

In the Matter of DEPEW PAVING CO., INC. and NAPOLEON SARGENT,  
AN INDIVIDUAL

*Case No. 3-CA-217.—Decided November 20, 1950*

DECISION AND ORDER

On July 13, 1950, Trial Examiner Albert P. Wheatley 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 therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. The Trial Examiner also found that the Respondent had not engaged in certain other unfair labor practices alleged in the complaint, and recommended dismissal of these allegations. Thereafter, the Respondent filed exceptions to the Intermediate Report, and a supporting brief.

Pursuant to the provisions of Section 3 (b) of the Act, the Board has delegated its powers in connection with this case to a three-member panel [Members Houston, Murdock, and Styles].

The Respondent's request for oral argument is hereby denied, as the record, the exceptions, and the Respondent's brief, in our opinion, adequately present the issues and the positions of the parties.

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 Respondent's exceptions and brief, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, with the modifications and additions set forth below.

1. The Trial Examiner found, and we agree, that it will effectuate the policies of the Act to assert jurisdiction herein. The Respondent's operations for the year 1949, which are fully described in the Intermediate Report, include the construction, maintenance, and repair of roads and of a landing strip at Buffalo Airport for which the Respondent received sums far greater than \$50,000. The totality of these operations is greatly in excess of that which the Board has recently

stated to be the minimum required for exercising its discretion to assert jurisdiction on the basis of services supplied to instrumentalities of commerce.<sup>1</sup>

The Trial Examiner found, and we agree, that the Respondent violated Section 8 (a) (1) and (3) of the Act by its discharge of Napoleon Sargent. This finding was based largely upon the testimony of Sargent. The Trial Examiner went on to say, however, that "even if Gibbs' [Respondent's superintendent] testimony is credited Respondent's position probably is untenable as an excuse for its conduct. . . ." We find it unnecessary to pass upon, and do not adopt, the alternative thus raised by the Trial Examiner. The Trial Examiner's credibility findings with respect to Sargent's testimony are supported by a clear preponderance of all the relevant evidence. We shall therefore adopt these findings and the findings of fact based thereon.

3. The Trial Examiner recommended dismissal of the allegation in the complaint that the Respondent had entered into an unlawful agreement with the Union. No exception has been filed to this recommendation. Accordingly, we shall dismiss this allegation of the complaint.

### The Remedy

We found that the Respondent, by its discharge of Sargent and other illegal acts, violated Section 8 (a) (1) and (3) of the Act. We are of the opinion, upon the entire record in this case, that the commission in the future of such acts and of other unfair labor practices may be anticipated from the Respondent's conduct in the past. We shall therefore order that the Respondent cease and desist from such conduct, and from in any other manner infringing upon the rights guaranteed to its employees in Section 7 of the Act.

### 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, Depew Paving Co., Inc., Depew, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Encouraging membership in International Hod Carriers' Building and Common Laborers' Union of America, Local 210, AFL, or any other labor organization of its employees, by discharging any of its employees or in any other manner discriminating in regard to their hire or tenure of employment or any term or condition of

<sup>1</sup> Cf. *Hollow Tree Lumber Company*, 91 NLRB 635.

their employment, except in accordance with Section 8 (a) (3) of the Act;

(b) Interrogating employees concerning their union affiliations, activities, or sympathies;

(c) In any other manner interfering with, restraining, or coercing employees in the right to refrain from exercising the rights guaranteed in Section 7 of the Act, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized by Section 8 (a) (3) of the Act.

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

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

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

(c) Upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, time cards, personnel records and reports, and all other records necessary to analyze the amounts of back pay due and the right of reinstatement under this Order;

(d) Post at its place of business in Depew, New York, copies of the notice attached hereto marked Appendix A.<sup>2</sup> Copies of said notice, to be furnished by the Regional Director of the Third Region, shall, immediately upon receipt thereof, after being duly signed by the Respondent's representative, be posted by the Respondent 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; and

(e) 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.

IT IS FURTHER ORDERED that the complaint be, and it hereby is, dismissed insofar as it alleges an unlawful agreement or arrangement between the Respondent and International Hod Carriers' Building and Common Laborers' Union of America, Local 210, AFL.

<sup>2</sup> In the event this Order is enforced by 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 encourage membership in INTERNATIONAL HOD CARRIERS' BUILDING AND COMMON LABORERS' UNION OF AMERICA, LOCAL 210, AFL, or in any other labor organization, by discriminating in any manner in regard to hire and tenure of employment, or any term or condition of employment, except as required 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 NOT interrogate our employees concerning their union affiliations, activities, or sympathies.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the right to refrain from any or all of the concerted activities guaranteed them by Section 7 of the Act, 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 Napoleon Sargent 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 against him.

All our employees are free to become, remain, or refrain from becoming members of the above-named union except to the extent that this right may be affected by agreements in conformity with Section 8 (a) (3) of the National Labor Relations Act.

DEPEW PAVING Co., INC.,  
*Employer.*

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

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

INTERMEDIATE REPORT AND RECOMMENDED ORDER

Messrs. William Naimark and Milton Pravitz, for the General Counsel.  
Smith, Miller, Murphy and Roberts by Messrs. Esmond D. Murphy and James R. Ulsh, of Buffalo, N. Y., for the Respondent.

## STATEMENT OF THE CASE

Upon a charge duly filed by Napoleon Sargent, the General Counsel of the National Labor Relations Board<sup>1</sup> by the Regional Director for the Third Region (Buffalo, New York) issued a complaint dated May 5, 1950, against Depew Paving Co., Inc., hereinafter called Respondent, alleging that Respondent, by discriminatorily discharging Napoleon Sargent and by other conduct, 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, 61 Stat. 136, hereinafter called the Act. Copies of the complaint with copies of the charge were duly served upon the Respondent and upon Napoleon Sargent.

Respondent filed an answer denying that it committed the unfair labor practices alleged in the complaint.

Pursuant to notice, a hearing was held on May 22, 25, and 26, 1950, at Buffalo, New York, before the undersigned Trial Examiner. The General Counsel and Respondent were represented by Counsel. The parties participated in the hearing and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues. At the conclusion of the General Counsel's case-in-chief and at the conclusion of the entire hearing, Respondent moved to dismiss the complaint on jurisdictional grounds and for lack of proof. After extensive oral argument on the record the undersigned denied the motion.

The parties were afforded an opportunity to file briefs and proposed findings of fact and conclusions of law. Respondent has filed a letter directing the Trial Examiner's attention to *Marathon Rubber Products Co.*, 10 NLRB 704, which the undersigned has considered.

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

## FINDINGS OF FACT

## I. THE BUSINESS OF THE RESPONDENT

Depew Paving Co., Inc., a New York corporation maintaining its principal office and place of business at Depew, New York, is engaged as a contractor in the general construction of roads and highways and the installation of sewers.

Respondent, in the course and conduct of its business operations during 1948, performed services for which it received approximately \$1,200,000. Respondent purchased materials, supplies, and equipment valued in excess of \$522,000 which consisted primarily of cement, cement pipe, sand and gravel, steel reinforcing, and crushed stone.

Respondent, in the course and conduct of its business operations during the year 1948, performed various highway construction work for the State of New York and the town of Cheektowago, New York, for which it received approximately \$1,284,000 and \$40,000 respectively. This work consisted primarily of the installation of sewers and the construction of highways and roads within the State of New York.

During the year of 1949, Respondent's purchases of materials and supplies approximated \$652,000 and consisted primarily of cement, steel, slag, pipe, bricks, lumber, crushed stone, and sand and gravel. All materials and supplies were purchased, produced and/or manufactured locally within the State of New York

<sup>1</sup> Hereafter references to the General Counsel are to his representatives at the hearing.

with the exception of \$11,159.55 worth of pipe which was purchased in Buffalo but produced and/or manufactured and shipped from points outside of New York to Respondent. The figures concerning total purchases for 1949 include; \$51,656.56 worth of steel purchased from Bethlehem Steel Company within New York, \$35,523.66 worth of steel purchased from Wickwire Spencer Steel Company in New York, and \$61,993.33 worth of cement purchased from Lehigh Portland Cement Company purchased within New York. Also during 1949, Respondent purchased two bulldozers valued at approximately \$20,000 from International Harvester Machines. These bulldozers were purchased locally and the point of origin is undetermined.

Respondent, in the course and conduct of its business operations during the year 1949, rendered services for which it received approximately \$2,148,867. These services included the repair or reconstruction of a landing strip at the Buffalo Airport for which Respondent received approximately \$610,455; construction of 4.7 miles of the Grand Island West River Parkway (a State parkway commission road on Grand Island which is bordered by the Niagara River which runs between the United States and Canada) in Erie County for the New York State Department of Public Works for which Respondent received approximately \$774,554; construction of 2.13 miles of union road (State Route 18B ending at State Route 240 which in turn crosses U. S. Highway 20) in Erie County, New York, for the New York State Department of Public Works for which Respondent received approximately \$76,067; paving of 4.82 miles of Holland Yorkshire Road (New York State Highway No. 16 which crosses U. S. Highway 20) in Erie County, New York, for the New York State Department of Public Works for which the Respondent received approximately \$668,953; construction of 2.99 miles of Attica-Batavia Road (New York State Route 98 which crosses U. S. Highway 20) and two bridges over creeks for the New York State Department of Public Works for which the Respondent received approximately \$18,836.

Buffalo Airport is used by American, Capital, and Robinson Airlines and by the Flying Tigers, which is a freight line, and Buffalo is thereby connected with passenger and air express routes from and to all points of the globe. Since Respondent engages in the construction of instrumentalities of commerce and arteries essential to the flow of commerce among the several of the States, it is directly and intimately related to the free flow of commerce and I find that it will effectuate the policies of the Act to assert jurisdiction (see *Strong Company*, 86 NLRB 687; *Brown Ely Co.*, 87 NLRB 27; *J. R. Reeves and A. Teichert & Sons, Inc.*, 89 NLRB 54).

## II. THE LABOR ORGANIZATION INVOLVED

International Hoř Carriers' Building and Common Laborers' Union of America, Local 210, AFL, herein called the Union, is a labor organization within the meaning of Section 2 (5) of the Act.

## III. THE UNFAIR LABOR PRACTICES

### A. Facts

On July 13, 1949, Napoleon Sargent applied for work at the Buffalo Airport, and was told by C. C. Gibbs, Respondent's secretary and superintendent, "Stick around awhile. We are going to put on some fellows as soon as we get started up here." According to Sargent shortly thereafter Gibbs brought "some boots"

and he (Sargent) and three other workers employed that morning were shown where to work and what to do by "a fellow worker," Walter Todd. Sargent testified that throughout that day and the next he (Sargent), Norman Horton, Jim Brooks, and Harry Irwin handled steel reinforcements (10 feet by 14 feet sheets of steel mesh) placed in poured concrete.

Gibbs testified that on July 13, 1949, four or five men including Sargent and Harry Irwin came to the airport looking for work and that he (Gibbs) told them "to stick around" and later that morning they were hired by Anthony Schunk, master mechanic. According to Gibbs on the 2 days that Sargent worked, he "worked with the cement crew, the concrete crew." On cross-examination by Respondent's counsel<sup>2</sup> Gibbs failed to deny specifically Sargent's testimony as to his duties. Gibbs testified:

Q. (By Mr. Murphy) What did Mr. Sargent do during the two days that he worked there; what type of work?

A. He worked with the cement crew, the concrete crew.

Q. Did he do any of the steel work he referred to?

A. He couldn't very well. They were all union steel workers.

Q. The fact is he didn't, is that right?

A. No one could touch the steel, only the union steel men.

Later when called as witness for Respondent Gibbs testified:

Q. (By Mr. Murphy) Mr. Gibbs, what work did Napoleon Sargent do during the two days he was on the airport job, approximately July 13, 1949?

A. He worked in the concrete crew directly behind the mixer, spreading concrete.

Q. Did he do any steel job?

A. None whatsoever.

Q. Who was his foreman?

A. Bruno Bonaselli.

Q. Was there a man there by the name of Todd?

A. Yes.

Q. Who is Todd?

A. He works in the concrete crew right behind the mixer, spreading the concrete ahead of the spreader.

Q. Was he a foreman or another laborer, or what?

A. He is a laborer.

Schunk testified that he (Schunk) hired Sargent<sup>3</sup> and three other men, that Sargent was assigned to the concrete gang, under the direction of Bruno Bonaselli, foreman, and worked around "the paving, distributing the concrete, handling it with a shovel," that Sargent and the others hired with him did not do any steel work involving the laying of steel mesh, and that such work was done by "iron workers." Schunk was unable to describe Sargent. He stated: "I don't know the man well enough for that. I know I hired him and the last time I seen him was when he was in here this morning." Bonaselli, Todd, Horton, Brooks, and Irwin were not called as witnesses and the record does not contain any explanation as to why they were not called.

<sup>2</sup> Gibbs was called an adverse witness by the General Counsel and later testified as a witness for Respondent.

<sup>3</sup> Sargent testified he did not know Schunk, and that the master mechanic did not speak to him on July 13.

Upon the entire record herein the undersigned believes and therefore finds the facts concerning Sargent's employment to be as testified to by Sargent and outlined above.

About 15 minutes after Sargent started working on July 13, 1949, a "fellow worker," whom Sargent could describe only as "some worker there, which, I think was acting as steward or something" asked Sargent, "Are you in the union?" and Sargent told him, "No."

Sargent testified that on July 14, 1949 between 3:30 and 4 p. m. Joseph Cerullo, president of Respondent, came to where he (Sargent) was working, called him outside the runway and said to him, "I thought you were in the union" and when he (Sargent) answered "No, sir, I am not a union member" Cerullo stated "I have to let you go. If I had known you were not in the union, I would have put you in with the rest of the fellows. I got some fellows down on Holland Road I have to try to get in, and I got to let you go." Sargent testified that the timekeeper (Albert Dicesare) was present during this conversation and that Cerullo told the timekeeper to make up his (Sargent's) pay "through that day" that Sargent was "finished." According to Sargent at quitting time that day he (Sargent) was paid off by the timekeeper.

Sargent indicated uncertainty as to Cerullo's first name and referred to him as superintendent. However, Sargent testified that he was informed, by another worker, that Cerullo's first name was Joseph, and that he had known Cerullo "for quite a while" through his (Sargent's) employment at the National Battery Company in Depew. Furthermore Sargent gave a detailed description of Cerullo and Gibbs which indicates the two men are entirely different in appearance. Sargent testified he "learned" that Cerullo was superintendent of the job and that he saw him (Cerullo) in working clothes "walking up and down looking at most of the working fellows" and "talking to some of them." It was stipulated that "Joseph Cerullo is president of the company" and Sargent was adamant in his testimony that his conversation was with Joseph Cerullo and not Gibbs as testified to by Gibbs. The record does not indicate any other Cerullo connected with Respondent.

Cerullo was not called as a witness and the record does not contain any explanation as to why he was not called.

Albert Dicesare,<sup>4</sup> timekeeper, testified that Gibbs laid off Sargent, that about 3 o'clock on the day Sargent was laid off "Mr. Gibbs come up to me and asked me how much time Mr. Sargent had on the job. I referred to my records and saw that he had started the previous morning about 9 o'clock and gave him the time up until 4:30." Dicesare was not questioned concerning Sargent's testimony that at quitting time on July 14 he (Sargent) was paid off by the timekeeper and was not questioned concerning the conversation between Sargent and Cerullo at which he (Dicesare) was allegedly present. Concerning Cerullo his (Dicesare's) only testimony was:

Q. Was Mr. Cerullo there at all [at time of layoff]?

A. I don't believe so. I didn't see him.

Q. You were present, were you?

A. At the airport?

Q. Yes.

A. Yes, sir, I was.

Gibbs testified that "as a matter of course on all new men" he interrogated them as to "whether they were members of the union," that such interrogation

<sup>4</sup> A witness called by Respondent.

is made because frequently union representatives inquire of him (Gibbs) as to the number of union and nonunion men on the job and he (Gibbs) endeavors to give accurate information when requested so as not to disturb the amicable relationship between Respondent and the Union. Gibbs testified there is no arrangement or agreement with the Union regarding employment of employees that Respondent employs both union and nonunion laborers and at the time of the occurrences herein there were about 40 laborers employed by Respondent and about 12 or 14 of them were not members of the Union and that this ratio has existed for 3 or 4 years.

According to Gibbs on the afternoon of July 13, 1949, he (Gibbs) asked Sargent if he belonged to the Union and when Sargent said, "Yes," he (Gibbs) asked to see his card and was told by Sargent that he would bring it in the next morning. Gibbs testified that the next day between 3 and 4 p. m. he (Gibbs) asked "to see his card" and Sargent stated he "didn't have it, he didn't belong to the union; that he had lied in hopes he could get into the union" and I [Gibbs] told him we couldn't keep him around, that we didn't want anybody to work for us that lied." Gibbs testified that Harry Irwin was "laid off, too, the same time," that "they were both together" because "he lied the same as Sargent did" because "he didn't have a union card and he said he did have one." Sargent and Irwin, according to Gibbs, were permitted to finish the day and at quitting time he (Gibbs) paid Sargent off in cash and the timekeeper (Dicesare) was not present. Gibbs stated he was not certain but he believed the timekeeper was present during the afore-mentioned conversation with Sargent and Irwin on July 14, 1949. Dicesare testified he "didn't hear Mr. Sargent talking to Mr. Gibbs" and that he "didn't know that he talked to Mr. Gibbs." As noted previously Irwin did not testify in this proceeding.

Gibbs could not recall whether Cerullo was on the job the day of Sargent's discharge and stated he (Cerullo) "was in and out of the job quite a bit at that time." Gibbs testified that he (Gibbs) and not Cerullo "told Mr. Sargent that he was through."

Gibbs stated that the only time he saw Sargent was on July 13 and 14, 1949, and "I never seen him before or since."

Sargent, upon recall as a witness, testified that Gibbs did not speak to him on July 14, 1949, that Gibbs did not say anything to him about having lied about being a member of the Union, and that Cerullo, not Gibbs, told him he was discharged. Sargent stated he never lied about being a member of the Union and denied specifically that Gibbs was the man that had the talk with him about laying off and stated that at quitting time the "timekeeper came back and told me to come out and he handed me the envelope."

Sargent gave direct, positive, and detailed testimony practically all of which was subject to verification or contradiction by officials and employees of Respondent. Nevertheless, these officials and employees, especially Cerullo, Bonaselli, Todd, Horton, and Brooks, did not testify herein and no explanation of their failure to testify has been made. Furthermore these same officials and employees, except Cerullo, together with Irwin, according to Gibbs' testimony, were in a better position (because of their alleged active participation in the event and occurrences involved) than those called as witnesses to corroborate Gibbs' testimony. Under these circumstances Respondent's failure to call the aforementioned persons or explain its failure to do so justifies an inference that had they appeared and testified they would have corroborated Sargent's testimony. In any event Cerullo's failure to testify leaves Sargent's testimony concerning the conversation between Sargent and Cerullo undenied. Dicesare, although

called as a witness by Respondent, was not questioned concerning the gravamen of Sargent's testimony (the alleged statements by Cerullo in the timekeeper's presence), did not deny giving Sargent his "envelope," and did not corroborate Gibbs' testimony concerning his (Gibbs') alleged conversation with Sargent.

On the basis of the entire record, the undersigned credits Sargent's testimony and believes and finds that the facts concerning Sargent's employment and discharge to be as revealed by his testimony as stated above.

The complaint alleges:

At all times since about July 12, 1949, and prior thereto, Respondent and the Union were parties to an agreement and an arrangement relating to wages, hours and conditions of employment, and at all times since then enforced such agreement and such arrangement between them, which required that all employees hired by Respondent must be members in good standing of the union as a condition of employment.

Respondent's answer denies this allegation.

The only direct evidence concerning this allegation is the testimony by Gibbs and he testified that no agreement or arrangement whatsoever, written or oral, existed or exists between Respondent and the Union regarding employment of employees. Counsel for the General Counsel, when asked during his oral agreement what evidence he thought supported the above allegation, stated:

We have no direct evidence to support that other than the inference that could be drawn from the testimony given by Sargent as to his conversation with Mr. Cerullo in which Mr. Cerullo said, I believe, "We can't hire you unless you are a member of the union."

As indicated during the oral argument the undersigned believes the testimony referred to does not support the above allegation of the complaint.

It appears, however, from the testimony of Sargent, which the undersigned credits that employees are interrogated concerning their union membership or affiliation and that Respondent requires membership in good standing in the Union as a condition of employment and the undersigned so find. Gibbs' testimony also establishes such interrogation.

#### B. Conclusion

The Board has frequently held that interrogation of employees concerning their union affiliation is violative of the Act. The undersigned finds nothing herein requiring or warranting a deviation from this interpretation of the statute. The facts set forth in this Report establish an unwarranted invasion of employees' privacy having a reasonable tendency to interfere with the enjoyment of their rights guaranteed by the Act. *N. L. R. B. v. Fairmont Creamery*, 169 F. 2d 169; *Standard-Coosa-Thatcher Company*, 85 NLRB 1358.

Under the facts as found by the undersigned, there is no question that Respondent violated Section 8 (a) (1) and (3) of the Act by its discharge of Napoleon Sargent on July 14, 1949. Furthermore even if Gibbs' testimony is credited Respondent's position probably is untenable as an excuse for its conduct since, under Respondent's version of the facts, the sole question is whether Sargent was acting within his rights as guaranteed by the Act, i. e., is a misstatement, uttered without malice and without intent to injure the employer, in response to an inquiry prohibited by the Act, a just cause for discharge?<sup>5</sup> In view of

<sup>5</sup>Cf. *N. L. R. B. v. Peter Cailler Kohler Swiss Chocolates Co.*, 130 F. 2d 503 (C. A. 2); *N. L. R. B. v. Illinois Tool Works*, 153 F. 2d 811, 815-816 (C. A. 7).

the findings made herein it is not necessary to determine the answer to the question posed. Nevertheless the undersigned is cognizant of the argument that to countenance a discharge under such circumstances may lead to a self-defeating interpretation of the Act and a frustration of the policy against interrogation whereby the Board, on one hand, would hold that employers violate the Act by interrogating, while telling employees, on the other hand, that they must not make misstatements in response to such interrogation and if they do the Board will not lend its processes to obtain their reinstatement in the event of discharge therefor.

The undersigned concludes and finds that the afore-mentioned acts and conduct of Respondent constitute unfair labor practices within the meaning of Section 8 (a) (1) and (3) 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 described in Section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and such of them as have been found to constitute unfair labor practices tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

#### V. THE REMEDY

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

It has been found that Respondent discriminated in regard to the hire and tenure of employment of Napoleon Sargent thereby encouraging membership in the Union. It will be recommended that Respondent offer to Napoleon Sargent immediate and full reinstatement to his former or substantially equivalent position<sup>6</sup> without prejudice to his seniority or other rights and privileges and that Respondent make whole Napoleon Sargent for any loss of pay he may have suffered by reason of Respondent's discrimination against him.<sup>7</sup> Consistent with the policy of the Board<sup>8</sup> the loss of pay shall be computed on the basis of each separate calendar quarter or portion thereof during the period from Respondent's discriminatory action to the date of a proper offer of reinstatement. The quarterly periods hereafter called "quarters" shall begin with the first day of January, April, July, and October.

In accordance with the policy of the Board it will be further recommended that Respondent make available to the Board upon request payroll and other records to facilitate the checking of the amount of back pay due.<sup>9</sup>

Since it has been found that Respondent did not enter in any agreement or arrangement with the Union requiring membership in the Union as a condition

<sup>6</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 and if such position is no longer in existence then to a substantially equivalent position." See *The Chase National Bank of the City of New York, San Juan, Puerto Rico, Branch*, 65 NLRB 827.

<sup>7</sup> See *Crossett Lumber Co.*, 8 NLRB 440; and *Republic Steel Corporation v. N. L. R. B.*, 311 U. S. 7.

<sup>8</sup> *F. W. Woolworth Company*, 90 NLRB 289.

<sup>9</sup> *F. W. Woolworth Company, supra*.

of employment it will be recommended that the complaint be dismissed insofar as it alleges such an unlawful agreement or arrangement.

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. International Hod Carriers' Building and Common Laborers' Union of America, Local 210, AFL, 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 Napoleon Sargent thereby encouraging membership in a labor organization, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (3) of the Act.

3. By such discharge and by otherwise interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, 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.

[Recommended Order omitted from publication in this volume.]