

CONCLUSIONS OF LAW

1. Local 176, International Molders and Foundry Workers Union of North America, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

2. St. Cloud Foundry & Machine Company, Inc., is engaged in commerce within the meaning of Section 2(6) of the Act.

3. All production employees including working foremen employed in Respondent's foundry at St. Cloud, Minnesota, but excluding office clericals, managerial and machine shop employees, guards, and supervisors as defined in the Act, constitute a unit appropriate for the purpose of collective bargaining within Section 9(b) of the Act.

4. On February 4, 1959, and at all times thereafter, Local 176 has been and still is the exclusive representative of the employees in the above-described appropriate unit for purposes of collective bargaining within Section 9(a) of the Act.

5. Respondent has violated Section 8(a)(5) and (1) of the Act by refusing and failing to bargain in good faith with Local 176.

6. Respondent has violated Section 8(a)(3) and (1) of the Act by refusing and failing on December 29, 1959, and thereafter to reinstate its employees in the unit who went out on strike April 3, 1959, to wit:

Lloyd Abraham
Frank Becker
Vernon Belmont
George Boss
Harold Habiger

Vernon Moore
Raymond Reinholz
Richard Rosenberger
Leonard Schill
Aloys Steckel

7. Respondent has violated Section 8(a)(3) and (1) of the Act by closing and ceasing operations on February 6, 1960, of the foundry portion of its business with the objective and for the purpose of denying reinstatement to their former positions of employment to those employees named above.

8. Respondent by the foregoing conduct has interfered with, restrained, and coerced its employees in the exercise of rights guaranteed them by Section 7 of the Act and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

9. 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.]

G & H Construction Company and John H. Clifton. Case No. 12-CA-1368. March 1, 1961

DECISION AND ORDER

On July 20, 1960, 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 alleged in the complaint 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 alleged unfair labor practices. Thereafter, the Respondent filed exceptions to the Intermediate Report together with a supporting brief. On October 24, 1960, the Board remanded the case to the Trial Examiner for further hearing, and on January 3, 1961, the Trial Examiner issued his Supplemental Intermediate Report, a copy of which

is, attached hereto, affirming the findings and conclusions, and renewing the recommendations, contained in his Intermediate Report. Thereafter, the Respondent filed exceptions to the Supplemental Intermediate Report and a supporting brief.

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

The Board has reviewed the rulings made by the Trial Examiner at the hearings and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate and Supplemental Intermediate Reports, the exceptions and briefs, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.¹

ORDER

Upon the entire record in this case, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, G & H Construction Company, its officers, agents, successors, and assigns, shall:

1. Cease and desist from encouraging membership in Local Union 308, International Brotherhood of Electrical Workers, AFL-CIO, or any other labor organization, by discharging employees or discriminating in any like or similar manner in regard to hire or tenure of employment or any term or condition of employment, to encourage or discourage membership in the labor organization.

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

(a) Offer to John H. Clifton 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 John H. Clifton under the terms of this Order.

¹ Absent exceptions, we adopt *pro forma* the Trial Examiner's finding that the Respondent did not violate the Act, as the complaint alleged, by failing to post a copy of the referral procedure contained in its collective-bargaining agreement with the Union.

(c) Post in its office at Winter Park, Florida, copies of the notice attached hereto marked "Appendix."² Copies of said notice, to be furnished by the Regional Director for the Twelfth Region, shall, after being signed by Respondent's representative, be posted by Respondent immediately upon receipt thereof, and be maintained by it for 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 said notices are not altered, defaced, or covered by other material.

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

²In 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 to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

WE WILL NOT encourage membership in Local Union 308, International Brotherhood of Electrical Workers, AFL-CIO, or in any other labor organization of our employees, by discharging or refusing to reinstate employees because of nonmembership in said Local Union, or in any other labor organization, nor will we discriminate in any like or similar manner in regard to hire or tenure of employment or any term or condition of employment, to encourage or to discourage membership in a labor organization.

WE WILL offer to John H. Clifton 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 refrain from becoming members of the above Union, or any other labor organization.

G & H CONSTRUCTION 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; 73 Stat. 519), was heard in Orlando, Florida, on May 11, 1960, pursuant to due notice. The complaint, issued on April 12, 1960, and based on charges duly filed and served, alleged that Respondent had engaged in unfair labor practices proscribed by Section 8(a)(1) and (3) of the Act by: (1) terminating the employment of John H. Clifton on February 26, 1960, because he was not a member of Local Union 308, International Brotherhood of Electrical Workers, AFL-CIO (herein called the Union); and (2) failing properly to post a copy of the referral procedure contained in a collective-bargaining agreement between Respondent and the Union. Respondent answered, denying the unfair labor practices.

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

FINDINGS OF FACT

I. RESPONDENT'S BUSINESS; THE LABOR ORGANIZATION INVOLVED

I find on facts alleged in the complaint and admitted in the answer that Respondent's operations substantially affect commerce within the meaning of the Act,¹ and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE UNFAIR LABOR PRACTICES

A. *The issues*

The only issue as to the posting of the referral procedure is whether, under the unusual circumstances of this case, a posting at Respondent's office in Winter Park and at the Union's office at St. Petersburg constituted compliance with the Board's *Mountain Pacific* standards (*Mountain Pacific Chapter of the Associated General Contractors Inc., et al.*, 119 NLRB 883). As to Clifton's termination, the issue as litigated was whether he was discriminatorily discharged as alleged or whether he was selected during a reduction in force because he was less qualified for the job and because he was not permanently located in the area. Anomalously, that issue turns on opposing testimony given by two witnesses called by the General Counsel—Clifton, the dischargee, and P. J. South, Respondent's general foreman, who made the selection and the discharge.

B. *The evidence*

This case arises out of Respondent's operations in the Florida west coast area (which included Clearwater, St. Petersburg, and Tarpon Springs), where Respondent operated some five crews of electrical linemen who were engaged in performing contracts for the Florida Power and Light Company. Respondent and Local 308, of St. Petersburg, were parties to a collective-bargaining agreement which provided in part that the Union should be the exclusive source of referrals for employment, that referrals would be made without discrimination as to union membership or lack of it, that Respondent retained the right to reject applicants, and that copies of the referral procedure should be posted on the bulletin board in the offices of the Union and of the Employer. Though the referral agreement required the Union to maintain a register of applicants for employment in priority groups, based on such factors as experience in the trade, permanent residence in the geographical area, etc., there was no provision which affected Respondent's right to make layoffs or discharges either with or without consideration of those factors or of the factor of seniority on the job.

At the time of Clifton's termination Respondent was operating two crews at Clearwater, two at Tarpon Springs, and one at St. Petersburg,² consisting of nine men each, including four linemen. The crew members, all referred by Local 308,

¹ During the year 1959 Respondent performed services in excess of \$50,000 each for Tampa Electric Company and Florida Power and Light Company, each of whom purchased materials directly from outside the State in an amount in excess of \$50,000 annually.

² The St. Petersburg crew had been set up in November 1959, by transferring men from the other crews in the west coast area, to perform a contract for Florida Power Company, which was being completed around February 26.

consisted of its members, members of sister locals (i.e., permit men), and nonmembers of IBEW. Clifton had been a member of various other locals since joining IBEW in 1935; he was a permit man who had worked for Respondent on three different occasions in the past, beginning in 1952, and whose last employment began May 1, 1958, as a class "A" (journeyman) lineman. At the time of his discharge, he was assigned to a Clearwater crew under L. W. Stroud.

Respondent's west coast operations were centered around Clearwater, but it had no office or headquarters there or elsewhere in the area. Communications were by mail with P. J. South, Respondent's general foreman, who worked in conjunction with the general foreman of Florida Power, and who made some use of that foreman's office at Clearwater. However, Respondent maintained no office there, and South had no desk there, though there was a slot in which his work orders were deposited. Neither did the employees customarily report to or go to that office, though Clifton testified to one or more occasions when he went there to pick up job forms.

Respondent parked its trucks on the property of two service stations in Clearwater and Tarpon Springs, where the crew members assemble and report, but that property was also privately owned. There was no work office of any kind there or at the jobsites. The crew members in fact work on a mobile situs, moving from pole to pole, sometimes as often as every 5 minutes, as the work progresses. No copy of the agreement was posted at the mobile site, nor on the body of the truck, though the evidence established that a copy was kept in the glove compartment of each truck, where it was at all times available for reference. The evidence also established that posting on the body of the truck was not feasible as a practical matter, both because of weather conditions and because a posted copy would be scraped or torn off by the limbs of trees as the truck moved along. There was no evidence that notices to employees or to applicants were customarily posted at the office of the Power Company, at the assembly points, upon the trucks, or elsewhere along the mobile jobsites, nor was there evidence that applications for employment were made at any of those points.

We turn now to the events surrounding Clifton's discharge. Having heard rumors around February 17 of an impending layoff at St. Petersburg, Clifton testified he inquired of South, who verified the rumor and who stated it would be arranged according to seniority. When Clifton asked how he would fare, South assured him he had nothing to worry about because he was one of the older linemen working in his tools. Clifton later discussed the layoff with his foreman, Luke Stroud, on February 25, telling Stroud that if any of the men were to be transferred around, he would like to go back to the Tarpon Springs crew, to which he had formerly been assigned. When Stroud stated he understood Clifton was to be laid off, Clifton informed him what South had said about Clifton's seniority. Stroud continued, however, that he had heard a rumor that none of the other foremen wanted to work Clifton and added that he had to make room on his crew for some of the Local 308 men on the St. Petersburg crew, who were being laid off and who would be transferred to Clearwater.

Clifton then checked with S. W. Hadley, Business Agent of Local 308, who verified both the report of Clifton's impending layoff and the report of the transfer of the 308 members. Clifton also spoke to Foreman Frank Griffin and James Sewell, under whom he had previously worked, and they informed him in effect that they preferred him to some of the other men who were being transferred.

Clifton testified further that on February 26, South notified him he was being laid off and explained that he (South) had to make room for some of the Local 308 men who were being laid off at St. Petersburg. South assured Clifton there was nothing wrong with his work,³ and stated that he would like to keep Clifton because he expected that in a month or 6 weeks the Company would be putting one or two crews back on.

Clifton was replaced by Jim Hughes, a lineman on the St. Petersburg crew and a member of Local 308. Hughes had come onto the Clearwater job in late August 1958, which was after Clifton's last hiring. Clifton testified that there were other linemen working on the job with him who were not discharged, some of whom were members of Local 308 and some who were not.

Except for the testimony of Foreman James K. Sewell that Clifton was a "fine" lineman, the remainder of the General Counsel's case was an uphill struggle with

³ Though Respondent's counsel was permitted to cross-examine Clifton concerning his involvement in certain accidents, after a representation that they entered into the reasons for his discharge, the point was not pursued with any of the other witnesses in the case, and South did not claim to base the termination on any such matters.

unwilling witnesses who had given prior (favorable) affidavits to Westheimer during pretrial preparations but who qualified or disavowed them on the stand. Thus, Frank B. Griffin, another foreman, testified grudgingly that Clifton was an "average" lineman, evaded questions concerning Clifton's comparative experience in terms of service on the job, and when confronted with his prior affidavit immediately disavowed it on the ground that he was drunk when Westheimer took it from him.

South, the general foreman, who had made the discharge, also gave testimony which conflicted substantially with two affidavits which he gave Westheimer a few days after Clifton's discharge, particularly on the crucial points of the cause of the discharge and what he had told Clifton concerning the cause.

South testified that he informed Clifton he was being laid off⁴ due to his "qualifications," and because he preferred a man who lived in the area and had his home there, available for call at any time. Qualifications included, South testified, the ability of a lineman to get along with the crew, and on the latter point he referred to complaints from foremen that Clifton was causing "contention" and "agitation" in the crews. Illustrating the latter complaints, South testified that Clifton raised technical questions about the contract provisions, "trying to be a little business agent," and cited as an example Clifton's grievance over the point that the foreman was not supposed to drive a truck. South testified at one point that Clifton's "agitation" about the contract had no bearing whatsoever on his decision, but he admitted later that such agitation "bothered" him and that it entered "in a way" into his consideration of Clifton's qualifications for the job. South testified further that Stroud requested him to transfer Clifton some week and a half before the discharge because of contention in the crew, and that he "believed" he talked to Clifton and told him to straighten up. (Clifton emphatically denied any such conversation.) South also testified that in his estimation Clifton was not a qualified class "A" journeyman lineman and that Hughes, who replaced Clifton, was better qualified.

South's testimony was in sharp conflict with the following statements contained in his affidavits:

The reason that I laid Clifton off was in order to make room for another Local 308 man. . . .

I told Clifton on February 26th that I had to lay him off in order to make room for some of the home Local 308 men, and Clifton seemed to understand. . . .

When questioned about those statements, South proceeded both to admit and to deny their truth:

Q. (By Mr. WESTHEIMER.) Well, did you tell [Clifton] you were doing it to make way for a 308 man?

A. No, sir, I did not tell him that.

* * * * *

Q. Is that affidavit true and correct or not?

A. To the best of my knowledge, sir, if I said it, I did.

Q. Well, is it true that you laid him off to make room for a 308 man?

A. No, sir, I did not lay the man off for that reason.

* * * * *

Q. This is not true, when you told me that?

A. I suppose it is, the best I can do.

* * * * *

Q. Mr. South, let me ask you this: In fact, when you gave these affidavits under oath, were you telling the truth? . . .

A. As far as I knew at that time, yes sir.

Although South testified that he realized later, on reading a copy of the affidavits, that they put things in a different light, he did not notify Westheimer at any time before he took the stand, including the morning of the hearing.

On Respondent's side, Michael Cary, controller, and Herman G. Grier, president, testified that Respondent leaves all matters of hiring and firing in the hands of the general foreman in the area; that its general policy is to hire and fire purely on the basis of qualifications to do the job; that questions of union membership are not a factor; and that seniority is not a factor.

⁴ South admitted that he would not rehire Clifton, and a written statement which Clifton demanded and received read that Clifton's employment was "terminated." Respondent's brief agrees that the action constituted a discharge.

L. W. Stroud, Clifton's foreman, testified that Clifton had worked on his crew for about 4 months on an earlier occasion and around 3 or 3½ weeks on the final occasion. Clifton inquired about the impending layoff several times, and he finally told Clifton he thought Clifton would be laid off and that there were a lot of men he would rather work than Clifton. Stroud assumed that Clifton would be laid off because he had spoken to South a few days before about transferring Clifton to another crew on the ground that Clifton was causing contention in the crew and because South's responses gave Stroud the impression that Clifton would probably be on the next layoff. Stroud admitted on cross-examination that Clifton raised the point as to his seniority on the job and that he himself agreed with Clifton on that. He denied emphatically that he told Clifton he would be laid off to make room for members of Local 308. Stroud cited as an example of the "contention" which Clifton raised among the men Clifton's complaint that Stroud's driving of a truck was work which a foreman was not supposed to do. Stroud described Clifton as a lineman who did fairly good work at times and not so good at others. He admitted he did not object when Clifton was put on his crew some 2 or 3 weeks before the discharge and admitted further that he had no complaint when Clifton was with him previously. Stroud testified that two other permit men were retained as linemen on his crew when Clifton was laid off.

S. W. Hadley, business manager of Local 308, testified that Clifton's complaint to him did not relate to Hughes but to the fact that Respondent had kept a man on the job who had no union affiliation whatever. Hadley refused to do anything about it. Hadley made no denial of Clifton's testimony that he confirmed the report of the transfer of Local 308 men to Clearwater, and he admitted that he knew that the St. Petersburg crew was being terminated and that he had received from South a list of names for layoff.

C. Concluding findings

1. The posting

The General Counsel's position as outlined during oral argument was that the *Mountain Pacific* standards (119 NLRB 883, *supra*)⁵ required posting of the referral procedure at the jobsite, which, under the circumstances shown by the record, meant a posting either in the cab of the truck or on the outside of the truck. Rejecting as inadequate the depositing of a copy in the glove compartment, the General Counsel argued that if such a posting as he contends for is physically impossible or impracticable, then the employer would have no right to enjoy such an exclusive hiring hall arrangement as is otherwise licensed by *Mountain Pacific* because it cannot comply with all the safeguards of that decision.

As a reference to the "posting" provision in *Mountain Pacific* will disclose, the General Counsel's position involves the application to the Board's language of an administrative gloss by the prosecuting branch of the agency which the Board has not so far adopted and which is plainly not justified under the circumstances of the present case. For what the clause requires is that the referral provisions in the agreement be posted in *places where notices to employees and applicants for employment are customarily posted*. Posting at the jobsite *as such* is not required, though under normal circumstances the jobsite would constitute a place where such notices are posted. But here the General Counsel offered no evidence that notices of any kind were posted at the jobsite. Indeed, the only bulletin boards referred to in the evidence were maintained by the Company at its office in Winter Park and by the Union in its office in St. Petersburg, and there was a posting at those points. There was also no evidence that prospective employees applied for work at the mobile jobsites.

Furthermore, were the General Counsel's position to be adopted by the Board, the peculiar circumstances here justify the conclusion, and I find, that the depositing of a copy of the referral procedure in the glove compartment of each truck was as practicable a compliance with the Board's standard as a posting to the inside or outside body of the truck, which the General Counsel conceded would be adequate.

⁵ In its supplemental decision, *Jesse Jones Sausage Company*, 127 NLRB 1279, the Board accepted the remand from the Court of Appeals for the Ninth Circuit, but did not agree with the court's rejection of its holding. The question raised in that case is the same as that before the Supreme Court in *Local 357, International Brotherhood of Teamsters, etc. v. N.L.R.B.*, 363 U.S. 837, cert. granted June 27, 1960. In the meantime, of course, the Board's decision constitutes a binding precedent on its Trial Examiners. *Insurance Agents International Union, AFL-CIO (The Prudential Insurance Company of America)*, 119 NLRB 768, 772-773.

2. The discharge

As it is clear from the evidence that South made the decision to discharge Clifton, that he made the actual discharge, and that he assigned the reason or cause for his action, the crux of the case turns on what South said and did and why he did it.

Clifton testified that South told him that he was being laid off to make room for members of Local 308, who had finished the St. Petersburg job. That testimony, if believed, would plainly establish a *prima facie* case of discrimination within the meaning of Section 8(a)(3), i.e., to encourage membership in Local 308, of which Clifton was not a member.

Did Clifton correctly quote South? South's testimony furnished the only evidence which bore on that point, and the weighing of it is complicated by the fact that South, called to support the General Counsel's case, proved hostile to the extent that the General Counsel found it necessary to resort to *impeachment* by prior inconsistent affidavits. The problem here is one of assigning proper weight to those prior sworn statements.

Though Wigmore (Wigmore on Evidence, 3d ed., volume III, section 1018, at pp. 687-688) argues that prior self-contradictions of a witness should not be treated as having no affirmative testimonial value and that there is nothing to prevent the tribunal from giving such testimonial credit to the extrajudicial statement as it may seem to deserve, he concedes that the contrary view is the orthodox one, stating it as follows:

It is universally maintained by the Courts that Prior Self-Contradictions are not to be treated as having any *substantive or independent testimonial value*.

That rule was followed in *N.L.R.B. v. Quest-Shon Mark Brassiere Co., Inc.*, 185 F. 2d 285, 289 (C.A. 2), cert. denied 342 U.S. 812, where the court added:

Hence prior inconsistent statements are admissible not as affirmative evidence to prove the truth of what they affirm, but only as matter tending to show that the witness is not credible, because he has changed his story.

The Board has consistently followed the *Quest-Shon Mark* case, the most recent example being in *Sealtest Southern Dairies, National Dairy Products Corporation*, 126 NLRB 1223, where (citing that case) it held that:

[T]he pretrial affidavits here adduced in evidence have no independent testimonial value and, in accord with the weight of authority, must be looked to solely as measures of the credit of the individuals who testified at the hearing.

Though in cases where the affiant is a *party* to the proceedings, the affidavit becomes affirmative proof, particularly if it constitutes an admission against interest (*Trafford Coach Lines*, 97 NLRB 938, and Supplemental Decision, 99 NLRB 399; and see Wigmore, *supra*, volume IV, section 1048, at pp. 2-6). South was, of course, not a party here.

On the point of credibility, the statements in South's affidavits plainly negate his testimony both as to what he told Clifton and as to his reasons for making the discharge. When that is coupled with the fact that South both admitted and denied the truth of his affidavits, it is plain that his testimony can be given no weight in any respect in which it conflicts with Clifton's. I therefore accept and fully credit Clifton's testimony concerning his conversations with South, which, unless overborne by a preponderance of evidence on Respondent's side, plainly established that the basis of South's action was his desire to prefer members of Local 308 over Clifton.

Was Respondent's evidence sufficient to overcome that showing? The chief difficulty with Respondent's case is that its evidence did not directly reach the discharge incident or cover the question of South's motivation, who alone made the decision and the discharge. Indeed, Cary and Grier, in testifying to general company policy, admitted that it left matters of hiring and firing in the hands of the general foreman. Hadley's testimony that Clifton's complaint to him did not concern the fact that he was being replaced by a Local 308 member was also wide of the mark, for Clifton was doubtless unaware of the legal implications of South's preferring the Local's member over him. Significantly, also, Hadley did not deny Clifton's testimony that he confirmed the report that laid-off members of Local 308 were being transferred to the Clearwater job.

What remains was Stroud's testimony that he had complained to South that Clifton was causing contention in the crew⁶ and that South's responses gave him

⁶ Though South's testimony has been rejected, it is to be noted that he admitted that Clifton's stirring up of grievances under the contract (participated in by the steward) entered in part into his decision to discharge Clifton. Even were that testimony accepted,

the *impression* that Clifton might be included in the next layoff. That testimony signally failed to establish, or even to throw direct light on, South's motivation. Indeed, so far as Stroud's surmises went, South may have had in mind only transferring Clifton to another crew. In any case, Stroud's testimony does not reach the discharge incident and cannot overcome Clifton's credited testimony concerning it.

Though the resolution of credibility as between Clifton and South makes immaterial the question whether or not Stroud also told Clifton he would be laid off to make room for members of Local 308, the entire evidence supports Clifton's testimony that Stroud did so. Thus it was not until the time of the actual discharge that South told Clifton he was making room for Local 308 members. But Clifton testified that the intimation to that effect had already come from Stroud, and that that was the reason why he checked with Hadley, who confirmed the report before South's action made it official.

It is also to be noted that, except for Stroud's complaint, Respondent offered no evidence that Clifton was in fact an unsatisfactory or unqualified workman. The history of his employment with it would seem to establish the contrary. Though South claimed that both Griffin and Sewell had also made complaints about Clifton, Sewell's testimony was, to the contrary, an unqualified endorsement, and Griffin's a fair one. Respondent made no attack upon, and no effort to refute, their testimony.

I therefore conclude and find on the basis of the entire evidence that Respondent discharged Clifton on February 26, 1960, in order to make room for a member of Local 308, to which Clifton did not belong, and that it thereby engaged in discrimination to encourage membership in said Local.

III. THE REMEDY

Having found that Respondent engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and that it 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. As there is no evidence in this case from which either a threat or a danger can be inferred of the commission by Respondent of other unfair labor practices, the recommended cease and desist order will be limited to the unlawful conduct herein found and to any like or related conduct.

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. Local Union 308, International Brotherhood of Electrical Workers, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

2. By discharging John H. Clifton on February 26, 1960, Respondent engaged in discrimination to encourage membership in said Local Union 308, thereby engaging in unfair labor practices proscribed by Section 8(a)(3) and (1) of the Act.

3. The aforesaid unfair labor practices having occurred in connection with the operation of Respondent's 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.

4. Respondent did not engage in unfair labor practices in the posting of the referral agreement with Local 308.

[Recommendations omitted from publication.]

it would appear that the discharge might still be unlawful (though not on the precise theory of the complaint), because Clifton's actions would have constituted engaging in protected concerted activities. *H. Muehlstein & Co., Inc.*, 118 NLRB 268, 275; *Gibbs Corporation*, 124 NLRB 1320; *Chemical Construction Corporation*, 125 NLRB 593.

SUPPLEMENTAL INTERMEDIATE REPORT

On October 24, 1960, the Board issued its order remanding the above case to the Trial Examiner for the purpose of permitting further cross-examination of John H. Clifton, the Charging Party, concerning inconsistent charges which he filed with the Regional Office and for further proceedings consistent with said order. Pursuant to said order and to the scheduling of a further hearing by the Acting Regional Director, the hearing was held at Orlando, Florida, on December 9, 1960, at which Clifton was examined at length concerning the charges which he had filed with the Board.

The original charge stated that Clifton was terminated by Respondent because of his membership and activities in behalf of Local Union 308, International Brotherhood of Electrical Workers, AFL-CIO, or to discourage membership in that labor organization, whereas the amended charge, on which the complaint was based, alleged that Clifton was terminated because of his nonmembership in Local Union 308. The General Counsel represented at the original hearing that the charges had been drawn by the General Counsel and that the amended charge was drawn because of a "typographical error" in the original.

It developed at the supplemental hearing that Clifton's schooling extended only to the third grade and that he could read only such things as his name, the name of his Employer, and other such things which he memorized. Clifton testified that he signed the original charge in blank at the direction of the Board's representative as a condition to opening his case and that the contents were not read to him. He testified further, however, that a written statement was also prepared and read to him and that, though he was not sworn, he signed the statement after affirming that it was true. A week or 10 days later Westheimer called him in, read him the contents of the original charge, and asked him if it was true. Clifton replied that it was not true that he was terminated because he was a member of Local Union 308 and denied that he told anyone at any time that he was terminated for that reason. Westheimer thereupon prepared the amended charge and read it to Clifton, who signed it under oath.

The written statement which Clifton gave originally squared with the amended charge as well as with Clifton's testimony at the original hearing. Thus the following paragraphs in Clifton's statement are in substantial accord with his testimony as summarized at lines 19 through 47. at page 3 of the Intermediate Report:

5. I was working on the job as usual on Wednesday, Feb. 24, when the general foreman, P. J. South, brought the pay checks. I asked him the procedures for layoffs—how he was going to arrange it. He said on the seniority basis; "That is the only way we can do it, and do it legally." He added, "John, you don't have anything to worry about." I replied that I shouldn't have, because I'm the oldest man still climbing and working in my tools." He agreed with me.

6. Thursday, Feb. 25, the line foreman, L. W. Stroud, told me that he thought my name was listed to be laid off. I said, "Well, it shouldn't be; I'm the oldest man left on the job climbing." He said, "That doesn't matter; that doesn't have anything to do with it." I said, "Well, maybe it does have something to do with it." He said that South, however, had stated I was to be laid off. "None of the other foreman want to work you; we got to make room for some of our own members." Stroud is a Local 308 member.

7. That night I called Skip Hadley, B.A. for Local 308, and asked him if he were going to lay off according to seniority; and he said they could not. He also informed me that my name was on the layoff slip. He said that I was being replaced with one of the members of his own local. . . .

It is plain from the foregoing, and I hereby find, that the inconsistency in the charges was due to the improper drafting of the original by the Board's representative and that Clifton's written statement, made contemporaneously with the original charge, was consistent with the amended charge and with his testimony at the original hearing.¹ Accordingly, I adhere to my former action in crediting Clifton's testimony and in discrediting the testimony of South and Stroud where it conflicted with Clifton's.

I therefore readopt the findings of fact and conclusions of law and renew the recommendations contained in my Intermediate Report.

¹ Though at the original hearing it appeared, or was assumed, that Clifton could read, he was not asked whether he could and made no claim that he could. For example, in identifying the agreement between Respondent and Local 308, he specifically denied that he had read it and testified that all he saw was "Just the name on it," as it lay on a desk in the Local's office.

Respondent points to certain confusions in Clifton's testimony on direct examination at the supplemental hearing. Those confusions were cleared up on cross-examination, and Clifton's testimony as clarified is as summarized above.