2. Pacific Maritime Association is, and has been at all material times, an employer within the meaning of Section 2(2) of the Act.
3. Wilbert Howard, Jr., Johnson Lee, James Cagney, Adrian McPherson, and Kenneth Vierra have been, at all times material here, employees within the meaning of Section 2(3) of the Act.
4. By interfering with, restraining, and coercing employees in the exercise of a right guaranteed them by Section 7 of the Act, as found above, Pacific Maritime Association has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.
5. By restraining and coercing employees in the exercise of a right guaranteed them by Section 7 of the Act, as found above, Local 10 has engaged in unfair labor practices within the meaning of Section 8(b)(1)(A) of the Act.
6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

[Recommended Order omitted from publication.]

Red Spot Paint & Varnish Co., Inc. *and* International Chemical Workers Union, AFL-CIO. *Cases Nos. 25-CA-2039 and 25-CA-2175. November 30, 1965*

DECISION AND ORDER

On August 24, 1965, Trial Examiner George A. Downing issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices within the meaning of the National Labor Relations Act, as amended, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. The Trial Examiner also found that Respondent had not engaged in certain other unfair labor practices and recommended that the complaint be dismissed with respect to such allegations. Thereafter, the Respondent filed acquiescence and exceptions to the Trial Examiner's Decision, and the General Counsel filed exceptions thereto and a brief in support thereof as well as a brief in support of the Trial Examiner's Decision.

Pursuant to the provisions of Section 3(b) of the Act, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel [Chairman McCulloch and Members Fanning 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 Trial Examiner's Decision, the exceptions, the briefs, and the entire record in the case, and hereby adopts the findings,[1] conclusions, and recommendations of the Trial Examiner.

[1] In adopting the Trial Examiner's finding that Superintendent Mentzel told a group of employees (including Bonnell) that he had union meetings under surveillance, we do not rely upon the fact that Respondent called none of the employees as witnesses to support Mentzel's denial of Bonnell's testimony on this point.

[The Board adopted the Trial Examiner's Recommended Order.]

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

These consolidated proceedings under Section 10(b) of the National Labor Relations Act, as amended, were heard before Trial Examiner George A. Downing in Evansville, Indiana, on January 25 and 26 and June 28, 1965, pursuant to due notice. The complaint in Case No. 25–CA–2039, which was issued on November 20, 1964, on a charge dated September 14, alleged in substance that Red Spot Paint & Varnish Co., Inc., herein called the Respondent, engaged in unfair labor practices proscribed by Section 8(a)(1) and (3) of the Act by assertions that Respondent had under surveillance certain union activities and by discriminatorily discharging Athol Bruce Gardner and Revel Allen Kingsbury, Jr., on July 17, 1964, because of their union membership and activities. The complaint in Case No. 25–CA–2175, was issued on May 7, 1965 (during a recess in the hearing in the former case), on a charge dated March 22, 1965; it alleged in substance that since February 1, 1965, Respondent engaged in unfair labor practices proscribed by Section 8(a)(1), (3), and (4) of the Act by discriminating in certain respects against Jack L. Bonnell because of his union membership and activities and because he gave testimony at the former hearing. The proceedings were consolidated on May 17, 1965, by order of me on the General Counsel's motion without objection by Respondent. Respondent filed separate answers to said complaints in which it denied the allegations of unfair labor practices.

The issues under the pleadings and under the evidence are purely factual ones; they concern only questions whether Respondent in fact engaged in the unfair labor practices alleged in the complaints.

Respondent's motions to dismiss, on which ruling was reserved at the hearing, are disposed of on the basis of the findings herein.

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

FINDINGS OF FACT

I. JURISDICTIONAL FINDINGS

Respondent, an Indiana corporation, has its principal office, place of business, and a manufacturing plant in Evansville, Indiana, where it is engaged in the manufacture, sale, and distribution of paints, varnishes, and related products. Respondent purchases and receives annually directly from extrastate points goods and materials valued in excess of $50,000, and it sells and ships annually to extrastate points goods valued in excess of $50,000. Respondent is therefore engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

International Chemical Workers Union, AFL–CIO, herein called the Union, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *Introduction*

These proceedings were an outgrowth of an unsuccessful union campaign early in 1964, which was itself the subject of a representation proceeding in Case No. 25–RC–2557. The Union lost the election which was held in that case on March 17, 1964, but it filed no objections and the Regional Director certified the results on March 25. Allen Kingsbury acted as the Union's observer in that election, substituting for Bruce Gardner who had withdrawn.

Kingsbury and Gardner were discharged on July 17, and the charge in Case No. 25–CA–2039 was filed on September 15. The Section 10(b) date is therefore March 15, precluding the finding of any unfair labor practice based on conduct which occurred prior thereto. Though the General Counsel offered evidence concerning Respondent's conduct during the election campaign as far back as January,

it is given weight herein only insofar as relevant to show hostility to the Union (in support of the alleged discriminatory motive for the discharges) and knowledge of the union activities.

B. *Preelection and postelection conduct; interference, restraint, and coercion*

The General Counsel offered a series of letters from Respondent to its employees from January 31 through March 14. Examination of them shows that they advanced legitimate campaign arguments within permissible bounds of free speech though they also showed that the Respondent was opposed to the Union, a fact which Respondent stipulated. Furthermore it was stipulated that in a speech made by Respondent President Harry Bourland shortly before the election Bourland made no threats concerning the Union or union activities and stated that if a majority of the employees wanted the Union he would go along with them and that no one would be discharged because of union activities.

Gardner testified that on January 31 Plant Superintendent Gilbert Mentzel approached him and began to discuss the Union, but that conversation is noteworthy only for the fact that Gardner disclaimed any interest in the Union and stated the matter was one "for the younger men to decide."

Jack Bonnell testified that in February Mentzel asked him whether he had heard anything about a union movement in the plant and how Bonnell felt about it. Bonnell replied that he could not see that a union could do much good for the employees. Bonnell testified further that a week before the election Mentzel discussed the election with him and that Mentzel stated he knew of a favor the Company had done for Bonnell and that he knew of nothing that would hurt him worse than to know that Bonnell would vote yes at the election.

Kingsbury testified that in January Mentzel asked him whether he had been approached by the Union and when he acknowledged that he had, Mentzel proceeded to tell him some of the things the Company proposed to do. Kingsbury brought up the subject of an item in a local newspaper concerning the alleged payment of some $50,000 in Christmas bonuses to Respondent's employees. Mentzel stated that that was a mistake and should have been corrected.

Concerning those preelection activities Mentzel freely admitted that after the Company received the election notice from the Board, he "campaigned" on the Company's behalf by going to each employee individually and asking him to support the Company. He denied going any further than that, though he testified that when Kingsbury mentioned the newspaper item he informed Kingsbury the figure of $50,000 mentioned in the newspaper story must have been a misprint.

Both Kingsbury and Bonnell testified to separate conversations with Mentzel after the election in which Mentzel allegedly made statements which the General Counsel relies upon as establishing violations of Section 8(a)(1). Kingsbury testified that around March 30, Mentzel called him into an office, referred to the fact that he had just gotten Kingsbury a 10-cent raise, stated that was the best he could do at the time, and that he had concluded that Kingsbury was one of the union supporters because he had brought up the item in the newspaper (concerning the Christmas bonuses). Kingsbury commented that he was not supposed to have been the Union's observer, and Mentzel replied that he knew that because he had someone who kept him informed of who was in the Union and what they were doing and he therefore knew that Kingsbury was "pinch-hitting for another party" through the informer who kept Mentzel "up to date on everything that was said."

Bonnell testified that some time after the election Mentzel spoke to a group of some six employees in the shipping office one morning, stating that he knew everything that went on during the union drive and who the employees were who attended the meetings because he had a man who was sitting in on the meetings and reporting back to him. Bonnell named four of the other persons present on the occasion, including Kenneth Bittner

Mentzel denied Kingsbury's testimony concerning an alleged informer or spy at union meetings and denied that he had any such informer. He also denied the remainder of Kingsbury's testimony and testified that the only reference to a union on the occasion when he spoke to Kingsbury about his raise was Kingsbury's comment that he would not bother Mentzel about a union again. Mentzel admitted knowing, however, through "rumors," that Kingsbury was the substitute for Gardner as the Union's observer, explaining that "in a plant like that you hear everything."

Mentzel flatly denied Bonnell's testimony concerning his alleged discussion of the Union with a group of the employees in the shipping office. Respondent called no witness to support Mentzel's latter denial despite the fact that Bonnell had supplied the names of four other persons in the group, including Kenneth Bittner, who testified for Respondent on other matters.[1]

Determinative of the credibility issues between Mentzel and the General Counsel's witnesses are the following circumstances: (1) Mentzel admitted that he campaigned for company support among all of Respondent's employees. (2) Though the postelection statements which Kingsbury and Bonnell testified to were made on separate occasions, they were substantially identical in content as concerned Mentzel's claims of surveillance and they may therefore be considered to an extent as mutually corroborative. (3) Mentzel admitted knowing of Kingsbury's substitution for Gardner and his explanation indicated that he heard everything else (concerning the Union). (4) Finally, and most persuasive, Respondent did not attempt to support Mentzel's denials concerning statements made to the group in the shipping office though Bonnell supplied the names of four other employees who were present, including Respondent's witness Bittner.

I therefore credit the testimony of the General Counsel's witnesses concerning both Mentzel's preelection statements and his postelection statements. Confining my findings only to the latter, I conclude and find that by Mentzel's statements that he had kept under surveillance the meeting places, meetings, and activities of the Union, Respondent interfered with, restrained, and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act.

C. *The discharge of Bruce Gardner and Allen Kingsbury*

Bruce Gardner was employed in 1951 as stockman at the rate of $1.10 per hour and progressed by raises (cost-of-living, length of service, and merit) to $1.90 on July 6, 1959. He received no raises during the last 5 years of his employment, a period which coincided with Mentzel's tenure as plant superintendent. Allen Kingsbury was hired on February 19, 1959, as a paint filler at the rate of $1.50 per hour and after a year was made a paint shader. His rate of pay progressed ultimately to $2.10 per hour, his two final raises of 10 cents each coming on January 13 and March 30, 1964.

Both Gardner and Kingsbury had signed authorization cards for the Union, and stipulated testimony was received that they were among persons who secured cards of other employees and delivered them to the Union's representative. Gardner at one time had promised to act as the Union's observer in the election, but he announced in a union meeting on March 13 that "for medical reasons" he was unable to serve. Kingsbury was chosen at that meeting to substitute for him. Mentzel admitted knowledge of that substitution as found in section B, *supra*.

Despite the foregoing, the evidence showed that Gardner possessed no genuine sentiment for the Union and that Respondent had no reason to believe that he did. Indeed, Gardner's testimony disclosed only slight interest in the campaign and slight participation in it. Thus he testified he engaged in no public activity for a union and that in an earlier campaign he had in fact talked *against* the Union, telling the employees that a small place like Respondent's plant should not have a union. Gardner also served as the *Company's observer* in the prior election. As for the current campaign Gardner testified:

> Q. (By Mr. FISHER.) Had you yourself asked other employees to sign union cards during this union drive?
> A. I did not. I probably handed a card or two to someone else when the thing was mentioned, but merely handed them to them. I asked no one to vote.
> Q. Not to vote, but to sign a card?
> A. I asked no one to sign a card.

Furthermore on January 31 Gardner specifically disclaimed to Mentzel any interest in the Union, saying that he did not care whether there was one union or a dozen unions because at his age, 62, he was not concerned about the matter and that it was one for the younger men to decide. Finally, Gardner admitted that he informed

[1] Bittner's testimony on direct examination concerned only matters relating to Gardner's discharge. On redirect examination Bittner was questioned in general terms about whether Mentzel ever asked him to spy, whether he did spy, and whether he reported to Mentzel, but at no time was he questioned about Mentzel's statements made to the group which Bonnell identified.

Respondent Attorney Donovan that he was not active in the Union and testified his only real activity concerning the Union occurred in the earlier campaign when he had worked against it.

Mentzel discharged both Gardner and Kingsbury on July 17, and except for the coincident discharge of the Union's observer there is little in the record which tends to support a finding that the General Counsel made out even a *prima facie* case that Mentzel discharged Gardner because of his union activities. But whatever the strength of an inference which might be drawn from the coincidence of the discharges, from Mentzel's claims of surveillance, and from the evidence that Mentzel (and Respondent) were opposed to the Union, Respondent adduced evidence which overcame the General Counsel's showing and which established that Gardner was discharged for causes unrelated to his meager prounion sentiments and activities. It is unnecessary to review that evidence in detail for it showed, without substantial conflict, the following facts:

Gardner's job during his entire employment involved manual labor, i.e., the moving, storing, or stocking of the packed paint, and he also helped in labeling from time to time. The job became, with advancing age, an arduous one for Gardner, particularly because of contracting emphysema, whose effects were felt in the cutting down of an oxygen supply and hence of energy. The hauling or moving of the heavy loads of paint induced panting and loss of breath and the necessity for longer periods of rest on the job. In addition to the foregoing Kenneth Bittner frequently complained to Mentzel that Gardner did not help him with labeling when Gardner had nothing else to do.

Mentzel in turn had long borne a grudge against Gardner because Gardner presumed on a long-standing personal friendship with President Harry Bourland and Mentzel felt that Gardner was using Bourland as a whip over his head because Gardner "had more pull with the boss." [2] He had given Gardner no raise during his 5-year tenure as plant superintendent, excluding him even from a blanket raise to all employees in April 1964.

Though Mentzel testified to getting other complaints concerning Gardner, it was Bittner who complained most frequently (concerning Gardner's failure to help him) and Bittner finally informed Mentzel he would have to choose between them. Even then Mentzel put Bittner off, referring to rumors that Gardner proposed to quit at age 62 and later in 1964 to a rumor that Gardner would wait until he got his 2 weeks' vacation.[3] Mentzel testified that in discharging Gardner he informed him the reason was that Gardner was physically unable to do the work and that there was a rumor that he was going to quit at age 62. Gardner's testimony was to substantially similar effect: i.e., that Mentzel stated the reason was that Gardner had not helped Bittner as he should and that he had not retired despite many statements that he was going to retire. Gardner replied that he had not informed Mentzel of his intention to retire and that Mentzel could believe what he wanted to.

A notation on the Company's personnel records assigned as the reason for discharge, "Work unsatisfactory," and a form which Respondent issued to the Indiana Employment Security Division assigned, "Incapable to perform job requirement."

Mentzel cited as precedent for his action his discharge in 1962 or 1963 of one Edmund Rhodes, an employee of some 10 years' standing, who was also 62 years of age and who also like Gardner became physically unable to work.

I conclude and find that Respondent's evidence, as above summarized, was plainly sufficient to overcome the General Counsel's showing and to dissipate whatever inference or suspicion of discriminatory motivation might be drawn from the General Counsel's case if considered alone. I therefore conclude and find that the General Counsel failed to establish by a preponderance of the evidence that Mentzel discharged Gardner because of the latter's union membership and activities.

Kingsbury's discharge, however, stands on an entirely different footing both as concerned the strength of the General Counsel's case and as concerned the weaknesses in Respondent's defense. On the first score there was here no corresponding disclaimer by Kingsbury of union sentiments and activities, he did not withdraw as observer as Gardner did, and Mentzel was fully informed through their conversations and otherwise (see section B, *supra*) of Kingsbury's attachment to the Union. Furthermore, certain inconsistencies and weaknesses in Respondent's defenses tended only to strengthen and confirm the General Counsel's own showing.

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[2] Jack Bonnell, a witness for the General Counsel, corroborated testimony of Respondent's witnesses concerning both the extent of Gardner's claims of friendship with Bourland and the fact of Mentzel's dislike for Gardner.

[3] Gardner actually got his vacation in June before his discharge.

Respondent's records showed that Kingsbury received some eight separate raises for "merit and length of service," by which his pay was increased from $1.50 to $2.10. Five of those raises were given after Kingsbury was made a paint shader and the last two of them, given in 1964, accounted for one-half (i.e., 20 cents of 40 cents), of all which were given him after he was made a paint shader. But Respondent sought to impeach that showing of its own endorsement of Kingsbury's job performance and capabilities by testimony of Mentzel and Ray Sills, his assistant, which may be summarized as follows:

Paint shading is a technical job and some 2 years or more of training are required for a trainee to become a qualified shader. Kingsbury's progress was satisfactory for the first 2 years but after that his rate of progress slackened and his performance generally became unsatisfactory. Mentzel attributed Kingsbury's deterioration in part to the fact that Kingsbury's mental attitude became affected by certain financial and other personal problems, resulting in inability to concentrate properly on the technical details of mixing colors. Sills' testimony was to similar effect.

Sills testified that he frequently spoke to Kingsbury about the need to increase his production. On one occasion, approximately a year before the discharge, Kingsbury defended himself against Sills' criticism by implying that Sills was motivated by religious differences. Sills testified further that he spoke to Kingsbury some three of four times during the period from January to July 1964, but he was unable to specify the occasion of his last criticism or to fix the time of it except to say it was a month or so before the discharge. Under Sills' testimony all his criticisms were phrased in terms of the need to increase production.

Mentzel testified that he discharged Kingsbury on July 17, assigning as the reason at the time that Kingsbury's work was unsatisfactory. That reason corresponded also to the one noted on Respondent's personnel records and to the one assigned in the form issued to the Indiana Employment Security Division. Kingsbury's testimony was also in substantial accord; i.e., Mentzel told him he was being discharged "because you will never make a shader."

Despite the foregoing unanimity and the firm commitment explicit in the foregoing evidence, Mentzel proceeded to testify, however, that the "immediate cause" of Kingsbury's discharge was that Kingsbury falsely claimed to be sick on Monday, July 13, when in fact he went to the Morris Plan Bank to apply for a loan. Mentzel learned of the deception immediately through a call from the bank and after discussing the matter with Sills decided to discharge Kingsbury at the end of the week. However, though Mentzel spoke to Kingsbury about his absence when Kingsbury came in to work on Tuesday, his comment was limited to the innocuous observation that Kingsbury "got well pretty fast." Mentzel said nothing in criticism of Kingsbury's deception, gave him no warning, and did not inform him of his impending discharge. Indeed, so far as the evidence shows, Kingsbury was never informed that his Monday's absence had anything to do with his discharge, much less than it was "the immediate cause," as Mentzel testified.

Concerning Kingsbury's two raises in 1964, Mentzel explained that he gave the final one (March 30) to relieve Kingsbury's financial worries and that he told Kingsbury at the time he should try to get his mind on his job. Under Kingsbury's testimony, however, that was the occasion on which Mentzel referred to Kingsbury as a union supporter and to knowledge through an informer of Kingsbury's selection as union observer. Kingsbury's testimony concerning that conversation has previously been credited in section B, *supra*.

Further evidence concerning developments after Kingsbury's discharge is also of some relevance as concerns the quality of Kingsbury's work. Kingsbury testified that around November 13 he was offered reinstatement through Respondent Counsel Donovan and that he also got a letter from Mentzel which directed him to report to work on November 16. Under Kingsbury's testimony neither Donovan nor Mentzel made any reference to Kingsbury's alleged prior unsatisfactory work though the job to which he was assigned was not that of paint shader. Kingsbury testified that when he reported, Mentzel stated he did not think Kingsbury was coming back and that he had given to another employee the job he was going to give Kingsbury. Respondent stipulated that Kingsbury was not offered reinstatement to his job as shader and that the job on which he was reemployed required less skill than that of shader.

Kingsbury also testified to an offer which he received in late December from Robert Holland, the chemist in Respondent's laboratory, to come into the laboratory as a paint shader, working on metallizing. Though I credit Kingsbury's testimony concerning the circumstances surrounding that offer,[4] it was plain from the entire evidence

[4] Holland's testimony was characterized by abrupt reversals and self-contradictions, and he ultimately admitted that he discussed with Kingsbury the "possibility" that Kingsbury would come into the lab.

that Holland was acting on his own initiative, that he knew nothing of the basis of Kingsbury's discharge or of the circumstances surrounding his reinstatement, and nothing of Kingsbury's capabilities other than that Kingsbury once worked in the shading department. Holland's offer is therefore without significance on the issue of Kingsbury's competence.

The problem in appraising Respondent's evidence is not that of determining whether valid or justifiable cause existed for discharging Kingsbury but whether Respondent was in fact motivated by such causes. For where an alleged Section 8(a)(3) violation is involved it is the "real motive" of the employer which is decisive *N.L.R.B.* v. *Brown, et al., d/b/a Brown Food Store,* 375 U.S. 962, and cases these cited. In other words "the fact that a lawful cause for discharge is available is no defense where the employee is *actually* discharged because of his Union activities." *N.L.R.B.* v. *Ace Comb Co., et al.,* 342 F. 2d 841 (C.A. 8); and see *N.L.R.B.* v. *Wells, Incorporated,* 162 F. 2d 457, 460 (C.A. 9).

Furthermore the giving of implausible, inconsistent, or contradictory explanations of a discharge may be considered in determining the real motive; it is circumstance indicative of antiunion motivation. *N.L.R.B.* v. *Condenser Corporation of America,* 128 F. 2d 67, 75 (C.A. 3), *N.L.R.B.* v. *Radcliffe, et al, d/b/a Homedale Tractor & Equipment Company* 211 F. 2d 309, 314 (C.A. 9); *Sandy Hill Iron & Brass Works,* 69 NLRB 355, 377–378, enfd. 165 F. 2d 660 (C.A. 2); cf. *N.L.R.B.* v. *International Furniture Company,* 199 F. 2d 648, 650 (C.A. 5). "When an employer shifts position several times in explaining why an employee has been fired, his own case is weakened, and the Board's conclusion that the true reason was for union activity is correspondingly strengthened." *N.L.R.B.* v. *Georgia Rug Mill,* 308 F. 2d 89, 91 (C A. 5); and see *N.L.R.B.* v. *Schill Steel Products Inc.,* 340 F. 2d 568, 573 (C.A. 5).

The foregoing principles are fully applicable here. If it be assumed that the circumstances surrounding Kingsbury's absence on Monday were the real basis for the discharge, it seems inconceivable that Mentzel would not promptly have confronted Kingsbury upon the latter's return to work and have informed him of Mentzel's extreme displeasure and of the decision to discharge Kingsbury, particularly since the evidence did not show that Kingsbury's record of absenteeism was ever a prior source of complaint. But though Mentzel spoke to Kingsbury, he made no criticism and gave no warning but contented himself with making a casual comment on Kingsbury's recovery. It seems even more incredible, assuming the genuineness of Mentzel's testimony, that Mentzel did not, in discharging Kingsbury, inform him that his Monday's absence had sparked the discharge action. Instead, by oral statement and by two official records Mentzel assigned the cause as unsatisfactory work.

But that alleged cause was in turn inconsistent with the record of Kingsbury's advancement and Respondent's endorsement of his job performance. Thus Kingsbury received during his 4 years as a paint shader some five merit and length of service raises, four of which were given him during the last 2 years on the job, which according to Respondent's claims was the very period when Kingsbury's performance was lagging. Furthermore the last two of those raises were given in his *final 6 months on the job* and accounted for one-half of the total amount of the raises he received as a shader. Those facts plainly attested to Respondent's current and continuing regard for Kingsbury's competence and are plainly inconsistent with its contrary claims that Kingsbury's work was in fact unsatisfactory. Furthermore it would in no event have taken 4 years for Mentzel to determine that Kingsbury would "never make a shader." Significantly also, as found in section B, *supra,* Mentzel informed Kingsbury of his last raise in the setting of comments concerning Kingsbury's attachment to the Union and of Mentzel's admitted knowledge through an informer of Kingsbury's union activities.

Finally, though Respondent contends by brief that Kingsbury's financial difficulties also constituted "valid cause for discharge," the evidence showed that those difficulties were chronic throughout Kingsbury's entire employment and further showed that Mentzel did not assign them as a cause for discharge. And though Mentzel sought to explain his final raise by a desire to give Kingsbury some financial relief, Respondent's records assigned as usual, "Merit and length of service."

In sum, Respondent's own evidence itself furnished part of "reasonable cause for believing that the ground put forward by [it] was not the true one and the ground was because of union activity." *N.L.R.B.* v. *Texas Bolt Company,* 313 F. 2d 761, 763 (C.A. 5). Plainly when the weaknesses and inconsistencies in Mentzel's explanations are considered in the light of the circumstances of the discharge, of Kingsbury's service as the Union's observer, of Mentzel's earlier statements concerning Kingsbury's attachment to the Union and of Mentzel's professed surveillance through an informer of union membership and activities, the preponderance of the evidence on the record as a whole established that Mentzel was in fact discriminatorily motivated in discharging Kingsbury. I so conclude and find.

D. *The alleged discrimination against Bonnell*

Jack Bonnell testified as the General Counsel's witness in Case No. 25–CA–2039 on January 25. See section B, *supra*. Recalled on June 28 in support of the complaint in Case No. 25–CA–2175, Bonnell testified that for some 2 years before January he was available for overtime work at night only on infrequent occasions because his wife had nighttime employment and his presence was required at home as "babysitter." Bonnell had informed his supervisor, Edward McDaniel, of those circumstances and they had an understanding that Bonnell would notify McDaniel on occasions when he was available for overtime work at night. The last occasion on which Bonnell worked overtime at night prior to January 25 was in November or December, and after January 25 he worked no overtime, day or night, prior to the filing of the new charge on March 24. Thereafter he worked 12½ hours of daily overtime prior to the resumed hearing out of a total of 87 daytime hours and a grand total of 132 overtime hours. An ordinary overtime assignment at night ran from 3 to 4 hours.

Comparative figures for the year 1964 (contained in a tabulation) showed that Bonnell had worked a total of 56 overtime hours, 47½ daytime and 8½ at night, out of a total of 400½ hours, or approximately 14 percent of the total. If it be assumed that Bonnell was entitled to a comparable percentage of the 1965 overtime, he would have received an additional 6 hours of overtime work. Bonnell admitted, however, that there were one or two occasions between January 25 and March 25 when he could have worked overtime at night but he did not inform McDaniel that he was available and did not ask for overtime work. Bonnell also admitted that from January to March there were two occasions when McDaniel asked him if he wanted to work overtime at night and he refused because he had to babysit.

As for other alleged discriminatory treatment, Bonnell testified that prior to the former hearing McDaniel spoke to him occasionally during the day and that they would "cut up" and "carry on." He testified that after the hearing something seemed to come between them and that McDaniel did not want to talk with him.

Bonnell testified further than on March 11 McDaniel spoke to him at a time when he had no work to do, stating that though it did not matter to McDaniel, Bonnell had better find something to do because Mentzel had seen Bonnell standing around and that Bonnell had better start working on something if it was only making up boxes. Bonnell testified he assumed that Mentzel had seen him loafing and that McDaniel was simply relaying Mentzel's message to him.

Bonnell also testified to an occasion around February 1 when he was put to selling in the retail store for some hour and a half (not his normal work) while one Gilliland was doing his usual work.

The difficulty with the General Counsel's case is that Bonnell's testimony does not establish that he was in fact discriminated against. Though his failure to receive any overtime assignment until the charge was filed was a suspicious circumstance, the force of that suspicion was largely dissipated by the fact that Bonnell was twice offered overtime work and on two other occasions he failed to notify McDaniel that he was available for a nighttime assignment. As for the postcharge period, neither the tabulation nor Bonnell's testimony establishes that any discrimination occurred.

Bonnell's remaining claims of mistreatment were devoid of substance. As to his brief assignment to the retail store, there was no showing that either harassment or discrimination was intended. Also trivial was Bonnell's complaint that McDaniel no longer "cut up" with him, particularly since Bonnell admitted he once complained to Mentzel that it was *all play and no work* in the department and suggested an interest in being transferred. As for McDaniel's direction that he should find some work to do, discrimination is claimed because McDaniel said nothing to employee Gilliland at the time though Gilliland, who was also out of (plant) work, was engaged in working on McDaniel's personal antique furniture. That contention ignores the fact that McDaniel was simply relaying a message from Mentzel, who had apparently seen Bonnell loafing on the job, and there was no showing that Mentzel knew that Gilliland also was out of work or knew that he was working on McDaniel's furniture.

I therefore conclude and find that the evidence does not establish that Respondent in fact discriminated against Bonnell, and I shall recommend that the complaint in Case No. 25–CA–2175 be dismissed.

IV. 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 which is conventionally ordered in such cases as provided in the Recommended Order below and which I find necessary to remedy and to remove the effects of the unfair labor practices and to effectuate the policies of the Act. For reasons which are

stated in *Consolidated Industries, Inc.,* 108 NLRB 60, 61, and cases there cited, I shall recommend a broad cease and desist order. I shall recommend that Respondent be required to make the usual offer of reinstatement to Kingsbury, since the record establishes that Kingsbury was not reinstated to his former job of paint shader. Backpay of course should be computed in the usual manner as recommended below.

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

CONCLUSIONS OF LAW

1. By interfering with, restraining, and coercing its employees in the exercise of rights guaranteed in Section 7 of the Act, Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1).

2. By discharging Revel Allen Kingsbury, Jr., on July 17, 1964, and by thereafter failing to reinstate him to his former position because of his union membership and activities, Respondent engaged in discrimination to discourage membership in the Union, thereby engaging in unfair labor practices proscribed by Section 8(a)(3) and (1) of the Act.

3. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

4. Respondent did not discriminatorily discharge Athol Bruce Gardner on July 17, 1964, and did not discriminate against Jack Bonnell as alleged in the complaint in Case No. 25–CA–2175.

RECOMMENDED ORDER

Upon the foregoing findings of fact and conclusions of law and the entire record in the case, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, I recommend that the Respondent, Red Spot Paint & Varnish Co., Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in International Chemical Workers Union, AFL–CIO, or in any other labor organization of its employees, by discharging, failing to reinstate, or in any other manner discriminating against employees in regard to hire or tenure of employment or any term or condition of employment.

(b) Informing employees that it has kept under surveillance the meeting places, meetings, and activities of the Union.

(c) In any other manner interfering with, restraining, or coercing its employees in the exercise of their right to self-organization, to form, join, or assist said International Chemical Workers Union, AFL–CIO, or any other labor organization, to bargain collectively through representatives of their own choosing or to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities.

2. Take the following affirmative action which I find will effectuate the policies of the Act:

(a) Offer to Revel Allen Kingsbury, Jr., 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 would normally have earned from July 17, 1964, 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, together with interest thereon at the rate of 6 percent per annum. *Isis Plumbing & Heating Co.,* 138 NLRB 716.

(b) Notify Revel Allen Kingsbury, Jr., 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 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, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under this Recommended Order.

(d) Post in its offices and plant at Evansville, Indiana, copies of the attached notice marked "Appendix." [5] Copies of said notice, to be furnished by the Regional Director for Region 25, shall, after being duly signed by Respondent's representative,

[5] If this Recommended Order is 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. If the Board's Order is enforced by a decree of a United States Court of Appeals, the notice will be further amended by the substitution of the words "a Decree of the United States Court of Appeals, Enforcing an Order" for the words "a Decision and Order."

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 by 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 receipt of this Decision, what steps Respondent has taken to comply herewith.[6]

It is recommended that the complaint in Case No. 25–CA–2175 be dismissed.

[6] If this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify the Regional Director for Region 25, 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, as amended, we hereby notify our employees that:

WE WILL NOT discourage membership in International Chemical Workers Union, AFL–CIO, or in any other labor organization, by discharging or failing to reinstate employees or in any other manner discriminating in regard to hire or tenure of employment or any term or condition of employment.

WE WILL NOT inform employees that we have kept under surveillance the meeting places, meetings, and activities of the Union.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of their right to self-organization, to form, join, or assist said International Chemical Workers Union, AFL–CIO, or any other labor organization, to bargain collectively through representatives of their own choosing, or to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities.

WE WILL offer to Revel Allen Kingsbury, Jr., 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 in the manner provided in the Trial Examiner's Decision.

All our employees are free to become or remain, or to refrain from becoming or remaining, members of the above-named or any other labor oganization.

RED SPOT PAINT & VARNISH CO., 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 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.

If employees have any question concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 614 ISTA Center, 150 West Market Street, Indianapolis, Indiana, Telephone No. Melrose 3–8921.

Stark Ceramics, Inc. *and* United Brick and Clay Workers of America, AFL–CIO. *Cases Nos. 8–CA–3547, 8–CA–3716, and 8–CA–3891. November 30, 1965*

DECISION AND ORDER

On September 17, 1965, Trial Examiner Federick U. Reel issued his Decision in the above-entitled proceeding, finding that Respond-