

awarded to the Building Service electricians. Such factors as the Employer's assignment which conforms with its past practice with regard to similar work, the fact that the maintenance electricians have sufficient skill and experience to do the work, and the consequent economy and efficiency of operation, demonstrate the superior claim of the employees represented by the BSEIU to the disputed work. We shall, accordingly, determine the jurisdictional dispute by deciding that the Employer's maintenance electricians are entitled to continue performing the work in dispute. Our present determination is limited to the particular controversy which gave rise to this proceeding. In making this determination, we are awarding the disputed work to the employees of the Employer who are represented by BSEIU, but not to that Union or its members.

### DETERMINATION OF DISPUTE

Upon the basis of the foregoing findings, and the entire record in the case, the Board makes the following Determination of Dispute pursuant to Section 10(k) of the Act:

1. Employees engaged in installing primary switch gear currently represented by Local 79, Building Service Employees' International Union, AFL-CIO, are entitled to continue this project in the Guardian Building.

2. Local 58, International Brotherhood of Electrical Workers, AFL-CIO, is not and has not been lawfully entitled to force or require Guardian Building Company to assign IBEW members the work of installing primary switch gear.

3. Within 10 days from the date of this Decision and Determination of Dispute, Local 58, International Brotherhood of Electrical Workers, AFL-CIO, shall notify the Regional Director for the Seventh Region, in writing, whether or not it will refrain from forcing or requiring Guardian Building Company by means proscribed by Section 8(b)(4)(D) to assign the work in dispute to its members rather than to the employees of Guardian Building represented by BSEIU.

---

**The Bankers Warehouse Company and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 17.** *Case No. 27-CA-1388. April 30, 1964*

### DECISION AND ORDER

On October 18, 1963, Trial Examiner James R. Hemingway issued his Decision in the above-entitled proceeding, finding that the Re-  
146 NLRB No. 135.

spondent had not engaged in unfair labor practices as alleged and recommending dismissal of the complaint, as set forth in the attached Trial Examiner's Decision. Thereafter, the General Counsel filed exceptions to the Decision and a supporting brief.

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 [Chairman McCulloch and Members Fanning and Brown].

The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the entire record in this case, including the Trial Examiner's Decision, the exceptions, and the briefs, and as noted hereafter, finds merit in certain exceptions of the General Counsel. Accordingly, the Board adopts the findings of the Trial Examiner but not his conclusions or recommendations.

The complaint alleged that Barbara Burr, an employee of the Respondent, was discharged because of her union membership or activities. Burr was hired in April 1962 as a temporary recoper<sup>1</sup> and 2 weeks later, at the end of her probationary period, she was made a permanent employee. Respondent had a collective-bargaining agreement with the Union<sup>2</sup> which contained a union-shop provision. However, the list of classifications covered by the contract did not mention recoper. Upon accepting permanent employment, Burr was not required to and did not join the Union under the contract's union-security clause.

In mid-April 1963, Burr telephoned the president of the Union and expressed interest in joining, and Union President Mossberger agreed to assume bargaining responsibilities for her. Subsequently Burr filled in a union application blank and other forms and took them to the Union's office. On April 29, 1963, Mossberger wrote to the president of the Respondent, Philip Milstein, stating that Burr had authorized the Union to represent her in collective bargaining and that the Union would like to meet with him for "negotiation of wages, hours, and conditions" for Burr as soon as possible.

On April 30, Respondent's vice president, Murray Hayutin, had a brief conversation with Burr about the Union's letter. Burr credibly testified that Hayutin asked about her joining the Union and she indicated it was prompted by her desire for a wage increase. Burr further testified that Hayutin said that her classification was not in the union contract; that he would not negotiate for her; and that, if re-

<sup>1</sup> As noted in the Trial Examiner's Decision, reopering involves unpacking and repacking damaged and undamaged goods.

<sup>2</sup> Local 17, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America.

quired to pay her more money, he would hire a man for her job. On the following day, May 1, Hayutin informed Burr that as a result of a conference the evening before with Milstein and Deniston, Respondent's president and superintendent respectively, it had been decided to terminate her effective at the end of the week because of lack of work. At the hearing, Deniston admitted on cross-examination that he had stated that the Respondent would be better off to have a man in the reworking job if it had to pay union wages to Burr. While Deniston reluctantly estimated the date of such statement as occurring some 30 days prior to Burr's discharge, the Trial Examiner concluded that it more logically occurred in a discussion about a wage increase for Burr on April 30.

The Respondent contends that it had been planning for some time to eliminate women from reworking because they could not be transferred to the warehouse when extra workers were needed inasmuch as they could not do the heavy lifting required there.<sup>3</sup> It further contends it had been training a man to combine inventory and reworking work and that such training had ended in late April. The fact that Burr's announced discharge occurred the day following the receipt of the union letter was termed "purely coincidental."

The Trial Examiner rejected, as we do, Respondent's contentions that the Company had planned to replace Burr at this time with a man who could do reworking as well as inventorying and that Burr's work was unsatisfactory. In Hayutin's conversation with Burr on April 30, Hayutin did not inform Burr that she was to be replaced but merely informed her he would not bargain with the Union for her. The claim that Burr's work was unsatisfactory appears an afterthought because, as the Trial Examiner noted, she had never been reprimanded or warned about her work during her year of employment. The Trial Examiner further found that there was no evidence other than receipt of the union's letter requesting bargaining that could account for Burr's abrupt discharge and concluded that Respondent's decision to terminate Burr was made after receipt of the union letter. Despite his findings, the Trial Examiner concluded that while Respondent's discharge of Burr might be discrimination because of her sex, she was not discriminated against because of her union membership and activities. We disagree.

It is, of course, not the purpose of the Act to restrict an employer's choice of employees based solely upon considerations of efficiency, work performance, or sex. Respondent's action here took place in the wake of its receipt of the union letter and Hayutin's conversation with Burr, a conversation that indicated his displeasure with Burr's newly acquired union membership and the prospect of bargaining

<sup>3</sup> Presumably this was true, however, when Burr was hired a year previously.

with the Union in respect to her wages. Moreover, if Burr was discriminated against solely because of her sex, it is strange that such discrimination occurred only after she joined the Union and enlisted its support in behalf of a wage increase. Even assuming that Burr's discharge was based in part on the fact that the Respondent did not wish to pay higher wages to a woman, we find that her demand for higher wages was inextricably interwoven with her union membership and the Union's demands for bargaining on her behalf.<sup>4</sup> We conclude the Employer's conduct here necessarily discouraged Burr's union membership irrespective of how amicable a relationship existed with the Union with respect to other employees.

We are persuaded that Burr's discharge violated the Act because the timing of the announcement of Burr's discharge occurred the day following the Union's demand for bargaining on her behalf; the admission by Deniston that he stated that if they had to pay her union wages they would get a man for the job; the fact that she had been employed for a year without any indication that her sex precluded her from satisfactorily performing her job; and the short termination notice and the absence of any other credible reason for her peremptory discharge. Even assuming that the Respondent's conduct was caused in part by considerations of Burr's sex, we find that the motivating or moving cause of her discharge was her attempt to enlist the support of the Union in securing a wage increase and that this occurred as a natural result of her union membership. By its discharge of Burr in these circumstances, we find that the Respondent violated Section 8(a)(3) and (1) of the Act.<sup>5</sup>

#### The Effect of the Unfair Labor Practices Upon Commerce

The activities of the Respondent, noted previously, occurring in connection with its operations as set forth in the Trial Examiner's Decision, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

#### THE REMEDY

Having found that the Respondent discriminatorily discharged Barbara Burr, we shall order the Respondent to offer her immediate and full reinstatement to her former or substantially equivalent position, and make her whole for any loss of earnings she may have suffered because of the discrimination against her by payment to her

<sup>4</sup> As there is no issue before us of a refusal to bargain within the meaning of Section 8(a)(5), we do not consider, pass on, or adopt the Trial Examiner's remarks about the appropriateness of the unit or whether the Respondent, in fact, was not required to bargain with respect to Burr.

<sup>5</sup> *Edmund A. Gray Co., Inc.*, 142 NLRB 590.

of a sum of money equal to the amount of wages she would have earned from the date of discrimination to the date of Respondent's offer of reinstatement, less net earnings, if any, during said period, with interest thereon at 6 percent per annum in accordance with the Board's usual practice.<sup>6</sup>

Upon the basis of the foregoing findings of fact and upon the entire record in the case, the Board makes the following:

#### CONCLUSIONS OF LAW

1. The Bankers Warehouse Company is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local 17, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. By discharging Barbara Burr, because of her membership or activities in the Union, the Respondent has violated Section 8(a)(3) and (1) of the Act.

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

#### ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the Respondent, The Bankers Warehouse Company, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership of any of its employees in Local 17, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or in any other labor organization, by discharging employees or in any other manner discriminating against employees in regard to hire, tenure of employment, or any term or condition of employment, except as authorized in Section 8(a)(3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959.

(b) In any other manner interfering with, restraining, or coercing its employees in the exercise of their rights guaranteed to them in Section 7 of the Act, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of continued employment, as authorized by Section 8(a)(3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959.

<sup>6</sup> *F. W. Woolworth Company*, 90 NLRB 289; *Isis Plumbing & Heating Co.*, 138 NLRB 716.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Offer Barbara Burr immediate and full reinstatement to her former or substantially equivalent position without prejudice to her seniority or other rights or privileges, and make her whole for any loss of earnings she may have suffered, in the manner prescribed in the section of this Decision entitled "The Remedy."

(b) 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 analyze the amount of backpay due under the terms of this Order.

(c) Post at its plant in Denver, Colorado, copies of the attached notice marked "Appendix."<sup>7</sup> Copies of said notice, to be furnished by the Regional Director for the Twenty-seventh Region, shall, after being duly signed by Respondent's representative, be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 days thereafter, in conspicuous places, including all places where notices to its employees are customarily posted. Reasonable steps shall be taken by the Company to insure that said notices are not altered, defaced, or covered by any other material.

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

<sup>7</sup> In the event that the Board's Order is enforced by a decree of a United States Court of Appeals, the words "A Decree of the United States Court of Appeals, Enforcing an Order" shall be substituted for the words "A Decision and Order."

## APPENDIX

### NOTICE TO ALL EMPLOYEES

Pursuant to a Decision and Order 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** discriminate against Barbara Jean Burr in regard to her hire and tenure of employment, because of her membership in or activities on behalf of International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 17, or any other labor organization.

**WE WILL NOT** in any other manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form labor organizations, to join or assist the above Union or any other labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted

activities for the purposes of collective bargaining or 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 to Barbara Jean Burr immediate and full reinstatement to her former or substantially equivalent position, without prejudice to her seniority or other rights and privileges, and make her whole for any loss of pay suffered as a result of the discrimination against her.

All our employees are free to become, remain, or refrain from becoming or remaining members of International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 17, or of any other labor organization, except to the extent that this 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.

THE BANKERS WAREHOUSE COMPANY,  
*Employer.*

Dated----- By-----  
(Representative) (Title)

NOTE.—We will notify the above-named employee if she is presently serving in the Armed Forces of the United States of her right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act of 1948, as amended, after discharge from the Armed Forces.

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

Employees may communicate directly with the Board's Regional Office, 609 Railway Exchange Building, 17th and Champa Street, Denver, Colorado, Telephone No. 534-4151, Extension 513, if they have any question concerning this notice or compliance with its provisions.

#### TRIAL EXAMINER'S DECISION

##### STATEMENT OF THE CASE

Upon a charge filed on May 7, 1963, and an amended charge filed on June 25, 1963, by International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 17, herein called the Union, against The Bankers Warehouse Company, herein called the Respondent, the General Counsel of the National Labor Relations Board, herein respectively called General Counsel and Board, caused to be issued on June 28, 1963, a complaint alleging that the Respondent had engaged in and was engaging in certain unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

The complaint alleges, in substance, that on May 3, 1963, Respondent discharged its employee Barbara Jean Burr because of Burr's activities on behalf of, or membership in, the Union, or both. On July 5, 1963, the Respondent filed an answer in which it denied the allegations of unfair labor practices.

Pursuant to notice, a hearing was held before Trial Examiner James R. Hemingway on August 27, 1963. The General Counsel and the Respondent were both represented by counsel. At the opening of the hearing, the Respondent moved to strike the original charge from the record. This motion was denied.<sup>1</sup> At the close of the hearing the parties waived oral argument but requested a date for the filing of briefs. A date was set and was, upon request of counsel for the Respondent, later extended to October 7, 1963. Briefs have been received and have been considered.

From my observation of the witnesses and upon the entire record in the case, I make the following:

## FINDINGS OF FACT

### I. THE BUSINESS OF THE RESPONDENT

The complaint alleges, the answer admits, and I find that: the Respondent is, and at all times material herein has been, a corporation duly organized under, and existing by virtue of, the laws of the State of Colorado; at all times material herein Respondent has maintained its principal office and place of business in Denver, Colorado; at all times material herein Respondent has continuously engaged in the warehousing of various commodities for manufacturing and distributing companies; the Respondent, in the course and conduct of its business, located in Denver, Colorado, performs services for, and annually derives income in excess of \$50,000, received directly from, customers located outside the State of Colorado; and Respondent now is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

### II. THE LABOR ORGANIZATION INVOLVED

The Union is a labor organization admitting to membership employees of the Respondent.

### III. THE UNFAIR LABOR PRACTICES

#### A. *Discrimination; interference, restraint, and coercion*

##### 1. *Background*

Respondent operates four warehouses. Warehouses No. 1 and No. 2 are adjacent to one another. In warehouse No. 1, an enclosed area has been set aside for use in reconditioning operations. The reconditioning area is separated from the rest of the warehouse and can be locked. Reconditioning involves the removal of merchandise from containers for the purpose of dealing therewith in a special way and then returning it to the containers in accordance with the directions of the customer. Most of the reconditioning involves damaged merchandise, but it also involves undamaged merchandise with which the customer wishes to make changes, such as relabeling of bottles or the addition of sale stickers. Before April 1962 the Respondent had male warehousemen do the reconditioning. Sometimes temporary help was brought in to assist the men who were doing reconditioning.

In March 1962 the Respondent entered into a union-shop contract with the Union for a 3-year term from January 1962 to January 1965. Article I, on recognition, defined the bargaining unit as "All classifications of employees enumerated in Appendix 'A', but excluding all other employees, including clerical employees, office employees, janitors, watchmen, solicitors, salesmen, foremen, dispatchers, and all supervisory employees with authority to hire, promote, discharge, or discipline." There was no classification of reconditioner in appendix A.

In April 1962 the Respondent decided to try out women for reconditioning work on a temporary basis and hired two women for a period of 2 weeks to assist the men who were then doing reconditioning work. One of these men, Bill Veto, was an elderly man in his seventies, on social security, who worked on a reduced schedule

<sup>1</sup>The official reporter garbled the Trial Examiner's explanation of his ruling on page 6 of the transcript. This is amended in the following respects: In line 3, the word "not" is deleted. In line 5, after the word "original", insert the word "charge". In line 7, after the word "Section", delete "B" and insert in lieu thereof "10(b)". In line 8, after the word "the" and before "limitation", insert "statute of".

and at a reduced rate of pay under a special arrangement with the Union.<sup>2</sup> He was not a member of the Union. The other man, one Gutierrez, a member of the Union, was after April 1962 used in general warehouse work and as a driver.

## 2. History of Burr's employment.

Barbara Burr was one of the two women who were hired in April 1962 as temporary recuperers. Her employment started on April 6, and just before her 2 weeks' temporary employment expired, Arlie Ferdon, the traffic manager, who had interviewed Burr at the time of her employment, told Burr that she would be kept on as a permanent employee. The other woman, hired at the same time as Burr, was released. Burr's rate of pay was \$1.50 an hour throughout the term of her employment. For the most part, Burr worked in the enclosed recupering area in warehouse No. 1, although occasionally she and Veto would be required to take their materials on a cart to a spot in warehouse No. 2 where damaged cases were situated in a place where they could not be moved to the recupering area. Then the recupering would be done on the spot where the damaged goods were located. Burr never worked in other than these two warehouses. Warehouse No. 1 was used by Respondent for the merchandise of a number of customers, whereas warehouse No. 2 was used for a single large customer.

Burr was not a member of the Union, and the Union never required that she join under its union-shop contract. In November 1962, the union business agent, Hillery Israel, did broach the subject with Respondent following a grievance meeting about another subject by asking Philip Milstein, the Respondent's president, "How about getting the ones in [the] recupering room signed up with the Union?" Milstein had replied that recupering was not involved in warehouse work, that it was separate from warehouse work. The Union did not again raise the subject, nor did it seek to bargain for Burr until late in April 1963 after Burr had joined the Union voluntarily.

In January 1963, Burr, in attempting to reach something on a shelf overhead, stood on a 5-gallon can; the can tipped, and Burr fell, injuring her back. As a consequence, Burr was absent from work from January 8 to January 21. Following her return to work, Burr went to the Respondent's doctor and other doctors a number of times, during working hours at first and sometimes later on also.<sup>3</sup>

Shortly after her return to work on January 21, 1963, Burr asked the Respondent if it could give her any office work. She did not, however, get any office work at that time, but on a few occasions in April 1963, when Burr had no work to do, she had been directed to the office, where the office manager, Joan Fortunato, had some microfilming to be done.<sup>4</sup> During the last 2 weeks of April, Burr spent 1 full day and several half-days in the office. On one occasion, according to Fortunato, President Milstein saw Burr in the office and commented to Fortunato that, if Burr did not have enough recupering to keep her busy, perhaps the Respondent should let her go.

In mid-April 1963, Burr telephoned Robert Mossberger, president of the Union, and expressed interest in joining the Union, asking if the Union accepted women. In a subsequent meeting between Mossberger and Burr, Mossberger said that the Union would accept women and explained to Burr that after she had signed an application for membership and other forms, he would write a letter to the Respondent requesting a meeting to discuss her working conditions and pay. Mossberger explained to Burr that the Union would probably negotiate for her a lower rate of pay than any in the contract, because she was a woman and because she had been injured. He said they would try to get her a rate of \$2 an hour. He left the forms for Burr to fill out and to send to the Union. Burr filled in the application blank and other forms left with her by Mossberger and, on April 23, took them to the Union's office.

Under date of April 29, 1963, Mossberger wrote to President Milstein, stating that Burr had authorized the Union to represent her in collective bargaining and that the Union would like to meet with him and "negotiate wages, hours, and condi-

<sup>2</sup> The Union's contract with Respondent contained a provision permitting employees, who, "by reason of age, physical handicap or otherwise is unable to earn a fair profit for his Employer," to continue working at a reduced rate on condition that a written agreement be entered into between the Union, the employee, and the Employer.

<sup>3</sup> According to an affidavit of Respondent's vice president, the Respondent felt that Burr's injury was a result of her carelessness and denied liability therefor, but it was overruled [by the Compensation Commission?] and paid injury compensation to Burr.

<sup>4</sup> Apparently the office was behind on its microfilming because the girl who handled it was absent because of illness.

tions" for Burr as soon as possible. The Respondent presumably received Mossberger's letter the following day, because on Tuesday, April 30, Respondent's vice president, Murray Hayutin, had a brief conversation with Burr about it. Burr testified that Hayutin, with the little booklet containing the union contract in his hand, asked Burr, "What's this about your joining the Union?" Burr testified that she replied that she had worked there for more than a year and thought that she should have a little more money. Burr further testified that Hayutin looked at the booklet in his hand and said that there was no classification like hers and that he would not try to negotiate or talk about a wage increase and that she could do what she wanted to. Burr also quoted Hayutin as saying that, if he had to pay more, he would hire a man for the job. Hayutin, in his testimony, denied that he had talked with Burr "about union activity in any way." His memory at the hearing did not extend to this conversation. He had, however, in a prehearing affidavit, made the statement, "I mentioned casually to Mrs. Burr that we had received a letter from the union requesting that we negotiate on her behalf," and he testified that this was probably correct. Hayutin's memory of the incident appeared reluctant. Since he did not anywhere categorically deny Burr's testimony, and since Burr's testimony appeared to be honest, I credit Burr's testimony and find that Hayutin did, in substance, make the statements quoted by Burr.

Under date of April 30, 1963, Hayutin wrote a letter to Mossberger in reply to Mossberger's letter of April 29, in which Hayutin stated:

. . . we do not interpret recoopering work to be subject to collective bargaining. Barbara Burr was hired and is performing miscellaneous recoopering and repacking work. She has been instructed to do none of the work of a warehouseman including any material handling labor.

As a matter of fact, we have found that we do not even have enough work to keep Barbara Burr busy full time in the warehouse and she has been performing miscellaneous office jobs at regular intervals.

Although this letter was dated April 30, the envelope in which the letter was sent bears a postmark of 6 p.m., May 2, 1963.

On Wednesday, May 1, Burr telephoned Hayutin from her home and told him that she would not be in that day because of illness. She testified that this was because her back was bothering her. In this conversation, Hayutin told Burr, according to the latter, that he had talked with Superintendent Ward Deniston and President Milstein the evening before and that Bill Veto was going to do all the recoopering work and that she would not be needed after Friday of that week.

Burr presumably worked the last 2 days of that week, May 2 and 3. She testified that there was still more work to be done when she was terminated, and I take this to be a fact, although there was nothing to indicate that the amount of work was then at emergency proportions, requiring extra help. Following Burr's termination, Mossberger telephoned the Respondent and spoke with Hayutin about it. Hayutin told Mossberger that the reason the Respondent terminated Burr's employment was because of lack of work.

After that week, employee Les Nepple, who was being trained to take inventories, was assigned to do the recoopering work in warehouse No. 1, also, while Veto did the recoopering in warehouse No. 2. When Nepple quit his employment in July 1963, the Respondent got another man who had had the same training as Nepple to do the same work as Nepple had done. Both Nepple and the replacement were members of the Union.

### 3. Respondent's defense

The Respondent's defense is that it had, for some time, been planning to eliminate women from recoopering work because they could not be transferred to work in the warehouse when someone extra was needed there, because women could not lift heavy cases or sacks and needed the assistance of a man anyway and because it had been training a man to do a combination of inventory and recoopering work and by the end of April this man was ready to take over. The Respondent asserts that it was pure coincidence that it decided to terminate Burr about the time when it learned of her joining the Union.

According to Respondent's evidence, the Respondent had, for some time before April 30, 1963, been trying to improve its system for taking inventory and had decided that inventory-taking should be done in warehouse No. 1 by one man for all the accounts there rather than by having the man handling a single account take the inventory, as had been done in the past. Under this new procedure, it was decided, according to the Respondent's evidence, that the man who took the inventories should also do the recoopering work, so as to have a better check on the entire stock. It

is undisputed that the Respondent had hired and was training a man named Les Nepple for inventory work. The evidence indicates that one who takes inventories should be acquainted with recooling, since the goods in that department would have to be included in a full inventory. It is also established that Nepple worked with Burr in the recooling room on a number of occasions. Sometimes he would work there only for a couple of hours a day, but at least once and perhaps oftener it was for a full day. Prince Banks, a warehouseman who worked in a department near the one in which Burr had worked, testified that, during April 1963, Nepple had helped Burr three or four times a week.<sup>5</sup> Nepple had progressed with his training so far as to take his first inventory on April 10, 1963.

The evidence is not sufficiently detailed to permit an inference that Nepple's work on recooling in April 1963 caused a shortage of such work for Burr at the times when she was assigned to work in the office, but before April 1963, Burr had always had enough recooling to do so that she had worked exclusively on that. Likewise, there is no evidence of Veto's location when Nepple was assisting Burr. According to Burr, any lack of work she had was due to a lack of cartons.<sup>6</sup> On the evidence available, however, I am unable to reach the conclusion that Burr would have had to wait for cartons to work on the next order irrespective of whether or not Nepple had done recooling work with her. It is conceivable that his assistance made the work on the earlier orders go faster and finish sooner than it otherwise would have done.

The Respondent adduced evidence that Superintendent Ward Deniston had expressed dissatisfaction with Burr's work because she would not follow orders. Deniston testified but gave no details about this fault and the Respondent adduced no evidence to show that Burr had been warned about not following orders. The Respondent's failure to specify what orders were not followed or to adduce evidence of reprimand suggests that Burr's fault was venial, that perhaps she lifted cartons although she was instructed to let a man do the heavy work. Deniston testified that he preferred to have a man on recooling because a man could be transferred from recooling to warehouse work as needed, whereas a woman could not do general warehouse work. Vice President Hayutin testified that about a week before Burr's discharge, Deniston had recommended her release. Deniston, too, testified that he had made such a recommendation. Hayutin's testimony tended to be vague with respect to the events close to Burr's termination, and because of this vagueness as well as other evidence I deduce that Deniston's recommendation was made on the afternoon of April 30 when there took place the conference that Hayutin mentioned to Burr in their telephone conversation on May 1. Deniston admitted, on cross-examination, that he had made a remark that the Respondent would be better off to have a man in the recooling job if it had to pay union wages to Burr. Deniston was not specific as to when he had made this remark but he separated it from his recommendation for discharge of Burr by estimating that he had made the remark about being better off with a man if the Respondent had to pay Burr union wages about 30 days before Burr's termination. The very form of Deniston's statement, however conditional in form, makes it improbable that his statement was unrelated to the subject of a raise in pay for Burr, despite Deniston's denial that it was. Both Hayutin and Deniston appeared to me to be intentionally vague about time.

#### 4. Conclusions

As the Respondent's witnesses appeared inclined to avoid a revelation as to precisely what had taken place following the receipt by Hayutin of the Union's letter requesting negotiations concerning wages, hours, and working conditions for Burr, the facts can be reconstructed only by inference. In this case, it is not easy to draw a fine line between inference and speculation. However, I find no evidence of any occurrence during the week of April 29, 1963, which would have precipitated Burr's discharge at the end of that week other than receipt of the Union's letter or the facts disclosed by it or disclosed by Burr herself. By use of the word "precipitated," I do not mean at this point completely to reject the Respondent's evidence that it was preparing Nepple eventually to take over the recooling work in warehouse No. 1 along with inventory work. It appears to me, however, that if the Respondent had terminated Burr solely because of its decision that Nepple

<sup>5</sup> Banks was called by the General Counsel as a witness, but gave the testimony herein related on cross-examination. Banks was unbiased and objective in his testimony, and his testimony is credited.

<sup>6</sup> Cartons had to be requisitioned by the Respondent from the customer. Sometimes the customer was slow in supplying them.

was ready to take over, the Respondent would have recognized this fact sufficiently far in advance to give Burr a week's notice rather than 3 days' notice. Even if it had chosen not to give a week's notice, it would be expected that Hayutin would have told Burr, at the time that he mentioned having received the Union's letter and when he told her that he did not intend to bargain with the Union about her wages, that there was no use doing so because she was to be terminated at the end of that week. He did not then so inform Burr, however. Another indication that the Respondent's plans concerning Nepple had not jelled appears from the fact that when Hayutin told Burr on May 1 that she would not be needed after that week, he told her that Veto was going to do all the retooling. In Burr's testimony (and she was the only one to testify about what was said in this conversation), no mention was made of Nepple by Hayutin. Furthermore, Hayutin said nothing about Nepple's taking over when he explained Burr's termination to Mossberger immediately following Burr's termination. On the state of the evidence, I do not incline to the view that Burr's termination was merely a culmination of plans for Nepple to take over her work. Obviously, when it released Burr, the Respondent planned to have retooling work done by a man or men, but I am inclined to believe that the use of Nepple on such work exclusively in warehouse No. 1 and the use of Veto on such work in warehouse No. 2 resulted from a later determination. Also, if Respondent's decision to release Burr had been made the week before receipt of the Union's letter, as Hayutin's testimony suggested, I should not expect that Deniston would have been so reluctant as he appeared to be to date the making of his statement (about being better off with a man if the Respondent were going to have to pay union wages to Burr) as on April 30, nor should I have expected Hayutin to have been so vague in his memory that he could not have fixed the date of the decision to terminate Burr more precisely. As pointed out before, the evidence of Deniston's quoted comment (apparently at the conference on April 30) cannot logically be divorced from an effort by Burr, through the Union, to get a raise, in view of the conditional form of his comment. The Respondent learned of Burr's joining the Union only when, on April 30, 1963, it received the Union's letter, and Burr was informed by Hayutin early the next morning that she would be terminated at the end of the week. From the timing of the facts and on the entire record, I conclude that an inference is warranted, and I find, that the Respondent made its decision to terminate Burr after having received the Union's letter.

Such a finding is not, however, tantamount to a finding that, by such discharge, the Respondent was discriminating against Burr because of her membership in or activity on behalf of the Union, thereby discouraging membership in the Union in violation of the Act.<sup>7</sup> The complaint does not allege, and the General Counsel does not appear to contend, that Burr was discharged for engaging in concerted activities, independently of her joining the Union or her alleged union activities. The allegation in the complaint is that she was discharged because of her "activities on behalf of and/or membership in the Union." Since the Union's contract defining the unit did not cover Burr's job and since the Union tacitly admitted that the contract did not require Burr to join the Union as a condition of employment,<sup>8</sup> I find that the Union's claim of authority to bargain for Burr came about solely because of her having designated the Union as her individual bargaining representative. In the absence of an application of the doctrine of accretion, this put Burr in a bargaining unit by herself. The General Counsel makes no contention that Burr was in the bargaining unit by accretion or that Burr was in the bargaining unit as defined in the contract at all. Indeed, only an amendment of the contract by mutual agreement or appropriate proceedings before the Board could have enlarged the unit to embrace Burr's retooling job. The Respondent took the position that it was not required to bargain with the Union about Burr, and there is no contention that the Respondent was legally obliged to bargain with the Union about her.

Since the complaint is limited to the allegation of discrimination because of Burr's union membership or activity, I shall confine myself to a consideration of this topic. The only union activity in which Burr engaged, so far as the evidence shows, was applying for membership in the Union, authorizing the Union to bargain on her behalf, and (if this be considered union activity) asking, through the Union,

<sup>7</sup> The General Counsel, in his brief, states that the "principal issue presented herein is whether Respondent was motivated in its discharge of Burr by her union activities or whether she was discharged for cause."

<sup>8</sup> It may be observed that, although the original charge included an allegation of refusal to bargain, that allegation was omitted from the amended charge and from the complaint based on the amended charge.

for bargaining on the terms of an individual contract for herself. It is a question of fact, then, as to whether or not the Respondent's motive in terminating Burr was for such activity; and it is a question of law as to whether or not, if Respondent did discharge her for any such reason, Respondent violated Section 8(a)(1) or (3) of the Act.

I find no reason to infer that Burr's act of joining the Union, alone, would have caused Respondent to take immediate action to discharge Burr if she had not been seeking a wage increase. The Respondent points to the fact that membership of all other warehouse employees (pursuant to the Union's union-shop contract) is evidence of a lack of desire or motive on Respondent's part to discourage union membership. Although I would not consider such fact, in isolation, to be proof of lack of motive, I note that there is a total absence of evidence of union animus and that the Respondent and the Union apparently were enjoying amicable relations. It may be observed also that, following Burr's termination, her work was done by union members already in Respondent's employ.<sup>9</sup> This suggests that the Respondent did not wish to engage in any further dispute with the Union about the question of the inclusion of re-coopering in the contract regardless of its conviction that it was not required to bargain about wages, hours, and conditions of employment for one not in the unit. With this attitude, it would be natural to decide to revert to the system used before Burr's hire—that of having warehousemen do re-coopering work.

It is the General Counsel's position that the precipitate action in deciding to discharge Burr upon receipt of the Union's letter negates any other reason for Burr's termination than the Union's letter revealing her membership. I am not persuaded that this is true, because her membership in the Union was not the only information transmitted before Burr was given notice of termination. The Union's letter not only reports Burr's membership but requested bargaining. From this, the Respondent might readily infer that the main object of bargaining was for a raise in pay for Burr. But if there had been any doubt in Hayutin's mind, Burr, herself, removed that doubt by informing Hayutin that she had joined the Union thinking that she could thereby get a raise in pay. Even though the Respondent's decision to discharge Burr was made as a sequel, this does not necessarily disprove a possible plan, perhaps as yet nebulous, eventually to revert to re-coopering by warehousemen and to terminate Burr. Although I do not weigh it heavily, I do not completely discredit the evidence that Respondent was less satisfied with Burr's work toward the end of her employment than at the beginning. The evidence is not clear enough to enable me to determine the extent to which Burr's injury to her back or even her possible failure to follow instructions might have contributed to the Respondent's diminished satisfaction with her services. Rejecting the evidence that the Respondent planned as early as April 30, 1963, to have Nepple replace Burr in re-coopering, I find that the only alternative motive on Respondent's part for Burr's termination was its conviction that a person doing only re-coopering work was not worth more than \$1.50 an hour; that, if it paid anyone more for that work that person would have to be able to do other warehouse work as well; and that, since Burr was pressing for a raise which Respondent did not wish to give, it would terminate her services and use a man to do re-coopering in conjunction with other work. If this be discrimination, it is discrimination based on sex and not on union membership or activity. On all the evidence, I conclude that the Respondent was not motivated by a desire to discourage union membership in discharging Burr. Furthermore, I find that the Respondent's purpose was not to discourage union activity, for I have found that Burr's request, through the Union, was not union activity on the facts of this case.

The General Counsel has cited Board decisions to support his position. I have examined the cases cited and find that they are distinguishable. In *Edmund A. Gray Co., Inc.*, 142 NLRB 590, the women employees involved were in the bargaining unit and the union was bargaining for them as well as all other employees in the unit when, without notice to the union, the Respondent terminated their employment. The Board found that the employer had discharged those women in order to avoid collective bargaining with the union over the union's demand for equal wages for both men and women. But in that case the employer was legally bound to bargain with the union about them. Here the Respondent was not bound to do so. There, clearly the women employees were, through their union, engaged in collective bargaining. Here, bargaining for Burr was not collective.

<sup>9</sup> There was some evidence that Veto had been assisted by two new men, but the evidence does not show that they were other than temporary employees, and they were not hired until many weeks after Burr's termination.

In the case of *Marietta Paint and Color Company*, 136 NLRB 1530, a case more nearly like the one under consideration, a single man was involved. The Trial Examiner there had found that that man was an independent contractor and not in the bargaining unit. The Board, in reversing the Trial Examiner, found that the man was not an independent contractor, that he was an employee, and that, although the union there had not bargained nor sought to bargain for him or his position before he joined the union, he was nevertheless in the bargaining unit and that the union therefore had a right to bargain on his behalf. In that case, as here, the job of the single employee was not listed in the various classifications for which rates had been negotiated. However, the unit in that case had been defined as including "All production, maintenance . . . employees . . . ." and the man involved was a maintenance mechanic who would normally come under the classification of maintenance employees. The definition in the case at hand was not so inclusive. Here, the contract between Respondent and the Union defined the unit only by job classifications none of which was Burr's. There was no all-inclusive language such as "all warehousemen and helpers." This difference, though seemingly small, supplies the important difference between this case and the cases cited by the General Counsel. I have examined innumerable decisions of the Board in cases where an employee was terminated for economic reasons at about the time of joining a union or engaging in concerted activity. It will serve no purpose to cite such cases here since I find that they are all distinguishable. In many of such decisions the employer was induced by his opposition to the purposes of the Act to terminate employees on alleged economic grounds. That opposition is frequently expressed by a refusal to bargain collectively where obliged to do so under the Act.<sup>10</sup> I cannot here find that the Respondent was so induced inasmuch as it had bargained with the Union collectively and was not obliged to bargain with the Union as the representative of an individual employee. In some of the cases decided by the Board the employer was punishing an employee for joining a union or for engaging in concerted activities.<sup>11</sup> I have found that Burr was not being punished for joining the Union.<sup>12</sup> If Burr had been discharged for asking for a raise in pay for herself, absent a union, no violation of the Act would appear to be committed. It would be too farfetched a theory to say that Burr was engaging in concerted activities (not alleged in the complaint) because she enlisted the aid of a representative who represented other employees collectively in order to press for an individual wage increase.

On all the evidence, I find that the Respondent did not discriminate against Burr in violation of the Act.

#### CONCLUSIONS OF LAW

1. The Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The Respondent has not discouraged union membership by discrimination in regard to the hire or tenure of employment of Barbara Burr in violation of Section 8(a) (3) of the Act.
4. The Respondent has not interfered with, restrained, or coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a) (1) of the Act.

#### RECOMMENDED ORDER

I recommend that the Board issue an order dismissing the complaint in its entirety.

<sup>10</sup> *Adkins Transfer Company*, 109 NLRB 956, enforcement denied 226 F. 2d 324 (C.A. 6); *The R. O. Mahon Company*, 118 NLRB 1537, enforcement denied 269 F. 2d 44 (C.A. 6); *Kingsford Motor Car Co.*, 135 NLRB 711, enfd. as modified 313 F. 2d 826 (C.A. 6); *Town & Country Manufacturing Company, Inc.*, 136 NLRB 1022, enfd. 316 F. 2d 846 (C.A. 5). And see *Adams Dairy, Inc.*, 137 NLRB 815, enforcement denied 322 F. 2d 553 (C.A. 8).

<sup>11</sup> See such cases as *Bowman Transportation, Inc.*, 134 NLRB 1419; *Bunney Bros. Construction Company*, 139 NLRB 1516; *Ross Gear and Tool Company*, 63 NLRB 1012; *The Laredo Daily Times*, 64 NLRB 1191.

<sup>12</sup> *Cf. Tee-Pak, Inc.*, 123 NLRB 458, where the employer, in terminating employees, was not demonstrating an opposition to the purposes of the Act, although he was refusing to yield to a union's demand for inclusion of the work assigned under the contract at contract rates and laid off two employees because the union would not consent to their working for less, and the Board found no unfair labor practice.