Catherine Wintle, quoted heretofore, in which she admitted that one of the reasons for the layoff was that the Lamberts had picketed her premises on November 15 This picketing, as already found, followed in the wake of these events On November 12, Chester Lambert, in the course of an angry exchange with Joseph Wintle, his foreman, became vocal about working conditions, mentioning, *inter alia*, the long hours of the dockworkers, their lack of coffeebreaks and their failure to get paid overtime Whereupon, Joseph Wintle discharged him on the spot, only to revoke the discharge immediately upon the intercession of Charles Lambert, and then to reinstate the discharge on November 15, the next working day

It is patent that the Lamberts' action, in consequence of the foregoing, of picketing with signs bearing the legend "Wintle is unfair to labor" was triggered by the discharge of Chester Lambert because he had protested his working conditions in an effort to improve them and, with specific reference to overtime pay, in an effort to gain compliance with the applicable bargaining agreement between Local 413 and Respondent¹⁶ As such, this conduct would seem to have the protection of the Act However, Respondent contends, in effect, that the facts herein require a different result allegedly because the Lamberts were engaged at the time of the picketing in "a wildcat strike or work stoppage not called and approved by the Union" I cannot agree Thus, with reference to Chester Lambert, as Respondent discharged him and thereby caused him to cease work and leave the premises, it is clear, and I find, that the above contention must fall with respect to him And as to Charles Lambert, assuming, without deciding, that by leaving his work and joining with his father he engaged in a wildcat strike, Respondent exceeded permissible bounds under the

¹⁵ In marked contrast to this personnel action was Respondent's action in placing the Lamberts on a 4-day week during the summer of 1971, when because of past experience it could have expected business to slacken

¹⁶ Thus, the Ohio Addendum annexed to the Central States Area Local Cartage Supplemental Agreement provides the base rate applicable to dockmen among others and article 61 section 2 of this Supplemental Agreement provides in relevant part All hours worked in excess of eight (8) hours in any one (1) day or forty (40) hours in any one (1) week shall be paid at the rate of time and one half (1 1/2) the regular hourly rate but not both

existing agreement in discharging him Respondent recognizes, in this connection, that the existing agreement includes a provision rendering immune from the extreme penalty of discharge those who participate in an unauthorized work stoppage of less than 24 hours,¹⁷ but argues that neither of the Lamberts was covered by this agreement, allegedly because they were not members of the Union at the time. However, membership in the Union is not the criterion as to such coverage. For, apart from the matter of when the Lamberts actually became members of the Union, it suffices, as I find here, that they were at all relevant times part of the collective-bargaining unit set forth in the aforesaid agreement and were therefore covered by it. Accordingly, it follows therefrom that Respondent's reliance upon article 2, section 3, of the National Master Freight Agreement, which renders the agreement inapplicable to employees in a noncovered unit who have not designated a signatory Union as their collective-bargaining agent is misplaced.¹⁸ Further, with specific reference to the above mentioned provision 8(a)(3)(a), the Board, in *Wagoner Transportation Co.*, 177 NLRB 452, where a similar no-strike provision was in issue held, with Court approval,¹⁹ that "to the extent that the Agreement prohibited the Respondent from exacting the penalty of discharge on employee-participants in wildcat strikes of less than 24 hours' duration, such strikes are protected activities under the provisions of Section 7 of the Act which guarantees to employees the right to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection."

In sum, therefore, I find that the picketing by the Lamberts, which Respondent concedes was one of the reasons for their termination, was protected by the Act. And I find further, in view of my rejection heretofore of Respondent's claim that it laid them off about 2 weeks thereafter because of slack work, and in the light of the entire record, that the picketing by them was the only reason for their termination. This is underscored by Catherine Wintle's testimony that she told Charles Lambert, while walking back and forth with him during the picketing on November 15, that "that was a dirty trick [he] did," and further "that regardless what happens she will not take him back under any circumstances", that, although she took the Lamberts back the same day upon Gordon's intercession in the matter, she did so reluctantly and indicated to Gordon that she was already thinking of laying them off "if I don't have work for them," making no reference to the other dock workers, that nothing untoward occurred between Respondent and the Lamberts in the period of about 2 weeks thereafter, and that they were discharged precipitately and without warning at a time when business increases because of the upcoming holidays

¹⁷ As already found, the picketing herein lasted only 4 hours and occurred on the day the Lamberts left the plant after Chester Lambert's discharge.

Article 8(a)(3)(a) of the National Master Agreement herein provides as follows in relevant part:

It is specifically understood and agreed that the Employer during the first twenty four (24) hour period of such unauthorized work stoppage in violation of this agreement, shall have the sole and complete right of reasonable discipline including suspension from employment up to and including thirty (30) days, but short of discharge, and such employees shall not be entitled to or have any recourse to the grievance

and before the end of the payroll period, indeed, in the middle of the shift.

It follows from all the foregoing, and I find, that the Lamberts were discharged for engaging in protected concerted union activities in violation of Section 8(a)(1) and (3) of the Act.²⁰ In respect to whether the aforesaid conduct of Respondent violated Section 8(a)(3) of the Act, I am cognizant of both Respondent's contention that it did not know that the Lamberts were "attempt[ing] to join the Union" at the time of their termination, and of the requirement that an essential ingredient of a finding of a violation of Section 8(a)(3) is that Respondent had union animus. However (1) since it is clear, and I find, that Respondent was, at the least, aware that the Lamberts were adherents of the Union, and (2) since the discharges occurred against a background of warnings by Catherine Wintle and Jack Wintle to the Lamberts, albeit 8 months prior thereto and outside the 10(b) period, to the effect that they risked discharge or adverse consequences if they became involved with the Union, and since their discharges followed by about 2 weeks their return to work through the intercession of Business Agent Gordon, I perceive no impediment to inferring, and finding, as I do here, that, by discharging the Lamberts, Respondent also discriminated against them for antiunion reasons in violation of Section 8(a)(3) of the Act.

E The Alleged 8(a)(1) Violation

The complaint alleges in paragraph 5 thereof that Respondent contravened Section 8(a)(1) of the Act by offering reinstatement to an employee only if he would cease his sympathy for, membership in, and activities on behalf of the Union. As heretofore found, early in February 1972, according to the undenied testimony of Charles Lambert, he was told by Joseph Wintle, during the course of an application for reinstatement, "that if [he] had a chauffeur's license they might be able to get [him] on, or if [he] could get a signed statement from [his] father of all obligations to [his father] they might want [him] back. They had work for another man but not for [his] father." As it is apparent that the attribution to Joseph Wintle was stated in the alternative, the first of which is clearly not objectionable, and the second of which is ambiguous, and as, even assuming no ambiguity in the second alternative, it does not support the above allegation of the complaint, I conclude, and find, that the complaint in this respect has not been sustained by the record.

Upon the basis of the entire record, I make the following

procedure

¹⁸ Article 2 section 3 the caption of which is non Covered Units reads as follows

This agreement shall not be applicable to those operations of the Employer where the employees are covered by a collective bargaining agreement with a Union not a signatory to this Agreement or to those employees who have not designated a signatory Union as their collective bargaining agent

¹⁹ See 424 F 2d 628 (C A 6)

²⁰ See *Wagoner Transportation Co supra*

CONCLUSIONS OF LAW

1 Respondent is an employer as defined in Section 2(2) of the Act, and is engaged in commerce and in operations affecting commerce within the meaning of Section 2(6) and (7) of the Act

2 The Union is a labor organization within the meaning of Section 2(5) of the Act

3 By discharging Chester G Lambert and Charles Lambert on December 1, 1971, because they engaged in protected concerted activity, Respondent interfered with, restrained, and coerced its employees in violation of Section 8(a)(1) of the Act

4 By discharging Chester G Lambert and Charles Lambert on December 1, 1971, and thereafter refusing to reinstate them because of their union activity, Respondent discriminated against the hire and tenure of its employees in violation of Section 8(a)(3) of the Act

5 Respondent has not violated Section 8(a)(1) of the Act in any other respect alleged herein

REMEDY

Having found that Respondent has engaged in unfair labor practices within the meaning of both Section 8(a)(1) and (3) of the Act by discharging Chester G Lambert and Charles Lambert, I shall recommend that a broad order issue that it cease and desist therefrom, and that it affirmatively take such action as will dissipate the effects of its unfair labor practices. In the latter regard, I shall recommend that Respondent offer each of them immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position without prejudice to his seniority or other rights and privileges, and make him whole for any loss of earnings he may have suffered during the period of this discrimination against him by payment to him of a sum of money equal to that which he would have earned as wages from the date of such discrimination to the date of Respondent's offer of reinstatement, less his net earnings during such period, with backpay and interest thereon to be computed in the manner prescribed by the Board in *F W Woolworth Co.*, 90 NLRB 289, and *Isis Plumbing & Heating Co Inc.*, 138 NLRB 716

Upon the foregoing findings of fact, conclusions of law, and the entire record in the case, I hereby issue the following recommended ²¹

ORDER

Respondent, its officers, agents, successors and assigns, shall

1 Cease and desist from

(a) Interfering with, restraining, or coercing employees in the exercise of the rights guaranteed in Section 7 of the Act by discharging any of its employees because they engaged in protected concerted activity

(b) Discharging any of its employees for antunion reasons

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

2 Take the following affirmative action which will effectuate the policies of the Act

(a) Offer to Chester G Lambert and to Charles Lambert immediate and full reinstatement to their former jobs or, if these jobs no longer exist, to substantially equivalent positions without prejudice to their seniority or other rights and privileges, and make each of them whole for any loss of earnings he has suffered, in the manner set forth in the section hereof entitled "The Remedy"

(b) Preserve and, upon request, make available to the National Labor Relations Board or its agent, for examination and copying, all payroll records, social security records, timecards, personnel records and reports, and all other records necessary or useful to determine or compute the amounts of backpay due, as herein provided

(c) Notify Chester G Lambert and Charles Lambert, if presently serving in the Armed Forces of the United States, of their right to full reinstatement upon application, in accordance with the Selective Service Act and Universal Military Training and Service Act of 1948, as amended, after discharge from the Armed Forces

(d) Post at its plant in Columbus, Ohio, copies of the attached notice marked "Appendix"²² Copies of said notice on forms provided by the Regional Director for Region 9, after being signed by a representative of Respondent, shall be posted by Respondent immediately upon receipt thereof 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 insure that said notices are not altered, defaced, or covered by any other material

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

(f) It is further recommended that the complaint be dismissed insofar as it alleges violations of the Act not found herein

²¹ 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

²² 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 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"

²³ 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 said Regional Director for Region 9 in writing 20 days from the date of this Order what steps Respondent had taken to comply herewith"

APPENDIX

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

WE WILL NOT interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed

under the Act by discharging any of them because they engaged in protected concerted activity

WE WILL NOT discharge any of our employees for antiunion reasons

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed in Section 7 of the Act

WE WILL offer to Chester G Lambert and to Charles Lambert 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 each of them whole for any loss of pay suffered as a result of his discriminatory discharge

WINTLE DELIVERY AND
REFRIGERATION TRUCK
SERVICE, INC
(Employer)

Dated _____ By _____
(Representative) (Title)

WE WILL notify Chester G Lambert and Charles Lambert, if presently serving in the Armed Forces of the United States, of their respective right to full reinstatement upon application, in accordance with the Selective Service Act and the Universal Military Training and Service Act of 1948, as amended, after discharge from the Armed Forces

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, Federal Office Building, Room 2407, 550 Main Street, Cincinnati, Ohio 45202, Telephone 513-684-3686