In the Matter of AMERICAN PACKING CORPORATION *and* JOHN COLE

Case No. 2–CA–17.—Decided April 11, 1949

DECISION

AND

ORDER

On November 26, 1948, Trial Examiner Josef L. Hektoen issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices in violation of Section 8 (a) (1) and Section 8 (a) (3) of the Act and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the Respondent and the Intervening Union filed exceptions to the Intermediate Report and supporting briefs.

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 proceeding to a three-man panel.*

The Board has reviewed the rulings of the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and briefs filed by the parties, 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 dual union activity of Cole during a protected period was the motivation for his expulsion from the AFL and the resulting discharge by the Respondent. Like the Trial Examiner, we think that the surrounding circumstances and the admitted familiarity of officers and supervisors of the Respondent with Cole's CIO affiliation and activity show conclusively that the Respondent knew of the AFL's true reason for requesting the discharge. It follows, therefore, that the instant discharge under

*Houston, Reynolds, and Murdock.

a closed-shop contract for dual union activity occuring during a protected period and before the effective date of the contract is in violation of the Act.[1]

2. The Respondent also contends that Cole was discharged for cause. The record does not support this contention. Although both the Respondent and the AFL introduced evidence at the hearing charging that Cole was a gambler, there was no evidence that the Respondent discharged him for that reason. On the contrary, Cole was admittedly discharged as a result of the request of the AFL and not because of any independent determination by the Respondent that he was engaged in gambling. The discharge was executed in response to notification by the AFL that Cole had been expelled for "conduct unbecoming a member." As stated previously, we are in agreement with the Trial Examiner as to the reason of the AFL for requesting this action and the Respondent's knowledge thereof.

ORDER

Upon the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, American Packing Corporation, Jersey City, New Jersey, its officers, agents, successors, assigns, shall:

1. Cease and desist from discouraging membership in United Packinghouse Workers of America, CIO, or in any other labor organization of its employees, or encouraging membership in Local 5, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL, 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 employment, for engaging in activities directed toward the designation of a new collective bargaining representative at an appropriate time.

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

(a) Offer to John Cole immediate and full reinstatement to his former or substantially equivalent position, without prejudice to his seniority or other rights and privileges;

(b) Make whole said John Cole for any loss of pay he may have suffered by reason of the Respondent's discrimination against him, by payment to him of a sum of money equal to that which he normally would have earned as wages during the period from the date of his

[1] See *Matter of Wallace Corporation*, 68 N L R. B 285.

discharge to the date of the Respondent's offer of reinstatement, less his net earnings during such period;

(c) Post at its Jersey City, New Jersey, plant, copies of the notice attached to the Intermediate Report, marked "Appendix A."[2] Copies of said notice, to be furnished by the Regional Director for the Second Region, shall, after being duly signed by the Respondent's representative, be posted by it immediately upon receipt thereof, and maintained by it for sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material;

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

INTERMEDIATE REPORT

Mr. Jack Davis, for the General Counsel.
Mr. Emanuel Kohn, of Jersey City, N. J., for the Respondent.
Mr. Abraham Levine, of Jersey City, N. J., for Cole.
Mr. David I. Ashe, of New York, N. Y., for Local 5.

STATEMENT OF THE CASE

Upon an amended charge, filed November 3, 1947, by John Cole, an individual, herein called Cole, the General Counsel of the National Labor Relations Board,[1] by the Regional Director for the Second Region (New York, New York), issued his complaint dated June 21, 1948, against American Packing Corporation, 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 (a) (1) and (3) and Section 2 (6) and (7) of the National Labor Relations Act, as amended (June 23, 1947, Public Law 101, 80th Congress, 1st Session), herein called the Act. Copies of the complaint, accompanied by notice of hearing thereon, were duly served upon the Respondent, Cole, and Local 5, Amalgamated Meat Cutters and Butcher Workmen of North America, A. F. L., herein called Local 5.

With respect to the unfair labor practices, the complaint alleged, in substance, that the Respondent: (1) on or about June 15, 1947, discharged Cole and had since refused to reinstate him because of his membership in and assistance to United Packinghouse Workers of America, C. I. O., herein called the C. I. O., and because he was denied membership in or refused or failed to remain a member in good standing of Local 5 and refused or failed to assist it; and (2) thereby

[2] This notice, however, shall be and hereby is amended by striking from the first paragraph thereof the words "The Recommendations of a Trial Examiner," and substituting in lieu thereof the words, "A DECISION AND ORDER." In the event this Order is enforced by decree of a United States Court of Appeals, there shall be inserted before the words, "A DECISION AND ORDER," the words "A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING "

[1] The General Counsel and his representative at the hearing are herein called the General Counsel; the National Labor Relations Board is called the Board.

interfered with, restrained, and coerced its employees in the exercise of rights guaranteed in Section 7 of the Act.

Thereafter the Respondent filed its answer admitting certain allegations of the complaint with respect to the nature of its business but denying the commission of any unfair labor practices.

Pursuant to notice, a hearing was held at New York, New York, on August 24, 25, and 26, 1948, before Josef L. Kektoen, the undersigned Trial Examiner, duly appointed by the Chief Trial Examiner. The General Counsel, Cole, the Respondent, and Local 5 [2] were represented by counsel and participated in the hearing. Full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence on the issues was afforded all parties. At the close of the General Counsel's case in chief, counsel for the Respondent moved to dismiss the complaint on the ground that Cole's activities rendered his discharge nondiscriminatory; the motion was denied by the undersigned. Counsel for the Respondent also moved to strike testimony relating to certain matters antedating May 26, 1947, and reiterated it at the close of the hearing; the undersigned reserved ruling in both instances; the motions are hereby denied. At the conclusion of the hearing, counsel for the Respondent and the General Counsel argued orally before the undersigned; a brief was thereafter filed with him by counsel for Local 5.

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, American Packing Corporation, is a New Jersey corporation engaged in slaughtering cattle and processing and selling meat at its plant in Jersey City, New Jersey. During the year 1947, it bought cattle valued in excess of $50,000, about 80 percent thereof being shipped to it from points outside the State of New Jersey. During the same period, it sold finished products valued in excess of $50,000, about 80 percent thereof being shipped by it to points outside the State of New Jersey.

II. THE ORGANIZATIONS INVOLVED

Local 5, Amalgamated Meat Cutters and Butcher Workmen of North America, A. F. L., and United Packinghouse Workers of America, C. I. O., are labor organizations admitting to membership employees of the Respondent.

III. THE UNFAIR LABOR PRACTICES

A. *Background*

Prior to the time it was acquired by the Respondent, its Jersey City plant was occupied, in full or in part, by Cudahy Packing Company, the employees of which were represented by the C. I. O. Cole, a Cudahy employee, was a member of the C. I. O. and of its executive board and grievance committee. As such, he frequently discussed grievances with Cudahy Foreman William Costine [3] to the knowledge of Cudahy Assistant Superintendent Henry Finkenstadt. Cudahy ceased its Jersey City operations during the late summer of 1946, and on November 15, 1946, the premises were acquired by the Respondent. It thereafter leased

[2] Counsel for Local 5 moved to intervene at the opening of the hearing; the motion was later, on the same day, allowed, he participated throughout the hearing

[3] Costine's supervisory status with the Respondent is discussed *infra*.

portions thereof to other packing concerns, the fertilizer and rendering departments to Packers By-Products, Inc., herein called Packers.

Packers was at that time under a closed-shop contract with Local 5 expiring on June 15, 1947. The C. I. O., however, represented by Cole and Field Representative William Rix, demanded recognition as representative of Packers' employees. After a number of conferences, some or all of which were attended by representatives of Packers, the Respondent, Local 5, and the C. I. O , the latter acquiesced in a "ruling" by Emanuel Kohn, General Counsel and Secretary-Comptroller, of the Respondent, that Local 5 was entitled to represent Packers' employees.

Packers began operations on November 26, 1946. Cole, together with a number of other former Cudahy employees, was employed by it. Cole became a member of Local 5 and was elected a shop steward thereof. Packers also employed Costine and Finkenstadt in the positions formerly held by them at Cudahy.

B. *The events leading to Cole's suspension by Packers*

On December 27, 1946, the C. I. O. filed a petition for certification of representatives of Packers' employees, naming Lincoln Farms[4] as their employer.[5] Shortly thereafter, according to Cole's undenied and credible testimony, Secretary-Treasurer Anthony Lester, of Local 5, appeared in the plant. He berated Cole for the C. I. O.'s alleged "double-cross" of Local 5, stated that the C. I. O. "was trying to start trouble," and accused its members of ingratitude to Local 5 after the latter had secured jobs for them.

At about the same time, according to Cole, Vice President William Goldberger, of the Respondent, suggested to Cole that he come to work for the Respondent at better pay and when Cole demurred, stating that he enjoyed working for his present employer, told Cole that he, Goldberger controlled Packers, that he knew that Cole was an ardent supporter of the C. I. O., having observed him as a member of the C. I. O. committee at the November conferences concerning representation of Packers' employees, stated that he wanted no talk of the C. I. O. in the plant, and finally assured Cole that the C. I. O. would not penetrate it. Goldberger categorically denied the alleged conversation. He was not a convincing witness and testified in a less than forthright fashion. His assertion that as "executive and one of the principal owners" of the Respondent, he had never had any contracts or agreements with Packers when at the time the latter was occupying under lease an important part of the Respondent's plant, appears to the undersigned to be inherently incredible. Cole, on the other hand, related a believable and consistent account of the incident in such a way as to persuade the undersigned that the possibility of his having fabricated it is insignificant.[6] He accordingly finds that the conversation transpired substantially as related by Cole.

On March 17, 1947, the C. I. O. filed an amended petition naming Packers as the employer of the affected persons.[7]

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[4] The record is not altogether clear respecting the status of Lincoln Farms. However, it appears that it is a firm with widely diversified interests in the packing industry and that Packers was a subsidiary thereof. Finkenstadt was an employee thereof at the time of the hearing.

[5] Docketed as Case No 2–R–7432.

[6] Cole later admitted having lied to the management of Local 5 when questioned concerning his C. I. O. activities by having denied them. In the context of events revealed by the record, the undersigned does not feel that Cole's credibility as a witness was thereby impugned.

[7] On May 5, 1947, the Regional Director dismissed the petitions in Case No. 2–R–7432 because untimely filed.

On April 10, the C. I. O. filed a new petition naming the Respondent as their employer.[8]

On April 25, 1947, President William Turner, of Local 5, together with Lester, appeared in the plant. Assistant Superintendent Finkenstadt credibly testified that they informed him that Cole would have to "go" on account of his dual union activity, that Finkenstadt so informed Elmer Cohen, head of Packers,[9] and that he thereupon took them to Cole's place of work where Lester informed Cole accordingly, stating that he would have to answer union charges to the same effect at an executive board meeting of Local 5.[10] Cole testified that Lester told him he was being suspended for "talking CIO and writing . . . cards." Lester denied mentioning dual unionism and testified that he told Cole his suspension was caused by conduct unbecoming a member. Turner substantiated Lester's version of the incident. Costine, although he was in the vicinity at the time the conversation was had, testified that he did not hear it. Cole finished out the day and, at Finkenstadt's direction, left the plant. On April 30, at a Local 5 executive board meeting, Lester preferred charges of gambling against Cole who pleaded not guilty. No evidence of gambling was obtained against him and on May 14, the board found him not guilty.[11] On May 15, Local 5 gave Cole a check for $189 representing his lost wages and on May 19, he returned to work at Packers.

Finkenstadt, who was never in the Respondent's employ, was a credible witness who had no apparent cause to be less than frank and veracious on the stand. Cole substantiated his testimony as to that portion of the incident during which he was present. Turner and Lester were not impressive witnesses. It has been found above that Lester had previously censured Cole in connection with the activity by the C. I. O. The undersigned is persuaded and finds that the events took place substantially as related by Finkenstadt and Cole.

C. *The events leading to Cole's discharge by the Respondent*

On May 26, 1947, the Respondent, having terminated Packers' lease, took over the premises until then occupied by the latter. Cole, together with other Packers employees, including Foreman Costine,[12] were employed by the Respondent. On May 27, at Lester's suggestion, the Respondent wrote Local 5 stating that a gambling problem existed in the plant and that Cole was said to be involved. No response by Local 5 is revealed by the record.

Some days before June 13, the Regional Director announced the conduct on that date of a "pre-hearing" election of the Respondent's employees, based upon the C. I. O.'s petition.

Shortly before the election, according to President Turner of Local 5, in a local union gathering place, he overheard Cole urge several other Negro employees of the Respondent to vote for the C. I. O. because its representative, Rix, was

[8] Docketed as Case No. 2–R–7759.

[9] Cohen did not testify and his response, if any, is not revealed by the record.

[10] The executive board consisted of Turner, Lester, and the three other officers of Local 5.

[11] This finding is based upon minutes of the meeting appearing in the transcript and read from what was established as the official records of Local 5.

[12] The Respondent sought to show that Costine was without supervisory status within the meaning of the Act. Costine had supervision over 17 employees on both day and night shifts, if they did not perform satisfactory work, he reported them to the "office" and if necessary, recommended dismissal; he recommended hiring and firing; he testified, in connection with Finkenstadt's suspension of Cole, "I was only his foreman there. He was the supervisor over me." The undersigned rejects the Respondent's contention and finds Costine to have been a supervisory employee within the meaning of the Act.

also a Negro and that they could therefore expect to gain greater benefits under his leadership than under the white management of Local 5.[13] Although Cole denied using such an argument in the course of his electioneering for the C. I. O., its efficacy, under the circumstances, is so obviously compelling that the undersigned is persuaded that he did so and in this case credits Turner's testimony and finds that Cole made the remarks attributed to him.

On June 13, Cole wore a number of C. I. O. buttons upon his person while in the plant. During the early afternoon of that day he obtained permission from Foreman Costine to leave the plant in order that he might act as a C. I. O. observer at the election. On his way to the polling-place, according to Cole, he met Lester who told him to ". . . pack up. Get out," that he was "finished." Lester denied the conversation. In the light of events which speedily followed, and Lester's less than convincing testimony, the undersigned credits Cole and finds that Lester spoke to him as Cole testified.[14]

Cole acted as a C. I. O. observer at the election. Local 5 won the election 152 to 29.

On the following day, Saturday, June 14, Local 5 wrote the Respondent as follows:

> This letter is to notify your company that John Cole, an employee of the American Packing Co., formerly employed by the Packers By Products, has been suspended, pending hearing and trial, before his Union, on Saturday, June 14th, 1947 for conduct unbecoming a member of Local "5."
>
> The Union requests that this employee be relieved of his duties until further notice.

On Monday, June 16, Cole was suspended by the Respondent and left the plant. He has not worked for the Respondent since that date. On the same day, the Respondent and Local 5 entered into a 2-year, closed-shop contract dated June 15.[15]

Cole testified, without contradiction, and the undersigned finds that, late in June Cole spoke to Turner and Lester and inquired why there had been no meeting on his case; that Lester replied, "What's the use of having a meeting. Everybody was there. They saw you, you was guilty"; and that when Cole protested that Turner had informed him that a meeting had been held at which Cole was fined $200, Lester stated that he had notified Cole thereof. Cole protested that he had had no notification, whereupon Lester promised Cole that he would arrange to have another meeting and to duly notify Cole. It is signifi-

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[13] According to its minutes, Turner so reported to a subsequent meeting of the executive board of Local 5. The Union's "initiatory obligation" provides, in part, as follows: ". . . and never to discriminate against a fellow worker on account of creed, color or nationality."

[14] Asked by counsel for Local 5 if he had made such a statement to Cole, Lester answered: "I never said that. I didn't even know the result of the election Even if I wanted to be a wise guy and say that. I might have been the one myself." A few minutes before, under examination by counsel for the Respondent, he was asked about the results of the election and answered, "There was never any doubt about the outcome"

[15] It will be remembered that the contract between Packers and Local 5 expired on June 14 or 15 The Respondent succeeded to Packers on May 26, for the balance of the term, to June 14 or 15, under the successorship clause of this contract. No question respecting the legality of the new contract, entered into while an unresolved question concerning representation was pending, was raised by the pleadings or at the hearing The significant portions of the new contract provide that only union members in good standing shall be employed, that new employees shall be hired only through the Union, and that should the Union inform the employer that an employee is not in good standing, such employee shall be discharged at the end of the workweek within which the notice is received

cant that on June 28, before anything further occurred, the Respondent wrote Cole asking that he come to the plant and pick up his personal belongings.[16]

On July 3, Local 5 notified Cole by registered mail to attend an important meeting of the executive board to be held July 9. On that date, Cole attended the meeting. According to the minutes thereof, Turner preferred charges of racial prejudice against him and the executive board voted to expel him from membership.[17] The record is confused as to the details surrounding the meeting. Cole denied having heard the matter of racial prejudice mentioned and testified that he had been solely charged with C. I. O. activity. Although the undersigned has grave doubts regarding the matter, he feels, under all of the circumstances, that he is bound by the minutes and finds that the events of July 9 transpired as set forth therein.

On July 10, Local 5 notified the Respondent that Cole had been found guilty of conduct unbecoming a member and requested his discharge. The record is silent as to what formal steps, if any, were thereafter taken by the parties.

D. *Concluding findings*

The General Counsel's position is that Cole was wrongfully discharged by the Respondent pursuant to a demand by Local 5 based upon his protected C. I O. activity. The Respondent contends that, pursuant to the provisions of its contract with Local 5, it was bound to discharge Cole upon demand by Local 5 and that it did so in the belief that such demand was based upon Cole's having been found guilty of gambling. Local 5 takes the position that Cole was expelled from membership on account of his appeal to racial prejudice and gambling and that his discharge by the Respondent followed as a matter of course.

If the General Counsel's position is to prevail, the real reason for Cole's expulsion from Local 5 must be found to have been his protected activity on behalf of the C. I. O. and the Respondent must be found to have had knowledge thereof.[18]

The Board has often held that a closed-shop contract valid under the proviso to Section 8 (3) of the Act (before its amendment) might not be used to perpetuate a particular union and that at a time when a question concerning representation might appropriately be raised toward the end of a contract term, activity on behalf of a rival union directed toward the designation of a new collective bargaining representative was protected.[19] Cole's activities clearly fall within the protected period established by such decisions.[20]

As to the motivation of Local 5 in demanding Cole's release, it will be remembered that after the C. I. O., on April 10, filed its third petition, this time naming the Respondent as employer, Local 5 undertook its abortive effort to rid itself

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[16] Cole did so only after his subsequent expulsion from Local 5.

[17] According to the minutes, Turner and Lester also reported that gambling complaints had been received respecting Cole. Turner's testimony, however, made it clear, and the undersigned finds, that Cole was "officially" expelled on account of the charges of racial prejudice brought by Turner.

[18] *Matter of Rutland Court Owners, Inc.*, 44 N. L. R. B. 587, 46 N. L. R. B. 1040; *Matter of Diamond T. Motor Car Company*, 64 N. L. R. B. 1225.

[19] See e. g, *Matter of Portland Lumber Mills*, 64 N. L. R. B. 159; *Matter of Durasteel Company*, 73 N. L R. B. 941.

[20] Counsel for the Respondent contended in oral argument that Cole's activity occurred during an unprotected period. Cole's testimony shows, and the undersigned finds, that the incidents of C. I. O. solicitation referred to by counsel, occurred in April 1947. The petition upon which the election was held was filed on April 10, 1947. The Board, in the *Durasteel* case found a period of 68 days before the expiration of a closed-shop contract protected. The undersigned reject's counsel's contention.

of Cole by means of gambling charges, its real motive, as is hereby found, having been, as stated by Turner and Lester to Finkenstadt, as found above, to discipline Cole for his activities on behalf of the C. I. O. The effort proved unsuccessful, but the day following the Respondent's occupancy of Packers' premises, Lester asked for and obtained from the Respondent a letter placing the onus for alleged gambling activities on Cole. Nothing further was done along these lines, however, and Local 5 bided its time until the June 13 election at which Cole acted as observer for the C. I. O. It immediately suspended him and although its letter of June 14 to the Respondent is not entirely unambiguous, it appears that he was to be tried "before his Union, on Saturday, June 14, 1947 for conduct unbecoming a member. . . ." This view is supported by Lester's admonition to him on June 13 to pack up, that he was finished. Cole was tried and found guilty *in absentia* and discovered this fact only about 2 weeks later in conversation with Turner and Lester, although the Respondent, judging by its letter to Cole of June 28, asking that he pick up his belongings, had apparently been previously informed of the developments by Local 5. When Cole protested, Turner and Lester set about conducting a meeting of the executive board and on July 9 formally memoralized Cole's expulsion from the Union. The undersigned does not approve of nor condone Cole's appeal for the C. I. O. on the basis of which the union records show that he was expelled. But from the entire record in the case, he is convinced and finds that but for Cole's C. I. O. activity, particularly in acting as observer at the election, Cole would not have lost his membership in Local 5.[21]

As to the Respondent's knowledge of Cole's wrongful expulsion, the roots thereof lie in its knowledge of his C. I. O. persuasion and leadership which it gained as a consequence of the November 1946 conversations respecting the representation of the Packers employees. Goldberger emphasized the fact of such knowledge in his December comments to Cole in the same year. Although General Counsel Kohn, of the Respondent, testified that when the Respondent took over Packers' premises he was unaware of Cole's difficulties with Local 5, the evidence reveals that his assistant, Henry Herzfeld, had bespoken the cooperation of Packers in an anti-gambling drive conducted by the Respondent in the period March–May 1947. In the light of all of the circumstances revealed by the record, it would be unrealistic to believe that the Respondent was unaware of Cole's difficulties with Local 5 in connection with his suspension and the unproved charges against him. Furthermore, on the day after the Respondent took possession of the Packers premises, Herzfeld wrote Local 5 respecting Cole. The undersigned therefore finds that the Respondent had knowledge of this incident and the circumstances surrounding it. Cole then acted as observer at the June 13 election and on the following day Local 5 wrote the Respondent asking that he be relieved of his duties on account of conduct unbecoming a member. The timing of this incident, together with the Respondent's clear knowledge of Cole's activities on the day of the election, are sufficient, in the opinion of the undersigned, to support a finding of knowledge by the Respondent of the reason for the Union's precipitate action. The election was obviously a matter of moment to all concerned and the fact of Cole's acting as observer for the petitioning C. I. O. was, through Foreman Costine and others, including the Respondent's observers, necessarily notorious. On the Monday following the

[21] Much testimony concerning Cole's alleged gambling, all of it denied by him, appears in the record. It has been fully considered by the undersigned who, in the light of all of the circumstances revealed by the record, deems so much thereof as is not adverted to herein, irrelevant to a determination of the issues and does not, therefore, resolve the conflicting testimony.

Friday of the election, the blow struck, the letter was received. The undersigned, in the light of all of the circumstances revealed by the entire record in the case, is convinced and finds that the Respondent well knew the cause and motivation thereof.[22]

It is therefore found that on June 16, 1947, the Respondent discriminatorily discharged John Cole because of his activities on behalf of the C. I. O., thereby discouraging membership in the C. I. O. and encouraging membership in Local 5, and interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed them 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

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

Having found that the Respondent has discriminated against John Cole in regard to the hire and tenure of his employment by discharging him on June 16, 1947, and thereafter refusing to reinstate him, it will be recommended that the Respondent offer him immediate and full reinstatement to his former or substantially equivalent position,[23] without prejudice to his seniority and other rights and privileges, and that the Respondent make him whole for any loss of pay he may have suffered by reason of the Respondent's discrimination against him, by payment to him of a sum of money equal to the amount which he normally would have earned as wages from the date of his discharge to the date when, pursuant to the recommendations herein, the Respondent shall offer him reinstatement, less his net earnings during said period.[24]

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

CONCLUSIONS OF LAW

1. Local 5, Amalgamated Meat Cutters and Butcher Workmen of North America, A. F. L., and United Packinghouse Workers of America, C. I. O., are labor organizations, within the meaning of Section 2 (5) of the Act.

2. By discriminating in regard to the hire and tenure of employment of John Cole, thereby discouraging membership in United Packinghouse Workers of America, C. I. O., and encouraging membership in Local 5, Amalgamated Meat

[22] Counsel for Local 5 contends in his brief that because Cole did not exhaust his intra-union remedy of appeal in connection with his expulsion, the matter is not subject "to review" This contention is rejected. See *Matter of The American White Cross Laboratories, Inc.*, 66 N. L. R. B 866; *Matter of Durasteel Company*, 73 N. L. R. B. 941.

[23] The expression "former or substantially equivalent position" is intended to mean "former position wherever possible, but if such position is no longer in existence, then to a substantially equivalent position." See *Matter of The Chase National Bank of the City of New York, San Juan, Puerto Rico Branch*, 65 N. L R. B. 827

[24] By "net earnings" is meant the definition of the term in *Matter of Crossett Lumber Company*, 8 N. L. R. B. 440, and *Republic Steel Corporation* v. *N. L. R. B.*, 311 U. S. 7.

Cutters and Butcher Workmen of America, A. F. L., the Respondent has engaged in and is engaging in unfair labor practices, within the meaning of Section 8 (a) (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 (a) (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

On the basis of the foregoing findings of fact and conclusions of law, and upon the entire record herein, the undersigned recommends that the Respondent, American Packing Corporation, Jersey City, New Jersey, its officers, agents, successors, and assigns, shall:

1. Cease and desist from discouraging membership in United Packinghouse Workers of America, C. I. O., or in any other labor organization of its employees, or encouraging membership in Local 5, Amalgamated Meat Cutters and Butcher Workmen of North America, A. F. L., 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 employment, for engaging in activities directed toward the designation of a new collective bargaining representative at an appropriate time.

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

(a) Offer to John Cole immediate and full reinstatement to his former or substantially equivalent position, without prejudice to his seniority or other rights and privileges;

(b) Make whole said John Cole for any loss of pay he may have suffered by reason of the Respondent's discrimination against him, in the manner set forth in the section entitled "The remedy," above;

(c) Post at its Jersey City, New Jersey, plant, copies of the notice attached hereto and marked "Appendix A." Copies of said notice, to be furnished by the Regional Director for the Second Region, shall, after being duly signed by the Respondent's representative, be posted by the Respondent immediately upon receipt thereof, and be maintained by it for at least sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that such notices are not altered, defaced, or covered by any other material;

(d) Notify the Regional Director for the Second 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 therewith.

It is further recommended that unless on or before ten (10) days from 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 203.46 of the Rules and Regulations of the National Labor Relations Board—Series 5, as amended August 18, 1948, any party may, within twenty (20) days from the date of service of the order transferring the

case to the Board, pursuant to Section 203.45 of said Rules and Regulations, file with the Board, Rochambeau Building, Washington 25, D. C., an original and six copies of a statement in writing setting forth such exceptions to the Intermediate Report and Recommended Order 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 six copies of a brief in support thereof; and any party may, within the same period, file an original and six copies of a brief in support of the Intermediate Report and Recommended Order. Immediately upon the filing of such statement of exceptions and/or briefs, the party filing the same shall serve a copy thereof upon each of the other parties. Statements of exceptions and briefs shall designate by precise citation the portions of the record relied upon and shall be legibly printed or mimeographed, and if mimeographed shall be double spaced. Proof of service on the other parties of all papers filed with the Board shall be promptly made as required by Section 203.85. As further provided in said Section 203.46, 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 service of the order transferring the case to the Board.

In the event no Statement of Exceptions is filed as provided by the aforesaid Rules and Regulations, the findings, conclusions, recommendations, and recommended order herein contained shall, as provided in Section 203.48 of said Rules and Regulations, be adopted by the Board and become its findings, conclusions, and order, and all objections and exceptions thereto shall be deemed waived for all purposes.

Dated at Washington, D. C., this 26th day of November 1948.

JOSEF L. HEKTOEN,
Trial Examiner.

APPENDIX A

NOTICE TO ALL EMPLOYEES

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

WE WILL NOT discourage membership in UNITED PACKINGHOUSE WORKERS OF AMERICA, C. I. O., or any other labor organization, or encourage membership in LOCAL 5, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, A. F. L., or any other labor organization of our employees, by discharging or refusing to reinstate any of our 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, because of their failure to maintain membership in a labor organization.

WE WILL OFFER to John Cole immediate and full reinstatement to his former or substantially equivalent position without prejudice to any seniority or other rights and privileges previously enjoyed, and make him whole for any loss of pay suffered as a result of the discrimination.

AMERICAN PNACKING CORPORATION,
Employer.

By _____
(Representative) (Title)

Dated _____

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