

**Mack Trucks, Inc. and Jose M. Banelos**, Case 32-  
CA-462

May 30, 1979

### DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS PENELLO  
AND TRUESDALE

On February 9, 1979, Administrative Law Judge James S. Jenson issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed a letter and its brief to the Administrative Law Judge in answer to the exceptions and brief of Respondent.

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

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,<sup>1</sup> and conclusions of the Administrative Law Judge and to adopt his recommended Order.

### ORDER

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

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

### APPENDIX

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

WE WILL NOT refuse to hire employees because they engaged in, or are engaging in, union and/or protected concerted activities.

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

WE WILL offer immediate employment to Jose Banelos in the bargaining unit of which International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, United Auto Workers Union Local 76, is the representative, without prejudice to seniority and other rights and privileges he would have enjoyed had he been employed on September 26, 1977, or, in the event no such vacancy exists and no employee has been hired since September 26, 1977, in the bargaining unit of which said Union is the representative, WE WILL establish a preferred hiring list and place the name of Jose Banelos at the top of said list. In such latter event, Jose Banelos is to be offered employment at such time as a vacancy may occur in the bargaining unit which the Union represents.

WE WILL make Jose Banelos whole for any loss of pay he may have suffered as a result of the discrimination against him by paying him a sum of money equal to that which he would have earned absent the discrimination, plus interest.

MACK TRUCKS, INC.

### DECISION

#### STATEMENT OF THE CASE

JAMES S. JENSON, Administrative Law Judge: This case was heard before me in Oakland, California, on March 23, 24, 27, and 28, and August 7, 1978. The complaint, which issued on December 29, 1977, pursuant to a charge filed on October 10, 1977, alleges that Respondent unlawfully refused to hire Jose Banelos on September 22, 1977, because of his union or protected concerted activities. Relying upon evaluations from Respondent's supervisors who supervised Banelos when he was employed by another employer, Respondent contends Banelos was not offered employment because his production output while working for the former employer had not been satisfactory. All parties were given full opportunity to appear, introduce evidence, examine and cross-examine witnesses, argue orally, and file briefs. Briefs were filed by the General Counsel and Respondent and have been carefully considered.

Upon the entire record in the case,<sup>1</sup> and from my observation of the demeanor of the witnesses, and having considered the post-hearing briefs, I make the following:

<sup>1</sup> My ruling quashing Respondent's pretrial *subpoena duces tecum* seeking the production of all affidavits and/or statements and/or declarations of witnesses whom the General Counsel intended to call to testify in the instant proceeding, as well as any other writings ratified or otherwise adopted by said witnesses, has been reconsidered and is hereby reaffirmed.

## FINDINGS OF FACT

## I. JURISDICTION

Mack Trucks, Inc., a Pennsylvania corporation, is engaged in the manufacture of trucks in Hayward, California. In the past 12 months, in the course and conduct of its business operations, Respondent sold and shipped goods valued in excess of \$50,000 directly to customers located outside the State of California and purchased and received goods or services valued in excess of \$50,000 directly from suppliers located outside the State of California. Respondent admits, and I find, that Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

## II. THE LABOR ORGANIZATION INVOLVED

International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, United Auto Workers Union Local 76 is a labor organization within the meaning of Section 2(5) of the Act.

## III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Setting*

Respondent is engaged in the manufacture of trucks in Hayward, California. Robert Block is the production manager; Richard Culhane, the section manager of personnel services, is in charge of benefits, medical, safety, personnel administration, employment, and training; Sharon McDermott was employment supervisor from February 19, 1977<sup>2</sup> to September 14,<sup>3</sup> and was succeeded in that position on September 19 by Stephen Buckner;<sup>4</sup> Peter Baturin and Louis Reis are section supervisors employed by Respondent, the former having been a general foreman and the latter a section supervisor and paint consultant at International Harvesters Truck Manufacturing Facility in San Leandro, California (herein called IH), prior to its closing in early 1975.<sup>5</sup> Jose Banuelos, the alleged discriminatee, was employed by IH from March 1969 until the plant closed on February 14, 1975, and was among a group of employees who were requested to stay on until March 23 in order to finish up the last trucks. He is presently employed by General Electric Company, Nuclear Energy Division, in San Jose, California. He began work for IH as an assembler, was promoted to final repairman a year later, and in 1972 became a painter, the position he held when the facility closed. Banuelos worked at IH in two departments, first in department 60, and in June 1974 was transferred to department 58. During his tenure in department 60, Banuelos was supervised by Section Supervisor Larry Wese, and at times by Section Supervisor Louis Reis who in turn were under

<sup>2</sup> All dates hereafter are in 1977 unless stated otherwise.

<sup>3</sup> McDermott was demoted on that date because she was not doing her job properly.

<sup>4</sup> Section Manager of Personnel Services Culhane took over McDermott's duties until Buckner assumed them on September 19.

<sup>5</sup> General foremen were over several section supervisors.

General Foreman Baturin.<sup>6</sup> During his employment in department 58, Banuelos appears to have been supervised at one time or another by Section Supervisors Michael Gavin, Vern Thomas, Robert Van Cour, and Reis, all of whom were under paint department General Foreman Michael Perfetto.<sup>7</sup> IH had, and Respondent had had since 1966, a collective-bargaining relationship with the Union covering, *inter alia*, the employees in both departments 58 and 60.

Although Banuelos was not a shop steward while assigned to department 60, he testified he had been very active in helping other employees write up grievances during his tenure in that department, and had personally filed a grievance against Reis. Edward Thompson, an employee in department 58 prior to Banuelos' transfer to that department, testified that 2 or 3 weeks before Banuelos started working in department 58, Reis told him and two other employees that "there was a new fellow, it would be new to us, coming up in the department that was a trouble-maker, and there would be some unrest." Reis identified the new fellow as Banuelos. Reis' testimony on the subject is as follows:

Q. (By Ms. Canning) Mr. Banuelos was a very active union steward when he was in both departments, wasn't he?

A. Yes.

\* \* \* \* \*

Q. (By Ms. Canning) What's the basis for your statement? Can you give us some examples of his activity?

A. Well, he was doing his job as a union steward.

Q. Filing grievances?

A. Right.

Q. Talking to the supervisors, when they were in violation of contract provisions?

A. Yeah.

Q. Anything else you can think of?

A. No. Safety problems.

Q. You considered Mr. Banuelos a trouble-maker though, didn't you?

A. Well, he was doing his job.

Q. Well, did you ever have occasion to call him a troublemaker?

A. I don't believe so.

Q. Wouldn't you remember that, if you made that statement? Is it that you don't recall or that you didn't make the statement?

A. I don't recall.

Q. You could have called him a trouble-maker?

A. I doubt it, but I don't recall ever saying that to him.

Q. Okay. Did you say it to anyone else?

A. No.

I decline to credit Reis with respect to his equivocal denial of such key testimony that would demonstrate the basis for his later reaction to Banuelos' employment by Respon-

<sup>6</sup> Baturin was over five section supervisors, each of whom supervised approximately 20 bargaining unit employees.

<sup>7</sup> Perfetto, who is currently employed by the Caterpillar Tractor Company, was over 8 section supervisors and approximately 160 unit employees.

dent. In contrast, the testimony of Thompson is of far superior persuasion on demeanor grounds of composure, candor, and spontaneously genuine recall. Accordingly, I credit his testimony that Reis referred to Banuelos as a troublemaker prior to his transfer to department 58, and conclude the description derived from Banuelos' activities in filing a grievance against Reis and in helping other employees write up grievances, clearly protected concerted activities.

Shortly after his transfer to department 58, Banuelos was elected shop steward, a position he held throughout the remainder of his employment by IH. As noted above, Reis acknowledged that Banuelos was a very active union steward, and admitted that Banuelos had filed a number of grievances against him.<sup>8</sup>

### B. *The April Interview*

In the fall of 1976, Banuelos submitted a resume to Respondent and completed a job application. In April, McDermott contacted Banuelos regarding a job interview since Respondent was seeking new hires to work in the place of regular production workers during summer vacations and on long-term leaves of absence. On April 20, Banuelos completed another employment application and was interviewed by McDermott.<sup>9</sup> While there is a dispute as to whether McDermott told Banuelos the job for which he was interviewing would be permanent or temporary with the possibility of permanency, the testimony shows that those employees hired at the time ultimately became permanent employees. At the time of the job interview, McDermott had in her possession a copy of Banuelos' resume, employment application, and a form entitled Pre Employment Recap, upon which she, and later Buckner and Culhane made notations regarding Banuelos' application for employment. In response to McDermott's having noted that Banuelos was making more money working for General Electric than the job for which he was interviewing paid, Banuelos explained that he enjoyed working on trucks and Respondent's plant was closer to his home. Banuelos informed McDermott that he would have to give his present employer 2-weeks notice, which McDermott noted on the Pre Employment Recap, beside which is written "temporary work only available at this time." Nevertheless, she advised him it was necessary that he take a physical examination, and sent him to Respondent's local physician with instructions to report back to Gallagher, the plant nurse, with the results of the physical. Following the physical, Gallagher asked him questions regarding his medical history and then sent him back to McDermott, who asked him

<sup>8</sup> Banuelos testified the grievances he handled against Reis and Van Cour "dealt with violation of the contract dealing with management doing bargaining unit work, unequal treatment, harassment, in the form of following people around so closely that it interfered with their job performance, also threatening physical violence to employees in department 58, and racial slurs and degrading remarks." He attempted to resolve some of these matters in direct discussions with the supervisors and others through special meetings called by IH management. Those involving alleged "racial slurs" and "degrading remarks" made in the latter part of 1974 resulted in charges being filed with the EEOC and California Fair Employment Practices Commission, herein FEPC, by union committeeman Ibbesson.

<sup>9</sup> Banuelos' resume contains handwritten notations indicating an attempt had been made to contact Banuelos on March 31, that on April 14 McDermott left a message, and that the interview was scheduled for 9 o'clock on April 20.

to wait in a conference room down the hall from her office. In the meantime, according to McDermott, Ron Dios, a former IH employee and now a section supervisor with Respondent, came to her office and asked what Banuelos was doing there, and she responded he had been interviewed for a job. Dios asked why she had not checked with him, and she replied that she had checked with Baturin, who had approved Banuelos' hire.<sup>10</sup> Dios suggested she talk to Reis, at about which point Reis entered her office and asked if Banuelos was being hired, and why she had not asked him first. She responded that Baturin had given his approval. According to Reis, he then told her "that Banuelos had worked for me at times, and that he wasn't that good of a worker . . . he wasn't that productive, that he was a goof-off." She replied that she could not check with Reis all the time and that she was in a hurry, that Baturin had given his approval. Baturin, who had entered McDermott's office at some point, then stated that as long as the Company had invested money in a physical, it was all right to hire Banuelos. McDermott noted on the Pre Employment Recap form "no" per R. Dios and L. Reis, former supervisors, "okay" P. Baturin. Banuelos testified that McDermott called him back into the office and asked when he could start work, and that he replied he had to give his present employer 2-weeks notice; that she responded she wanted him to start the following Monday, and he said it was not possible; and that she then told him that Respondent would be hiring "extensively" in August, and after Banuelos indicated he would wait until then, he left. While McDermott admits she offered Banuelos a job, she contends she told him on April 20 that the job was temporary and that she would be in contact with him. On April 21 she called and told him he had passed the physical and was acceptable for an available job on a temporary basis. She testified that Banuelos responded that he was not interested in temporary employment, that she responded it could possibly work into permanent employment, that he again stated he only wanted permanent employment, and that she told him his application would "be put on file."<sup>11</sup>

### C. *The September Interview*

On September 15, Banuelos called McDermott and informed her he was still interested in employment with Respondent.<sup>12</sup> McDermott noted the call on Banuelos' Pre Employment Recap, and within a few days Buckner, who succeeded McDermott as employment supervisor on September 19, called Banuelos and arranged for a job interview at 7:45 a.m. on September 20.<sup>13</sup>

<sup>10</sup> It was Respondent's practice to check former IH employee applicants with former IH supervisors currently employed by Respondent. Dios was not called to testify, and there is doubt in my mind that he was a former IH supervisor; however, as noted before, Baturin had been a general foreman and Reis a section supervisor at IH.

<sup>11</sup> I deem it unnecessary to determine whose version of the interview and post-interview conversation is more accurate since it is undisputed that McDermott offered Banuelos a job in April.

<sup>12</sup> On September 14, McDermott had been demoted from employment supervisor to personnel representative and no longer had employment responsibilities.

<sup>13</sup> Buckner testified that Culhane had given him a number of applicant folders on the 19th, and that he proceeded to set up employment interviews starting at 7 a.m. on the 20th. The new hires were to start work on Monday, September 26.

According to Buckner, he told Banuelos that Respondent was hiring employees to commence work the following Monday, September 26; that as a result of the interview, he found Banuelos to be a satisfactory applicant; that he told him job offers were contingent upon background checks and a physical, and sent him for a physical examination. He denied he made a job offer. McDermott, who had noticed Banuelos waiting to be interviewed, called Buckner's attention to the fact Banuelos had been interviewed in April, that there was a question regarding his qualification, and that he should check with the former IH supervisors.<sup>14</sup> The Pre Employment Recap carries the notation made by Buckner in the upper right right corner "W/S 9/26/77 at 7:00 a.m." Buckner testified the notation reflects Banuelos stated he "would start" on the specified date. I conclude, however, on the basis of Banuelos' credited testimony below and the failure of Respondent to call Gallagher to testify, that the notation W/S signified that Banuelos *will start* 9/26/77 at 7 a.m. Additionally, there would have been no point in adding the hour of 7 a.m. unless an offer had been made and a starting time specified.

Banuelos testified that Buckner had asked when he could start work and that he replied "immediately" to which Buckner responded that Monday, September 26, would be soon enough.<sup>15</sup> When asked if he would mind taking a physical, Banuelos pointed out the fact that he had taken one in April, which Buckner verified from the Pre Employment Recap.<sup>16</sup> He testified that Buckner then called Gallagher, the nurse, and learned that another physical examination was not necessary, but that the nurse wanted to review his medical history. Banuelos contends Buckner then told him he was hired pending the outcome of his medical report. Banuelos testified he reported to Nurse Gallagher and told her he was hired pending an okay on his medical; that she reviewed his medical record and advised him that everything appeared to be okay and asked him to step outside the room. Banuelos observed her through the glass in the door dial the telephone and speak with someone, after which she called him back in. According to Banuelos, "she told me that I was to report the following Monday to work, and to report to the personnel department. From there, I would be taken out to my immediate supervisor. She told me to wear work boots, wear work clothes, bring a bag lunch, if possible, and park in the bargaining unit parking lot. Then she asked me if I knew where the bargaining unit parking lot was. I said: No. She showed me a map how to get to the bargaining unit parking lot." Gallagher, who was still employed by Respondent, was not called as a witness, nor was an explanation given for the failure to call her. An inference adverse to a party who fails to call a witness otherwise available to it, or neglects to explain the failure to call such witness, has been established law since the early

<sup>14</sup> It is clear from the record that Buckner had Banuelos' Pre Employment Recap sheet which contained McDermott's notations regarding the reactions of Baturin, Reis, and Dios to Banuelos in April. The form also contains McDermott's notation that Banuelos' physical was "okay."

<sup>15</sup> Banuelos thought he could hold down two jobs at once during the notice time he would have to give General Electric. The job with Respondent would be the day shift starting at 7 a.m. and the General Electric job the evening shift.

<sup>16</sup> Buckner's testimony that he was not aware Banuelos had already had a physical examination is not credited. McDermott had noted it on the Pre Employment Recap form which was in Buckner's possession.

days of the Board. *Freuhauf Trailer Company*, 1 NLRB 68 (1935), reversed 85 F.2d 391 (6th Cir. 1936), 301 U.S. 49 (1937) reversing circuit and enforcing the Board. Accordingly, I credit Banuelos' account of the Gallagher interview and find that she told him to report for work on September 26 after talking with someone, whom I am convinced and infer was Buckner. Banuelos then left, and after starting his regular shift at 3:30 p.m. at General Electric, he informed Kolstad, his supervisor, that he had gotten another job and was giving his 2-week notice. They discussed a successor to Banuelos' job as group leader. He testified that later that day he received a call from Buckner, which he took in Kolstad's office, and was advised that after a review of his application, he was not hired because of a bad background check. According to Banuelos, he asked if Buckner had spoken with Baturin and Reis, and Buckner admitted he had spoken with Baturin, but was silent with respect to Reis. Banuelos, who was under the impression a review committee passed on applicants, asked Buckner to take his application back to the review committee. Buckner agreed to do so and told Banuelos to call him the next evening. According to Banuelos, Buckner told him that his production record was good "but there were other elements in my background that made [sic] him to believe that I wouldn't be suitable for employment at Mack Trucks."

The next afternoon about 5 p.m., according to Banuelos, he called Buckner from Kolstad's office and was told that Respondent was firm on its decision not to hire him. Banuelos asked if Buckner had contacted IH and was told that he had. No response was given to the question whether he had also contacted General Electric.<sup>17</sup> Questioned further for the reason he was not being hired, Banuelos contends Buckner stated, "Well, you're a troublemaker." Banuelos responded, "Well, if the supervisors didn't violate the contract or people's civil rights, that they would never have had any problems or troubles." Buckner replied, "Well, this is a union matter," and Banuelos agreed and stated he would take a different course of action. Kolstad corroborated Banuelos regarding the timing of the two telephone conversations and that at the conclusion of the second one Banuelos told him he did not have the job after all due to the fact he had a work record at some other place and "he was a troublemaker." Banuelos' account of the two conversations, corroborated in material parts by Kolstad, a disinterested witness, is credited.

In early October, Banuelos called Horace Russell, the custodian of IH's records since that plant closed in 1975, and advised Russell that he had applied for a job with Respondent which he had not gotten and wondered if IH had given him a bad report. Russell "pulled" Banuelos' employment file and told him, according to Russell, "There's no way" he could have given him a bad report "because he had a very clean file" with no warnings regarding his work. The fact Russell had not received an inquiry concerning Banuelos' employment from Respondent was confirmed in a letter of the same date to Banuelos. He also sent Banuelos the following recommendation bearing the same date:

<sup>17</sup> Kolstad denied he had received a call from Respondent regarding Banuelos.

October 5, 1977

To Whom It May Concern:

This will serve to introduce to you Jose N. Banuelos who was employed by us from March 10, 1969, until March 23, 1975, when we closed our San Leandro facility.

Jose was hired as an assembler and a year later promoted to final repairman. In August, 1972, he became a painter and remained in that position until his termination.

During his employment with us he compiled an outstanding attendance record, missing only 14 days in 4-1/2 years.

He has a clean record with no reprimands or other derogatory items in his file. Two previous employers also rated him outstanding in job performance, conduct, ability and attendance.

I am sure you will find him to be a quite capable and dependable employee.

Acknowledging on cross-examination that verbal reprimands ordinarily would not appear in a personnel file, Russell testified that if a foreman sees that verbal reprimands are not going to work, then "they are going to start building a case. They are going to make a written notation of that verbal reprimand. Then there is going to be a reprimand."<sup>18</sup> He went on to testify he was not contacted by anyone from Respondent regarding Banuelos until December 21 when Culhane called, at which time he "pulled" Banuelos' file, advised Culhane of the two letters he had written on October 5, "and I told him it was a good, clean record. It was a thin file." He testified he received another call from Culhane in early January 1978 wherein Culhane reported that Reis had not given Banuelos a good reference, to which Russell responded, "Well, there's nothing in the file, there's no reprimands in the file, other than the one where almost everybody in the plant had, during that wild-cat strike one day. Nothing derogatory whatsoever."

Buckner testified that after the September 20 job interview, his next contact with Banuelos was on September 21 when he returned a call Banuelos had made to him from General Electric. Banuelos, he testified, wanted to know what was happening to his application, and he responded that a decision had not yet been made, but that he would call him when a decision was made. He testified that a meeting was held on September 22 in Culhane's office with Baturin and Reis also present, and that the four of them reviewed a number of job applicants whom he had interviewed, including Banuelos. He testified that when Banuelos' name was brought up, Reis responded by saying "No. That application should be shit canned," and that Baturin nodded his head in agreement. He testified further "at this point, I was somewhat shocked, and asked why it was 'no,' and why was there such a quick decision on the applications that were not going to be hired? Mr. Reis informed me that Mr. Banuelos was basically a goof-off or a fuck-off, while he was at International Harvester and we did not want to pursue applicants like that . . . . That basically Mr.

<sup>18</sup> None of Banuelos IH supervisors claimed they had ever reduced any warning given Banuelos to writing.

Banuelos was a slow starter and needed constant supervision."<sup>19</sup> He denied the subject of the Union or civil rights activities was brought up.<sup>20</sup>

Reis testified first that he observed Banuelos' work for "roughly 3 months" on an off-and-on basis; then that he observed it "as long as he was in . . . either department," and finally "I would say a year," but that he was not sure. At another point in the trial he testified he observed Banuelos' work for 6 months. He based his characterization of Banuelos as a "goof-off" upon the "quantity" of his work.<sup>21</sup> Questioned regarding the basis for his characterization, Reis was unable to cite specifics and conceded it was just an "overall impression," that he could not rely on him to complete what was started. Questioned along the same line 5 days later in the trial, Reis testified that he was not directly involved with Banuelos all the time, but only when a foreman or supervisor in his department was sick, on vacation, "or something like that," and he would fill in. On those occasions, he testified, Banuelos "knew what to do, he knew how to do it . . . but he just didn't get it done." In explanation, he testified that when work started, Banuelos "would be the last one to get his coveralls on. If you tell him to pull a cab out and start in masking it, and I had to go to a different part of the plant, I'd come back and the cab was still there, it wasn't done yet. Just things that I always had to keep saying to him to do, which is not like a moving line, where something came by you and you had to do it all the time. It was just something that the individual had to get in and do." He claimed he had talked to Banuelos about the problem five or six times,<sup>22</sup> yet he never issued a written warning. Nor, apparently, did he make any written notation of verbal reprimands as Russell testified supervisors did if verbal reprimands were not effective. Other times, he claimed, he would come into the area and Banuelos would not be there.<sup>23</sup> He admitted that at one point Banuelos had been so involved with union work that he had to be taken off the production line. He also acknowledged that Banuelos, as a union steward, had filed a number of grievances against him, but did not remember what they were for. He denied initially remembering a grievance filed against him and Van Cour for using "racial and derogatory remarks," but then admitted meetings to discuss the problem "but I don't think it was basically at me." Asked specifically if he

<sup>19</sup> Culhane testified Buckner asked what was wrong with Banuelos, that he "looked pretty good on paper. Interviewed pretty well."

<sup>20</sup> Buckner claimed he had verified Banuelos' prior employment history by contacting both General Electric and IH. He made no notation in the file regarding who he talked to at IH or whether it had been Russell's office in San Leandro or the office in Fort Wayne, Indiana; however, he testified "I've contacted International Harvester on previous occasions in San Leandro and the Fort Wayne plant." Russell testified that he had never received a telephone call from Respondent regarding any employee. I conclude from Russell's credited testimony and from the fact Buckner had just assumed his duties with Respondent on September 20, that he had not, as he claimed, contacted IH "on previous occasions" in both San Leandro and Fort Wayne, and that he did not make the background check with IH that he claimed. Further, I credit Russell's testimony, not refuted by Culhane, that Culhane told him Respondent had not called IH regarding Banuelos because it relied on Baturin.

<sup>21</sup> Respondent admits no deficiency in the "quality" of Banuelos' work.

<sup>22</sup> He testified "I really don't know what I said."

<sup>23</sup> When Banuelos had union steward duties to conduct during working time, he secured authorization from his section supervisor or general foreman. In the absence of their authorization, he was permitted to sign himself out for union business.

was named in the grievance, he did not remember. Later, he "vaguely" remembered the meetings, but did not remember what was said.

Michael Perfetto, a former general foreman for IH, presently employed by Caterpillar Tractor Company, was called by Respondent and testified that Banuelos was technically talented and knew his job well, but was not a self-starter; that unless a foreman was present, he would stand around talking, "doing everything but what he was supposed to be doing"; that he knew just how far to push and what to get away with. While he was sure he talked to the section supervisors about Banuelos, he never verbally reprimanded him, nor did he ever remember ever talking to Banuelos regarding any of his shortcomings.

Baturin, against whom Banuelos filed no grievances, testified he did not "necessarily" agree with Reis' characterization of Banuelos at the September 22 meeting. As the general foreman, he had discussed the quantity and quality of each employee's work with the shift supervisors, but could not recall anything derogatory about Banuelos. Based upon his personal observation, the quantity of work put out by Banuelos was average.<sup>24</sup>

### Conclusions

The complaint alleges that Respondent refused to hire Banuelos because of his union or protected concerted activity. The principal question is what inspired Reis' animus toward Banuelos; whether it was because Banuelos filed grievances against him and was an active union steward, or whether it was because Banuelos was a low producer when he was employed by IH. It is beyond question that the filing and processing of grievances by an employee, whether or not a union steward, is a protected concerted activity protected by the Act. Also, it has long been established that applicants for employment are entitled to the protections of the Act. *Phelps-Dodge Corp. v. N.L.R.B.*, 313 U.S. 177 (1941). Further, it is settled law that the Board is not compelled to accept an employer's stated reason for discharge or refusal to hire where there is a reasonable cause for believing that the ground put forward by the employer was not the true one and the real reason was the employer's dissatisfaction with the employee's union or protected concerted activities.

Upon consideration of all the evidence, Respondent's contention that Banuelos was not hired because of his unsatisfactory production record with IH is not persuasive. I am convinced that Respondent's refusal to hire Banuelos in September was because of Reis' animosity toward him because of his having filed grievances against Reis and because he was an active union steward, and not for the reason advanced by Respondent.

The record establishes that prior to his transfer from department 60 to 58, Banuelos had filed a grievance against Reis; and when it became known Banuelos was transferring to department 58, Reis told Thompson and two other employees in that department that Banuelos was being transferred in and that he was a troublemaker and there would

be unrest. Reis' evaluation proved accurate, for after his transfer Banuelos became the shop steward and, according to Reis' own testimony, filed a number of grievances against him and also talked to him and other supervisors regarding contract violations and other problems. Reis' characterization of Banuelos as a troublemaker was later reiterated by Buckner in September in a telephone conversation with Banuelos, at which time Buckner told him Respondent had changed its mind about hiring him.

Respondent's defense is rife with contradictions. While Buckner testified he had contacted IH to verify Banuelos' employment history, the credited evidence proves otherwise. Not only did Russell deny he had been contacted by Buckner, Russell testified without contradiction that Culhane told him no one had called regarding Banuelos because they had relied on Baturin for references.<sup>25</sup> Asked by the General Counsel regarding whom he talked to at IH, Buckner claimed he could not recall. He then claimed "I've contacted International Harvester on previous occasions here in San Leandro and the Fort Wayne plant." Not only did Russell deny he had ever been contacted by anyone from Respondent regarding verification of employment of former IH employees, it is obvious Buckner had not called either IH office "on previous occasions," since he had just been hired. Knowing that a check had already been made in April, Buckner was satisfied with Banuelos' qualifications during the interview of September 20, and advised him, as Banuelos testified credibly, that he was hired pending a check of his medical history by Gallagher.<sup>26</sup> Buckner then noted on the Pre Employment Recap sheet "W/S 9/26/77 at 7:00 A.M.," indicating that Banuelos would start his employment on September 26 at 7 a.m. Thereafter Gallagher, after obviously talking to Buckner, told Banuelos to report the following Monday to the personnel department attired for work, and she pointed at the bargaining unit parking lot to him on a map.<sup>27</sup> Later that day, Buckner apparently had some misgivings due to Reis' intervention and called Banuelos at work at General Electric and told him he was not hired, but at Banuelos' request agreed to reconsider the decision. The following day, Buckner advised Banuelos that Respondent was standing firm in this decision and, when pressed for the reason, told Banuelos he was a troublemaker, the precise term used by Reis when he warned the employees of department 58 that Banuelos was being transferred to that department.

Respondent's characterization of Banuelos as a "goof-off," *inter alia*, and an unmotivated employee is likewise not convincing. Reis, who was never able to decide just how much supervisory contact he had had with Banuelos, was unable to cite the specifics and dwelt in generalities. Nor was Perfetto more convincing. Banuelos testified without contradiction that Perfetto had asked him to be a floater in department 58 in mid-1974. It was explained that a floater had to be able to do any job in the department at any time to fill in for absent workers, hardly a job for an unmotivated employee. Banuelos' claim that he had never been warned about being a slow worker was far more convincing

<sup>24</sup> In about January 1978, Banuelos filed charges against Respondent with the EEOC and FEPC. The General Counsel specifically denied any contention that the alleged discrimination herein was due to Banuelos' Spanish heritage.

<sup>25</sup> Baturin had approved Banuelos' hire in April.

<sup>26</sup> Culhane testified Buckner had stated Banuelos looked "good on paper."  
<sup>27</sup> I have noted earlier the failure to call Gallagher as a witness regarding this critical aspect, and accordingly have credited Banuelos.

than Reis' claim that he had, and Peretto admitted he had not ever spoken to Banuelos about the problem. Further convincing me that Respondent's excuse for not hiring Banuelos was a subterfuge is the fact his personnel file at IH contains no written warnings or any notations of verbal warnings. In this regard, Russell, the custodian of the IH personnel files, testified that if a verbal warning was not successful, the foreman started building a case by making written notations of verbal reprimands, followed by a written reprimand. Banuelos' personnel file revealed no such action taken with respect to him. I find it hard to believe that the personnel file of an employee as deficient in motivation as Banuelos was characterized by Respondent's witnesses, if true, did not contain even a written notation of a verbal reprimand. To the contrary, as evidenced by Russell's letter of recommendation, "he had a clean record with no reprimands or other derogatory items in his file. Two previous employers also rated him outstanding in job performance, ability and attendance." Furthermore, I find it unlikely that when IH closed its plant on February 14, 1975, Banuelos would have been one of the few people retained until March 23 to finish the last trucks on the assembly line unless he was a motivated employee. Moreover, Baturin had approved Banuelos' hire in April. Basing his evaluation on personal observation, he testified that the quantity of work Banuelos produced was average and that he did not "necessarily" agree with Reis' characterization of Banuelos.

In *Shattuck Denn Mining Corporation (Iron King Branch) v. N.L.R.B.*, 362 F.2d 466, 470 (9th Cir. 1966), the court stated that where the trier of fact finds that an asserted motive is false, he can infer that there is another motive. "More than that, he can infer that the employer desires to conceal—an unlawful motive—at least where the surrounding facts tend to reinforce that inference." Here, "the surrounding facts" preponderate in favor of a finding that Respondent, in refusing to hire Banuelos, was motivated by Reis' animus toward him because of his protected concerted activities, and that the reasons advanced by Respondent are false. Accordingly, by such conduct, Respondent violated Section 8(a)(3) and (1) of the Act.

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

The activities of Respondent set forth in section III above, occurring in connection with the operation of Respondent as described in section I above, have a close, intimate, and substantial relationship 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

Having found that Respondent has engaged in unfair labor practices in violation of Section 8(a)(3) and (1) of the Act, I shall recommend that Respondent cease and desist therefrom and take certain affirmative action in order to effectuate the policies of the Act. I shall recommend that Respondent be required to offer Jose Banuelos immediate employment in the bargaining unit of which International

Union, United Automobile, Aerospace and Agricultural Implement Worker of America, United Auto Workers Union Local 76 is the representative without prejudice to seniority and other rights and privileges he would have enjoyed had he been employed on September 26, 1977, or, in the event no such vacancy exists, and no employee has been hired since September 26, 1977, in the bargaining unit of which said Union is the representative, establish a preferred hiring list and place the name of Jose Banuelos at the top of said list. In such latter event, Jose Banuelos is to be offered employment at such time as a vacancy may occur in the bargaining unit which the Union represents. I shall further recommend that Respondent make Banuelos whole for any loss of pay he may have suffered from September 26, 1977, by reason of the discrimination against him. The backpay shall be computed on a quarterly basis in the manner set forth in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest thereon as set forth in *Florida Steel Corporation*, 231 NLRB 651 (1977).<sup>28</sup>

It is also recommended that Respondent make available to the Board, upon request, all payroll and other records to facilitate checking the amount of backpay due.

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

#### CONCLUSIONS OF LAW

1. Respondent is an employer 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. By refusing to hire Jose Banuelos on or about September 26, 1977, because of his union and protected concerted activities, Respondent has engaged in an unfair labor practice within the meaning of Section 8(a)(3) and (1) of the Act.
4. The aforesaid unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

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

#### ORDER<sup>29</sup>

The Respondent, Mack Trucks, Inc., Hayward, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:
  - (a) Refusing to hire employees who are engaging in union and/or protected concerted activities.
  - (b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.
2. Take the following affirmative action necessary to effectuate the policies of the Act:

<sup>28</sup> See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

<sup>29</sup> In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(a) Offer to Jose Banuelos immediate employment in the bargaining unit of which International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, United Auto Workers Union Local 76 is the representative without prejudice to seniority and other rights and privileges he would have enjoyed had he been employed on September 26, 1977, or, in the event no such vacancy exists, and no employee has been hired since September 26, 1977, in the bargaining unit of which said Union is the representative, establish a preferred hiring list and place the name of Jose Banuelos at the top of said list. In such latter event, Jose Banuelos is to be offered employment at such time as a vacancy may occur in the bargaining unit which the Union represents.

(b) Make Jose Banuelos whole for any loss of pay he may have suffered as a result of the discrimination against him by paying him a sum of money equal to that which he would have earned absent the discrimination.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records and reports, and all other records necessary or

useful to determine the amount of backpay due under the terms of this Order.

(d) Post at its facilities in Hayward, California, copies of the attached notice marked "Appendix."<sup>30</sup> Copies of said notice, on forms provided by the Regional Director for Region 32, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 32, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

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<sup>30</sup> In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."