

or all of 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.

WE WILL offer to Perfecto Merced and Jose Luis Garcia immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make each of them whole for any loss of pay suffered as a result of the discrimination against them.

All of our employees are free to become or remain, or to refrain from becoming or remaining, members of United Steelworkers of America, AFL-CIO, or any other labor organization, 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.

UNIVERSAL TEXTILE MILLS, INC.,
Employer.

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

NOTE.—We will notify any of the above-named employees presently serving in the Armed Forces of the United States of their 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.

If employees have any question concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, P. O. Box 11007, Fernandez Juncos Station, Santurce, Puerto Rico, Telephone No. 724-7171.

Norfolk Tallow Co., Inc. and United Packinghouse, Food and Allied Workers, AFL-CIO. *Case No. 5-CA-2996. September 8, 1965*

DECISION AND ORDER

On May 18, 1965, Trial Examiner James V. Constantine issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices alleged in the complaint and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. The Trial Examiner further found that the Respondent had not engaged in certain other unfair labor practices alleged in the complaint be dismissed with respect to the latter allegations. The Respondent filed exceptions to that portion of the Trial Examiner's Decision in which it was found to have violated the Act and filed a brief in support thereof. No exceptions were filed by the General Counsel or Charging Party.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its power in connection with this case to a three-member panel [Members Fanning, Brown, and Jenkins].

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 Trial Examiner's Decision, the Respondent's exceptions and brief, and the entire record in this proceeding, and hereby adopts the Trial Examiner's findings,¹ conclusions, and recommendations.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby adopts as its Order the Recommended Order of the Trial Examiner, as modified herein, and orders that the Respondent, Norfolk Tallow Co., Inc., its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order, as so modified:²

In paragraph 2(c), insert between the words "reinstatement" and "upon" the words "or reemployment, as the case may be."

¹ Respondent has excepted to the Trial Examiner's finding that on January 27, 1964, certain employees, other than James Daughtrey, also attended the representation hearing related to the instant case. We find it unnecessary to pass on such contention as it would not, in any event, affect our conclusion to affirm the Decision of the Trial Examiner.

² The telephone number for Region 5, appearing at the bottom of the Appendix attached to the Trial Examiner's Decision, is amended to read: Telephone No. 752-2159

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

This is an unfair labor practice case prosecuted under Section 10 of the National Labor Relations Act, as amended. On November 23 and December 28, 1964,¹ United Packinghouse, Food, and Allied Workers, AFL-CIO, filed a charge and an amended charge, respectively, naming Norfolk Tallow Co., Inc., as Respondent. On December 31 the Regional Director for Region 5 (Baltimore, Maryland) issued a complaint on behalf of the General Counsel of the Board against said Respondent. Said complaint, as amended at the trial, alleges that Respondent has engaged in conduct transgressing Section 8(a)(1) and (3), and affecting commerce within the meaning of Section 2(6) and (7), of the National Labor Relations Act, herein called the Act. Respondent has answered admitting some facts but putting in issue the perpetration of any unfair labor practices.

Pursuant to due notice, this case came on to be heard and was tried before Trial Examiner James V. Constantine at Norfolk, Virginia, on March 9 and 10, 1965. All parties were represented at and participated in the hearing and were granted full opportunity to adduce evidence, examine and cross-examine witnesses, submit briefs, and offer oral argument. Briefs have been received from Respondent and the General Counsel. Respondent's motion to dismiss in part was denied after I allowed its representative to argue said motion, even though the General Counsel's attorney protested that entertaining the Respondent's argument "is an unfair use of [his] time." It is difficult to understand why I should deny Respondent the right to argue its motion to dismiss. I reserved on said motion to dismiss as to the discharge of George A. Perry. That part of the motion to dismiss is disposed of in the findings of fact and conclusions of law made herein.

Upon the entire record in this case, including the stipulations of the parties, and from my observation of the witnesses, I make the following:

FINDINGS OF FACT

I. AS TO JURISDICTION

Norfolk Tallow Co., Inc., herein called Respondent or the Company, a Virginia corporation, is engaged at Chesapeake, Virginia, in the business of rendering inedible animal fats and tissues. During the year 1964 Respondent shipped goods, materials, and products valued in excess of \$50,000 directly to points located outside the Com-

¹ Unless otherwise specified all dates mentioned refer to 1964

monwealth of Virginia. I find that Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the purposes of the Act to assert jurisdiction over Respondent in this proceeding.

II. THE LABOR ORGANIZATION INVOLVED

United Packinghouse, Food, and Allied Workers, AFL-CIO, herein called the Union, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. Background

On December 18, 1963, the Union filed a petition in Case No. 5-RC-4486 to be certified as the collective-bargaining representative of Respondent's production and maintenance employees, including truckdrivers. The direction of election added the mechanic to the unit. Having won the election held on July 2, 1964, the Union was certified as such representative on July 12.

During the Union's organizational campaign, which began in the fall of 1963, Field Representative Bruce Nolan requested certain employees to solicit membership in, and to obtain signed cards for, the Union from fellow workers in the plant. Those so selected were James Daughtrey,² Easton Daughtrey, and Marvin Skinner, who enlisted solely among the truckdrivers, and George Perry and William or Willie Green, who confined their recruiting to the production and maintenance group. James Daughtrey also accompanied Nolan to and attended the hearings of January 27, 1964, held on the RC petition, acting as an adviser to Nolan on the contested issue of whether truckdrivers should be excluded from the unit. Easton Daughtrey, Marvin Skinner, George Perry, and Willie Green attended also as members of a union employee committee from the plant. Present at that hearing for Respondent were William Hughes, F. Patrick Kavanaugh, and Edgar Tugman, respectively, its general manager, vice president, and labor relations consultant.

Respondent and the Union held bargaining sessions on September 1, 15, and 17 and October 28 and 29. Perry and Willie Green attended all but the last two.

On October 25 an open-air meeting of the Union was held at the Giant Open Air Market to consider the discharge of employees James Daughtrey, George Perry, and Willie Green. In addition to Field Representative Nolan, employees present were James Daughtrey, Perry, Willie Green, Colbert, and five or six others.

B. Interference, restraint, and coercion

As noted above, on July 2 an election was held on the Union's petition in Case No. 5-RC-4486. A few weeks before this Pat Kavanaugh, Respondent's vice president and a supervisor under Section 2(11) of the Act, convened the employees in front of the office at the plant. At that assembly Kavanaugh told the employees that they did not need a union, that if they wanted anything to go see him about it, and that if the Union went on strike he could hire more men as replacements. Kavanaugh testified that he did no more than advise the employees that they could vote for the Union as they saw fit. I find that he did say this. But I do not credit his denial of the other statements made contemporaneously and attributed to him for the reasons mentioned below. However, I find that Section 8(c) of the Act protects the above statements because they either fall short of threatening employees with reprisals (*Screen Print Corporation*, 151 NLRB 1266) or that, as to replacing strikers, a correct statement of the law was made. (*Schuck, Incorporated*, 118 NLRB 1160, 1162-1163).

About July 1, Kavanaugh left word with another employee that he wanted to see employee Dennis Green, a night-shift employee, the next morning before Green went home. Green saw Kavanaugh on July 2. Kavanaugh opened the conversation by saying that he had heard that Green was pushing the Union. When Green replied that he knew how he was going to vote,³ Kavanaugh retorted that if the Union got in and if Green voted for the Union, Green would be the first man fired by Kavanaugh. I do not credit Kavanaugh's contrary version of this conversation, not only because of my observation of the witnesses Kavanaugh and Green, but also because of (1) Respondent's strong hostility toward the Union, and (2) Respondent's commission of other unfair labor practices, so that Green's story fits into a pattern of unfair labor practices by Respondent.

² Daughtrey, Perry, and Green also signed union cards.

³ The election was held after this conversation occurred.

Shortly after the election of July 2 Fletcher Sawyer, Respondent's superintendent of transportation, whom I find to be a supervisor, asked employee Henry W. Goff, in Sawyer's office, if he had signed a union card. Goff replied that he had. Thereupon Sawyer asked Goff what he thought of the Union. Goff answered that it made "no difference" to him "one way or the other." Then Sawyer inquired if Goff went to union meetings. When Goff replied that he had attended, Sawyer asked him what transpired there. But Goff did not reveal what he heard at the union meetings. I do not credit Sawyer's contrary evidence for the same reason I have not credited Vice President Kavanaugh.

About a week after the election of July 2, William Harmon, Respondent's plant superintendent and a supervisor under Section 2(11) of the Act, asked employee Joe Pruden whether Pruden knew "anybody that joined the Union or signed for the Union." Pruden replied in the negative. At another time Harmon told Pruden about a union meeting to be held that night and that Pruden was free to go if he so desired. Harmon's denial is not credited.

About a week following the July 2 election Plant Superintendent Harmon asked employee Francis Goodman how he felt about the Union. Goodman replied he was for it if it would get him more money. Harmon then answered that he could not see why the men wanted a union or wanted "to make trouble getting the Union," because they could "see the man" for a raise and, if they did not succeed thereat, they could quit. The quoted remarks are shielded by Section 8(c) of the Act, for it is not an unfair labor practice to express hostility to unions. *N.L.R.B. v. Threads, Inc.*, 308 F. 2d 1, 8 (C.A. 4). Harmon's denial of this testimony is not credited on demeanor grounds.

At some undisclosed time John C. Stafford, whom I find to be a supervisor,⁴ asked employee Goodman "which way was [Goodman] going."⁵ In this conversation Stafford also said that those who were for the Union were not going to be there long. Although Stafford denies that he uttered these remarks, I do not credit him, but, instead, I credit Goodman. This credibility issue has been issued on my observation of these two witnesses and Stafford's own testimony that he told⁶ employees that "you'd better be [with Stafford] or I'll cut you off of cigarettes." Stafford often gave cigarettes and clothing to employees.

Concluding Findings as to Interference, Restraint, and Coercion

As noted above, certain remarks by Vice President Kavanaugh, delivered to the assembled employees before the July 2 election, have been found to be inoffensive to the Act. However, Kavanaugh also spoke to individual employees. To some of the employees he uttered statements going beyond the contours of permissible expressions sanctioned by Section 8(c) of the Act. Thus, his inquiries addressed to employee Dennis Green, and his threat to fire Green, made about July 1, are coercive. Similarly, when Kavanaugh told employee Perry on July 2 that he heard that Perry was pushing the Union and that he had ways of finding out, Kavanaugh engaged in conduct proscribed by Section 8(a)(1) of the Act. Then again Kavanaugh exceeded the bounds of allowable action when, on October 26, he elicited information from employee Willie Green as to certain activities of the Union.

Similarly, I find that Superintendent Sawyer's interrogations of employee Goff around July 2, and of employee James Daughtrey before July 2; Superintendent Harmon's inquiries to employees Pruden and Goodman shortly after July 2; and Supervisor Stafford's interrogation of employee Goodman constitute unlawful interrogation. And Stafford's statement to employee Goodman that those who were for the Union were not going to be there very long amounts to a threat of reprisal which transgresses the Act.

The interrogation of the foregoing employees is not shown to be either essential in aiding Respondent to prepare for this case or necessary in connection with other lawful objectives. Hence it is indefensible under the Act. *Johnnie's Poultry Co.*, 146 NLRB 770. Of course the mere asking an employee if he joined a union or inquiring what benefits he expects to derive from union membership is not obnoxious to the Act. *Willard Bronze Company*, 148 NLRB 1686; *N.L.R.B. v. Mid-West Towel and*

⁴ Stafford was empowered to fire employees. He himself testified that he in effect fired employee Dennis Green, and that he was "the supervisor on the night operation." In fact Respondent's representative at the hearing referred to Stafford as a supervisor.

⁵ Goodman placed this occurrence both before and after the election and finally testified he could not definitely recall when. I find that it occurred before, since it infers that the election was yet to come.

⁶ Stafford claims he made these statements jokingly, but I do not credit him that he was "kidding."

Linen Service, Inc., 339 F. 2d 958, 960-961 (C.A. 7). But as found herein, Respondent's inquiries are repugnant to the Act because they amount to more than innocuous interrogation; rather, they attain the stature of interference, restraint, and coercion proscribed by the Act.

On the day before the election Respondent convened the plant's employees at the Sunset Manor. They were told, among other things, that they were free to vote any way they wanted to. This is insulated by Section 8(c) of the Act. But it does not erase the coercive effects of other coercive statements which I have found were made at other times. *Surprenant Manufacturing Co. v. NLRB.*, 341 F. 2d 756, 761-762 (C.A. 6).

C. *The discharge of James R. Daughtrey*

Daughtrey was hired as a truckdriver by Respondent in 1960. He signed a union card on July 31, 1963, and also assisted in the Union's organizing campaign by soliciting employees to join the Union and by distributing union membership cards to them. He also attended the representation hearing in Case No. 5-RC-4486 as more fully narrated above. To attend that hearing Daughtrey obtained permission therefor from Respondent Vice President Hughes, to whom he mentioned the hearing and that he would testify on behalf of the Union. He also attended some bargaining sessions as an employee member of the Union's negotiating committee.

On several occasions prior to the July 2, 1964, election, Transportation Superintendent Sawyer asked Daughtrey how he was going to vote, if Daughtrey knew who would vote for and against the Union, what the men were saying at union meetings, and if he heard any of the employees talking about the Union. But Daughtrey never gave an unequivocal answer. Daughtrey did tell Sawyer, however, that he felt the Union "would be a good thing." On the day of the election, but after it had concluded, Sawyer asked Daughtrey how many had voted for the Union to Daughtrey's knowledge, and whether certain specific employees had voted for the Union.

On July 17, a Friday, Daughtrey went on vacation expected to return to work on Monday, July 27. However, on July 24 or 25 Daughtrey broke out with welts and a sore throat, causing him to telephone a doctor. The latter invited Daughtrey to his office in nearby Sunbury, North Carolina, on Monday, July 27. Daughtrey lived in Suffolk, Virginia. Consequently, during the morning of July 27 Daughtrey telephoned Superintendent Sawyer to inform him of the appointment with the doctor. Sawyer asked Daughtrey to telephone him of the doctor's decision. Later that day Daughtrey telephoned Sawyer that the physician told him to stay out 2 or 3 days. Sawyer then instructed Daughtrey to telephone on Wednesday, July 29, for Thursday's work assignment.

On July 29 Daughtrey's mother, according to Daughtrey, telephoned Sawyer that her son was "still out." Sawyer asked her to tell Daughtrey to call him. That afternoon Daughtrey did call Sawyer, only to be told to call again the next day, July 30. When Daughtrey called on July 30, Sawyer told him to call Vice President Hughes.

Shortly thereafter on July 30 Daughtrey called Hughes. When Hughes asked why Daughtrey had neither returned to work nor called up to explain his absence, Daughtrey replied that he had called Sawyer. When Hughes protested he "did not know nothing about it," Daughtrey described his malady. When Daughtrey asked if there would be any work for him, Hughes replied, "I do not think so," insisting that Daughtrey did not call in for 3 or 4 days, and that it made no difference that Daughtrey had a doctor's certificate.⁷

The foregoing chronicles Daughtrey's evidence. Sawyer testified that he never received any calls from Daughtrey or Daughtrey's mother; that when Vice President Hughes inquired of him on Monday, July 27, as to the whereabouts of Daughtrey, Sawyer could only reply that Daughtrey had not reported for work and had not called in; that he gave the same answer on Tuesday when Hughes propounded the same question; that Hughes on Tuesday then told Sawyer to instruct Daughtrey to talk to Hughes when he did call in; and that Sawyer directed Daughtrey to call Hughes on Thursday when Daughtrey did finally call.

Initially, I find that Sawyer uttered the remarks about the Union attributed to him by Daughtrey as narrated above. This is because Sawyer admitted he talked with Daughtrey about the Union in "general conversation," but he did not either specifically deny the words ascribed to him or relate the particulars of the content of the "general conversation" referred to above.

⁷ Daughtrey testified that he had a doctor's certificate at home but had lost it before the date of the trial of this case.

However, I do not credit Daughtrey that he called in and that his mother also called in to account for his absence from work on July 27, 28, and 29, while I do credit Sawyer that no such calls were made. This is because Daughtrey categorically tied the above telephone calls to an illness on July 27 involving welts for which he consulted a physician, Dr. Payne, and mentioned both the alleged visit to the doctor and a doctor's certificate in his said calls. Yet the doctor's certificate in evidence, together with the relevant stipulation of the parties, disclose that (1) Dr. Payne on July 1 treated Daughtrey for a virus infection with enlarged uvula involving "a cough, cold, and congestion in lungs," and (2) Dr. Payne did not treat Daughtrey on July 27 or at any other time (except July 1). Thus I find that Dr. Payne's certificate and the stipulation of the parties supports Sawyer's assertion that no calls were made by Daughtrey on July 27, 28, and 29, and refutes Daughtrey's contention both as to the nature of his illness and his calling in to report that he was under a doctor's care.

The fact that I have credited Daughtrey and Sawyer each in part and discredited each in part does not present an inconsistency on my part. For a trier of facts may accept in part and reject in part the testimony of any witness. *Marquandt v. Y.W.C.A.*, 282 Mass 28, 184 N.E. 287.

Concluding Findings as to the Discharge of James Daughtrey

It is my opinion, and I find, that Daughtrey was discharged for laying out for 3 consecutive days (July 27, 28, and 29) immediately following his vacation without calling in or otherwise accounting for his absence at the time. Further, I find that such neglectfulness or shortcoming of duty constitutes valid cause for discharge under Section 10(c) of the Act. The extent of discipline is for the employer. *N.L.R.B. v. Ace Comb Company, et al.*, 342 F. 2d 841 (C.A. 8). However I recognize that the "mere existence of valid grounds for discharge is no defense to a charge that the discharge was unlawful." *N.L.R.B. v. Symons Manufacturing Co.*, 328 F. 2d 835, 837 (C.A. 7); *N.L.R.B. v. Texas Bolt Company*, 313 F. 2d 761, 763 (C.A. 5). Hence the question is whether Daughtrey was actually fired for his union activity so that his laying out has been seized upon as pretext to cloak or hide the real reason for his termination.

In this connection it is well to bear in mind that the burden at all times rests upon the General Counsel of establishing that the discharge is illegal. *Rubin Bros. Footwear, Inc., etc.*, 99 NLRB 610, 611, set aside 203 F. 2d 486 (C.A. 5). In my opinion that burden has not been sustained here. In the first place I do not credit Daughtrey's testimony that he and his mother called in to report his illness and that he was treated by Dr. Payne for welts on July 27, for the reasons mentioned above. Of course this does not dispose of the matter, for the General Counsel contends that even accepting Respondent's evidence, that evidence demonstrates that Daughtrey was discriminatorily discharged. This is but another way of saying that pretext exists.

But I do not find pretext. While it is true that documentary evidence in the record discloses that other employees who laid out without calling in were not always disciplined, it is equally true that none of those employees failed to show up for 3 days following a vacation. Nevertheless, even assuming disparate treatment towards Daughtrey in connection with his laying out, that alone is insufficient to establish a discharge for union activity. Something more must be shown—something, for example, in the nature of a precipitate discharge for an old offense, or constant petty criticism of work over a period of time, or an abrupt discharge as soon as an employee's union activity becomes known to the employer. But none of that appears here, for Daughtrey's union activity was known as far back as a hearing on January 27, he was terminated for a fresh offense, and old offenses were not resurrected to confront him. "Where, as here, the employer has justification to terminate an employment, . . . the Board cannot impute an ulterior motive to the employer from the synchronism, without more, of the firing and the employee's union advocacy." *N.L.R.B. v. Covington Motor Co., Inc.*, 344 F. 2d 136 (C.A. 4).

It is true that Respondent entertained a strong hostility towards the Union, and I so find. Yet this without more is insufficient to establish a discriminatory discharge although it may be taken into consideration—and I have done so—in assessing the evidence as to whether an illegal motive prompted the discharge. *N.L.R.B. v. Threads, Inc.*, 308 F. 2d 1, 8 (C.A. 4); *N.L.R.B. v. Little Rock Downtowner, Inc.*, 341 F. 2d 1020, 1021 (C.A. 8). Finally, "An employer's conduct is not unlawful,

however, merely because it results in the termination of the employment of a union member" (*Pioneer Photo Engraving, Inc.*, 142 NLRB 1099, 1101); and union activity does not confer immunity from discharge or from discipline. *Metals Engineering Corporation*, 148 NLRB 88; *Wellington Mill Division, West Point Manufacturing Co. v. N.L.R.B.*, 330 F. 2d 579, 586-587 (C.A. 4). As the Board quite recently held, "Engaging in protected, concerted activity . . . does not perforce immunize employees against discharge for legitimate reasons." *Mitchell Transport, Inc.*, 152 NLRB 122.

D. *The discharge of George A. Perry*

This employee was hired by Respondent about 1959 as a handyman to work under Plant Superintendent William Harmon. In addition to attending a couple of meetings with Union Field Representative Nolan, Perry aided the Union's organizing drive by soliciting membership therein and distributing union membership cards. With employee Willie Green, Perry obtained 8 or 10 signed cards. Perry signed one himself dated December 8, 1963. After the election Perry also attended three bargaining sessions between Respondent and the Union as an employee member of the Union's negotiating committee.

On July 2, Vice President Kavanaugh spoke to Perry about "some garnishees." As a result Kavanaugh agreed to pay Perry's creditor \$5 a week from Perry's wages. But the creditor rejected this arrangement and repeated the garnishment. This caused Respondent to lay off Perry for a short time later. But Perry was soon recalled to work.

Just before the ballots were counted on July 2 Perry was ordered to report to Vice President Kavanaugh's office. Perry was excused after Kavanaugh ascertained from him that Perry had "taken care of the papers." The record does not identify "the papers." As he left, Perry helped employee Earl Phillips carry two chairs into the office. At this point Kavanaugh asked Perry why he was "messing into this thing?" When Perry asked what "this thing" meant, Kavanaugh replied, "I heard you were pushing the Union," and stated that he had "ways of finding out things" when Perry wanted to know the source of this information. After some further conversation, Perry left.

On September 30, Perry substituted for absentee Francis Goodman in running the expellers machine. When the pump on it choked, Perry turned off the power and left the area to obtain a wrench. When he returned he found maintenance employees McDonald and Thompson, neither of whom was a supervisor, at his machine. McDonald forbade Perry to apply to the pump the wrench which Perry carried in his hand. Thereupon Perry dropped the wrench and proceeded manually to maneuver the wheel on the pump. At this point McDonald hit Perry's hand and at the same time exclaimed, "Don't touch that damned wheel." When Perry asked McDonald, "what is wrong with you?" McDonald grabbed Perry. A scuffle ensued. Both parties beat each other and threw each other down. McDonald left after the fighters broke apart. Then, with Thompson, Perry started to repair the pump.

About 5 minutes later, Superintendent Harmon came to Perry's work station with the news that "They want me to suspend you." Perry said "O.K." However, McDonald was not suspended or otherwise disciplined. Then Perry went to Vice President Hughes' office to see Hughes. In about 15 minutes Perry was ushered into the office where he found Hughes accompanied by Labor Relations Consultant Edgar Tugman. Tugman assured Perry that he would not be fired and that "we do not act" until "we look into things." Then Perry gave his version of the fracas. Although Perry complained that his suspension meant that Respondent had acted without hearing him, Tugman replied that McDonald had "reported it" first. Perry replied he had to change his dirty clothes to go to the office and thus was preceded by McDonald. After insisting that he had been unfairly dealt with, Perry walked out.

A few days later Perry received a letter (General Counsel's Exhibit No. 6) from Vice President Kavanaugh reading:

On my return to the plant yesterday, Monday, October 5, 1964, I was told that you and Mac had had an argument and that you hit Mac and threw him down. Because of this I am releasing you from our employment.

Enclosed is a check representing your second weeks vacation you had earned during your work with us.

Concluding Findings as to the Discharge of George Perry

In my opinion, Perry was discharged for being active on behalf of the Union and the reason assigned for the discharge, i.e., that he engaged in a fight with employee McDonald, is a pretext to mask or disguise the real reason.

At the outset, I reject Respondent's defense⁸ that Perry started the fight and took the initial aggression against McDonald. This is because (a) I credit Perry that McDonald attacked him without provocation, (b) Perry is supported by Respondent's witness U. K. Thompson (the sole witness to the altercation), who testified that McDonald "approached [Perry] in a rather harsh way [and] . . . the whole incident could have been avoided if McDonald had approached [Perry] in another way [and] . . . if he used a different tone of voice," (c) McDonald did not testify, and (d) immediately following the affray Thompson and Perry proceeded to fix the pump.

Nevertheless, inability to establish a defense does not constitute affirmative evidence of the facts sought to be proved by the General Counsel. *Gunan v. Famous Players*, 167 N.E. 235, 243 (Mass.); *N.L.R.B. v. Audio Industries, Inc.*, 313 F. 2d 858, 863 (C.A. 7). The burden of proof at all times rests upon the General Counsel to demonstrate affirmatively by a preponderance of the evidence that Perry was illegally discharged. *Rubin Bros.*, 99 NLRB 610, 611; *N.L.R.B. v. Murray Ohio Manufacturing Company*, 326 F. 2d 509, 513 (C.A. 6). I am of the opinion, and find, that the General Counsel has sustained that burden, that Perry was discharged principally, if not solely, because of his union activities, and that the asserted reason for his discharge, namely, his scuffle with McDonald, is a pretext to conceal the actual reason. In my opinion, *N.L.R.B. v. Clearwater Finishing Co.*, 216 F. 2d 608 (C.A. 4), does not compel a different result. This conclusion and its accompanying subsidiary findings are based on the whole record and the following elements which I find as facts:

1. Respondent entertained a strong union animus. Of course I am aware that it is not enough to show that an employer opposes or dislikes unions; it must additionally be shown that such antipathy is proximately linked with the unfair labor practice for which Respondent is being tried. *N.L.R.B. v. The Citizen-News Company*, 134 F. 2d 970, 974 (C.A. 9); *Wellington Mill v. N.L.R.B.*, 330 F. 2d 579, 586-587 (C.A. 4); *Lasko Metal Products, Inc.*, 148 NLRB 976. But unlike the situation with respect to Daughtrey, I find that such animus is causally related to the discharge of Perry. Cf. *Majestic Weaving Co., Inc., of New York*, 147 NLRB 859.

2. Perry was active on behalf of the Union and Respondent had actual knowledge thereof. Further, Respondent resented Perry's union activities. This is discernible in Vice President Kavanaugh's conversation with Perry on July 2.

3. McDonald, who engaged in the fight with Perry, did not testify, although he was still employed by Respondent and no excuse was offered for the failure to call him. Hence I draw an inference adverse to Respondent from this.

4. It is of significance that Respondent did not conduct a fair and objective investigation of the affray between Perry and McDonald. Manifestly an impartial inquiry into this situation would have included the affording to Perry of an opportunity, either personally or through his Union as the collective-bargaining representative, to present his account of the event, especially since Thompson's written statement to Tugman mentioned that McDonald was harsh. Yet Perry was suspended after the event without even the semblance of a chance to defend himself. Perry's statement to Tugman hardly rises to the stature of a defense since it followed the suspension. And the discharge letter of Kavanaugh does not mention that Perry's account was considered. Failure to conduct a fair investigation of an employee's alleged misconduct is evidence of a discriminatory intent, especially when viewed in the light of Respondent's hostility to the Union on whose behalf the employee was active. *Illinois Tool Works*, 61 NLRB 1129, 1132. See *Shell Oil Company v. N.L.R.B.*, 128 F. 2d 206, 207 (C.A. 5). In my opinion *Fort Smith Broadcasting Co. v. N.L.R.B.*, 341 F. 2d 874, 878 (C.A. 8), is distinguishable because there a thorough investigation was made notwithstanding that the discharge was not interviewed.

E. The discharge of Willie L. Green

Willie Green was hired by Respondent as a laborer in January 1964. Later he was assigned to be a cooker in the processing plant. He aided the Union's organizing campaign by soliciting employees, at their homes and in the plant, to become members; by having one organizational meeting, attended by six or seven employees, at his home; and by obtaining some signatures, including his own on February 4, 1964, to union cards.

⁸ It is axiomatic that if the true reason for the discharge is the fight, the discharge must be upheld as having been made for cause, regardless of who is to blame for the quarrel. *Fort Smith Broadcasting Co. v. N.L.R.B.*, 341 F. 2d 874 (C.A. 8); *N.L.R.B. v. Prince Macaroni Manufacturing Co.*, 329 F. 2d 803, 809 (C.A. 1); *N.L.R.B. v. United Parcel Service, Inc.*, 317 F. 2d 912, 914 (C.A. 1); *Thurston Motor Lines, Inc.*, 149 NLRB 1368; *N.L.R.B. v. Clearwater Finishing Co.*, 216 F. 2d 608 (C.A. 4).

During the campaign the Union held a meeting at the YMCA, where among other things, the employees present voted to have Green and George Perry as their representatives on the Union's negotiating committee. As such representative Green attended the first three of the bargaining sessions while employed by Respondent.

After the Union was certified, Green claims Respondent was "dogging [him] around . . . pushing [him] around, cursing" him, arguing with or jumping on him, and cursing at him sometimes, especially when the cooking machine spilled over. On one Saturday in September, when he took his wife to a doctor, Green asked his cousin to report his absence and the reason for it. Nevertheless, he was reprimanded therefor on the following Monday, and was also suspended until Thursday, by Vice President Kavanaugh. In addition Green resented being called "hey, boy" by employee McDonald. As a result of the above conditions, Green did not report for work on October 2 or thereafter. He gave no reason to his employer. His last day at work was October 1. Green never communicated with Respondent as to why he failed to return to work.

About October 26 Green returned to the plant, where he asked Plant Superintendent Harmon to get his job back. Although willing to rehire Green, Harmon stated he was powerless to do so, and directed Green to see Vice President Kavanaugh. Thereupon Green went to Kavanaugh's office. After a while Kavanaugh came into the room and inquired of Green what he wanted. When Green asked to "get my job back," Kavanaugh reminded him that Green "left on [your] own." Green replied, "I know I did." (The quoted words are taken from Green's testimony.)

Continuing, Kavanaugh asked Green if he went to the Union's meeting at Giant Open Air Market the day before. Green acknowledged that he did but was late. Then Kavanaugh asked Green to identify those attending that meeting. Green mentioned some. Then Kavanaugh asked if George Perry came to that meeting. Green said Perry came late. When Kavanaugh elicited information as to what transpired at the meeting, Green told him they discussed Perry's fight with McDonald. Kavanaugh also asked what employees would be on the Union's negotiating committee at a forthcoming negotiating session. Finally, Kavanaugh expressed a desire to recall Green, praising Green as a good worker, but insisted he could not at that time "afford to hire" him or George Perry because Kavanaugh "had too much money tied up in messing with this union."⁹

Some days after this Green told Supervisor Stafford, while riding in a car with him, that Green quit his job because he found a cleaner job elsewhere and also because his new employer permitted him to work a "lot of overtime."

Concluding Findings as to the Discharge of Willie L. Green

Paragraphs VII and VIII of the complaint, in material part, allege that this employee was discharged on October 2, and that Respondent has since failed and refused to reinstate him, for being a member of and engaging in activities on behalf of the Union.

1. As to the discharge

It is my opinion, and I find, that Green was not discharged.¹⁰ I further find that he voluntarily quit when he left work at the end of his workday of October 1, that he did not return to the plant until October 26, and that he neither gave notice to nor otherwise communicated with the Company at any time thereafter until October 26, when he applied to be rehired.

The foregoing findings are derived from Green's own evidence. Thus he testified that on October 26, when he tried to "get my job back," Vice President Kavanaugh insisted that Green "left on his own," to which Green replied "I know I did." But the General Counsel has attempted to show that Green's leaving on October 1 amounts to a constructive discharge resulting from imposition of intolerable working conditions as a reprisal for Green's union activities.

But I find no constructive discharge. The only working conditions which Green depicted as objectionable consisted of employee's McDonald often calling him "boy," which Green resented, and Respondent's supervisors "dogging," pushing, cursing, and jumping on him. Since McDonald is not shown to be a supervisor, his conduct cannot be attributed to Respondent, assuming that it was motivated by antiunion considerations. Nor can the action of the supervisors be found to con-

⁹ Kavanaugh denies the matters asserted by Green in this paragraph. But I credit Green and do not credit Kavanaugh for the reasons given under section III, B, of this Decision entitled "*Interference, restraint, and coercion.*"

¹⁰ Previous to this Green had been laid off or suspended for 3 days. I find this suspension was for cause and was not indicative of union animus.

stitute a constructive discharge absent a showing that it was generated by hostility to the Union. Moreover, the action of the supervisors is portrayed in such general language that it is meaningless and, therefore, cannot be evaluated on the question of whether it was so unbearable as to warrant a leaving of work without either a protest of the conditions or a statement to the employer that such conditions rendered further employment insufferable unless corrected or ameliorated. Finally, Green on October 26 did not allude to these or any other unendurable conditions as the reason why he quit.

2. As to the failure to reinstate

It is not clear from the General Counsel's pleading whether the discharge plus the refusal to reinstate constitute one cause of action or whether the discharge comprises one cause of action and the failure to reinstate comprehends another. Liberally construing the complaint, I read this part of the complaint distributively, and hence I rule that the discharge and the want of reinstatement each embrace a separate and distinct cause of action.

At the time when Green applied for his old job back he was not employed by Respondent, but, rather, he did so as an applicant for employment. I so find. But an applicant, for hire is entitled to the protections of the Act, so that his request for work (which the complaint denominates as "reinstatement") may not lawfully be denied because he belongs to or has engaged in activities for a labor organization. *Phelps Dodge Corp. v. N.L.R.B.*, 313 U.S. 177, 182-186. The question then is whether the embargo which Respondent placed on Green's reemployment was inspired by antiunion motives.

Initially, I rule that an employer may fire an employee or turn down an applicant for employment for any reason, whether good or bad, or no reason, so long as it does not discriminate in a manner which encourages or discourages membership in a labor organization. *Fort Smith Broadcasting Co. v. N.L.R.B.*, 341 F. 2d 874, 879 (C.A. 8). It is my opinion that Green's solicitation for his old job was turned down because he belonged to and exerted himself on behalf of the Union, and that, therefore, Respondent thereby unlawfully discriminated against him. This ultimate finding emerges from a consideration of the entire record, and the following elements, which I find as facts:

a. Green was a member of the Union and rendered substantial services on its behalf. Respondent had knowledge thereof prior to October 26.

b. As of October 26 no one had been hired to replace Green, so that his job was still open and available.

c. Superintendent Harmon was not only willing but expressed a desire to rehire Green, but nevertheless steered Green to Vice President Kavanaugh. Since Harmon had been Green's supervisor, it is reasonable to infer that he would have then and there rejected Green if Green's quitting without notice were an impediment to his reemployment. Yet Harmon not only failed to mention any misconduct as an impediment to the rehire of Green but also expressly approved the return of Green to his old job.

d. Since Green's job was available, I reject Vice President Kavanaugh's testimony that Green was denied employment because Kavanaugh did not need any help.

e. Kavanaugh displayed not only hostility toward the Union but also committed an unfair labor practice in questioning Green. Of course antipathy to unions is not an unfair labor practice, and the commission of acts proscribed by Section 8(a)(1) of the Act does not automatically render a discharge or a refusal to hire illegal. The two must be causally connected. But I find such connection here under all the circumstances, including Kavanaugh's statement that, although Green was a good worker, Kavanaugh could not afford to hire Green because the Company had too much money tied up in messing with the Union, and including the fact that Kavanaugh engaged in unlawful interrogation before turning down Green's request to be reemployed.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent found to constitute unfair labor practices as set forth in section III, above, occurring in connection with its operations described in section I, above, 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.

V. THE REMEDY

It having been found that Respondent has engaged in certain conduct prohibited by Section 8(a)(1) and (3) of the Act, it will be recommended that it cease and

desist therefrom and that it take specific affirmative action, as set forth below, designed to effectuate the policies of the Act. It is reasonable to anticipate that such violations may recur. Hence an order is warranted which will provide a remedy commensurate with the gravity of the violations found. Since the discharge of Perry and the refusal to hire Green go "to the very heart of the Act" (*N.L.R.B. v Entwistle Mfg. Co.*, 120 F. 2d 532 (C.A. 4)), it will be recommended that the Order issued safeguard employees against infringement in any manner of the rights vouchsafed to them by Section 7 of the Act.

Having found that Respondent discriminated against George A. Perry as to his tenure of employment, and against Willie L. Green with respect to his application for employment, it will be recommended that the Company (a) offer Perry full and immediate reinstatement to his former position or one substantially equivalent thereto, without prejudice to his seniority and other rights and privileges, and (b) offer Green immediate employment without prejudice to such seniority or other rights and privileges he would have enjoyed or acquired had he been hired on the date when, absent the discrimination against him, Respondent would have reemployed him.

It will be further recommended that Respondent make whole Perry and Green for any loss of pay each may have suffered as a result of Respondent's discrimination against him, beginning from the date of such discrimination to the date when reinstatement, or reemployment, is offered, as the case may be. Computation thereof shall be calculated in accordance with the formula adopted in *F. W. Woolworth Company*, 90 NLRB 289, with interest thereon at 6 percent as computed in *Isis Plumbing & Heating Co.*, 138 NLRB 716. It will finally be recommended that Respondent retain and make available to the Board or its agents, upon request, all pertinent records and data necessary to determine the amount, if any, or backpay due.

Upon the basis of the foregoing findings of fact and the entire record in this case, I make the following:

CONCLUSIONS OF LAW

1. The Union is a labor organization within the scope of Section 2(5) of the Act.
2. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
3. By discriminating in regard to the tenure of employment of George Perry and the application for employment of Willie Green, thereby discouraging membership in the Union, a labor organization, Respondent has engaged in and is engaging in unfair labor practices within the purview of Section 8(a)(3) and (1) of the Act.
4. By (a) coercively interrogating employees concerning their and other employees' membership in, activities on behalf of, and adherence to, the Union, and (b) threatening employees with economic reprisals because of their membership in, activities on behalf of, and adherence to, the Union, or if they supported the Union in an NLRB election, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.
5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.
6. Respondent has not committed any other unfair labor practices as alleged in the complaint.

RECOMMENDED ORDER

Upon the basis of the foregoing findings of fact and conclusions of law and the entire record in the case, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, it is recommended that Respondent, Norfolk Tallow Co., Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:
 - (a) Discouraging membership in United Packinghouse, Food, and Allied Workers, AFL-CIO, or any other labor organization, by discharging employees or otherwise discriminating in any manner in respect to their tenure of employment or any term or condition of employment, or by refusing or failing to hire or accept applicants for employment or otherwise discriminating in any manner against such applicants with respect to their hire.
 - (b) Coercively interrogating employees concerning their and other employees' membership in, activities on behalf of, and adherence to, the said Union.
 - (c) Threatening employees with economic reprisals because of their membership in, activities on behalf of, and adherence to, the said Union, or if they supported the said Union in an NLRB election.
 - (d) In any other manner interfering with, restraining, or coercing employees in the right to self-organization, to form, join, or assist labor organizations, to bargain

collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or mutual aid or protection, or to refrain from any or all such activities.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Offer to George A. Perry full and immediate reinstatement to his former or a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed by him.

(b) Offer Willie L. Green immediate employment without prejudice to such seniority or other rights and privileges he would have enjoyed or acquired had he been hired on the date when, absent the discrimination against him, Respondent would have reemployed him.

(c) Make whole George A. Perry and Willie L. Green each for any loss of pay he may have suffered by reason of the discrimination against him, with interest at the rate of 6 percent, and notify any of them 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 and the Universal Military Training and Service of 1948, as amended, after discharge from the Armed Forces.

(d) 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 to ascertain the amount of backpay due under the terms of this Recommended Order.

(e) Post at its plant at Chesapeake, Virginia, copies of the attached notice marked "Appendix."¹¹ Copies of said notice, to be furnished by the Regional Director for Region 5, shall, after being signed by a duly authorized representative of Respondent, be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily displayed. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director for Region 5, in writing, within 20 days from the receipt of this Decision, what steps Respondent has taken to comply herewith.¹²

It is further recommended that the complaint be dismissed in all other respects.

It is finally recommended that unless Respondent shall within the prescribed period notify the said Regional Director that it will comply, the Board issue an order requiring Respondent to take the aforesaid action.

¹¹ If this Recommended Order is adopted by the Board, the words "a Decision and Order" shall be substituted for the words "the Recommended Order of a Trial Examiner" in the notice. In the further 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".

¹² If this Recommended Order is adopted by the Board, this provision shall 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 Recommended Order 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 United Packinghouse, Food, and Allied Workers, AFL-CIO, or any other labor organization, by discharging any of our employees or in any other manner discriminating against them in regard to hire or tenure of employment or any term or condition of employment, or by refusing or failing to hire or accept applicants for employment or otherwise discriminating in any manner against such applicants with respect to their hire.

WE WILL NOT coercively interrogate employees concerning their and other employees' membership in, activities on behalf of, and adherence to, the above-named Union.

WE WILL NOT threaten employees with economic reprisals because of their membership in, activities on behalf of, and adherence to, the said Union, or if they supported the said union in an NLRB election

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed to them in Section 7 of the Act.

WE WILL offer George A. Perry full and immediate reinstatement to his former position or one substantially equivalent thereto, without prejudice to his seniority or other rights and privileges previously enjoyed by him.

WE WILL offer Willie L. Green immediate employment without prejudice to such seniority or other rights and privileges he would have enjoyed or acquired had he been hired on the date when, absent the discrimination against him, we would have reemployed him.

WE WILL make whole George A. Perry and Willie L. Green each for any loss of pay he may have suffered as the result of the discrimination against him.

All our employees are free to become or remain, or refrain from becoming or remaining, members of the above-named or any other organization.

NORFOLK TALLOW CO., INC.,
Employer.

Dated _____ By _____
(Representative) (Title)

NOTE.—We will notify George A. Perry and Willie L. Green, if presently serving in the Armed Forces of the United States, each of his right to full reinstatement or reemployment 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.

If employees have any question concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, Sixth Floor, 707 North Calvert Street, Baltimore, Maryland, Telephone No. 752-8460, Extension 2100.

Paramount Paper Products Co. and Atlanta Stereotypers & Electrotypers Union No. 42. Case No. 10-CA-5939. September 8, 1965

DECISION AND ORDER

On June 15, 1965, Trial Examiner James V. Constantine issued his Decision in the above-entitled proceeding, finding that the Respondent had not engaged in certain unfair labor practices as alleged in the complaint and recommending that the complaint be dismissed in its entirety, as set forth in the attached Trial Examiner's Decision. Thereafter, the Charging Party filed exceptions to the Trial Examiner's Decision and a brief in support thereof, and the Respondent filed cross-exceptions to the Trial Examiner's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel [Chairman McCulloch and Members Brown and Zagoria].

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 Trial Examiner's Decision, the exceptions and cross-exceptions, the brief, and the entire record in this case, and hereby adopts the Trial Examiner's findings, conclusions, and recommendations.