

We shall also order Respondent, in the event it does not reopen its manufacturing facilities, to make whole the employees discriminatorily denied reinstatement . . . for any loss of pay suffered by reason of the discrimination against them by paying to each of them a sum of money equal to the amount he or she would normally have earned as wages from [the date of discharge] until such time as each secures, or did secure, substantially equivalent employment with other employers.

We also expressly reserve the right to modify the backpay and reinstatement provisions of this Decision and Order if made necessary by a change of conditions in the future, and to make such supplements thereto as may hereafter become necessary in order to define or clarify their application to a specific set of circumstances not now apparent.

I believe the situation presented in the *Bonnie Lass Knitting Mills* case is analogous to the situation here except that here trucking operations, rather than manufacturing operations, are involved. I believe further that the remedy prescribed in that case, with necessary adaptation of language, is appropriate in the instant case and will effectuate the policies of the Act. I will therefore frame the recommended order in the instant case accordingly.<sup>9</sup>

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

#### CONCLUSIONS OF LAW

1. Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By threatening his employees with economic reprisals in the event of unionization, Respondent has engaged in and is engaging in an unfair labor practice within the meaning of Section 8(a)(1) of the Act.
4. By discriminatorily discharging Floyd David Catterson, Alfred Alson Elledge, Elwood M. Goble, Boyce Kirkpatrick, Roy Richardson, and Hobart Steele, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.
5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

[Recommendations omitted from publication.]

<sup>9</sup>It should be noted that Respondent in the instant case disposed of his equipment to Work Well, Incorporated, the stock ownership of which was vested principally in Respondent's wife and son. Work Well, Incorporated, was not named as a respondent in this proceeding and no order can be issued against it. On the other hand, it may appear in subsequent compliance negotiations or proceedings that for purposes of the Act and without regard to the validity of the incorporation of Work Well, Incorporated, for tax or related purposes, the latter entity is an *alter ego* of Respondent, or a successor or assign within the contemplation of the Board's remedial order. See *Regal Knitwear Company v. N.L.R.B.*, 324 U.S. 9; *N.L.R.B. v. Deena Artware, Inc.*, 361 U.S. 398.

**Miele Iron Works and United Steelworkers of America, AFL-CIO.** *Case No. 22-CA-497. October 11, 1960*

#### DECISION AND ORDER

On April 18, 1960, Trial Examiner John P. von Rohr issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. The Trial Examiner also found that the Respondent had not engaged in certain other unfair labor practices and rec-

ommended that the complaint be dismissed with respect to them. Thereafter, the Respondent filed exceptions to the Intermediate Report and a supporting brief.<sup>1</sup>

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, the Board has delegated its powers in connection with this case to a three-member panel [Chairman Leedom and Members Rodgers and Jenkins].

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

### ORDER

Upon the entire record in this case, and pursuant to Section 10(c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the Respondent, Miele Iron Works, Union, New Jersey, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in United Steelworkers of America, AFL-CIO, or in any other labor organization, by laying off or otherwise discriminating in regard to the hire or tenure of employment of its employees, or any term or condition of employment.

(b) Interrogating its employees concerning their union activities, affiliation, or sympathies in a manner constituting interference, restraint, or coercion in violation of Section 8(a)(1) of the Act.

(c) Threatening its employees with reprisals or promising them benefits to discourage union membership and activity.

(d) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist United Steelworkers of America, AFL-CIO, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection as guaranteed in Section 7 of the Act, or to refrain from any and all such activities, except to the extent

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<sup>1</sup>The Board hereby denies the Respondent's request for oral argument because the record, exceptions, and brief adequately present the issues and positions of the parties.

<sup>2</sup>As no exception was taken to the Trial Examiner's finding that the Respondent did not violate the Act by terminating the employment of Cleophus Burrough on September 30, 1959, we shall adopt such finding *pro forma*.

<sup>3</sup>In his discussion of the layoff of Hardwick, the Trial Examiner states. "As has been seen, Miele stated to Hardwick, after having questioned him, 'I guess you're for the union.'" The Intermediate Report contains no prior reference to any such testimony by Hardwick, but we note that the record reflects that Hardwick had so testified and we correct accordingly the Intermediate Report. The Intermediate Report is corrected accordingly.

that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act, as 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) Make whole Sammie Lee Hardwick, Chester Bell, Harvey Daniels, and Cleophus Burrough for any loss of pay they may have suffered, by reason of the discrimination against them, in the manner set forth in the section of the Intermediate Report entitled "The Remedy."

(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 other records necessary to analyze the amounts of backpay due under the terms of this Order.

(c) Post at its plant at Union, New Jersey, copies of the notice attached hereto marked "Appendix."<sup>4</sup> Copies of said notice, to be furnished by the Regional Director for the Twenty-second Region, shall, after being duly signed by an authorized representative of the Respondent, be posted by it immediately upon receipt thereof, and be maintained by it for a period of 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 Twenty-second Region, in writing, within 10 days from the date of this Order, what steps the Respondent has taken to comply herewith.

IT IS HEREBY FURTHER ORDERED that the complaint herein be, and it hereby is, dismissed, insofar as it alleges that the Respondent violated Section 8(a)(3) of the Act by terminating the employment of Cleophus Burrough on September 30, 1959.

<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"

## 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, as amended, we hereby notify our employees that:

WE WILL NOT discourage membership in United Steelworkers of America, AFL-CIO, or in any other labor organization, by laying

off, or in any other manner discriminating against, employees in regard to their hire or tenure of employment, or any term or condition of employment.

WE WILL NOT threaten employees with reprisals or make them promises of benefit in order to discourage membership in United Steelworkers of America, AFL-CIO, or any other labor organization, or interrogate them as to their union membership or sympathies in a manner constituting interference, restraint, or coercion in violation of Section 8(a) (1) of the Act.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their rights to self-organization, to form, join, or assist United Steelworkers of America, AFL-CIO, or any other labor organization, to bargain collectively through representatives of their own choosing, and 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 requiring membership in a labor organization, as authorized in Section 8(a) (3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959.

WE WILL make whole Sammie Lee Hardwick, Chester Bell, Harvey Daniels, and Cleophus Burrough for any loss of pay they may have suffered as a result of the discrimination against them.

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

MIELE IRON WORKS,  
*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

Upon a charge, duly filed, the General Counsel of the National Labor Relations Board, for the Regional Director of the Twenty-second Region (Newark, New Jersey), issued a complaint, dated October 28, 1959, against Miele Iron Works, herein called the Respondent or the Company, alleging that the Respondent had engaged in certain unfair labor practices within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the National Labor Relations Act, as amended

Respondent filed an answer on November 2, 1959, in which it admitted the jurisdictional allegations of the complaint, but denied the commission of any unfair labor practices.

Pursuant to notice, a hearing was held at Newark, New Jersey, on February 1, 2, and 3, 1960, before the duly designated Trial Examiner. During the hearing the General Counsel moved to amend the complaint to the extent that an allegation charging the Respondent with a failure and refusal to reinstate one Cleophus Burroughs be amended to allege that Respondent discriminatorily failed and refused to reinstate Burroughs until on or about October 25, 1959. The motion was granted without objection. Briefs submitted by the Respondent and the General Counsel have been carefully considered. Based upon the record as a whole, and upon my observation of the witnesses, I hereby make the following:

## FINDINGS OF FACT AND CONCLUSIONS

### I. THE BUSINESS OF THE RESPONDENT

The Respondent is a New Jersey corporation with its principal office and place of business located in Union, New Jersey, where it is engaged in the manufacture, sale, and distribution of cellar doors, septic tanks, and related products. The Respondent annually purchases and receives raw materials valued in excess of \$50,000 from firms located outside the State of New Jersey. The Respondent admits, and I find, that at all times material herein the Respondent has been engaged in commerce within the meaning of the Act.

### II. THE LABOR ORGANIZATION INVOLVED

United Steelworkers of America, AFL-CIO, hereinafter referred to as the Union, is a labor organization within the meaning of Section 2(5) of the Act.

### III. THE UNFAIR LABOR PRACTICES

#### A. *Background; interference, restraint, and coercion*

The Respondent Company, which has always operated as a nonunion shop, is a relatively small business and might be best described as a father-son operation. It employed about 17 employees during the period here under consideration. Raphael Miele, Sr., president, and Raphael Miele, Jr., vice president, were themselves engaged in physical work and at the same time were largely responsible for the direct supervision of all employees. The work of the employees, which consisted principally of welding, fabricating, and paint spraying, was performed in the open. The Company's office is located in a converted trolley car and the only other buildings consist of two small sheds which are used for storage purposes. However, a new building was erected by the Company on its property at a cost of \$40,000 and was completed in August 1959. Although the building was not yet put to full use during the period in October when the alleged unfair labor practices took place, some of the Respondent's machinery had been moved into the building by this time.

The first indication which the Respondent had that its employees were interested in the Union was on September 11, 1959 (a Friday), at which time it received a communication from the Board notifying it that the Union had filed a petition for certification as representative of its employees. A copy of the petition was enclosed with the communication. On the same day Raphael Miele, Sr., called the employees together and addressed them in two groups. Miele, Jr., was also present at both meetings. Miele, Sr., conceded that the meetings were prompted by his receipt of the Board's letter notifying him of the Union's claim to represent his employees. There is a conflict, however, between the Miele's and the employees who testified as to what was said at the meetings, particularly insofar as any threats or promises of benefits are concerned.

Five employees who were present at one or the other of the two meetings on this Friday testified on behalf of the General Counsel with respect to the remarks made by Miele, Sr., during the course of these meetings. With the exception of a few minor variations, the substance of the testimony of these witnesses with respect to the statements which they attributed to Miele is corroborative and adds up to substantially the same version. Thus, according to these witnesses, Miele first explained to them that in the year 1958 the Company made a profit of only \$7,500. He proceeded to state that he could not afford to pay union wages, that he would not have the Union in the plant, and that he would close the shop if the Union came in. According to witness Hardwick, Miele stated also "that [in the

event of a union] he would close the new building down and rent it out." Further, according to Hardwick and witness Cleophus Burrough, that he and his son would go into the business themselves of buying and selling cellar doors. On the other hand, according to all of these witnesses, Miele, Sr., stated that if they would go along with him, he would give them a wage increase, a bonus, and hospitalization insurance.

We turn now to the senior Miele's version of the meetings. Miele was frank to concede that the meetings held on this day were occasioned by receipt of the Board's letter. He testified that he started the meeting by telling the employees that he had received a letter that "some organization" was requesting to act as the bargaining agent ". . . and that I would like to outline our position to them, so they would understand, if possible, our economic status." According to Miele, Sr., he proceeded to tell them of the narrow profit margin (\$8,500) that the Company had made in the last year; that the increases in the cost of freight had gone up 100 percent; and that the cost of material had gone up approximately 50 to 75 percent. Miele testified also, "I told them that we had tried to make things so that the Company would make more profit and be in a better position to improve conditions of work plus some extra remuneration if we could get this building in shape for operations." Further, "I told them that if we were compelled to increase our costs by any organization, or other means, we would be compelled to rent out the new building, that we could not stand the additional strain of approximately \$500 a month and we would then have to keep our products that we could compete on." Miele denied that he told the employees he would close the plant or rent out the building (in the event of a union) and he denied promising the men any wage increases, bonus, or hospitalization insurance during the course of these meetings.

The pertinent fact to be decided is whether in these meetings, Miele, Sr., made any threats or promises of benefits to the employees based upon union considerations. From my observation of the witnesses, and in the light of the entire record of this case, I credit the mutually corroborative testimony of the five employees that during these meetings Miele, Sr., (1) told the employees that he would close the plant and that he would rent out the new building if the Union came in,<sup>1</sup> and (2) promised the employees a wage increase and other benefits if they went along with him.<sup>2</sup>

The receipt of the Board letter advising of the Union's representation claim also prompted Miele, Sr., to discuss the matter individually with each of the employees. According to the senior Miele's testimony, on the Monday following the Friday meeting (discussed above) he prepared a list of names of all the employees so that he could check the names of each off the list after he spoke to them. Miele did not detail the conversations he had with any of the employees, but testified generally that when he spoke to the employees, individually, he told them he had received complaints that some of the men did not understand "this Union" and that "if they had any doubt an attorney could be appointed and they could get out a petition and have their choice." Concerning these conversations, Miele testified that this was his way of trying to express to the employees that they had the privilege of doing what they wanted.

Chester Bell, an employee, testified that on this Monday Miele, Sr., came to him and started to talk, but that Miele, Jr., then approached and told Miele, Sr., to go to some other men, that he would "take" him. According to Bell, Miele, Jr., asked if he would go along with the Company. Bell replied that he did not know and that he would not give an answer at present. Miele, Jr., then told Bell that he would guarantee him 25 cents more if he would sign for the Company, but Bell still refused to give an answer. Bell further testified that Miele, Jr., then took him to the basement where his father was and told his father "this man won't give me no answers.

<sup>1</sup> Sammie Hardwick impressed me as an intelligent and honest witness. Moreover, his testimony was not shaken under vigorous cross-examination. Counsel for the Respondent thrice queried Hardwick as to whether Miele did not say that he (Miele) "might" have to rent the shop "if forced" by a wage increase. Hardwick repeatedly stated, "He didn't phrase it like that . . . he just said that if the union would come in there that he would close down and rent the new building out."

<sup>2</sup> Miele, Jr., testified, in substance, that his father made no threats or promises of benefits during these meetings. However, I find that Miele, Jr., was a verbose and an unreliable witness. I do not credit his denials in this respect. Thus, although Miele, Sr., conceded that he told the employees that he had received a request for representation from some "organization," and also that this request prompted the meetings, Miele, Jr., insisted that the meeting was called only for the purpose of explaining the Company's financial position. He refused to concede, as did his father, that anything pertaining to a union matter prompted the meetings or was mentioned during the course of the meetings.

We might as well get rid of him. He ain't no good to us." However, according to Bell, Miele, Sr., said that he could not do that (get rid of him) and told him to go back to work.

Harvey Daniels testified that Miele, Sr., approached him on the same Monday with a paper in hand and asked him whether he was for the Company or for the Union. Daniels testified that he replied he would rather have the Union, whereupon Miele said, before walking away, "Well, it seems like you are for the Union and against the Company."

Cleophus Burrough testified about a conversation he had with Miele, but identified the time of this conversation as having occurred on the preceding Friday (September 11).<sup>3</sup> Burrough testified that on this occasion Miele, Sr., took him to the basement of the office building where they sat down at a table. Miele had a folded piece of paper in hand. Burrough testified that Miele said he was trying to find out how the employees stood and that he was trying to get a petition for the employees to sign which he could give to his lawyer to keep the Union from coming in the shop; and also, that Miele promised him a 25-cent an hour raise, a bonus, and hospitalization insurance. According to Burrough, Miele then asked if he would sign the paper against the Union, stating that he would make him a supervisor if he did. Burrough testified that at this point he refused to sign the paper, whereupon Miele wrote his name on the blank piece of paper and wrote the word "union" after it. This ended the conversation and Burrough left.

Miele's version of the conversations, which he held with the individual employees, has been stated above. In addition, Miele generally denied questioning employees concerning their union sympathies or that he made any threats or promises of benefits. He also denied that he asked any employee to sign a paper or that he wrote the word "union" after the name of any employee.

Having observed the demeanor of the witnesses on the stand, and under all the circumstances of this case, including Miele's previously shown hostility to the Union and his admission that he spoke to all the employees individually about the Union, I accept and credit the employees' versions of the above conversations as being more reliable. Whether Miele merely put a cross mark after the employee's names, or whether he wrote the word "union" after their names, I am satisfied and I find that it was Miele's purpose to find out for himself who was for and who was against the Union and that he coercively interrogated these employees about their union sympathies and feelings.

There remains for consideration two additional incidents which are alleged to be violative of Section 8(a)(1). Eddie Mobly, a part-time employee and a welder, credibly testified that shortly after the layoff of the four employees discussed below, Miele came to him and asked how he felt about unions. Mobly replied that he was neutral in the matter and, further as a part-time employee his decision would have no bearing, one way or the other. Mobly's testimony concerning the rest of this conversation, which is credited, is best told in his own words as follows:

Well, he mentioned that he had offered the rest of the fellows an increase in wages, the amount he didn't say. And that if they would go along with him, and I asked him, "Go along with you on what?" So he says to keep the Union out and I told him, "I think I mentioned before to you that I am neutral in this thing, and however it turns out, well, I will probably be without the part-time job anyway." And so he wanted to know pointblank whether I was for him or for the opposite side, and I told him I was still neutral and if I was forced to take a side then I would let him know.

The last incident involving alleged infringement with the rights of the employees occurred during a conversation which Miele, Jr., had with Sammie Hardwick. According to the credited testimony of Hardwick, about October 8, Miele, Jr., took him to the back of the new building and showed him some new machinery. Hardwick testified that Miele at this point stated he was not going to set the machinery up until he found out what was going to happen. Miele then told Hardwick that he was a good influence over the men, that he should take off and persuade the men to go along with the Company, and that his father would still have more to offer than the Union and that he would still give a 25-cent wage increase.<sup>4</sup>

<sup>3</sup> Miele conceded having an individual conversation with Burrough, as he did with others, but did not specify the time when it took place.

<sup>4</sup> In crediting Hardwick's testimony concerning this conversation, I have, among other considerations, deemed it noteworthy that Miele, Sr., acknowledged that Hardwick was influential among the men. As he put it, "Mr. Hardwick seemed to have the men flocking to him." Indeed, prior to a Board election, which was held on about October 1, 1959, Miele, Sr., asked Hardwick to explain the election procedure to the men.

The law is well settled that threats and promises of benefit by an employer to his employees, in the context of union considerations, is violative of Section 8(a)(1) of the Act. Likewise, interrogations by employers of employees regarding their union activities and union sympathies under such circumstances as are present in this case, constitute coercive interference with rights guaranteed in Section 7 of the Act. In summary, I conclude and find that the Respondent, by interrogating its employees concerning their attitude toward and their interest in behalf of the Union, and by warning its employees against union activities and promising its employees benefits for refraining from union activities, all of which is detailed above, interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed by Section 7 of the Act and thereby violated Section 8(a)(1).

#### B. *The discriminatory layoffs of Hardwick, Bell, Burrough, and Daniels*

On September 15, 1959, at the end of the day, Respondent laid off Sammie Lee Hardwick, Chester Bell, Harvey Daniels, and Cleophus Burrough. The stated reason given the employees for the layoff by Miele, Sr., was lack of work due to a shortage of steel. The complaint alleges that this layoff, which lasted approximately 10 days, was made in violation of Section 8(a)(3) of the Act.

From the evidence presented, it is clear that the General Counsel presented a very strong *prima facie* case to show that the layoffs were discriminatorily motivated. Witness the chain of events: On Friday, September 11, the Respondent received a notification from the Board that the Union had filed a representation petition. It is undisputed that this is the first notice or knowledge that Respondent received that the employees were interested in a union. On that same day, Respondent called a meeting of employees and during that meeting sought to discourage them from any further union activity by admonishing them with coercive statements and promises of benefits. On the following Monday, Respondent continued its campaign against the Union by coercively interrogating all of the individual employees. The next day, without prior notice and before the end of the workweek, it selected four employees known to be sympathetic toward the Union for layoff.

Before turning to the Respondent's defense, which is an economic one, consideration must be given to Respondent's contention that the layoffs could not have been discriminatorily motivated because the Respondent had no knowledge of the employees' union activities. Although it is true that knowledge by the Respondent of any specific union activities by these four employees is lacking, it is equally true, and it is found, that Respondent acquired knowledge of the union *sympathies* of these employees through its systematic interrogation of them on the Monday and Friday preceding the layoffs. As has been seen, Miele stated to Hardwick, after having questioned him, "I guess you're for the union." Bell was threatened with discharge by Miele, Jr., when he refused to state whether he was for or against the Union. Burrough refused to sign a paper or a petition against the Union and Miele, Sr., made it clear to Burrough that he thought Burrough was with the Union. Daniels, upon being questioned, told Miele, Sr., that he was for the Union, whereupon Miele told him, "Well, it seems like you are for the Union and against the Company." Thus, it is clear, and I find, that Respondent regarded each of these employees as being pronoun in their sympathies. It follows that if they were laid off by the Respondent for this reason, the intended result would be to discourage union or concerted activities among the employees and a violation of Section 8(a)(3) must follow.

The decision that there would be a layoff on September 15 (a Tuesday) was made by Miele, Sr. With respect to the Respondent's reason for laying the men off, the sum and substance of Miele's testimony is that on this Tuesday he looked over the situation and determined that the Company did not have enough fabricated steel on hand to keep the men busy. Further, according to Miele, he did not have any assurance as to when additional fabricated steel would be received.

The Respondent offered no documentary evidence to reflect the amount of steel it had on hand at the time of the layoff. While Respondent did introduce in evidence a letter dated September 14, 1959, which it received from its principal fabricated steel supplier, this letter stated only that the regular steel requirements could not be met at the regular times during the steel strike.

Witnesses Hardwick, Bell, and Daniels credibly testified that at the time of the layoff they observed that there was an adequate amount of work on the premises to keep all the employees busy. Indeed, after generally testifying about the shortage of steel, Respondent's economic defense was seriously impaired when Miele in effect conceded that there was no such shortage of material as to warrant an immediate layoff on September 15. Thus, when asked by his counsel how much work there was for the welders on September 14, Miele replied, "*We figured, after looking over*

the situation, that unless we got more steel in, we would be compelled, if we kept all our men going to shut down in three or four days." [Emphasis supplied.] Further, Miele testified, "At the time we laid off the men we had some prospects that we may get steel, but we never knew when." In view of the foregoing, and contrary to Respondent's contention, I find that on September 15, the date of the layoff, there remained ample work for all the employees.<sup>5</sup> This fact, coupled with the Respondent's other simultaneous antunion activity and the suddenness and the timing of the layoffs, is alone sufficient to compel the conclusion that the layoffs were discriminatorily motivated. But there are yet other factors which point to the same conclusion. Thus, Miele testified that he did not use seniority as a basis in deciding which employees were to be laid off, but rather that he selected for layoff only the employees he could spare the most—that is, Miele explained, he refrained from laying off those employees whom he considered to be the "better workers." This testimony can hardly be reconciled with his testimony later in the hearing that Hardwick, who was laid off, was "a very capable worker." Miele, Jr., also described Hardwick as a skillful worker, so skillful, in fact, that "when there was a special job particularly to be done, we always called Sammie in on the job." Further, Chester Bell, another of the laid-off employees, was characterized by Miele, Jr., as being a "good" employee. Thus, assuming *arguendo* that there was a need to lay off employees at this time, I cannot accept Miele's explanation that the layoff selections were predicated upon the employees' job qualifications.

Further pointing toward the discriminatory motivation of the September 15 layoff is the fact that Respondent hired a new employee on September 11 and that it retained this employee during the entire layoff period. It is true that this employee, Kenneth Williams, was the employee of another employer who was on strike at the time and it is also true that he was hired by the Respondent with the knowledge that he would remain only for the duration of the steel strike. I have no doubt, as claimed by Miele, Sr., that Williams was a capable and experience employee. However, it will be recalled that Respondent also regarded Hardwick as a very capable and skilled employee. Yet, Williams and the others were laid off allegedly because of the lack of work due to a shortage of materials. In this regard it is also significant to note that Respondent continued to utilize the services of a part-time employee, Eddie Mobly, during the layoff period.

In view of all the foregoing, I am persuaded, and I find, that the layoffs of the employees on September 15 were not impelled by economic considerations, but, contrary to the Respondent's contention, were precipitated by Respondent's discovery and belief that these employees were in favor of the union. Accordingly, it is found that the Respondent laid off Sammie Lee Hardwick, Chester Bell, Harvey Daniels, and Cleophus Burrough on September 15, 1959, in order to discourage membership in the Union in violation of Section 8(a)(3 and (1) of the Act.

### C. The second alleged discriminatory layoff of Cleophus Burrough

Cleophus Burrough, whose discriminatory layoff on September 15, 1959, has been discussed above, was recalled to work by the Respondent on September 25, 1959. His employment was terminated again by the Respondent on September 30. He was recalled for the second time on or about October 25, 1959. Burrough's termination on September 30 is also alleged to be violative of Section 8(a)(3).<sup>6</sup>

The incident which prompted Burrough's second termination is for the most part not in dispute. I find the facts concerning it to be as follows: On the day in question, September 30, Burrough reported to work somewhat over 2 hours late and after the end of the 10 a.m. smoking break. On the day preceding he had told Eugene Reid, the only foreman, that he would be late on the following day, but he did not so notify either of the Miele's or the office, as was customary. Upon arriving at work, but before punching in, Burrough proceeded to the restroom to change his clothes. Eddie Mobly, a part-time employee, was using the toilet as he entered. Burrough began to change his clothes and at the same time smoked a cigarette and entered into a discussion with Mobly. Here there is a minor variation between Burrough and Miele as to what next occurred. Burrough testified that at this point Miele entered the men's room and told him to get his money, that he was being discharged. Further, according to Burrough, he then asked Miele why he was being

<sup>5</sup> There is also testimony by witnesses for the General Counsel and witnesses for the Company that steel was received in September 1959, both before and after the layoffs.

<sup>6</sup> In view of the findings herein, it is immaterial whether Burrough's termination on September 30 be regarded as a discharge, as urged by the General Counsel, or as a disciplinary layoff, as contended by the Respondent.

discharged and Miele answered only by saying he was a troublemaker. Miele's version is somewhat different. According to Miele, he entered the restroom and observed that Burrough was smoking and talking to Mobly. He then waited outside the door for about 20 minutes until Burrough came out, at which point, according to Miele, "I told him that I could not countenance this constant infraction of the rules and that he should go into the office and get his pay."

The General Counsel urges that "the September 30th discharge of Burrough, the day before the N.L.R.B. election, was generated by Mr. Miele, Sr.'s antiunion animus and was an attempt to eliminate a known vote for the union."<sup>7</sup> Other than the events heretofore described, which occurred prior to the first layoff, there is no evidence of additional interrogation of or animus toward Burrough by the Respondent between the time of his recall on September 25 and his termination on September 30.

Returning to the incident that led to the second termination of Burrough, it is my conclusion that the General Counsel has not sustained the burden of proof to support his contention that this incident was used by the Respondent as a pretext to terminate Burrough. Thus, the evidence establishes that Respondent gave the employees regular break periods for smoking. Due to fire hazards on the property, the Company had a rule against smoking at any other time. Burrough conceded that the rule against smoking was generally enforced. Thus, Burrough testified, "They were always going around checking, you know, like Reid [the foreman] and so we did not smoke in the men's room, not as I know of." Further, I credit Miele's testimony that he had warned Burrough on a number of occasions in the past for various aspects of his personal behavior.<sup>8</sup> Without burdening the report in this regard, suffice it to say that Burrough conceded that on an occasion before his layoff he admitted to Miele, Sr., that he was responsible for having written obscene remarks on the restroom wall.<sup>9</sup> Moreover, Burrough conceded that on past occasions he had various "disagreements" with Miele, Sr.

It is obvious to the Trial Examiner that the termination of Burrough on September 30 was neither premeditated or planned. On the contrary, Miele, Sr., took this action on the spur of the moment. Burrough himself testified that Miele was "excited" over the incident in the toilet. Further, from my observation of Miele on the stand, I am satisfied that he is a high-strung and excitable individual. On several instances during the hearing Miele became so aroused that he arose from the witness stand while testifying. In view of all the circumstances cited above, it is not surprising that Miele became aggravated and upset when he observed Burrough's conduct in the restroom and that he then and there decided to take some action against Burrough.<sup>10</sup> Accordingly, I find that Miele, Sr., terminated Burrough on September 30 solely because of the incident in question and not because of Burrough's union sympathies or union activities. It is therefore concluded and found that Respondent did not, by terminating Burrough on September 30, for the reasons stated, engage in discrimination within the meaning of Section 8(a)(3) of the Act.

#### IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Respondent set forth in section III, above, occurring in connection with the operations of the Respondent described in section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

#### V. THE REMEDY

Having found that the Respondent has engaged in unfair labor practices violative of Section 8(a)(3) and (1) of the Act, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

<sup>7</sup> Official Board records, of which I have taken notice, show that an election was held among Respondent's employees on October 1, 1959.

<sup>8</sup> Although I have previously discredited some of Miele, Sr.'s testimony, I have no difficulty, upon a consideration of all the evidence, in crediting Miele's testimony concerning Burrough's layoff on September 30. As stated by Judge Learned Hand in *N.L.R.B. v. Universal Camera Corporation*, 179 F. 2d 749 (C.A. 2): "It is no reason for refusing to accept everything a witness says, because you do not believe all of it; nothing is more common in all kinds of judicial decisions to believe some and not all."

<sup>9</sup> Burrough testified that he actually was not responsible for these writings, but that he merely took the blame for the others

<sup>10</sup> Specifically, I find that Burrough violated a company rule by smoking at a time when smoking was not permitted

Having found that the Respondent, on September 15, 1959, discriminated in regard to the tenure of employment of Sammie Lee Hardwick, Chester Bell, Harvey Daniels, and Cleophus Burrough, it will be recommended that these employees be made whole for any loss of pay suffered as a result of the discrimination against them. Backpay shall be computed in accordance with the formula in *F. W. Woolworth Company*, 90 NLRB 289.

Inasmuch as the parties indicated some disagreement as to the exact date of recall of these employees, a matter for compliance, it will be further recommended that the Respondent, upon request, make available to the Board and its agents all payroll and other records pertinent to the dates of recall and to the analysis of the amounts of backpay due.

Since the violations of the Act which the Respondent has committed are related to other unfair labor practices proscribed by the Act, and the danger of their commission in the future is reasonably to be anticipated from its past conduct, the preventive purpose of the Act may be thwarted unless the recommendations are co-extensive with the threat. To effectuate the policies of the Act, therefore, it will be recommended that the Respondent cease and desist from infringing in any manner upon the rights guaranteed by the Act.

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

#### CONCLUSIONS OF LAW

1. The Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. United Steelworkers of America, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By interfering with, restraining, and coercing its employees in the exercise of the 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. By discriminatorily laying off Sammie Lee Hardwick, Chester Bell, Harvey Daniels, and Cleophus Burrough on September 15, 1959, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

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

6. Respondent has not engaged in unfair labor practices within the meaning of Section 8(a)(3) and (1) by terminating the employment of Cleophus Burrough on September 30, 1959.

[Recommendations omitted from publication.]

**Central Rigging and Contracting Corporation and David Edwin Beard, Robert Thomas Quinnelly, Wesley B. Lasseter, Robert Bruce Beard, and George Lawrence Eunice**

**Lodge 554, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO, and its Agent C. K. Curry and Robert Thomas Quinnelly, Wesley B. Lasseter, Robert Bruce Beard, George Lawrence Eunice, and David Edwin Beard.** *Cases Nos. 10-CA-4082, 10-CA-4083, 10-CA-4084, 10-CA-4085, 10-CA-4087, 10-CB-1086, 10-CB-1087, 10-CB-1088, 10-CB-1089, and 10-CB-1090. October 11, 1960*

#### DECISION AND ORDER

On April 21, 1960, Trial Examiner Sidney Lindner issued his Intermediate Report in the above-entitled proceeding, finding that the Respondents had engaged in and were engaging in certain unfair