Upon the basis of the above findings of fact, and upon the entire record in the case, I make the following

CONCLUSIONS OF LAW

1 Motion Picture Operators Union of Essex County, Local 244, International Alliance of Theatrical Stage Employees and Moving Picture Operators of the United States of America and Canada, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act

2 Stanley Warner Corporation is engaged in commerce within the meaning of Section 2(5) of the Act

3 By attempting to cause Stanley Warner Corporation to discriminate against Joseph Weiner in violation of Section 8(a)(3) of the Act, the Respondents have engaged in unfair labor practices within the meaning of Section 8(b)(2) of the Act.

4 By maintaining and enforcing agreements, arrangements, practices, or understandings with Stanley Warner Corporation requiring membership in good standing in, or clearance by, Local 244 as a condition of hiring projectionists in Stanley Warner theaters in Essex County, New Jersey, the Respondents have engaged in unfair labor practices within the meaning of Section 8(b)(2) of the Act

5 By requiring Stanley Warner Corporation to contribute to Local 244's welfare and health fund for the sole benefit of members in good standing of Local 244 and their dependents, the Respondents have engaged in unfair labor practices within the meaning of Section 8(b)(2) of the Act

6 By restraining and coercing employees in the exercise of rights guaranteed in Section 7 of the Act the Respondents have engaged in unfair labor practices within the meaning of Section 8(b)(1)(A) of the Act

7 The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act

[Recommendations omitted from publication]

Richard, Robin and Colin Williams, Copartners d/b/a Williams Brothers Asphalt Paving Company *and* Local 324, International Union of Operating Engineers, AFL–CIO

Richard, Robin and Colin Williams, Copartners d/b/a Williams Brothers Asphalt Paving Company *and* Dale G. Tracy

Richard, Robin and Colin Williams, Copartners d/b/a Williams Brothers Asphalt Paving Company *and* Jack Blew. *Cases Nos 7–CA–2083, 7–CA–2084, and 7–CA–2086. February 2, 1960*

DECISION AND ORDER

On July 10, 1959, Trial Examiner George A Downing 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 Thereafter, the Respondent filed exceptions to the Intermediate Report, a supporting brief, and several motions to reopen the record

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 Rodgers, Jenkins, and Fanning]

The Board 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, motions,[1] and the entire record in this case, and hereby adopts the findings,[2] conclusions, and recommendations of the Trial Examiner, with the following modifications and additions.

1. The record shows that, during the calendar year 1958, Respondents made purchases of equipment and supplies originating outside the State which were valued in excess of $50,000. Accordingly, on the basis of our indirect inflow standard, we find that it will effectuate the purposes of the Act to assert jurisdiction.[3]

2. We do not agree with the Trial Examiner that Respondents violated Section 8(a)(3) and (1) by failing to rehire Dale Tracy for the 1958 season.

(a) It was established that the Respondents' business is seasonal, that the seasonal employees are terminated each fall, and that reemployment is made upon application the following spring. Dale Tracy was first hired in 1955, and worked each season thereafter until the end of the 1957 season. In April 1958, substantially before hiring was commenced for the 1958 season, Tracy visited the Respondents' office seeking employment. He spoke to Richard Williams. Tracy testified that in answer to his request for employment, Williams said, "The way it looks, I guess we ain't going to have much work anyway." Tracy judged from Richard's attitude that he was being rejected and made no further attempt to reapply. We find in these circumstances that there was no warrant for any belief by Tracy that further applications would have been futile when the Respondents commenced seasonal hiring. Accordingly, Tracy failed in our opinion, to exercise due diligence in applying for employment.

(b) The Trial Examiner found that Tracy's adherence to the Union was known to the Respondents, in view of the following evidence: The Respondents in July 1957 conducted a private election among the employees to determine whether or not they desired to be represented by the Union. Tracy testified that he signed his ballot, and that after the election, Respondents took possession of these ballots. Tracy also testified that shortly after the election, Colin Williams asked him

[1] The various motions to reopen the record are denied for the reason that they fail to show that the evidence now sought to be adduced was not available at the time of the hearing. See *N.L.R.B. v. Tyrrell County Lumber Company*, 203 F 2d 951 (C.A. 4); *James Julian, Frank Julian and Charles Julian, copartners d/b/a Julian Aluminum Foundry Company*, 120 NLRB 1319.

[2] We do not adopt the finding in the Intermediate Report that prior to his conversation with Colin Williams, Earl Houseman was approached by union agents. The record shows that during this incident the union agents conferred with several employees on the jobsite, but not Houseman. This modification, however, does not affect our final conclusions herein.

[3] *Bussey-Williams Tire Co., Inc.*, 122 NLRB 1146.

what he thought of the Union, and he said, "Well, I have been in unions before and I believe in them. If one contractor can be union, it seems like they all should." We do not agree this evidence is sufficient to impute to the Respondent's knowledge of Tracy's union activities. Even were we to accept the Trial Examiner's finding that Tracy, among others, signed his ballot, there is no evidence that Tracy had cast his vote in favor of the Union. Nor do we find that Tracy's remark to Colin Williams in and of itself was of such a nature as to support the finding that Respondents had knowledge of his union activities. For the foregoing reason, we shall dismiss the complaint as to Tracy.

[The Board dismissed the complaint in Case No. 7–CA–2084.]

ORDER

Upon the entire record in this proceeding, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondents, Richard, Robin and Colin Williams, Copartners d/b/a Williams Brothers Asphalt Paving Company, Ionia, Michigan, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in Local 324, International Union of Operating Engineers, AFL–CIO, or in any other labor organization of their employees, by refusing to rehire employees because of their union membership and activities, or discriminating in any other manner in regard to hire or tenure of employment, or any term or condition of employment, to discourage membership in a labor organization, except as authorized by Section 8(a)(3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959.

(b) Promising reemployment on condition that employees withdraw from the Union, threatening reprisals against employees because of their union membership and activities, or threatening to cut the working hours if the Union should come in.

(c) In any other manner interfering with, restraining, or coercing their employees in the exercise of their right to self-organization, to form, join, or assist Local 324, International Union of Operating Engineers, AFL–CIO, or any other labor organization, to bargain collectively through representatives of their own choosing, or to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from all such activities except to the extent that such right may be affected by an agreement authorized by Section 8(a)(3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959.

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

(a) Offer to Jack Blew immediate and full reinstatement to his former or substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of pay he may have suffered by payment to him of a sum of money equal to that which he normally would have earned from the date of the discrimination against him to the date of the offer of reinstatement, less his net earnings during said period (*Crossett Lumber Company*, 8 NLRB 440), said backpay to be computed on a quarterly basis in the manner established by the Board in *F. W. Woolworth Company*, 90 NLRB 289.

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all records necessary to analyze the amount of backpay due and the rights of Jack Blew under the terms of this Order.

(c) Post at their plant at Ionia, Michigan, copies of the notice attached hereto marked "Appendix."[4] Copies of said notice, to be furnished by the Regional Director for the Seventh Region, shall, after being signed by the Respondents' representative, be posted by Respondents immediately upon receipt thereof and maintained by them for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondents to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for the Seventh Region, in writing, within 10 days from the date of this Order, what steps the Respondents have taken to comply therewith.

[4] 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."

APPENDIX

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 Local 324, International Union of Operating Engineers, AFL–CIO, or in any other labor organization of our employees, by refusing to rehire employees because of their union membership and activities, nor will we discriminate in any other manner in regard to hire or tenure of employment, or any term or condition of employment,

to discourage membership in a labor organization, except as authorized by Section 8(a)(3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959.

WE WILL NOT promise reemployment on condition that employees withdraw from the Union, threaten reprisals against employees because of their union membership and activities, or threaten to cut working hours if the Union should come in.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their right to form, join, or assist said Local 324, International Union of Operating Engineers, AFL–CIO, or any other labor organization, to bargain collectively through representatives of their own choosing, or to engage in other 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 authorized by Section 8(a)(3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959.

WE WILL offer to Jack Blew immediate and full reinstatement to his former or substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of pay he may have suffered as a result of our discrimination against him.

All our employees are free to become, or remain, or refrain from becoming or remaining members of the above Union, or any other labor organization, except to the extent that this right may be affected by an agreement in conformity with Section 8(a)(3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959.

RICHARD, ROBIN AND COLIN WILLIAMS,
COPARTNERS D/B/A WILLIAMS BROTHERS ASPHALT PAVING COMPANY,
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

STATEMENT OF THE CASE

This proceeding, brought under Section 10(b) of the National Labor Relations Act, as amended (61 Stat. 136), was heard in Ionia, Michigan, on April 28 and 29, 1959, with all parties represented. The issues as raised by the pleadings and as litigated at the hearing were whether Respondents discriminatorily refused reemployment to Jack Blew and Dale G. Tracy in May 1958, in violation of Section 8(a)(3) of the Act, and whether they engaged in various acts of interference, restraint, and coercion as specified in the complaint, in violation of Section 8(a)(1).

Respondents' defense in Tracy's case was that they did not rehire him because of "his habits of personal cleanliness." In Blew's case Respondents' final contention was that they did not rehire him solely because of the wage rate which he demanded, though their answer had assigned a different ground.

Upon the entire record, and from my observation of the witnesses, I hereby make the following:

FINDINGS OF FACT

I. RESPONDENTS' BUSINESS

Respondent copartners, whose principal office and place of business is at Ionia, Michigan, are engaged in the business of surfacing roads in the State of Michigan and supplying crushed stone for such operations. Substantial quantities of such work are performed on State and county highways within the State of Michigan which are constructed with Federal funds and/or constitute links in the national highway system. During the calendar year 1958 Respondent performed such services valued in excess of $100,000 on State highways and also performed such services valued in excess of $100,000 on county roads. During the same calendar year, Respondent made extrastate purchases of equipment and supplies valued in excess of $50,000.

Respondents are therefore engaged in commerce within the meaning of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Local 324, Operating Engineers, herein called the Union, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

Respondents' business is concerned mainly with the blacktopping of State and county roads. It is a seasonal operation, running normally from about the middle of May to the first of November, though seasonal preparations, including the assembling of a crew, usually begin in April and though some four or five employees, including supervisors, are retained through the winter months. Normally some 30 employees are employed at the peak, divided between the asphalt and gravel plants and the road jobs. Respondents normally hire some 12 or 15 men at the beginning of the season, roughly half of whom have worked for Respondents in previous seasons. It is customary for the old employees who desire reemployment to apply at the beginning of the new season.

Though the unfair labor practices herein revolve around Respondents' failure to reemploy Blew and Tracy at the beginning of the 1958 season, much of the evidence relevant to the alleged discriminatory motivation concerned events which occurred during the 1957 season and may be properly considered (though outside the Section 10(b) period) because of its direct bearing on the issue of motivation. *Federal Trade Commission* v. *Cement Institute,* 333 U.S. 683, 705.[1]

A. *Background evidence; the 1957 season*

Both Blew and Tracy worked for Respondents during the 1957 season, as well as in earlier seasons, and both were acknowledged to be good workmen.

In July 1957, Anthony Giaimo, business agent of the International Union of Operating Engineers, began an organizational campaign among Respondents' employees and sometime later requested, and was refused, recognition. Both Blew and Tracy joined the Union and Blew became known to Respondents as one of its leading proponents. Blew testified that shortly after he signed the application card, Colin inquired whether he had joined the Union and who else had joined. Blew answered only for himself.

Shortly after that, Respondents conducted an election among the employees of the asphalt plant. At Colin's request, employee Clare Hubert assisted him in conducting the election. Approximately 12 employees cast their ballots on slips of paper marked with "Yes" and "No" boxes opposite the questions, "Have you joined

[1] The charges were filed September 11, 1958, and served on September 13. Though the complaint charged a course of interference, restraint, and coercion back to August 1947, no findings of unfair labor practices can be made prior to March 13, 1958. Findings may, however, properly be made on "independent" violations of Section 8(a)(1) which occurred after the latter date despite the failure of the charges to include them. *N.L.R.B.* v. *Fant Milling Company,* 360 U.S. 301 (decided June 15, 1959); *National Licorice Co.* v. *N.L.R.B.,* 309 U.S 350, 369

the International Union of Operating Engineers?" and "Do you want Union representation?" The ballots were counted by Hubert, Leon Fredericks, and another employee, and resulted in a count of approximately eight votes for the Union to four against it. The ballots were then delivered to Respondents.

Tracy testified that he signed his ballot, but Respondents denied knowledge of that fact and produced five ballots at the hearing, none of which was signed. Leon Fredericks, who participated in the counting, testified for Respondents that none of the ballots which he saw was signed; but Hubert, called in rebuttal, testified that he also signed his own ballot and that he saw two or three signed ballots, though not his own. Hubert testified that he counted only some of the ballots and that the remainder were counted by the other two employees. The entire testimony can be reconciled, of course, on the basis of the latter explanation, which would account for Fredericks' failure to see any signed ballots. In view of Hubert's corroboration of Tracy, Respondents' possession of the cards, and its production of only 5 (unsigned) cards out of 12,[2] Tracy's testimony is credited, and it is found that Respondents had knowledge of Tracy's vote.

There was other evidence that Respondents knew of Tracy's adherence to the Union and of Blew's leadership in the campaign. Tracy testified that about 2 weeks later, the State Labor Board conducted another election (which resulted in a 7–7 tie vote) and that following that election Colin asked him his opinion about the Union and that he replied that he had belonged to unions before and believed in them, and that if one contractor could be union, they all should be. Colin replied, "If it hadn't been for Jack Blew, he was the whole instigator of it, it never would have happened." [3]

Blew testified that as the men were starting back to work after the State election, Colin said to him, "Well, Jack, you didn't get the union, did you?"

Blew, who was one of five employees (including three foremen) who had worked during the winter of 1956–57, testified that when Colin laid him off at the end of the '57 season, Colin told him that if he had not "got tangled up with this union business," he could have worked all winter long as he had the previous winter. Colin denied that there was any conversation about winter work at the time but made no specific denial of his alleged reference to Blew's connection with the Union.[4] Neither did Colin deny the remark which Blew attributed to him after the State election. Blew's testimony is credited.

Tracy testified that at the time of the layoff at the end of the 1957 season, Colin remarked that he hoped to be seeing the employees next year. Colin admitted making such a remark, but he testified that it was addressed to the group and not to any individual employee.

B. *The 1958 season*

Pursuant to custom, both Tracy and Blew applied to Respondents prior to the beginning of the 1958 season. The evidence concerning Tracy's application is brief and not in conflict. Tracy called on Richard at the office early in April and asked for a job. Tracy testified that Richard acted as if he did not want to speak and that he said only that the way it looked there would not be much work and that Respondents had not gotten anything up to that time. Tracy admitted that Richard did not say he was refusing to hire Tracy, but he judged from Richard's attitude that he was being rejected. In any case, Tracy left and did not reapply.

Richard testified only that he could not recall talking with Tracy on the occasion, though he agreed that he might well have done so.

Blew testified that he called Colin on the telephone in April and asked about coming back to work. Colin replied that it would be about another month before the plant would start and that he would call Blew. On May 19, Blew went in pursuant to Colin's call and talked with Colin and Robin, but two other incidents which preceded his visit should first be noted.

Giaimo went to the plant just prior to Blew's visit and renewed a request for recognition which he had made the previous year. He testified that Colin and Robin informed him they wanted no part of the Union. Giaimo then asked why they did

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[2] Respondents claimed that the remaining cards had been lost.

[3] There was also evidence that Respondents at one time suspected Clarence Carr, a new employee, of instigating the union activities

[4] Colin had given the Board an affidavit in which he assigned financial reasons as the basis of Respondents' failure to keep Blew during the winter, but he admitted on cross-examination that Respondents hired Ed Hirski for the off-season at the same rate they paid Blew.

not rehire Blew and two other employees (Sweet and Carr).[5] Though the brothers replied that they had no work, Giaimo testified that the gravel plant was operating and that other equipment was being readied for a job. Giaimo informed the brothers that if he could prove that their failure to rehire the men was union activity, he would file unfair labor practice charges. The discussion became extremely heated, and at the conclusion, Colin followed Giaimo to the gate and stated that he had a shotgun which he would use if he ever caught Giaimo on the property again.

The chief conflict under the testimony of Colin and Robin related to the threat to shoot Giaimo. Colin testified that they did not have a gun and that Giaimo was not threatened with shooting "by any of us." He admitted, however, that Robin made some reference to the probability that *some of the men on the job would shoot Giaimo* if they knew he was out there trying to cause trouble. Robin denied both threatening to shoot Giaimo and hearing any reference to shooting. He admitted, however, that at one time during the heated argument, he ordered Giaimo off the property and told him that if he was not careful *he might get killed before he left there.*

It is thus plain from all the versions that Giaimo's visit ended with threats of violence which followed his suggestion that unfair labor practice charges might be filed.

Clare Hubert, who had just been rehired, testified that a few minutes after he saw Giaimo at the plant, he and Colin had a discussion concerning the Union during which Colin said that if there were to be a Union in the plant, he (Colin) would organize it.

Blew testified that when he arrived, Colin referred to the fact that Giaimo had been there and had demanded that Respondents reemploy Blew and two other employees. Colin said that no union man could tell him how to run the business or who to hire and that they had told Giaimo that if he came back on their property again they would shoot him. Robin stated in turn that if they found out which employee started "this union business" Respondents would blackball them from all jobs in the territory and that he did not see why "a good guy" like Blew had gotten mixed up in the union business. Blew testified further that he was asked what wage rate he wanted, and he replied that as Respondents had State work he thought the rate should be $2.50 per hour. Colin replied that the rate on State work was only $2.12 and asked if Blew would work for that. Blew agreed. Colin informed Blew that if he would get a withdrawal card and "forgot about this union business" he could come back to work, but Blew refused Colin then stated that Respondents could get all the help they wanted on Blew's job for a $1 an hour, and Blew replied, "Good, you get them," and walked out. He did not contact Respondents further nor did they contact him.

Both Colin and Robin denied that anything was said about blackballing employees or about Blew getting a withdrawal card. They testified that they had in fact decided to reemploy Blew but that Blew demanded $2 50 an hour, and that they had no work at that rate. They denied that Blew offered to work for $2.10 (his previous rate) or $2.12 or $2.09 or any other rate except $2.50. They also denied that the $2.12 rate was mentioned and testified that they knew of no such rate pertaining to their jobs. Colin's final testimony was that *the sole reason they did not employ Blew was because he wanted $2.50 an hour.*

One key to resolving the foregoing conflict is whether there was in fact any such rate as $2.12 which was applicable to Respondents' State jobs and of which Respondents claimed ignorance. We start with an admission by Colin that the State rates on State roads were the same as Davis-Bacon rates on Federal fund jobs. Russell Conolly, business representative of Road Construction Laborers of Michigan, Local 1191 testified in rebuttal that the $2.12 rate was actually in effect for the full 1957 season, that it was the State "prevailing wage" which appeared in all bids let by the State, and that it was the same as the Davis-Bacon rate. A further key was supplied by Respondents themselves in their letter of September 15, 1958, to the Board, in which they made no reference to an alleged disagreement over Blew's rate but assigned instead an entirely different and inconsistent reason for not rehiring Blew. See Concluding Findings, *infra.* The foregoing facts persuade me that Respondents' witnesses did not give a truthful account of their conversation with Blew. I therefore conclude and find that Blew in fact agreed to work for $2.12 an hour as offered by Respondents.

There remains the further issue whether Respondents imposed the condition that Blew obtain a withdrawal card from the Union. The record plainly established that

[5] Giaimo testified he did not refer to Tracy because he was under the impression that Tracy was returning to work.

Respondents were not only opposed to the Union, but violently opposed to it, as shown by their reaction to Giaimo's visit. Furthermore, immediately after that visit, Colin made it plain to Hubert that there would be no union in the plant except such as Respondents might themselves organize and at one point Colin told Blew that so far as Respondents were concerned, "this union business is settled." The requirement that Blew obtain a withdrawal card from his Union fitted plainly into the pattern of Respondents' conduct as shown by the entire record, namely, to prevent the employees from bargaining collectively through representatives of their own choosing. Blew's testimony is therefore fully credited.

One further incident showed that Respondents' attitude continued well into the 1958 season. Earl Houseman testified that he was hired on June 12, that in July he was approached on the job near Cass City by agents of Teamsters and Operating Engineers, and that thereafter Colin told him that if the Union came in, Respondents would have to cut the plant to 40 hours and would run two shifts if they had to. Colin admitted making the statement, but testified that he intended no discrimination against the Union and was referring to the necessity of reducing costs by eliminating overtime work.

C. *Concluding findings*

The record overwhelmingly supports the conclusion that Respondents' failure to rehire Blew was discriminatorily motivated. Their course of conduct during the 1957 season, including the blaming of Blew as the "instigator" of the organizational campaign and the failure to retain him through the winter season because of "this union business" was plainly indicative of such a motivation. But when all that is coupled with Respondents' continued antiunion conduct during the 1958 season and the express conditioning of Blew's employment on abandonment of his union membership, the conclusion is inescapable.

Respondents' defenses, which are presently based on their version of the May 19 interview, not only fell with the credibility resolution, but were further refuted by their letter of September 15, 1958, to the Board. That letter made no reference to the claim that Blew was not hired because he demanded $2.50, but explained instead that Blew was one who had become "so obsessed" with Giaimo's promises that his work had suffered considerably and that he was not rehired, "not because he tried his very best to help Giaimo force a union into our organization, but because of an unhealthy careless attitude he acquired as a result of his association with Mr. Giaimo."

Presumably, it was that defense which Respondents sought initially to support at the hearing by evidence concerning certain accidents which Blew had in 1957, but that defense was completely demolished by Colin's final testimony that Blew was not rehired solely because he demanded $2.50, and by two recommendations which Respondents subsequently gave Blew. In one of those Respondents recommended Blew as "an efficient and reliable operator" of heavy equipment and in the other as "a conscientious and capable individual" and as "a satisfactory employee."

Though Tracy was not shown to have been as active in union leadership as Blew was, yet his adherence to the Union was well known to Respondents as a result of the signed ballot and Colin's subsequent interrogation concerning his union sentiments and his forthright replies. Those circumstances, coupled with Respondents' strong antiunion animus as shown by the entire record, including the conditioning of Blew's employment on withdrawal from the Union and Colin's announced intention to Hubert to permit only a union of his own creation, plainly established for the General Counsel a *prima facie* case that Respondents failed to hire Tracy for the 1958 season because of his membership in and adherence to the Union.[6] We turn then to the matters which Respondents assert in defense.

The circumstances surrounding Tracy's application must be viewed in the light of the evidence surrounding his previous year's hiring and Respondents' defense that they did not recall him because of disapproval of his personal habits, i.e., lack of cleanliness. The evidence showed that Tracy was hired for the '57 season by Richard, without prior consultation with his partners. Though Richard was told by Colin and Griswold (Respondents' foremen) that they wished he had not recalled Tracy because of his habits and though Colin warned Tracy in mid-July concerning

[6] That Respondents did not choose to eliminate all employees whose adherence to the Union was known to them is not, of course, a circumstance indicative of innocence as concerned their conduct regarding either Tracy or Blew. *N.L.R.B.* v. *W. C. Nabors Company*, 196 F. 2d 272, 276 (C.A. 5), cert. denied 344 U.S. 865, enfg. 89 NLRB 538, 542; *N.L.R.B.* v. *Shedd-Brown Mfg. Co.*, 213 F. 2d 163, 174–175 (C.A. 7), enfg. 102 NLRB 742, 764.

cleanliness and the change of clothing, Respondents not only retained him throughout the season but gave him a raise in September. Furthermore, they did not inform Tracy at the end of the season that he would not be rehired for the next season. To the contrary, Tracy was one of a group to whom Colin expressed the hope that they would return.

If there were any continued objections by Respondents to Tracy's personal habits and if Respondents actually entertained any intention of not recalling him, certainly that was the logical time to inform him. There remained in addition 6 months of the off-season during which Respondents might have notified him not to report. Again in mid-April, when Tracy applied at the customary time to Richard, who was fully aware of the alleged objections to Tracy, Richard made no reference to those objections or to Respondents' alleged intention not to rehire him because of them, but cursorily turned him away with the claim that Respondents *would not have work*. Yet when Richard wrote Respondents' letter of explanation to the Board some 6 months later, he claimed instead that Tracy was not recalled because of objections concerning "his habits of personal cleanliness." Significantly, also, there was no claim by Richard that Tracy had not applied.

It is inconceivable, if Respondents' objections were *bona fide*, that they would have retained Tracy throughout the 1957 season (admittedly a slack one), would have laid him off at the end of the season without notifying him not to reapply, would have remained silent through another 6 months of the off-season, and would finally, upon his appearance for the new season, have assigned the specious claim that they had no work. Respondents' evidence thus lent further support to the General Counsel's case that Respondents' action was discriminatorily motivated.[7]

It is therefore concluded and found on the entire evidence that Respondents refused to rehire Dale G. Tracy in April and Jack Blew on May 19, 1958, because of their union membership and activities to discourage membership in the Union.

It is further concluded and found that by conditioning Blew's rehiring upon his withdrawal from the Union, by threatening reprisals against employees because of their union activities, and by threatening to cut the working hours if the Union should come in, Respondents interfered with, restrained, and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act. The latter findings are based only on Respondents' conduct during the 1958 season which fell within the Section 10(b) period.

IV. THE REMEDY

Having found that Respondents engaged in certain unfair labor practices, I shall recommend that they cease and desist therefrom and that they take certain affirmative action of the type conventionally ordered in such cases which I find necessary to remedy and to remove the effects of the unfair labor practices and to effectuate the policies of the Act. For reasons which are stated in *Consolidated Industries, Inc.*, 108 NLRB 60, 61, and cases there cited, I shall recommend a broad cease and desist order.

Upon the basis of the above findings of fact, and upon the entire record in the case, I make the following:

CONCLUSIONS OF LAW

1. The Union is a labor organization within the meaning of Section 2(5) of the Act.
2. By refusing to rehire Dale G. Tracy and Jack Blew because of their union membership and activities, Respondents engaged in discrimination to discourage membership in a labor organization and thereby engaged in unfair labor practices proscribed by Section 8(a)(3) and (1) of the Act.
3. By promising reemployment on condition that employees withdraw from the Union, threatening reprisals against employees because of their union membership and activities, and threatening to cut the working hours if the Union should come in, Respondents engaged in unfair labor practices proscribed by Section 8(a)(1) of the Act.

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[7] The giving of implausible, inconsistent, or contradictory explanations of a discharge may be considered in determining the real motive; it is a circumstance indicative of anti-union motivation. *N.L.R.B.* v. *Condenser Corporation of America*, 128 F. 2d 67, 75 (C.A. 3); *N.L.R.B.* v. *Radcliffe et al*, 211 F. 2d 309, 314 (C.A. 9); *Sandy Hill Iron & Brass Works*, 69 NLRB 355, 377–378, enfd. 165 F. 2d 660 (C.A. 2); cf. *N.L.R.B.* v. *International Furniture Company*, 199 F. 2d 648, 650 (C.A. 5), enfg. 98 NLRB 674; *N.L.R.B.* v. *O & J Camp, Inc., et al., d/b/a Kibler-Camp Phosphate Enterprise*, 216 F. 2d 113, 115 (C.A. 5), enforcing 107 NLRB 1068.

4. The aforesaid unfair labor practices having occurred in connection with the operation of Respondents' business as set forth in section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and substantially affect commerce within the meaning of Section 2(6) and (7) of the Act.

[Recommendations omitted from publication.]

Swift & Company *and* National Brotherhood of Engineers, Firemen & Power Equipment Operators, Petitioner. *Case No. 30–RC–1760. February 2, 1960*

DECISION AND ORDER

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, a hearing was held before Allison E. Nutt, hearing officer. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

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 Rodgers, Bean, and Fanning].

Upon the entire record [1] in this case, the Board finds:

1. The Employer is engaged in commerce within the meaning of the Act.

2. The Petitioner, referred to herein as NBE, and the Intervenor, United Packinghouse Workers of America, Local 88, AFL–CIO, are labor organizations claiming to represent certain employees of the Employer.[2]

3. No question affecting commerce exists concerning the representation of employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act for the reasons given below.

The Petitioner seeks to sever the employees in the engineroom department of the Employer's packing plant at Denver, Colorado, from a production and maintenance unit represented by the Intervenor. The Employer and Intervenor moved to dismiss the petition, contending *inter alia*, that NBE, ostensibly organized to represent powerhouse employees, is fronting for an industrial union, National

[1] After the hearing the Petitioner requested the Board to issue a consolidated decision for this case and for *Iowa Packing Company, Division of Swift & Company,* Case No. 18–RC–4039, which was then pending before the Board. The request to consolidate the two cases was, in effect, denied by the issuance of a separate Decision and Order in the *Iowa Packing* case on December 31, 1959 (125 NLRB 1408), but the Board considered the record made in this proceeding before issuing the decision in *Iowa Packing.* The testimony of Claude H. Erixson, a witness in the earlier proceeding, was incorporated into this record by the agreement of the parties.

[2] The Employer and the Intervenor refused to stipulate that NBE was a labor organization. However, we affirm our finding in *Iowa Packing Company, supra,* that NBE is a labor organization within the meaning of Section 2(5) of the Act.