

**Raines Brothers Store Fixtures, Inc. and Alvin O. Pearman.** Case 10-CA-13075

September 19, 1978

DECISION AND ORDER

BY MEMBERS PENELLO, MURPHY, AND TRUESDALE

On June 7, 1978, Administrative Law Judge John C. Miller 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,<sup>1</sup> and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Raines Brothers Store Fixtures, Inc., Birmingham Alabama, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

<sup>1</sup> The Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (C.A. 3, 1951). We have carefully examined the record and find no basis for reversing his findings.

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

WE WILL NOT threaten to discharge or actually discharge Alvin O. Pearman because of his refusal to join Carpenters Local 520, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, or any other Union.

WE WILL NOT promise an employee a wage increase contingent upon his joining Local 520 of the Carpenters Union noted above or any other union.

WE WILL NOT in any other manner interfere

with, restrain, or coerce our employees in the exercise of their Section 7 rights, including their right to refrain from joining a union.

WE WILL make Alvin O. Pearman whole for any loss of earnings he suffered as a result of his unlawful termination with interest until the date of his reinstatement to his job.

RAINES BROTHERS STORE FIXTURES, INC.

DECISION

STATEMENT OF THE CASE

JOHN C. MILLER, Administrative Law Judge: This case was heard in Birmingham, Alabama, on January 10, 1978, on a complaint issued October 5, 1977, alleging *inter alia*, that Respondent, Raines Brothers Store Fixtures, Inc., interrogated, threatened to discharge, and discharged employee Alvin O. Pearman on or about September 9 and 12, 1977, respectively, because he failed to join the Union.

Upon the entire record in this case, including my observation of the witnesses and their demeanor, I make the following findings:

FINDINGS OF FACT

I. JURISDICTION

Respondent is an Alabama corporation with an office and place of business located in Birmingham, Alabama, where it is engaged in the manufacture and installation of store fixtures. The complaint alleges and Respondent admits that during the past calendar year it sold and shipped finished products in excess of \$50,000, directly to customers located outside the State of Alabama. I find that Respondent is, and has been at all times material, engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

The complaint alleges, Respondent admits, and I find that Carpenters Local 520, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, herein called the Union, is and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

II. THE UNFAIR LABOR PRACTICES

A. *Primary Issue*

Whether J. O. Raines, vice president and plant manager of Respondent terminated Alvin Pearman because he refused to accept a 25-cent wage increase contingent upon Pearman joining the Union; or whether as Respondent contends, Pearman voluntarily quit because he was refused a wage increase to \$6.50 an hour.

B. *Background Facts*

It is undisputed that the charging party, Alvin Pearman, was reemployed<sup>1</sup> by Respondent on November 2, 1976. The

<sup>1</sup> In view of Respondent's position, that Pearman was not discharged because of absenteeism or incompetency but that he voluntarily terminated his sporadic employment with the Respondent over the years, is of little significance.

parties dispute, however, whether Pearman's cessation of employment on September 12, 1977, was prompted by the insistence of Raines, the plant manager, that Pearman join the Union as a condition of getting a 25-cent increase as the General Counsel contends, or whether Pearman voluntarily quit when his wage demand of \$6.50 an hour was not met.

Respondent's counsel conceded at the hearing that Pearman was not discharged or terminated because of a record of absenteeism or because of any question of his competency as a worker. This case is essentially one of credibility since, if as General Counsel contends, there is credible testimony to support the allegations, a violation of the Act is clear since employees cannot be required to join a union in a right-to-work State irrespective of any union-management contract to the contrary. Conversely, if Respondent's testimony is credible and Pearman did in fact quit work voluntarily because he did not receive a wage increase to \$6.50 an hour, no violation of the Act occurred.

While the termination or voluntary quitting is the major issue, there are subsidiary but related issues of whether J. O. Raines, interrogated or promised Pearman a wage increase if he would join the Union. Lastly, paragraph 9 of the complaint contains the allegation that J. O. Raines threatened to discharge an employee (Pearman) if he failed to join the Union.

#### 1. The testimony of Alvin Pearman

Pearman testified that he had two conversations with Curtiss Hamilton, the union shop steward, on Friday, September 9, 1977, while at work. In the first conversation Hamilton asked him if he was going to join the Union and Pearman replied no. Somewhat later Hamilton returned and showed him a petition signed by employees and told him that the men were going to withdraw from the Union if he did not join and suggested that if he joined the Union it would save a big hassle. About an hour or so later, he saw Hamilton hand the petition to Raines. Respondent's counsel offered the petition to Counsel for the General Counsel, which was identified by Pearman and admitted as General Counsel's Exhibit 2.<sup>2</sup>

Pearman further testified that he was off sick Wednesday through Friday preceding the Labor Day holiday (September 5, 1977) and that although he had failed to call in to the Company either on Wednesday or Thursday, he did call in sick on Friday. He returned to work the following Tuesday and on Friday, September 9, learned from Ted Roy, the shop foreman, that he would not be paid for the Labor Day holiday. According to Pearman, Roy had checked with J. O. Raines and then informed him that he would not be paid.

Somewhat later that same morning, Pearman talked to Raines about the holiday pay question and was informed by Raines that since he did not work the day before, i.e., Friday, the last working day before the holiday, he would not get paid for the Labor Day holiday. Pearman in reply cited the existing labor contract which he contended provided that if you called in sick, you were still eligible for the holiday pay. Raines told him not to quote the contract to

him and asked him if he was going to join the Union and Pearman said he was not going to join the Union unless he got his holiday pay and backpay of 25 cents from March 17, 1977, or alternatively, to be compensated by having his pay raised to \$6.50 an hour. According to Pearman, Raines responded that he would not pay either the holiday pay or backpay, but he would think about the request for a wage increase to \$6.50 an hour.

Later that same day, Raines informed him that he could not raise him to \$6.50 an hour because of his work record but that he would raise him to \$6.25, a 25-cent raise and that he would need to join the Union. Pearman said he would not join the Union but would continue to work for \$6 an hour.

The following Monday, September 12, 1977, Pearman reported to work and about 8 a.m. was called to Raines' office and had a further conversation there. Raines told him that they had to have a union shop to get some of the jobs they get, again offered him \$6.25 an hour, and told him he had to join the Union and told him he would not be paid for the Labor Day holiday. Pearman again offered to join the Union if he was given \$6.50 an hour. Raines then responded that there was no sense in him staying and that he should go gather up his tools and he would make up his check. Pearman returned to the shop, gathered up his tools, and after about 15 minutes Raines came out, punched out his timecard and about a half hour later, Pearman received his final check and left the plant.

After Raines testified as discussed hereafter, Pearman was called again, on rebuttal, and testified again that the conversations with Raines occurred on Friday and Monday, September 9 and 12, respectively. He also denied that he ever stated he was quitting and that Raines stated that while he could not under the law require him to join the Union, he (Raines) could have a reduction in force. He affirmed that Raines told him that if he accepted the \$6.25 an hour he had to join the Union and that he responded that he would stay on at \$6 an hour and not join the Union.

#### 2. The testimony of J. O. Raines

Raines testified that the Carpenters Union had represented the employees for as long as he was associated with the Company, approximately 40 years. He stated that a new contract went into effect the day that Pearman was hired. The four wage scales set forth in the contract were minimums for that classification provided that an employee had satisfactorily completed a 60-day probationary period. The four wage classifications are set forth on page 12 of Joint Exhibit I, and are for helpers, semiskilled, journeyman, and leaderman with the latter classification receiving the top salary scale. Raines did testify, however, that these were minimums and that employees could receive in excess of those amounts.

Raines testified that when Orman (Pearman) applied for a job they did not really need additional help but that he finally told him he could pay him \$5.50 an hour and that Orman accepted the job on that basis. In February, Orman asked him for a raise and he (Raines) offered to give him a 25-cent raise but told him that if he did so he would not get the 25-cent raise called for in the contract for March 2, 1977. Pearman was thus raised to \$5.75 in February but

<sup>2</sup> The petition was signed by 14 employees.

remained 25 cents under the journeyman rate when the March increase raised journeymen to \$6.

Raines also stated that employees in the Union were on checkoff and knew generally what employees were in the Union because after employees executed checkoff authorizations, dues were deducted pursuant to a list maintained by the bookkeeper and sent directly to the Union. He did mention several employees in the shop who were not on checkoff. One, Walmack, an older man, only worked part time. Another employee named Hall, while originally hired for the shop, did substantial work doing drafting work in the office. Two other employees, one a truckdriver and another a laborer, were given as illustrations of other employees not in the Union.

Raines testified that he had a conversation with Pearman on Tuesday, the day after Labor Day, about whether he would receive holiday pay. Raines stated that he was not going to pay him because he had been laid off for 3 days and queried whether Pearman would pay an employee if he were in his place. When Pearman contended the contract provided for payment if you were sick, Raines asked him if he was a union member. When he responded no, Raines said, "then do not hit me with the union contract." When Pearman requested a raise to \$6.50, he told him he would consider it.

Raines further testified that on payday, Friday, he saw Pearman and advised him that he could not pay him \$6.50 an hour in view of his work record, citing some 29 absences over a 8 to 10 month period, but that he needed him and would pay him \$6.25 an hour or he could go elsewhere and look for another job. In this second conversation with Pearman on Friday, Raines denied that the Union was mentioned and stated that Pearman made no offer to join the Union. After being refreshed by his affidavit, Raines modified his testimony to state that Pearman had told him why he would not join the Union: (they) beat him out of some money. He affirmed that Hamilton, the union steward, gave him the petition identified as General Counsel's Exhibit 2. After reading the petition, Raines was not clear whether the petition signers were threatening to resign their job or their union membership. When he questioned two of the men about the meaning of the petition, they did not answer him directly when he asked if that meant they were going to quit their jobs. They did say, however, that they did not think it was fair that Pearman got the benefits of the union contract, but did not have to pay dues. He noted that the petition was signed by the core of the production force and that it did upset him because it was disrupting the men and production. He told them that he was not permitted to require Pearman to join the Union.

As to the conversation on Monday, September 12, 1977, Raines testified that in accord with Friday's conversation with Pearman he called him into the office between 8:30-9:00 a.m. and told him he had a decision to make, namely, whether to accept the \$6.25 an hour or leave. Raines stated he told Pearman that there was a big problem between him (Pearman) and the men due to his nonmembership in the Union and that the relationship between the men was a problem for the Company and was disrupting production. He then asked him to make the decision to accept his offer of \$6.25 an hour or to try to get \$6.50 somewhere else. He

stated Pearman said he could go to work for Wilbur Woodworks tomorrow although he could not make as much money.

Raines conceded that he knew it was unlawful to force any employee into the Union and replied no when asked by counsel if he terminated Pearman because of his failure to join the Union.

Raines further testified that on Respondent Exhibit 5, a form from the Alabama Unemployment Compensation Agency, he made the notation with respect to Pearman's discharge. The notation stated in part:

Claimant left our employment of his own accord. Work was available, he was not fired or dismissed. He demanded a wage per hour that we could not pay, therefore he made the decision to terminate his employment here.

He denied that Pearman stated he would work for \$6 an hour, but conceded that he may have discussed that among various ways people could be laid off; a reduction in force was a common way. On cross-examination, he testified that there had always been a harmonious relationship with the Union; that there had never been any strikes; or any grievances except the one filed by Pearman. He conceded that a majority of the work of his firm required bidding on jobs that required a union shop or union label on materials used.

By stipulation of the parties, Joint Exhibit 1, a copy of the contract in effect from November 2, 1976, contains a union-shop clause in article III, section 1, which states as follows:

*Section 1.* The company agrees that it will work only such employees, as governed by this agreement, who are members in good standing with the Union, in the Birmingham, Alabama plant of the Company. Any new employee shall be considered a probationary employee for a period of thirty (30) days to sixty (60) days, after which time such employee shall immediately make application to become a member of the Union. The Union agrees not to arbitrarily or unreasonably withhold its approval of any application for membership in the Union by such probationary employee.

The General Counsel has not urged or alleged that the above clause be found an unfair labor practice, but has urged that such clause be considered in determining whether the actions alleged are violative of the Act. Other than the fact that the union steward handed a petition to Raines threatening that certain employees would "resign," there is no other evidence implicating the Union in Pearman's alleged dismissal. In any event, the Union is not charged here with a violation of the Act.

Raines testified that in negotiations it (the Company) has tried to get rid of article III, section 1, but that the Union has insisted it remain in the contract on the basis of a "savings" clause in the contract. He denied that such clause has been utilized or that any person has been discharged because he was not a member of the Union.

Raines affirmed that Pearman filed a grievance respecting his failure to receive the holiday pay for Labor Day and for his failure to receive the 25-cent raise as provided by the contract from March 2, 1977, for journeyman. Pearman

filed such grievance shortly after his discharge. As a result he was awarded the holiday pay, but his request for the additional 25 cents hourly retroactive to March 2, 1977 was denied.

Upon redirect examination, Raines affirmed that the Company has other nonunion employees and that the Union has never requested their discharge. He conceded that employees had asked him to get Pearman to join the Union. He also admitted that he had not received any petitions similar to General Counsel's Exhibit 2 with respect to any other nonunion employees.

### C. Findings and Conclusions

For the reasons enunciated hereafter, I find and conclude that Respondent, through its vice president and plant manager, J. O. Raines, unlawfully terminated Alvin Pearman because he refused to become a member of the Union.

It is undisputed that from the date of his hire in November 1976, Alvin Pearman was being paid 25 cents under the journeyman rate despite his prior years of service with the Company and that this fact rankled Pearman and became the touchstone of his dispute with the Union and the Company. For some reason not fully explained, he appeared to hold the Union also responsible for his failure to get the journeyman rate and this explains his comment to the union steward in response to their request to join the Union that since they had made him wait for 6 months, he was going to make the Union wait for his dues and membership.

The testimony of Raines himself made it clear that Pearman's nonmembership in the Union became of paramount importance once the core of his production force threatened to resign if he were not required to join the Union. While mindful of the fact that he could not lawfully force Pearman to join the Union, Raines attempted to condition an offer of an increase of 25 cents an hour to Pearman's joining of the Union. Raines himself testified that he was upset by the petition and that the lack of cooperation between Pearman and the men was a company problem that was affecting production. In this context it is only logical that Raines would attempt to smooth out the problem by alternating waving a carrot (a 25-cent raise) to Pearman if he would join the Union or threatening to discharge him if he did not join the Union.

Nor am I persuaded that in this factual context, Pearman went to Raines and demanded \$6.50 an hour or he would quit since Pearman's conduct throughout did not indicate such a precipitous nature. Pearman had hired on at \$5.50 an hour; had accepted a 25-cent raise in February knowing that he would again be below the journeyman scale when the contractual raise scheduled for March 2, 1977, went into effect. He worked from March 2, 1977, until he ceased work in September 1977 still 25 cents under the journeyman rate. Given such background, it is inconsistent that suddenly Pearman would demand \$6.50 or else and gives credence and credibility to Pearman's testimony that he did not threaten to quit. Moreover, given his growing antipathy towards the Union because it had not assisted him in his wage demands, it is consistent that he rejected the 25-cent wage increase conditioned upon his joining the Union and made his counter offer to join the Union if he were given the \$6.50 rate.

I credit the testimony of Pearman over Raines on all critical points not only because it is more logical in the factual context discussed above, but based also on the demeanor of the witnesses. Moreover, as I indicated the testimony of Raines was inconsistent. At one point he testified that the problem of Pearman's membership in the Union was a problem between him (Pearman) and the men in the shop. In the same breath he stated that the petition presented him was upsetting, that the dispute was affecting the production of the shop and presented a problem to the Company.

Whether the petition of the men was a threat to resign from the Union or their jobs, I find it unnecessary to resolve, as either alternatives presented a major problem for Raines and the Company. Thus, while giving lip service to the fact that the law prevented him from requiring Pearman to join the Union, I find that Raines conditioned his offer of a raise of 25 cents on Pearman's joining the Union. When Pearman rejected the offer, Raines seized the opportunity to place the burden on Pearman to either accept his offer conditioned with union membership or to leave. Raines conceded that Pearman never mentioned the word quit. Moreover the conduct of Raines in going to secure Pearman's timecard is more consistent with a termination than that of a voluntary quit. Accordingly, for the reasons noted above, I find that Pearman was terminated because he rejected Raines' offer of 25 cents contingent upon union membership. The fact that Pearman offered to join the Union if he was raised to \$6.50 is not material inasmuch as he also offered to remain without union membership at \$6 an hour. It was the lack of union membership and not Pearman's wage scale that was causing the trouble in the shop.

Granted that Raines was faced with the practical problems of resolving the union question without untoward effect on production, the law is clear that, in a right-to-work State, an employer may not condition continued employment on an employee's joining of a union. I find that he did so here and that in fact, Raines terminated Pearman for his failure to join the Union. Such conduct is violative of Section 8(a)(3) and (1) of the Act.

The complaint contains further related allegations to the effect that:

(a) Respondent, through J. O. Raines, on or about September 9, 1977, interrogated an employee about his union membership (par. 7 of the complaint).

I find no support for such allegation. At the most, Raines, whom I find already knew that Pearman was not a member of the Union, responded rhetorically when Pearman began to cite the contract to him about his right to qualify for the Labor Day holiday pay. Raines stated in effect that you quote the contract to me when you are not even a union member. Raines was not really interrogating Pearman to find out his union membership. Accordingly, such allegation is dismissed.

(b) That J. O. Raines promised an employee a wage increase if he would join the Union (par. 8 of the complaint).

As I have previously credited Pearman's testimony that Raines offered him a 25-cent raise contingent upon his joining the Union, there is adequate support for such allegation. Accordingly, I find that by such an offer of benefit, Respondent interfered with Pearman's Section 7 rights to

refrain from joining a union and that such conduct is violative of Section 8(a)(1) of the Act.

(c) That J. O. Raines, on or about September 12, 1977, threatened to discharge an employee if he failed to join the Union (par. 9 of the complaint).

As I have found that Raines unlawfully terminated Pearman on September 12, 1977, I also find that Raines' statement that while he could not fire him for not joining the Union, he could always have a reduction in force, constituted a threat of discharge and is therefore violative of Section 8(a)(1) of the Act.

#### CONCLUSIONS OF LAW

1. Raines Brothers Store Fixtures, Inc., is an employer engaged in commerce within the meaning of the Act.

2. Carpenters Local 520, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, is a labor organization within the meaning of the Act.

3. By terminating Alvin O. Pearman on September 12, 1977, because he refused to join the Union, Respondent violated Section 8(a)(3) and (1) of the Act.

4. By promising Alvin O. Pearman a 25-cent raise on September 9 and 12, 1977, if he joined the Union and by alternately threatening his discharge if he failed to join the Union, Respondent violated Section 8(a)(1) of the Act.

5. Any other allegations of unfair labor practices not specifically found herein are hereby dismissed.

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

#### THE REMEDY

By letter dated October 13, 1977, Respondent offered to reinstate Alvin O. Pearman and he was subsequently reinstated to his job. In light of such reinstatement, Respondent at the hearing moved to dismiss that part of the allegations of paragraphs 10 and 11 that allege a refusal to reinstate. Counsel for the General Counsel agreed and moved to amend the complaint accordingly. I noted for purposes of the record that the question of reinstatement was no longer in issue.

Having found that Respondent has engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. The affirmative action will consist of making Alvin O. Pearman whole for any loss of wages he may have incurred by reason of such unlawful termination on September 12, 1977, until his offer of reinstatement with interest thereon to be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).<sup>3</sup>

Upon the basis of the foregoing findings of fact, conclusions of law, and the entire record in this proceeding, and

pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

#### ORDER<sup>4</sup>

The Respondent, Raines Brothers Store Fixtures, Inc., Birmingham, Alabama, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Encouraging membership in or activity on behalf of Carpenters Local 520, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, or any other labor organization and interfering with the protected concerted activities of employees, by promising a wage increase if employees join a Union, or by threatening to discharge or by discharging employees if they failed to join a Union.

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

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

(a) Make Alvin O. Pearman whole for any loss of pay he may have suffered by reason of Respondent's unlawful termination of him by payment to him of a sum of money equal to what he could have earned from September 12, 1977, to the date of Respondent's offer of reinstatement with interest as set forth in the section of this Decision entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, necessary to analyze the amounts of backpay due under the terms of this recommended Order.

(c) Post at its Birmingham, Alabama, plant copies of the attached notice marked "Appendix." Copies of said notice, on forms provided by the Regional Director for Region 10, after being duly signed by Respondent's representative, shall be posted by Respondent 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 insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 10, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

<sup>4</sup> 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.

<sup>5</sup> In the event that this 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."

<sup>3</sup> See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).