

WE WILL NOT interrogate our employees concerning their union membership, activities, or sympathies, in a manner constituting interference, restraint or coercion within the meaning of Section 8(a)(1) of the Act

WE WILL NOT discourage membership in the above-named union or any other labor organization, by discharging or otherwise discriminating against our employees in regard to their hire or tenure of employment, or any term or condition of employment

WE WILL offer to reinstate Benito Martinez to his former or substantially equivalent position, without prejudice to his seniority and other rights and privileges, and make him whole for any loss of pay he may have suffered as a result of the discrimination against him.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed to them in Section 7 of the Act, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the National Labor Relations Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959.

All our employees are free to become and remain or to refrain from becoming or remaining members of the above-named Union or any other union.

DAZZO PRODUCTS, INC.,
Employer.

Dated----- By-----
(Representative) (Title)

NOTE.—We will notify the above-named employee if presently serving in the Armed Forces of the United States of his right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act of 1948, as amended, after discharge from the Armed Forces.

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

Employees may communicate directly with the Board's Regional office, 745 Fifth Avenue, New York, New York, Telephone No Plaza 1-5500, if they have any question concerning this notice or compliance with its provisions.

Aerodex, Inc. and Charles Paglianite. *Case No. 12-CA-2651.*
October 28, 1964

DECISION AND ORDER

On June 8, 1964, Trial Examiner Abraham H. Maller issued his Decision 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 attached Trial Examiner's Decision. He also found that allegations of other unfair labor practices set forth in the complaint had not been sustained. The Respondent filed exceptions to the Trial Examiner's Decision, with a supporting brief.¹

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, the Board has delegated its powers in connection with

¹ Respondent's request for oral argument is hereby denied, as the record and brief adequately present the issues and positions of the parties.

this case to a three-member panel [Chairman McCulloch and Members Leedom and Jenkins].

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 entire record in this case, including the Trial Examiner's Decision, the exceptions, and brief, and hereby adopts the Trial Examiner's findings, conclusions,² and recommendations.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the Board hereby adopts as its Order the Order recommended by the Trial Examiner and orders that the Respondent, Aerodex, Inc., its agents, officers, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order, with the following addition:

Add as a separate paragraph under paragraph 2(b) of the Trial Examiner's Recommended Order, the following:

"Notify the above-named employee if presently serving in the Armed Forces of the United States of his right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act of 1948, as amended, after discharge from the Armed Forces."

² We agree with the Trial Examiner that Respondent discharged Paglianite because of the nature of the petition he had been circulating rather than for the act of solicitation on working time. As further support for the Trial Examiner's conclusion in which we concur, that the discharge action was actually motivated by the Respondent's resentment of the nature of the petition and its fear that the petition might encourage an employee movement to revoke the vote for contract ratification, we note that the Respondent, in contesting Paglianite's claim for unemployment compensation, stated to the State agency in its letter of March 1, 1963, that "Paglianite's unauthorized actions most definitely tended to stir up old controversies and arguments. . . ."

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

Upon a charge and an amended charge filed May 23 and September 27, 1963, respectively, by Charles Paglianite, the Regional Director for Region 12 of the National Labor Relations Board, herein called the Board, on October 1, 1963, issued a complaint on behalf of the General Counsel of the Board against Aerodex, Inc., herein called the Respondent, alleging that the Respondent maintained in effect and enforced a rule which prohibits employees from engaging in lawful union activity on Respondent's property during the employees' nonworking time, in violation of Section 8(a)(1) of the Act, and on or about December 21, 1962, discharged Paglianite because he engaged in concerted activities for the purpose of collective bargaining or mutual aid or protection, in violation of Section 8(a)(3) of the Act. In its duly filed answer, the Respondent denied the commission of any unfair labor practice.

Pursuant to notice, a hearing was held before Trial Examiner Abraham H. Maller at Miami, Florida, on December 16 and 17, 1963. The General Counsel and the Respondent were represented and were afforded full opportunity to be heard, to introduce relevant evidence, to present oral argument, and to file briefs with me. A brief was filed only by the Respondent. Upon consideration of the

entire record,¹ including the oral argument of counsel for the General Counsel and the brief of the Respondent, and upon my observation of each of the witnesses,² I make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. THE BUSINESS OF THE RESPONDENT

The Respondent is engaged in the business of overhaul and maintenance of aircraft engines and engine accessories. At all times material herein Respondent has maintained its principal office and place of business at Miami International Airport, Miami, Florida. During the year preceding the issuance of the complaint, the Respondent performed services in excess of \$1 million for the Armed Forces of the United States, and during the same period of time purchased goods and materials valued in excess of \$50,000 which were shipped directly to Miami from points located outside the State of Florida. In view of the foregoing, I find and conclude that the Respondent is engaging in commerce within the meaning of the Act and that it will effectuate the policies of the Act for the Board to assert jurisdiction here.

II. THE LABOR ORGANIZATION INVOLVED

Teamsters Union Local 290, an affiliate of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ISSUES

1. Whether the Respondent maintained in effect and enforced a rule which prohibits employees from engaging in lawful union activity on Respondent's property during the employees' nonworking time, in violation of Section 8(a)(1) of the Act.
2. Whether the Respondent's discharge of Paglianite constituted an unfair labor practice within the meaning of Section 8 (a) (3) of the Act.

IV. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The no-solicitation rule*

Sometime prior to the events involved herein, Respondent had published a set of rules for its employees (Basic Rules—A Manual for the Personnel of Aerodex, Inc., revised August 1, 1960). One of the rules read as follows:

Solicitation of any kind, the collection of funds, group congregating or participation in any activity other than Company business shall not be carried

¹ On January 20 and on January 31, 1964, I received from the counsel for the General Counsel and from the Respondent, respectively, motions to correct the record in certain particulars therein specified. No opposition to such motions have been filed. Upon consideration of the motions (which are hereby received in evidence as Trial Examiner's Exhibits Nos. 1 and 2, respectively), it is hereby ordered that said motions be and they are hereby granted.

On January 29, 1964, I received from the Respondent a motion to reopen the record to admit evidence. Attached to said motion as Respondent's Exhibit No. 6 was an agreement between the Respondent and the employees of the Company composing the classifications as represented by Teamsters Union Local 290, effective August 1, 1960, to August 1, 1962, and Respondent's Exhibit No. 7 which is an agreement between the Respondent and the employees of the Company composing the classifications as represented by Teamsters Union Local 290, effective August 1, 1962, to August 1, 1964. The motion alleged, *inter alia*, that the existence of these documents is already a matter of record, the genuineness of these documents is not disputed, and there would be no prejudice to any parties by the admission of these documents as exhibits. No opposition to the motion has been received. Accordingly, the record herein is reopened and Respondent's Exhibits Nos. 6 and 7 are hereby received in evidence.

² Unless specifically indicated to the contrary, any credibility evaluation I make of the testimony of any witness appearing before me is based, at least in part, upon his demeanor as I observed it at the time the testimony was given. Cf. *Retail Clerks International Association, AFL-CIO, Local 219 (National Food Stores, Inc.)*, 134 NLRB 1680, 1683, footnote 3; *Bryan Brothers Packing Company*, 129 NLRB 285. To the extent that I indicate that I do not rely on or reject in part or entirely the testimony of any given witness, it is my intent thereby to indicate that such part or whole of the testimony, as the case may be, is discredited by me. Cf. *Jackson Maintenance Corporation*, 126 NLRB 115, 117, footnote 1, enf. 283 F. 2d 569 (C.A. 2).

out in the Company's premises without special permission of the managing head of the Company. Distribution or posting of unauthorized literature or material on the Company's property is forbidden.

Although the rule as thus stated appeared to cover nonworking as well as working time, Mr. Tonks, president of the Respondent, in a speech to the employees had informed them that it applied only to company time. The employees generally, and Paglianite in particular, were aware of Tonks' interpretation of the rule.

As to the enforcement of the rule, Personnel Manager William M. Terry testified without contradiction that solicitation in the plant was permitted for the United Fund; that when the Company had been raided by other large national unions, it had let it be known that it wanted solicitation prohibited on company time, but that it had no right to prohibit solicitation on company premises; and that solicitation during break periods and lunch periods was permitted.

Respondent's agreement with the Union, effective August 1, 1960, to August 1, 1962, provided, *inter alia*:

Employees and Union representatives shall not solicit Union membership from any employee while he is on Company time. Such activities are permitted on Company property provided they do not affect any employee while on Company time. For the purpose of this paragraph, lunch and rest periods are not to be considered Company time.

The subsequent agreement between the Respondent and the Union effective August 1, 1962, to August 1, 1964, contained the same provision.

On July 1, 1963, the Respondent revised its basic rules. The rule with regard to solicitation now reads as follows:

With the exception of official Company business, solicitation of any kind, the collection of funds or participation in any activities other than those protected under the National Labor Relations Act, shall not be carried out at any time on the Company's premises without special permission of the managing head of the Company. Posting of unauthorized literature or material on Company property is forbidden, except as provided for in Article 24 in the agreement between Aerodex, Inc., and the Teamsters Union Local No. 290.

B. *The discharge of Paglianite*

Paglianite was employed as a welder in the colmonoy department. He was a member of the Union and at the time of his discharge was serving as a shop steward. On December 21, 1962, Paglianite came to work with several copies of the following petition:

This petition is to request the Secretary Treasurer of Aerodex Local #290 to exercise his power and authority for the removal of the Business agent and the two Chief Shop Steward [sic] of Aerodex.

He testified as follows: He passed out a few of the petitions outside the gate when he came to work that day. He then went inside the plant, stopped at the jack shop and gave Sam Jackson a copy of the petition. From there he went to the summer line weld shop and spoke to Don Fraser, Charlie Rose, and Mario Cueto. He was told that he had to be careful that he did not pass the petitions out on company time, "and so I said, yes, I remember when we had the election of the union, the Teamsters, and when Mr. Tonks, the President of the Company, made a statement that lunch periods and rest periods are not be considered Company time." He then went back to his department to get ready for work and waited for the starting whistle. At 9:15 a.m. there was a 10-minute break during which he talked to Red Howard in the dimensional department, then went to the disassembly (tear down) department where he procured some signatures. From there he went to the final assembly department and talked with a couple of people there, then ran back to the final service department, and then out to the hangar. On his way back to his own department he met Rocco Pangallo and gave him a petition. During the lunch period which began at 11:15, he went to the baffle shop and spoke to Santiago Amador and some other men who signed the petition. From there he went to the machine shop and procured more signatures. When the warning whistle blew indicating that the lunch period was over, he started back to his own department

and was met by Paul Eckman, general foreman, who told him that he was wanted in the personnel office. After a conference in the personnel office, Paglianite was discharged. He was handed a discharge slip which read as follows:

You are hereby discharged effective 11:15 A.M., FRIDAY, December 21, 1962. By your own admission you created, solicited for and caused to be circulated an illegal and unauthorized petition on Company premises. This action is in direct defiance of Company rules and regulations and has resulted in discord and lack of harmony among your fellow employees.

The General Counsel produced five witnesses to corroborate Paglianite's testimony that he solicited during nonworking time. Norman Ryan testified that Paglianite approached him during the first break in the tear-down department. Amador testified that Paglianite approached him in the baffle department during the lunch period. Vega testified that Paglianite approached him during the lunch period in the baffle department. Richard A. Hughes testified that Paglianite approached him in the machine shop, but he did not remember whether it was on company time or not. Harry H. Ray testified that Paglianite approached him in the machine shop during a break period, but was uncertain which break period it was.

Respondent produced several witnesses who testified credibly that Paglianite solicited their signatures to the petition during working time. Mario Cueto testified that he was on his way from the hangar where he worked to the baffle department during working time before the first break. Paglianite called him and asked him to come into the weld shop and asked him to sign a petition. He also asked Cueto to circulate one of the petitions. Cueto refused to do either. He testified further that the conversation took 5 or 6 minutes. James McEney testified that he was in the hangar inspecting an engine between 7:15 and 9:15 a.m., when Paglianite approached him, asked him to sign a petition, and to circulate one. Steve Howard testified that around 8 o'clock in the morning when he was at work in the dimensional inspection department, Paglianite approached him and handed him a copy of the petition. Howard testified further that he had talked with Paglianite three times that morning: at 7:15, around 8, and 9:15 on the first break.

In addition, several witnesses testified credibly to Paglianite's absence from his work area during the morning and before the first break. Donald J. Savela, a leadman in the colmonoy department (where Paglianite was employed), testified that Paglianite left his work area at approximately 8 o'clock and when he saw him, Paglianite was on the top of the ramp talking with another employee. Paglianite had a piece of paper in his hand. Savela reported the matter to his foreman, James Dukes. Pangallo testified that he worked in the receiving department, next to the colmonoy department; that he spoke to Paglianite about 2 minutes before the first whistle when Paglianite asked him to sign a petition; that about 5 minutes before 8 he saw Paglianite talking to somebody on the ramp and that Paglianite had a piece of paper in his hand at that time. James E. Dukes, Paglianite's foreman, testified that he saw Paglianite at his workbench at 7:15 in the morning; that he (Dukes) left his area at about 7:20, came back approximately 5 minutes later, and noticed that Paglianite was not at his bench. He inquired as to where Paglianite was, and receiving no information, went to look for him. He continued to look for him for about 45 minutes at various places including the men's room and returned to his shop. Pangallo and Savela corroborated Dukes' testimony that he was looking for Paglianite. When he returned Paul Eckman, general foreman, asked Dukes where Paglianite was. While they were talking Paglianite came back and started to work. Homer Funderburg, machine shop foreman, testified that he saw Paglianite in the machine shop in the neighborhood of 8 o'clock talking to various employees. Paglianite spent between 20 and 30 minutes in the machine shop.

From my analysis of the foregoing testimony, I find and conclude that Paglianite solicited signatures to the petition on working time. The fact that four witnesses called by the General Counsel testified that they were solicited either during the break period or during the lunch period does not prove that other employees were not solicited on working time. The credible testimony of Respondent's witnesses detailed above makes it quite evident that Paglianite was absent from his work area for a considerable period of time after the starting whistle and before the first break period and solicited signatures to the petition during that time, and I so find.

Moreover, an analysis of Paglianite's testimony as to his travels from shop to shop during the break period, considering the distances involved, casts grave doubt on his credibility. According to Paglianite, during the 10-minute break period he went from his work area to dimensional inspection, then to disassembly (tear down), final assembly, final service, out to the hangar, and back to his work area, a distance of approximately 3,400 feet or two-thirds of a mile.³ Considering also the fact that, by his own admission, it took Paglianite from 4 to 7 minutes to talk to the people whom he solicited, I find it difficult to believe that he could have accomplished all this within the space of a 10-minute break.

Nor can I credit Paglianite's testimony that he solicited signatures to the petition during the lunch period. The credited testimony of Pangallo, Dukes, Eckman, and Terry indicate that Paglianite was summoned to the personnel office for a conference which led to his discharge during or after the first break period, and the discharge slip which he received indicates that his discharge was at 11:15 a.m., which was the beginning of the lunch period.⁴

In sum, I find that Paglianite solicited signatures to the petition during working time.

Concluding Findings

1. As to the validity of the no-solicitation rule

Respondent's no-solicitation rule as written was presumptively invalid, as it was not limited to working time. *Walton Manufacturing Company*, 126 NLRB 697. However, it is clear that the Respondent did not interpret the rule to embrace breaktime and lunch periods, and Respondent's president had so informed the employees. As noted above, the employees generally, and Paglianite in particular, were aware of this interpretation. And Paglianite in his testimony was careful to point out that all his efforts were expended during the first break period and during the lunch period. Further evidence of Respondent's interpretation of the no-solicitation rule as not applying to rest and lunch periods is found in its agreement with the Union, which prohibits solicitation of union membership on company property but specifically provides that "lunch and rest periods are not to be considered company time." I therefore find and conclude that the no-solicitation rule as interpreted by the Respondent and as understood by the employees generally, and by Paglianite in particular, was a valid rule. *The J. L. Hudson Company*, 67 NLRB 1403; and cf. *J. H. Rutter-Rex Manufacturing Company, Inc.*, 86 NLRB 470, 472, where the Board found that the employer's interpretation of the rule as inapplicable to nonworking time had not been clearly explained to the employees.⁵

Accordingly, I shall recommend that the complaint be dismissed insofar as it alleges that the Respondent maintained in effect and enforced a rule which prevents employees from engaging in lawful union activity on Respondent's property during the employees' nonworking time, in violation Section 8(a)(1) of the Act.

2. As to Paglianite's discharge

Respondent could have discharged Paglianite for cause, i.e., either for being absent from his work area for a substantial period during working time, or for having violated the no-solicitation rule (valid as interpreted by the Respondent) by soliciting during working time. However, Respondent did neither. It discharged Paglianite for circulating "an illegal and unauthorized petition on Com-

³ The distances are computed by tracing Paglianite's route on Respondent's Exhibit No. 1, a blueprint of Respondent's plant drawn to a scale of 1 inch to 50 feet

⁴ Witnesses Amador and Vega testified that they were solicited during the lunch period. Since Paglianite was discharged at 11:15 a.m., the beginning of the lunch period, I believe that these witnesses were mistaken as to the period during which they were approached. The mistake is a natural one, considering the fact that they were testifying approximately 1 year after the event

⁵ I recognize the fact that some 3 months after Paglianite's discharge, Respondent's assistant personnel director, in a letter to the Unemployment Compensation Division of the Florida Industrial Commission, sought to justify Paglianite's discharge, *inter alia*, by citing the no-solicitation rule as written. I note also that Personnel Manager Terry, when asked why he characterized the petition as "illegal" in the discharge slip, gave two explanations, one of which was that Paglianite broke "the solicitation rule as it was written" In view of Paglianite's understanding of the rule as interpreted by Respondent's president, I do not consider the after-the-fact reliance on the rule as written as derogating from my conclusion set forth above.

pany premises." When asked what he meant by the term "an illegal petition," Personnel Manager Terry (who with his assistant had prepared the discharge slip) stated that he had been informed by the chief steward that "the petition in circulation was an illegal one, in that, the dismissal of a union official would have to be taken under the Teamster constitution at the union hall whereby if the charge were confirmed he and the other parties involved would be automatically discharged."⁶ Terry testified further:

The union had already taken a strike vote which incidentally did us irreparable harm, so that I would feel that when many were congregating and when the topic of conversation on the following morning was that of turning over the whole, that is, chief stewards and business agents, and many of the people in the plant I was sure were left with the opinion that there was probably a general movement in the plant to perhaps not accept the ratification which had taken place which was overwhelmingly in favor of the ratification of the contract by vote, I would say in summation that this would create discord and havoc with the people on the floor.

It is apparent from the foregoing, and I find, that it was not the *act* of solicitation or distribution of the petition which was the cause of Paglianite's discharge; rather, it was the *nature* of the petition which was the cause of Paglianite's discharge. Cf. *Idaho Potato Processors, Inc.*, 137 NLRB 910, enfd. 322 F. 2d 573 (C.A. 9). Respondent had just gone through an unsettled period of negotiations with the Union for a contract, and the contract had been ratified by the employees the day before Paglianite distributed his petition. Understandably, Respondent was concerned that a petition to remove the chief stewards and the business agents might, as Personnel Manager Terry testified, develop into a general movement in the plant to revoke the vote of ratification.

But while Respondent's motive is one which can readily be understood in the circumstances then prevailing, it does not avail the Respondent. Regardless of the merit of Paglianite's petition, Paglianite was engaged in a protected activity. Thus, the Board has held that the Act protects employees who attempt by persuasion to induce their designated representative to follow a particular course of action or to adopt a particular attitude toward a subject of collective bargaining or a matter relating to terms and conditions of employment, and an employer who interferes with the employees' exercise of their rights to engage in such intraunion activities violates Section 8(a)(1) of the Act. *Wertheimer Stores Corp.*, 107 NLRB 1434, 1444; *Nu-Car Carriers, Inc.*, 88 NLRB 75, enfd. 189 F. 2d 756 (C.A. 3), cert. denied 342 U.S. 919; *Paul Cusano et al. trading as American Shuffleboard Company*, 92 NLRB 1272, enfd. 190 F. 2d 898 (C.A. 3). And an employer who discriminates against employees for having engaged in such protected activities discourages participation by employees in union business and affairs thereby discourages membership in any labor organization in violation of Section 8(a)(3) of the Act. *Wertheimer Stores Corp.*, *supra*; *Nu-Car Carriers, Inc.*, *supra*; *American Shuffleboard Company*, *supra*. Paglianite's activities do not stand on a different footing, even though the Respondent had just entered into a contract with the Union. Employees have as much interest in the identity of the persons who will represent them in the presentation of grievances and in discussions with the employer regarding the interpretation and application of the contract, etc., as they have in fixing the terms of the contract. See *Top Notch Manufacturing Company, Inc.*, 145 NLRB 429, where it was held that "the chief overall factor in the effectuation of the discharge was . . . [the employee's] efforts, in concert with others, to bring about a change in the management of the Local, activity which the Respondent not unreasonably regarded as a threat to its continued honeymoon with the Union which over some 16 years had not been marred by a single dispute." See also *Falstaff Brewing Corporation*, 128 NLRB 294, 305, enfd. as modified 301 F. 2d 216 (C.A. 8).⁷

⁶ I do not accept Terry's explanation that the discharge slip was so worded because he was building a case for the Respondent in the event the matter went to arbitration. If anything, discharging Paglianite for circulating a petition which Terry was informed was "illegal" under the Union's constitution appears to be an attempt to propitiate the Union.

⁷ Respondent's contention that Paglianite was not engaged in "concerted" activity must be rejected. "An activity may be concerted although it involves only a speaker and a listener" (*Salt River Valley Water Users Association*, 99 NLRB 849, 853, enfd. 206 F. 2d 825, 828 (C.A. 9)). See also *Root-Carlin, Inc.*, 92 NLRB 1313, 1314.

Nor is the Respondent exonerated because it had a rule against the creation of discord and lack of harmony.⁸ It has long been recognized by the Board that the exercise of rights protected by the Act frequently produces "some irritation to employees, or unrest in a plant . . ." (*Stuart F. Cooper Co.*, 136 NLRB 142, 144). Absent special circumstances, such incidental effects do not justify the promulgation of rules which will inhibit protected activity or the discipline of employees for having engaged in such activity.

The unrest caused by Paglianite's activity was minimal. General Foreman Eckman testified that when he entered the plant about 7:50 in the morning of Paglianite's discharge, he saw some employees talking when they should have been working and "that it was hurting production a little bit." Obviously, this is a situation which could have been readily remedied by the Respondent.

In view of all the foregoing, I find and conclude that the real reason for Paglianite's discharge was his circulation of a petition for the removal of the chief stewards and the business agent, an activity which was protected by the Act. Respondent thereby violated Section 8(a)(3) and (1) of the Act.

C. As to the effect of Paglianite's failure to invoke the grievance-arbitration procedure

As an affirmative defense, Respondent points out that article 20(g) of the agreement between the Respondent and the Union provides that if an employee is discharged or disciplined and disputes the validity of the reasons therefor he may follow the procedure set forth in article 21 for the orderly settlement of disputes; that article 21 provides for a grievance procedure and binding arbitration; that Paglianite had not exhausted the remedies provided in article 20(g) and article 21 of the agreement, and that the complaint should therefore be dismissed. The contention is without merit. Section 10(a) of the Act explicitly provides that the power of the Board with respect to unfair labor practices "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise . . ." Notwithstanding the foregoing, the Board, for reasons of policy, has seen fit in appropriate circumstances to withhold or limit the jurisdictionally permissible scope of its powers in cases where a prior arbitration award has been made (*Spielberg Manufacturing Company*, 112 NLRB 1080), while reserving to itself the right to scrutinize the award as to fairness and regularity, whether all the parties had agreed to be bound by the award, and whether the award was not repugnant to the purposes and policies of the Act. *Spielberg Manufacturing Company*, *supra*, p. 1082; *Max B. Oscherwitz et al., d/b/a I. Oscherwitz and Sons*, 130 NLRB 1078, 1079. However, the Board has never shunned jurisdiction merely because a party had the contractual right to go to arbitration but has never exercised the option. *Newspaper Guild of Buffalo Local #26, American Newspaper Guild (AFL-CIO) (Niagara Falls Gazette Publishing Corporation)* 118 NLRB 1471, 1479; *Milk Drivers & Dairy Employees Union, Local No. 546, etc. (Minnesota Milk Company)*, 133 NLRB 1314, 1329-1330; *International Union, United Automobile, etc. (John I. Paulling, Inc.)*, 130 NLRB 1035, 1044.

The authorities relied upon by the Respondent are inapposite. *Steelworkers v. American Manufacturing Company*, 363 U.S. 564, and *Steelworkers v. Warrior & Gulf Co.*, 363 U.S. 574, involved action under Section 301 of the Act to compel arbitration under a contract. These cases did not involve an attempt to deprive the Board of its jurisdiction to process an unfair labor practice. In *International Harvester Co. (Indianapolis Works)*, 138 NLRB 923, an arbitration award had already been rendered. In *Dubo Manufacturing Corporation*, 142 NLRB 431, the charging party, after the filing of the charge and before the issuance of the complaint, had petitioned the United States District Court for an order requiring the Respondent to arbitrate grievances filed by some of the discharged employees named in the charge, and the district court had issued an order directing the employer to arbitrate. Under the circumstances, the Board deferred action on the 8(a)(3) allegations in the complaint pending completion of the arbitration directed by the court. In *Dazey Corporation*, 106 NLRB 553, the Board held that the discharges were not engaged in a protected activity. The statement quoted by Respondent at page 43 of its brief to the effect that resort by the dissident group to the grievance

⁸ The rule in question reads as follows: "An employee who creates discord and lack of harmony jeopardizes the efficiency of the plant and the happiness of his fellow workers. Such an employee cannot be retained."

procedure set forth in the bargaining agreement might not have been futile was made by the Board to demonstrate the remedies which could have been utilized by the dissident group instead of engaging in an unprotected activity.

In view of the foregoing, Respondent's challenge to the Board's jurisdiction is overruled.

V. THE EFFECT OF THE UNFAIR LABOR PRACTICE UPON COMMERCE

The activities of the Respondent set forth in section IV, above, occurring in connection with the business operations of the Respondent set forth 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 hereof.

VI. THE REMEDY

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

Since I have found that the Respondent discharged Charles Paglianite for engaging in concerted union activity, I shall recommend that the Respondent be required to offer him immediate and full reinstatement to his former or substantially equivalent position, without prejudice to his seniority or other rights, and make him whole for any loss of earnings he may have suffered because of the discrimination against him, with backpay computed in the customary manner.⁹ I shall further recommend that the Board order the Respondent to preserve and make available to the Board or its agents on request, payroll and other records to facilitate the computation of the backpay due and the right of employment.

RECOMMENDED ORDER

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record in the case, I recommend that the Respondent, Aerodex, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Encourage or discouraging membership in Teamsters Union Local 290, an affiliate of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or in any other labor organization of its employees by discharging or in any other manner discriminating against employees for seeking to change union officers or representatives or otherwise engaging in concerted union activities, in violation of Section 8(a)(3) of the Act.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Offer to Charles Paglianite 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 he may have suffered by reason of the Respondent's discrimination against him in the manner set forth in the section of the Decision 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 for the determination of the amount of backpay due.

(c) Post at its plant at Miami, Florida, copies of the attached notice marked "Appendix."¹⁰ Copies of said notice, to be furnished by the Regional Director for Region 12, shall, after being duly signed by the Respondent's representative, be posted by it immediately upon receipt thereof and maintained by it for 60 consecu-

⁹ *F. W. Woolworth Company*, 90 NLRB 289; *Isis Plumbing & Heating Co.*, 138 NLRB 716.

¹⁰ In the event that this Recommended Order be adopted by the Board, the words "a Decision and Order" shall be substituted for the words "the Recommended Order of a Trial Examiner" in the notice. In the further event that the Board's Order be enforced by a decree of a United States Court of Appeals, the words "a Decree of the United States Court of Appeals, Enforcing an Order" shall be substituted for the words "a Decision and Order"

tive 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 Region 12, in writing, within 20 days of the receipt of this Decision, what steps it has taken to comply herewith.¹¹

It is further recommended that so much of the complaint as alleges that the Respondent maintained in effect and enforced a rule which prevents employees for engaging in lawful union activity on Respondent's property during the employees' nonworking time be dismissed.

¹¹ In the event that this Decision be adopted by the Board, this provision shall be modified to read: "Notify said Regional Director, in writing, within 10 days from the date of this Order, what steps the Respondent has taken to comply herewith."

APPENDIX

NOTICE TO ALL EMPLOYEES

Pursuant to the Recommended Order of a Trial Examiner 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 encourage or discourage membership in Teamsters Union Local 290, an affiliate of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or in any other labor organization of our employees, by discharging or in any other manner discriminating against employees for concertedly seeking to change union officers or representatives or otherwise engaging in concerted union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed in Section 7 of the Act.

WE WILL offer Charles Paglianite immediate and full reinstatement to his former or substantially equivalent position without prejudice to his seniority or other rights or privileges, and make him whole for any loss he may have suffered by reason of our discrimination against him.

AERODEX, INC.,
Employer.

Dated _____ By _____
(Representative) (Title)

NOTE.—We will notify the above-named employee, if presently serving in the Armed Forces of the United States, of his right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act of 1948, as amended, after discharge from the Armed Forces.

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

Employees may communicate directly with the Board's Resident Office, Room 826, Federal Office Building, 51 SW. First Avenue, Miami, Florida, Telephone No. 350-5391, if they have any question concerning this notice or compliance with its provisions.

Sinko Manufacturing and Tool Company and District 50, United Mine Workers of America and Plastic Workers Union Local 18, I.U.D.T.W., AFL-CIO, Party to the Contract

Sinko Manufacturing and Tool Company and Eugene Payan.
Cases Nos. 13-CA-4433 and 13-CA-4433-2. October 28, 1964

DECISION AND ORDER

On July 16, 1963, Trial Examiner Stanley Gilbert issued his Intermediate Report in the above-entitled proceeding, finding that the 149 NLRB No. 21.