

In the Matter of JOS. N. FOURNIER, ROME LINCOLN-MERCURY CORP.  
and LODGE 1787, INTERNATIONAL ASSOCIATION OF MACHINISTS

Case No. 3-CA-146.—Decided October 6, 1949

DECISION

AND

ORDER

On August 18, 1949, Trial Examiner Josef L. Hektoen issued his Intermediate Report in this proceeding, finding that the Respondent had engaged and was engaging in certain unfair labor practices in violation of Section 8 (a) (1) and (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 filed a document with the Board's Regional Director for the Third Region entitled "Objections to the Findings of Facts and Conclusions of Law." Although this document is not in conformity with the Board's Rules and Regulations, Section 203.46 (a) and (e), Series 5, as amended, we shall, in the circumstances of this case, regard it as a general exception to the Trial Examiner's findings.<sup>1</sup>

The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the document regarded as exceptions, and the entire record in the case, and hereby adopts the findings,<sup>2</sup> conclusions, and recommendations<sup>3</sup> of the Trial Examiner.

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<sup>1</sup> See *Matter of Standard-Coosa-Thatcher Company*, 85 N. L. R. B. 1358.

Chairman Herzog and Member Murdock would not find that the document referred to constituted exceptions to the Intermediate Report. Hence they would have held that Sec. 203.48 of the Board's Rules and Section 10 (c) of the Act operated to make the Trial Examiner's recommended order that of the Board, because of the Respondent's failure to file exceptions. The majority having held that exceptions were filed, the Chairman and Member Murdock have considered the case on the merits and are in full agreement with the decision thereon.

<sup>2</sup> As the Trial Examiner found, the business began in April 1948, when Jos. N. Fournier, an individual doing business as Rome Lincoln-Mercury Company, entered into agreements with the Ford Motor Company for the sale of new Lincoln and Mercury automobiles. On March 10, 1949, the agreements were assigned to the Respondent corporation. The record clearly establishes that the corporation is the *alter ego* of the former individual

86 N. L. R. B., No. 53.

## 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 Jos. N. Fournier, Rome Lincoln-Mercury Corp., Rome, New York, and its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in Lodge 1787, International Association of Machinists, or in any other labor organization of its employees, by discharging or refusing to reinstate any of its employees, by refusing to hire applicants for employment, or by discriminating in any other manner in regard to their hire and tenure of employment or any term or condition of employment;

(b) Interrogating its employees concerning their union affiliations, activities, or sympathies, threatening to discharge its employees, or to sell or close its business, should they join or remain members of a union, or in any other manner interfering with, restraining, or coercing its employees in the exercise of their right to self-organization, to form labor organizations, to join or assist Lodge 1787, International Association of Machinists, or any other labor organization, 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, or to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the amended Act.

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

(a) Offer immediate employment to James E. Janes, in the position in which he would have been employed on or about January 5, 1949, had the Respondent not discriminated against him, or in a substantially equivalent position;

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proprietorship, and, like the Trial Examiner we are of the opinion that the Respondent corporation is responsible for remedying the unfair labor practices found to have been committed while the business was operated as an individual proprietorship. See *Matter of E. C. Brown Company*, 81 N. L. R. B. 140.

<sup>3</sup> We find that the unfair labor practices committed by the Respondent potentially relate to other unfair labor practices proscribed and that danger of their commission in the future is to be anticipated from the Respondent's past conduct. The preventive purpose of the Act will be thwarted unless our order is coextensive with the threat. Accordingly, in order to make effective the interdependent guarantees of Section 7 and thus effectuate the policies of the Act, we shall adopt the Trial Examiner's recommendation and order the Respondent to cease and desist from in any manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed by Section 7 of the Act. *May Department Stores v. N. L. R. B.*, 326 U. S. 376; *N. L. R. B. v. Entwistle Manufacturing Co.*, 120 F. 2d 532 (C. A. 4); *Matter of Tri-State Casualty Insurance Co.*, 83 N. L. R. B. 828.

(b) Make whole James E. Janes 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 in such position from the date of the discrimination against him to the date of the Respondent's offer of employment, less his net earnings during said period;

(c) Offer to Edward F. O'Connor and Robert F. Martin immediate and full reinstatement to their former or substantially equivalent positions<sup>4</sup> without prejudice to their seniority or other rights and privileges;

(d) Make whole Edward F. O'Connor and Robert F. Martin for any loss of pay they may 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 the date of the respective discharges to the date of the Respondent's offer of reinstatement, less the net earnings<sup>5</sup> of each during said period;

(e) Post at its shop in Rome, New York, copies of the notice attached hereto and marked "Appendix A."<sup>6</sup> Copies of said notice, to be furnished by the Regional Director for the Third Region, after being signed by the Respondent's representative, shall be posted by the Respondent 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;

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

<sup>4</sup> In accordance with the Board's consistent interpretation of the term, 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. The same definition is applicable to the prospective position of Janes which he was discriminatorily denied.

<sup>5</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, which would not have been incurred but for this unlawful discrimination and the consequent necessity of his seeking employment elsewhere. *Matter of Crossett Lumber Company*, 8 N. L. R. B. 440. Monies received for work performed upon Federal, State, county, municipal, or other work-relief projects shall be considered earnings. *Republic Steel Corporation v. N. L. R. B.*, 311 U. S. 7. This definition also applies to the case of Janes.

<sup>6</sup> In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be inserted in the notice before the words: "A DECISION AND ORDER," the words: "A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING."

## APPENDIX A

## NOTICE TO ALL EMPLOYEES

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

WE WILL NOT interrogate our employees concerning their union affiliations, activities, or sympathies, threaten to discharge our employees, or sell or close our business, should they join or remain members of a union, or in any other manner, interfere with, restrain or coerce our employees in the exercise of their right to self-organization, to form labor organizations, to join or assist LODGE 1787, INTERNATIONAL ASSOCIATION OF MACHINISTS, or any other labor organization, 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, or to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

WE WILL OFFER to the employee named below immediate employment in the position, or substantially equivalent position, which he was discriminatorily denied, and make him whole for any loss of any pay suffered as a result of the discrimination.

James E. Janes

WE WILL OFFER to the employees named below immediate and full reinstatement to their former or substantially equivalent positions without prejudice to any seniority or other rights and privileges previously enjoyed, and make them whole for any loss of pay suffered as a result of the discrimination.

Edward F. O'Connor  
Robert F. Martin

All our employees are free to become, remain, or refrain from becoming members of the above-named union or any other labor organization except to the extent that this right may be affected by an agreement in conformity with Section 8 (a) (3) of the amended Act.

WE WILL NOT discriminate with regard to the hire or tenure of employment or any term or condition of employment against any

employee because of membership in or activity on behalf of any such labor organization.

JOS. N. FOURNIER,  
 ROME LINCOLN-MERCURY CORP.  
*Employer.*

Dated \_\_\_\_\_ By \_\_\_\_\_  
 (Representative) (Title)

This notice must remain posted for 10 days from the date hereof, and must not be altered, defaced, or covered by any other material.

INTERMEDIATE REPORT

*Messrs. Shally O. Wise and William J. Cavers, for the General Counsel.  
 Mr. Raymond A. Stuber, of Utica, N. Y., for the Union.*

STATEMENT OF THE CASE

Upon a charge duly filed by Lodge 1787, International Association of Machinists,<sup>1</sup> herein called the Union, the General Counsel of the National Labor Relations Board, herein respectively called the General Counsel and the Board, by the Regional Director for the Third Region (Buffalo, New York), issued his complaint dated July 8, 1949, against Jos. N. Fournier, Rome Lincoln-Mercury Corp., Rome, New York, herein called the Respondent, alleging that the Respondent had engaged in and was engaging in unfair labor practices affecting commerce, within the meaning of Sections 8 (a) (1) and (3) and 2 (6) and (7) of the National Labor Relations Act, 49 Stat. 449, as amended by the Labor Management Relations Act, 61 Stat. 136, herein called the Act. Copies of the complaint, accompanied by a copy of the charge and notice of hearing, were duly served upon the Respondent and the Union.

With respect to the unfair labor practices, the complaint alleged in substance that the Respondent: (1) on or about January 17, 1949, discharged Edward O'Connor, on or about January 19, 1949, discharged Robert Martin, on or about January 5, 1949, discharged or failed or refused to employ James E. Janes, all because of their having joined and assisted the Union and engaged in concerted activities for the usual purposes; and (2) from on or about July 1, 1948, to the date of the complaint, interrogated its employees concerning their union affiliation or activity, stated to them that they would be discharged should they join or remain members of the Union, and warned and threatened them that if they did so, the Respondent would sell or close its business.

The Respondent filed no answer and was not present nor represented at the hearing.<sup>2</sup>

<sup>1</sup> The complaint was amended at the hearing so as to add "Lodge 1787" to the designation of the Union.

<sup>2</sup> On August 9, 1949, the undersigned received from the General Counsel a communication stating that before the opening of the hearing and before the undersigned arrived at the place thereof, an individual appeared thereat and sought to deliver to the General Counsel a letter addressed to "Trial Examiner" at the place of the hearing and signed by Joseph N. Fournier. Attached to the letter was a *subpena duces tecum* addressed to Fournier. The General Counsel refused to accept the letter and the individual thereupon departed. The documents were subsequently, on August 3, sent by registered mail to the Buffalo Regional Office of the Board from which they were received by the undersigned together with the communication of August 9. The letter indicates that Fournier found it inconvenient to come to Rome for purposes of attending the hearing from Syracuse, New York, a distance of some 39 miles by rail, and makes certain statements respecting the merits of the case. On account of its untimeliness, its not being sworn to, and the lack of opportunity to cross-examine the writer thereof, the undersigned can neither accept the letter as an answer to the complaint nor as a defense to its allegations.

Pursuant to notice, a hearing was held on August 2, 1949, at Rome, New York, before the undersigned Josef L. Hektoen, the Trial Examiner duly designated by the Chief Trial Examiner. The General Counsel and the Union were represented by counsel and representative, respectively, and participated in the hearing. The parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing upon the issues. At the close of the hearing the usual motion of the General Counsel to conform the pleadings to the proof in respect of formal matters was granted without objection. Oral argument was waived and no briefs have been received.

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, Jos. N. Fournier, Rome Lincoln-Mercury Corp., is a New York corporation with its principal place of business in Rome, New York, where it is engaged in the sale of Lincoln and Mercury automobiles, and parts and accessories therefor, and where it conducts a general new and used car business. It operates under sales agreements with the Ford Motor Company, Dearborn, Michigan, for Lincoln and Mercury automobiles, respectively.<sup>3</sup>

From April 1948 to April 30, 1949, the Respondent bought Lincoln and Mercury automobiles from the Ford Motor Company valued at \$264,926. They originated from Dearborn and Detroit, Michigan, and Metuchen, New Jersey, and were shipped to Rome, New York, in commerce. From April 1948 to June 30, 1949, the Respondent bought parts and accessories from the Ford Motor Company valued at \$15,503. They originated from Buffalo, New York, Pittsburgh, Pennsylvania, St. Louis, Missouri, and Detroit, Michigan. The undetermined but substantial position of the parts originating from outside the State of New York were shipped to Rome, New York, in commerce.

From April 1948 to April 30, 1949, the Respondent sold automobiles, parts and accessories, and rendered service for which it received a total of \$491,050.56.

The undersigned finds that the Respondent is engaged in commerce within the meaning of the Act.<sup>4</sup>

##### II. THE ORGANIZATION INVOLVED

Lodge 1787, International Association of Machinists, is a labor organization admitting to membership employees of the Respondent.

##### III. THE UNFAIR LABOR PRACTICES<sup>5</sup>

###### A. *Interference, restraint, and coercion*

Henry George Phillips was hired by the Respondent on December 6, 1948. At the hiring interview, Fournier asked him whether he belonged to the Union and

<sup>3</sup> The business began in April 1948, when Joseph N. Fournier, an individual doing business as Rome Lincoln-Mercury Company, entered into Lincoln and Mercury sales agreements with the Ford Motor Company. On March 10, 1949, the agreements were transferred to the Respondent corporation. The company and the corporation are herein jointly called the Respondent. On May 24, 1949, the Respondent asked to be released from the sales agreements. The record is silent as to what thereafter occurred. The minutes of the stockholders' meeting at which the action asking for release was taken indicate that the sole stockholders of the Respondent are Joseph N. Fournier, president, Edith H. Fournier, and Ida F. Mosette, all of the State of New York.

<sup>4</sup> See *Matter of Johns Brothers, Inc., et al.*, 84 N. L. R. B. 294 (24 L. R. R. 1258).

<sup>5</sup> All findings in this Section hereof are made upon the undenied and credible testimony of witnesses called by the General Counsel.

upon being assured that Phillips did not and felt hostile to unions generally, promptly employed him. Fournier thereafter asked that Phillips keep his eye on the few union members in the shop and that Phillips from time to time report to him as to any union talk and activity therein. At the same time, Fournier promised Phillips that the latter would become shop manager within a year, a position Phillips believed would require 3 years to reach.

About a week after Phillips started to work, Fournier told him that subsequent dischargees, employees O'Connor and Martin, were the real union agitators in the shop, and shortly before Martin's discharge in January 1949, that Fournier was about to discharge him and that he would use lack of work as a pretext for doing so.<sup>6</sup>

By the acts and statements of Fournier, its proprietor and later president, found above, the Respondent has interfered with, restrained, and coerced its employees in the exercise of rights guaranteed in Section 7 of the Act.

*B. The discrimination against Janes, O'Connor, and Martin*

*James E. Janes*,<sup>7</sup> having been told by a mutual acquaintance that Fournier was in need of a mechanic, Janes' trade, applied for a job as such with the Respondent early in January 1949. Fournier interviewed him at some length as to his qualifications and ability to bring in new business and upon being reassured by Janes as to both, asked him to return in a few days. Janes did so on or about January 5, and after a further extensive conversation with Fournier and inspection of the shop, the latter suddenly turned upon Janes and asked if he were not a union member. Janes answered that he was, whereupon Fournier told him "to get the hell out of here," stated that he would rather sell the shop than have a union penetrate it, and walked off. Janes, who was then unemployed, fruitlessly waited outside Fournier's office for some 45 minutes in order to obtain the job. He testified, and the undersigned finds, that he was then willing to give up his union membership in order to do so.

The evidence reveals that Janes had favorably impressed Fournier as to his ability as a mechanic and his ability to bring in new business to the shop. The Respondent was then in need of a mechanic and from the entire evidence disclosed by the record in the case, it appears to be very nearly certain that, but for Janes' union membership, he would have been hired. The undersigned finds that the Respondent failed to hire Janes on account of his union membership and that it has thereby discriminated against him in regard to his hire to discourage membership in the Union. He further finds that thereby, and by Fournier's questioning of Janes as to union affiliation, the Respondent has interfered with, restrained, and coerced its employees in the exercise of rights guaranteed in Section 7 of the Act.<sup>8</sup>

*Edward F. O'Connor*, who, in the early summer of 1948, was employed in a Lincoln-Mercury shop in Utica, New York, and was a member of the Union, having heard that the Respondent was in need of a "parts man," spoke to Fournier in Rome about such a job. Fournier told O'Connor that he would hire him as soon as he could rid himself of an evidently undesirable incumbent employee, and offered O'Connor a job at \$60 per week. O'Connor replied that he would have to consider the matter and in reply to Fournier's question as to whether the Utica shop where O'Connor then worked was unionized, replied in the affirmative.

<sup>6</sup> As hereinafter found, the evidence, however, reveals that sufficient work existed in Martin's department to warrant his being retained by the Respondent.

<sup>7</sup> Janes' name incorrectly appears in the record as "James." The transcript has been physically amended to indicate the correct spelling of the name.

<sup>8</sup> *Phelps Dodge Corp. v. N. L. R. B.*, 313 U. S. 177, 185.

O'Connor thereafter took a week's vacation in the course of which Fournier repeatedly telephoned him leaving messages that he desired to see O'Connor forthwith. O'Connor again spoke with Fournier in Rome, and on about July 17, finally took a position as manager of the parts department of the Respondent, a nonsupervisory task.

In August 1948, Raymond A. Stuber, business representative of the Union, visited O'Connor in the shop of the Respondent. Shortly thereafter Fournier asked O'Connor, while the latter was at work in the shop, whether he continued to be a union member. O'Connor replied that he did and explained that he could not afford to abandon membership in the Union on account of the \$75 reinstatement fee that he would be compelled to pay to rejoin it. Fournier told O'Connor that he would suffer if he continued his union affiliation and that he was wasting his money by doing so.

Early in December, Fournier wrote O'Connor a letter of discharge. Called upon to explain his motive, Fournier first told O'Connor that the Ford Motor Company, which received monthly statements respecting the Respondent's operations, had insisted that the Respondent dispense with O'Connor's services in order to reduce expenses. A bit later, however, Fournier told O'Connor that the letter had been motivated by the latter's continuing union membership and that the Respondent would close its doors rather than have the Union come into the shop. They spoke again on the following day. Fournier then asked that O'Connor resign from the Union. O'Connor offered to do so upon condition that Fournier give him a written undertaking to reimburse to him his \$75 reinstatement fee. Fournier refused to do so and O'Connor nevertheless went back to work.

Late in December 1948, Fournier asked that O'Connor resign his job with the Respondent. O'Connor refused and continued to work.

On January 17, 1949, O'Connor, having heard rumors in the shop that he was about to be discharged, waited upon Fournier in an effort to discover the reason for his prospective severance. Several of the employees in the shop had asked that O'Connor speak to Richard Lindberg, in charge of the service department of the Lincoln-Mercury Division of the Ford Motor Company at Buffalo, New York. Fournier immediately telephoned Lindberg, at O'Connor's request, and before giving the receiver to O'Connor, told Lindberg that O'Connor had reduced the shop to an unstable condition, and nearly succeeded in unionizing it, and that he was therefore being discharged. When O'Connor spoke to Lindberg, he informed the latter that he was being discharged on account of his union membership. After some further conversation indulged in by Lindberg, via telephone, and Fournier and O'Connor in the Respondent's office, Fournier gave O'Connor 20 minutes to "get the hell out of here," stated that O'Connor, on account of his union membership, was a "damned traitor," and that Martin would be the next employee to be discharged. O'Connor thereupon left the plant.

The reason for O'Connor's discharge by the Respondent is so clear as to cause the undersigned to consider that any further review of the incidents respecting his employment would constitute surplusage. It is found that the Respondent by discharging him as related above, discriminated in regard to the tenure of employment of O'Connor on account of his union membership, to discourage membership in the Union and that it thereby, and by Fournier's repeated questioning of O'Connor respecting his union membership, stating that he would suffer on account of his persisting therein, requesting that O'Connor resign from the Union, and stating that his continued adherence to the Union was traitorous, has interfered with, restrained, and coerced its employees in the exercise of rights guaranteed in Section 7 of the Act.

*Robert F. Martin* was hired by Respondent on November 18, 1948, as a "body and fender man" and painter. At his hiring interview, Fournier asked if Martin were a union member. The latter replied that, having been out of the Union for about 8 months and lacking the necessary \$75 reinstatement fee, he was not. Fournier thereupon told him, "You're hired. But remember no union in this shop."

Shortly before the end of his tenure of employment with the Respondent, Martin was visited in the shop by an insurance agent who hugely interested Fournier. The latter asked O'Connor, then still employed by the Respondent, if the visitor was a union man, and upon O'Connor's inability to identify him as such, called O'Connor a liar. Fournier also inquired of the visitor as to his identity and inquired of Martin as to whether he was "another one of the union organizers."

During December, Martin spoke to two employees respecting the Union in a restaurant close by the shop, stating that if the Respondent's operation were unionized the lot of the employees would be materially ameliorated.

On January 19, 1949, after a dinner party for the employees given by the Respondent, Martin learned from the Respondent's service manager that he was about to be discharged. He thereupon consulted Fournier, who had returned to the office of the Respondent after the dinner, informed him of what the official had said, and asked Fournier the reason for his imminent discharge. Fournier told Martin that his discharge was the result of the latter's union proclivities, adding that he was "sick" of union organizers. Martin undertook to leave immediately and persisted in doing so even though Fournier asked him to stay out the week in order to complete a number of jobs then in the shop. It will be remembered that the work in Martin's department was sufficient to have kept him occupied, that Fournier had told Phillips that he would use alleged absence thereof for a pretext to let Martin go, and that he had told O'Connor that Martin was the next who was to be purged on account of union activity.

Again, it would be futile to further belabor the evidence. It is quite clear that Martin was got rid of on account of his union activities and sympathy and Fournier's intense hostility to the Union. The undersigned so finds and further finds that the Respondent thereby discriminated against Martin in regard to the tenure of his employment to discourage membership in the Union, and by doing so and by Fournier's questioning him as to his union membership, the Respondent has interfered with, restrained, and coerced its employees in the exercise of 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 its operations 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 and is engaging in certain unfair labor practices, it will be recommended that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

It has been found that the Respondent has discriminated in regard to the hire of James E. Janes. It will therefore be recommended that the Respondent offer him immediate employment to the position in which, but for its discrimination

against him, he would have been employed on or about January 5, 1949. It will be further recommended that the Respondent make him whole for any loss of pay he may have suffered by reason of the discrimination against him, by the payment to him of a sum of money equal to that which he would normally have earned as wages in such position from the date of the discrimination against him to the date of the Respondent's offer of employment, less his net earnings during said period.<sup>9</sup>

It has been further found that the Respondent has discriminated in regard to the tenure of employment of Edward F. O'Connor and Robert F. Martin. It will therefore be recommended that the Respondent offer them, and each of them, immediate and full reinstatement to their respective former or substantially equivalent positions,<sup>10</sup> without prejudice to their seniority and other rights and privileges, and make them whole for any loss of pay they may have suffered by reason of the Respondent's discrimination against them by the payment to each of them of a sum of money equal to that which he normally would have earned as wages from the date of the respective discharges to the date of the Respondent's offer of reinstatement, less the net earnings of each during said period.<sup>11</sup>

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. Lodge 1787, International Association of Machinists, is a labor organization, within the meaning of Section 2 (5) of the Act.

2. By discriminating in regard to the hire of James E. Janes, and the tenure of employment of Edward F. O'Connor and Robert F. Martin, thereby discouraging membership in Lodge 1787, International Association of Machinists, 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 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

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record herein, the undersigned recommends that the Respondent,

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<sup>9</sup> Since the matter appears most readily susceptible of solution in the effectuation of compliance, no attempt is made by the undersigned to deal with the present activities of the Respondent nor the availability of the position in respect to which Janes was discriminated against, nor the period for which any monetary award should be computed.

<sup>10</sup> In accordance with the Board's consistent interpretation of the term, 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. The same definition is applicable to the prospective positions of Janes which he was discriminatorily denied.

<sup>11</sup> *Matter of Crossett Lumber Co.*, 8 N. L. R. B. 440. This definition also applies to the case of Janes.

Jos. N. Fournier, Rome Lincoln-Mercury Corp., Rome, New York, its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Discouraging membership in Lodge 1787, International Association of Machinists, or in any other labor organization of its employees, by discharging or refusing to reinstate any of its employees, by refusing to hire applicants for employment, or by discriminating in any other manner with respect to the hire or tenure of employment of its employees or with respect to 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 labor organizations, to join or assist Lodge 1787, International Association of Machinists, or any other labor organization, 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, and to refrain from any and all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3) of the Act, as guaranteed by Section 7 thereof.

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

(a) Offer immediate employment to James E. Janes, in the position in which he would have been employed on or about January 5, 1949, had the Respondent not discriminated against him, or in a substantially equivalent position;

(b) Make whole said Janes for any loss of pay he may have suffered in consequence of the discrimination against him, in the manner set forth in Section V above, entitled "The remedy";

(c) Offer to Edward F. O'Connor and Robert F. Martin immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority and other rights and privileges;

(d) Make whole said O'Connor and Martin in the manner set forth in Section V, above, entitled, "The remedy";

(e) Post at its shop in Rome, New York, copies of the notice attached hereto and marked "Appendix A." Copies of said notice, to be furnished by the Regional Director for the Third Region, after being duly signed by representatives of the Respondent, shall be posted by Respondent immediately upon receipt thereof and maintained by it for a period of sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees customarily are posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by other material; and

(f) Notify the Regional Director for the Third Region in writing, within twenty (20) days from the date of the receipt of this Intermediate Report, what steps Respondent has taken to comply herewith.

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, Washington 25, D. C., an original and six 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 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. 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 the findings, conclusions, and order, and all objections thereto shall be deemed waived for all purposes.

Dated at Washington, D. C., this 18th day of August 1949.

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** in any manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form labor organizations, to join or assist LODGE 1787, INTERNATIONAL ASSOCIATION OF MACHINISTS, or any other labor organization, 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, and to refrain from any and all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3) of the Act.

**WE WILL OFFER** to the employee named below immediate employment in the position, or substantially equivalent position, which he was discriminatorily denied, and make him whole for any loss of pay suffered as a result of the discrimination.

James E. Janes

**WE WILL OFFER** to the employees named below immediate and full reinstatement to their former or substantially equivalent positions without prejudice to any seniority or other rights and privileges previously enjoyed, and make them whole for any loss of pay suffered as a result of the discrimination.

Edward F. O'Connor  
Robert F. Martin

All of our employees are free to become or remain members of the above-named union or any other labor organization. We will not discriminate in regard to hire

or tenure of employment or any term or condition of employment against any employee because of membership in or activity on behalf of any such labor organization.

JOS. N. FOURNIER, ROME LINCOLN-MERCURY CORP,  
*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.