(d) Notify the Board's Regional Director for Region 10, in writing, within 20 days from receipt of this Decision, what steps have been taken to comply with the provisions hereof.[8]

IT IS RECOMMENDED that the complaint be dismissed as to unfair labor practices alleged therein and not herein found to have been engaged in.

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

APPENDIX

NOTICE TO ALL EMPLOYEES

Pursuant to the Recommended Order of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

WE WILL NOT discharge or in any way discriminate against employees because of their membership in or activities on behalf of International Union, District 50, United Mine Workers of America.

WE WILL NOT in any way interfere with, restrain, or coerce employees in their exercise of rights guaranteed under the National Labor Relations Act, as amended.

WE WILL offer reinstatement with backpay to Louise Adams and Mable Johnson.

BLUE RIDGE MANUFACTURERS, INC.,
Employer.

Dated_____ By_____
(Representative) (Title)

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, 528 Peachtree-Seventh Building, 50 Seventh Street NE., Atlanta, Georgia, Telephone No. 526-5741.

David Friedland Painting Co., Inc. *and* Carl Dobrosky, an Individual. *Case No. 22-CA-2363. May 2, 1966*

DECISION AND ORDER

On December 28, 1965, Trial Examiner Harry H. Kuskin issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent filed exceptions to the Trial Examiner's Decision with a supporting 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 this case to a three-member panel [Members Fanning, Brown, and Jenkins].

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds no prejudicial error was committed. The rulings

are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and supporting brief, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations [1] of the Trial Examiner, as modified herein.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby adopts as its Order the Recommended Order of the Trial Examiner, as herein modified, and orders that the Respondent, David Friedland Painting Co., Inc., Elizabeth, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order, as so modified:

1. Delete from paragraph 1(a) the reference to Local Union No. 1221.

2. Delete from paragraph 2(c) the phrase beginning with "and at all locations" and ending with "contractors' work."

3. Redesignate paragraph (d) of the Trial Examiner's Recommended Order as (e) and insert a new paragraph (d) to read as follows:

"(d) Sign and mail copies of said notice to the Regional Director for Region 22 for posting by Local 144, if willing, at places where notices to its members are customarily posted."

4. The notice marked "Appendix" attached to the Trial Examiner's Decision is hereby amended by deleting the reference to Local Union No. 1221.

[1] The Respondent excepts to the Trial Examiner's recommendation that Local No. 1221, International Brotherhood of Painters, Decorators and Paperhangers, AFL–CIO, be included within the scope of his Recommended Order. The record is devoid of any evidence that Local 1221 members were affected by the layoff. Accordingly, we shall modify the Trial Examiner's Recommended Order and attached notice (Appendix) by striking references to Local 1221.

The Respondent further excepts to the Trial Examiner's Recommended Order requiring the Respondent to post the notice at all locations where Respondent is currently performing painting contractor's work since the Respondent is engaged in performing painting contracts statewide. To remedy the unfair labor practices found, we think it sufficient to require posting by Respondent at its plant premises in Elizabeth, New Jersey, and we shall modify the Order accordingly.

In view of the fact that members of Local 144 were directly affected by the layoffs, we shall also provide for posting, Local 144 being willing, at places where notices to Local 144's members are customarily posted.

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

This proceeding was heard before Trial Examiner Harry H. Kuskin at Newark, New Jersey, on September 23, 1965, pursuant to a charge filed on May 5, 1965, and a complaint, which was thereafter amended at the hearing, issued on July 30, 1965.[1]

[1] All dates mentioned hereinafter are in 1965.

It presents the question whether David Friedland Painting Co., Inc., herein called Respondent, violated Section 8(a)(3) and (1) of the Act by laying off on a selective basis nine of its employees because the local union of which they are members was engaged in striking an employer association of painting contractors over contract terms, where Respondent, also a painting contractor, is not a member of that association but could be affected economically by the outcome of such contract negotiations. Respondent admits the allegations of the complaint, as amended, as to commerce, and as to the layoffs on or about May 1, of the nine named employees.[2] It denies that the layoffs and the refusal to recall the named employees until May 6 were because of their membership in Local 144, International Brotherhood of Painters, Decorators and Paperhangers of America, AFL–CIO, a labor organization within the meaning of Section 2(5) of the Act. It contends, in substance, that under the circumstances, the layoff had as much legal justification as the lockouts which received Supreme Court approval in the *Buffalo Linen* case, the *Brown* case, and the *American Ship Building Company* case.[3]

Upon the entire record,[4] including my observation of the witnesses and after due consideration of the briefs of the General Counsel and Respondent, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

The complaint alleges, and Respondent admits, that it has its principal office in Elizabeth, New Jersey, and is a contractor engaged in the business of providing and performing painting and related services at various jobsites in New Jersey; and further that during the preceding 12 months it performed services valued in excess of $50,000 for enterprises in New Jersey, each of which annually receives goods and materials valued in excess of $50,000 directly from points located outside New Jersey.

I find, upon the foregoing, that Respondent is engaged in commerce within the meaning of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Local Union No. 144, International Brotherhood of Painters, Decorators and Paperhangers, AFL–CIO, herein called Local 144, and Local Union No. 1221, International Brotherhood of Painters, Decorators and Paperhangers, AFL–CIO, herein called Local 1221, are labor organizations within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES [5]

A. *Background*

The layoffs by Respondent herein were triggered by a strike which was called against an association of painting contractors, *viz,* Master Associated Painters of Perth Amboy and Vicinity, by a sister local of the local with which Respondent bargains. The layoffs are to be considered against the following backdrop:

There are within New Jersey, according to a stipulation of the parties, approximately 19 locals of the International Brotherhood of Painters and Paperhangers of America, AFL–CIO. Each local has a specific territorial jurisdiction. Within each territory there is an organization or association of employers which bargains with the area local. All union employers are subject to the existing area contract whether or not they are members of the association doing the bargaining. Nonmember union painting contractors not only follow the contract but sign the contract.

Respondent operates a union shop in the territorial jurisdiction of Local 1221. It is a member of Union Painters Association of Greater Elizabeth and Vicinity, which bargains directly with, and is currently in contractual relations with, Local 1221. Leo Friedland, secretary-treasurer of Respondent, is a chairman of this association and

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[2] Carl Dobrosky, Anthony Kowaleski, Steve Odolecki, Donald Lindson, Fred Keckses, Carl Lauffenberger, Angelo Palmerini, Steve Borisewski, and John Uzar.

[3] The citations, respectively, are *N.L.R.B.* v. *Truck Drivers Local Union No. 449, etc. (Buffalo Linen Supply Co.),* 353 U.S. 87; *N.L.R.B.* v. *Brown, et al., d/b/a Brown Food Store,* 380 U.S. 278; and *Local 374, Intl. Brotherhood of Boilermakers (American Ship Building Company)* v. *N.L.R.B.,* 380 U.S. 300.

[4] As corrected by my order correcting transcript dated November 18.

[5] Unless otherwise indicated, the testimony referred to herein is uncontradicted.

personally participates in its bargaining with Local 1221. It does not appear that there were any negotiations pending between this association and Local 1221. Negotiations, however, had been going on in a neighboring area where Local 144, a sister local, has territorial jurisdiction. Involved in these negotiations was the Master Associated Painters of Perth Amboy and Vicinity, of which Respondent is not a member. These negotiations eventually broke down and a strike occurred on May 1 which lasted until May 10, when an agreement was reached. Respondent, not being member of the association, took no part in these negotiations.

Respondent is also a member of the Garden State Painters Association which is a statewide association in New Jersey of over 200 union contractors. Leo Friedland is its vice president. It was stipulated that there is no direct organizational connection between the State association and the various local groups that bargain with the locals in their respective areas, that the State association does not bargain with any of these locals and that while Respondent is a member of its local association and also of the State association, there are members of the local associations who are not members of the State association.

According to the testimony of Leo Friedland, some discussions had been held between him and other employers in the State association as to practices that should be adopted by them with respect to the employment of members of any local union, in the event of a strike by such local. He testified further that there is a policy in effect in this association, dictated by the fact that all the contractor members have an interest in every area of the State, to "support the specific area where there are negotiations of a contract or there is a strike whatever incident is there." Hence, where areas are on strike, the "employees" of that area are not hired and, if such employees are working at the time the strike begins, they are "terminated." He added that to his knowledge there has been no variation in that practice among members of the association, including Respondent, during Respondent's 21 years in business. It is noteworthy that, on cross-examination, Friedland conceded that this policy is not invariably uniform, and that an exception is made when it affects the economy of the member. Further, according to Friedland, that was the situation in the instant case and explains why the nine alleged discriminatees worked during the first day of the strike and were recalled during the strike and worked for the balance of the strike. In direct contradiction of Friedland's testimony as to a longstanding policy, Albert Totka, business agent of Local 144 during the past 9 years, testified that there was no such practice in the past, that it became the practice "just during the last strike." And with particular reference to the layoffs here, he testified that, in his experience of about 20 years in the painting industry, other than layoffs or strikes affecting his particular local, "the only place that ever had men laid off that was (sic) employed by an out-of-town employer, out of his jurisdiction, was at the Linden job at American Cyanamid." Totka also testified that during the May 1 strike, T. Fitiles Company and John Becker, both being members of the State association, worked throughout the strike. Each employed one man who was a member of Local 144; and Fitiles, who was working in the territorial jurisdiction of Local 144, signed a retroactive agreement to May 1 while Becker, who was working outside the Perth Amboy area did not sign a retroactive agreement.[6] In addition, he identified some five additional painting contractors [7] who continued working in the area with Local 144 men, signing retroactive agreements to May 1, although he did not know whether four of them were members of the State association.[8] This witness also recalled that during a strike in 1959, 13 employees of 1 employer from Plainfield, New Jersey, worked "right through" the 2 weeks of that strike and 4 employees of another from Mount Vernon, New York, did the same.

The record, as further amplified by stipulation, also shows that Respondent is required under section 3 of its contract with local 1221, whenever it does work within the territorial jurisdiction of another local of the Painters to hire not less than 75 percent of its work complement from residents of the area where the work is performed, such residents being required to be members of the local involved, and to pay them the wages required by the contract between the painting contractors' association

[6] Totka explained that during a strike he offers retroactive agreements (to May 1 in this instance) to employers who are willing to continue working during the strike.

[7] Hass Painting Company, from North Bergen, New Jersey; Thomas Loapena, from Toms River, New Jersey; Mullen, from Toms River; Radar Painting Company, from Fords, New Jersey; and J. I. Hass, from Jersey City, New Jersey.

[8] Totka identified J. I. Hass as one who was not a member.

in that area and that local.[9] The record shows that Respondent deals with 13 locals in all and that it has done more than $100,000 worth of business within the territorial jurisdiction of Local 144 during the last 3 years.

B. *The American Cyanamid job*

As already noted, when the strike occurred, Respondent was not doing any work in Local 144's territorial jurisdiction. It was, however, doing work in the jurisdiction of Local 1221, at the above-mentioned American Cyanamid job. Its work complement on that job consisted of two regulars or shop men (i.e., Foreman Tineo and an apprentice), one employee recruited for this job through the Painters' local in Newark, New Jersey, and the nine employees alleged to be discriminatees herein, who were members of, and recruited through, Local 144.[10] More specifically, these nine employees began working for Respondent around April 21 [11] and continued thereafter until they were, as detailed hereinafter, laid off at the close of the work day on May 1. They were thereafter recalled on May 6 and continued to work until about May 28, when the job was nearly completed. During the layoffs, no replacements were hired, the work being continued with a reduced complement of three, consisting of Tineo, the apprentice, and the employee recruited through the Painters' local in Newark.

As to the circumstances of the layoffs, Friedland testified that William Zack [12] called him on Friday night, April 30, to inform him that a strike vote had been taken and that "Perth Amboy was on strike." Whereupon, as stipulated by the parties, Friedland directed Leo Butler, Respondent's superintendent, to lay off from the Cyanamid jobsite all members of Local 144 because that local was on strike against the Master Associated Painters of Perth Amboy and Vicinity. According to Carl Dobrosky, financial secretary of Local 144, and one of the nine alleged discriminatees, he had a conversation with Foreman Tineo on the job during the afternoon of May 1, the day on which the strike began, and Tineo told him and the other eight alleged discriminatees, all of them being from Local 144, that "[they] were not to come in. [They] were not to report in Monday morning," that "pressure was applied to his boss by William Zack to have the Perth Amboy men to stop from [sic] work." Dobrosky testified further that, as the laid off employees had not been "paid off" on Saturday, they considered themselves still Respondent's employees and returned on Monday, May 3, intending to go to work. Tineo told them at that time that "on orders from his boss he was not to put [them] to work" and that they would be replaced the following day. After receiving their pay, the men sought out the superintendent of the general contractor, Wilheim Company, informing him that they had been locked out by Respondent not because of faulty work or any violations by them but because of the strike in Perth Amboy, adding that if they were replaced, they would take the matter to the Board. As already found, no replacements for them were hired and they were recalled to work on May 6; at that time the strike was still in progress; in fact, it was terminated several days later on May 10. It thus appears that these nine individuals worked during the strike, except for the second, third, and fourth working day thereof.

[9] The stipulation asserts, in this connection, that, when Respondent does work within Local 144's jurisdiction, should it happen that Local 1221's wages are higher than Local 144's wages, Respondent would pay Local 1221 men the higher rate and Local 144 men the lower rate; and should it happen, as was the case here, that the work is done within Local 1221's jurisdiction and Respondent employs men from Local 144, Respondent would pay them the Local 1221 rate which happened to be the higher rate.

At the hearing, Respondent sought to adduce testimony to prove that its practice in seven areas other than those of Local 1221 and Local 144, where it does business, is the same. I sustained the objection of the General Counsel to this line of testimony and Respondent made an offer of proof. After further deliberation, I have decided to reverse my ruling. Accordingly, I accept as true for the purpose of this proceeding the above factual material in the offer of proof.

[10] Leo Friedland, the secretary-treasurer of Respondent, testified that, after learning from the business agent of Local 1221, which has territorial jurisdiction of the Linden area and the work in question, that the latter could not supply him with enough men, he had choice under Respondent's agreement with Local 1221 as to which Painters' local to approach and he elected to go to Local 144.

[11] At that time, Respondent knew that negotiations between Local 144 and the Master Associated Painters of Perth Amboy and Vicinity had not yet been resolved.

[12] Zack was an officer of the Master Associated Painters of Perth Amboy and Vicinity and was the principal contractor involved in that association's negotiations with Local 144.

Friedland gave the following reasons as to why these individuals were not laid off for the duration of the strike: In respect to the first day of the strike, they were allowed to work because the American Cyanamid job was a critical one, a time penalty job, and American Cyanamid was in a rush to get into the plant and "[he] felt that if we could do it as fast and as much work as possible, [he] would try." He, therefore, notified his superintendent "to put in a day on Saturday and stop on Monday," Saturday being a workday anyway. And with respect to the reason for the recall of the nine individuals on May 6, Friedland testified that, "Cyanamid said unless the job was manned, they would terminate their contract and man it with their own personnel so [he] decided to hire the men back and reactivate the job to its former condition." [13]

C. *Concluding findings as to the layoffs*

To recapitulate, the issue herein is whether, in the circumstances, Respondent's selective layoff or "lockout" of all those among its employees who were members of Local 144 violated Section 8(a)(3) and (1) of the Act; or stated conversely, whether Respondent's conduct was justifiable in the circumstances on the ground that it served Respondent's legitimate business interests.

A review of existing Board precedent establishes that the Board has held that a lockout, even though motivated by economic considerations, was barred by the Act, except where it was used to preserve a multiemployer unit or to safeguard a single employer against unusual operating losses.[14] More recently, the United States Supreme Court indicated in the *American Ship Building* case [15] that the Board's approach to what constitutes a lawful lockout is too restricted, and held that after an impasse in negotiations had been reached, a single employer could temporarily lay off or "lockout" his employees to bring economic pressure in support of his bargaining position.[16]

As heretofore indicated, Respondent points to the *Buffalo Linen, Brown,* and *American Ship Building* cases as supporting its conduct herein. However, Respondent's position, under the *Buffalo Linen* and *Brown* cases, that the lockout was lawful, although it was used to preserve a multiemployer unit broader than the unit in which it was, in fact, bargaining, is lacking in merit. Respondent argues, in part, that in economic reality and effect the multiemployer association in the Perth Amboy area, of which it was not a member, was its agent for the negotiation of wages, hours, and conditions of employment, for the substantial amount of work it performed in the Perth Amboy area (over $100,000 in 3 years). This is so, Respondent's argument continues, because under the contract which it had with Local 1221, it must hire Local 144 members when it does work in that Local's jurisdiction in the Perth Amboy area and it must pay members of Local 144 when it does work in that area the wages determined by Local 144's contract with the multiemployer association in Perth Amboy. To further buttress its argument that it would be improper to view the multiemployer unit as confined to the association of employers of which it is a member, Respondent points out that it works in the jurisdictional territory of 13 locals, and must therefore abide by 13 separate union contracts, making it a physical impossibility and tremendous burden to require Respondent to be a member of each of the employer groups in these areas. And further, since Respondent cannot bargain separately throughout the State and must rely on the bargaining of a few contractors in each association with the Painters' local in that area, it should be afforded the same rights under the Act as if it were directly a member of the bargaining group; finally, it asserts that, what

[13] In this connection, Friedland indicated he could have utilized the men in Respondent's shop, but he chose not to do so on advice of counsel herein that he rehire those laid off.

[14] See *Buffalo Linen Supply Company,* 109 NLRB 447, reversed *sub nom.*; *N.L.R.B.* v. *Truck Drivers Local Union No. 449,* 353 U.S. 87; *Betts Cadillac Olds, Inc.,* 96 NLRB 268; and *Quaker State Oil Refining Corporation,* 121 NLRB 334, enfd. 270 F. 2d 40 (C.A. 3), cert. denied 361 U.S. 917.

[15] *The American Ship Building Company* v. *N.L.R.B., supra.*

[16] See, in this connection, *Weyerhaeuser Company, et al.,* 155 NLRB 921, in which the Board held on the authority of both the *American Ship Building* and *Brown* cases that, where two or more employers bargain with a union, even assuming that they were mistaken as a matter of law with respect to either the establishment or the recognition of their association as a multiemployer unit, and where an impasse in negotiations is reached over a mandatory subject of collective bargaining and the union strikes only some of the employers engaged in such joint bargaining, the remaining employers may justifiably lock out their employees.

appears to be a group of separate multiemployer bargaining units is in economic effect and reality one bargaining unit with subcommittees dealing within the separate geographical jurisdictions of the various locals of the Painters.

I perceive no basis for pyramiding these local area multiemployer units into a broader unit. Thus, there is absent here any established bargaining unit which is either statewide in scope or of any lesser scope yet broader than the scope of each local association; nor is there any agreement between all or some of the local associations, on the one hand, and all or some of the local unions, respectively, on the other hand, to bargain upon a broader basis than presently. And long-established precedent precludes the establishment of a multiemployer unit in the absence of a multiemployer bargaining history or agreement as to the appropriateness of such a unit. Indeed, the parties have stipulated to facts which indicate no desire to bargain on a broader basis; as pointed out it is stipulated that there exists currently a statewide association of over 200 members, that there is no direct organizational connection between the State association and the various local groups that bargain with locals of the Painters in their respective areas, that the State association does not bargain with any of these locals and that, while Respondent is a member of its local association and also of the State association, there are members of the local associations who are not members of the State association. In context then, the above fact that the State association does not function as a bargaining agency strongly suggests that those members of the local associations who are members of the State association are content to continue bargaining on a local association basis.

Nor is there any merit to the additional argument alluded to herein that a broader unit should be found on agency grounds. Obviously, agency cannot be lawfully implied solely because a failure to do so would result in economic disadvantage to the person asserting the agency or because alternatives to an agency relationship could have been established only with considerable hardship.

Nor are the foregoing deficiencies in Respondent's arguments concerning the breadth of the unit bolstered by the already mentioned testimony of Leo Friedland that there is a policy in the State association, dictated by the fact that all the contractor members have an interest in every area of the State, to "support the specific area where there are negotiations of a contract or there is a strike or whatever incident is there." In more specific terms, according to Friedland, the policy is that where areas are on strike, the "employees" of that area are not hired and if such employees are working at the time the strike begins, they are "terminated." From my observation of Friedland and Totka on the witness stand, plus the fact that Friedland's testimony, on cross-examination, disclosed that the so-called policy could be breached by a painting contractor in the State association when that contractor's economic situation dictated it, the further fact that the handling of the layoffs and the recall by Respondent in this very instance was such a breach of the claimed policy, and in view of the straightforward and more credible testimony of Totka, which denied that there was such a policy, amplifying it by instances during the instant strike by Local 144 and the one in 1959 in which State association members belied that policy by continuing to work, I am persuaded that there was no such policy in effect heretofore and further that no such policy was invoked beginning with the May 1 strike by Local 144.

Finally, contrary to Respondent's contention, no special considerations on unit grounds or agency grounds are applicable here because Respondent and the members of the various associations are engaged in the construction industry. Those special considerations deriving from the fact that an employer is in the construction industry are clearly delineated in the Act, and it would serve no useful purpose to set them forth. Suffice it to say that those special considerations have no relevance here.

As already noted, in addition to the *Buffalo Linen* and *Brown* cases, Respondent rests its case on the *American Ship Building* case. There, the United States Supreme Court held that *after* an impasse in the negotiations had been reached, a single employer could use a lockout offensively to advance his bargaining position. However, the Court did not decide the question whether a lockout *before* impasse is permissible and the further question whether an employer in one bargaining unit could lockout to advance the position of another employer or group of employers in another bargaining unit, both of which factors are present here in somewhat truncated form.

In this connection, I am cognizant of the Board's decision in the *Evening News Association* case,[17] relied upon by the General Counsel to support a finding of violation herein. There, the Board concluded that: The News locked out its employees

[17] *The Evening News Association, Owner and Publisher of the Detroit News*, 145 NLRB 996.

from April 16 through 19 because of the strike against the Free Press; because the two papers did not bargain in a multiemployer unit, the lockout was not privileged under the *Buffalo Linen* doctrine which permits the use of a lockout to preserve the integrity of a multiemployer unit; and consequently the News trenched upon the rights of its employees in violation of Section 8(a)(1) and (3) of the Act.[18] While *Evening News Association* would appear to support a finding of a violation here on an *a fortiori* basis, that case was decided within the Board's prevailing, and now rejected, theory as to the types of lockout that were permissible. Furthermore, the Court of Appeals for the Sixth Circuit, considering *Evening News Association* against the backdrop of the United States Supreme Court's decision in *American Ship Building*, reversed the Board[19] and held that the News acted lawfully when it locked out its employees before an impasse had been reached in its negotiations with the union and did so in support of the Free Press which was in a separate unit.

It is also clear, however, that the above holding by the court of appeals avails Respondent nothing. Assuming, without deciding, that the court has correctly applied the principles of *American Ship Building* to the facts of *Evening News Association*, the instant case is clearly distinguishable. Thus, there, unlike here, the employer using the lockout, while seeking to advance the bargaining position of another employer, was facing many identical issues in its bargaining negotiations with the same union and was therefore seeking, by using the lockout offensively, also to advance its own position. As already appears, Respondent was not in bargaining negotiations with the union representing its employees and therefore was not concerned about advancing its own bargaining position. Nor could it have done so by its lockout here, because it was in a bargaining relationship with another union, *albeit* a sister local. Stated differently, Respondent was seeking to intrude in a labor dispute not its own, involving a union other than the one with which it was then in untroubled relationship, for the reason that a settlement of the labor dispute favorable to that union could have an economic effect upon it. To allow this collateral or indirect interest in a labor dispute to be deemed a legitimate business interest sufficient to serve as justification for a lockout of Respondent's own employees is to arrive at a far-reaching result never intended by the Supreme Court in *American Ship Building*. It would lead to a proliferation of the use of the lockout so as to render it lawful in any situation where the employer making use of it against members of a certain union could arguably be affected economically by the outcome of particular negotiations between that union and another employer. It would be an invitation to industrial chaos rather than to industrial stability which the Act is designed to foster. Accordingly, as I find the instant situation to be clearly distinguishable from that in *American Ship Building*,[20] and as I perceive no warrant for applying that case here on any other basis, I conclude that Respondent's lockout of those of its employees who were members of Local 144 is not justifiable under Board and court decisions.

Respondent, in opposing a finding of a violation of Section 8(a)(3), argues further that, in any event, as in *American Ship Building*, there is no proof of union animus here. Thus, it contends, there is no indication that the lockout destroyed the striking union's capacity for effective and responsible representation and there is further no indication of hostility by Respondent to the concept of collective bargaining. Additionally, Respondent urges that it has acted here without any intent of destroying Local 144; "its purpose in locking out the members of Local 144 was purely self-help to contribute what it could toward preventing a victory by the union in the strike which would force it to pay benefits in excess of what it otherwise would be required to pay whenever it performed work within the territorial jurisdiction of Local 144." However, as I have already found, the employer interest served by Respondent's lockout is far less significant and direct than in *American Ship Building*. This, without more, distinguishes the instant situation from that in *American Ship Building*. Bearing this distinction in mind, a balancing of the employer's interests herein against the rights of its employees under Section 7 of the Act to self-organization, to form, join, or assist labor organizations, to bargain collectively through agents of their own choosing, and to engage in other concerted activities for the purpose of collective

[18] The Board found a violation not only as to the locked out employees but as to the other employees laid off as a consequence of the lockout.

[19] *Detroit Newspaper Publishers Association, The Evening News Association, Owner and Publisher of the Detroit News, et al.* v. *N.L.R.B.*, 346 F. 2d 527.

[20] It is noteworthy that the Supreme Court was careful to point out that "there is no claim that the employer locked out only union members or locked out any employee simply because he was a union member. . . ."

bargaining or other mutual aid or protection, leads inevitably to the conclusion that the Section 7 rights of Respondent's employees are paramount. Accordingly, as the natural tendency of the lockout was to discourage union membership, since the reason for the selection of these employees for layoffs was their membership in the striking local, their discriminatory layoffs violated Section 8(a)(3) of the Act.[21] Further, since, apart from the foregoing, the record supports a finding that the layoffs herein stemmed from the fact that these employees had voted for the strike and would thereafter vote on its termination, it follows that the layoffs were effected because of the concerted activities of these employees for their mutual aid and protection and were therefore violative of Section 8(a)(1) of the Act.[22]

In sum, I conclude in view of all the foregoing, that by laying off its employees on May 1, 1965, and refusing to recall them until May 6, 1965, Respondent violated Section 8(a)(3) and (1) of the Act.

IV. THE REMEDY

Having found that Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act, I shall recommend that Respondent cease and desist therefrom, and from interfering, restraining, and coercing its employees in any like or related manner. I shall also recommend that Respondent take certain affirmative action set forth below designed to effectuate the policies of the Act (a provision which I would recommend under all the circumstances to remedy the violation of Section 8(a)(1), even if there had been no violation of Section 8(a)(3)), and post appropriate notices.

As the discriminatees herein were recalled to their jobs and worked thereafter until the job for which they were hired was virtually completed, the remedy of reinstatement is not here applicable. However, these employees were in layoff status for 3 working days, i.e., May 3, 4, and 5, and, to the extent that they suffered any loss of earnings, they are entitled to be reimbursed therefor. I find no merit in Respondent's contention, in effect, that, as the laid-off employees were not replaced and continued where they had left off after they were recalled, they are not entitled to any backpay. It is patent that Respondent's unlawful conduct prolonged the time that elapsed from the beginning to the completion of the American Cyanamid job with a loss of earnings in all likelihood to the laid-off employees on those days on which they were in layoff status and could have worked for Respondent. To the extent that they suffered loss of earnings, they were disadvantaged by Respondent's unlawful conduct. I shall therefore recommend that Respondent make each discriminatee whole for all the earnings lost by him by reason of the discrimination against him, by paying him a sum of money equal to the amount he would have earned from the date of his layoff to the date of his reinstatement, less his net earnings during said period. Backpay, with interest at the rate of 6 percent per annum, shall be computed in the manner set forth in *F. W. Woolworth Company*, 90 NLRB 289, and *Isis Plumbing & Heating Co.*, 138 NLRB 716.

Upon the basis of the entire record, I make the following:

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[21] The fact that the United States Supreme Court in *American Ship Building* refused to apply the "natural tendency" rationale is not controlling here. The Supreme Court so held in the context of a finding by it of "actions taken to serve legitimate business interests in some significant fashion." Absent here as significant and legitimate a business interest as in *American Ship Building*, the instant case is controlled by *Radio Officers' Union, etc.* (*A. H. Bull Steamship Company*) v. *N.L.R.B.*, 347 U.S. 17, 43, where the aforesaid rationale was applied. See, in this connection, *Local 357, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America* (*Los Angeles-Seattle Motor Express*) v. *N.L.R.B.*, 365 U.S. 667, 680, where the Supreme Court in discussing the scope of its decision in the above *Radio Officers'* case said, "A similar absence of significant business justification for the employer's acts which tended to discourage union activity explains the dispensability of proof of discriminatory motivation in *Allis-Chalmers Mfg. Co.* v. *Labor Board*, 162 F. 2d 435; *Cusano* v. *Labor Board*, 190 F. 2d 898, and *Labor Board* v. *Industrial Cotton Mills*, 208 F. 2d 87."

[22] Whether the layoffs herein are found to be violations of Section 8(a)(3) or 8(a)(1), the remedy for such violations, if it is to effectuate the statutory purposes, would be the same. *N.L.R.B.* v. *J. I. Case Company, Bettendorf Works*, 198 F. 2d 919 (C.A. 8), cert. denied 345 U.S. 917; *Modern Motors, Incorporated* v. *N.L.R.B.*, 198 F. 2d 925, 926 (C.A. 8).

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. Local Union No. 144, International Brotherhood of Painters, Decorators and Paperhangers, AFL–CIO, and Local Union No. 1221, International Brotherhood of Painters, Decorators and Paperhangers, AFL–CIO, are labor organizations within the meaning of Section 2(5) of the Act.
3. By discriminating in regard to the hire and tenure of Carl Dobrosky, Anthony Kowaleski, Steve Odolecki, Donald Lindson, Fred Keckes, Carl Lauffenberger, Angelo Palmerini, Steve Borisewski, and John Uzar by laying them off on May 1, 1965, and thereafter refusing to reinstate them until May 6, 1965, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.
4. The aforesaid unfair labor practices are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

RECOMMENDED ORDER

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

1. Cease and desist from:

(a) Discouraging membership in Local Union No. 144, International Brotherhood of Painters, Decorators and Paperhangers, AFL–CIO, and Local Union No. 1221, International Brotherhood of Painters, Decorators and Paperhangers, AFL–CIO, or any other labor organization of its employees by discriminating against any employee in regard to his hire, tenure, or any other term or condition of employment.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

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

(a) Make Carl Dobrosky, Anthony Kowaleski, Steve Odolecki, Donald Lindson, Fred Keckses, Carl Lauffenberger, Angelo Palmerini, Steve Borisweski, and John Uzar whole for any loss of earnings each of them may have suffered, in the manner set forth in the section hereof entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to determine the amount of backpay due, as herein provided.

(c) Post at its plant premises in Elizabeth, New Jersey, and at all locations where Respondent is currently performing painting contractors' work, copies of the attached notice marked "Appendix." [23] Copies of said notice to be furnished by the Regional Director for Region 22, shall, after being duly signed by Respondent's representative, be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the aforesaid Regional Director, in writing, within 20 days from the date of the receipt of this Decision, what steps Respondent has taken to comply herewith.[24]

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[23] In the event that 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 shall 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."

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

APPENDIX

NOTICE TO ALL EMPLOYEES

Pursuant to the Recommended Order of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

WE WILL NOT discourage membership in Local Union No. 144, International Brotherhood of Painters, Decorators and Paperhangers, AFL–CIO, and Local Union No. 1221, International Brotherhood of Painters, Decorators and Paperhangers, AFL–CIO, or any other labor organization, by discriminating as to the hire, tenure, or any other term or condition of employment of any of our employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form, join, or assist a labor organization, to bargain collectively through a bargaining agent chosen by themselves, to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; or to refrain from any such activities (except to the extent that the right to refrain is limited by the lawful enforcement of a lawful union-security requirement).

WE WILL pay Carl Dobrosky, Anthony Kowaleski, Steve Odolecki, Donald Lindson, Fred Keckses, Carl Lauffenberger, Angelo Palmerini, Steve Borisewski, and John Uzar for any loss of wages suffered by each of them because of our discrimination against them.

All our employees are free to become or remain, or to refrain from becoming or remaining, members of any labor organization.

DAVID FRIEDLAND PAINTING CO., INC.,
Employer.

Dated_____ By_____
(Representative) (Title)

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 National Newark Building, 744 Broad Street, Newark, New Jersey, Telephone No. 645–3088.

Harrison Iron & Metal Company *and* George Robert Young, Otis Reams, George Oliver, John Gandy and Woodrow Barfield. *Cases Nos. 7–CA–5088, 7–CA–5088–2, 7–CA–5088(3), 7–CA–5088(4), and 7–CA–5088(5). May 2, 1966*

DECISION AND ORDER

On January 26, 1966, Trial Examiner Arthur Christopher, Jr., issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. The Trial Examiner further found that the Respondent had not engaged in certain other unfair labor practices alleged in the complaint and recommended that those allegations be