

In the Matter of S. B. WHISTLER & SONS, INC. and INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, CIO

*Case No. 3-CA-130.—Decided November 8, 1950*

DECISION AND ORDER

On June 1, 1950, Trial Examiner Ralph Winkler 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 (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 exceptions to the Intermediate Report and a supporting brief.

The Board<sup>1</sup> has reviewed the rulings of the Trial Examiner made 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 brief, and the entire record in the case,<sup>2</sup> and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner with the following additions and modifications.<sup>3</sup>

1. The Trial Examiner found, and we agree, that the Respondent interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act, thereby violating Section 8 (a) (1) of the Act, as amended, by: (a) Vice-President Whistler's questioning employee Klein on February 2, 1949, as to

<sup>1</sup> Pursuant to the provisions of Section 3 (b) of the Act, the National Labor Relations Board has delegated its powers in connection with this proceeding to a three-member panel [Chairman Herzog and Members Murdock and Styles].

<sup>2</sup> The request of the Respondent for oral argument is denied because the record, the exceptions and brief submitted, in our opinion, adequately present the issues and position of the parties.

<sup>3</sup> The Intermediate Report contains minor inaccuracies which do not affect our ultimate findings: (1) The Trial Examiner erroneously stated that Merz testified that only Havas had greater seniority than Rafter as a universal draftsman; the record, however, shows that Merz testified that only Havas had greater seniority than Lang as a universal draftsman; and (2) the Trial Examiner erroneously stated that Rafter's absences on July 16 and 17, 1948, were with Merz's permission; the record, however, does not show that the absences on July 16 and 17, 1948, were with Merz's permission.

whether anyone had "contacted (him) the previous evening about the Union," and specifically, whether Rafter and Lang had done so; and (b) Vice-President Whistler's interrogation of job applicants concerning their union membership.

2. We also agree with the Trial Examiner for the reasons fully set forth in the Intermediate Report,<sup>4</sup> that the Respondent discharged Rafter on February 2, 1949, and Lang on February, 25, 1949, because of their activities in behalf of the Union, thereby violating Section 8 (a) (3) and 8 (a) (1) of the Act.

### The Remedy

As recommended by the Trial Examiner, we shall order the Respondent to make Rafter and Lang whole for any loss of pay they may have suffered by reason of the Respondent's discrimination against them. Since the issuance of the Trial Examiner's Intermediate Report, however, the Board has adopted a method of computing back pay different from that prescribed by the Trial Examiner.<sup>5</sup> Consistent with that new policy, we shall order that the loss of pay be computed on the basis of each separate calendar quarter or portion thereof during the period from the Respondent's discriminatory action to the date on which the employee no longer desired reinstatement (May 31, 1949, in case of Rafter; March 7, 1949, in case of Lang). The quarterly periods, hereinafter called "quarters," shall begin with the first day of January, April, July, and October. Loss of pay shall be determined by deducting from a sum equal to that which the employee would normally have earned for each quarter or portion thereof, his net earnings,<sup>6</sup> if any, in other employment during that period. Earnings in one particular quarter shall have no effect upon the back-pay liability for any other quarter.

We shall also order the Respondent to make available to the Board upon request, payroll and other records to facilitate the checking of the amount of back pay due.<sup>7</sup>

<sup>4</sup> In addition to the facts found and relied upon by the Trial Examiner in reaching his conclusion as to the discharge of Lang, we also rely upon the evidence showing that, following the discharge of Rafter on February 2, 1949, Lang did not discontinue his activities in behalf of the Union, but accelerated them. Thus, Lang credibly testified that between February 2 and 25, 1949, he signed up 23 new members in the Union.

<sup>5</sup> *F. W. Woolworth Company*, 90 NLRB 289.

<sup>6</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 the unlawful discrimination and the consequent necessity of seeking employment elsewhere. *Crossett Lumber Company*, 8 NLRB 440. Monies received for work performed upon Federal, State, county, municipal, or other work-relief projects shall be considered as earnings. *Republic Steel Corporation v. N. L. R. B.*, 311 U. S. 7.

<sup>7</sup> *F. W. Woolworth Company*, *supra*.

As recommended by the Trial Examiner we shall also order the Respondent to cease and desist from, in any other manner, infringing upon the rights guaranteed 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, as amended, the National Labor Relations Board hereby orders that the Respondent, S. B. Whistler & Sons, Inc., Buffalo, New York, its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Interrogating employees and applicants for employment concerning their union membership and activities or concerning the union activities of other employees;

(b) Discouraging membership in International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, CIO, or in any other labor organization, by discharging any of its employees or by discriminating in any other manner in regard to their hire or tenure of employment, or any term and condition of employment;

(c) 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 International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, CIO, 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 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.

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

(a) Make whole Harry R. Lang and John Rafter in the manner set forth above in the section entitled "The Remedy" for any loss of pay they may have suffered by reason of the discrimination against them;

(b) 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 under the terms of this Order;

(c) Post at its place of business in Buffalo, New York, copies of the notice attached hereto and marked Appendix A.<sup>8</sup> Copies of said notice, to be furnished by the Regional Director for the Third Region, shall, after being duly signed by the Respondent's representative, 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;

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

## 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** discourage membership in INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, CIO, or any other labor organization of our employees, by discharging any of our employees, or by discriminating in any other manner with regard to their hire and tenure of employment, or any term or condition of employment.

**WE WILL NOT** interrogate employees and applicants for employment concerning their union membership and activities or concerning the union activities of other employees.

**WE WILL NOT** 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 the INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, CIO, 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 such activities, except to the extent that such right may be affected by an agreement requiring

<sup>8</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."

membership in a labor organization as a condition of employment as authorized by Section 8 (a) (3) of the Act.

WE WILL MAKE whole Harry R. Lang and John Rafter for any loss of pay suffered as a result of the discrimination against them.

All 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.

S. B. WHISTLER & SONS, INC.,  
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.

#### INTERMEDIATE REPORT AND RECOMMENDED ORDER

*William J. Cavers, Esq.*, for the General Counsel.

*Davis, Townsend, McElvien & Potter*, by *Harold F. Potter, Esq.*, and *Leland G. Davis, Esq.*, of Buffalo, N. Y., for the Respondent.

*Mr. Jay C. Watkins*, of Buffalo, N. Y., for the UAW.

#### STATEMENT OF THE CASE

Upon a first amended charge filed May 9, 1949, by International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, CIO, herein called the UAW, the General Counsel for the National Labor Relations Board, by the Regional Director for the Third Region (Buffalo, New York), issued a complaint dated October 18, 1949, alleging that, by discriminatorily discharging two employees and by other conduct, 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 Labor Management Relations Act, 1947, 61 Stat. 136, herein called the Act. Copies of the complaint, with copies of the second amended charge, were duly served upon the Respondent.

The Respondent filed an answer denying that it committed the unfair labor practices alleged in the complaint; it also interposed certain affirmative defenses to the complaint.

Pursuant to notice, a hearing was held on April 24 and 25, 1950, at Buffalo, New York, before the undersigned Trial Examiner. The General Counsel and the Respondent were represented by counsel and the UAW by a representative. 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.

The Respondent moved to dismiss the complaint for lack of proof. The Examiner reserved ruling at the time and the motion is now denied in accordance with the findings of fact and conclusions of law set forth below.

All parties were afforded an opportunity to file briefs and proposed findings of fact and conclusions of law. The General Counsel and the Respondent have filed briefs which the Examiner has considered.

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

#### FINDINGS OF FACT

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

The Respondent, a New York corporation, maintains its office and principal place of business in Buffalo, New York, where it is engaged in the manufacture of dies and machine tools. In the calendar year 1949, the Respondent purchased raw materials valued in excess of \$150,000, of which amount approximately 10 percent was obtained outside the State. The value of the products manufactured by the Respondent during the same period exceeded \$1,000,000, of which approximately 50 percent was sold and transported outside the State.

I find, and the Respondent concedes, that it is engaged in commerce within the meaning of the Act.

##### II. THE ORGANIZATION INVOLVED

The UAW is a labor organization within the meaning of the Act, admitting to membership employees of the Respondent.

##### III. THE UNFAIR LABOR PRACTICES

###### A. *Discrimination*

###### 1. Preliminary statement and discussion of the issues

Late in 1948, employees Harry R. Lang and John Rafter first discussed organizing a union among the Respondent's employees, there being no labor organization at the plant at the time. They did nothing about it, however, until January 31, 1949, when Lang, Rafter, and several other employees of the Respondent met at Lang's home and at Lang's instigation with a subregional director of the UAW named Gray to discuss the advisability of forming such a union. Gray outlined the advantages of a union and Rafter and Lang signed membership cards in the UAW. At a local bowling alley the following evening, Lang and Rafter solicited several of the Respondent's employees, including Jerome Klein, to join the Union. Later that evening, Lang also discussed the Union with one or two other employees by telephone.

The next day at the plant, February 2, Respondent's Vice-President L. V. Whistler asked Klein whether anyone had "contacted [Klein] the previous evening about the Union" and whether Lang and Rafter had done so. Whistler discharged Rafter the same day. Several weeks later, on February 25, Whistler either laid off or discharged Lang.

The complaint alleges that Lang and Rafter were discriminatorily discharged. Denying discrimination in both cases, the Respondent asserts in its answer that it discharged Rafter because of "habitual and repeated tardiness and absenteeism over a long period of time, despite repeated warnings both that his attendance must greatly improve and that he would be discharged if it did not do so improve." The Respondent's answer asserts that Lang was laid off because of slack work, particularly in Lang's department, and that the layoff was made in

accordance with seniority principles as they are established in the Respondent's plant with due regard to the "quality" of Lang's work and his "lack of cooperation."

Risking supererogation, I shall state fundamental principles applicable to the case. The Respondent could discharge Lang and Rafter for any reason, weighty or trivial, except, however, that it could not lawfully discharge them for the reason that they joined and assisted the UAW, not withstanding any lawful cause it might have had which, in fact, did not motivate the discharge. Questions of motive usually are difficult to resolve, particularly where the testimony is in conflict as to material facts. Conflicting words spoken at a hearing, when marshalled and juxtaposed in chronological sequence and also when analyzed in terms of rational behavior, frequently themselves demonstrate what is true and what is not. However, when the testimony is not self-clarifying, it becomes particularly important for the trier-of-fact to evaluate the testimony in the light of his impressions of the demeanor of witnesses in order to determine the intrinsic value of the respective testimony. Thus one should consider, among other things, whether the witness was evasive or hostile under examination, did he try to conceal some facts or to obfuscate others, did he testify consistently as to material facts or facts he considered material, did he assert as a fact something he later denied to be true, etc. My resolution of the ultimate question of motivation and the related problems of credibility is based on such observation of the demeanor of witnesses together with the testimony they uttered.

## 2. The Respondent's knowledge of Lang's and Rafter's activities

In February 1949, Lang and Rafter were employed as draftsmen in the universal perforated section of the Respondent's engineering department. The engineering department also includes the custom die section. Foreman Merz is in charge of the universal section; Foreman Hamilton has charge of the custom die section. Vice-President Whistler does most of the hiring.

Whistler, Merz, and Hamilton denied any knowledge of Lang's and Rafter's union membership or activities when these employees were separated from employment. In this connection, the Respondent emphasizes testimony of Rafter and Lang that they engaged in no such activity in the plant on February 1 and 2 (the period between the meeting at Lang's home and Rafter's discharge) and testimony of Klein that Klein did not answer Whistler's inquiry on February 2 as to whether Lang and Rafter were the persons who spoke to him about the Union the evening before. However, in view of Whistler's specific reference to Lang and Rafter while questioning Klein, as related above, and in view of the entire record of the case, I am convinced and find that on and after February 2, 1949, the Respondent knew that Rafter and Lang were promoting the Union among the Respondent's employees. Also, on the basis of the entire record including the Respondent's interrogation of job applicants as set forth below, I find that the Respondent was actively interested in ascertaining the status of union activities among its employees.

## 3. Rafter's discharge

Rafter was hired by the Respondent in March 1944. He worked 6 months as a clerical and then was transferred to the universal section as a draftsman under Foreman Merz. Rafter had no drafting experience at the time; following the transfer Rafter enrolled in a local night school to complete a college en-

trance course. Rafter's starting wage in the universal section was 80 cents an hour. He received several increases and at the time of his discharge his wage rate was \$1.20 an hour. Foreman Merz testified that Rafter was an excellent draftsman.

The facts attending Rafter's actual discharge on February 2, 1949, are undisputed: Whistler called Rafter to his office where Merz also was present. Rafter admitted to Whistler that he had been late that day and the two preceding workdays, Whistler thereupon discharged Rafter, stating to Rafter that he could not tolerate tardiness. There was no mention of Rafter's union activities. Rafter has not desired reinstatement since May 31, 1949, when he obtained employment elsewhere.

*Rafter's tardiness and absences:* Whistler testified that Rafter had been tardy frequently at the beginning of his employment, that Rafter was not late very often during the next few years after his transfer to the engineering department in 1944, that Rafter again began coming in late and was absent for periods of a day or longer starting about February 1948 and continued such practices intermittently until his discharge, that Whistler spoke to Rafter six or seven times over the entire period of Rafter's employment concerning this matter, that Rafter's conduct was detrimental to the morale of other employees, and that Foreman Merz complained of the absences and tardiness to Whistler. Whistler further testified that on the alleged occasion of such a complaint by Merz approximately 8 or 9 months before the discharge, Whistler told Rafter in Merz' presence that "I am giving you a good warning . . . I am not going to tolerate this continued absenteeism and being late"; Whistler also testified that on the occasion of a similar complaint by Merz several months before the discharge, Whistler told Rafter in Merz' presence, "Jonnie, this is your final warning. The next time any of this occurs, I will have to let you off."

Merz testified that he had told Rafter several times that Rafter should report on time but that he never had warned Rafter as to tardiness or absences. According to Merz' version of Whistler's two afore-mentioned conversations with Rafter as to which Whistler testified, Whistler told Rafter he would have to improve but did not tell Rafter he would lose his job if tardiness continued.

Mrs. V. P. Whistler, the Respondent's bookkeeper, testified that Rafter returned late from lunch during the period from late November 1948 through February 2, 1949, and that Rafter alone was guilty of such infraction. She testified that she purposely watched for Rafter's tardiness in that respect and that she did "some detective work on my own that Mr. Whistler didn't even know about."

In principal documentary support of its contention, the Respondent also introduced a schedule of Rafter's absences and tardiness during the year immediately preceding Rafter's discharge. (This schedule is attached hereto as Appendix A.)

Rafter impressed the undersigned as an honest, forthright, and intelligent witness. He admitted that he had come in late on occasions and that he had been absent; he also admitted telling Whistler on the occasion of his discharge that he had been late that day and on the two preceding workdays. Rafter testified that Whistler had mentioned the matter of tardiness to him but that Whistler had done so in connection with a discussion stemming from Rafter's request for a wage increase and a complaint by Rafter to Merz that Rafter was stalemated in the universal section. Rafter denied that either Whistler or Merz ever had stated that he would be discharged or otherwise disciplined

because of tardiness or absences. I credit this denial and find that neither Whistler nor Merz has warned Rafter in this matter.

Rafter and Lang credibly testified, in regard to the subject of Mrs. Whistler's testimony, that Rafter and other identified employees in the universal section went to the bank and returned together during Friday lunch periods, Friday being payday, and that Rafter and the others occasionally returned late. Rafter, therefore, was not alone in these latenesses; and, however insignificant these noonday latenesses may have been, it is to be noted that Merz was unable to testify that he was aware of them and there is no showing, particularly in view of Mrs. Whistler's own testimony, that before Rafter's discharge she communicated to Whistler the purported results of her sleuthing. If she had not so reported, and I am unable to find that she did, Whistler's decision to discharge Rafter could not have been based thereon.

I turn now to Appendix A, the compilation of Rafter's lateness and absences which the Respondent originally submitted without qualification as supporting its position. Properly appraised, this list is not quite so impressive as the unexplained entries might indicate. Thus, Rafter credibly testified, and Merz corroborated this testimony in many material respects, that some of the recorded latenesses were with Merz' permission for the purpose of taking State Regent examinations (February 10, 1948; June 21 and 22, 1948; January 26, 27, and 28, 1949); that the lateness on May 27, 1948, had Merz' approval; that some absences also were with Merz' permission (May 29, 1948; June 1, July 16 and 17, 1948); and that the absence on June 2, 1948, was unavoidably caused by an automobile breakdown while returning from Indianapolis where he had gone with Merz' knowledge and permission.

It is apparent, therefore, and I find that even those absences and tardiness for which permission had been granted are included in Appendix A. Another circumstance also to be noted is the concluding statement on the Appendix that none of the other employees in Merz' universal section was either late or absent, except on holidays and vacations, during the period under discussion. Whistler and Merz both testified to the effect that these other employees had been absent on occasions other than holidays or vacations.

In summary it therefore appears that, while Rafter had been absent and tardy on occasion, not all entries on Appendix A are culpable or otherwise inexcusable; that Whistler never had warned Rafter in regard to this matter despite his positive assertions to the contrary; and that other employees also had been absent contrary to the statement in Appendix A. Considering these facts in the light of the entire record, including the general unpersuasiveness of the Respondent's proof, I am convinced and find that the Respondent did not discharge Rafter, admittedly an excellent draftsman of 4½ years such experience with the Respondent, because of the reasons it alleged.

#### 4. Lang's discharge

The Respondent hired Lang in November 1942, and after 6 months' clerical work transferred Lang to the universal section as an apprentice draftsman under Foreman Merz. Although he had no such experience at the time, Lang became an excellent draftsman according to Whistler, and in mid-1948 the Respondent transferred Lang to the custom die section under Foreman Hamilton. The custom die section requires much more skill and experience than the universal section, and Whistler testified that Lang was transferred there for training to

become Hamilton's assistant. Whistler and Hamilton testified that that after a while they felt Lang was not adapting himself to custom die work. In this connection they testified that Lang fell asleep at his job, that he couldn't understand the work, and that he gave the impression of "surliness." Lang was returned to Merz' section about December 1948 or early January 1949. Hamilton's testimony indicates that Lang apparently did not have adequate training for the die custom die work.

Merz testified that after Lang's return to the universal section, Lang lacked interest in his work and was "nowheres near as good" as he originally had been in the section. Whistler testified that Lang's production was only one-fourth of what it had been and Merz also stated that Lang's output, after his return to the universal section, did not equal in quality or quantity that of Weber, one of the other universal draftsmen; Merz also testified, however, that he had no figures to show that Lang's production was reduced during this period of January and February 1949, that he "wouldn't know" whether Lang's work was as good as that of other men in his department during this period, and that he never checked the quality of Lang's work. Merz testified further that at no time after Lang's return to the universal section did he recall instructing or speaking to Lang about the latter's work.

Lang admitted that he fell asleep on several occasions during the approximately 6-month period in the custom die section; and while Lang stated that Hamilton had offered suggestions to him, he credibly testified and I find that neither Hamilton nor Merz had criticized his work.

As in the case of Rafter, there is no real dispute as to the occasion of Lang's separation from employment: Whistler merely advised Lang that he was being laid off for lack of work and offered to give Lang a recommendation. Lang has not desired reinstatement with the Respondent since March 7, 1949.

#### Conditions of the Respondent's Business in February 1949 and Lang's Seniority

The Respondent adduced testimony to the effect that sales of universal perforated equipment had fallen off during the period in question and in this connection it introduced weekly records of such sales together with sales records for the preceding year. These production records, as abstracted below, are on a cumulative weekly basis. The stated percentage refers to the drop in sales as compared with the same period of the preceding year.

Week ending—	Yearly total	Week ending—	Yearly total	Percent
Dec. 31, 1947.....	\$964, 584. 13	Dec. 31, 1948.....	\$924, 265. 60	49½
Jan. 8, 1948.....	22, 741. 11	Jan. 8, 1949.....	14, 314. 97	37
Jan. 15, 1948.....	65, 847. 39	Jan. 15, 1949.....	27, 716. 06	58
Jan. 22, 1948.....	86, 953. 46	Jan. 22, 1949.....	42, 094. 37	52
Jan. 29, 1948.....	100, 328. 13	Jan. 29, 1949.....	57, 769. 17	45
Feb. 5, 1948.....	123, 592. 09	Feb. 5, 1949.....	69, 045. 08	44
Feb. 12, 1948.....	140, 351. 98	Feb. 12, 1949.....	85, 469. 48	39
Feb. 19, 1948.....	159, 624. 40	Feb. 19, 1949.....	97, 317. 26	39
Feb. 26, 1948.....	180, 677. 33	Feb. 26, 1949.....	113, 406. 02	39
Mar. 5, 1948.....	201, 420. 03	Mar. 5, 1949.....	149, 385. 86	25
Mar. 12, 1948.....	226, 725. 34	Mar. 12, 1949.....	166, 182. 53	22
Mar. 19, 1948.....	253, 457. 45	Mar. 19, 1949.....	186, 558. 89	26
Mar. 26, 1948.....	266, 977. 85	Mar. 26, 1949.....	204, 095. 87	24
Apr. 2, 1948.....	285, 392. 09	Apr. 2, 1949.....	215, 945. 80	25
Apr. 9, 1948.....	320, 013. 21	Apr. 9, 1949.....	227, 938. 55	29

The Respondent also introduced a schedule of "plant personnel" which shows a gradual reduction from 154 employees on June 21, 1948, to 106 employees on

February 26, 1949. This schedule shows in addition, that on February 1, 1949, the plant workweek was reduced from 48 to 45 hours.

The General Counsel contends, however, that such reductions in plant personnel and in sales of universal equipment do not reflect either the personnel needs or the work output of the universal section where Lang was employed.

The universal section under Merz is an engineering—not a manufacturing—department. It is a small section, consisting of 5 or 6 draftsmen on February 1, 1949, as compared with the plant personnel of 130 on that date. The universal section not only does the drafting on jobs which are ultimately manufactured as universal perforated equipment, but it also prepares layouts and quotations for submission to prospective customers. Merz admitted that “most of the engineering or drafting” in his department “went into the proposal of sales,” that some of these submittals involve a great deal of time in preparation, and that many of them do not result in sales. The production figures of universal equipment set forth above do not include the amount of time spent in preparing layouts and quotations which do not result in sales. The General Counsel’s contention is therefore well founded, and I find that the sales figures of universal equipment do not reflect the work situation in the universal section and, therefore, do not show a reduction of work in Lang’s section. Similarly, while there is a direct connection between production statistics and statistics as to manufacturing personnel, I also find that the reduction of plant personnel—most of whom are presumably engaged in actual manufacturing operations—also does not demonstrate a need for personnel reduction in the universal section.

Indeed, as one of the principal functions of the universal section is to prepare layouts and quotations for the purpose of soliciting new accounts or additional orders, it is also consistent with fundamental business practices and reasonable to assume that the universal section would redouble, not curtail, its efforts in this respect to recoup its falling market. The Respondent nevertheless failed, particularly in the light of this economic posture of the case—which, incidentally, the General Counsel called to Respondent’s attention at the hearing—to bring forward convincing proof that work in the universal section also was slackening. Whistler did testify that the Respondent had transferred some of the more skilled draftsmen from the custom die section to the universal section and that, after Rafter’s layoff, it laid off two other universal engineers. Merz testified at one point that he recalled no layoffs in his section other than Lang’s and Rafter’s. The record does show, however, that one employee, Peck by name, was hired as a replacement for Rafter early in February and that Peck was laid off a few weeks later, allegedly for lack of work, according to the Respondent. On cross-examination, Merz testified that he didn’t know and would deny that his section worked from 47½ to 56½ hours a week for a period of 6 to 8 weeks beginning March 18, 1949. The Respondent, however did not, by appropriate evidence, show the weekly working hours in the universal section after February 26, 1949.

Under all the circumstances, I am not persuaded that work in the universal section had slackened and that there was a need for personnel reduction in that section on February 25, 1949.

Having thus found that no need existed for personnel reduction in the universal section, it is unnecessary to consider the subsidiary question whether Lang’s selection for layoff was made on the basis of seniority and ability. However, even in regard to the evidence on this issue I received certain impressions which fortify my ultimate conclusions.

The Respondent's answer stated that it selected Lang for layoff on the basis, in part, of "seniority principles as they are established in the Respondent's plant." At the hearing, however, Whistler stated that "We don't go on length of service. We go on ability"; and the Respondent also stated that the matter of seniority was irrelevant to the case. Then, when later asked to explain the meaning of "seniority" in its answer, the Respondent stated that it was referring to seniority "which is a combination of length of service, ability to do the job, cooperativeness and so forth" and to "departmental seniority defined the same way."

Merz testified that the following men comprised his universal section on February 2, 1949: Havas (who is Merz' assistant), Peck, Weber, and Lang. At one point at the hearing he testified that an employee named Roman was then working in the office; later he testified that Roman was in his section at the time in question. Merz testified that only Havas had greater seniority than Rafter as a universal draftsman but that Peck alone had less over-all seniority. At one point Whistler testified that Peck was laid off after Lang; later he testified that Peck's layoff occurred earlier.

Lang did not make the grade in the custom die section. This was attributable essentially, as Hamilton indicated, to insufficient training for the much more difficult job. In any event, however, the Respondent did give glowing tribute to Lang's previous 5 years work in the universal section. Although the Respondent asserts that upon Lang's return he was "nowheres as good," in my opinion the Respondent has failed to substantiate this depreciating conclusion with testimony which I consider to be reliable and persuasive. It is also difficult to ascertain from the record exactly what "seniority principles," if any there be, are established at the Respondent's plant. Suffice it to say, I found the testimony regarding seniority related, in unpersuasiveness, to the Respondent's testimony on other disputed issues. I am unable to find, even assuming a need for layoff, that Lang's selection was motivated by the reasons asserted by the Respondent.

#### 5. Conclusions

The Respondent asserts that until the present case it had an unblemished record so far as alleged unfair labor practices are concerned; it urges this circumstance as showing, apparently, that it is not the kind of employer who would engage, and that it therefore did not engage, in the unlawful conduct alleged in this case. I have considered this circumstance and must nevertheless conclude, reluctantly, that in my opinion mere happenstance does not satisfactorily explain the separation from employment of both Lang and Rafter so soon after they engaged in union activities; nor does coincidence explain why in each case the reasons offered by the Respondent were, as I have found, not the actual motivation for its conduct.

Under all the circumstances and upon the preponderance of the evidence, I conclude that the Respondent precipitately discharged Lang on February 25, 1949, and Rafter on February 2, 1949, because of their activities in behalf of the UAW; and I find that the Respondent thereby discriminated in regard to their hire and tenure of employment, discouraging membership in the Union, and that by such conduct that Respondent also interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act. This conduct violates Section 8 (a) (3) and 8 (a) (1) of the Act.

### B. Interrogation

In addition to Whistler's questioning of Klein as related above, Whistler admittedly inquires and has inquired of applicants for employment "What labor organization do you belong to, if any?" Whistler denies that he seeks this information for an unlawful purpose; he asserts, rather, that such information better enables the Respondent to pass on the applicant's qualifications and to determine the applicant's wage classification. In this connection, the Respondent also testified that it hired an applicant in March 1950—after this case arose—despite the fact that the application form of this applicant showed him to be a member of the UAW, the charging party in this case.

That it is *per se* unlawful to interrogate job applicants concerning their union membership and, as in the case of Klein, to interrogate employees concerning union activities and identity of other union members and adherents is well established. *Standard-Coosa-Thatcher Company*, 85 NLRB 1358; *Houston and North Texas Motor Freight*, 88 NLRB 1462; *Jacksonville Motors, Inc., et al.*, 88 NLRB 181; *Ozark Dam Constructors, et al.*, 86 NLRB 520. Accordingly, the Respondent's explanation, even if true *arguendo*, does not mitigate the offense and I find that by such interrogation of Klein and applicants for employment, the Respondent has interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7, thereby violating Section 8 (a) (1) 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 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 be unfair labor practices tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

### V. THE REMEDY

In order to effectuate the policies of the Act, I will recommend that the Respondent cease and desist from the unfair labor practices in which it has been found to have engaged. I also will recommend that the Respondent make Rafter and Lang whole 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 he would normally have earned as wages from the date of his discharge (February 2, 1949, in the case of Rafter; February 25, 1949, in the case of Lang) to the date on which he no longer desired reinstatement (May 31, 1949, in the case of Rafter; March 7, 1949, in the case of Lang), less his net earnings during this period. As neither Rafter nor Lang desire reinstatement, their reinstatement is not recommended.

In view of the nature of the unfair labor practices committed, particularly the discriminatory discharges, I will also recommend, in order to make effective the interdependent guarantees of Section 7 of the Act, that the Respondent cease and desist from, in any other manner, infringing upon the rights guaranteed in Section 7 of the Act.

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 Union, United Automobile, Aircraft and Agricultural Implement Workers of America, CIO, 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 John Lang and Harry R Rafter, thereby discouraging membership in a labor organization, the Respondent has engaged 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.

[Recommended Order omitted from publication in this volume.]