

Gyrodyne Company of America, Inc. and International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW. Case 29-CA-57

June 4, 1973

SECOND SUPPLEMENTAL DECISION

BY CHAIRMAN MILLER AND MEMBERS FANNING AND PENELLO

On March 12, 1968, the National Labor Relations Board issued a Decision and Order¹ in the above-entitled proceeding in which it adopted the findings, conclusions, and recommendations of Trial Examiner² Arthur E. Reyman as contained in his Trial Examiner's Decision of January 21, 1966. The Board therein accepted the Trial Examiner's credibility resolutions and concluded, among other things, that Respondent had not engaged in conduct in violation of Section 8(a)(1) and (3) of the National Labor Relations Act as alleged. Subsequently, the Charging Party filed with the United States Court of Appeals for the District of Columbia Circuit a petition for review of the Board's Order dismissing the complaint.

Thereafter, on November 5, 1969, the court handed down its opinion³ in which it stated that certain of Respondent's records, subpoenaed by the General Counsel but not produced by Respondent, appeared clearly relevant to the issues in the case. The case was remanded, and the Board, on October 8, 1970, issued its Supplemental Decision⁴ setting forth its reasons for not drawing an "adverse inference" from Respondent's failure to produce certain documents pursuant to a *subpoena duces tecum*. Thereafter, the Charging Party again filed with the United States Court of Appeals for the District of Columbia a petition for review of the Board's Supplemental Decision. On January 25, 1972, the court handed down its opinion⁵ in which it reiterated its position that the documents in issue were relevant to the case and that the Board should, subject to certain conditions, draw an adverse inference from the failure of the Respondent to produce its "rehiring records." In its opinion, the court directed the Board to "allow the company 30 days to produce the rehiring records." In accord with the court's opinion, the Board, by order dated April

26, 1972, reopened the record herein and remanded the case for hearing before an Administrative Law Judge. Pursuant to the remand, a hearing was held before Administrative Law Judge Abraham H. Maller on June 26 and 28, 1972, at Brooklyn, New York, and on July 25 and 27, 1972, at Centerreach, New York. On December 29, 1972, the Administrative Law Judge issued his Supplemental Decision. Thereafter, the Respondent, the General Counsel, and the Charging Party filed exceptions with supporting briefs.

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 penultimate issue involved in this case is the legality of the Respondent's actions in discharging and laying off certain employees in June 1964. The General Counsel and the Charging Party maintain that the terminations were because of union activity while the Respondent contends that the terminations resulted from "cost-cutting" increased efficiency and the conversion from proto-type manufacturing to production line manufacturing.⁶

After an extensive hearing spanning many days and encompassing the testimony of numerous witnesses in the initial proceeding, Trial Examiner Reyman issued his Decision wherein he found that the Respondent had not violated the Act in discharging or laying off the named employees. Critical to the Trial Examiner's decision was that aspect of Respondent's defense relating to "cost-cutting." Thus, any records of Respondent relating to its "rehiring" or "hiring" during the critical period immediately following the layoffs would be germane to the case. At the hearing, Respondent, while submitting substantial portions of the records covered by the subpoena, did not submit those documents covering the hiring or rehiring records for the critical period. The failure of Respondent to produce these subpoenaed records was raised as an issue at the hearing. At the time, the Trial Examiner had before him the testimony of Respondent's officials that there was no hiring or rehiring during the critical period. In view of the Respondent's failure to produce the records, the Trial Examiner, at one point during the hearing, indicated that he would draw an adverse inference from the failure of the possessor of the records to produce the same. However, in his Decision, the Trial Examiner did not draw any adverse

¹ 170 NLRB 236

² Although the title of "Trial Examiner" was changed to "Administrative Law Judge" effective August 19, 1972, the designation Trial Examiner in reference to Mr. Arthur E. Reyman has been retained herein for purposes of clarity.

³ 419 F.2d 686 (C.A.D.C., 1969)

⁴ 185 NLRB 934.

⁵ 459 F.2d 1329 (C.A.D.C., 1972).

⁶ Prior to the original hearing herein, the Respondent was served with a *subpoena duces tecum*, requesting, *inter alia*

Names and last known addresses of all persons hired or rehired by Respondent in the period January 1, 1964, through December 31, 1964, in the following classifications and departments. packager; packager, [sic] drones, transmissions or blades, inspector, shipping, receiving, packaging, expeditor, inspector, mechanical, technician, electronic, test, operator, drill press, technician, calibration; mechanic, blade; machinist, lather, packager

inference, relying instead on the credited testimony of Respondent's officials that there had been no "hiring" or "rehiring" during the critical period.

The case, in this posture, as noted above, went to the court of appeals. In its most recent remand giving rise to the instant proceedings the court took the position that the Board should have drawn an adverse inference from a failure by Respondent to produce the "rehiring" records. The court directed the Board to reject Respondent's cost-cutting defense unless the Respondent within 30 days produced its hiring or rehiring records. In addition, the court directed that in evaluating Respondent's other defenses the Board should take into account the fact that the testimony of Papadakos, Respondent's president, "has been thoroughly impeached," if the cost-cutting defense is stricken. Following the court's remand, a hearing was held before Administrative Law Judge Maller wherein the subpoenaed material was made available. The hearing, which opened on June 26, 1972, was thereafter continued for several days to allow the General Counsel and counsel for the Charging Party to examine the records produced by Respondent in answer to the subpoena. Counsel for the Charging Party spent several days examining Respondent's records, including therein those records pertaining to Respondent's "hiring" and "rehiring" practices during the critical period. The record shows and the Administrative Law Judge found that, after examining the record, neither the General Counsel nor the Charging Party submitted any evidence from the proffered records to show that the Respondent had "hired" or "rehired" any employees after the termination of the alleged discriminatees. As the case now stands, the testimony of Papadakos and other supervisory personnel on the Respondent's "cost-cutting" defense has been fully corroborated. The record does not show why the Respondent refused to submit the subpoenaed evidence at the earlier hearing, and we can only speculate as to why Trial Examiner Reyman did not draw an adverse inference from the Respondent's failure to produce the records since there was substantial testimony on the "rehiring" issue. In any event, the record clearly establishes that Respondent's records were not withheld for the purpose of suppressing evidence that would have been unfavorable to Respondent's "cost-cutting" defense, with regard to "hires" during the critical period.

Notwithstanding his conclusion that there was no "hiring" or "rehiring" during the critical period, the Administrative Law Judge weighed the question of certain transfers and layoffs in the "blade" department. Thus, relying on the fact that three union members had been laid off in that department while other employees of lesser seniority were either transferred in

or returned to it from sick leave, as well as the fact that certain employees received pay increases, the Administrative Law Judge concluded that these factors contradict Respondent's defense of "cost-cutting" as to the blade department. We do not agree. The record in the earlier hearing clearly shows that Respondent was relying on at least three reasons for the layoffs. Respondent's defenses were that selections were based on the fact that its operations were converted from proto-type production to mass production, that increased efficiency was desired, and that per unit costs would be reduced. At no time did the Respondent claim that all selections were predicated on lack of seniority or deficiencies in the employees laid off. To the contrary, the record clearly shows that Respondent's witnesses were aware of the fact that some of the laid-off employees were in one sense or another superior to those retained and that many of them had more seniority than those retained. These factors were fully developed on the initial record and were considered by Trial Examiner Reyman in his initial decision, wherein he credited the testimony of Respondent's witnesses as to their reasons for selecting one employee for retention and one for layoff. Since the initial record clearly shows that there were transfers in and out of various departments, we do not believe that the documents relied on by the Administrative Law Judge, documents that merely confirm that which was already conceded by Respondent, justify a conclusion that the three named employees were selected for layoff in violation of the Act. As the court itself noted in its remand, the Board, "in evaluating these other defenses [increased efficiencies and production changeovers]. . . should take into account" the lack of a cost-cutting defense. As the "cost-cutting" defense found by Trial Examiner Reyman is clearly supported by the record, we affirm such finding. Contrary to the Administrative Law Judge's finding, we conclude that the subsequent transfer of employees into the "blade" department does not negate the Respondent's "cost-cutting" defense.

During the course of the hearing before the Administrative Law Judge, the Respondent produced, and the General Counsel and Charging Party's counsel examined, voluminous records. Among these records were personnel files of the employees. After examination of these records, the General Counsel and the Charging Party requested that the Administrative Law Judge allow into evidence certain exhibits which allegedly would prove that certain "leadmen" in Respondent's employ were supervisors within the meaning of the Act. The Administrative Law Judge, relying on the scope of the Board's remand order directing the hearing, refused to allow into evidence these proffered documents.

After the close of the hearing, the General Counsel and the Charging Party each filed a motion to conform Board Order to mandate of court of appeals, seeking therein to have the Board expand its remand order for the purpose of allowing the proffered evidence to be received by the Administrative Law Judge. These motions were denied on the ground that they were in effect premature exceptions of the Administrative Law Judge's ruling at the hearing. The denials were without prejudice to renewal following the issuance of the Administrative Law Judge's Decision. Following the issuance of that Decision, the General Counsel and the Charging Party have renewed their motions to put into evidence those records they contend have a bearing on the supervisory status of certain leadmen.

We agree with the Administrative Law Judge's ruling on this issue. Our remand order was specifically directed at receiving evidence on the Respondent's "hiring" practices during the "critical period" involved herein. In our opinion, this is what the court of appeals directed the Board to do. In its opinion, the court of appeals referred to the "hiring" or "rehiring" issue no less than 20 times, and careful analysis of the opinion clearly shows that its entire tenor and direction was toward the "cost-cutting" defense.

The Board, in its remand to the Administrative Law Judge, followed the very precise directions of the court of appeals. The opinion of the court of appeals leaves little doubt but that the documents sought under its remand to the Board were the "hiring" or "rehiring" records. In view of this fact the Board in its remand to the Administrative Law Judge was equally precise, limiting the hearing to those documents relating to the "hiring" or "rehiring" practices of the Respondent. In these circumstances, we affirm the Administrative Law Judge's ruling rejecting the proffered evidence.

At the same time, mindful of the court's repeated admonitions in this case we have given additional consideration to the General Counsel's and the Charging Party's aforementioned motions. We have concluded that even if we were to accept the proffered evidence, it would not support a result different from that which we have previously reached in this case.

The documents in question are records from the personnel files of various employees. On their face, these documents contain at various places references to various individuals with the title of supervisor. The particular named individuals were also identified as leadmen at the original hearing herein. During the course of the original hearing, one of the issues litigated was the supervisory status of various leadmen. The testimony and evidence concerning the supervisory status of these individuals and their functions was extensive. They were frequently referred to in the tes-

timony as "supervisors" on the one hand, and elsewhere as "leadmen." There is no question but that the leadmen, as a group, stood slightly higher in the production process than the other employees. Yet, the record clearly shows that, on the whole, their job functions involved the same type work as the other production employees. In our opinion the fact that they were frequently referred to as "supervisors" by many of the witnesses, as well as in the various documents proffered, is not controlling, since the record shows that they were engaged in day-to-day production work, which included the making of routine assignments of work and recordkeeping. We affirm our original finding that the individuals in question are not supervisors within the meaning of Section 2(11) of the Act. In reaching this conclusion, we are not unmindful of the court of appeals' theory that oral testimony contradicted by documentary evidence may become impeached testimony. While this theory might very well have been applicable to the "cost-cutting" defense advanced by Respondent's managing officials, we do not believe that the documents submitted in support of the motion would be sufficient to impeach the substantive testimony of the leadman. We have carefully reexamined the record in the light of these contentions and are of the opinion that the leadmen as a group testified in a frank and forthright manner without any attempt to understate their work responsibilities. In fact, the testimony of several of the leadmen might, in other circumstances, favor a finding of supervisory status.

While we might have reached a different conclusion than the Trial Examiner as to the supervisory status of Morel and, perhaps of Southworth and Manico, it is noted that in any event, the Trial Examiner in the main credited the denials of these alleged supervisors with respect to the alleged conduct attributed to them by the alleged discriminatees. Thus, the Board had before it then, as now, the question of whether certain unlawful conduct was engaged in and, if so, whether the conduct complained of was the action of a supervisor. Merely proving the supervisory status of the individual does not prove that the unlawful conduct has been committed. Trial Examiner Reyman had extensive and, at almost all points, conflicting testimony before him. The testimony of some of the alleged discriminatees bordered on the incredible. Portions of their testimony appear to have been designed to meet the exigencies of the moment. The record shows that after due deliberation, as noted above, Trial Examiner Reyman resolved credibility issues in favor of Respondent's witnesses. While the Board might have reached different conclusions as to the supervisory status of some of the leadmen, the Board was of the opinion then, as it is now, that there is nothing in the record that would support a reversal

of Trial Examiner Reyman's credibility resolutions,⁷ and his ultimate conclusion that Respondent had not violated the Act. In conclusion, we find that a reconsideration of the issue of the alleged supervisory status of the leadmen would not lead to a different result in this case, and, therefore, we deny the General Counsel's and the Charging Party's motion to reopen the record for purposes of receiving the proffered evidence relating to the supervisory status of Respondent's leadmen. Accordingly we adhere to our original Decision and Order.

⁷ *Standard Dry Wall Products, Inc.*, 91 NLRB 544, enfd. 188 F.2d 362 (C.A. 3, 1951).

SUPPLEMENTAL DECISION

ABRAHAM H. MALLER, Administrative Law Judge: The current phase of the instant proceeding was initiated on April 26, 1972, by the issuance by the Board of an order reopening and remanding proceedings to Regional Director for hearing. This case is over 7 years old and has been before the Board and the Court of Appeals for the District of Columbia on two prior occasions.¹

The complaint issued on February 15, 1965, charged Respondent with unfair labor practices in violation of Section 8(a)(1) and (3) of the Act. The latter involved the discharge of a number of employees allegedly for union membership. One of the defenses urged by the Respondent was that the discharges were effected pursuant to an effort by the Respondent to cut costs in the manufacture of helicopters for the U.S. Navy; that such an effort was made pursuant to letters from the President of the United States and the Secretary of Defense.

Prior to the original hearing, the General Counsel had issued and served upon the Respondent a *subpoena duces tecum* calling for the production of certain of Respondent's employment records. The Respondent did not honor the subpoena. Despite Respondent's failure to do so, the Trial Examiner hearing the case did not draw any inference adverse to the Respondent and recommended that the complaint be dismissed. The Board adopted the Trial Examiner's Decision.² The Charging Party thereupon appealed to the Court of Appeals for the District of Columbia which issued an opinion and order remanding the case to the Board to "(1) explain its failure to draw the requested inferences, (2) draw the inferences and explain the consequences, or (3) require production of the records."³

Upon remand, the Board refused to draw any inference adverse to the Respondent and set forth its rationale. The Charging Party again appealed to the Court of Appeals for the District of Columbia. On January 25, 1972, the court of appeals handed down its opinion in which it stated that it

considered the subpoenaed material critical to the case and that it was of the opinion that the Board should have drawn an adverse inference from Respondent's failure to produce the subpoenaed material. Accordingly, the court remanded the case to the Board for further proceedings; specifically, to reopen the record to afford the Respondent one last chance to respond to the subpoena by submitting the material originally sought therein and not produced at the hearing before the Trial Examiner. The court directed that the Respondent be given 30 days to produce the subpoenaed "rehiring records," holding that if the Respondent did not, within the time period, come forward with such evidence, the Board should strike Respondent's cost-cutting defense, and reconsider the case on the merits taking into consideration the factor that Respondent's defense of "cost-cutting" has been stricken and the testimony of Respondent's president, Papadakos, relating thereto has been "thoroughly impeached."⁴

Following this remand, the Board issued its order on April 26, directing that a hearing be held "for the purpose of receiving into evidence the subpoenaed records of Respondent's 'hiring' practice during the critical period in accordance with the court's opinion and remand, but also including any testimony of witnesses of any of the parties hereto who may wish to present evidence relating to the authenticity and accuracy of the evidence to be received under this Order." The order further provided that "upon conclusion of such hearing, the Trial Examiner shall prepare and serve on the parties a supplemental decision containing findings of fact based upon the evidence received" Thereafter, the case was assigned to me, and pursuant to notice a hearing was held on June 26 and 28 at Brooklyn, New York, and on July 25 and 27, 1972, at Centerreach, New York. All parties were represented at the hearing and were afforded full opportunity to be heard.

At the hearing, Respondent produced voluminous records, and I adjourned the hearing to afford the General Counsel and the Charging Party ample opportunity to examine such records. When the hearing resumed, the General Counsel and the Charging Party presented a stipulation as to the contents of certain records relating to the transfers of employees, and the Respondent introduced evidence with regard to such records.

Thereafter, the Charging Party and the General Counsel announced that they had found among Respondent's records evidence which bore on another issue in the original case, viz: That a major reason for the Board's conclusion that the Respondent did not violate Section 8(a)(3) of the Act with regard to 17 of 30 of the alleged discriminatees was the Trial Examiner's finding, adopted by the Board, that Respondent's leadmen were not supervisors, hence their knowledge of the union activities of the dischargees was not chargeable to the Respondent who did not otherwise have knowledge of such union activity; the Board's finding with respect to the leadmen's status was also a premise for the dismissal of numerous violations of Section 8(a)(1) of the Act in which these so-called leadmen participated; and since the newly discovered evidence demonstrates that they were in fact supervisors, their conduct is chargeable to the Respondent. The Charging Party and the General Counsel

¹ Original Board Decision 170 NLRB 236; opinion and order remanding case to the Board *International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America (UAW) v. N.L.R.B.*, 419 F.2d 686 (C.A.D.C., 1969); supplemental Decision 185 NLRB 934; opinion and order remanding case to the Board 459 F.2d 1329 (C.A.D.C., 1972).

² 170 NLRB 236.

³ 419 F.2d at 687.

⁴ 459 F.2d 1329, 1348.

contended that a review of the records which the Respondent had been suppressing for 7 years demonstrates: that the leadmen effectively recommended employees for hire, effectively recommended wage increases, normally appraised work of employees for the purpose of determining whether wage increases were to be given, often initiated a notice of termination, and thus began the process of separating employees, and reviewed the performance of probationary employees at the completion of the 90-day probation period; in a number of documents, the Respondent has listed these leadmen as foremen; and a very substantial wage disparity existed between the leadmen on the one hand and other employees on the other. The Charging Party and General Counsel contended that they have a right to present the foregoing evidence because they are entitled to be in the position in which they would have been, had the Respondent complied with the subpoena during the original hearing. They therefore moved for leave to present the foregoing evidence.

After careful consideration, I denied the motion, pointing out that the hearing called for by the Board's order of April 26 was limited to "receiving into evidence the subpoenaed records of Respondent's 'hiring' practice during the critical period in accordance with the Court's opinion and remand." In response to the contention of the Charging Party and General Counsel that the Board's order has construed too narrowly the opinion of the court of appeals, I stated, assuming *arguendo* that there was merit to this contention, it was beyond my authority to revise the Board's order which was clear and explicit on its face, and that I was bound by it.

The Charging Party and General Counsel announced that they would take a special appeal to the Board from my ruling and would move to reopen the record to receive the evidence they desired to offer. In order to enable the Charging Party and General Counsel to present appropriately this issue to the Board, I permitted them to make a lengthy offer of proof of the foregoing, and I closed the hearing.

Neither party filed a special appeal from my ruling. However, on August 25, the Charging Party filed with the Board a motion to conform Board order to mandate of the court of appeals. On September 11, the General Counsel filed a motion to conform Board order to court of appeals mandate and joinder to Charging Party's motion to conform to court's mandate. On November 10, the Board issued an order denying the motions as premature, stating that the motions of the Charging Party and the General Counsel were in effect an attempt to take exception to a not yet issued decision of an Administrative Law Judge. The order noted that the denial was without prejudice, and with leave to file the motions anew upon the issuance of the Administrative Law Judge's decision, in their entirety or by incorporation by reference, in any exceptions thereafter filed by the Charging Party or the General Counsel.

Pending consideration by the Board of the aforesaid motions, the time for filing briefs was extended at request of the parties. On December 8, the General Counsel filed a motion, and brief in support thereof, renewing his motion that the Board's order reopening the proceeding be construed as permitting the admission into evidence of the subpoenaed records and documents relating to the status of leadmen as supervisors. On the same day, the Charging

Party filed a memorandum commenting briefly on the evidence received and adopting the motion and supporting brief of the General Counsel. Also filed on December 8 was a memorandum of law submitted by the Respondent, including proposed findings of fact and conclusions of law. Upon consideration of the foregoing, and pursuant to the Board's order of April 26, I make the following:

I RULING ON THE MOTIONS TO PERMIT
THE INTRODUCTION OF EVIDENCE RELATING TO
THE ALLEGED SUPERVISORY STATUS OF LEADMEN

As indicated above the General Counsel and the Charging Party have renewed their motions to permit the introduction into evidence of subpoenaed records and documents as to the alleged supervisory status of the leadmen. The motions are denied. As I stated at the hearing, the Board's order of April 26 was limited to "receiving into evidence the subpoenaed records of Respondent's 'hiring' practice during the critical period in accordance with the Court's opinion and remand." The proffered evidence relating to the alleged supervisory status of the leadmen is plainly beyond the scope of the Board's order. Were I to receive the proffered evidence, I would be revising and enlarging the Board's order. This is plainly beyond my authority. The argument that the Board construed too narrowly the opinion of the court of appeals is one which is not properly addressed to me, but should be addressed to the Board. In sum, the Board's order of April 26 is clear and explicit on its face, and I am bound by it.

The argument that the proffered records are admissible under the provisions of Section 102.48 (d)(1) of the Board's Rules and Regulations as newly discovered evidence does not require a different conclusion. Were the hearing before me held pursuant to an order reopening the case generally, the evidence would be clearly admissible. Indeed, if the Board's order had reopened the proceeding for the purpose of receiving into evidence all of the subpoenaed records, the proffered evidence would be admissible without regard to Section 102.48. But such is not the order pursuant to which I held the hearing. As I have pointed out, the hearing was ordered "for the purpose of receiving into evidence the subpoenaed records of Respondent's 'hiring' practice. . . ." In view of all the foregoing, I adhere to my ruling and deny the motions.

II FINDINGS OF FACT

*A. Compliance With the
Subpoena Duces Tecum*

Neither the General Counsel nor the Charging Party contends that the Respondent has failed to comply fully with the *subpoena duces tecum*. Accordingly, I find that the Respondent has fully complied therewith.

B. As to the Cost-Cutting defense

It should be noted at the outset, that after examining the records produced by the Respondent, the General Counsel and the Charging Party did not present any evidence that the Respondent hired or rehired any employees after the

termination of the alleged discriminatees. However, as bearing on the Respondent's cost-cutting defense, the General Counsel and the Charging Party introduced evidence relating to the staffing of the blade department after the termination of three employees in that department, *viz*, Schmidt, Bentivegna, and Fluellen.

In the original proceeding, the Respondent took the position that the discharge of the three-named employees in the blade department was the result of its effort to cut costs. The records produced by the Respondent in the reopened proceeding demonstrate that, on the date of the termination of these three employees, the Respondent transferred to the blade department three employees (Rogers, Jacobi III, and Schiel) from the manufacturing-machine shop. Subsequently, on August 24, Respondent transferred employee Coleman to the blade department from manufacturing-airframe and final assembly administration department. On September 14, Respondent transferred to the blade department employee Kailer from manufacturing-machine shop, administration department. Also, on July 20, Costa and Maxim, employees in the blade department, returned to that department from leaves of absence.⁵ On July 22, Dekker, also employed in the blade department returned to that department from a medical leave of absence which began on March 23, 1964. In the case of Dekker, a notation in his personnel file stated that although the Company's physician had approved his return to work, "Mr. Dekker is still temporarily required to wear a surgical device which might limit his work performance in any unusually strenuous activity. If possible, therefore, please arrange Mr. Dekker's assignments so that he may avoid unusually heavy work for the next three-four weeks."

From a document entitled "Critical Department Analysis May 1, 1964 to December 31, 1964," introduced by the Respondent, it appears that in wood blade-inspection where Schmidt had been employed Respondent employed four men on May 1, 1964, three on July 1, and the staff remained constant at three through December 31, 1964.⁶ Other sections of the blade department show the following: In blade laminate cutting, Respondent had employed two men on May 1, 1964. The number remained constant until August 30, when it increased to three, then went back to two on October 30, and remained at that figure until December 31, 1964. In laminate glue layup, Respondent employed six men on May 1, 1964. The number was reduced to five on July 1, went back to six on July 31, down to five on August 30, four on September 28, and remained at four through December 31, 1964. In routing, where Bentivegna had been employed, the Respondent employed eight men on May 1, 1964. The number of employees increased to nine on July 31; to 10 on August 30, and remained constant at 10 through December 31, 1964. In hand contouring, Respondent employed six men on May 1, 1964. With the termination of Fluellen and another employee, the number was reduced to four on July 1, but increased to five on July 31,

and remained at that number through December 31, 1964. In finishing, Respondent employed two men on May 1, 1964. The number of employees was increased to three on July 1; to four on July 31; to five on August 30; to six on October 30, and remained at six through December 31, 1964.

Returning to the eight employees who were either transferred to the blade department or returned from leaves of absence, the record shows that on July 20, 1964, less than a month after the termination of the three alleged discriminatees, seven of the eight received pay increases ranging from 10 to 25 cents per hour.

Respondent argues that the foregoing evidence should be disregarded because it is outside the scope of the purpose for which the case was reopened *viz*, the production of evidence of new hires or rehires. I do not agree. While the Board reopened the proceeding to receive evidence of Respondent's "hiring" practice, it would be unrealistic, in the posture of the case, to disregard the fact that Respondent maintained the staffing level of the blade department by transfers from other departments. In essence, the issue in the reopened proceeding is whether the Respondent's records contradict the defense that the terminations were occasioned by the effort to cut costs. Thus, if Respondent had hired new employees or rehired old ones after the terminations, such evidence would disprove the defense. But the continued level of staffing of the blade department, and indeed the enlargement of the blade department staff, after the terminations by transfers from other departments is as relevant as if it were accomplished by hires or rehires.⁷

As previously noted seven of the eight employees who either were transferred to the blade department or returned thereto received pay increases less than a month after the terminations of Schmidt, Bentivegna, and Fluellen. This action is inconsistent with the contention that the termination of the three employees was occasioned by cutting of costs. The Respondent argues that the wage increases could be considered to be an incentive to the employees to meet the need of operating the department with fewer employees. The argument might have validity if, in fact, the Respondent attempted to operate the blade department with fewer employees. But as pointed out above, the Respondent's own evidence demonstrates that the number of employees in the Blade Department did not decrease. To the contrary, it increased.

In view of the foregoing, I find that Respondent's records contradict its defense that Schmidt, Bentivegna, and Fluellen were terminated because Respondent was attempting to cut costs.⁸

⁷ The Respondent does not contend that the transferees and employees returning from leaves of absence had greater seniority than the alleged discriminatees. Indeed, the opposite is true. Thus, Schmidt and Bentivegna had more seniority than all but one of the transferees and more seniority than the men returning from leaves of absence. Fluellen had more seniority than four of the eight men in the combined categories.

⁸ Pursuant to the Board's direction to "prepare a supplemental decision containing findings of fact based upon the evidence received," I make no recommendations as to the effect of my findings upon the Board's original Decision. To do so would be to go beyond the scope of the Board's Order. The effect of the findings of fact upon the Board's original Decision is appropriately a matter for the Board's consideration.

⁵ Costa had been on a medical leave of absence since May 28, 1964. Maxim likewise since May 26, 1964.

⁶ On September 22, one employee, Roeder, was laid off, but another employee, Raftery, was transferred from another department the next day to take his place.