

Burdett Oxygen Co. of Cleveland, Inc. and Local 414, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case 25-CA-6002

August 23, 1974

DECISION AND ORDER

BY MEMBERS FANNING, KENNEDY, AND PENELLO

On May 13, 1974, Administrative Law Judge Jennie M. Sarrica issued the attached Decision in this proceeding. Thereafter, General Counsel filed limited exceptions and a supporting brief, and Respondent filed limited exceptions and an answering 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 her 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 Administrative Law Judge and hereby orders that Respondent, Burdett Oxygen Co. of Cleveland, Inc., Fort Wayne, Indiana, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

¹ The Administrative Law Judge found it immaterial that Porubsky, the manager of Cleveland's cylinder control department, may have "raised the cry" to fire Blanton and that Parsons pronounced the decision for termination. We do not agree. Personnel and Labor Relations Director Parsons has the authority to discharge employees. Parsons' testimony indicates that his decision to discharge was based on his discussion with Porubsky and Mrs. Collins' earlier letter suggesting Blanton's discharge even though Parsons would not have discharged Blanton without conferring with Hutchens. These circumstances tend to suggest that Blanton's discharge resulted from her deficiencies as an employee and not from her signing of the union card.

DECISION

STATEMENT OF THE CASE

JENNIE M. SARRICA, Administrative Law Judge: Upon due notice, this proceeding under Section 10(b) of the National Labor Relations Act, as amended (29 U.S.C. 151, *et seq.*), hereinafter referred to as the Act, was tried before me at Fort Wayne, Indiana, on March 20, 1974, pursuant to a

complaint issued January 31, 1974, presenting allegations that Burdett Oxygen Co. of Cleveland, Inc., hereinafter referred to as the Respondent, committed unfair labor practices within the meaning of Sections 8(a)(1) and (3) and 2(6) and (7) of the Act. Respondent filed a timely answer denying that it committed the violations of the Act alleged. Representatives of all parties were present and participated in the hearing.

Based on the entire record, including my observation of the witnesses, and after due consideration of the arguments presented in the briefs filed by the General Counsel and the Respondent, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent, an Ohio corporation with its principal office at Cleveland, Ohio, and facilities located in various other States of the United States, including the Fort Wayne, Indiana, facility involved herein, is engaged in the manufacture, sale and distribution of bottled gases, oxygen, and related products.

During the preceding 12 months, a representative period, Respondent manufactured, sold and shipped from the Fort Wayne facility products valued in excess of \$50,000. During the same period, Respondent purchased, transferred, and delivered to the Fort Wayne facility directly from States other than the State of Indiana, goods and materials valued in excess of \$50,000.

Respondent admits, and I find, that it is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE UNION

Respondent admits, and I find, that Local 414, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, the Charging Party, hereinafter referred to as the Union, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

The General Counsel seeks to establish that Respondent, through branch manager, James Hutchens, unlawfully interrogated union steward, Mike Harshbarger, and discriminatorily discharged, and refused to reinstate Linda Blanton, because the latter attempted to join the Union.

The Union is the collective-bargaining representative of a unit of plant employees at the Respondent's Fort Wayne facility which includes dockmen, warehousemen, truck-drivers, and counter salesmen but does not include office clerical employees.

Blanton was employed May 7, 1973,¹ as a general office clerk in the Fort Wayne Branch. She was discharged on December 7, by Hutchens. The reasons given Blanton at the time of discharge were that she was costing the company money with the demurrages which were being returned

¹ All dates are in 1973.

from the Cleveland office to be corrected and that Hutchens felt she just was not suited for the job.

Just before Thanksgiving Blanton inquired of Harshbarger concerning details of union membership benefits and asked him for a membership application. Harshbarger reminded her that there was no classification for her in the contract.² Blanton asserted she felt they were discriminating against her, so Harshbarger, after talking to Union Business Agent Thomas M. Jones, gave Blanton the application card. That evening Blanton called Jones to discuss her intention to file the application. When Jones indicated he did not believe there was a classification for her, Blanton reminded him that Gene Salgo did clerical work and he was covered by the contract.³ Jones then stated that he had been looking at the contract while they were talking and that there might be a classification for her, so she should complete and turn in the application. Blanton did so, and on Monday, December 3, dated and gave the completed application to Harshbarger who arranged for Jones to pick it up on Friday, December 7.

One afternoon near the middle of that week, Hutchens came out to the dock and asked Harshbarger if Blanton was planning to join the Union. Harshbarger told Hutchens that it was a possibility. Hutchens stated that Blanton would not be able to join because she was an office worker. Harshbarger stated that this decision would be between the Union and Blanton.⁴ Harshbarger did not mention this conversation to Blanton.

After her discharge at the end of the workday on Friday, December 7, Blanton contacted Harshbarger, reported what had happened and asked him to contact the business agent. As a result of various phone calls and discussions between them, and a phone call by Jones to Hutchens, a meeting was set for Monday morning, December 10. During the phone conversation, and later at the meeting, Hutchens denied that Blanton was discharged because of her interest in joining the Union, and he refused to reinstate her.⁵

² In July Blanton had inquired of Harshbarger whether she could join the Union. Harshbarger gave her an application but told her the Union had no classification for her and any action on her application would have to wait until the end of the contract term, which Blanton understood to be sometime in November. Believing it useless, Blanton did not complete the application card for membership at that time.

³ Gene Salgo works at a counter which is located in the vicinity of the office, outside the manager's office and near the desks of the office staff.

⁴ Hutchens testified that he overheard a statement through the door of his office that the office girls were going to become members of the Union. Because of this Hutchens went out to Harshbarger and, in a joking manner, said "I understand you're going to have females as local members." Hutchens admitted that he did ask specifically about Blanton and that Harshbarger replied, "Yes, she asked for a card and I turned it over to Tom Jones." Hutchens further testified that he treated it in a joking manner when he spoke to Harshbarger, but it was not a joke to him if it were true.

⁵ At the December 10 meeting attended by Hutchens, Jones and Harshbarger, Jones asked Hutchens if he was holding to the discharge and Hutchens replied in the affirmative. He told the Union representatives he had discharged Blanton because she made too many mistakes on billing and was incompetent. Jones asked whether Hutchens was aware that Blanton had signed the Union card. Hutchens denied such knowledge, and asked Jones whether Blanton had already signed the card or had signed it afterwards and backdated it. (According to Hutchens he told Jones he had not received confirmation, that he had only "heard scuttlebutt.") Jones asked Hutchens whether he had given Blanton any oral or written warnings. Hutchens asserted he had talked to her and had a file of notes and records of her mistakes. However, he did not show the Union representative the file. Jones asked why

Respondent contends that Blanton was discharged for her incompetency in all phases of her work which persisted during her entire employment period and that her work deteriorated until upon the insistence of the Cleveland office because of recent gross errors the decision was made in Cleveland to terminate her employment. Respondent asserts that the timing of the discharge in relation to her interest in joining the Union was purely coincidental.

In view of the nature of Respondent's defense, it is necessary to review Blanton's entire work history. As a general office employee, Blanton's duties were to call gas customers and take their orders for the next day's deliveries, and to answer all incoming calls. She also did filing and some typing, posted all invoices on customer demurrage sheets, and at the beginning of each month, computed the demurrages and sent them to the Cleveland office for review and customer billing. During the first month of her employment, Blanton began learning how to post the invoices onto the demurrage sheets, along with her other duties. She handled the monthly computation of the demurrage sheets for the first time in early July covering demurrages for the month of June. Hutchens' wife, who had handled the demurrages in June for the month of May, and who worked part time performing filing, typing, and coding of invoices, was present during the July demurrage computation period for 2 or 3 days and tried to explain the procedure. Manager Hutchens was unable to help Blanton with these. He told her he did not know how to do them and that they would drive him crazy. He promised to have someone from Cleveland come to train her, but this was not done.⁶

The demurrage work required keeping track of and posting the number, by size and product, of all cylinders taken out of and returned to the company; computing the number of cylinders outstanding for each customer⁷ for purposes of charges and cylinder rentals; and submitting the monthly demurrage sheet containing those computations to the cylinder control section in Cleveland. There, after review and corrections where needed were made, the information was fed into a computer for billing purposes after which a copy

Hutchens had given her a raise if Blanton was such an incompetent employee. Hutchens stated that the raise was to encourage her to improve. Jones told Hutchens he would have to turn the matter over to the Labor Board and Hutchens told Jones to do whatever he had to do.

⁶ There is no explanation why Mildred Savoy, the other office worker, who knew how to do the demurrages and who would answer specific questions asked by Blanton, did not, and was not assigned to train Blanton. I do not credit testimony by Robert L. Porubsky, cylinder control manager in Cleveland, that when he and the former manager, Ann Louise Collins, were in Fort Wayne auditing the invoices and taking inventory of the cylinders at the plant, Collins trained Blanton. It is contrary to all other evidence, including his own statement of what they were doing in Fort Wayne at that time. Hutchens verifies that they were occupied in taking inventory and checking postings of the invoices. Hutchens also testified that he had later requested Porubsky to come back to Fort Wayne and give Blanton some training.

⁷ When Blanton began doing the demurrage work there were around 800 accounts of which 700 were on lease arrangements. During the summer Respondent arranged with a distributor to take over a substantial number of the accounts. After the transfer there remained about 500 accounts of which monthly demurrage statements were required for about 225. The Fort Wayne Branch still remained one of the major facilities in account activity ranking fifth highest in the entire corporation in volume of inventory and sales. The work Blanton was doing on the demurrages entailed the control and inventory of between 11,000 and 13,000 cylinders at the facility which handles approximately 96,000 cylinder turnover a year. The average cost of a cylinder is in excess of \$50 each.

of the demurrage sheet was mailed to the customer. Errors found on demurrage sheets were noted in pencil and the sheets were returned to the originating branch for correction.

Porubsky, who at that time was Collins' assistant, reviewed Blanton's work. He telephoned Blanton and pointed out her errors on demurrage sheets, explaining what she should have done in each case. He also promised her he would come to Fort Wayne and give her some training when he could arrange the time, but he never came.

Whenever she made a mistake, Blanton became concerned and would make this fact known to Hutchens who would say "You're doing fine—no problem." Mrs. Hutchens also told Blanton she was doing "a tremendous job" and told the same thing to Blanton's husband. When the demurrages came back from Cleveland for correction, Hutchens would merely tell Blanton to correct them and send them back. At one time he told her that girls at other branches with 4 and 5 years of experience still made mistakes and received demurrages back to be corrected. With respect to mistakes in computation, Hutchens told Blanton to slow down; she was going too fast and this was the reason she was making those mistakes.

Between May and August Blanton frequently brought up the subject of her pay. She testified that she did not exactly ask Hutchens for a raise but she would "tease" him about the amount of her pay. An example of this teasing was an occasion when she asked Hutchens in passing whether she would make more money if he were to move her desk over into the plant. Hutchens just laughed. On August 8, Hutchens filled out a form requesting a raise for Blanton which she received effective September 1. On this form Hutchens stated:

This girl is great in demurrages and shows a great deal of company conscientiousness [sic]. She deserves more pay.

Later that month, while complimenting Blanton on her work, Hutchens told her he had put in for a raise for her but did not know how much it would be. He also told her that in March 1974 she would get another raise, which she understood would be automatic.

One Friday late in August, Blanton left a note in Hutchens office giving him a 1-week notice of her intent to leave the job, stating as the reason constant friction between her and Savoy. On Monday morning Hutchens asked Blanton whether he could talk her out of quitting. Blanton agreed to stay on the job. Later he asked Blanton to write out a list of the things that were causing friction between her and Savoy and give it to him and he would speak to Savoy when she returned from vacation.

Collins sent a memorandum to Hutchens under date of August 15. In this memorandum Collins set forth the types of errors Blanton was making and concluded:

I do not think she is acquiring the computation or procedure very quickly. Perhaps if you hired another girl and we started from scratch again, we would be much further ahead.

Hutchens did not tell Blanton about this letter. Instead, he made a list of the examples given as to the types of errors Blanton was making and gave them to her as items to check when doing the demurrage sheets. As they appear in Collins' memorandum, the criticisms of Blanton's work were:

. . . most of the errors are due to carelessness and probably not knowing exactly how to compute the demurrages and not just error in figures as you thought.

1) If she proved her balances, she would have caught most of her own errors, or at least have known something was wrong.

2) The demurrages come thru out of alphabetical order. She has said, since that is the way she receives them so that is the way she is returning them. This answer makes no sense, as you do not skip around and compute your demurrages.

3) She is not stapling her pages together when a customer has more than one page.

4) She is forgetting to put customer code numbers on some of the demurrages. This is very important.

5) She is not separating her NONES from the monies.

6) She forgot to tape the monies and count her money customers.

7) She is not changing the invoice numbers to correspond with her first sheet.

Collins retired in mid-September. Porubsky assumed her position on September 1. Sometime shortly after Porubsky took over there was a telephone conversation between Porubsky's secretary and Blanton which Blanton found very disturbing. She was being questioned about a matter concerning which she had no knowledge. Blanton sought out Hutchens and related the conversation to him. It developed that the subject matter pertained to certain files in Savoy's possession. Hutchens told Blanton everything was all right, he would take care of the matter. After that incident Hutchens stopped Cleveland from making any more calls to Blanton with respect to her demurrages, insisting that all comments come to him and in writing.⁸ Blanton did speak with Collins just before the latter retired. In that conversation Blanton asked Collins several questions she had about demurrages. Collins was very helpful and cordial, reassuring Blanton by stating that she had been with the company 24 years and still became confused and made mistakes.

Blanton testified that she had reason to believe a certain amount of friction developed between Hutchens and Porubsky which may have been over her work. Hutchens had stated to her that he was keeping a file on Porubsky, which to her knowledge contained different memoranda Porubsky had sent Hutchens, and that when Porubsky came to Fort

⁸ I am not convinced by Blanton's assertion that she made no complaints to Hutchens about Porubsky's telephone calls concerning her mistakes on the demurrages, and that she was not upset by those calls. The single call from his secretary would hardly account for the breadth of the action taken by Hutchens in cutting off all calls from Cleveland to Blanton.

Wayne he was going to change Porubsky's way of thinking. In November, Porubsky returned 3 demurrages for correction on which neither Blanton nor Savoy could find an error. Hutchens told Blanton to photocopy these for the Porubsky file and return the demurrages to Cleveland.

Blanton asserted that although Hutchens gave her constructive suggestions on how to improve her demurrage work, he never criticized her work in any way, and that no one else criticized her work to her knowledge. She was aware that after Porubsky took over from Collins the relations with Cleveland changed and Hutchens started receiving a lot of memoranda regarding her work. Blanton also testified she thought it would be fair to say that Hutchens defended her in her work throughout her employment, but when he fired her, Hutchens did not tell her he was doing so on directions from Cleveland.

With respect to her demurrage errors, Blanton testified she kept no records of the number each month but did recall that there were 29 or 30 mistakes the first month and that one month her errors were as low as 7. Hutchens testified that errors in July for Blanton's first month were heavy involving 18 accounts. Hutchens did not know the number of accounts returned for correction from Cleveland for the intervening months but testified that errors for Blanton's last reports covering November sales totaled 12 which involved 7 accounts—5 of them returned from Cleveland a second time because they were still incorrect.

Hutchens testified that the reason for Blanton's discharge was her incompetency in the work on demurrages. However, he promptly started adding other areas of incompetence as additional reasons until the list encompassed her every duty, asserting between each addition that he had named all of the reasons for her discharge. He listed as a secondary reason her attitude. Hutchens asserted that Blanton could not get along with many of the customers in the phone conversations because she was in a bad mood once or twice a week, every week, and that he overheard her speaking to customers in an inconsiderate manner. However, admittedly, throughout the entire period of her employment he did not mention this to her. At another point in his testimony Hutchens stated that Blanton had a good personality and could speak well to customers, then added, when she was in a good mood. Incompetent typing was listed as one of the reasons for her discharge. Later her typing was excused on the ground that she was not trained as a typist. Although Hutchens did not criticize Blanton's work, and when demurrages were returned he only told her to go through them and correct them, he did once write her a note stating her errors were primarily because she was not proving her balances and that she was not taking enough time and not slowing down.

When Hutchens received a memorandum from Collins suggesting that Blanton be replaced, according to his testimony, Hutchens told her he thought Blanton had the potential to be a good employee and needed only additional training from his wife and Porubsky. However, he did not arrange for Mrs. Hutchens to give Blanton further training, nor did Porubsky come to Fort Wayne to do so. Hutchens also testified that he first became aware of Blanton's deficiencies when he received the Collins memorandum. Later he testified that Blanton did not improve after the initial

training by his wife when she was first employed, but on the contrary her work deteriorated. He then contradicted this by asserting that her bad attitude started in late August or September and manifested itself particularly in her performance of work on demurrages in which she assumed the stance of "I will do the best I can and the heck with the rest of it." It was an attempt on his part to use psychology that caused him to request a raise for her. Hutchens testified that he lied in the statements he made on the form recommending the raise for Blanton and that he asked for the raise for her to try to make her want to work. Significantly, the request is dated August 8, well before the time of the asserted change in attitude.

Hutchens gave as the reason he did not discharge Blanton as soon as he learned of her deficiencies the fact that Porubsky was new in his position and Hutchens felt he was getting second-hand information from Porubsky. This was the reason he required Porubsky to direct all calls and memoranda on the demurrages to him. At another point Hutchens asserts that he was trying to help Blanton by keeping the phone calls by Porubsky from her so he had those calls directed to him as well as all of the memoranda, so that he could calmly explain to Blanton what the problem was. Hutchens asserts he defended Blanton's work monthly and had many hostile phone conversations with Porubsky regarding the matter until December after he received the erroneous demurrages back from Cleveland for the second time. Hutchens states that it was then he decided he could no longer tolerate Blanton's continuing mistakes.⁹

With respect to the December demurrage sheets, Hutchens states that Porubsky called him on December 4, and advised him that several of Blanton's demurrages were still incorrect and were being returned. In that phone conversation Porubsky strongly advised that Blanton be discharged. Hutchens waited until the rejected demurrages arrived on December 6, then called Jack Parsons, personnel and labor relations director in Cleveland. Hutchens told Parsons of Blanton's work performance and of Porubsky's recommendation, and stated he was seeking Parsons' approval. Parsons decided Hutchens should discharge Blanton.

Hutchens denied he told Parsons he had knowledge of Blanton's interest in joining the Union, or that her indicated interest therein had anything to do with his recommendation to Parsons.

Porubsky testified that when they receive the demurrages in Cleveland they have no way of knowing whether the items are posted from the proper invoices and in the proper columns; they can only check the computations and have to assume that the invoices have been properly posted. He also asserted that Respondent does have a 3-day training arrangement for demurrage clerks.

Porubsky labeled Blanton's work as terrible and the worst in the corporation. He asserted that her mistakes exceeded those of any other branch and that for one month they

⁹ Still a third version is that Hutchens and Porubsky had words over Blanton in September because Porubsky was not using ethics in his constructive criticism, he was not being very cool in his presentation on the phone, and he was causing Blanton to become very upset, and this together with the incident involving his secretary and the expense involved caused him to put an end to the direct calls to Blanton. He also requested written instructions for demurrages which Porubsky later directed to all branch managers.

exceeded those of all 15 branches. He called Blanton attempting to explain to her the errors he had found but Blanton was not receptive to criticism and became irritated. In September a heated discussion between Blanton and his secretary was followed by a call from Hutchens expressing his discontent with Porubsky's vocal criticism of Blanton. Hutchens told Porubsky he wanted Porubsky to go there and train Blanton, and that further communications on demurrages should go through him.

Subsequent discussions between Porubsky and Hutchens became heated because Porubsky was very irritated with Blanton's mistakes which he viewed as very careless. On three or four occasions Porubsky called to the attention of Parsons his dissatisfaction with Blanton's work, stating only his opinion as he had no authority to recommend Blanton's discharge. When Blanton's mistakes were so numerous for November and some had to be sent back a second time, Porubsky called Hutchens and told him this just could not be tolerated any longer. He requested that Hutchens discharge Blanton. Porubsky also made it a point to see Parsons on December 5, and inform him of the problem. He stated to Parsons that he could not put up with the problem any longer and requested Parsons to dismiss Blanton.

Parsons, who testified that he very seldom is called into the picture but that he saw the papers when Blanton was hired, he had received a copy of the Collins memorandum relating to the demurrage errors at the Fort Wayne Branch, he approved the raise for Blanton in August, stated that Porubsky had expressed his dissatisfaction with Blanton's performance and reported he had made this known to Hutchens who had not seen fit to take any action, therefore he was asking Parsons to intercede. Thus, when Hutchens called him on December 6, he was well aware of the situation. However, he waited until he received Hutchens' opinion of Blanton's work before he made his decision that Blanton should be discharged.

Parsons further testified that there is a requirement for his approval before any employee can be discharged except in cases of theft or drunkenness, and that Respondent does have a 60-day probationary period within which most employees who are not performing up to Respondent's standards are dismissed. Finally, he first learned that Hutchens knew of Blanton's interest in the Union sometime after the December 10 meeting between Hutchens and the Union.

Analysis and Conclusions

Hutchens' undisputed interrogation of the Union steward concerning Blanton's attempt to join the Union clearly establishes his knowledge of Blanton's union activity. With respect to whether the interrogation itself was unlawful, it may well be argued that in content as well as context this interrogation could not reasonably be regarded as coercion of the union steward. However, the Act prohibits interference as well and I find that Hutchens, by injecting his inquiry and opinion into the matter of whether Blanton desired to or would be able to join the Union, technically, was interfering with the protected rights of his employees. By doing so Respondent violated Section 8(a)(1) of the Act.

Turning now to the question of the alleged Section 8(a)(3) violation, I do not credit Hutchens as a reliable witness, not

only because of his demeanor but also because of the numerous internal inconsistencies appearing in his testimony—several instances of which are set forth above. Therefore, I accept his testimony only where it is consistent with or corroborated by the testimony of credible witnesses. Porubsky clearly is inclined to gross exaggeration and allowances are made for this characteristic in evaluating his testimony.

Also of some significance as an indicator of the probabilities of what occurred is the particular personality characteristics displayed by various witnesses, particularly Porubsky who revealed a positive aggressiveness to the point of being somewhat abrasive and Blanton who appeared to be highly sensitive and who displayed impatience, alertness of mind, quickness of speech and a tendency to answer questions to the point even before they were completed.

The testimony leads me to conclude that Blanton was a very fast worker, with a good personality for dealing with customers in taking telephone orders, and that she was a substantial asset as a general office clerical employee. She was able to perform all the many details of her job assignments even without the initial special 3-day training generally given for handling demurrages and, in addition, was able to handle other duties as assigned without training, e.g., preparation of the payroll on three occasions although this was a major part of Savoy's job. Blanton's greatest failing was that she worked so fast that she made needless and careless errors, a telling example of which is the fact that on the membership application card which she submitted to the Union she gave her year of birth as 1973. This failing was compounded by the fact that Blanton was sensitive and easily upset, and had to deal with Porubsky who, no doubt, was aggressive rather than diplomatic in pointing out her errors. On the other hand, Blanton's speed, willingness to work, and ability to handle whatever work she was assigned, made her appear to Hutchens as potentially a very valuable employee worth special effort and handling. He therefore went to great lengths to satisfy her sensitivity in the office and to shield her from outside criticism. This brought about the situation wherein his will to run his own shop was pitted against Porubsky's aggressiveness in venting his aggravation with the needless errors—or more accurately failures¹⁰—of Blanton to follow prescribed form in presentation of her monthly demurrage summaries.

I reject Hutchens' claim of incompetence in practically all areas of job performance as the causes for Blanton's discharge, either over the entire period of her employment or over any more current period. The very multiplicity of asserted reasons and Hutchens' equivocation with respect thereto makes all of them suspect. However, the evidence of persistent difficulties in relation to Blanton's handling of demurrages is too well documented and too consistent to be negated by Hutchens' deficiencies as a witness. I find that these problems were real.

It is possible that the return for the second time¹¹ of the

¹⁰ That Blanton's so called errors involved more form and procedure than calculations is indicated by the types of errors covered by Collins' August 15, memorandum; the type of instructions issued at Hutchens' request in November by Porubsky; and, the bulk of the memoranda sent by Porubsky to Hutchens concerning Blanton's reports.

¹¹ Of the six demurrage memoranda dated December 4, from Porubsky

same accounts for correction of November errors in demurrages was sufficient to cause Hutchens to give up the stand he had taken against Porubsky's telling him how to run his branch, which was a dispute grounded in the demurrage errors being returned from Cleveland. I do not believe the validity of this claimed reason for the discharge is negated by the fact that at the time of discharge Hutchens told Blanton her mistakes were costing the company too much money, and the failure of the evidence to establish that Hutchens had any idea that her errors had in fact been costly. In this connection it is noted particularly that Porubsky testified that Cleveland had no way of knowing whether the invoices had been properly posted onto the demurrage summaries. No audit had been made to determine whether all sales and rentals were being correctly reported and there was no showing that any of her errors in computation had slipped by Cleveland into the billing process to the company's detriment or otherwise.

It is immaterial that Porubsky may well have been the one who raised the cry, "fire her", and that Parsons was the one who pronounced the decision for termination. Equally irrelevant is the question of whether either Parsons or Porubsky had actual or presumptive knowledge that Blanton had only recently displayed interest in joining the Union and that Hutchens had gained knowledge thereof. For, Porubsky admittedly had no authority to recommend Blanton's discharge, and Parsons admittedly would not have taken any action on Porubsky's urging without the call from Hutchens and his recommendation. Hutchens clearly was the moving force in the discharge.

Hutchens' specific knowledge, as pointed out above, was gained by his unlawful interrogation of the Union steward, and the timing of the discharge in relation to when he gained that knowledge makes his action highly suspicious. The question remains whether his interrogation also establishes antiunion animus necessary to support any inference that Hutchens would not have called Parsons for approval of the discharge but for Blanton's recent union activity.

The Board has steadfastly held to the view that unlawful motivation is a necessary element and although antiunion animus is an inference it must be based on substantial evidence, not mere suspicion.¹² The Supreme Court defined substantial evidence in *N.L.R.B. v. Columbian Enameling and Stamping Company, Inc.*, 306 U.S. 292, 300 (1939), thus:

Substantial evidence is more than a scintilla and must do more than create a suspicion of the existence of the fact to be established. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. . . .

I do not believe that the isolated instance of curiosity satisfaction indulged in by Hutchens, either in content or

received by Hutchens on December 6, three indicate that they covered demurrage accounts that previously had been returned for correction, one was an inquiry concerning a missing account previously returned, one was for verification of a customer's address and one involved identification of the sizes of cylinders involved.

¹² See *Borin Packing Co., Inc.*, 208 NLRB No. 45 (1974).

context, reveals antiunion animus sufficient to establish an unlawful motive. As I weigh the evidence, this is a close question. I also realize that reasonable minds do differ, but it is the General Counsel's burden to tip the scale with a preponderance of evidence. I cannot find that preponderance sufficient to support antiunion animus, even though, as found above, Respondent committed a technical violation of Section 8(a)(1). Accordingly, I do not find a violation of Section 8(a)(3) and shall recommend dismissal of the complaint with respect to that allegation.

Upon the foregoing factual findings and conclusions, I make the following:

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local 414, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America is a labor organization within the meaning of Section 2(5) of the Act.

3. By engaging in interrogation, Respondent interfered with, restrained, and coerced employees in the exercise of rights guaranteed them in Section 7 of the Act, in violation of Section 8(a)(1) of the Act.

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

5. Except for the foregoing, Respondent has committed no unfair labor practices under the Act.

THE REMEDY

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

Upon the basis of the foregoing findings of fact and conclusions of law and upon the entire record in this case, I hereby recommend that the Board issue the following:

ORDER ¹³

Burdett Oxygen Co. of Cleveland, Inc., Fort Wayne, Indiana, its officers, agents, successors, and assigns, shall, with respect to its operations at Fort Wayne, Indiana:

1. Cease and desist from interrogating, or in any like or related manner, interfering with, restraining, or coercing its employees in the exercise of their rights to self-organization, to form, join, or assist any labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, and to refrain from any and all such activities.

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.

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

(a) Post at its place of business at Fort Wayne, Indiana, copies of the attached notice marked "Appendix." ¹⁴ Copies of said notice, on forms provided by the Regional Director for Region 25, after being duly signed by Respondent's authorized representative, shall be posted by it immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter, in conspicuous place, 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.

(b) Notify the Regional Director for Region 25, in writing, within 20 days from the date of the receipt of this Order, what steps the Respondent has taken to comply herewith.

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 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."

APPENDIX

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

WE WILL NOT interrogate our employees concerning the union activity of any employee or in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights to organize, form, join, or assist any labor organization; to bargain collectively through representatives of their own choosing; to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; or to refrain from any such activities.

BURDETT OXYGEN CO. OF
CLEVELAND, INC.
(Employer)

Dated _____ By _____ (Representative) _____ (Title)

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, ISTA Center—6th Floor, 150 W. Market Street, Indianapolis, Indiana 46204, Telephone 317-633-8921.