

**Hendrie and Bolthoff Company and Robert C. Quist.** *Case No. 27-CA-1164. September 28, 1962*

### DECISION AND ORDER

On June 29, 1962, Trial Examiner Maurice M. Miller issued his Intermediate Report herein, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Intermediate Report. Thereafter, exceptions to the Intermediate Report and a supporting brief were filed by the Respondent.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to a three-member panel [Members Rodgers, Fanning, and Brown].

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and brief, and the entire record, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner except as modified herein.

#### THE REMEDY

We find, in agreement with the Trial Examiner, that the backpay obligations of the Respondent with respect to the discriminatee shall include the payment of interest at the rate of 6 percent. Such interest shall be computed in the manner set forth in *Isis Plumbing & Heating Co.*, 138 NLRB 716.<sup>1</sup>

#### ORDER

The Board hereby adopts the Recommended Order of the Trial Examiner as its Order, with the following modifications:

1. In paragraph 2(a), after the words, "Intermediate Report," add the words, "as modified by this Decision and Order, for any loss of pay he may have suffered by reason of the Respondent's discrimination against him."
2. In the notice, immediately below the signature, insert the following sentence:

NOTE.—We will notify the above-named employee if presently serving in the Armed Forces of the United States of his right to full reinstatement upon application in accordance with the Selective Service Act after discharge from the Armed Forces.

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<sup>1</sup>For the reasons set forth in his dissent in *Isis Plumbing & Heating Co.*, *supra*, Member Rodgers would not grant interest on backpay, and does not approve such an award here.

3. Also in the notice, insert the words "This notice must remain posted for 60 consecutive days from the date of posting, . . ." for the words "60 days from the date hereof, . . ."

## INTERMEDIATE REPORT AND RECOMMENDED ORDER

### STATEMENT OF THE CASE

Upon a charge duly filed and served February 5, 1962, the General Counsel of the National Labor Relations Board caused a complaint and notice of hearing to be issued and served upon Hendrie and Bolthoff Company, designated as Respondent in this report. The complaint was issued March 19, 1962; therein Respondent was charged with unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) of the National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519. Thereafter, through an answer duly filed, Respondent conceded the complaint's jurisdictional allegations and certain factual allegations; commission of any unfair labor practice was, however, denied.

Pursuant to notice, a hearing with respect to the issues was held at Denver, Colorado, on April 10, 1962, before Trial Examiner Maurice M. Miller. The General Counsel and Respondent were represented by counsel. Each party was afforded a full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence pertinent to the issues. Before their testimonial presentation began, representatives of the General Counsel moved to amend their complaint in certain minor respects; without objection, the motion was granted. When the testimonial presentation was complete, counsel suggested their desire to file briefs. These have been received; though submitted belatedly, they have been fully considered.

Upon the entire testimonial record, documentary evidence received, and my observation of the witnesses, I make the following:

### FINDINGS OF FACT

#### I. THE BUSINESS OF RESPONDENT

Respondent is a Colorado corporation, which maintains its principal office and places of business in Denver, Colorado; there it is engaged in the wholesale distribution of automotive, industrial, and electrical supplies. In the course and conduct of its business operations, Respondent purchases more than \$50,000 worth of merchandise annually, directly from points and places outside the State of Colorado, for shipment to its places of business within the State.

Upon the complaint's jurisdictional allegations, which are conceded to be accurate, I find that Respondent is now, and at all times material has been, an employer within the meaning of Section 2(2) of the Act, engaged in commerce and business activities which affect commerce within the meaning of Section 2(6) and (7) of the Act, as amended. With due regard for the jurisdictional standards which the Board presently applies—see *Siemons Mailing Service*, 122 NLRB 81, and related cases—I find assertion of the Board's jurisdiction in this case warranted and necessary to effectuate statutory objectives.

#### II. THE LABOR ORGANIZATION INVOLVED

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 775, designated as the Union in this report, is a labor organization within the meaning of Section 2(5) of the Act, as amended, which admits Respondent's employees to membership.

#### III. UNFAIR LABOR PRACTICES

##### A. Issues

The questions presented for determination in this case may be stated simply. They are: (1) Did Respondent discharge one of its truckdrivers, Robert C. Quist, on February 2, 1962, and refuse him reinstatement thereafter because he had joined or assisted the Union, or engaged in other union activity for the purpose of collective bargaining or other mutual aid or protection; (2) did Respondent's supervisory personnel, beginning on February 1, and continuing on various dates thereafter, unlawfully interrogate certain employees relative to their union activity, or threaten

such employees with loss of employment or some other economic reprisal should they become or remain union members or give support and assistance to that organization? With respect to both questions, Respondent maintains the negative. Determination of the issues posed, thereby, will require credibility resolutions, primarily.

## B. Facts

### 1. Background

#### a. Setting

Respondent's principal office and place of business—designated the firm's "main store" for the record—is located at 1635 17th Street, Denver, Colorado; further, the firm maintains a warehouse and garage, located on premises approximately three or four blocks distant. Respondent operates several other Denver stores, none of which, however, are closely involved with the present question. Throughout the period with which this case is concerned, James Gunkle functioned as Respondent's warehouse superintendent; he was the responsible supervisor of the firm's warehousemen, truckdrivers, pipe shop, machine shop, and garage workers. Norm Allen served as the firm's automotive division manager, with main store headquarters. William Hale was the supervisor of Respondent's automotive division. Counsel for the firm concedes that each person designated—throughout the period with which this case is concerned—functioned as Respondent's agent, by virtue of his status as a supervisor within the meaning of Section 2(11) of the Act, as amended.

Other company personnel, more or less involved in the various developments which preceded Quist's discharge, include Arthur Blinde, Respondent's cashier; Richard Acosta, the firm's assistant cashier; and Emmett Seaton, shipping clerk. All of the men named were headquartered at Respondent's main store.

#### b. Union organizational activity

On or about January 25, 1962, the Union began an organizational campaign among Respondent's employees, primarily through Quist and another worker. These men undertook to circulate union authorization cards among the warehouse and garage workers. Quist also solicited signatures at three of Respondent's stores. Shortly thereafter, a meeting of Respondent's employees, scheduled to be held under union auspices, was announced for 7:30 p.m. on February 1; printed cards bearing such an announcement appear to have been distributed within the vicinity of Respondent's warehouse. (Testimony proffered by Foreman Gunkle, which I credit in this connection, establishes that he found such a card in Respondent's warehouse parking lot on February 1, during the afternoon.) Approximately 20 to 22 employees attended the meeting, which organizers for the local Joint Council of Teamsters conducted. During the meeting, I find, Quist submitted 12 signed union authorization cards.

### 2. The discharge of Quist

On February 1, shortly after his discovery of the Union's meeting announcement, Superintendent Gunkle accosted two of Respondent's truckdrivers, Buscietta and Rodriguez, with a query as to whether they planned to attend the meeting that night. (While a witness, Gunkle conceded that he had asked Buscietta such a question. He characterized his inquiry as casual, however, made in a friendly "kidding" manner.) While Buscietta could not recall whether Gunkle had particularized his reference to the union meeting, he testified credibly that the superintendent's query was so understood. "We don't know," was the truckdriver's reply.

On February 2, during the mid-afternoon, President Andrews of Respondent telephoned Gunkle at the warehouse office. After a short exchange, which employees present in the office did not overhear, the Superintendent left. Approximately 15 to 20 minutes later he returned, put some papers on his desk, and commented that the men were trying to get union representation. Proceeding to his desk forthwith, Gunkle took out a company "discontinuance" slip, typed certain entries, removed the slip from his typewriter, and left. One of Respondent's employees testified, credibly, that Quist's name was seen on the slip.

Subsequently, Gunkle conversed with several drivers. Testimony proffered by three drivers with respect to the substance of these conversations was partially denied. For reasons noted subsequently in this report, however, their testimony is credited.

During a conversation with Buscietta shortly after 4 o'clock, conducted with truck-driver Sidney Pederson present, Gunkle queried both as to whether they had attended

the union meeting. Upon receiving an affirmative answer from Buscietta, Respondent's superintendent professed his disquiet over the union activity; he reported that "they" were quite disturbed about the situation up at Respondent's main store. Further, Gunkle declared that "because of the union activities" he would have to terminate someone that night. Buscietta observed a payroll check in the superintendent's pocket. Thereafter—while Gunkle, Buscietta, and Pederson were leaving Respondent's washroom—the superintendent observed further that if the Union were brought in, working conditions would probably become more difficult; reference was made by him to the likely possibility of a layoff, comparable to layoffs which had occurred at "Mine and Smelter," Respondent's competitive supply house, subsequent to its unionization. Gunkle observed that "Mine and Smelter" had had 15 truck-drivers when union organization began, but now had only 5, because customers were requested to pick up their own purchases.

Shortly after 4:15, Gunkle asked truckdriver Clarence Coverley whether he had heard about "this union" business. Receiving an affirmative reply, Respondent's superintendent observed that he had been up talking to President Andrews, who was "pretty hot under the collar" about the situation. Gunkle then declared that he had a check in his pocket for "Bob" Quist.

Later that afternoon, at 4:30 p.m. approximately, Gunkle advised Quist—who had just brought his truck back—that he had some bad news. Queried, he declared, I find, that he would have to let Quist go. When asked what the trouble was, Respondent's superintendent declared, I find, that there had been some union talk, and that he would have to lay off the truckdriver in a reduction of force. Quist protested, pointing out that two other drivers had less seniority. Gunkle then declared that Quist was being terminated because of a reduction in force and because of "personal reasons" which had originated at Respondent's main store, no explanation of his reference to "personal reasons" was proffered. Quist was then given his check. He asked if his work had been satisfactory; Gunkle, I find, replied affirmatively. Quist then requested a recommendation, and was promised a "good" one. (Gunkle testified that he had promised to give Quist a "dandy" recommendation; his tone while giving this testimony was clearly calculated to suggest that sarcasm had been manifested. For reasons noted elsewhere in this report, however, I find it unnecessary to determine whether Gunkle's promise was really meant to be taken at face value.) Quist accepted his check and departed. On February 5 he returned to get his recommendation. Gunkle declared that Respondent gave no letters of recommendation but would retain such a recommendation in Quist's record. He promised that if anyone called, he would give Quist a good recommendation.

(During their conversation, Gunkle told Quist—for the first time, I find—that he had been discharged because of a "mistake" he had made in handling a check received from a company customer for a small c.o.d. delivery. Respondent presently contends, however, that the dischargee's misbehavior with respect to the check in question triggered his discharge. Because of this contention, proffered in Respondent's behalf, Quist's conduct relative to the check matter—together with my determination regarding its claimed connection with his termination—will be detailed elsewhere in this report.)

So far as appears, Quist had no further contact with representatives of the Respondent prior to the present hearing.

### 3. Subsequent developments

Sometime during the period now under consideration, the Union filed a representation petition with the Board's Regional Office. A consent-election agreement was executed; the scheduled election was set for March 16. (The result of the election was not reported for the record in this case. I make no findings with respect to the matter.) Before the election, discussion of the Union's campaign appears to have involved Respondent's supervisory personnel on several occasions.

Somewhere around February 5 or 6, Superintendent Gunkle, I find, observed that union representation might be good for Respondent's employees. Seven or eight days before the scheduled election, however, Respondent's superintendent told Pederson, substantially, that he hated to consider the possibility of unionization for the sake of the men, since there might be layoffs. Queried as to how Respondent might lay men off without hurting its own business, Gunkle declared that the firm could possibly cut down delivery service. Early on the morning of March 16, Gunkle advised three company workers, prior to their vote, that Respondent might install time clocks if the Union won representative status.

On February 5, William Hale, a supervisor within Respondent's automotive division, questioned Michael Babb, order filler and shelf stocker at Respondent's

main store, as to whether he had attended evening union meetings; he received a negative reply. During a February 14 conversation with Charles Von Stein, another order picker, Hale was asked to explain the reason for the "big rush" with respect to some job. He replied, "You union men are going out on strike," coupling this declaration with a comment that he could tell a union man 20 miles off. Record evidence establishes that Hale, approximately 1 week later, announced loudly before several employees—during a smoke or coffee break—that if the Union got in, Respondent would install timeclocks and require workers to punch in and out.

(While a witness, Hale conceded that he "might" have been responsible for the various questions and statements attributed to him; he contended, however, that his questions and statements were made casually or facetiously, and that they were not intended seriously.)

Shortly before the scheduled hearing in this case, on April 6, Hale—knowing that Von Stein would be called to testify on Tuesday, the 10th of the month—observed, "Charley, you and me will be walking the streets side by side after Tuesday." While this remark does not appear to have been explained, Von Stein's testimony suggests that he may have taken it seriously.

On or about March 13, employee Babb conferred with Norm Allen, then Respondent's automotive division manager, relative to certain prior disagreements between himself and Supervisor Hale; Allen, I find, had summoned Babb to the conference. During their conversation, however, Allen digressed to comment about the Union's campaign. (Allen categorically denied any conversation with Babb regarding the Union or union activity. Upon the entire record, and from my observation of the demeanor of the witnesses, Allen's denials did not impress me as credible. Babb's version of their talk, in this regard, has been credited.) Declaring that "we" didn't need the Union as a worker's representative, Allen observed that Respondent had always given employees, with a year's service, one or two extra vacation days whenever a request for such allowance was made. He declared that Respondent would be unable to continue this practice under a union contract; should such a contract call for 1 week's vacation, that would be all the men would receive. The record is silent with respect to Babb's reply.

### C. Conclusion

#### 1. The discharge

With matters in this posture, Board determination would clearly be warranted that Quist was terminated to discourage the Union's organizational campaign.

Credible testimony with respect to his prominent role as a union proselytizer during that campaign has not been challenged. And, despite the paucity of direct testimony reasonably calculated to sustain a determination that Respondent's management was cognizant of Quist's conduct, circumstantial evidence worthy of credit has been provided which plainly calls for the necessary conclusion. Specifically, reference is made to the testimony regarding: (1) Gunkle's conceded knowledge with respect to the Union's February 1 meeting, (2) his comment about the Union's organizational campaign, just prior to his preparation of the dischargee's "discontinuance" slip; (3) his subsequent declaration, during a conversation with two truck-drivers, that various persons at Respondent's main store were quite disturbed about the union situation and that "because of the union activities" someone would be terminated, (4) his reference to the fact that he had Quist's termination check in his pocket, coupled with his declaration that Respondent's president was "pretty hot under the collar" about the union situation; and (5) the superintendent's reference to "union talk" during his February 2 conversation with the dischargee, which he coupled with the cryptic comment that "personal reasons" made manifest at the firm's main store had contributed to Quist's termination. Considered as a whole, testimony of such tenor would certainly call for a determination that Quist's discharge derived from Respondent's desire to discourage union membership, regardless of the General Counsel's failure to provide direct proof that the firm's management knew about Quist's personal role in that organization's campaign.

(Gunkle—though he conceded friendly, casual interrogation of Buscietta with respect to his presence at the February 1 union meeting—denied making various conversational references to Quist's prospective termination within a context of discussion dealing with management's reaction to the prospect of union organization. These denials—despite their reiteration with patent conviction—lack persuasive power. Buscietta, Pederson, Howe, and Coverley testified in a straightforward manner which carried conviction. The suggestion has been advanced that their testimony—regardless of its sincerity—derived from some sort of mistaken recollection, conditioned by the comments of Quist subsequent to his discharge and retrospectively

buttressed by their recollection of the February 1 union meeting and Gunkle's brief references to the union campaign thereafter. Such a suggestion—presented for consideration by learned counsel—cannot be dismissed cavalierly. With due regard for the record as a whole, however, the suggestion must be rejected. The General Counsel's witnesses testified without equivocation; cross-examination failed to persuade them to retract or modify their testimony. The fact that Buscietta, Pederson, Howe, and Coverley testified while still in Respondent's employ, further, lends special credence to their testimonial recitals. And commonsense, likewise, suggests the remoteness of any possibility that each of these four witnesses could have been separately led into parallel error with respect to the verbal context within which certain comments were made by their supervisor, during three distinct conversations. Gunkle's denials—on the other hand—were primarily couched in terms of his failure to recall the statements attributed to him. Further, testimony proffered by Respondent's garage mechanic—purportedly to corroborate Gunkle's denials of some reference to "union talk" during his February 2 discussion with Quist—reveals that he did not hear their complete conversation. My review of the entire record, thereafter, together with my observation of the witnesses, has convinced me that honest failure of recollection may more reasonably be attributed to Gunkle than to his subordinates.)

*Prima facie*, therefore, justification can be found for a Board determination that the General Counsel's contention, with respect to the Respondent's motivation for the challenged dismissal, has been sustained. Such is my conclusion. Compare *Gardner Construction Company*, 130 NLRB 1481, enfd. 296 F. 2d 146 (C.A. 10), in this connection.

Respondent's presentation, calculated to justify Board rejection of the General Counsel's theory, and to prove that Quist's discharge was effectuated for other reasons, fails to persuade.

Respondent contends that Quist was actually dismissed because he mishandled a check received by him for delivery to the company cashier; Gunkle's testimony was that the truckdriver's treatment of the check triggered his discharge, since it capped a course of conduct which had previously led the superintendent to consider his termination.

Record testimony reveals that Quist made a late afternoon c.o.d. delivery on February 1, for which he was given an \$11.51 check, made out to the Respondent firm. However, he reached Respondent's garage too late to permit his delivery of the check to the firm's cashier that afternoon. Therefore, I find, he retained possession of the check, intending its delivery to the cashier at Respondent's main store next morning. (No question has been raised with respect to the propriety of Quist's decision to retain custody of the check under such circumstances; his testimony, proffered without contradiction, would warrant a determination that company drivers frequently returned from delivery assignments after the closing of their cashier's office, and that they routinely retained custody of any checks then in their possession for submission the following morning.) Early during the evening of February 1, however, Quist—while on his way to the union meeting previously noted—stopped off at a restaurant-tavern, designated as the Log Cabin Inn, to have a few drinks. The truckdriver's testimony, which I credit in this connection, reveals that he asked the bartender whether he would cash a "short" check, which Quist had previously received from his father for services rendered. This was a check for \$6, drawn on the North Denver Bank. When he received an affirmative reply, Quist reached into his billfold, took out a check which he endorsed, and gave it to the bartender.

When the latter then requested Quist to write "Hendrie and Bolthoff" on the back of the check, as part of his endorsement, the truckdriver did so without reflection. Almost immediately, however, he began to wonder about the reason for the bartender's request; he then realized that he had mistakenly submitted the Company's c.o.d. check. Calling for the return of Respondent's check, Quist scratched out his endorsement and Respondent's name; he then submitted the check from his father which he had really wished to cash, properly endorsed. This check was cashed, pursuant to his request.

Early the next day, Quist turned Respondent's c.o.d. check over to Richard Acosta, the firm's assistant cashier. When doing so, I find he called the assistant cashier's attention to the stricken endorsement, explaining the marks on the back of the check as the result of a mistake. (Conflicting testimony has been presented with respect to Acosta's reaction. Quist testified that the assistant cashier told him not to worry about the matter. Acosta—though he conceded that Quist had called his attention to the stricken matter—denied any comment calculated to reassure the driver. Upon about the matter Acosta—though he conceded that Quist had called his attention of the matter has been made.) Later that morning, Acosta showed the check in

question to his superior, Cashier Blinde, who promised to remember the matter. The record is clear, however, that Quist was never told, prior to his termination, that Respondent's cashier, assistant cashier, or any other management representative considered his treatment of the check a serious dereliction.

Considered as a whole, Respondent's presentation with respect to, (1) Quist's submission of the check with his stricken signature, and (2) management's reaction to the situation, fails to generate any genuine conviction that the testimony of the General Counsel's witnesses—herein found credible—should be rejected as mistaken. While Respondent, clearly, would have been privileged to consider any worker's deliberate attempt to convert a company check—even one which the worker failed to consummate because of presumptive second thoughts—as sufficient justification for a discharge, testimony presumably offered to show that the firm's decision to discharge Quist was motivated by such considerations calls for rejection because of its lack of certainty.

For example, Superintendent Gunkle testified—during direct examination—that the decision to terminate Quist was his own decision, and that the decision had been reached when he saw the company's check with the truckdriver's endorsement stricken. According to Gunkle, Respondent's cashier had summoned him to the Company's main office at 3:15 or 3:30 that afternoon to show him the check, and he had determined to discharge Quist, after taking "one look" at the check, because:

I thought in my mind I was sure he had tried to cash one of the company checks, and I had told him before that if anything else happened whatsoever he was going to be discharged.

When cross-examined, however, the superintendent conceded that he could not remember whether the cashier had shown him the check; responding directly to a question as to whether the check had been shown him, Gunkle merely said, very quietly, that he "believed" it had been shown. Blinde—when queried by the General Counsel's representative as a rebuttal witness—conceded that he, likewise, could not recall whether he had shown the check to the superintendent; during his cross-examination, Blinde revealed himself as willing to speculate that Assistant Cashier Acosta might have been the one who showed Gunkle the check. (The testimony proffered by Acosta, however, would clearly warrant an inference that his exhibition of the check to Blinde, coupled with his report regarding Quist's comment about its appearance, concluded his participation in the matter.)

Further, despite Blinde's testimony—during direct examination—that he had telephoned Gunkle with a request that he visit Respondent's main store, to look at a check which one of the firm's drivers had submitted, the cashier's prior affidavit—proffered and received for the record without objection—contains no reference to such conduct by him. While a witness, Blinde conceded that these developments had taken place on payday, that he had had much to do that day, and that he could not remember the events of the day in question too well. Queried in cross-examination as to whether he had, really, summoned Gunkle to tell him about the check, Blinde merely said, "It runs in my mind that way now." Gunkle, himself, could not recall the circumstances clearly; though he testified that Blinde telephoned him, his testimony reveals that he was in Respondent's garage, and suggests that he "might" have gotten Blinde's message secondhand, when he called the firm's warehouse.

Further, Respondent's claim—that Quist's treatment of the check led to his discharge—fails to persuade, (1) because Gunkle's testimony, taken at face value, reveals his failure to give Quist a forthright explanation of the considerations which purportedly motivated his dismissal, and (2) because the superintendent, thereby, conceded his failure to give the truckdriver any chance to explain his conduct. According to Gunkle's direct testimony, Quist was merely handed his check with a statement that, "this came from up above in the cage" meaning the cashier's office, or, "this comes direct from the cage, and you should know what it is"; the superintendent conceded that he made no effort to amplify his cryptic comment until the following Monday, when the truckdriver's treatment of the check was first cited as the reason for his termination. (During cross-examination, when confronted with his prior affidavit made before a Board field examiner, Gunkle further conceded that "maybe" he had not even mentioned the cashier's cage when Quist was given his check.) Gunkle's declared reluctance to embarrass discharges by comments about the reason for their discharge within the hearing of their fellow workers, though commendable, fails to explain his lack of candor with Quist during their February 2 conversation; while Respondent's garage mechanic, Foster, may have been within hearing distance during part of that conversation, Gunkle could conceivably have sought privacy for their talk—pursuant to his professed practice—during which a candid statement of the purported reason for the truckdriver's discharge could have been given. He made no effort to "take [Quist] alone," however. (Paren-

thetically, note may be taken that Gunkle's professed reluctance to make any public declaration of the reason for a worker's discharge did not—according to his own testimony—prevent him from voluntarily telling Buscietta and Coverley, separately, that Quist was being given his check because of "something" having to do with the cashier's cage.) Further, the superintendent's testimony suggests that Quist's explanation of the check's treatment had been communicated to him—assuming it was communicated at all—through Blinde, who had received it, in turn, from the firm's assistant cashier. Though he was presumably aware, therefore, that no other management representative had sought confirmation of the truckdriver's reported explanation directly, Gunkle's testimony would warrant a determination that he had refrained from asking questions. Substantially, the superintendent's recital reflects his readiness to base a discharge decision upon presumptions with respect to Quist's purpose in endorsing the firm's c.o.d. check. Such conduct by a responsible supervisor, concerned with the effectuation of a discharge, normally suggests that justifications therefor subsequently provided reflect some pretext rather than the real reason for a challenged dismissal.

Respondent also contends—through Gunkle specifically—that Quist's treatment of the check capped a series of misdeeds; the suggestion has been made that Quist's conduct with respect to the check, though perhaps not sufficient to justify discharge standing alone, represented the straw which broke the camel's back. Such a contention, however—even when considered without regard for credible evidence sufficient to warrant its rejection—lacks persuasive power upon the present record. True, that record does disclose Quist's concession that Gunkle had cautioned him—during the previous June or July—against driving too fast across certain nearby railroad tracks. During the previous October, likewise, Quist's truck had concededly been damaged extensively when the truck's drive shaft broke while he was driving it down a cobblestoned street near the railroad tracks; record testimony establishes that Gunkle had considered Quist's negligence responsible for the damage, that he had been taxed severely as a result, and that he had been warned about his vulnerability to discharge for any serious dereliction thereafter. Nevertheless, Quist was permitted to remain a driver. (There is testimony in the present record, further, that Gunkle once saw Quist jerk the wires off the spark plugs of another driver's truck, presumably during horseplay. Quist conceded the predilection of various drivers toward such horseplay, and further conceded his own victimization, but denied responsibility for any conduct of the type cited. Gunkle did not fix any time when the incident was supposed to have occurred; since his own testimony, further, was that Quist had merely been warned to desist, I have not resolved their testimonial conflict. The incident—should Gunkle's recital be credited—would add little to Respondent's catalogue of Quist's pre-discharge driving derelictions, with respect to which no substantial challenge has been noted.) During December 1961, Superintendent Gunkle criticized Quist when he was ticketed for going straight through in a local "turn-only" lane, while driving a company truck. Quist pleaded guilty and paid a fine for this moving violation; Respondent, nevertheless, did not suspend or discharge him, despite Gunkle's prior declaration, "The next time, that'll be it," after his October accident. He was allowed to continue driving.

Within the General Counsel's brief, these three incidents are dismissed as "nothing more nor less than what might befall any person" whose duties entailed daily truckdriving. Such a characterization might well be considered to reflect too casual a view. Upon the entire record, nevertheless, I am satisfied that Quist's conduct as a truckdriver did not suggest any compelling ground for his discharge because of supposedly accumulated misdeeds—despite Respondent's contention to the contrary—until the Union's entry upon the scene. (Though Gunkle did testify—with Shipping Clerk Seaton's corroboration—that he had been dissuaded from discharging Quist, after the October accident, only by Seaton's plea for the driver's retention to service Respondent's "busy season" delivery requirements, the superintendent's further testimony shows that Quist's next difficulty, the December traffic law violation, did not lead to his termination.) During January 1962, Quist's purported participation in a traffic violation, while engaged in the operation of a private automobile outside of working hours, led to a formal proceeding which conceivably could have resulted in the total revocation of his driver's license. Respondent's shipping clerk, Seaton, recalled a contemporaneous discussion with Gunkle regarding Quist's situation; he characterized the substance of their discussion as follows: "We was just kind of talking about it and of course hoped it didn't happen." Ultimately, the formal proceeding noted resulted in Quist receiving a qualified "red" probationary license. Still, he was not discharged. Upon such a record, Respondent can hardly contend that Quist's prior derelictions, retrospectively viewed

during January of the current year, were really considered serious, even when supplemented with a further, personal, record of traffic law difficulty.

Considered as a whole, therefore, Respondent's testimonial presentation, calculated to support its contention with respect to the reason for Quist's discharge, warrants characterization as weak.

Elsewhere in this report the General Counsel's presentation has been found forthright and credible; Respondent's presentation has failed to persuade me that the General Counsel's witnesses may have been misled or sincerely mistaken. Rather, I find that Respondent's defense reflects present reliance upon a pretext for discharge, derived from a fortuitous circumstance and designed to obscure the firm's real motive for the challenged dismissal. And, since the General Counsel's presentation has not been vitiated by credible testimony sufficient to warrant its rejection, I find—consistently therewith—that Quist was terminated on February 2, 1962, to discourage union membership by Respondent's employees.

## 2. Interference, restraint, and coercion

Within a context of proclaimed company perturbation with respect to the Union's campaign, and Quist's contemporaneous discharge, Gunkle's interrogation of Buscietta, Pederson, and Coverley regarding their knowledge and interest in the campaign clearly warrants characterization as proscribed interference, restraint, and coercion. Respondent's superintendent, whose sincerity in this respect cannot be doubted, characterized the several conversations during which such interrogation took place as casual and friendly. Nevertheless—despite my willingness to concede that Gunkle's interrogation of his subordinates, which he coupled with pessimistic observations regarding employment prospects should the Union win representative status, may have been motivated by well-meant paternalism—the reasonable tendency of such questions and comments to interfere with, restrain, and coerce employees in the exercise of statutory rights cannot be denied.

Similar conclusions would seem to be justified, also, with respect to Gunkle's various comments prior to the scheduled consent election within Respondent's operation, since the firm's employees were told (1) that unionization might result in some layoffs because delivery service could be curtailed, and (2) that Respondent might install time clocks for its workers if the Union won representative status. Standing alone, the comment by Respondent's superintendent about timeclocks might well warrant dismissal as trivial, since any company decision to take such action would not deprive employees of privileges or benefits legitimately enjoyed, and would clearly be within the scope of management's prerogative. However, record testimony which has not been contradicted reveals that Gunkle mentioned the possibility of such company action only in terms of possible reprisal should the employees choose union representation; under such circumstances, his comment must be considered a threat, reasonably calculated to interfere with freedom of choice by his subordinates during the scheduled vote.

With respect to Hale's conduct, however, two divergent conclusions seem warranted. His February 5 interrogation of Michael Babb, regarding the latter's attendance at evening union meetings, clearly calls for characterization as a sample of conduct subject to statutory proscription. His February 14 comment to Von Stein, however—to the effect that some job then underway would have to be handled as a rush job because "you union men" were going to strike—persuasively conveys a suggestion of friendly raiillery; Hale's sheepish confession that he "might" have been responsible for such a statement would seem to support my conclusion that the comment was not seriously meant to disparage unionization or restrain a presumptive union supporter. Considered with due regard for its nonverbal context, I find Hale's comment should not be treated as a statement reasonably calculated to restrain or coerce his listener.

Hale's subsequent statement relative to the likelihood of timeclock installations should the Union win representative status—like Gunkle's statement previously noted—merits characterization as violative of the statute. Though presumably voiced with good humor, the supervisor's declaration clearly reflected a suggestion that Respondent might take such action by way of reprisal for any show of union support; since the Company's workers would normally consider their automotive division supervisor a knowledgeable source of information with respect to company policy, his comment, however casual, would be reasonably calculated to restrain and coerce their judgment.

Similar conclusions do not appear to be warranted, however, with respect to Hale's final comment to Von Stein, shortly before the scheduled hearing in this case, that both of them would be "walking the streets side by side" after the hearing began;

despite Von Stein's testimony that Hale's remark seemed seriously made, the statement's patently hyperbolic character warrants an inference that it was really facetious. No determination that it violated the statute would seem to be justified.

While Norm Allen, formerly manager of Respondent's automotive division, and presently Respondent's secretary-treasurer, has been found responsible for a comment to Michael Babb that Respondent would adhere strictly to any vacation policy fixed by union contract, no determination that his remarks violated the statute would, in my opinion, be warranted. Despite Allen's declaration that Respondent routinely gave employees, with 1 year's service, one or two extra vacation days upon request, no direct testimony with respect to the maintenance of such a company policy can be found in the record. Though clearly calculated to influence Babb, Allen's comment, I find, merely suggested that Respondent might be less generous in permitting exceptions to a fixed vacation policy should that policy be embodied in some union contract; such a prophecy regarding a possible shift of managerial discretion seems too vague and generalized to warrant agency prohibition as a threat of reprisal for the exercise of rights statutorily guaranteed.

Upon the entire record, therefore, my conclusion that Respondent did interfere with, restrain, and coerce employees in the exercise of Section 7 rights rests upon: (1) Gunkle's conceded interrogation of several truckdrivers with respect to their attendance at union meetings, and their knowledge of the Union's campaign; (2) his February 2 declaration, previously noted, that "because of the union activities" he would have to terminate someone; (3) his observation that union representation would probably result in making working conditions more difficult, and might lead to layoffs; (4) Supervisor Hale's interrogation of Michael Babb as to whether he had attended evening union meetings; and (5) comments by Gunkle and Hale that Respondent might install timeclocks if the Union won representative status. With respect to the General Counsel's further contentions, regarding other comments by Supervisor Hale and Manager Allen, determinations adverse to Respondent cannot be considered warranted.

#### IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, since they occurred in connection with the business operations described in section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the States, and, absent correction, would tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

#### V. THE REMEDY

Since it has been found that Respondent engaged and continues to engage in certain unfair labor practices, it will be recommended that the Board issue an order requiring that it cease and desist therefrom and take certain affirmative action, including the posting of appropriate notices, designed to effectuate the policies of the Act, as amended.

Specifically, it has been found that the firm—through its warehouse foreman—discriminated with respect to the hire, job tenure, and terms of employment of Robert C. Quist, by the effectuation of his discharge without legal justification, because he assisted a labor organization and engaged in concerted activity for the purpose of collective bargaining or other mutual aid and protection. Thereby, employees of the Respondent enterprise, generally, were interfered with, restrained, and coerced in the exercise of rights statutorily guaranteed. To effectuate the statutory objectives, therefore, my recommendation will be that the Board order Respondent to offer Quist immediate and full reinstatement to his former or substantially equivalent position, without prejudice to his seniority or other rights and privileges. See *The Chase National Bank of the City of New York, San Juan, Puerto Rico, Branch*, 65 NLRB 827, for a definition of the phrase "former or substantially equivalent position" used in this report. Further, a recommendation will be made that Respondent be ordered to make the dischargee whole for any loss of pay or other incidents of the employment relationship which he may have suffered by reason of the discrimination practiced against him.

The General Counsel requests that any Board order, with respect to the payment of wages lost by Quist because of his termination, include a requirement that Respondent pay interest at the rate of 6 percent per year on the quarterly amounts found due, pursuant to the backpay formula which the Board presently employs. Such a requirement would seem to be within the Board's power; this Agency possesses power under Section 10(c) of the Act to require any person, found to have engaged

in unfair labor practices, to take "such affirmative action including reinstatement of employees with or without backpay" as will effectuate statutory policies.

The Board has already been requested, in several cases, to make such an interest requirement part of its backpay order. See *Isis Plumbing & Heating Co.*, Case No. 21-CA-4579 [138 NLRB 716] (Intermediate Report, April 11, 1962), in which my concurrence with such a request has been noted. An interest requirement, in my judgment, would not be punitive; to the contrary, it would provide remedial reparation for the damage suffered by the dischargee. Discrimination deprived him of employment. Thereby he was deprived of sums which he would have received as wages; Respondent, correlatively, gained the opportunity to use such money for its own purposes. Payment of interest at the moderate rate proposed—which appears to be a conventional rate under the circumstances—would merely constitute Quist's equitable reimbursement for Respondent's use of money denied him through discrimination. Determination of his right to such reimbursement would comport with conventional conceptions, reflected in the statute law of many jurisdictions, that he who owes money to another should be required to pay interest thereon at a given rate—customarily provided by statute—where the parties have no other interest arrangement. The presently unliquidated character of the Respondent's backpay obligation should not be considered sufficient to vitiate the propriety of the interest requirement; Respondent will be required to pay Quist back wages computed pursuant to the *Woolworth* formula, and any interest payable can be determined readily in the computation process.

There can be no doubt that backpay, under the statute, replaces wages payable to employees; that the Board collects such wages for the benefit of injured workers; and that the Board's backpay awards constitute claims founded upon an "implied" contract, within the meaning of bankruptcy statutes. *Social Security Board v. Nierotko*, 327 U.S. 358; *MacKenzie Coach Lines v. N.L.R.B.*, 344 U.S. 25. The Board must adapt its remedies so that "victims of discrimination may be treated fairly" and may be made whole for losses suffered. *Phelps Dodge Corp. v. N.L.R.B.*, 313 U.S. 717, 194. In fashioning remedies to undo the effects of statutory violations, the Board must draw upon enlightenment gained from experience. *N.L.R.B. v. Seven-Up Bottling Company of Miami, Inc.*, 344 U.S. 344, 346. Where the payment of wages has been delayed, employees are not made whole for losses suffered by receiving simply the amount of those wages, with no recompense for delay.

The General Counsel has briefed, fully and ably, statute and case law relevant to the propriety of interest awards in cases involving: (1) breach of contract; (2) monetary claims based upon statutes; (3) proceedings under the Universal Military Training and Service Act, 50 U.S.C.A. App. 451, 459; (4) proceedings under the Walsh Healey Act, 31 U.S.C.A. 36 for the recovery of sums deducted, rebated, or refunded from wages, or withheld through underpayment. No useful purpose would be served by detailed review of these analogous situations; the analogies noted appear to be cogent, and I find the General Counsel's contentions persuasive.

It will be recommended, therefore, that the Board order Quist made whole by the payment to him of a sum of money equal to the amount which he normally would have earned as wages in Respondent's employ between the date of his discharge and the date of any proper reinstatement offer which Respondent may make hereafter, pursuant to recommendations made in this report, less his net earnings during the period indicated, together with interest upon the net amounts due computed as noted below. *Crossett Lumber Company*, 8 NLRB 440, 497-498; *Republic Steel Corporation v. N.L.R.B.*, 311 U.S. 7. Pay losses suffered by Quist should be computed on a quarterly basis, pursuant to the formula which the Board now utilizes. *F. W. Woolworth Company*, 90 NLRB 289, 291-294; *N.L.R.B. v. Seven-Up Bottling Company of Miami, Florida, Inc.*, 344 U.S. 344. The interest payable thereon should be computed at the rate of 6 percent per year on the amount found due for each calendar quarter under the *Woolworth* formula, beginning with the end of each calendar quarter and continuing until payment of such amount is properly made. Respondent should preserve and, upon request, make available to the National Labor Relations 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 permit an analysis of the backpay amount due the dischargee, together with his reinstatement rights, pursuant to these recommendations.

Respondent's course of conduct, which I have found violative of the statute, goes to the very heart of the Act, as amended, and necessarily suggests to employees the firm's purpose, generally, to limit their lawful rights. The unfair labor practices found are closely related to similar unfair labor practices, the future commission of which can reasonably be anticipated because of the course of conduct found

attributable to Respondent in this report. The preventive purposes of the statute will be frustrated, therefore, unless remedial action recommended in this case, and any order which may prove to be necessary, can be made co-extensive with the threat. To make the interdependent guarantees of Section 7 effective, prevent any recurrence of the unfair labor practices found, minimize industrial strife which burdens and obstructs commerce, and thus effectuate the policies of the statute, it will be recommended that Respondent cease and desist from infringement, in any other manner, upon the rights guaranteed by the aforesaid statutory provision.

In the light of the foregoing findings of fact, and upon the entire record in this case, I make the following:

#### CONCLUSIONS OF LAW

1. Hendrie and Bolthoff Company is an employer within the meaning of Section 2(2) of the Act, engaged in commerce and business activities which affect commerce within the meaning of Section 2(6) and (7) of the Act, as amended.

2. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 775, is a labor organization within the meaning of Section 2(5) of the Act, as amended, which admits employees of Hendrie and Bolthoff Company to membership.

3. By its discriminatory discharge of Robert C. Quist, its subsequent failure or refusal to offer him effective and complete reinstatement, interrogation of its employees with respect to their participation in union activity, and threats of economic reprisal against such employees consequent upon their continued support for that organization, Respondent engaged in and continues to engage in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act, as amended.

#### RECOMMENDED ORDER

Upon these findings of fact and conclusions of law, and upon the entire record in the case, it is recommended that the Board, pursuant to Section 10(c) of the National Labor Relations Act, as amended, order that Respondent, Hendrie and Bolthoff Company, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouragement of membership in International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 775, or any other labor organization, by the discharge of employees, or by discrimination in any other manner with respect to their hire and tenure of employment, or any term or condition of their employment, except as authorized under Section 8(a)(3) of the Act, as amended.

(b) Interference with, restraint, or coercion of employees, in any other manner, in the exercise of their right to self-organization, to form labor organizations, to join or assist International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 775, or any other labor organization, to bargain collectively through representatives of their own free choice, and to engage in other 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 that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act, as amended.

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

(a) Offer Robert C. Quist immediate and full reinstatement to his former or substantially equivalent position without prejudice to his seniority and other rights and privileges, and make him whole in the manner set forth in "The Remedy" section of the Intermediate Report.

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, time-cards, personnel records and reports, and all other records necessary or appropriate to permit an analysis of the backpay amount due the employee designated, together with his reinstatement rights, as set forth in "The Remedy" section of the Intermediate Report.

(c) Post at its principal office and warehouse in Denver, Colorado, where the unfair labor practices were committed, copies of the attached notice marked "Appendix."<sup>1</sup> Copies of the notice, to be furnished by the Regional Director of

<sup>1</sup> In the event of Board adoption of this Recommended Order, the words "A Decision and Order" shall be substituted for the words "The Recommendations of a Trial Ex-

the Twenty-seventh Region, shall, after being duly signed by the Respondent's representative, be posted by the Respondent immediately upon receipt thereof, and be maintained for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that these notices are not altered, defaced, or covered by any other material.

(d) File with the Regional Director of the Twenty-seventh Region, within 20 days of the date of service of this Intermediate Report and Recommended Order, a written statement setting forth the manner and form in which it has complied with these recommendations.<sup>2</sup>

aminer" in the notice. In the further event of enforcement of the Board's Order by a decree of a United States Court of Appeals, the words "Pursuant to a Decree of the United States Court of Appeals, Enforcing an Order" shall be substituted for the words "Pursuant to a Decision and Order."

<sup>2</sup>In the event of Board adoption of this Recommended Order, this provision will be modified to read: "Notify said Regional Director, in writing, within 10 days from the date of this Order, what steps the Respondent has taken to comply herewith."

APPENDIX

NOTICE TO ALL EMPLOYEES

Pursuant to the Recommendations of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

WE WILL NOT discourage membership in International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 775, or any other labor organization, by the discharge of employees, or by discrimination against them in any other manner in regard to their hire and tenure of employment, or any term or condition of their employment, except as authorized in Section 8(a)(3) of the Act, as amended.

WE WILL NOT interfere with, restrain, or coerce our employees, in any other manner, in the exercise of their right to self-organization, to form, join, or assist International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 775, or any other labor organization, to bargain collectively through representatives of their own free choice, and to engage in other 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 that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act, as amended.

WE WILL offer Robert C. Quist immediate and full reinstatement to his former or substantially equivalent position, without prejudice to his seniority and other rights and privileges, and make him whole for any loss of pay, or other incidents of the employment relationship, which he may have suffered by reason of the discrimination practiced against him.

All of our employees are free to become, remain, or refrain from becoming or remaining, members of any labor organization, except as that right may be affected by an agreement requiring membership in a labor organization as a condition of employment, authorized in Section 8(a)(3) of the Act, as amended. We will not discriminate in regard to hire or tenure of employment, or any term or condition of employment, against any employee because of membership in or activity on behalf of any labor organization.

HENDRIE AND BOLTHOFF COMPANY,  
*Employer.*

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

Employees may communicate directly with the Board's Regional Office, Room 609, Railway Exchange Building, 17th and Champa Streets, Denver, Colorado, Telephone Number, Keystone 4-4151, Extension 513, if they have any question concerning this notice or compliance with its provisions.