by means proscribed by Section 8(b)(4)(D) of the Act, to force or require the Employer to assign the above work to ironworkers who are represented by it.

3. Within 10 days from the date of this Decision and Determination of Dispute, Iron Workers Local No. 155, International Association of Bridge, Structural and Ornamental Iron Workers, AFL–CIO, shall notify the Regional Director for Region 20, in writing, whether it will refrain from forcing or requiring Valley Foundry & Machine Works, Inc., by means proscribed by Section 8(b)(4)(D), to assign the work in dispute in a manner inconsistent with the above determination.

Conomos Painting Company *and* Gary Nichols, Kenneth Yahrmatter

Painters Local Union No. 8, Brotherhood of Painters, Decorators and Paperhangers of America, AFL–CIO *and* Gary Nichols.
Cases Nos. 25–CA–2131 and 25–CB–591. December 20, 1965

DECISION AND ORDER

On October 1, 1965, Trial Examiner Thomas A. Ricci issued his Decision in the above-entitled proceeding, finding that Respondents had not engaged in any unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety, as set forth in the attached Trial Examiner's Decision. Thereafter, the General Counsel filed exceptions to the Decision and a supporting brief, and the Respondents filed answering briefs in support of the Trial Examiner's Decision.

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 this case to a three-member panel [Members Fanning, Brown, and Zagoria].

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,[1] the exceptions and briefs, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.

[The Board dismissed the complaint.]

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[1] We hereby note and correct the following inadvertent errors in the Trial Examiner's Decision: Under his finding of facts in section 4, substitute "senior to W Lambert" for "junior to W. Lambert," and "senior to Heiman and Tsankaris" for "junior to Heiman and Tsankaris."

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

This proceeding, with all parties represented, was heard before Trial Examiner Thomas A. Ricci in Chicago, Illinois, on June 23, 24, and 25, 1965, on consolidated complaint of the General Counsel and answers by Conomos Painting Company, herein called the Company Respondent or the Company, and by Painters Local Union No. 8, Brotherhood of Painters, Decorators and Paperhangers of America, AFL–CIO, herein called the Union Respondent or the Union. The issues litigated are whether the Union has violated Section 8(b)(1)(A) and 8(b)(2) of the Act, and whether the Company has violated Section 8(a)(3) and (1). Briefs were filed after the close of the hearing by all parties. The General Counsel also filed a motion to correct the transcript in a number of details; no objections were received from either Respondent concerning this motion. Except for a proposed change in the testimony of the witness Yahrmatter, discussed below, the motion is granted and the motion document is hereby made a part of the record as a Trial Examiner's exhibit.

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

FINDINGS OF FACT

I. THE BUSINESS OF THE COMPANY

Conomos Painting Company, a Pennsylvania corporation with its principal office in Pittsburgh, is engaged in the business of general painting throughout the United States; at the time of the events here involved it was working on a large project at Portage, Indiana. During the past year, a representative period, the Company performed services valued in excess of $50,000 in States other than the State of Pennsylvania. During the same period the Company purchased, transferred, and delivered to its various projects throughout the country goods and materials valued in excess of $50,000 which were transported to such locations directly from States other than the one in which the projects or locations were located. I find that the Respondent is engaged in commerce within the meaning of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

Painters Local Union No. 8, Brotherhood of Painters, Decorators and Paperhangers of America, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

The Question

Yahrmatter and Nichols are painters who have always been members in good standing in Local Union No. 8; in January 1965 they were employed by the Conomos Company on a building project at Portage, Indiana, where Bethlehem Steel was erecting a large new facility. For a year the question of whether the painters should or should not do overtime work for time and a half instead of double time had been a recurring source of irritation, among the employees themselves, between them and company officials, within the Union with members disagreeing with their spokesmen, and even, apparently, setting some union officers against others. The need for painters fluctuated on the project as the stages of construction varied, and, in the normal course of business, the Company laid off about 10 men in mid-January from the then complement of approximately 50.

Yahrmatter and Nichols were among those who believed it wrong to work overtime for less than double time, although they had worked at the lower rate throughout their employment. Twice during the 13- or 14-month period between the start of the job and the end of 1964, group sentiment among the painters had caused union agents to ask the Company to either pay double time or discontinue overtime entirely, and in each instance the men reverted to a straight 40-hour week. The last such action occurred on or about the first of January 1965; no overtime was performed at all between that date and the time of the hearing in June.

The complaint alleges that the Union, in resentment against these two men for having been the instigators in bringing about discontinuance of overtime altogether, caused the Company to select them for inclusion among the group of men that had to

be laid off in January. The Company in turn is charged with having discriminated against them in their employment by selecting them because the Union so commanded. On the asserted grounds that the efforts of the men to win double time pay in place of time and a half was a form of union or concerted activity displeasing to the "Union," or the "union officers," or at least "certain" union officers, the Union Respondent is said to have caused illegal discrimination in violation of Section 8(a)(3) of the Act, and therefore itself to have committed an unfair labor practice in violation of Section 8(b)(2), and the Company, because it acted pursuant to such pressure, to have violated Section 8(a)(3).

The General Counsel's Theory of Proof; The Nature of the Evidence

This is strictly a circumstantial evidence type of case and the General Counsel literally conceded the fact at the hearing. There is no testimony, or other form of direct proof, indicating that any agent or person on behalf of the Union communicated to management a desire or demand that Yahrmatter and Nichols be laid off. Pursuant to a prehearing motion by the Union the General Counsel was ordered by a Trial Examiner to disclose, among other things, the identity of the union agents who acted on its behalf, and to what persons, on behalf of the Company, they spoke. In response the General Counsel stated this information was unknown to him, and that at best he could only say the business agent, or the steward, "or persons unknown," committed the deed for which the Union is now called to account. The sole question therefore is one of fact, and the case as a whole must stand or fall against the long-standing test laid down in *N.L.R.B.* v. *Glen Raven Knitting Mills, Inc.*, 235 F. 2d 413 (C.A. 4). Does the preponderance of the substantial evidence on the record in its entirety support the essential allegation of the complaint.

Like all records on which it is argued guilt must be inferred, this too contains certain facts which lend support to the overall conclusion urged by the complaint, and others either in themselves tending to negate the inference or otherwise weakening the persuasiveness of the supporting props upon which the Government's case rests. And, as always, an out-of-context appraisal of only those facts selected by either side of the argument—as each presents them in its brief—would be not only misleading but unfair. Some statements made on the record are more revealing than others; some, although perhaps literally relevant, are of such little weight either way as not to warrant detailed repetition here, else the report must be as long as the record. The decision below is based upon all of the record, although only the truly salient and significant facts justify discussion.

Facts

The following are the principal factual assertions urged as requiring a finding of illegal discharge: (1) Yahrmatter and Nichols had long been outspoken critics of the Union's passive acquiescence in the time-and-a-half arrangement; (2) they were the moving force leading to discontinuance of overtime work at the end of December; (3) the Company did not select them for layoff strictly in accordance with hiring seniority; and (4) unlike some others who were released, Yahrmatter and Nichols were not called back to work by the Company.

1. Overtime was performed at time and a half from the start of the project late in 1963. Both Yahrmatter and Nichols started work on March 15, 1964, both quit for more desirable employment—Nichols in April and Yahrmatter in July—and both were rehired, the former in October and the latter in September. They worked overtime like all others throughout their employment.

Early in May there developed a general resentment among the painters against working for less than double time and in consequence all overtime was discontinued. Yahrmatter testified simply that "the men" decided against the old practice, and directed Steward Davis to tell the Company of their decision. Another painter, Robert Cox, testified that Business Agent Stevens was present when the men made this decision and that Sevens only said "If a 100% of the men wanted to work for time and a half, he would ask for it," else it must be discontinued. Stevens denied telling the Company it was for the men to decide one way or the other. These conflicts in testimony are of no significance now; Stevens, like all witnesses for the Respondents, were determined not to help the General Counsel prove a case. The business agent, like the president of Local Union No. 8, also must have been in the anomalous position of trying to protect an area contract calling for double time while simultaneously blinking at wholesale disregard of the provision by the Conomos

Company.[1] In any event, all that really matters so far as this proceeding is concerned, is that time and a half had been paid, the employees decided against it, and the Union, one way or another, supported those against the Company, and all overtime was discontinued. According to the General Counsel the fact that Yahrmatter was even at that time opposed to the arrangement constitutes part of the proof that he was laid off about a year later for that reason. His attitude then carries little, if any, weight on the main argument, because he was only one in the large group which took the same action and all of whom appear to have been equally vociferous. If the "Union," or one or two of its agents, in fact preferred to continue the old arrangement, their consequent resentment must have been directed against at least a majority of the painters, for there is indication that the men formally voted on the matter.

2. In a matter of days, at most a few weeks, overtime work was resumed on the old basis, with an official of the Company promising 7 days of work each week as inducement. He did not keep the promise, but nothing further happened until the end of the year. In December again the painters started to grumble because the men were receiving less than double time; as a result the Union called a special meeting for those members working on this project. The purpose was to discuss this sole question. It is not clear as to when the men met: Business Agent Stevens said it was sometime in January, Yahrmatter and Heiman placed it on January 6, Robert Cox testified it occurred "the latter part of December, and the first part of January—I don't recall." Meler, the union president, recalled it as just before Christmas, and Nichols, one of the Charging Parties, said it was December 30. There were 15 to 20 painters present, plus all 3 of the local union officers. While the precise date may not be of critical significance, the vagueness in the recollections of so many witnesses on what should be a simple and objective matter illustrates meaningfully the general unreliability of much of the testimony throughout the hearing.

The witnesses were equally elusive as to exactly what was said at the meeting, or just who took clear and definitive positions on the big question. From the total testimony, however, certain facts are clear. President Meler presided and announced he knew the men were receiving only time and a half, he had heard there was dissatisfaction because of it, and he thought the matter should be openly discussed. In the course of the general talk Yahrmatter and Nichols stated their view that the men should not work at that rate, that there was a contract which was not being observed, that continuing the practice in this instance would encourage other employers to do the same with consequent deterioration of working conditions. Steward Davis expressed himself unequivocally in favor of the time and a half rate, arguing that insistence upon double time would lose overtime entirely for the men and would even keep other companies from permitting it at all. Business Agent Stevens professed ignorance of what was going on, a very unlikely state of affairs in view of his activities at the jobsite in the past and the great number of painters who had so long received the limited rate. It is also clear that in the end Meler announced his decision that overtime would no longer be permitted at that rate, that he instructed his subordinates to so advise the Company, and that this was done. The last day of overtime work was December 19, 1964. It was not until sometime in May of 1965, and then only on very limited jobs at the express request of Bethlehem Steel and with that company paying the full bill, that a small amount of overtime work was performed at double time.

The basic contention that the criticism voiced by Yahrmatter and Nichols at this meeting is the reason why they were chosen, by both the Union and the Company, for retribution, is weakened by a more significant fact, as to which there can be no dispute. Other painters took the same position, spoke out in criticism of the union agents, and were as much a moving force in eventually causing loss of all overtime work as these two particular men. Yahrmatter testified that Milam, Robert Cox, Lester LeMastus and Robert Coleman spoke up to oppose time and a half as did Yahrmatter and Nichols. Robert Cox, called after Yahrmatter, said there was much confusion, everybody talking at once, but he "did not open my mouth." But Yahrmatter was called by the General Counsel to support his own charge and I must believe him on this point. Yahrmatter also said that while some of the men remained

[1] Conomos, out of Pittsburgh, takes jobs throughout the country; it had no signed contract with Local Union No. 8 here, but, as is its custom, complied with union conditions of employment when it arrived. There was much disagreement among the witnesses as to precisely what is the prevailing union practice in this area; the current contract was not placed in evidence. Without doubt the Union—including its President Meler—knew what was going at this project, for at times there were as many as 150 painters at work, and overtime at this rate was performed almost throughout the entire year of 1964. It is only a play on words to say this was not a practice. What the record does show is that the Union's practice is to approve of time and a half if the painters on a particular project are satisfied with the arrangement.

neutral, only one, William Cox, urged continuance of the established rate. If anything, Milam, an ordinary painter, was more persistent than either of the two litigants in his criticism. When Business Agent Stevens claimed he did not know what was going on, Milam gave him the lie by recalling that he himself had told Stevens in the beginning, when earlier in the year the same question had arisen and overtime been discontinued, and that it was he, Milam, who had been responsible for the discontinuance. William Cox corroborated Yahrmatter that only one man spoke in favor of time and a half, and added that "90 percent" of the painters present spoke up in favor of double time. And Meler, the president, recalled that Yahrmatter and Nichols spoke no more than did a number of others, and that in the end "the men agreed in numbers that were present that this would be discontinued."

3. The general layoff took place on the afternoon of January 20, and that evening the regular monthly meeting of the Union was held; the laid off members were there. There was talk of the layoff, some painters voiced the possibility of suit against the Company to compel retroactive payment of the half-time differential between time and a half and double time for all overtime performed in the past, and again the disagreement between Yahrmatter and/or Nichols, together with other employees, on the one hand, and union agents on the other, came to the fore. As in the case of the earlier special meeting, the testimony is vague and general as to what was said there that may be pertinent to the issue of this proceeding. Regardless of whatever else may have been said, Yahrmatter admitted at the hearing that although all the union officers were present, neither he nor Nichols accused any of them of having caused their discharge. Nichols agreed with this testimony and added he did not even ask why he had been released. He did say that sometime during the meeting he expressed the opinion Yahrmatter and he had been laid off "because of the comments we made at the special meeting in early December . . . because we made an attempt to collect something due us, something about the backpay, and the time and a half thing . . . ."

Some of the men gathered at a nearby tavern for beer following the meeting. After some drinking, Davis came to the tavern and had words with Yahrmatter, the two almost coming to blows. Yahrmatter told him he "stank" as a steward, and in reply, according to Yahrmatter, Davis "told me if my mouth was as big as I was, I would still have my job. I said the reason that you've got your job . . . he said, 'I'm going to get my book, and have you fired by every contractor in the area.' " [2]

At this point there can be no question but that between these two men there existed a very deep dislike, and that in some fashion the discussion during the meeting a few minutes before had included sharp words between them. Davis did threaten to hurt Yahrmatter in his work opportunities, in the future at least, although what he meant by "get your book" remains ambiguous; it could as well mean having him expelled from the Union as it might reveal an intent to cause illegal discrimination to a union member. Certainly whatever Davis said in the heat of the argument, so poorly remembered and quoted by Yahrmatter, falls far short of a clear admission of personal responsibility for what the employer had done that day. The men were reveling in deriding each other; Davis said the other had to suffer because of his "big mouth," a phrase which points to another possibility lurking behind much of the testimony in the entire record. Resentful of the activities of some employees in refusing to work at time and a half, the Company way well have seized the opportunity of the economic layoff to get rid of them quite independently of whatever the Union or any of its agents may have wished.

4. During the afternoon of January 20, Roles, a general foreman, appeared at the project with a slip of paper on which were listed a number of names and told Steward Davis these men were to be laid off. Yahrmatter and Nichols were included, and the fact that in this case strict seniority was not followed is urged as further proof that

[2] Davis did not appear as a witness. In his motion to correct the transcript, the General Counsel would alter this testimony by Yahrmatter to read as follow:

> So he told me if I was as big as my mouth I would still have my job, the reason you got fired was because you were after my job. He said "I'm going to get your book, and have you fired by every contractor in the area."

Nichols was present at the time and he testified that to his knowledge Davis did not "say to Yahrmatter you were fired from the job for any reason," but did make "some other comments to the effect he would still have a job if he didn't have a big mouth."

In view of the General Counsel's initial announcement that this was essentially a circumstantial evidence case, I was particularly attentive throughout the hearing to all testimony touching upon any statements that may have been made by agents of either Respondents. I am certain Yahrmatter did not testify as the General Counsel asserts in his motion, and I therefore deny the motion to alter the transcript in this critical and substantial way.

the Union was responsible for their selection. Here again the record is utterly confused and it is almost impossible to say exactly how many men were released and what their precise hiring dates were. Throughout the hearing the witnesses were sure a slip of paper with about 10 names was passed around on the 20th, and that as the men listed there were located they were sent home. Their testimony supports that of Paul Bon, the general superintendent, who testified that around the 15th, because of reduced work, he decided a layoff was necessary, listed the 10 men for release, and then instructed his subordinates to carry out the reduction in force on the 20th.

At the very end of the hearing the Company produced, on subpena of the General Counsel, the original payroll records, and, without then commenting upon their significance, the General Counsel placed them into evidence *in toto*. They were analyzed later, and in the General Counsel's brief there is present an out of context, selected picture reducing the total layoff activity, and eliminating other pertinent facts which weakened the seniority argument.

Neither the oral testimony nor any of the records prove the day of hiring of the employees; all that appears is the week during which they came, or during which they left. Nor is there any probative evidence of the relative skill and experience of the men; passing phrases of opinion as to one or two individuals by "pushers," or straw bosses, or even by clear supervisors, in some instances describe particular painters, but serve not at all to evaluate any of them in a relative sense.

The records show that about 40 men worked during January. Seven or eight who arrived at the jobsite after Yahrmatter and Nichols, were "permanent" employees, had worked in other cities and were going to other locations throughout the country for the Company, and are always retained if at all possible. The General Counsel sees nothing wrong in the Company having kept them in any event. As to the remaining painters, they list as follows, so far as the record reveals seniority:

	1964
	Nov.
W. Lambert	29
Cease	22
Kolega	22
LeMastus	15
Monroe	1
Heiman	1
Tsankaris	1
Schrader	1
Martin	1
	Oct.
J. Davis	25
Coleman	25
Nichols	25
Thomas	18
C. Lambert	18
Niferos	18
Splittsberger	4
W. Davis	4
Ele	4
	Sept.
Shiller	20
Yahrmatter	20
R. Cox	20

Of these, 11 ceased work in the middle of January, 4 leaving during the week ending January 17 (Cease, Kolega, Martin, and Ele), and 7 the week ending January 24 (LeMastus, Monroe, Schrader, Coleman, Nichols, Yahrmatter, and Robert Cox). The only rationale finding I can make, on this entire record, is that these were the 10 or 11 names Bon wrote down for release when, on January 15, he prepared the list which later was seen by so many employees.[3] I must believe that by the 20th, the first four had already left of their own accord, or for whatever reason. There is no other way in which I can accept the total testimony, unless it be to hold all of the witnesses—both in favor and against the complaint—deliberately lied. There is no basis for such an approach.

[3] Bon testified at random as names were thrown at him at the hearing. It was clear he had no personal recollection of individuals worthy of note. In the course of his testimony he said flatly he had scheduled Kolega, Cease, and Martin for discharge on the 20th.

In his brief the General Counsel makes much of the fact that the slip of paper, on which the general superintendent had listed the men to be laid off, was not produced; he calls it the "mysterious lists" [sic] because the superintendent's earlier affidavit shows an "s" after the word list. But there is no evidence on the record that there was more than one slip of paper, the document was not shown to have been a regular record of the Company, and there does not appear to have been any reason why the Company should have preserved it at the time. Unless, of course, it is to be presumed the Company was guilty and knew it! Perhaps it can be said the Respondents deliberately refused to assist the General Counsel to prove a definitive case at the hearing; a void cannot serve as positive support for any affirmative burden resting upon the General Counsel in this type of situation. I find that the 11 men named above were selected for layoff in consequence of a purely economic need.

At one point during the hearing the General Counsel skirted the idea that perhaps the entire layoff was discriminatorily motivated, upon demand of the Union; he does not pursue this theory in his brief. In any event in that case it would have to be argued that all 11 painters were treated illegally, and all should have been included in the complaint. The record would not support such an allegation, and the case reverts to the theory that although the layoff was an economic one Yahrmatter and Nichols were deliberately selected because they pushed the Union into insisting upon double time and/or because they irked the union steward.

The overall inference of illegal motivation is not greatly strengthened by the fact that the Respondent did not select Yahrmatter and Nichols on the basis of strict seniority, and on that basis alone, because (1) the greater length of service of some who were retained was extremely short, (2) others were also selected for layoff out of seniority, and (3) there is no substantial evidence that the Company in this instance departed from an established past seniority practice. All of the men laid off were junior to W. Lambert, retained; four men laid off, other than Yahrmatter and Nichols, were also junior to Heiman and Tsankaris, both retained; and R. Cox, a very vocal agitator against time and a half, had the same seniority as Yahrmatter; i.e., was senior to 11 men who stayed. Nichols started work the week of October 25; Heiman and Tsankaris, called junior to him, had come the following week. For all the record shows one may have started the last workday of one week and the others the first day of the next. And there had never been a general layoff of this magnitude in the past. In scanning the company records after the close of the hearing, the General Counsel discovered that during the week ending January 10, two men were laid off, one who had worked less than 1 week and the other about a month, both junior at the time. The only other occasion for multiple layoffs seems to have been early in December, when four men were released; at that time at least two others who had come later were retained. Such a limited and inconsistent record, considered against a total complement of perhaps 50 painters, is not proof of any practice respecting seniority in layoffs.

5. Yahrmatter testified that Schoonover, one of the two general foremen, when releasing the men on January 20 said "he would call us back maybe if he needed us." Nichols was less clear on whether there was a promise to recall made to anyone. "Schoonover . . . made a remark about a telephone called, I can't state positively, but I believe he said something to the effect that he would call Yahrmatter. He wasn't speaking to me, it must have been Yahrmatter." Nichols testified positively that he was not told he would be recalled. Roles said all he told the men was to "keep in touch" with him. Neither of these two men ever returned to ask for work, either at the project or through the Union, although each heard later that the Company had started to put men back to work again. Nichols found other employment 6 days later; in February Yahrmatter started on other jobs within the jurisdiction of the Respondent Local.

The Company hires indiscriminately when it needs local men; the word is passed through the painters on the job to their friends outside men who apply are hired at the gate, and the Company sometimes calls the union hall for help. This is the traditional hiring practice in the construction industry by roving contractors like the Respondent Company, and its representatives testified that on this project this was company practice. The testimony offered by the General Counsel to offset the company witnesses does not warrant a contrary finding.

Further Testimony, Analysis and Conclusion

Agents of both Respondents disclaimed all allegations that it was the Union which wanted Yahrmatter and Nichols to be laid off, or that the reason why they were selected was to satisfy such a demand. Instead Bon, the highest officer of the Company at the project, explained that he chose the 10 men on the basis of their "relia-

bility, dependability, capability and possibly if everything being equal the recently hired." This complex phrase appears and reappears throughout Bon's testimony, and in his earlier affidavit, in many variations; all it means is he claims to have selected on the basis of his personal judgment of individual painters' craft skill, cooperation in being available when needed, plus those ever-varying reactions that make one employee more desirable than another to his superiors. The factors being largely subjective or requiring a relative evalaution of all the painters on the job, necessarily the Company could not prove definitively or mechanically its application of this test throughout the layoff. Another supervisor in charge would probably have decided on a different list of 10 men even applying Bon's test. The question here is not, as the General Counsel argues, whether Bon correctly evaluated the men; it is only whether, on the basis of the Government's evidence, plus the Respondents' facts, plus Bon's exculpating testimony, an affirmative finding of illegal conduct is warranted. I find that the evidence as a whole does not support the essential allegation of the complaint and shall therefore recommend dismissal of the case as to both Respondents.

Yahrmatter was only one of many painters who joined in the majority which forced the union agents to commit themselves to double time for overtime work in the beginning. When he and Nichols again disagreed with the steward and the business agent at the end of the year at the special union meeting, again they were included in what someone called "90 percent" of those present. Whatever the percentage others were equally outspoken; of those identified in the record some were laid off, like Yahrmatter and Nichols, some were not. Why painters like Coleman, LeMastus, and Robert Cox, who no doubt irritated Steward Davis and Business Agent Stevens as much as anyone, and who were also laid off, are not named in the complaint is not explained. More confusing to the entire case is Milam, according to the testimony even more offensive to the Union at the special meeting; he was not laid off at all. The significance of his retention cannot be avoided by the General Counsel on the ground that Milam had greater seniority, for such explanation is inconsistent with the general theory of the complaint that the very proof of illegal motivation lies in the disregard of seniority. But all this shows that Yahrmatter and Nichols simply were not singled out for special treatment. The same is true of the seniority contention; this layoff was not shown to be substantially different from anything in the past, and others were also released out of seniority turn. Yahrmatter even said at the hearing that in his type of work "I know that seniority does not replace ability. Its what he can do and what he can't do."

Yahrmatter did not like Davis, the steward, thought him to be a poor union agent and told him so, at the special union meeting and at other times. He even tried to replace him in the steward's job. His opposition to the steward's stand on the overtime issue flared more than once and certainly Davis resented it. Animosity thus shown would be an element supporting the inference of retaliation by causing discharge. But Davis is not named as a respondent, a logical step if the case were pinpointed to him in the complaint. "The Union" is said to have caused the Company to choose Yahrmatter and Nichols. But the chief of the Union was President Meler, and although he surely knew Conomos was paying only time and a half, and by his silence necessarily did not object, there is no evidence whatever of personal animosity flowing from him to either of the Charging Parties, nor indeed towards these members of the Local as a group. In such a confused picture as to who, in the Union's hierarchy, was in dispute with these two men, the total absence of any proof of communication between the two Respondents on the entire subject assumes greater meaning.

And finally the two men said nothing, on the very evening of their discharge, when the matter was discussed in full union meeting. There was talk of suing the Company for backpay, but no one even remotely suggested the Union, or any of its officers, were responsible. Some men were recalled later, and some not, but on January 20 all the painters knew was who had crossed the steward or the business agent, and exactly what each man's seniority was.

More than once Nichols expressed the fear he would lose his job for speaking up in favor of double time. At the special meeting, weeks before the mass layoff, he voiced the opinion he "would possibly be fired for stating my opinions at this place," but Meler, the president, replied "he could not get fired on something like this for something he said that night." On the afternoon of the layoff Nichols told Frank Cole, a pusher, his discharge was "a lousy thing to do, just because I had opened my mouth and said what I thought." He also told Steward Davis in the shanty "I was laid off because of my remarks at the union meeting." There was considerable talk at the time, and the General Counsel makes much of the fact neither the pusher nor

the steward bothered to answer Nichols respecting that particular remark. It is not clear whether Nichols was accusing the Union or the Company; in any event the ambiguous charge out of his mouth is hardly substantial evidence of guilt by the Respondents.[4]

RECOMMENDED ORDER

Upon the basis of the foregoing findings and conclusions, it is hereby recommended that the complaint be dismissed in its entirety.

[4] A number of painters are pushers, and are called supervisors by the General Counsel; they are regular union members and were present at the various meetings. The General Counsel relies upon their presence at such meetings and on statements of some of them on the job as supporting proof that the Company knew what was going on in the Union and therefore carried out the will of the Union. I find on the entire record that the pushers are not supervisors within the meaning of the Act, but deem it pointless to detail here the *minutiae* of testimony on this disputed issue. Even assuming the pushers were agents of the Company, my conclusion would be the same, for their participation in the events adds little of substance to the case.

Joseph Busalacchi, Thomas Busalacchi, Mario Busalacchi and Anthony T. Procopio, a partnership d/b/a Union Fish Company,[1] Petitioner *and* Amalgamated Meat Cutters and Butcher Workmen of North America, Local 229, AFL–CIO [2]

Joseph Busalacchi, Thomas Busalacchi, Mario Busalacchi and Anthony T. Procopio, a partnership d/b/a Union Fish Company *and* Jeannette K. Liegel, Petitioner *and* Amalgamated Meat Cutters and Butcher Workmen of North America, Local 229, AFL–CIO. *Cases Nos. 21–RM–1147 and 21–RD–744. December 20, 1965*

DECISION, ORDER, AND DIRECTION OF ELECTION

Upon separate petitions duly filed under Section 9(c) of the National Labor Relations Act, as amended, a consolidated hearing was held before Hearing Officer Max Steinfeld. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. Thereafter, the Employer and the Intervenor filed briefs.[3]

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

[1] The name of the Employer appears as amended at the hearing.

[2] The name of the Intervenor appears as amended at the hearing.

[3] On March 15, 1965, the Intervenor filed a motion to stay proceedings and to reopen, and on May 24 filed a motion to reopen record for the receipt of arbitration transcript. On June 7 the Employer filed an opposition to the Intervenor's motion to stay and its motion to reopen. Subsequently, on July 22 the Intervenor filed a motion to reopen record for the receipt of addendum to agreement, and on July 30 the Employer filed an opposition to this last motion of the Intervenor. The foregoing motions are hereby denied for the reasons set forth elsewhere in this Decision, Order, and Direction of Election.