

We find that all parts room employees of the Employer at its Seattle plant, including head parts clerk, parts clerks, shipping and receiving clerks, pickup and delivery driver, shop clerk, and toolroom clerk, but excluding all other employees, mechanics, salesmen, office clerical employees, guards, professional employees, and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act.

[Text of Direction of Election omitted from publication.]

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BELL AIRCRAFT CORPORATION *and* HOWARD E. NIEBERGALL

LOCAL 501, INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, CIO *and* HOWARD E. NIEBERGALL. Cases Nos. 3-CA-593 and 3-CB-158. June 26, 1953

### DECISION AND ORDER

On March 26, 1953, Trial Examiner Albert P. Wheatley issued his Intermediate Report in this consolidated proceeding, finding the Respondent Bell Aircraft Corporation, herein called the Employer, and Respondent Local 501, International Union, United Automobile, Aircraft & Agricultural Implement Workers of America, CIO, herein called the Union, had engaged in and were engaging in certain unfair labor practices, and recommending that they cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the General Counsel, the Employer, and the Union filed exceptions to the Intermediate Report. The General Counsel and the Employer also filed supporting briefs.

The Board has reviewed the rulings of the Trial Examiner and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions, the briefs, and the entire record in these cases, and hereby adopts the Trial Examiner's findings, conclusions, and recommendations with the following additions and modifications.

1. We agree with the Trial Examiner that the Employer violated Section 8 (a) (1) and 8 (a) (3), and the Union Section 8 (b) (1) (A) and 8 (b) (2) by bringing about the discriminatory demotion and transfer of Howard E. Niebergall in June 1952.

As indicated in the Intermediate Report, Niebergall withdrew from the Union-sponsored strike of 1949 while it was still in progress. Niebergall, who had been a member of the Union during the strike, thereafter resigned from the Union but was not readmitted when he applied for membership in December 1950. In returning to work before the termination

of the strike Niebergall was exercising one of the rights guaranteed in Section 7 of the Act -- that of refraining from engaging in concerted activity. It is clear that by demoting Niebergall the Union and the Employer were punishing and coercing Niebergall in violation of Section 8 (b) (1) (A) and 8 (a) (1), respectively, for his reliance on this protected right. It is also clear that the demotion constituted discrimination in regard to Niebergall's terms and conditions of employment and tended to encourage union membership and, in particular, full and loyal participation in such concerted activities as strikes. Accordingly, we find, as did the Trial Examiner, that the Employer thereby violated Section 8 (a) (3) and 8 (a) (1) of the Act. As the Union caused the Employer to discriminate against Niebergall in violation of Section 8 (a) (3) of the Act, we also find in agreement with the Trial Examiner that the Union violated Section 8 (b) (2) and 8 (b) (1) (A) of the Act.

2. The General Counsel excepts to the dismissal at the hearing of those parts of the complaints which alleged that the Employer and the Union respectively violated Section 8 (a) (1) and 8 (a) (3) and Section 8 (b) (1) (A) and 8 (b) (2) by maintaining and giving effect to the clause in their contract providing that the Employer will not promote an employee to a supervisory position while charges are pending against him in the Union. The Trial Examiner found, and we agree, that there was no evidence herein to support the General Counsel's contention that the parties gave effect to the clause in question. He also held that the Board's ruling in a 1952 decision<sup>1</sup> involving the same parties and contract was dispositive of the issue herein as the Board then found that the clause was invalid and ordered the parties to cease giving effect thereto. The General Counsel argues, however, that the mere existence and continuation of the clause in the contract acts as a threat to the rights of employees guaranteed in Section 7 of the Act, and is therefore violative of Section 8 (a) (1) and Section 8 (b) (1) (A). He further contends that the parties intended to enforce the clause and consequently violated Section 8 (a) (3) and 8 (b) (2) as well. We find merit in the General Counsel's exception to the extent of agreeing that the physical presence of the clause in the contract, regardless of the parties' intent to enforce it, violated Section 8 (a) (1) and Section 8 (b) (1) (A).<sup>2</sup> Accordingly, as we have already in the earlier Bell Aircraft decision ordered the contracting parties to cease and desist from giving effect to the clause, we shall confine our order in the instant cases to the requirement that the clause be deleted from the contract. Absent proof

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<sup>1</sup>Bell Aircraft Corporation, 101 NLRB 132.

<sup>2</sup>Contrary to our dissenting colleague, we cannot view the unlawful discriminatory effects of this clause, clearly demonstrated in the earlier Bell Aircraft cases, as either improbable or speculative. While the parties, of course, at all times had the right to execute a valid union-security clause, the instant clause goes far beyond the permissible limitations contained in the proviso to Section 8 (a) (3).

of any attempt by the parties in the instant cases to utilize the unlawful provision, we do not find, however, that the Respondents' conduct in this regard violated Section 8 (a) (3) and 8 (b) (2).<sup>3</sup>

3. The General Counsel also excepts to the Trial Examiner's failure to include in his recommended order and notice language pertinent to his finding that the Union independently violated Section 8 (b) (1) (A) when it warned employee Black that continued association with Niebergall and other returnees would bring about possible economic reprisals. We find merit in this exception and shall therefore order the Union to cease and desist from such threats.

### ORDER

Upon the entire record in these cases and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that:

A. Respondent Bell Aircraft Corporation, its officers, agents, successors, and assigns, shall:

(1) Cease and desist from:

(a) Encouraging membership in Local 501, International Union, United Automobile, Aircraft & Agricultural Implement Workers of America, CIO, or in any other labor organization, by unlawfully discriminating in regard to terms and conditions of employment.

(b) In any like manner interfering with, restraining, or coercing its employees in the exercise of their right to engage in or to refrain from engaging in any or all of the concerted activities specified in 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.

(c) Continuing to include in its contract with the Respondent Union the clause which prohibits it from promoting to a supervisory position any employee against whom charges are pending in the Union.

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

(a) Offer to Howard E. Niebergall immediate and full reinstatement to his former job of crew chief without prejudice to his seniority or other rights and privileges.

(b) Jointly and severally with Respondent Union make whole Howard E. Niebergall for any loss of pay he may have suffered by reason of the discrimination against him, in the manner described in the Intermediate Report.

(c) Upon request make available to the Board or its agents for examination and copying all records necessary or useful to the analysis of the amount of back pay due under the terms of this Order.

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<sup>3</sup>Jandel Furs, et al., 100 NLRB 1390; Port Chester Electrical Construction Corporation, 97 NLRB 354.

(d) Delete from its contract with the Respondent Union the clause which prohibits it from promoting to a supervisory position any employee against whom charges are pending in the Union.

(e) Post in its plant in Wheatfield, New York, copies of the notice attached hereto and marked "Appendix I."<sup>4</sup> Copies of such notice, to be supplied by the Regional Director for the Third Region, shall, after being duly signed by a representative of the Respondent Employer, be posted 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 to insure that such notices are not altered, defaced, or covered by other material.

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

B. The Respondent Union, Local 501, International Union, United Automobile, Aircraft & Agricultural Implement Workers of America, CIO, its officers, representatives, and agents, shall:

(1) Cease and desist from:

(a) Causing or attempting to cause Respondent Bell Aircraft Corporation, its officers, agents, successors, or assigns to discriminate in any manner against its employees in violation of Section 8 (a) (3) of the Act.

(b) Threatening employees with economic reprisals for continuing to associate with employees who returned to work during the strike of 1949, or in any other manner restraining or coercing employees of Bell Aircraft Corporation, its successors or assigns, in the exercise of their rights to engage in or to refrain from engaging in any or all of the concerted activities specified in 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.

(c) Continuing to include in its contract with the Respondent Employer the clause which prohibits the Employer from promoting to a supervisory position any employee against whom charges are pending in the Union.

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

(a) Notify the Respondent Employer in writing, and furnish a copy to Howard E. Niebergall, that it withdraws its objections to the employment of said Niebergall as crew chief, and that it has no objections to the employment of said Niebergall as crew chief.

(b) Jointly and severally with the Respondent Employer make whole Howard E. Niebergall for any loss of pay he may

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<sup>4</sup>In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "Pursuant to a Decision and Order" the words "Pursuant to a Decree of the United States Court of Appeals, Enforcing an Order "

have suffered by reason of the discrimination against him, in the manner described in the Intermediate Report.

(c) Delete from its contract with the Employer the clause which prohibits the Employer from promoting to a supervisory position any employees against whom charges are pending in the Union.

(d) Post at its places of business in the vicinity of Buffalo, New York, copies of the notice attached hereto and marked "Appendix II."<sup>5</sup> Copies of such notice, to be furnished by the Regional Director for the Third Region, shall, after being duly signed by a representative of Respondent Union, be posted by it immediately upon receipt thereof and maintained for sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken to insure that such notices are not altered, defaced, or covered by other material.

(e) Additional copies of Appendix II, to be furnished by the said Regional Director, shall be signed by a representative of Respondent Union and forthwith returned to the Regional Director. These notices shall be posted, Respondent Employer willing, on the bulletin boards in the Employer's plant where notices to employees are customarily posted.

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

Member Murdock, dissenting in part:

I would not order the Employer and the Union to delete from their contract the clause which prohibits the Employer from promoting to a supervisory position any employee against whom charges are pending in the Union. I cannot agree with the finding in the earlier Bell Aircraft decision by a panel (of which I was not a member) that the language of this clause is per se invalid. Under its terms the Union could lawfully prevent an employee's promotion by bringing charges against him because of his failure to pay dues. While it is conceivable that the clause might also cover situations which are proscribed by the Act, the only proper course for the Board is to abstain from passing upon the clause in vacuo and to confine its attention and findings to specific applications of the clause. Properly interpreted and lawfully applied, the clause certainly does not, as the majority contend, go beyond the statutory rights accorded employers and unions in the proviso to Section 8 (a) (3).

I cannot stress too emphatically my conviction that Congress intended employers and unions to be free to work out their own contractual arrangements without Board intervention unless they are clearly violative of the Act. To rule out the clause as per se invalid merely on the speculative possibility that it might be illegally invoked constitutes, in my opinion,

<sup>5</sup>See footnote 4, supra.

an unwarranted interference with the collective-bargaining process.

Member Peterson took no part in the consideration of the above Decision and Order.

APPENDIX I

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, as amended, we hereby notify you that:

WE WILL NOT encourage membership in Local 501, International Union, United Automobile, Aircraft & Agricultural Implement Workers of America, CIO, or in any other labor organization by discriminating in regard to terms and conditions of employment or in any like manner interfere with, restrain, or coerce employees in the exercise of their rights specified in 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 Howard E. Niebergall immediate and full reinstatement in his former job as crew chief without prejudice to his seniority or other rights and privileges previously enjoyed and we will make whole said employee for any loss of pay suffered as a result of the discrimination against him.

WE WILL delete from our contract with the aforesaid union the clause which prohibits the employer from promoting to a supervisory position an employee while charges are pending against him in the union.

BELL AIRCRAFT CORPORATION,  
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.

APPENDIX II

NOTICE

TO ALL MEMBERS OF LOCAL 501, INTERNATIONAL UNION, UNITED AUTOMOBILE AIRCRAFT & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, CIO, AND TO ALL EMPLOYEES OF BELL AIRCRAFT CORPORATION

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, as amended, we hereby notify you that:

WE WILL NOT threaten employees with economic reprisals for continuing to associate with employees who returned to work during the 1949 strike, or in any other manner restrain or coerce employees of Bell Aircraft Corporation, its successors or assigns, in the exercise of their right to refrain from engaging in concerted activities as 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 NOT in any manner cause or attempt to cause Bell Aircraft Corporation, its officers, agents, successors, or assigns, to discriminate against any employee in violation of Section 8 (a) (3) of the Act.

WE WILL notify Bell Aircraft Corporation in writing, and furnish a copy to Howard E. Niebergall, that we withdraw our objections to the employment of said Niebergall as crew chief and we will make whole said Howard E. Niebergall for any loss of pay suffered as a result of the discrimination against him.

WE WILL delete from our contract with the aforesaid employer the clause which prohibits it from promoting to a supervisory position any employee against whom charges are pending in the union.

LOCAL 501, INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, CIO, Labor Organization.

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

Howard E. Niebergall, an employee of Bell Aircraft Corporation<sup>1</sup> (herein called Respondent Bell), was demoted on June 24, 1952, from his position as crew chief (a nonsupervisory position) and consequently suffered a loss of pay. The principal questions for determination herein are: Did Respondent Bell engage in unlawful discrimination by demoting Niebergall (violate Section 8 (a) (1) and 8 (a) (3) of the National Labor Relations Act, as amended, herein called the Act), and did Respondent Local 501, International Union, United Automobile, Aircraft & Agricultural Implement Workers of America, CIO, here sometimes called the Union, unlawfully cause such discrimination (violate Section 8 (b) (1) (A) and 8 (b) (2) of the Act). The facts regarding Niebergall's demotion follow.<sup>2</sup>

Contractual relations between the Respondents, the Union, and Respondent Bell have existed since 1943. The current contract (executed November 10, 1950, and effective until January 15, 1954), and apparently the previous ones, provides for a union shop and checkoff.

On June 13, 1949, the employees went on strike which was terminated October 17, 1949. Niebergall, a member of Respondent Union at the time of the strike, participated in the strike but abandoned it and returned to work before it was terminated. Thereafter Niebergall was given an opportunity to resign from the Union which he did. He was not thereafter readmitted to membership in the Union, although he sought such in December 1950. Nevertheless, pursuant to the union-security clause of the contract between Respondent Bell and the Union, dues have been deducted from his pay.

Since the termination of the strike, the Union has sought to discipline those employees who returned to work during the strike<sup>3</sup> and has indicated to employees that Respondent Union is a strong organization whose favor and help is to be sought and whose opposition is to be avoided. As noted in the case cited in footnote 3, on February 1, 1951, Respondent Union wrote Respondent Bell requesting that certain named employees not be promoted during the pendency of charges in the Union against them. This record reveals that all of the employees named had returned to work during the strike and that Niebergall was one of those mentioned. This record further reveals that the union representatives cautioned employees not to have anything to do with those employees who had returned to work during the strike and that if they did associate with the "scabs" or "returnees"<sup>4</sup> they would incur the disfavor of the Union and possibly economic reprisals. For example, Union Representative King<sup>5</sup> cautioned employee Black in June 1952 to cease conversing with Niebergall because Niebergall was a "scab," and indicated that if he did not cease conversing with him, he (Black) would create an "unfriendly atmosphere" for himself and "might not be able to be up-graded."<sup>6</sup> Union Representative Warren also cautioned Black against conversing with Niebergall and indicated that if he continued talking with Niebergall he might have a "hard time."

<sup>1</sup>Respondent Bell Aircraft Corporation is a New York corporation engaged in the manufacture, sale, and distribution of aircraft, guided missiles, and related products. During the course of its business operations it makes substantial purchases and sales outside the State of New York, a considerable portion of the sales being to the United States Government. The Board's jurisdiction is not contested. This proceeding concerns Respondent Bell's plant at Wheatfield, New York.

<sup>2</sup>The testimony concerning the incidents involved in this proceeding is thoroughly conflicting and contradictory and the findings of fact made herein result from my attempt to reconcile the evidence and determine what probably occurred. The findings of fact are based upon my consideration of the entire record and my observation of witnesses. All evidence on disputed points is not described so as not to burden unnecessarily this report. However, all has been considered and, where required, resolved. In determining credibility the undersigned has considered inter alia: The demeanor and conduct of witnesses; their candor or lack thereof; their apparent fairness, bias, or prejudice; their interest or lack thereof; their ability to know, comprehend, and understand matters about which they have testified; whether they have been contradicted or otherwise impeached; and consistency and inherent probability of the testimony.

<sup>3</sup>See Bell Aircraft Corporation, 101 NLRB 132.

<sup>4</sup>Those who returned to work were called "scabs" by the Union and "returnees" by the Company. The terms are used interchangeably herein. The record shows they are synonymous.

<sup>5</sup>The union representatives referred to in this report, by name or otherwise, were duly authorized representatives of Respondent Union whose conduct is chargeable to the Union. There is no issue herein concerning this matter.

<sup>6</sup>King's denial that he told Black that he "might not be able to be up-graded if he associated with Niebergall, or words conveying that meaning" is not credited by the undersigned.

In June 1952 there was an opening for the nonsupervisory position of crew chief on the third shift (shift operating from 1 a. m. to 8 a. m.). After the usual procedure for the selection of employees to fill such a vacancy, Niebergall, an employee on the second shift classified as milling machine operator-all around, was selected by Respondent Bell for this position. It was a promotion for Niebergall and it became effective about 1 a. m. on June 24, 1952. Niebergall reported to the department foreman, Frank Meiler, shortly before 1 a. m. on June 24 and was assigned to do "set ups" for a group of employees classified as milling machine operators-simple. He undertook his assignment. Shortly after the shift began employees on the shift, including those working directly with Niebergall, complained to Union Representatives Catanzaro and Marranca about Niebergall's assignment as crew chief. These employees claimed that Niebergall was a scab, a super scab, was boastful about being a scab, was not fit for the job, was appointed to the job out of seniority, was careless and lacked cooperation, and that a third-shift man should have the job. These employees threatened to walk out if Niebergall remained as crew chief. Catanzaro and Marranca told the employees to continue on their jobs and that they (the union representatives) would see Respondent Bell's officials and straighten the matter out. About 1:15 a. m. Catanzaro and Marranca left the department (department 43) and began a round of management, trying to get Niebergall removed, at least for that shift. Catanzaro and Marranca first called upon Foreman Meiler. They told Meiler the employees in the department concerned were very upset about Niebergall becoming a crew chief because he was a "scab" <sup>7</sup> and that the employees were threatening to walk out. They asked Meiler to remove Niebergall from the position of crew chief. Meiler refused to remove Niebergall, stating he lacked authority to remove him and that "things looked pretty quiet."

After Meiler's refusal to remove Niebergall, Catanzaro, Marranca, and other representatives of the Union called upon John Dwyer, Respondent Bell's labor relations representative on the third shift. They arrived in Dwyer's office about 2:15 a. m. and left about 3:30 a. m. The union representatives told Dwyer the men in the department concerned were upset because a "scab" from the second shift (Niebergall) had been appointed crew chief and that the men were threatening to walk out. The union representatives suggested that Niebergall be removed from the job of crew chief and be put on some other job for the rest of the shift and that the matter be referred to a committee of union and company officials, which meets during the day shift. Dwyer, in the presence of the union representatives, talked, via telephone, with Joe Harnisch, superintendent on the third shift, and told Harnisch the Union wanted Niebergall taken off the crew chief job for the night and that the men were threatening to walk out if Niebergall remained as crew chief. Harnisch indicated Niebergall had been properly promoted and was qualified to hold the job and refused to remove Niebergall. Dwyer told the union representatives Harnisch's decision and suggested that the union representatives persuade the men not to walk out and refer the matter to the day-shift officials. The union representatives indicated to Dwyer that they would try to stop the walkout, but that the men were ready to walk out unless Niebergall was removed <sup>8</sup>.

<sup>7</sup> Taken from the testimony of Meiler which the undersigned credits. Catanzaro testified he told Meiler the men were threatening to walk out because they couldn't get along with Niebergall and that the men thought there "was other fellows that had more seniority and entitled to the job." Meiler testified Catanzaro "asked me to take Niebergall off the job because he was a scab and that the men didn't like him and that they might walk out." Meiler further testified:

Q During the time that you talked with Catanzaro did he refer to any other matter about Niebergall, other than the fact that Niebergall was a scab?

A No, I don't recall.

Q Didn't he say that the men didn't like him?

A He said the men didn't want to work with him.

Mr. Lipsitz: No more questions.

Trial Examiner Wheatley: Mr. Winch?

Q (By Mr. Winch) Mr. Meiler, specifically did Catanzaro at any time during the intervals when he talked to you on the morning in question raise any question as to Niebergall's seniority?

A No.

Q The question of seniority was not discussed by any union representative?

A Not with me, no.

<sup>8</sup> The above statement of facts is based primarily upon the testimony of Dwyer. Catanzaro's and Marranca's testimony not consistent therewith is not credited by the undersigned.

After leaving Dwyer's office, Union Representatives Catanzaro and Marranca called upon Superintendent Harnisch, presented the problem to him, indicating, inter alia, that a question of seniority was involved, and asked him to remove Niebergall at least for the rest of the shift and have the matter referred to the day-shift committee of union and company officials. Harnisch refused to remove Niebergall from the crew chief's job. Harnisch indicated he did not believe the resentment against Niebergall was so great that the men would walk out, but if they did there was nothing he could do about it.

Leaving Harnisch, Catanzaro and Marranca returned to the department involved about 4 a. m. They again conferred with Foreman Meiler and asked him to remove Niebergall. Meiler again refused.

At 4:12 a. m. the luncheon recess for the third shift began. Immediately all the employees in the department involved including Union Representatives Catanzaro and Marranca, except supervisors, Niebergall, and one probationary employee, walked off the job and stayed away for the remainder of the shift. The record reflects the union representatives made little or no effort (at most only a passive effort) to stop the employees from walking off and that all the employees involved in the walkout were union members. Approximately 90 employees walked out.

At approximately 8:30 a. m. Arthur Connelly, the then acting manager of labor relations for Respondent Bell, found out about the early morning incidents on the third shift and arranged for a meeting with the shop committee of Respondent Union. Such a meeting took place between about 10 a. m. and noon and the parties discussed the problem at great length. The evidence is conflicting as to whether the union representatives protested Niebergall's promotion solely because he was a "scab" or "returnee," whether they protested only on the grounds that he was incompetent to perform the job and that there were other employees who had seniority that should have merited them the job that Niebergall was given; whether they protested on all of these grounds, or whether they protested because he was a "scab" or "returnee" and suggested the other matter (incompetence and seniority) as an excuse which Respondent Bell could use to relieve Niebergall of his duties as crew chief without revealing the true reason (as an excuse to conceal the fact that he was being relieved because he returned to work during the 1949 strike). The undersigned believes and finds that the primary reason voiced by union representatives was Niebergall's having returned to work during the 1949 strike. Since this was at least one of the chief reasons why the Union sought Niebergall's demotion and since the undersigned believes that this was not a legitimate reason for seeking Niebergall's demotion, even if coupled with other reasons which were not unlawful, the undersigned is not resolving the other conflicts noted immediately above. The evidence is also conflicting as to whether union representatives at this meeting indicated there would be further walkouts if Niebergall remained as crew chief. The undersigned believes and finds that the preponderance of the credible evidence establishes that the union representatives did so indicate. This meeting ended about noon with Connelly refusing to demote Niebergall.

In the early afternoon, Connelly discussed the problem with other officials of Respondent Bell and it was decided that, in view of the probability of further walkouts if Niebergall remained as crew chief, Niebergall would be demoted.

Officials of Respondent Bell and the union shop committee met again at about 3:30 p.m. on June 24, 1952, and Connelly then announced that "because of the fact Mr. Niebergall was unable to perform his duties, in that the men wouldn't work with him, and therefore, he was unable to perform his duties, and because of the fact that we had a walkout during the night in protest of his appointment, and because of the eminence of further walkouts throughout the plant, that Mr. Niebergall would be removed effective immediately."

The employees involved herein returned to work at 1 a. m. on June 25, 1952. Niebergall also reported at that time and was informed by Foreman Meiler that he was to return to the second shift as a milling machine operator-all around. That same afternoon Niebergall

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<sup>9</sup>It is well settled that where an unlawful reason is a motivating cause, the coexistence of separate lawful reasons do not eliminate the unlawful aspect of the conduct. See *N. L. R. B. v. Remington Rand Co.*, 94 F. 2d 862, 872 (C. A. 2) cert. den. 304 U. S. 576 and 585; *Kingston Cake Co.*, 97 NLRB 1445, *Al Massera Inc.*, 101 NLRB 837, is not inconsistent with the *Kingston Cake Co.* case. In *Al Massera Inc.*, the Board recognized the duty incumbent upon a Respondent to "disentangle" the legitimate reason from the unlawful reason and affirmatively establish, if it could, that it was motivated in its action by the former. It held that the Union and the Company had effectually performed the "disentanglement," proving that the reason for loss of membership by the employee, and consequent discharge, was nonpayment of dues and not "dual unionism."

reported to his old position. A few days later Edward Golen, a milling machine operator-all around on the third shift who had less of the required seniority than Niebergall and who was not a "scab" or "returnee," was appointed crew chief in Niebergall's place. There is no evidence of protests because of Golen's promotion.

At the meeting on the morning of June 24, 1952, Connelly pointed out to the union representatives that the walkout earlier that date was in violation of the contract.<sup>10</sup> By letter dated June 25, 1952, Connelly advised the Union:

The current contract between Bell Aircraft Corporation and Local 501 UAW-CIO dated November 10, 1951, was breached on Tuesday morning June 24, 1952. This breach of contract occurred when 93 employees of Department 43 engaged in a walkout at 4:12 a. m.

This work stoppage and walkout was in direct violation of Article VIII Paragraph 55

You are requested to discipline the employees who participated in the "unauthorized work stoppage" as contemplated in Para. 55.

You are further requested to notify this office of the action taken.

The Union did not reply to Connelly's letter and no employee was disciplined for participating in the walkout.

#### Conclusions

It is apparent from the facts outlined above that Respondent Bell was reluctant to demote and transfer Niebergall, but finally, in consequence of pressure from Respondent Union, acceded to the demand of the Union, and there is no doubt that the demotion and transfer were traceable to the Union's resentment of Niebergall because he had refused to participate in strike action sponsored by the Union. Accordingly, the demotion and transfer constituted discrimination within the interdiction of the Act.<sup>11</sup> See *Continental Oil Company v. N. L. R. B.*, 113 F. 2d 473, 484 (C. A. 10), and *Southeastern Pipe Line Company*, 103 NLRB 341. But, say Respondents, even if the demotion and transfer were brought about for reasons other than those permitted by the Act, still there can be no finding of a violation of the Act because, in the light of the union-security and checkoff clause of the contract,<sup>12</sup> there is no proof that the demotion and transfer, even if discriminatory, encouraged membership in the Union.<sup>13</sup> Reliance is placed upon the decision in *N. L. R. B. v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL*, 196 F. 2d 1 (C. A. 8). The undersigned is of the belief that this contention must be resolved adversely to Respondents. Subsequent Board law and the weight of court law adopt a contrary view. See *N. L. R. B. v. Radio Officers' Union*, 196 F. 2d 960 (C. A. 2), *N. L. R. B. v. Jarka Corporation*, 198 F. 2d 618 (C. A. 3), *General Motors Corp.*, 59 NLRB 1143, enforced 150 F. 2d 201 (C. A. 3), and *Local 57, United Automobile, Aircraft and Agricultural Implement Workers of America, CIO*, 102 NLRB 111. Respondent Union's success in causing Respondent Bell to

<sup>10</sup>Article VIII, paragraphs 55 and 56, of the contract provide:

55. Local 501, UAW-CIO hereby agrees to abide by the provisions of this contract between the parties. The Union further agrees not to engage in any unauthorized work stoppage and shall discipline any of its members who take part in an unauthorized work stoppage. Any such discipline shall be in accordance with the International UAW-CIO constitution.

56. The Union agrees not to strike until the provisions for the settlement of grievances provided for in the contract have been complied with and then only after the steps provided in the International UAW-CIO constitution have been followed.

<sup>11</sup>Section 8 (a) (3) of the Act, in pertinent part, forbids an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." Section 8 (b) (2) prohibits a union from causing an employer to violate Section 8 (a) (3).

<sup>12</sup>The contract provides for a union shop and for checkoff of dues and there is no claim herein that these provisions of the contract fall beyond the scope permitted by the Act.

<sup>13</sup>The Act provides an exception to the ban against discrimination "to encourage or discourage" union membership where a valid union-security agreement is in existence and action against an employee is taken pursuant thereto. There is no claim herein that the discrimination against Niebergall was because of nonmembership in the Union or nonpayment of union dues in the face of a valid union-security agreement.

impose penalties on employees whose attitude was objectionable to the Union could not fail to impress all employees with the fact that the Union was a potent organization whose assistance was to be sought and whose opposition was to be avoided. The normal effect of the discrimination against Niebergall was to encourage all members of the Union to retain their membership in good standing and all nonmembers to seek membership in the Union through fear of consequences of incurring the displeasure of the Union. It is worthy of note that employee Black, even prior to the discrimination and on the basis of a warning against conversing with Niebergall, sought and obtained a transfer away from the vicinity of Niebergall so that he would not risk incurring the displeasure of the Union and, accordingly, consequences.

Respondent Bell contends that it was necessary to make the demotion and transfer, and thus engage in the unfair labor practices, because its business would otherwise be disrupted and therefore, under all the facts, the demotion and transfer were excusable. It is well settled that discrimination against employees in response to a strike threat by a union which has no legal right to demand the discrimination represents a violation of the Act (the Act permits no immunity because the exigencies of the moment make expedient an infraction of the statute). *N. L. R. B. v. Star Publishing Co.*, 97 F. 2d 465 (C. A. 9), *McQuay-Norris Manufacturing Co.*, 116 F. 2d 748 (C. A. 7), certiorari denied 313 U. S. 565, *Wilson and Co., Inc. v. N. L. R. B.*, 123 F. 2d 411 (C. A. 8), *N. L. R. B. v. John Englehorn & Sons*, 134 F. 2d 553 (C. A. 3), *N. L. R. B. v. National Broadcasting Co.*, 150 F. 2d 895 (C. A. 2), *N. L. R. B. v. Union Mfg. Co.*, 200 F. 2d 656 (C. A. 5).

The conduct of the Union in demanding the demotion and transfer of Niebergall for discriminatory reasons and the conduct of Respondent Bell in effecting the discrimination constitute violations not only of Section 8 (b) (2) and 8 (a) (3) of the Act respectively, but also constitute violations of Section 8 (b) (1) (A) and 8 (a) (1), respectively. These sections prohibit an employer (8 (a) (1)) and a union (8 (b) (1) (A)) from restraining or coercing employees in the exercise of the right to refrain from engaging in concerted activity, a right which Niebergall exercised when he left the strike. Certainly the demotion and consequent loss of pay was "economic coercion in its most effective form." See *N. L. R. B. v. Radio Officers' Union*, 196 F. 2d 960 (C. A. 2).

In summary, the undersigned concludes and finds:

1. Local 501, International Union, United Automobile, Aircraft & Agricultural Implement Workers of America, affiliated with the Congress of Industrial Organizations, is a labor organization within the meaning of Section 2 (5) of the Act.

2. Respondent Bell is an employer within the meaning of Section 2 (2) of the Act.

3. By causing Respondent Bell to discriminate in regard to the terms of employment of Howard E. Niebergall, Respondent Union has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (b) (2) of the Act.

4. By such conduct and by its warnings to employee Black, Respondent Union has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (b) (1) (A) of the Act.

5. By discriminating in regard to the terms of employment of Howard E. Niebergall, thus encouraging membership in a labor organization, Respondent Bell has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (3) of the Act.

6. By such conduct Respondent Bell has interfered with, restrained, and coerced employees in the exercise of rights guaranteed in Section 7 of the Act and has thus engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (1) of the Act.

7. The aforesaid unfair labor practices occurring in connection with the operations of Respondent Bell's business 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.<sup>14</sup>

#### THE REMEDY

Having found that Respondents have engaged in unfair labor practices in violation of the Act, the undersigned recommends that Respondents, to effectuate the policies of the Act, cease and desist therefrom and take the affirmative action hereinafter specified:

<sup>14</sup>After the close of the hearing, Respondent Union filed with the undersigned proposed findings of fact and conclusions of law. Said proposed findings and conclusions are not consistent with the findings and conclusions herein made and are therefore rejected by the undersigned. Also in view of the foregoing, Respondents' motions to dismiss are denied.

Whether Niebergall's demotion and transfer be considered violative of Section 8 (a) (3) and 8 (b) (2) of the Act or of Section 8 (a) (1) and 8 (b) (1) (A), it is believed that effectuation of the policy of the Act requires that he be restored to his position as crew chief and that he be made whole for any loss of pay suffered.<sup>15</sup> Furthermore, it is believed that under the circumstances revealed by this record a recommendation that Respondents jointly and severally make whole Niebergall is warranted and appropriate. *N. L. R. B. v. Pinkerton's Natl. Detective Agency*, 202 F. 2d 230 (C. A. 9).

As it would be inequitable to Respondent Union to permit the amount of its liability to increase despite the possibility of its willingness to cease past discrimination, Respondent Union may terminate its liability for further accrual of back pay by notifying Respondent Bell in writing that it has no objection to the employment of Niebergall as crew chief, and in that event Respondent Union shall not thereafter be liable for any back pay accruing after 5 days from the giving of such notice. Absent such notification Respondent Union shall remain jointly and severally liable with Respondent Bell for all back pay that may accrue.

[ Recommendations omitted from publication. ]

<sup>15</sup> The loss of pay shall be computed in accordance with the customary formula of the National Labor Relations Board. See *N. L. R. B. v. Seven-Up Bottling Co.*, 73 S. Ct. 287; *F. W. Woolworth Company*, 90 NLRB 289.

CENTRAL CALIFORNIA CHAPTER, THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., ASSOCIATED HOME BUILDERS OF SAN FRANCISCO, CALIFORNIA, INC., PENINSULA GENERAL CONTRACTORS AND BUILDERS ASSOCIATION, INC., AND THE NORTHERN CALIFORNIA CONFERENCE OF THE PLUMBING AND HEATING INDUSTRY, INC., AND THEIR EMPLOYER MEMBERS *and* A. C. CAMPBELL, WILLIAM W. HAHNES, FRANK C. COOK, GEOFFREY J. HOOKER, LOUIS GENOVESE, WALTER KUNZ, JAMES P. MURPHY, BURRELL E. JACKSON, ROBERT E. HARGENS, JOE ARIBOS, ELIJAH SWAYZE, DOUGLAS JOBE, AND JOHN G. STANGUS

CENTRAL CALIFORNIA CHAPTER, THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., ASSOCIATED HOME BUILDERS OF SAN FRANCISCO, CALIFORNIA, INC., PENINSULA GENERAL CONTRACTORS AND BUILDERS ASSOCIATION, INC., AND THE NORTHERN CALIFORNIA CONFERENCE OF THE PLUMBING AND HEATING INDUSTRY, INC., AND THEIR EMPLOYER MEMBERS *and* BUILDING AND CONSTRUCTION TRADES COUNCIL OF SAN MATEO COUNTY

NORTHERN CALIFORNIA CHAPTER, THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., CENTRAL CALIFORNIA CHAPTER, THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., AND THEIR EMPLOYER MEMBERS: BOHANNON CONSTRUCTION CO., MCKENZIE & CRAWFORD, E. B. STANDISH & CO., STERN AND PRICE CONSTRUCTION CO. *and* BUILDING AND CONSTRUCTION TRADES COUNCIL OF SANTA CLARA AND SAN BENITO COUNTIES. Cases Nos. 20-CA-620, 20-CA-621, and 20-CA-622. June 26, 1953