

a threat to take a member's card away if he furnished a statement to the Board agent. This the Board found equivalent to a threat with respect to his employment security. These cases are not persuasive much less controlling here.

Section 8(b)(1)(A) cannot be regarded as an analogue of Section 8(a)(4).

I conclude that the allegations of the complaint have not been sustained.

CONCLUSIONS OF LAW

1. Ferguson is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. Respondent is a labor organization within the purview of Section 2(5) of the Act.
3. Respondent has not engaged in the unfair labor practices alleged in the complaint.

RECOMMENDED ORDER

Upon the basis of the foregoing findings of fact and conclusion of law and upon the entire record in this case, it is recommended that the complaint be dismissed.

American Casting Service, Inc. and International Molders' and Allied Workers' Union of North America, AFL-CIO, Petitioner
American Casting Service, Inc. and International Molders' and Allied Workers' Union of North America, AFL-CIO. Cases Nos. 25-RC-2525, 25-RC-2526, 25-CA-1877, and 25-CA-1878. February 18, 1965

DECISION, ORDER, AND DIRECTION OF SECOND ELECTIONS

On November 16, 1964, Trial Examiner Frederick U. Reel issued his Decision in the above-entitled proceeding finding that Respondent had engaged in and was engaging in certain unfair labor practices within the meaning of the Act, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Decision. The Trial Examiner also found that Respondent had not engaged in certain other unfair labor practices alleged in the complaint and recommended dismissal of these allegations. He further found that the Union's objections to the elections in Cases Nos. 25-RC-2525 and 25-RC-2526 should be sustained and recommended that the elections be set aside. Thereafter, Respondent filed exceptions, with a supporting brief,¹ to the Trial Examiner's Decision. The General Counsel filed a brief in support of the Trial

¹ In its brief Respondent also filed a motion to dismiss the representation matter as moot. In support thereof, Respondent alleges that it has entered into an agreement with another party for the lease of its Princeton, Indiana, facility, with an option to purchase at the end of 3 years; and that under the terms of this agreement the Princeton plant, which is presently closed for retooling and repairs, will reopen under the exclusive management of the lessee and at such time, the Owensboro plant will cease operations as a foundry. Even assuming the truth of these allegations, we perceive no reason for denying the employees the right to choose a collective-bargaining representative, if they so desire. Accordingly, the motion is denied.

Examiner's Decision and an answering brief to Respondent's exceptions and brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with these cases to a three-member panel [Chairman McCulloch and Members Fanning and Brown].

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 Decision, the exceptions and briefs, and the entire record in these cases, and hereby adopts the Trial Examiner's findings, conclusions, 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 Respondent, American Casting Service, Inc., Owensboro, Kentucky, and Princeton, Indiana, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.

IT IS FURTHER ORDERED that the election held on January 7, 1964, among the employees of American Casting Service, Inc., at its Owensboro, Kentucky, and Princeton, Indiana, plants, in the appropriate units, be, and they hereby are, set aside.

[Text of Direction of Second Elections omitted from publication.]

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

This consolidated proceeding, heard before Trial Examiner Frederick U. Reel at Princeton, Indiana, on August 11 through 14, 1964, presents primarily factual issues as to whether the Respondent Employer violated Section 8(a)(1) and (3) of the Act, and in so doing materially affected the outcome of certain representation elections. The "CA" cases¹ originated in charges filed January 14, 1964, and a consolidated complaint thereon issued June 11, 1964. The "RC" cases arise out of consent elections held January 7, 1964, both of which the Union lost but to both of which it filed on January 14, 1964, "Objections to Conduct Affecting Results of Election," alleging, *inter alia*, the same conduct alleged in the "CA" charges filed that date. The Regional Director in his report on the objections issued June 26, 1964, consolidated the "RC" and "CA" cases for hearing in view of the common issues raised.

After the hearing, briefs were filed by General Counsel and by the Respondent Employer. Thereafter, General Counsel filed a motion for permission to file a reply brief, and a motion to strike certain testimony, the latter resting on an alleged failure to provide documentation in support of certain testimony, cross-examination of which was curtailed with the understanding that supporting documentation would be submitted. In the absence of opposition thereto, these motions are hereby granted, the reply brief has been filed, and the testimony in question (page 845, line 13, through page 848, line 12) is stricken.

¹ There are two "CA" cases and two "RC" cases because separate charges and petitions were filed covering American Casting's two plants.

Upon consideration of the record, including my observation of the witnesses, and after careful study of the briefs, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE EMPLOYER, AND THE LABOR ORGANIZATION INVOLVED

American Casting Service, Inc., hereinafter called the Company, is engaged at Owensboro, Kentucky, and Princeton, Indiana, in the manufacture and sale of castings and related products, and annually ships from its latter plant to points outside Indiana products valued in excess of \$50,000. The Company admits, and I find, that it is engaged in commerce within the meaning of the Act, and that International Molders' and Allied Workers' Union of North America, AFL-CIO, is a labor organization within the meaning of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Interference, restraint, and coercion*

1. Owensboro plant

Union activity commenced at both Owensboro and Princeton plants in October 1963. At Owensboro, the men held meetings on October 17 and 21 in the home of employee Thomas Mason. The day after the second meeting one Paul Young, alleged in the complaint to be a supervisory employee, asked employee Johnson if the latter knew anything about a union meeting that had been held; Johnson, who had attended the meeting and signed a union card, replied in the negative. Within the next 2 weeks Jack Murphy, likewise alleged to be an Owensboro supervisor, asked employee Stafford if the latter knew anything about a union in Owensboro (Stafford, who had signed a card, denied knowledge of the Union), mentioned to employee Mays that "the guys were trying to get up a union" and that "Mr. Davis [company president] mentioned something about giving the guys a raise," and frequently asked employee Bryant if he knew anything about the Union. Murphy also told Bryant in these conversations that it would be best, if Bryant "knew anything," to tell Murphy "because [Bryant] was going to be out of work . . . Jack Davis would close up the plant and go to Florida."² Finally, employee Mason testified that sometime in November 1963, in the course of a conversation with Davis, the latter observed that "the union is trying to get in here" and added that "Before I'll have the Union, I'll shut both plants down and go to Florida."

Davis denied making the statement just quoted, and the issue becomes one of credibility. Upon considering the entire record including the demeanor of Mason and Davis on the witness stand, bearing in mind the unconcealed antipathy—a mixture of hatred and contempt—which Davis in his testimony and in his correspondence revealed toward the Union, and giving due weight to company counsel's argument that Mason was the sole witness who testified to ever hearing Davis make such a remark at Owensboro (but Davis did make a similar remark at Princeton, see *infra*), I find that Mason's testimony in this regard is credible and I discredit Davis' denial. With respect to Young and Murphy, who were not called as witnesses, the record is clear that both enjoyed supervisory status at Owensboro, although Young, who also worked at Princeton during part of the period here relevant, was not a supervisor at that plant. At Owensboro, Young hired employees, gave them orders, granted time off, directed them to work overtime, transferred an employee to another job, docked an employee's pay, corrected their timecards, and wore a uniform labeled "foreman." Young told employees at Owensboro that Murphy was a supervisor, and they obeyed Murphy's orders; also Murphy hired and discharged employees, and was compensated for holidays not worked, unlike rank-and-file employees. I therefore find that Young and Murphy were supervisory employees at Owensboro, and that as they were agents of the Company, it is responsible for their interrogation of employees as to union activity and for Murphy's threat to Bryant. The interrogation, considered in the context of the entire case, and Murphy's and Davis' remarks about the closing of the plant if the Union came in, violated Section 8(a)(1) of the Act.

² Bryant testified that he did not take Murphy too seriously, but this does not remove the illegal character of the threat. Cf. *NLRB v. Donnelly Garment Company*, 330 U S 219, 231.

2. Princeton plant

General Counsel in his brief assigns 13 specific episodes as violations of Section 8(a)(1) at the Princeton plant. I find it unnecessary to go into detail on each of the 13, as discussion of only a few will demonstrate violations of that section. Most of the items *not* discussed, moreover, are those in which I would find no violation, either because of credibility resolutions or because I would hold the alleged perpetrator not to be an agent of the Company under all the circumstances.

a. Early in November Davis made a speech to the assembled employees which was largely devoted to the problems caused by producing defective work, but in the course of which he stated that if the Union came in he would shut the plant, move to Florida, and live off other income. This threat (denied by Davis, but testified to by other witnesses whom I credit in this respect, notably Hildred Perry and White, substantially corroborated by Cullivan and Miskell) plainly violated Section 8(a)(1) of the Act³

b. On November 4, 1963, when Mr. and Mrs. Davis were in Florida, they learned, through a long-distance telephone conversation with Betty Barrett, the employee in charge of their Princeton office, of the receipt of the Board's notification that the Union had filed representation petitions. After this telephone conversation Barrett asked rank-and-file employee Hildred Perry, who is the brother of Mrs. Davis and of Supervisor Lewis Perry, to circulate among the employees a petition opposing the Union and obtain signatures thereto. Hildred Perry did so during working hours, advising some of the employees in the course of so doing that their signatures on the paper would safeguard their jobs and cause Davis not to shut down the plant. After obtaining approximately 30 signatures, Perry returned the paper to Barrett. Supervisors were aware of Perry's circulation of this petition at the time, and Davis became aware of it when he returned from Florida.

General Counsel contends that Barrett acted pursuant to telephonic instructions from Mr. or Mrs. Davis to defeat the union movement, and that in any event Barrett was a supervisor. I reject these contentions. The Davises denied giving any such orders to Barrett, and the latter, no longer employed by the Company, was not called as a witness. There is no credible evidence that the Davises so instructed Barrett, and the testimony of Hardman, which tends to support General Counsel's contention, is of doubtful probative value, particularly in the light of his retraction on cross-examination. As to Barrett's "supervisory" status, I find that she occupied a key position in the office and hence frequently relayed information to the foreman or to other employees concerning production requirements, but I do not find her to be a supervisor of the production workers within the meaning of the Act. However, on the occasion in question she had just spoken with the absent owners by long-distance telephone, a fact of which numerous employees were aware. In these circumstances the employees would have reasonable cause to believe that she and Hildred Perry, who acted at her direction, were agents of management, a belief reinforced by the fact that supervisors were aware of, and did not attempt to stop, Perry's activity. In the light of these facts, and in view of Davis' failure on his return to disavow this activity, I find that the Company is properly chargeable therewith, and that it thereby further interfered with, restrained, and coerced its employees in violation of Section 8(a)(1). Cf. *N.L.R.B. v. Birmingham Publishing Co.*, 262 F. 2d 2, 8 (C.A. 5).

c. Shortly after the Davises returned from Florida, Mrs. Davis, an active officer of the Company, asked employee Miskell what the latter's son-in-law, employee Angle, would do about the Union. Upon receiving Miskell's assurance that Angle was antiunion, Mrs. Davis said, according to Miskell, "I trust to you that he don't have a damn thing to do with it. If he does, I'll fire his damn ass out the door." I do not regard Miskell as credible in all respects. On the other hand, Mrs. Davis was not asked to, and did not, contradict this testimony. From her demeanor and from her unconcealed hostility to the Union (she admitted telling Barrett to throw in the wastebasket the communications from the Board about the Union), I am inclined to credit Miskell on this matter. The threat to discharge an employee for union activity was, of course, violative of Section 8(a)(1).

³ Davis also posted early in November a notice that the plant would close November 22, 1963, and General Counsel alleges that the notice was "bogus." I am inclined to agree with the contention, but the matter is plainly cumulative to the violation inherent in Davis' speech, and I therefore pretermitt discussion of the notice.

d. I credit the following: (1) the testimony of employee McGarrah that in the summer of 1963 General Foreman Kinder stated that Davis would close the plant if a union organized it; (2) the testimony of employee White that in November 1963 Mrs. Davis asked him if he could find out who were the union leaders; and (3) the testimony of employee Parson that in January 1964 Kinder asked if he knew who was the union leader. Each of these episodes, particularly when considered in the light of Davis' threat to close the plant if the Union came in, constituted violations by the Company of Section 8(a)(1).

B. *The alleged discriminatory discharges*

1. Owensboro plant

In the late fall of 1963 (between November 8 and December 15), the Company discharged 7 of the 20 employees at the Owensboro plant.⁴ Each of the seven had signed union cards; the employment of only three of the Owensboro employees who had signed union cards survived the discharges. Of the seven discharges, six (all but Mays) had attended at least one of the union meetings in October; as noted above, the Company, through Paul Young, had some knowledge that a union meeting had occurred at that time. Only two other employees were separated from the Owensboro payroll during this period, Kincaid, who "halfway quit" on December 4 after less than 2 months' employment,⁵ and Burch, who may also have quit, as he is not included among the laid-off employees listed by Davis in a pretrial affidavit. Among the employees retained at Owensboro throughout this period were three nonunion men, Oscar Pierce, who appears to have been hired in September 1963, Donald Gertersen and Bob Hartley, who were apparently hired in August. These three employees were junior in point of service to most of the laid-off employees. The Company rehired one of the discharges in February 1964, one in March, offered a job to a third in February, to a fourth about August 1, 1964, and made an offer of reinstatement to each of the remaining three at the hearing in this case. Between the end of February 1964 and the hearing in this case, the Company hired approximately 25 new employees at Owensboro, and in that same period terminated the employment of approximately 20 Owensboro employees.

The foregoing summary, coupled with the evidence of company hostility to the Union and company knowledge of the Union's organizing campaign, sets forth the essence of the General Counsel's "affirmative case" as to the seven discharges or layoffs at Owensboro. The Company, in its answer, and also in a pretrial affidavit of Davis, alleged that each of the seven were guilty of one or more infractions or shortcomings which led to his separation from the payroll. At the hearing, however, neither Davis nor any other company witness testified in support of these allegations. Insofar as those matters were developed on the record at all, the testimony is that of the employees in question, each of whom either completely denied or minimized the offense alleged. Under these circumstances, I cannot find on this record that the individual employees were selected for layoff or discharge for the reasons peculiar to each of them alleged in the answer or in Davis' affidavit. This, of course, by no means establishes that General Counsel has carried his burden of proof that they were discriminated against because of union activity, as there are other, more general, grounds for separation raised as defenses, and other circumstances to consider in determining whether General Counsel has carried his burden. As this record developed, however, I find that the Company's allegations as to the individual shortcomings of these employees are not sustained by the evidence.

The Company contends that the Owensboro layoffs (as well as those at Princeton, discussed below) resulted from economic factors, including the seasonal slack occasioned by freezing weather which curtailed the demand for pipe and sewer installation, and a loss of business resulting from customer dissatisfaction with the Company's defective products. The seasonal slack, while it may well explain the 2-week shutdown which occurred late in December, does not appear to warrant the curtailments which began early in November, for the testimony indicates that the seasonal layoffs could be expected in December and January.

A major issue in the case, affecting both the Owensboro and Princeton layoffs, arises out of the Company's loss of business. General Counsel concedes that early in November 1963, shortly before the layoffs in this case and shortly after learning

⁴ Thomas Mason, Jewell Stafford, George Bryant, Wilbur Mays, Hubert Gibson, Joe Jackson, and Wayne Johnson

⁵ General Counsel appears to have abandoned the allegation Kincaid was among those unlawfully laid off or discharged, and the complaint as to him will therefore be dismissed.

that the Union had filed representation petitions with the Board, the Company arranged to have a competitor, Tyler Pipe and Foundry Company, supply castings to one B & H Sales Company, which prior thereto had been a major customer of the Company. General Counsel argues that the Company deliberately dropped the B & H business after hearing of the union activity in order to have an excuse to reduce its force and lay off union adherents. The Company's position is that it lost the B & H business because the materials it had sold B & H were defective and were unacceptable to the eventual users, notably the city of West Palm Beach, Florida, to whom B & H passed them on. General Counsel contends that the trouble with B & H customers postdated the November arrangements, and the correspondence introduced into evidence lends some support to this contention. On the other hand, there is evidence of difficulties in West Palm Beach in September; Davis testified that he was personally engaged in trying to repair defective work there at the end of October; and a complaining letter from another contractor with the city, dated December 11, 1963, indicates that the city's objections to the Company's products were of long standing. I, therefore, notwithstanding the strong contention advanced by able General Counsel in his fine brief, do not find that the Company sacrificed its B & H business to have an excuse to cut its payroll and thereby get rid of union adherents. I further find, in accordance with the Company's contentions, that its difficulties with many of its customers arising out of inferior products made by the Company led it at this time to revert to its former practice of buying a large number of castings, and producing less of its own for sale to its customers.⁶

Resolution of these "economic" issues in the Company's favor, however, falls far short of ultimately disposing of the case. Accepting, as I do, the Company's position that a loss of business justified a layoff at Owensboro at the time in question, we are left with the question whether the selection of employees to be laid off was motivated by their union activity. Summarizing the facts, we have the layoff or discharge of 7 men, all of whom had signed union cards and 6 of whom had attended a union meeting, and a retention of 13 men, only 3 of whom had signed cards. Moreover, the Company, openly and avowedly hostile to the Union, did not recall four of the seven men, although it had numerous job openings in the next 6 months. With respect to the failure to recall, the Company urges that the men in question were casual laborers and that it had no policy to seek out former employees to offer them vacancies. The record indicates, however, that the Company did in fact recall some of the employees and took the initiative in seeking them out (e.g., Stafford and Mays), and also establishes that at the time of their separations the men were told they were temporarily laid off or that they would be called back.

Upon consideration of the entire record, including the evidence of company hostility to the Union, the lack of evidence that the laid-off men were selected for reasons reflecting on their abilities, the failure to recall them when vacancies occurred, the retention of employees junior in status, and the overwhelming disproportion of union men selected for layoff when considered in the light of the number of union members among the employees,⁷ I find and conclude that the Company was motivated by antiunion considerations in selecting the men to be laid off. Because two of the laid-off men, Mays and Gibson, had been employed only a few weeks each, however, I find that even in the absence of discrimination, they would have been included in

⁶ Employee Stafford testified that his supervisor, Murphy, told him early in November that Davis had canceled a large order for sewer lids. Even if this testimony were to be credited, it would not establish an antiunion motivation for the cancellation. Davis' denial that he ever had an order of the size Stafford reported was phrased in terms of "man-hole covers" and not "sewer lids," but unlike General Counsel, I view this as a denial of the episode, and I credit Davis in this respect.

⁷ Cf. the Seventh Circuit's recognition that "the disproportionate treatment of union and nonunion workers may under certain circumstances be very persuasive evidence of discrimination." *N.L.R.B. v. W. C. Bachelder, Receiver for Hoosier Veneer Co.*, 120 F. 2d 574, 578, cert. denied 314 U.S. 647. Accord: *N.L.R.B. v. Wmoma Textile Mills*, 160 F. 2d 201, 208 (C.A. 8); *N.L.R.B. v. Chattanooga Bakery, Inc.*, 127 F. 2d 201, 204 (C.A. 6), cert. denied 317 U.S. 676; *N.L.R.B. v. Whittenberg Construction Company*, 200 F. 2d 157, 159-160 (C.A. 6); *N.L.R.B. v. W. C. Nabors, d/b/a W. C. Nabors Company*, 196 F. 2d 272, 275-276 (C.A. 5); *N.L.R.B. v. Fredrica Clausen, d/b/a Luzerne Hide & Tallow*, 188 F. 2d 439, 442 (C.A. 3), cert. denied, 342 U.S. 868; *N.L.R.B. v. Earl I. Sifers, d/b/a Sifers Candy Company*, 171 F. 2d 63, 66 (C.A. 10); *F. W. Woolworth Company v. N.L.R.B.*, 121 F. 2d 658, 661-662 (C.A. 2); *N.L.R.B. v. Dinon Coil Company, Inc.*, 201 F. 2d 484, 486 (C.A. 2); *Amalgamated Clothing Workers of America, AFL-CIO v. N.L.R.B.*, 302 F. 2d 186, 190 (C.A.D.C.).

the layoff which was economically justified. (I also note that Mays did not attend any union meeting and that he was the first of the group to be offered reinstatement.) I therefore recommend dismissal of the complaint as to them, and also as to Kincaid (see footnote 5, *supra*), but sustain the allegations of unlawful discrimination as to Mason, Stafford, Bryant, Jackson, and Johnson.

2. The November-December discharges at Princeton

On November 8, 1963, the Company laid off or discharged 7 of its over 50 Princeton employees, and it released 1 more on December 8 and 2 on December 13. As in the case of the Owensboro layoffs which occurred during the same period, the Company contends that an economic layoff was necessitated by the loss of business, and General Counsel claims that the Company created the economic situation to give it an excuse to oust union supporters. On this issue, as noted above, I find that General Counsel has not sustained his burden of proof. But, as in the Owensboro situation, the Company's avowed hostility to the Union leads to an inquiry as to whether the selection of employees to be laid off was made on a discriminatory basis. The Company, in its pleadings and Davis' pretrial statements, assigned some grounds for selecting particular men at Princeton for layoff, but (with one exception, discussed below) no effort was made to substantiate these matters, and indeed they were dispelled by testimony at the hearing.

This almost complete lack of any evidence to indicate why particular individuals were selected for layoff creates some of the difficulties in this case. To be sure, the burden of proving unlawful discrimination rests on General Counsel; the Company may discharge for "a good reason, a bad reason, or no reason at all," but not for union activity. But here General Counsel has established the Employer's extreme hostility to the Union, the Employer's knowledge of an organizing campaign, and (as shown below) the Employer's belief that the employees discharged were union supporters. These circumstances, coupled with the failure of the evidence to substantiate the claims in the Company's answer relative to the shortcomings of these employees, give rise to a permissible inference that the selection was motivated by antiunion considerations. In this setting, it seems appropriate to consider the relative seniority of the men laid off and those retained. Certainly, in the absence of contract, the Company was not required to observe seniority. The mere fact that seniority is a commonly accepted basis of selection would not warrant the Board's imposing it on the Company in this case. But Davis himself, in his pretrial statement and in his answer to the complaint, referred to seniority as a factor in the selection for layoff. It seems reasonable to interpret these statements as an admission by Davis that where all other factors were equal, seniority would govern. The difficulty from the Company's standpoint is that on this record there is no evidence to justify findings (except possibly in one instance) which would sustain Davis' claim that all other factors were not equal. On the other hand, an unexplained failure to follow seniority is not enough to establish a violation, even by an antiunion employer, in the absence of evidence that he believed the employees laid off were union supporters.

At Owensboro the employees had attended a union meeting, and the matter had been the subject of interrogation thereafter, but at Princeton the chief source of company knowledge as to which employees supported the Union was the antiunion petition which Hildred Perry had openly circulated with the admonition that employees should sign it if they wanted to keep their jobs. This petition was turned in to the company office, and Davis, in a pretrial letter to the Board's Regional Office, admitted having a copy of it.

Of the seven men laid off on November 8, four (the two Terrys, Thompson, and McIntyre) were relatively junior employees in point of continuous service. The payroll records show that only four retained employees (Ellis, Scott, White, and Willis) had as little or less continuous service. Under these circumstances, the fact that the Terrys and Thompson had not signed the antiunion petition, and that McIntyre had only signed after exhibiting reluctance and after special prodding, would not serve to establish unlawful discrimination against them. Compare the cases of Mays and Gibson at Owensboro. Although the Company did not advance any "seniority" argument in its brief, that factor is mentioned in Davis' pretrial statement and answer as allegedly entering into the determination of whom to lay off. Moreover, once it is accepted (as I do) that a layoff was economically justified, the selection must be made on some basis not prohibited by law. The Company introduced no evidence justifying selection of these four employees on a "merit" basis, but there is evidence (the payroll records) warranting a conclusion that they would have been reached on a seniority basis.

With respect to the other three discharged at Princeton on November 8, however, their seniority far exceeded that of the four retained employees named above. Moreover, as to two of the three, Nelson and Carter, the testimony fails to show any ground for their being selected for layoff. Carter, who had signed a union card, had refused to sign the antiunion petition. The record does not conclusively establish whether Nelson signed it or not, but as he was one of the most active union proponents, it is a fair inference that he did not, particularly as Barrett, after Nelson's layoff, express the opinion that he was one of the union leaders. In the light of these circumstances, of the Company's open hostility to the Union, and of the lack of any other reason shown for their selection, I find that the selection of Nelson and Carter for inclusion in the November 8 layoff was caused, at least in part, by their engaging in activities protected by the Act.

A closer case is presented by the discharge of McGarrah on November 8. He had signed the antiunion petition and had not signed a union card. The record shows, however, that Betty Barrett, the office clerk who had ready access to Davis' ear and shared her Employer's antiunion sentiments, openly expressed the opinion that McGarrah was a union leader. Moreover, McGarrah had expressed pronoun views to General Foreman Kinder only 3 months before. On the other hand, McGarrah was the one employee as to whom there is testimony supporting the Company's pretrial contention that he was selected for discharge for nonunion reasons. To be sure, McGarrah's testimony tends to explain away the criticisms directed at him (e.g., he had slept in his truck, but only on his own time; his allegedly low average speed was occasioned by a misrouting; his presence on two occasions in a liquor store was for cashing checks), but the issue is not whether he was at fault in these matters, but whether the Company selected him for discharge because it believed him to be at fault or because it believed he was a union leader. These alleged faults of McGarrah had occurred some time before his discharge. The sleeping in the truck on his own time occurred "in the summer"; the misrouting occurred "two or three months before" the discharge; the episodes of check cashing in a liquor store are not fixed in time, but the first incident was observed by Mrs. Davis, who was in Florida in late October.

Significant in disposing of McGarrah's case is his testimony that in December, after his layoff, he met General Foreman Kinder, and Kinder then stated that he had expected to reemploy McGarrah before that date. Kinder, who testified thereafter, did not deny McGarrah's testimony, and inferentially confirmed it by testifying that he viewed the November 8 layoffs, including McGarrah's, as temporary and seasonal. This testimony tends to negate the evidence that McGarrah's alleged faults caused the Company to discharge him as an unsatisfactory employee. On the entire record, including the Company's known hostility to the Union and McGarrah's earlier expression of support for a union, I find that he was separated on November 8 because of the Company's belief that he was a union leader, and not because of his alleged faults. The fact that he was not active in the Union does not negate the illegal character of the illegally motivated action. See *The Ridge Tool Company*, 102 NLRB 512, 513, enfd. 211 F. 2d 88 (C.A. 6).

On December 8 the Company laid off Everett Cullivan and on December 13, Isaac Parson and Isaiah Young. Cullivan and Parson had both signed the antiunion petition; the record is silent as to whether Young signed it, but abounds with evidence that he and Nelson were the union leaders, and Davis, at the hearing, admitted knowing that Young was "very active in the Union." Also on or about December 13, the Company hired a new laborer and apprentice molder, one Whitehead. Although Parson and Cullivan were laid off out of seniority, no probative evidence in the record warrants a finding that the Company believed either of them to be union adherents. (Cullivan's testimony that employee Carnaharn had informed him of an inquiry from Mrs. Davis as to Cullivan's attitude on the Union is hearsay, as to Mrs. Davis.) Parson, moreover, was rehired the following month, and (in view of the 2-week shutdown at Christmas) missed less than 1 month's work. But the discharge of Young, a known union leader, coincident with the hiring of Whitehead, and the retention of such junior employees as White, Scott, Ellis, and Willis, is unexplained on this record, and in the light of company hostility to the Union may reasonably be attributed to Young's union activity. In short, I find that of the November-December layoffs or discharges at Princeton, those of Young, McGarrah, Nelson, and Carter were discriminatory; as to the others, General Counsel has failed to show that they would not have been reached in a nondiscriminatory layoff (the Terrys, Thompson, and McIntyre), or that the Company had any belief that they were engaged in union activity (Parson and Cullivan). Carter and Young were reinstated in June 1964.

3. The alleged constructive discharge of Lloyd Morgan

On January 22, 1964, employee Lloyd Morgan was one of a group of Princeton employees attending a union meeting in a room at the Juke Box Inn. Paul Young, who had been a supervisor at Owensboro but who was then a rank-and-file employee at Princeton, was observed making a list of the employees who attended that meeting.⁸ On January 24, 2 days later, Morgan's supervisor, General Foreman Kinder, told Morgan that from then on he would be expected to take his regular share of night duty. This problem had arisen the previous September, and Morgan had been permitted to avoid night duty on the plea that his wife worked, and he had to stay home with his children. In January, however, the Company insisted that Morgan take his regular turn at night, and Morgan therefore quit. The Company rehired him in May, when he was able to work at night, his wife having left her job in the meantime.

General Counsel urges that the Company learned, through Paul Young, of Morgan's attendance at the union meeting, and that it forced him to quit by insisting on working conditions it knew he would not accept, or in other words that Morgan was "constructively discharged." The coincidence in time lends considerable color to General Counsel's case. On the other hand, January 24 was also the date on which the Company rehired Parson, who was to share with Morgan and one Stryker in the projected night duty. The record indicates that when Morgan quit, Parson and Stryker shared the night duty, and that on occasion an additional man was transferred from another job to help them. From this General Counsel argues that the need for Morgan's night service was not so overwhelming as to warrant forcing him to quit. The record also indicates, however, that the need for night duty, which had lessened in October 1963, increased in January 1964, so that Kinder had some justification in reopening the issue with Morgan coincident with the reemployment of Parson. On the whole, and while the matter is not free from doubt, I find that General Counsel has not sustained his burden of proving that Morgan's attendance at the union meeting on January 22 was a motivating factor in the renewed demand 2 days later that he work his share of night duty, and I therefore recommend dismissal of the complaint as to him.⁹

III. THE OBJECTIONS TO THE ELECTION

The findings set forth above with respect to violations of Section 8(a)(1) and (3) at both the Owensboro and Princeton plants in the period between the filing of the petitions for certification and the election necessarily result in sustaining the Union's objections to the elections at both plants. I further find, as urged by the Union in support of its objections in the Princeton case, that the Company ordered McGarrah off its premises on the day of the election, thereby preventing him from fulfilling his assignment as observer designated by the Union. In the light of these findings, I shall recommend that the elections be set aside.

IV. THE REMEDY

As the record reveals deep and pervasive hostility to the employees' exercise of their Section 7 rights, I shall recommend a cease-and-desist order encompassing the unfair labor practices found and any other invasions of those rights. Affirmatively, I shall recommend that McGarrah and Nelson be offered reinstatement, and that they and the other employees found to have been the victims of unlawful discrimination, be made whole for wages lost as a result of the illegal action. Backpay due under the Recommended Order should be computed in accordance with the formulas set forth in *F. W. Woolworth Co.*, 90 NLRB 289, and *Isis Plumbing & Heating Co.*, 138 NLRB 716. I shall recommend the posting of an appropriate notice and, as noted above, the setting aside of the elections.

⁸ So far as this record shows, Young did not act at the Company's direction in compiling his list of employees attending the meeting, and I therefore do not find the Company guilty of unlawful surveillance.

⁹ The complaint alleged that the Company assigned Morgan "to the night shift . . . and refused to permit said employee to alternate between the day and night shift . . ." This allegation was obviously not sustained but General Counsel, without formally amending the complaint, presented the case on the theory that requiring *any* night work of Morgan was a device to force him to quit. I would not view this as a fatal variance if the proof sustained the new theory, as the facts were fully litigated.

CONCLUSIONS OF LAW

1. By its interrogation, threats, and failure to disavow the antiunion petition, as described above, the Company has interferred with, restrained, and coerced its employees in the exercise of their Section 7 rights, thereby committing unfair labor practices affecting commerce within the meaning of Sections 8(a)(1) and 2(6) and (7) of the Act.

2. By laying off or discharging employees Thomas Mason, Jewell Stafford, George W. Bryant, Jr., Joe Jackson, Wayne Johnson, Ralph Nelson, Theron Carter, Isaiah Young, and Joe McGarrah because of a belief that they were union supporters, the Company engaged in unfair labor practices affecting commerce within the meaning of Sections 8(a)(3) and (1) and 2(6) and (7) of the Act.

Accordingly, upon the foregoing findings of fact and conclusions of law, and upon the record as a whole, I recommend, pursuant to Section 10(c) of the Act, issuance of the following:

ORDER

American Casting Service, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discriminating against employees because of their membership in, or support of, International Molders' and Allied Workers' Union of North America, AFL-CIO, or any other labor organization.

(b) Threatening to close either or both of its plants if a labor organization should succeed in organizing its employees.

(c) Interrogating its employees as to their membership in, or support of, any labor organization, or as to their attendance at meetings of any labor organization, or as to which employees are leaders or supporters of any labor organization.

(d) Circulating, or acquiescing, in and ratifying the circulation of, any antiunion petition which employees are instructed to sign in order to retain their jobs.

(e) In any other manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

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

(a) Offer to reinstate Joe McGarrah and Ralph Nelson to their former or substantially equivalent positions, and make them and Thomas Mason, Jewell Stafford, George W. Bryant, Jr., Joe Jackson, Wayne Johnson, Theron Carter, and Isaiah Young whole, in the manner described in the portion of the Trial Examiner's Decision entitled "The Remedy," for any loss of earnings suffered by reason of the discrimination against them.

(b) Notify Joe McGarrah and Ralph Nelson if presently serving in the Armed Forces of the United States of their 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.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, time-cards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms thereof.

(d) Post at its plants in Princeton, Indiana, and Owensboro, Kentucky, copies of the attached notice marked "Appendix."¹⁰ Copies of such notice, to be furnished by the Regional Director for Region 25, shall, after being duly signed by Jack Davis, be posted 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.

(e) Notify the Regional Director for Region 25, in writing, within 20 days from the date of the receipt of this Decision, what steps the Respondent has taken to comply herewith.¹¹

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

¹¹ In the event that this Recommended Order is 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."

It is further ordered that the elections held January 7, 1964, among the employees of Respondent in its Princeton, Indiana, and Owensboro, Kentucky, plants, be, and hereby are, set aside, and that the Regional Director for Region 25 shall conduct further elections at such plants in the units he has heretofore found appropriate after he is satisfied that fair elections may be conducted at such plants.

APPENDIX

NOTICE TO ALL EMPLOYEES

As Recommended by a Trial Examiner of the National Labor Relations Board, we are posting this notice to inform our employees of the rights guaranteed them in the National Labor Relations Act:

WE WILL NOT discharge or lay off any employee for having joined, or supported the International Molders' and Allied Workers' Union of North America, AFL-CIO, or any other union.

WE WILL NOT ask any employee whether he or other employees are members of, or leaders of, a union.

WE WILL NOT threaten our employees that we will close our business rather than deal with a union.

WE WILL NOT in any other way interfere with our employees' right to join or support a union.

ALL OUR EMPLOYEES have the right either to join or not to join a union.

WE WILL offer Ralph Nelson and Joe McGarragh their old jobs, and we will give them and Isaiah Young, Theron Carter, Thomas Mason, Jewell Stafford, Wayne Johnson, Joe Jackson, and George W. Bryant, Jr., backpay for wages lost as a result of their discharge or layoff in November and December 1963.

AMERICAN CASTING SERVICE, INC.,
Employer.

Dated _____ By _____
(Representative) (Title)

NOTE.—We will notify Ralph Nelson and Joe McGarragh if either is 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, 614 ISTA Center, 150 West Market Street, Indianapolis, Indiana, Telephone No. Melrose 3-8921, if they have any question concerning this notice or compliance with its provisions.

Miscellaneous Drivers and Helpers Union Local 610, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America and Robert R. Wright, Inc. Case No. 14-CC-286-1. February 19, 1965

DECISION AND ORDER

Upon charges filed by Robert R. Wright, Inc., herein called Wright, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 14, issued a complaint dated August 31, 1964, against Miscellaneous Drivers and Helpers Union Local 610, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, herein called the Respondent, alleging that the Respondent had engaged in and was engaging in unfair labor practices within the meaning of