

Whale Oil Company, Inc. *and* Allan Kunz. Case  
29-CA-814

January 9, 1968

DECISION AND ORDER

BY CHAIRMAN McCULLOCH AND MEMBERS  
FANNING AND ZAGORIA

On June 12, 1967, Trial Examiner Samuel M. Singer 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 also found that the Respondent had not engaged in certain other unfair labor practices and recommended that such allegations be dismissed. Thereafter, the Respondent and the General Counsel filed exceptions to the Trial Examiner's Decision and supporting briefs. The Respondent also filed a brief in answer to the General Counsel's exceptions.<sup>1</sup>

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.

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 and briefs, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner except as modified herein.

The Trial Examiner found, and we agree, that the Respondent's discharge of Kunz was not, as alleged in the complaint, violative of Section 8(a)(3) and (1) of the Act. The Trial Examiner further found, and we agree, that the Respondent's refusal to process Kunz' grievance because he had filed charges with the Board was violative of Section 8(a)(4) and (1) of the Act.<sup>2</sup> We do not agree, however, that the facts of the instant case warrant the Trial Examiner's Recommended Order providing reinstatement and backpay for Kunz.

The Trial Examiner found that although the normal remedy in the circumstances of this case would be merely to order the Respondent to continue to process Kunz' grievance, such a remedy might be of doubtful efficacy because of the Respondent's apparent position against reinstating him or giving him backpay since the date of the interrupted grievance hearing. The Trial Examiner speculated that a prudent businessman would have reinstated Kunz on learning of the true facts at the grievance

hearing, and that the Respondent should therefore be ordered to do so now, with backpay from that time.

We are not persuaded that the Respondent would have reinstated Kunz if it had continued to process his grievance. Accordingly, we shall limit our order to requiring the Respondent to cease and desist from the violation found and to post an appropriate notice.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order of the Trial Examiner as modified below and hereby orders that the Respondent, Whale Oil Company, Inc., Brooklyn, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order, as so modified:

1. Delete paragraph 2(a), 2(b), and 2(c) and reletter paragraphs 2(d) and 2(e) to read 2(a) and 2(b), respectively.

2. Delete the third indented paragraph and the paragraph beginning with the word "Note" in the notice attached to the Trial Examiner's Decision.

<sup>1</sup> The Respondent's request for oral argument is hereby denied as the record, including the exceptions and briefs, adequately presents the issues and the positions of the parties.

<sup>2</sup> In view of the Respondent's termination of the grievance hearing with the statement that there was "nothing further to talk about" because Kunz had taken his case to the Board, we find it unnecessary to adopt the Trial Examiner's observations that Kunz had a statutory "right" to prosecute a grievance apart from the Union.

TRIAL EXAMINER'S DECISION

SAMUEL M. SINGER, Trial Examiner: This case was heard before me at Brooklyn, New York, on March 22, 1967, pursuant to a charge filed on December 8, 1966, and a complaint issued on March 9, 1967. The issues litigated were: whether Respondent discriminatorily discharged the Charging Party (Allan Kunz) for union and other protected activities, in violation of Section 8(a)(3) and (1) of the National Labor Relations Act, as amended; and whether Respondent thereafter refused to engage in the grievance procedure provided for in the contract between it and the majority representative of the employees because Kunz had filed unfair labor practice charges, in violation of Section 8(a)(4) and (1) of the Act.

All parties appeared and were afforded full opportunity to be heard and to examine and cross-examine witnesses. All waived oral argument at the conclusion of the case. Briefs were received from General Counsel and Respondent.

Upon the entire record in the case,<sup>1</sup> the briefs, and my observation of the witnesses, I make the following:

<sup>1</sup> Transcript corrected by my order, on notice, dated May 19, 1967.

## FINDINGS AND CONCLUSIONS

## I. THE BUSINESS OF RESPONDENT; THE LABOR ORGANIZATION INVOLVED

Respondent, a New York corporation with its principal office and place of business in Brooklyn, New York, is engaged in the wholesale distribution and sale of fuel oil and related products. It annually purchases and receives from States other than New York products valued in excess of \$50,000. I find that at all material times Respondent has been and is engaged in commerce within the meaning of the Act, and that assertion of jurisdiction in this case is proper.

Coal, Gasoline & Fuel Oil Teamsters, Chauffeurs, Oil Burner Insulation, Maintenance, Servicemen and Helpers of New York City and Vicinity, Nassau and Suffolk Counties, New York, Local Union No. 553, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (herein called the Union), is a labor organization within the meaning of the Act.

## II. THE UNFAIR LABOR PRACTICES

A. *Introduction: Contractual Provisions and Practices*

Respondent and the Union have had contractual relations for approximately 28 years. Under the collective agreement and/or industry practices, a new truckdriver drives alongside an experienced driver up to 5 days without compensation, to familiarize himself with the work (the "break-in" period). He is under "probation" for 30 days, subject to discharge at will of the employer. The contract contains grievance-arbitration provisions (sec. 8 and 21(a)) under which the parties have processed grievances of all types, including discharges.

B. *The Discharge of Allan Kunz*

Kunz began to work for Respondent as an oil truckdriver on October 31, 1966.<sup>2</sup> His compensated work period began on November 4, after 2 working days "break-in" period). He was assigned his own truck, working the night shift after 5 or 6 p.m. His job entailed pulling a hose from his truck and connecting it into the ground, as well as driving the truck.

Kunz testified that he was discharged on December 2.<sup>3</sup> According to Kunz, on the previous day (December 1), he went to the union office to pay his dues arrears.<sup>4</sup> After verifying that Kunz was still with Respondent, Business

Agent Hintze accepted Kunz' \$105 back dues and then (through Shop Steward Walker) informed Company Dispatcher Ward that Kunz was paid up and entitled to all contract benefits, including Saturday (premium) work.<sup>5</sup>

In accordance with its practice of requiring new employees to take physical examinations, Respondent arranged one for Kunz (and other new employees) at the offices of the Company's physician on November 23. Kunz filled out a medical application, indicating under "health history" that he had no prior illnesses or injuries, except two hernias. The physician (Dr. Koota) questioned him about the hernias, checked the scars, and told Kunz that he was in good physical condition. Due to an oversight, Doctor Koota failed to check the box on the bottom of the form indicating that Kunz was "qualified" for work. Nor did he send out the medical form to Respondent until after November 29.

Company Operations Manager Cohen testified that not having received Kunz' medical report and conscious of the imminent end of Kunz' 30-day probationary or trial period, he telephoned Doctor Koota's office on Monday, November 28, to check on Kunz' medical application. Cohen was advised by "somebody in the office"<sup>6</sup> that the doctor had not yet endorsed the certificate, but that if it was "more or less all right" except that it showed "a history of a double hernia." Cohen then reported the matter to his superior, Vice President Schwartz, who directed him to discharge Kunz. When Cohen told Schwartz that Kunz already was "booked to work that night at 6 p.m." the latter instructed Cohen to dismiss Kunz as of the end of the night shift (3 a.m., November 29). Cohen, in turn, instructed the dispatchers "not to book Mr. Kunz" for additional deliveries.<sup>7</sup>

Kunz was not "booked" for any jobs on and after November 29. On the day of his discharge,<sup>8</sup> Kunz, in accordance with normal procedure, telephoned the dispatcher for an assignment, but was referred to Cohen. Cohen told Kunz that he had to let him go. When Kunz asked "the reason," Cohen stated he had received orders to discharge him, adding that "according to the contract, we have 30 days to fire you without a reason, and that's what we are doing." Cohen assured Kunz, however, that there was nothing wrong with his work. Kunz then asked to talk with Union Shop Steward Walker, who happened to be in the office. When Kunz related on the telephone what had happened, Walker stated that he, too, could not ascertain the reason why Kunz was fired. Walker advised that "we will have to go through the Union" on this matter.

<sup>2</sup> Unless otherwise stated, all date references are to 1966.

<sup>3</sup> Company witnesses testified, and Respondent's records purport to show, that the discharge occurred on November 29. For reasons hereafter indicated, it is unessential to resolve the conflict on this point.

<sup>4</sup> The contract between Respondent and the Union (sec. 7) contains a union-shop clause requiring membership after 30 days' employment. Kunz had been a union member since January 1965, when he was employed by another union employer (Howard Fuel Corp.), but had discontinued dues payments in April 1965 when he left that employer.

<sup>5</sup> Hintze, Walker, and Ward could not recall the date of the above-described occurrence. Kunz did not produce his dues receipt specifying the date. I deem it unnecessary to make a specific finding as to the date of Kunz' dues payment.

<sup>6</sup> Cohen could not recall the person he spoke to, although he indicated it was Doctor Koota or his nurse. From all the surrounding circumstances, it is obvious that he did not speak with Dr. Koota; I so find.

<sup>7</sup> Schwartz corroborated Cohen's account of the interview. He testified

that there was "unequivocally" no other reason for the discharge than the medical one. His testimony that Respondent "had too many incidents with hernias that caused us a high incidence of compensation" is not supported by any evidence (including medical reports produced at the hearing), and I do not credit it. Furthermore, Schwartz was vague and evasive in this area. He avoided a direct answer when asked whether he had ever checked with his insurance company concerning the compensation risk, and Cohen could not say whether Respondent presently had any employees with a history of hernias. I do not give any weight to Schwartz' additional, self-serving testimony that because of Kunz' history of hernias he would not have retained Kunz "even if the doctor had okayed" him.

<sup>8</sup> As previously noted, Kunz fixed the date as December 2 and Respondent (through Cohen and Dispatcher Ward) as November 29. Kunz admitted, however, that he did not obtain work on November 29, 30, and December 1. He stated that he called in on each date, but was told that he was not needed.

Doctor Koota, a General Counsel witness, testified that in his opinion Kunz was physically qualified to perform the work of oil truckdriver and that it was only through oversight that he omitted stating his opinion on the medical application. He indicated that a person with a corrected hernia "should not have any difficulty" performing even "heavy work." Koota also testified that whenever he detected "anything suspicious" in an applicant's medical condition, it was his custom to personally call Respondent and alert it thereto.

The record shows that Kunz, now 31 years old, since his last hernia at 16 held a variety of jobs requiring heavy work in various capacities. He had worked as truckdriver, delivery man, and merchant seaman, without any recurrence of his old impairment. He had also served in the United States Marine Corps where, among other things, he laid cables and wire. No company supervisor had complained about his capacity to perform while in Respondent's employ.

### C. Respondent's Refusal to Process Kunz' Grievance

Shortly after his dismissal, Kunz discussed the discharge with Business Agent Hintze. Hintze took the matter up with Vice President Schwartz and then told Kunz that Schwartz still insisted that "according to the contract . . . they have a 30-day trial period and they can discharge a man" at will without any reason. Hintze told Kunz that there was nothing the Union could do because Kunz did not have his "30 days in."

On or around December 7, the Union received a letter from Kunz requesting it to take the matter through the contractual grievance procedure because he (Kunz) "believe[d] that he was fired from Whale Oil for Union activity." Business Agent Hintze immediately contacted Schwartz and arranged a meeting to take up Kunz' grievance.<sup>9</sup> On December 8, Kunz filed the unfair labor practice charges with the Board.

Kunz, Hintze, and Shop Steward Walker met with Schwartz on December 16. At the outset of the meeting, Schwartz opened a folder and said, "Kunz, have you taken this case to the National Labor Relations Board?" When Kunz replied that he had, Schwartz stated, "Well, we have nothing further to talk about." Hintze commented that he had not realized that a charge was filed and that had he known, he "wouldn't be here now." Hintze, Walker, and Kunz then left.

### D. Conclusions

#### 1. The discharge of Kunz

As noted, Respondent contends that Kunz was discharged on November 29 while General Counsel claims that he was terminated on December 2. Respond-

ent withheld its reason for the discharge from the Union as well as Kunz until the pendency of this proceeding. It told Kunz only that he was a less than 30-day probationary employee (a matter Kunz disputed) and, hence, that it did not owe him any explanation for its action. Kunz thereafter filed a grievance, but Respondent refused to process it on the ground that Kunz had filed an unfair labor practice charge. At the hearing Respondent contended that it terminated Kunz because in a telephone check with its physician's office it learned that Kunz had a history of "double hernia."

The record does not establish by a preponderance of evidence that Kunz' discharge was motivated by protected union or concerted activity. There is no evidence that Respondent was hostile to the Union or that it resented any protected concerted employee activities.<sup>10</sup> No substantial reason has been shown why Respondent should have selected Kunz for discriminatory discharge; Kunz was a union member, although delinquent in dues at the time of his hire.<sup>11</sup> The fact that he was discharged on or about the day he paid up his back dues is a coincidence without any special significance so far as this record discloses. Nor is the fact that Respondent made no attempt to check with its physician on the risk inherent on retaining an individual with corrected hernias determinative, absent other affirmative evidence of discriminatory intent.

Accordingly, in view of the absence of proof linking Kunz' discharge to antiunion or unlawful motivation, I conclude that the discharge was not violative of Section 8(a)(1) and (3) of the Act.

#### 2. The refusal to process Kunz' grievances

Section 8(a)(4) of the Act make it an unfair labor practice for an employer "to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act." The term "otherwise discriminate" is in "the broadest language" and "indicates clearly that Congress sought to extend Board scrutiny to all forms of discrimination." *John Hancock Mutual Life Insurance Company v. N.L.R.B.*, 191 F.2d 483, 485-486 (C.A.D.C.).<sup>12</sup>

Kunz' right to grieve under the contractual grievance procedure was an inherent part of his tenure of employment. Cf. *Bethlehem Steel Company*, 136 NLRB 1500, 1502, enfd. 320 F.2d 615, 620 (C.A. 3). By refusing to process his grievance because he had filed an unfair labor practice charge, Respondent accorded Kunz different treatment because he sought protection of the Board. Its conduct falls squarely within the proscription against discrimination set forth in Section 8(a)(4) of the Act. Its conduct also constitutes interference, restraint, and coercion within the meaning of Section 8(a)(1) of the Act, since "Section 8(a)(4) . . . only ma[kes] clear that which [is]

<sup>9</sup> Hintze's above action in itself refutes his contention that the contractual grievance procedure did not apply to employees with less than 30 days' employment. Furthermore, the collective agreement contains no such limitation. Nor did any party (including Respondent) advance such limitation as a bar to entertaining the grievance.

<sup>10</sup> Although conceding that "there is no indication of overt opposition to the Union by the Company," General Counsel claims that the discharge was motivated by the fact that "the Company strongly disapproved of any activity which would encroach upon the company's absolute control over their employees during their first 30 days of employment." The record does not support such contention.

<sup>11</sup> Kunz' job application disclosed that he had previously worked for an employer (Howard Fuel) who, Respondent knew, was a member of the same Association of which Respondent was a member, and which Association had contractual relations with the Union.

<sup>12</sup> See also *Local 138 International Union of Operating Engineers (Charles S. Skura)*, 148 NLRB 679, *Oil City Brass Works v. N.L.R.B.*, 357 F.2d 466, 471 (C.A. 5), *Pedersen v. N.L.R.B.*, 234 F.2d 417, 420 (C.A. 2).

implicit in . . . Section 8(a).” *H. B. Roberts of Local 925, IUOE v. N.L.R.B.*, 350 F.2d 427, 428 (C.A.D.C.).<sup>13</sup>

The fact that Kunz’ grievance lacked merit did not justify Respondent’s conduct. *N.L.R.B. v. Whitfield Pickle Company*, 374 F.2d 576, 582–583 (C.A. 5); cf. *California Portland Cement Company*, 103 NLRB 1375, 1377. Even though the discharge was not unlawful, Kunz nevertheless had the right to seek to persuade Respondent to reconsider and rescind its action. He could have shown and was entitled to an opportunity to show, for example, that what Respondent thought to be a disability (two corrected hernias) was not truly disabling, and to show further that he was not, as Respondent believed, a probationary employee under the collective agreement.

Nor is Respondent’s refusal to process the grievance excused by the Union’s acquiescence in company conduct. Respondent cannot abrogate its statutory duty to an employee by taking advantage of a union’s misfeasance. See *Miranda Fuel Co.*, 149 NLRB 181, 185–186, reversed on other grounds 326 F.2d 172 (C.A. 2). See also *Vaca v. Sipes*, 386 U.S. 171, 185–186. Where an employer and union have brought about discrimination, both are jointly and severally liable, and the injured employee has the right to proceed against either or both.<sup>14</sup> Furthermore, under the provisos to Section 9(a) of the Act an employee has “the right at any time to present grievances to [his] employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms” of the collective agreement and the “representative has been given opportunity to be present at such adjustment.” The Union here was of course afforded opportunity to be in attendance. The “adjustment” of Kunz’ grievance would not have contravened “the terms” of the collective agreement. The agreement, to be sure, contemplates initiation (and processing) of grievances by the Union. But where the union arbitrarily and in manifest bad faith abdicates its functions the employer is estopped from invoking the contractual limitation.<sup>15</sup> Indeed, the proviso to Section 9 was designed to protect the rights of individual employees whose bargaining agent refuses or fails fairly or adequately to process their grievances.<sup>16</sup>

I conclude that Respondent’s refusal to process Kunz grievance because he filed unfair labor practice charges constitutes violation of Section 8(a)(1) and (4) of the Act.

#### CONCLUSIONS OF LAW

1. By refusing to process Kunz’ grievance relating to his discharge because he had filed unfair labor practice

<sup>13</sup> See also *Charles S. Skura, supra, Pacific Intermountain Express, Company*, 110 NLRB 96, 108–109, enfd 228 F.2d 170 (C.A. 8). Cf. *Local Union No 12, United Rubber Workers v. N.L.R.B.*, 368 F.2d 12 (C.A. 5).

<sup>14</sup> However, it is not uncommon to require only the employer to remedy the unfair labor practice where the employer is the only respondent. See, e.g., *Eichleay Corporation v. N.L.R.B.*, 206 F.2d 799 (C.A. 3). See also *Radio Officers’ Union v. N.L.R.B.*, 347 U.S. 17, 53, where a charge was filed only against the union. The Board is empowered to proceed only against the party against whom the charge has been filed. No charge was filed against the Union in this case.

<sup>15</sup> Compare *Vaca v. Sipes*, 386 U.S. 171, 185, where the Supreme Court stated.

An obvious situation in which the employee should not be limited to the exclusive remedial procedures established by the contract occurs when the conduct of the employer amounts to a repudiation of those contractual procedures . . . In such a situation the em-

ployer is estopped by his own conduct to rely on the unexhausted grievance and arbitration procedures as a defense to the employee’s cause of action.

We think that another situation when the employee may seek judicial enforcement of his contractual rights arises if, as is true here, the union has sole power under the contract to invoke the higher stages of the grievance procedure, and if, as is alleged here, the employee-plaintiff has been prevented from exhausting his contractual remedies by the union’s wrongful refusal to process the grievance.

<sup>16</sup> Contrary to Respondent’s contention, *Black-Clawson Co., Inc. v. I.A.M.*, 313 F.2d 179 (C.A. 2) – wherein the court held that an employee had no standing to initiate or compel arbitration of a grievance – supports this conclusion. The court explicitly stated “that the proviso was designed to confer upon the employee the privilege to approach his employer on personal grievances when his union reacts with hostility or apathy.” 313 F.2d at 182.

#### THE REMEDY

Having found that Respondent engaged in unfair labor practices by denying Kunz the benefits of the contractual grievance procedure because he filed charges with the Board, I shall recommend that it cease and desist therefrom. In view of the special circumstances recited below, my recommended order will further require Respondent to reinstate Kunz with backpay from December 16, 1966, the date of Respondent’s refusal to process his discharge grievance.

The basic purpose of a remedial order is “restoration of the situation, as nearly as possible, to that which would have obtained but for [the unfair labor practices].” *Phelps-Dodge Corp. v. N.L.R.B.*, 313 U.S. 177, 194. Where an employer wrongfully refuses to process a grievance, the Board order will normally require him to do what he was legally bound to do in the first instance, i.e., to process it pursuant to established contractual grievance procedures. See, e.g., *Danner Press, Inc.*, 153 NLRB 1092, 1093, 1111. However, this remedy may be of doubtful efficacy and may not operate to restore the true *status quo ante*. An employer subjected to a formal complaint proceeding can hardly be expected to entertain and consider the merits of the grievance with a free and open mind. A requirement that he process the grievance at that stage could be a highly mechanical device and illusory, the employer having an already fixed position on the matter of restoring the grieving employee to his former position. Nonetheless, the Board cannot ignore the practical countervailing considerations which, in most situations, warrants nothing more than a requirement that the employer process the grievance. Thus, whether or not a dischargee will ultimately prevail (and be reinstated) through the grievance procedure is ordinarily conjectural and speculative, even where the employer entertains the grievance honestly and without hostility. However, there can be and are unusual situations where the outcome of the grievance procedure is not so speculative – where, for ex-

ample, the objective facts reasonably justify the inference that the employer, as a prudent businessman, would have retained the employee if the true facts were elicited in grievance discussion. In such cases, reinstatement with backpay should not be barred merely because the grievance outcome cannot be anticipated with precision. The Board is often required to draw inferences from facts and to act on probabilities, and there is no reason why it should not do so in these situations. Whatever doubt as to the grievance outcome still lingers should be resolved in favor of the injured employee rather than the wrongdoer whose illegal conduct in the first place – failure to fulfill his statutory obligation to entertain the grievance in more propitious circumstances – induced the doubt.<sup>17</sup> In such cases stronger medicine than the usual order, directing belated grievance processing, is appropriate.

It will be recalled that in this case Respondent did not reveal, either to Kunz or the Union, its reason for terminating Kunz. At the hearing, Vice President Schwartz stated that the sole reason for the discharge was that Kunz had a medical history involving hernias and that there was “unequivocally” no other reason. Had Respondent, in compliance with its statutory duty, entertained the grievance and disclosed the basis for its action, and had it heard Kunz’ case at the December 16 meeting called for that purpose, it would have learned that the hernias had been corrected some 15 years earlier; that the condition never interfered with Kunz’ past labors as truckdriver, delivery man, merchant seaman, and service in the United States Marine Corps; that there never had been any recurrence of the injury; that Respondent’s own physician had informed Kunz that he was physically fit to work for it; and that no company supervisor had had any complaints concerning Kunz’ performance. Furthermore, if in the process of grievance discussion and resolution, Respondent had called on its physician (Doctor Koota) to verify the facts, it would have learned that Kunz’ corrected hernias were indeed not disabling, that he had no medical deficiency, and that he was fully qualified to perform his job. Under the circumstances, Kunz is entitled to the benefits of the presumption that Respondent, as a reasonable and prudent employer, would have respected its physician’s medical evaluation. There is no proof that it had ever before overridden his professional judgment and there is no reason to believe it would have done so in this case. Under the circumstances, it is only fair to assume that Respondent would have rescinded its decision to discharge Kunz and would have reinstated him to his former position on December 16. In any event, it is Kunz that is entitled to the benefit of the doubt and not Respondent whose illegal conduct created it. Respondent, however, hermetically closed its mind to reinstating Kunz – refused even to consider the reinstatement question in the grievance procedure – on learning that Kunz had exercised his statutory right to file unfair labor practice charges.

In view of the foregoing, I shall recommend that Respondent reinstate Kunz and reimburse him for any

<sup>17</sup> Compare *N.L.R.B. v. Remington Rand Inc.*, 94 F 2d 862, 872 (C.A. 2), cert denied 304 U.S. 576, where Judge Learned Hand pointed out that it “rest[s] upon the tortfeasor to disentangle the consequences for which [it] is chargeable from those which it is immune.” See also *Local Union No. 2 of the United Association of Journeymen etc. of the Plumbing and Pipefitting Industry (Astrove Plumbing and Heating Corp.)*, 152 NLRB 1093, 1114, modified 360 F 2d 428 (C.A. 2).

<sup>18</sup> 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

loss of pay he may have suffered by reason of its unlawful conduct from December 16, 1966, to the date Respondent offers him reinstatement, backpay to be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289, and *Isis Plumbing & Heating Co.*, 138 NLRB 716.

### RECOMMENDED ORDER

Upon the basis of the foregoing findings and conclusions of law and upon the entire record, and pursuant to Section 10(c) of the Act, it is recommended that Respondent, Whale Oil Company, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to process grievances or otherwise discriminating against employees because they filed unfair labor practice charges with the Board.

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

2. Take the following affirmative action which it is found will effectuate the purposes of the Act:

(a) Offer Allan Kunz immediate and full reinstatement to his former or substantially equivalent position, without prejudice to any seniority or other rights and privileges, and make him whole for any loss of pay he may have suffered as a result of his discharge, in the manner set forth in the section of this Decision entitled “The Remedy.”

(b) Notify the above-named employee if presently serving in the Armed Forces of the United States of his right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act, 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, as well as all other records necessary to analyze and compute the amount of backpay due under the terms of this Order.

(d) Post at its place of business in Brooklyn, New York, copies of the attached notice marked “Appendix.”<sup>18</sup> Copies of said notice, to be furnished by the Regional Director for Region 29, after being duly signed by Respondent, shall be posted 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 the Respondent to insure that such notices are not altered, defaced, or covered by any other material.

(e) Notify said Regional Director, in writing, within 20 days from the date of receipt of this Decision, what steps it has taken to comply herewith.<sup>19</sup>

IT IS FURTHER RECOMMENDED that the complaint be dismissed in all other respects.

Recommended Order of a Trial Examiner” in the notice. In the further event that the Board’s Order is enforced by a decree of a United States Court of Appeals, the words “a Decree of the United States Court of Appeals Enforcing an Order” shall be substituted for the words “a Decision and Order”

<sup>19</sup> In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read “Notify the Regional Director for Region 29, in writing, within 10 days from the date of this Order, what steps Respondent has taken to comply herewith”

## DECISIONS OF NATIONAL LABOR RELATIONS BOARD

## 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 refuse to process grievances or otherwise discriminate against our employees because they filed unfair labor practice charges with the National Labor Relations Board.

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

WE WILL offer Allan Kunz immediate and full reinstatement to his former or substantially equivalent position, and make him whole for any loss

of pay he may have suffered by reason of the discrimination against him.

WHALE OIL COMPANY, INC.  
(Employer)

Dated \_\_\_\_\_ By \_\_\_\_\_ (Representative) \_\_\_\_\_ (Title)

Note: Notify Allan Kunz if presently serving in the Armed Forces of the United States of his right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act, 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, 16 Court Street, Fourth Floor, Brooklyn, New York 11201, Telephone 596-3535.