

In the Matter of WARSAW ELEVATOR COMPANY and UNITED STEEL-  
WORKERS OF AMERICA, C. I. O.

*Case No. 3-C-670.—Decided November 19, 1943*

DECISION

AND

ORDER

On October 9, 1943, the Trial Examiner issued his Intermediate Report in the above-entitled proceeding, finding that the respondent had engaged in and was engaging in certain unfair labor practices, and recommending that it cease and desist from the unfair labor practices found and take certain affirmative action, as set out in the copy of the Intermediate Report attached hereto. Thereafter the respondent filed exceptions to the Intermediate Report and a supporting brief. No request for oral argument before the Board at Washington, D. C., was made by any of the parties. The Board has considered the rulings of the Trial Examiner at the hearing and finds that no prejudicial errors were committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the respondent's brief and exceptions, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, with the additions noted below:

1. The Trial Examiner found, and we agree, that the respondent discharged Alvin Cook because of his union membership and activity. In making this finding we consider it significant that, as in the case of Frederick Ellsworth Perkins, Cook's release or "statement of availability" gave as the reason for the termination of Cook's employment that he had resigned, whereas the record shows the contrary to be the fact.

2. The respondent contends in its brief before the Board that, prior to and during the hearing, it offered reinstatement to Perkins and Cook. Since the respondent discriminated in regard to the hire and tenure of employment of Perkins and Cook, it was the duty of the respondent to offer each of these employees reinstatement to his former or substantially equivalent employment without prejudice

to his former rights and privileges. The record shows, and we find, that the respondent did not make such an offer.<sup>1</sup>

### ORDER

Upon the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the respondent, Warsaw Elevator Company, Warsaw, New York, and its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in United Steelworkers of America, C. I. O., or in any other labor organization of its employees, by discharging or refusing to reinstate any of its employees, or by discriminating in any other manner in regard to their hire or tenure of employment or any term or condition of their employment;

(b) In any other manner interfering with, restraining, or coercing its employees in the exercise of 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 concerted activities, for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act.

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

(a) Offer Frederick Ellsworth Perkins and Alvin Cook immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges;

(b) Make whole Frederick Ellsworth Perkins and Alvin Cook for any loss of pay they have suffered by reason of the respondent's discrimination against them, by payment to each of them of a sum of money equal to the amount which he normally would have earned as wages from June 29, 1943, to the date of the respondent's offer of reinstatement, less his net earnings during said period;

(c) Post immediately in conspicuous places throughout its plant at Warsaw, New York, and maintain for a period of at least sixty (60) consecutive days from the date of posting, notices to its employees stating: (1) that the respondent will not engage in the conduct from which it is ordered to cease and desist in paragraphs 1 (a) and (b) of this Order; (2) that the respondent will take the affirma-

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<sup>1</sup> *Matter of Maynard K Van Deusen*, 45 N. L. R. B. 679, 697, enforced in 138 F. (2d 893 (C. C. A. 2), decided November 4, 1943.

tive action set forth in paragraphs 2 (a) and (b) of this Order; and (3) that the respondent's employees are free to become and remain members of United Steelworkers of America, C. I. O., and that the respondent will not discriminate against any employee because of his membership or activity in that organization;

(d) Notify the Regional Director for the Third Region in writing, within ten (10) days from the date of this Order, what steps the respondent has taken to comply herewith.

MR. GERARD D. REILLY took no part in the consideration of the above Decision and Order.

#### INTERMEDIATE REPORT

*Mr. Peter Crotty*, for the Board.

*Kenefick, Cooke, Mitchell, Bass & Letchworth*, by *Mr. Lyman M. Bass*, of Buffalo, N. Y.; *Edward J. McEvoy*, of Warsaw, N. Y., for the respondent.

*Messrs. Edward Janiack, George Male, and James Carlton*, of Buffalo, N. Y., for the Union.

#### STATEMENT OF THE CASE

Upon a charge duly filed on July 15, 1943, by United Steelworkers of America, C. I. O., herein called the Union, the National Labor Relations Board, herein called the Board, by its Regional Director for the Third Region (Buffalo, New York), issued its complaint dated September 2, 1943, against Warsaw Elevator Company, herein called the respondent, alleging that the respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8 (1) and (3) and Section 2 (6) and (7) of the National Labor Relations Act, herein called the Act. Copies of the complaint, accompanied by notice of hearing thereon, were duly served upon the respondent and the Union.

With respect to the unfair labor practices, the complaint, as amended at the hearing,<sup>1</sup> alleged in substance that the respondent: (1) on or about June 29, 1943, discharged and thereafter refused to reinstate Frederick Ellsworth Perkins<sup>2</sup> and Alvin Cook because of their membership in the Union and because of their concerted activities for the purpose of collective bargaining; (2) from June 20, 1943, to the time of the issuance of the complaint attempted to discourage its employees in their right to form, join, or assist labor organizations by interrogating its employees about their Union activities, by threatening to discharge employees for taking part in Union activities, and by discharging the aforementioned employees.

The answer of the respondent, filed September 22, 1943, denied the commission of the unfair labor practices alleged, and averred that the respondent released the alleged discharges on their own request.

Pursuant to notice, a hearing was held at Warsaw, New York, on September 23 and 24, 1943, before James R. Hemingway, the undersigned Trial Examiner duly designated by the Chief Trial Examiner. The Board and the respondent were represented by counsel and the Union by lay representatives. Full oppor-

<sup>1</sup> The complaint was amended to correct the name of one of the alleged discharges from Sherman Cook to Alvin Cook, and the date of the alleged discharges from July 29 to June 29.

<sup>2</sup> Named in the complaint as Ellsworth Perkins

tunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing upon the issues was afforded all parties.

At the close of the Board's case the attorney for the respondent moved to dismiss the complaint. This motion was denied without prejudice to his right to renew the motion at the close of the hearing. At the close of the hearing the respondent's attorney renewed his motion to dismiss the complaint and ruling thereon was reserved. The motion to dismiss the complaint is herewith denied. Counsel for the Board and for the respondent argued orally before the undersigned, and the respondent has filed a brief.

Upon the entire record in the case and from his observation of the witnesses, the undersigned makes the following :

#### FINDINGS OF FACT

##### I. THE BUSINESS OF THE RESPONDENT

The respondent is a New York Corporation engaged at Warsaw, New York, normally in the manufacture and sale of passenger and freight elevators and parts and equipment therefor, but is now engaged exclusively in war work, manufacturing essential goods for the United States Navy. At the time of the hearing it had in its employ 241 persons exclusive of foreman and office workers. During the year 1942, the respondent used at its Warsaw plant raw materials of a value of approximately \$150,000 of which about one-third were imported from without the State of New York. During the same period the respondent manufactured finished products of the value of approximately \$800,000, about 90 percent of which was shipped from the plant to points outside the State of New York. The respondent admits that it is engaged in commerce within the meaning of the Act.

##### II. THE ORGANIZATION INVOLVED

The United Steelworkers of America, affiliated with the Congress of Industrial Organizations, is a labor organization admitting to membership employees of the respondent employed at the plant.

##### III. THE UNFAIR LABOR PRACTICES

###### A. *The inception of the Union*

In early June 1943, employees Frederick E. Perkins and Alvin Cook, being interested in organizing a union at the respondent's plant, drove to Batavia, New York, and talked with one Pastor, an officer of the local of the Union there. Pastor suggested they communicate with the Buffalo office of the Union. Perkins did so, and on June 18, James Carlton and Edward Janiak, representatives and organizers for the Union, came to Warsaw. Carlton gave Perkins some application cards, some of which Perkins gave to Cook. These two employees then talked to other workmen and solicited signatures. On Thursday evening, June 24, 1943, a meeting was held, at which Carlton, Janiak, and about 20 of the respondent's employees, including Perkins and Cook, were present. Perkins and Cook had signed their application cards, and, along with others, they delivered them to Carlton at the meeting.

###### B. *The interference, restraint, and coercion*

About the 24th of June, Earl Herman, foreman of the assembly department, where Perkins worked, called Perkins up to his desk during working hours and asked what it was he had been hearing about a union. Perkins told him

that "the boys" were talking of starting a union, whereupon Herman replied that it was not the time or place to start a union and that the employees would lose their bonus and overtime if the Union "went in." Perkins said it was up to the employees, and if they wanted a union, he would help them. Herman then said that it was "a one-man agitation" and that, if that one man stopped agitating, it would quiet down. Perkins then admitted to Herman that he had done more than the rest toward starting it.

On June 25, 1943, the day following the union meeting, James G. Warfel, foreman of the machine shop, approached Cook and asked him what it was he (Warfel) had heard about union talk. Cook replied that he did not know what it was that Warfel had heard, but he admitted there was some talk about a union. Warfel then said that it was his personal opinion that the men lacked the intelligence to start a union and that, while a union might have been all right in a larger place, he "did not think that a Union was the thing in Warsaw."<sup>3</sup> Cook replied that he did not "like the reference to our intelligence."

That same day, during working hours, Herman came to Perkins and asked how he came to be connected with the Union. Perkins replied that there were "lots of reasons" and that "the boys wanted it." On Tuesday, June 29, 1943, about the middle of the forenoon,<sup>4</sup> Herman came to Perkins and said he was sorry Perkins had "got mixed up with them" and that Mr. McEvoy<sup>5</sup> "would have it in for" him "whether the Union went in or not." Perkins said he did not see "why they would have so much objection to the Union." Herman replied that "they had just got through having trouble with them in Buffalo" where there had been a strike.<sup>6</sup>

Early in July 1943, Herman called to his desk employee Stephen S. Case, another member of the Union, and, according to Case's undenied testimony, which the undersigned credits, asked him if he "wasn't satisfied." Case said he was and asked what was the matter. Whereupon Herman asked, "Why to [sic] hell are you monkeying with the Union for?" Case replied, "Because . . . I think it is a damn good thing." Then Herman said, "I got orders from Mr. McEvoy anybody I caught monkeying with the Union to fire them."<sup>7</sup>

The undersigned finds that, by the statements of Warfel and Herman, the respondent has interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act.

### C. *The discharge of Perkins*

Perkins, previously a painter and paperhanger, was employed by the respondent as a laborer on September 7, 1942, at 45 cents per hour. At first he painted

<sup>3</sup> While Warfel's statement was expressed as his personal opinion, it was unsolicited by Cook, and the undersigned finds that it was designed to influence the conduct of the employees.

<sup>4</sup> Working hours were from 7 a. m. to 6 p. m. with an hour for lunch.

<sup>5</sup> Edward J. McEvoy, the respondent's president.

<sup>6</sup> The findings as to all of Herman's statements made to Perkins are based on Perkins' undenied testimony, which is credited by the undersigned. There was no substantial difference between the testimony of Cook and of Warfel as to what each said in their conversation, which the undersigned finds took place as related above.

<sup>7</sup> McEvoy denied having given any such instructions. Whether or not McEvoy did issue such instructions is a question which the undersigned finds it unnecessary to resolve in view of the fact that Herman did not deny having made the statement and because the effect of the statement upon the employees would be the same whether or not Herman was truthful in relating the fact that he had received such orders. Furthermore, Herman had authority to discharge without consulting McEvoy.

elevator cars and parts. About 2 or 3 weeks later he was set to work making brakes, but at times when there was no other work he did painting and other odd jobs. Within two months after he started, he had received two five cent raises. All wage increases at the plant are granted on the basis of merit. On May 8, 1943, Perkins, being dissatisfied that he had failed to be raised to 60 cents an hour when other men in his department were raised to that wage, left work and, without further notice, failed to return. On May 20, 1943, his brother-in-law brought him word that Foreman Herman wanted to know if he intended to return. That day Perkins went to see Edward J. Muldoon, personnel director and paymaster at the plant, and asked for his release. Muldoon told him that the respondent was not giving any releases.<sup>8</sup> In response to Muldoon's question as to why Perkins had left, the latter replied that he felt he should have received the same raise the other men got, and Muldoon suggested that he see Herman. Perkins talked to Herman, who asked him if he was ready to go back to work. Perkins replied that he would return if he got a raise. Herman told him he would give him a raise if he would return to work. On May 24, 1943, Perkins returned to work, and at the end of that week he was raised to 60 cents per hour retroactively to the first of the week.

As above found, Perkins received application cards from Carlton on June 18; he passed some of these out and solicited applicants at the plant; his own card he turned in at the union meeting on Thursday night, June 24; during the day on Thursday, Herman questioned Perkins about the Union and sought to discourage him in his activities on behalf thereof, expressing disapproval and suggesting that the employees would lose their bonus and overtime if the Union "went in"; the following day Herman again questioned Perkins about his interest in the Union; and about the middle of the morning of the following Tuesday, Herman expressed his regret that Perkins had become involved in the Union.<sup>9</sup> That same morning at about 10:45 a m., Herman, according to his testimony, reported to Muldoon that Perkins was still dissatisfied and that Muldoon should make up Perkins' time in full to noon. Herman signed a release form for the respondent's file which stated as a reason for Perkins' release, "Resigned," and told Muldoon to make up a release for Perkins. At noon Muldoon removed Perkins' time card from the rack. Shortly thereafter, a plant guard came to Perkins and told him he had been instructed to take Perkins' badge.<sup>10</sup> The guard handed him his pay envelope and escorted him to the door. Perkins was informed a few days thereafter that his release was ready for him, but he did not call for it because, as he testified, he "did not want to quit." A few days later he received his release by mail.

Herman testified that, upon several occasions after May 24, 1943, Perkins had expressed dissatisfaction with his wages; that the last time was either the day

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<sup>8</sup> This was in accordance with the respondent's understanding of the procedure approved by the War Manpower Commission in the case of employees who were not discharged but sought to resign. Muldoon testified that in the first half of June he talked with a representative of the United States Employment Service and asked him "if a man came up and asked us for a release and was dissatisfied with his wages and we did not feel he was entitled to any more money, how we would handle it. He said, 'You could either refuse to give the man a release, or give the man a release. Entirely up to your own judgment.'" Pursuant to this conversation and Muldoon's report thereof to McEvoy, according to Muldoon's testimony, the respondent on about June 14 changed its practice so as to grant statements of availability (releases) to dissatisfied employees who asked to be released.

<sup>9</sup> Perkins was not certain of the time of the first two talks, originally laying them as on Friday and Monday, but later he changed the days to Thursday and Friday. Herman did not deny having made any of these statements.

<sup>10</sup> Identification badge worn by war workers, without which they cannot enter the plant.

before or two weeks before Perkins was released;<sup>11</sup> that it was the respondent's policy not to keep dissatisfied employees; that Perkins had not asked for his release since he returned to work in May; and that, although he had stated as a reason for the termination of Perkins' employment that Perkins resigned, the word "resigned" was used in place of "discharged," and that the latter was the more accurate term.

Perkins denied that he had at any time since May 20 expressed any dissatisfaction with his wages and denied that he had asked for a raise or a release after May 20, averring that, while there was one man in his crew who was getting 65 cents per hour, the others were all getting 60 cents, and that, although he did not like to be the only one to receive a lower rate, he was satisfied as long as he was kept even with the majority of the men.

Herman testified that he did not know that Perkins was a member of any union, but he did not deny that he had accused Perkins, as the latter testified, of a "one-man agitation" in favor of the Union, and he did not deny that Perkins had, in response, admitted being the one who had done most toward starting the Union. On the basis of all the evidence, the undersigned finds that Herman was aware of Perkins' interest in, and activity on behalf of, the Union.

While the respondent's answer averred that Perkins was given his release because he asked for it, the main course of the respondent's testimony aimed to excuse an admitted discharge on the ground that Perkins was dissatisfied with his wages. It is noteworthy that Herman did not consider Perkins' alleged dissatisfaction as sufficient cause to prompt the discharge prior to the time when Perkins became active on behalf of the Union. The undersigned received an impression of utter candor from Perkins' testimony but received a contrary impression from Herman's testimony, particularly since the latter, with respect to Perkins' alleged request for a release and a raise, was vague and vacillating. Perkins' denial that he had expressed any dissatisfaction or even asked for an-

<sup>11</sup> Herman's testimony as to when Perkins was supposed to have spoken of dissatisfaction with his wages and of wanting a release was inconsistent as the following excerpts therefrom show:

*(Direct examination)*

Q. Did he [Perkins] ever ask you for a release again after May or before June 29th?

A. No.

Q. Didn't he have some talk with you a couple of weeks before he left about a release?

A. He told me he, if he didn't get any more money he wanted a release.

Q. About when was the last time he told you that?

A. It might have been two weeks.

Q. Did he indicate to you by any word that he was not satisfied unless he got the raise?

A. Yes, he did.

*(Cross-examination)*

Q. Was that [May 20] the last time he asked you for a release?

A. I think he talked to me once after that.

Q. When was that?

A. I think along about the middle of June.

*(Redirect Examination)*

Q. . . . Just in plain English what was the basis for your going in and asking Mr. Muldoon to give him a release and paying him off?

A. Because he spoke to me the day before, and said he ought to have more money.

*(Examination by the Trial Examiner)*

Q. So after he got that raise [in May], he did not ask you for a release between that time and the time he was finally released?

A. No.

Q. Now, before the 28th of June, did you have any intimation that Mr. Perkins was dissatisfied with what he was making?

A. Yes, he spoke to me once or twice he ought to get the same amount of money that the other men in the gang did.

Q. Can you fix a time on that?

A. It might have been a week or ten days before.

other raise above 60 cents is therefore credited, and the undersigned finds that dissatisfaction was not the real reason for Perkins' discharge.

In view of the proximity of Perkins' discharge to his initial union activity in the plant; in view of Herman's prompt and repeated expressions of disapproval of the Union, the last of which was made to Perkins coincidentally with the time Herman decided to discharge him; in view of the respondent's failure to show any plausible excuse for Perkins' discharge; and upon the entire record of the case, the undersigned concludes and finds that Perkins was discharged because of his union membership and activity in contravention of the Act.

#### *D. The discharge of Cook*

Cook was employed by the respondent on April 28, 1942, as a lathe operator at 50 cents per hour. Before the end of the year he had received two 5 cent merit raises. About the first week of June 1943, Cook asked Muldoon if he could get a release "a little later." Muldoon told him, as he had Perkins, that the respondent was not giving releases. About the middle of June, Muldoon mentioned Cook's request to Warfel, who went to Cook and asked him what the trouble was. Cook said he was not getting enough money, and Warfel told him he would see if he could get him a raise.

When Perkins first sought to contact the Union, Cook went with him to Batavia, New York, to talk to a union official there, and later, after Perkins had received a pack of application cards from Carlton, Perkins gave Cook about 20 of the cards. Cook spoke to several of the employees, passed some of the cards out, and procured one or two signatures, but he appears to have done little of this in the plant. Cook signed an application card on June 22, 1943, and delivered it to Carlton at the meeting two days later.

Warfel came to Cook during working hours on Friday, the day following the union meeting, questioned him about the Union, and commented that he did not consider the Union as "the thing" in Warsaw and that he thought the men there lacked the intelligence to start a union. Cook replied that he objected to the latter remark. That same day, according to Muldoon, Cook asked him for a raise or for a release. Muldoon referred him to Warfel. On either Monday or Tuesday morning following, Warfel came to Cook and said that he had learned that Cook had previously applied for a release and that he thought that it could now be arranged. Cook replied that he would let him know in 10 days.<sup>12</sup> At about 10 a. m. on Tuesday, June 29, Warfel, having received information that a 5-cent raise to 65 cents per hour, which he had recommended, had been approved for Cook, effective from June 24, went to Cook and gave him the news and asked him if it satisfied him. Cook, according to Warfel's testimony, said he thought he ought to have 70 cents, whereupon Warfel told Cook that, according to the rules of the respondent, he could not increase him more than a nickel at a time and that if he still wanted his release he would arrange it immediately. Cook replied that he wanted to think it over. Warfel, then returned to his office and, as he testified, considered the matter. Shortly, without waiting to hear Cook's decision, he decided to let Cook go, went to Muldoon, and told him to make out Cook's release. Muldoon made up Cook's pay to noon, placed it in an envelope, and gave it to the plant guard to give to Cook. The guard took Cook's badge and gave him his pay envelope. Cook went out and started down the street but returned

<sup>12</sup> This conversation probably took place on Tuesday, June 29. Cook gave it first as the 28th but later as the 29th. Warfel's testimony places his statement on the 29th and combines it with the conversation in which he informed Cook of his raise.

about 15 minutes later and asked Muldoon for his release. Muldoon prepared his statement of availability and gave it to him.

Warfel testified that he did not know that Cook was a union member. The denial is inconclusive since it fails to cover Cook's interest in, and activity on behalf of the Union. Warfel testified, "The fellows would come to me and would say, 'What do you hear about the Union?' And I would say, 'Nothing, what do you know about it?'" He admitted, however, that Cook had not asked his opinion and that he had gone to Cook and opened the conversation about the Union himself. His remarks in that conversation were designed to discourage Cook from union organization. From all the evidence, the undersigned is convinced and finds that Warfel knew that Cook was interested in the organization of the Union.

As in the case of Perkins, the respondent's answer averred that Cook was given his release because he asked for it. But here again the testimony indicated that the release was not given because of a request, since, when Warfel told Cook he could have his release, Cook had said he wanted more time to think it over, and Warfel directed Cook's release to be made out before Cook indicated his decision. The following excerpt from Warfel's testimony on direct examination makes this plain:

Q. And what was the plain English reason as to why you went in and asked Muldoon to pay him up and give him [Cook] his release?

A. I did not want anyone that was dissatisfied working in the machine shop. Concerning dissatisfaction as a ground for Cook's discharge, Warfel said: "I never like to have a dissatisfied man around. They can do more harm than good . . . If they are not satisfied, their heart is not in their work" No testimony was offered, however, to show that Cook's work had been affected by dissatisfaction. Warfel testified that Cook "stuck close to his lathe" and admitted that the release of Cook had nothing to do with the quality of the latter's work. While Warfel stated in the respondent's release form that the quality of Cook's work was fair, Cook testified, and Warfel admitted, that the latter had complimented Cook on his work, the latest occasion being in the month of June 1943.<sup>13</sup> McEvoy testified that at that time the respondent needed mechanics. Muldoon testified that when dissatisfied employees sought their releases he urged them to stay, that he had done so previously with both Perkins and Cook, but that he did not do so with either of them on June 29.

The fact that the directions for the release of Perkins and Cook—the two men responsible for the commencement of union activity at the plant—were given at approximately the same time of the same day is a significant coincidence. The undersigned likewise views as significant the fact that, although neither Perkins nor Cook had expressed a desire to terminate his employment on Tuesday, June 29, both were summarily dismissed, not only without being allowed to finish the work week, which would have given them the right to the customary weekly bonus which the respondent gave, but without even being allowed to finish the work day. The undersigned is not convinced that, absent discrimination based on union interest and activity, the respondent would have discharged a man as much needed and a man who was as satisfactory a workman as Cook was, and he therefore concludes and finds that Cook was discharged because of his union membership and activity in contravention of the Act.

By the discharge of Perkins and Cook the respondent has discriminated in regard to their hire and tenure of employment, thereby discouraging membership

<sup>13</sup> The respondent's counsel stated for the record, "I want to say the Company does not raise any question but what Mr. Cook was a very excellent workman."

in the Union, and interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act.

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

The activities of the respondent set forth in Section III above, occurring in connection with the operations of the respondent set forth 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

Since it has been found that the respondent has engaged in certain unfair labor practices, it will be recommended that it cease and desist therefrom and take affirmative action designed to effectuate the policies of the Act.

Since it has been found that the respondent has discriminated in regard to the hire and tenure of employment of Frederick Ellsworth Perkins and Alvin Cook, it will be recommended that the respondent offer to each of them immediate and full reinstatement to his former or substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make each of them whole for any loss he may have suffered by such illegal discrimination, by payment to him of a sum of money equal to the amount which he normally would have earned as wages from June 29, 1943, to the date of the respondent's offer of reinstatement, less his net earnings<sup>14</sup> during such period.

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

#### CONCLUSIONS OF LAW

1. The United Steelworkers of America, C. I. O., is a labor organization, within the meaning of Section 2 (5) of the Act.
2. By discriminating in regard to the hire and tenure of employment of Frederick Ellsworth Perkins and Alvin Cook, the respondent has engaged in and is engaging in unfair labor practices, within the meaning of Section 8 (3) of the Act.
3. By interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, the respondent has engaged in and is engaging in unfair labor practices, within the meaning of Section 8 (1) of the Act.
4. The aforesaid unfair labor practices are unfair labor practices affecting commerce, within the meaning of Section 2 (6) and (7) of the Act.

#### RECOMMENDATIONS

Upon the basis of the foregoing findings of fact and conclusions of law, the undersigned recommends that the respondent, Warsaw Elevator Company, Warsaw, New York, its officers, agents, successors, and assigns shall:

<sup>14</sup> By "net earnings" is meant earnings less expenses, such as for transportation, room, and board, incurred by an employee in connection with obtaining work and working elsewhere than for the respondent, which would not have been incurred but for his unlawful discharge and the consequent necessity of his seeking employment elsewhere. See *Matter of Crossett Lumber Company and United Brotherhood of Carpenters and Joiners of America, Lumber and Sawmill Workers Union, Local 2590*, 8 N. L. R. B. 440. Monies received for work performed upon Federal, State, county, municipal, or other work-relief projects shall be considered as earnings. See *Republic Steel Corporation v. N. L. R. B.*, 311 U. S. 7.

1. Cease and desist from:

(a) Discouraging membership in United Steelworkers of America, C. I. O., or in any labor organization of its employees, by discharging or refusing to reinstate any of its employees, or in any other manner discriminating in regard to their hire and tenure of employment or any term or condition of their employment;

(b) In any other manner interfering with, restraining, or coercing its employees in the exercise of their right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act.

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

(a) Offer to Frederick Ellsworth Perkins and Alvin Cook immediate and full reinstatement to their former or substantially equivalent positions without prejudice to their seniority or other rights and privileges;

(b) Make whole the said Perkins and Cook for any loss of pay each may have suffered by reason of the respondent's discrimination against him, in the manner set forth in the Section entitled "The remedy" above, less their respective net earnings<sup>15</sup> during said period;

(c) Post immediately in conspicuous places throughout its plant and maintain for a period of at least sixty (60) consecutive days, notices to its employees stating: (1) that the respondent will not engage in the conduct from which it is recommended that it cease and desist in paragraphs 1 (a) and (b) hereof; (2) that the respondent will take the affirmative action set forth in paragraphs 2 (a) and (b) hereof; and that the respondent's employees are free to become and remain members of United Steelworkers of America, C. I. O., and that the respondent will not discriminate against any of its employees because of membership in or activity on behalf of such organization;

(d) Notify the Regional Director for the Third Region in writing within ten (10) days from the date of the receipt of this Intermediate Report what steps the respondent has taken to comply herewith.

It is further recommended that unless on or before ten (10) days from the date of the receipt of this Intermediate Report the respondent notifies said Regional Director in writing that it will comply with the foregoing recommendations, the National Labor Relations Board issue an order requiring the respondent to take the action aforesaid.

As provided in Section 33 of Article II of the Rules and Regulations of the National Labor Relations Board, Series 2—as amended, effective October 28, 1942—any party may within fifteen (15) days from the date of the entry of the order transferring the case to the Board, pursuant to Section 32 of Article II of said Rules and Regulations, file with the Board, Rochambeau Building, Washington, D. C., an original and four copies of a statement in writing setting forth such exceptions to the Intermediate Report or to any other part of the record or proceeding (including rulings upon all motions or objections) as he relies upon, together with the original and four copies of a brief in support thereof. As further provided in said Section 33, should any party desire permission to argue orally before the Board, request therefor must be made in writing to the Board within ten (10) days from the date of the order transferring the case to the Board.

JAMES R. HEMINGWAY  
*Trial Examiner*

Dated October 9, 1943.

<sup>15</sup> See footnote 14, *supra*.