

Herman's, Division of W.R. Grace & Co. and Retail Clerks Union, Local 1371 chartered by Retail Clerks International Association, AFL-CIO. Case 22-CA-5797

February 21, 1975

DECISION AND ORDER

BY MEMBERS JENKINS, KENNEDY, AND PENELLO

On September 16, 1974, Administrative Law Judge Ramey Donovan issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions.

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

The Board has considered the record and the attached Decision in light of the exceptions and has decided to affirm the rulings, findings,¹ and conclusions² of the Administrative Law Judge and to adopt his recommended Order, as modified herein.

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, Herman's, Division of W.R. Grace & Co., Langhorne, Pennsylvania, and Trenton, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraphs 1(b) and 1(c):

"(b) Discouraging membership and activities in Retail Clerks Union or in any other labor organization by discriminatorily laying off employees because of their union activities or for giving testimony under the Act.

"(c) In any other manner interfering with, restraining, or coercing employees in their exercise of rights guaranteed to them by Section 7 of the National Labor Relations Act."

2. Substitute the following for paragraphs 2(a) and (c):

"(a) Offer to Lorraine Newton reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights and privileges, in the ski department of the Trenton, New Jersey, store during the 1974-1975 ski department season.

"(c) Offer to Steven Moyed 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, in the Oxford Valley, Pennsylvania, store, as set forth in this Decision under 'The Remedy.' "

3. Substitute the attached notice for that of the Administrative Law Judge.

¹ The Administrative Law Judge's inadvertent reference to "January 1973" in the second sentence of par. 7 of sec. II of his Decision is hereby corrected to state, "In January 1974, Kobensky again spoke to Miller."

² The layoffs of employees Newton and Moyed on February 23, 1974, concided with their attendance as witnesses for the Union at an NLRB hearing on February 19 and 22. Having found that Respondent's asserted economic reasons for the layoffs were pretextual, that Respondent exhibited hostility toward Newton's and Moyed's organizational efforts, and that Respondent discriminatorily laid them off because of their union activities, we conclude that one motivation for the layoffs was the presence of Newton and Moyed as witnesses at a Board hearing and that, as the Administrative Law Judge found, the layoffs are thereby violative of Sec. 8(a)(4) of the Act as well as Sec. 8(a)(3) and (1).

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 about their union activities.

WE WILL NOT discourage membership or activities in the Retail Clerks Union by discriminatorily laying off employees because of their union activities or for giving testimony under the Act.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of their right to self-organization, to form labor organizations, to join or assist the Union or any other organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities, except to the extent such right may be affected by an agreement requiring membership in a labor organization as a condition of employment.

WE WILL offer reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, to Lorraine Newton at the Trenton, New Jersey, store, and to Steven Moyed at the Oxford Valley, Pennsylvania, store, in accordance with the Decision in the case where the issue was litigated.

WE WILL pay to Lorraine Newton and Steven Moyed any loss of wages and commissions they may have suffered by reason of their layoffs on February 23, 1974, in accordance with the Decision in the case.

HERMAN'S DIVISION OF
W.R. GRACE & CO.

DECISION

RAMEY DONOVAN, Administrative Law Judge: The charge in this case was filed by Retail Clerks Union, Local 1371, Retail Clerks International Association, AFL-CIO, herein Retail Clerks Union, on February 25, 1974. The Employer is Herman's Division of W.R. Grace & Co., herein the Company or Respondent. On April 16, 1974, a complaint issued, alleging that Respondent interrogated employees in violation of Section 8(a)(1) of the Act and that Respondent illegally discharged and failed to reinstate two named employees in violation of Section 8(a)(3), (4), and (1) of the Act. In substance, Respondent's answer denies the commission of the alleged unfair labor practices. The case was heard before me at Newark, New Jersey, on May 29 and 30, 1974.

FINDINGS AND CONCLUSIONS

I. JURISDICTION

Respondent is a Delaware corporation, with its principal office in Pennsauken, New Jersey. Respondent has various retail sporting goods stores in New Jersey and Pennsylvania, including a store at Langhorne, Pennsylvania, referred to as the Oxford Valley store, and a store at Trenton, New Jersey, referred to as the Trenton store. The Oxford Valley store and the Trenton store are the facilities involved in the instant proceeding.

In the course and conduct of its business operations in a representative 12-month period, Respondent received gross revenue valued in excess of \$500,000. During the same period, Respondent received goods at both its Oxford Valley and at its Trenton store valued in excess of \$50,000 which were transported to its places of business in interstate commerce directly from states of the United States other than Pennsylvania and New Jersey.

At all times material, Respondent is, and has been, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

Retail Clerks Union is, and has been, a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

In October 1973, there was a conversation about organizing a union among Miller, Newton, and one or two others of Respondent's Trenton store employees. It was decided that Newton should contact the Retail Clerks Union. Newton arranged a meeting with Rocco, a Retail Clerks representative, and the meeting was held in early November. Thereafter, a series of three or four organizational meetings were held. During this period both Newton and Miller passed out Retail Clerks authorization cards to employees although Newton, according to Miller, was the most active in the number of cards distributed. Newton

¹ Shortly before Miller had been called to the office he had solicited fellow employee Ernst to sign a Retail Clerks card.

headed an employee organizing committee for the Retail Clerks.

Employee Moyed of Respondent's Oxford Valley store met with Rocco and another Retail Clerks representative around the end of December 1973 or early January 1974. He received a supply of union cards and thereafter distributed them among fellow employees and secured signatures thereon. A series of Retail Clerks meetings for employees was held at a highway diner, and, at one of these meetings at which Moore, assistant manager of the Oxford Valley store, was present, Moyed spoke in favor of the Retail Clerks.

In January 1974, District 65, Distributive Workers Union, herein District 65, commenced organizational efforts among the Trenton store employees. District 65 was also a factor at the Oxford Valley store since, at the aforesaid meeting at which Moyed spoke in favor of the Retail Clerks, he also spoke in opposition to District 65.

The Retail Clerks organizational campaign had progressed to the point where that Union had filed two petitions for certification with the Board. The Trenton store petition was filed on January 14, 1974, and the Oxford Valley store petition was filed on February 15, 1974.

From the latter part of 1973 Respondent's awareness and disposition toward the Retail Clerks organizational campaign became manifest. Around the end of November or early December 1973, Kobensky, assistant manager of the Trenton store, called employee Miller to store manager Gualfetti's office. In the presence of Lords, Respondent's assistant operations manager, Kobensky said to Miller, "what's this we hear about you trying to bring in a union?" Miller denied such a role. Kobensky said, "That's not what we hear. We hear you been talking to Tom Ernst about a union."¹ Miller, in substance, then admitted being in favor of having a union. Kobensky remarked that, if the Company's comptroller in the main office "found out about this, he'd have our heads."

I find that the foregoing incident constitutes, in context, illegal coercive interrogation in violation of Section 8(a)(1) of the Act since the loss of collective heads because of such activity was forecast.

Respondent's position toward the union activity, however, became more particularized. In January 1973, Kobensky again spoke to Miller. He said to Miller that he had received "the okay from Brooksey"² and it was okay to sign [cards] with District 65.

Shortly prior to the Board hearing of February 19, 1974, a leaflet was distributed by the Retail Clerks to the employees of the Trenton and Oxford Valley stores. The leaflet both announced a meeting and bore the names of the employees' organizing committee headed by the name of Newton.

Kaplan, Respondent's operations manager under Chief Operations Officer Brooks, testified that in January 1974 he became aware of the Retail Clerks organizing activity at

² Brooks, chief operations officer of Respondent's Herman Brooks Division of the stores.

the Trenton and Oxford Valley stores.³ Brooks admitted that he was aware that Newton and Moyed were connected with the Retail Clerks and that he was given this information by Kaplan prior to the Board representation case hearing on February 19. At the instant hearing Brooks was also asked:

Q. Did you know of any other employees in your stores at the time that were connected with the Retail Clerks Union?

A. Other than the two individuals involved?

Q. Other than these two.

A. Not directly, no.

Q. Did you know of other employees?

A. No.

The evidence leaves no room for doubt that Respondent was opposed to having the Retail Clerks as the collective-bargaining agent of the employees at the Trenton and Oxford Valley stores. At the February hearing on the Retail Clerks petition both the Respondent and District 65 took the position that a contract between District 65 and the Company constituted a bar to the Retail Clerks petitions and that the two stores constituted an accretion to the contract unit and were covered by the existing District 65 contract with Respondent.⁴ As also revealed by the Board's Regional Director's decision as a result of the representation hearing, Respondent and District 65 took the position at that hearing that Newton should be excluded from the unit on the ground "that she is a casual employee." For reasons stated in that decision this contention and others were specifically rejected. Separate elections were therefore directed at the Trenton and Oxford Valley stores.⁵ In the unit, *inter alia*, were all full-time and regular part-time employees, and among those excluded as supervisors were the store managers and assistant store managers.⁶

The above-mentioned representation hearing was held on February 19, 22, 25, and 26, 1974. Newton was present at the hearing on February 19 and 22, having been subpoenaed as a Retail Clerks witness, a fact known to Brooks and Kaplan. Moyed was also present under a Retail Clerks subpoena on February 19 and 22. He testified on February 22. Newton testified on February 25.

On February 23, 1974, Newton was laid off at the Trenton store and Moyed was laid off at the Oxford Valley store.

Respondent has introduced evidence that by letter of February 20, 1974, Brooks instructed all store managers to reduce store operating expenses by laying off employees because of a serious drop in sales volume. The managers were told to inform those laid off that it was the result "of the downturn in business and if and when the downturn is

halted and business starts moving up again, you [the manager] will be very pleased to call them back again."

Supporting data was also presented at the hearing by Respondent to show sales decreases at the various stores and failure to attain projected sales goals. None of these sales figures were refuted as such. Not satisfactorily explained in this picture of a business downturn is the fact that at the Trenton store the payroll shows four new hires in the week ending February 23, 1974. There were also new hires in March although Brooks testified that sales continued to be down in that period. There was a substantial number of new hires at the Oxford Valley store in March and April 1974.

The Layoff of Newton and Moyed¹ on February 23

Newton had worked for Respondent and its predecessors in the Trenton store since 1969. In these years her job was that of a part-time sales clerk of ski clothing in the ski department and she had usually worked from September or October of each year until the end of the ski season. The duration of her employment each year depended on such things as the weather and the state of the ski business, which factors, in turn, determined the length of the ski season and the period during which the ski department would function. In 1972, for instance, Newton had worked until about the middle of March. During past years, the last persons to be laid off in the soft ski department would be Pinto, the department manager, and Newton. Junior employees in the department would be the first to be laid off as the ski season drew to a close.

On February 23, 1974, Trenton Store Manager Gualfetti called Newton to his office. He there told her that the ski department would be closed in a few weeks and he was going to have to start laying off people, including Newton. Gualfetti said, however, that because of Newton's "high salary" she would have to be laid off "now," i.e. February 23.⁷ Newton asked why the other part-time employees in the ski department were being retained. Gualfetti said that these other employees could work hours that Newton could not. Newton said that she could work any night that the others could. Gualfetti reiterated that Newton would have to go as of February 23 and she was laid off on that day.

Initially, as we have seen, Gualfetti told Newton on February 23 that she was being laid off immediately although the ski department would not close until some weeks hence. The reason given for this action was

January and February 1974 it was company policy to keep outside organizers of the Retail Clerks out of his stores but to allow District 65 organizers free access to the stores and that in the same period police were called to remove Retail Clerks organizers from the store premises.

³ At the end of January or early February 1974, Oxford Valley Store Manager Casantini told Moyed that he knew that the latter was "fooling around with those union guys" and he admonished Moyed not to let such activity interfere with his work.

⁴ As we have seen, in January 1974 Kobensky told an employee that Brooks had given him the word that it was "okay" to sign up with District 65. Around April 1974, Trenton Store Manager Gualfetti said to an employee that, if District 65 did not get in (with the election at the store), he, Gualfetti, would probably be on his way out. Brooks testified that in

⁵ The Decision and Direction of Election was dated May 2, 1974.

⁶ In the instant Decision I have referred to Oxford Valley Assistant Store Manager Moore and to Trenton Assistant Store Manager Kobensky in connection with the Retail Clerks organizing activity among the employees.

⁷ Gualfetti did not testify.

Newton's "high salary."⁸ However, Brooks testified that the individual salaries of employees, whether too much or too little, had nothing to do with the selection of an employee for layoff.⁹

Kaplan, who testified that he was the one who had given final approval for Newton's layoff and for that of employees in other departments, was asked why he sanctioned Newton's layoff on February 23. He stated that it was because "she was slated to leave usually after the ski season." The fact is, however, that the entire ski department began closing after the ski season and all the employees therein were slated to leave. In prior years, Pinto, department manager, and Newton were the last to be laid off, with junior employees being the first to be laid off.

In 1973 there were four employees in the soft ski (ski clothing) department. They were Pinto, Newton, Colangelo, and Kolarik, all females. Colangelo and Kolarik are both young, unmarried students, who were part-time employees like Newton; although Newton was married and had three children. Colangelo commenced working for Respondent in October 1973 and Kolarik started in December 1973. Newton, next to Pinto, the department manager, was the senior employee in point of length of service.

After Newton's layoff on February 23, Colangelo was retained and continued to work in the department into the week ending March 16, 1974; Kolarik continued to work in the department into the week ending March 9, 1974. Pinto worked into the week ending April 12. In the 2-week payroll periods ending February 8 and 15, preceding the week in which Newton was laid off, the four employees in the department worked a total of 193 hours, in round numbers, or an average total of 48 hours each. In the weekly payroll periods after Newton's layoff, the three employees in the department worked a total of 160 hours or an average total of 50 hours each. It is thus apparent that if one or both of the junior employees had been laid off on February 23 instead of Newton, in accordance with past practice, there would have been several more weeks of work for Newton.

Gualfetti, as we have seen, first told Newton that she was being selected for immediate layoff because she made too much money. Brooks repudiated this reason in his testimony at the hearing. Then, when Newton asked Gualfetti why the junior part-time workers were being retained, he said that they could work hours that she could not. Gualfetti did not reply to Newton's response that she could work any evening that the others could.

It is a fact that Newton, as a mother with three children, had arranged to be home in the afternoon when the children returned from school. She thus was not present in the store at such time. This, however, was not something

new and her testimony is not controverted that, in her 5 years of part-time work in the store's ski department, her schedule had been arranged so that she worked according to when she "was able to work." Since Respondent has introduced evidence that in 1973, in the first quarter, sales were way down because of the gasoline crisis and other adverse factors, it is apparent that in years prior to 1973, when business was good, Respondent found it unnecessary to have Newton on duty around 3 p.m. but, in February 1973, when customers and business were greatly diminished, it invoked her work schedule as a reason for retaining junior employees in preference to Newton and contrary to past practice. Newton's undisputed testimony was that the afternoon period in the store was always slow, whereas evenings were the busy period.¹⁰ Thus, in 1972, a busier and better year than 1973, Newton would leave the store at 3 p.m. to be home for her children. She returned at 6 p.m. and worked until 9 or 10 p.m., "whatever was required."

Although Kaplan testified that, unlike Newton, the other part-time employees in the ski department were able to work at any time "within reason," he also admitted that "a number of times" Newton had been called to come to the store out of schedule on an emergency basis and she did report for work as required. When questioned about this testimony that the two junior employees "could give us hours that Newton could not," Kaplan was asked what hours he was talking about. His answer revealed that he had no specific hours or instance in mind. He suggested that it might be 4 p.m., "I will put it to you that way. . . . It is possible that those hours [of the junior employees] can be from an hour Mrs. Newton could not have been working. For instance, just for argument's sake, out of the clear blue sky, 4 to 6 or something like that. Q. It is possible but you don't really know, do you? A. No. I would be a good man. I am not sure of the hours." Store Manager Gualfetti who presumably would have been able to give specific testimony as to when Newton had been needed for hours for which she was unavailable, if such situation in fact existed, did not testify.

Kaplan said that in retaining the two unmarried students as part-time employees in preference to the married Newton who had three children, he gave no consideration to the married versus single factor or to the child factor. And, of course, Newton's substantially greater seniority was also ignored. However, in the case of Moyed, who was also laid off on February 23, Kaplan said that a factor in his selection of Moyed for a layoff, in preference to another part-time employee in the same department, was the fact that Moyed was 19 years old, a student, and single. The other man, Mladjen was 25, married, and had one child. Mladjen also had another full-time job.¹¹

⁸ Newton's salary was \$2.50 per hour, plus 1-percent commission on her sales. She and other part-time employees averaged about 16-20 hours per week.

⁹ Brooks testified as follows:

Q. What did you mean by the statement that their individual salaries had nothing to do with the layoffs?

A. On a personal basis had nothing to do with the layoffs. . . .

Q. You said their individual salaries had nothing to do with their layoff?

A. Not on a personal basis. Not because they were making too much or too little individually. . . .

¹⁰ Other part-time employees, concerning whose hours we have evidence in the record, were Moyed, who worked nights and Saturdays; and Miller, who worked Saturdays and 2 nights a week, except in the summer months.

¹¹ Mladjen as a holder of a full-time job with another employer and a part-time job with Respondent would presumably have little if any flexibility in the hours he could work for Respondent, a factor that

Moyed was hired in the Oxford Valley store at the end of August 1973.¹² He was a part-time employee and worked principally in the shoe department as a sales clerk. On a few occasions he also worked in other departments when additional help was needed there. One of these departments was general sporting goods.¹³ In the period of his employment by Respondent, Moyed had also been taught to foam ski boots, string tennis rackets, and drill holes in bowling balls. The indication is that Moyed's work performance was satisfactory and his work was never criticized by a supervisor. The store manager had complimented him on how well he foamed ski boots.

In addition to Moyed there were two other employees in the shoe department. Vanore was a full-time employee and the department manager. Mladjen was a part-time employee like Moyed. Mladjen also had a full-time job with another employer whereas Moyed was a college student and part-time employee with Respondent. Moyed had been hired August 30, 1973; Mladjen had been hired September 11, 1973.

At an earlier point in this Decision, I have described Moyed's organizational activity on behalf of the Retail Clerks. Respondent was aware that Moyed as well as Newton were identified with the Retail Clerks movement. Most recently, Moyed and Newton were among those subpoenaed as witnesses by the Retail Clerks at the Board representation hearing beginning February 19, 1974, a fact known to Respondent. Moyed and Newton were present at the hearing on February 19 and 22. Moyed testified on February 22. He was laid off on February 23.

On February 23, Store Manager Casantini called Moyed to his office. Casantini said that business was slow due to the energy crisis and he had been instructed to eliminate all unnecessary employees. He said that he was therefore laying off Moyed. In the latter's presence, Casantini wrote on a personnel sheet that the reason for the dismissal of Moyed was the energy crisis, and, where the form stated, "Would rehire?" Casantini wrote, "yes."

As previously described, Kaplan testified that in choosing Moyed for layoff instead of Mladjen, the other part-time worker in the department, he took into consideration the fact that Mladjen was married and had a child, whereas Moyed was a young, unmarried student. On its face, such a consideration is not unreasonable but its pretextual nature is revealed by the fact that in laying off Newton, who was married with three children, in preference to two young, unmarried students, Respondent gave no consideration to the factors allegedly used in the Moyed-Mladjen situation.

Also, while Moyed's seniority over Mladjen was slight, it nevertheless existed. At the time of the layoff Respondent was contending before the Board that its contract with District 65 covered the Oxford Valley and Trenton stores. Despite the absence of a copy of the contract in the instant record, it is reasonable to assume that it would be an unusual labor contract if it did not accord some recognition to seniority in selection for layoff. In further asserted adherence to the District 65 contract, Respondent hired

new employees during this period of layoffs at both the Oxford Valley and Trenton stores through referral of such employees from District 65.¹⁴

Although Store Manager Casantini did not testify, Kaplan testified that Casantini had told him that on several occasions Moyed had called in before he was scheduled to report for work and had said that he could not come in. Apparently the vice in this conduct, as described by Kaplan, was that Moyed had not given sufficient advance notice. Kaplan states that although no written warning was given Moyed about this, he was warned. Kaplan does not say who gave the warning but presumably it would be Casantini since Kaplan, who had other and broader responsibilities, was only at the Oxford Valley store once a week.

Since Moyed denied having not given proper notice of absences and denied having been reprimanded for such conduct, I am not disposed to credit Kaplan's indirect and general knowledge of such alleged conduct. If direct and accurate information existed regarding Moyed's alleged absences and his inadequate notification to the store of such absences, such information would presumably be found in store attendance records and in the knowledge of the occurrences by Store Manager Casantini and Assistant Manager Moore. No records were introduced on this matter and neither Casantini nor Moore testified. Further, the record is uncontroverted that at the time of the layoff Casantini noted on a form that he would rehire Moyed, presumably when work was available. Such an indication is not consistent with the effort of Respondent at the hearing to portray Moyed as an employee whose attendance record had been unsatisfactory.

Among the substantial number of new hires made by Respondent in the period subsequent to Moyed's layoff, some were hired in jobs for which Moyed was not adequately qualified as a salesman, e.g. hunting and fishing department salesmen. However, there were a number of jobs for which Moyed was qualified and in which Respondent hired new people rather than calling back the laid-off Moyed. A student named Alexander was hired on April 11, 1974, in the Oxford store's general sporting goods department as a part-time employee. Although Kaplan had no personal contact with Alexander, he testified, in effect, that through the store manager (who did not testify) that Alexander "happens to excel in sports." At another point, Kaplan stated that Alexander's "experience was billiards." How important billiards and other sports experience was as a prerequisite to working in the general sports department is open to question. Moyed had worked in that department on a number of occasions prior to his layoff and, at the Trenton store, two new employees, Imbrie and Klein, were hired in the general sporting goods department although neither had any prior experience in this field and there is

camping, scuba diving, skiing, and so forth.

¹⁴ The matter of applicability of the District 65 contract to these two stores was still pending before the Board during this period, and on May 2, 1974, the contract was held inapplicable to these stores but, until at least that time, Respondent purported to be acting pursuant to the contract

¹² The store was relatively new, and it opened for business in September 1973.

¹³ In Respondent's stores, although almost all its products can be described as sporting goods, a department such as general sporting goods does not include more specialized departments such as hunting and fishing,

no claim that they participated in or excelled in sports, whether billiards or otherwise.¹⁵ On April 11, 1974, a new man, Dellatore, with no prior experience, was hired at the Oxford Valley store to work as a part-time salesman in the stock department. In substance, the job was that of a stock clerk. Dellatore was terminated on May 1 because he did not show up for work. Neither before Dellatore was hired nor after Dellatore was terminated was Moyed recalled to work although there is no question that he was qualified to work in the stock department. The same situation in the case of Ficke, a new hire on April 11, 1974; no prior experience; part-time worker in the stockroom; terminated because he did not show up for work. This is also true with respect to Singer, a new hire on April 12, 1974, in the general sports department, with no prior experience, who was terminated in May when he did not show up for work.

This matter of Respondent hiring new inexperienced people for work for which Moyed was qualified bears not only directly on Respondent's failure to recall a laid-off employee, whose store manager had said, in effect, at the time of layoff that he would rehire when business picked up and work was available, but it also bears on the motivation for the original layoff since it indicates a discriminatory motivation against Moyed and a motivation other than business or economic considerations.

The evidence of Newton's and Moyed's leading active roles in union organizational activity on behalf of the Retail Clerks; Respondent's awareness of such activity by these employees; Respondent's opposition and hostility toward the Retail Clerks organizational effort; the timing of the layoffs of these two employees, coinciding with their attendance as witnesses for the Retail Clerks at a Board hearing; the contradictory and unconvincing reasons given by Respondent for the selection of these employees for layoff in preference to other employees in the same departments; the failure to recall Moyed when work was available,¹⁶ all persuade me that Newton and Moyed were discriminatorily selected for layoff and were laid off because of their union activities on behalf of the Retail Clerks in violation of Section 8(a)(3), (4), and (1) of the Act. I so find.

CONCLUSIONS OF LAW

1. Respondent has violated Section 8(a)(1) of the Act by the interrogation of an employee regarding union activities.

2. Respondent has violated Section 8(a)(3), (4), and (1) of the Act by discriminatorily selecting for layoff and by laying off employees Lorraine Newton and Steven Moyed because of their union activities and because of their subpoenaed presence as witnesses and because of their foreseen and actual testimony at such hearing as union witnesses.

¹⁵ At some subsequent date, unrevealed in the record, Kaplan testified that Imbrie and Klein were transferred to other stores. This fact is immaterial on the matter of their initial hiring and their lack of prior experience.

¹⁶ Since Newton's layoff in the ski department and the subsequent seasonal phasing out of that department, there was, of course, no occasion presented when the matter of Newton's recall to that department could be

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, it will be recommended that Respondent, pursuant to an Order, cease and desist from such practices and take prescribed affirmative action to remedy the effects of its conduct.

Newton is to be made whole for wages and commissions lost from the date of her layoff on February 23, 1974, to the date when she would have been laid off absent her discriminatory selection for layoff on February 23, 1974.

In arriving at the date when Newton would have been laid off in the normal course of events, absent discrimination, past practice shall be taken into consideration, as well as the period in 1974 when the soft ski department provided work for employees other than Pinto, after Newton's February 23, 1974, layoff. Any moneys that may be due Newton under the above standard shall be less her intermediate earnings, if any, and with interest at 6 percent on any balance due. The computation is to be on a quarterly basis.

In view of the discrimination against Newton, it is appropriate that Respondent be ordered to offer her reinstatement to her job at the commencement of the stores' 1974-75 season for soft ski equipment, in accordance with past practice and other relevant considerations, and with her seniority and other rights and privileges unimpaired by her premature and discriminatory layoff in 1974.

Moyed is to be offered reinstatement to his former job, displacing, if necessary, any junior part-time employee in the department or, in the event a job is not thus available in the department, Moyed shall be offered a substantially equivalent job for which he is reasonably qualified elsewhere in the store, with his seniority and other rights and privileges unimpaired. In the event no job is available, Moyed shall be placed on a preferential hiring list for the next job opening for which he is reasonably qualified. Moyed is to be paid wages and commissions lost from February 23, 1974, to the date of the offer of reinstatement or placement on the preferential hiring list, as the case may be, less intermediate earnings, if any, and with interest at 6 percent on the net sum due. The computation is to be on a quarterly basis.

Upon the foregoing findings of fact, conclusions, and conclusions of law, and upon the entire record and pursuant to Section 10(c) of the Act, I hereby issue the following:

ORDER 17

Respondent, Herman's Division of W.R. Grace & Co., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interrogating its employees about their union activities.

tested until the 1974-75 ski season.

¹⁷ 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.

(b) Discouraging membership and activities in Retail Clerks Union or in any other labor organization by discriminatorily laying off employees because of their union activities.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed to them by Section 7 of the National Labor Relations Act.

2. Take the following action to effectuate the policies of the Act.

(a) Offer to Lorraine Newton reinstatement to her former job in the ski department of the Trenton, New Jersey, store during the 1974-75 ski department season.

(b) Pay to Lorraine Newton the wages and commissions she lost by reason of her layoff on February 23, 1974, as set forth in the section of this Decision entitled "The Remedy."

(c) Offer to Steven Moyed reinstatement to his former job in the Oxford Valley, Pennsylvania, store, as set forth in this Decision under "The Remedy."

(d) Pay to Steven Moyed the wages and commissions he lost by reason of his layoff on February 23, 1974, to the date of the offer of reinstatement, as set forth in this Decision under "The Remedy."

(e) Post at its premises at Trenton, New Jersey, and Oxford Valley, Pennsylvania, copies of the attached notice marked "Appendix."¹⁸ Copies of said notice, on forms provided by the Regional Director for Region 22, after being signed by Respondent's representative, shall be posted by it immediately upon receipt thereof, and be maintained by it 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 ensure that said notices are not altered, defaced, or covered by other material.

(f) Notify the Regional Director, Region 22, in writing, within 20 days from the date of this Decision, what steps Respondent has taken to comply herewith.

¹⁸ In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant

to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."