

**McDowell Mfg. Co., Division of Alco Standard Corp.
and International Union of Operating Engineers,
Local 66, AFL-CIO. Case 6-CA-5527**

September 7, 1972

DECISION AND ORDER

BY CHAIRMAN MILLER AND MEMBERS JENKINS
AND KENNEDY

On May 1, 1972, Trial Examiner James M. Fitzpatrick issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed cross-exceptions and a brief in support thereof.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the Trial Examiner's Decision in light of the exceptions and brief and has decided to affirm the Trial Examiner's rulings, findings,¹ and conclusions and to adopt his recommended Order, to the extent consistent herewith.

The General Counsel has excepted to the Trial Examiner's recommended Order in that it only requires Respondent to make whole Howard L. Hunter, Sr., and Arthur Holes, for loss of earnings which they may have suffered as a result of Respondent's discrimination. We agree with the General Counsel that, as Hunter and Holes were on disability leave when they were terminated and were then receiving certain contractual benefits, both employees should also be made whole for any loss of benefits which they might have suffered as a result of Respondent's discrimination. Accordingly, we shall so modify the Trial Examiner's recommended Order.

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 Respondent, McDowell Mfg. Co., Division of Alco Standard Corp., 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) and insert the following in its place:

"(a) Offer Howard L. Hunter, Sr., and Arthur Holes immediate and full reinstatement to their former employment status without prejudice to their seniority or other rights or privileges, and make each

whole for any loss of earnings or benefits suffered as a result of discrimination against them in the manner set forth in the section of the Trial Examiner's Decision entitled 'The Remedy.' "

2. Substitute the attached notice for the Trial Examiner's notice.

¹ We agree with the Trial Examiner that Respondent was obligated to give employees Hunter and Holes adequate notice and opportunity to comply with the contractual union-security clause before invoking it unilaterally to effectuate their discharge. Under the circumstances, Respondent stood in the same position as the Union with respect to enforcement of the union-security clause and thus had to advise Hunter and Holes in explicit terms exactly what their current obligations were under the contract. See *Insulation Specialties Corp.*, 191 NLRB No. 38. Inasmuch as we have adopted the Trial Examiner's findings that Respondent violated Section 8(a)(3) and (1) by its conduct, we need not pass upon his additional findings with respect to the General Counsel's alternative theories of the case.

APPENDIX

**NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government**

The National Labor Relations Board having found, after a trial, that we violated Federal law by discharging Howard L. Hunter, Sr., and Arthur Holes because they did not comply with the union-security requirement of a collective-bargaining agreement without giving them reasonable notice and opportunity to comply:

WE WILL NOT encourage membership in International Union of Operating Engineers, Local 66, AFL-CIO, or any other labor organization, by discharging or in any other manner discriminating against any employee in regard to hire or tenure of employment of any term or condition of employment except as authorized by Section 8(a)(3) of the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed them in Section 7 of the Act, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act.

WE WILL offer Howard L. Hunter, Sr., and Arthur Holes immediate and full reinstatement to their former employment status without prejudice to their seniority or other rights and privileges and **WE WILL** make each of them whole for any loss of earnings or benefits suffered by reason of the discrimination against them.

McDOWELL MFG Co.,
 DIVISION OF ALCO
 STANDARD CORP.
 (Employer)

FINDINGS AND CONCLUSIONS

I. THE EMPLOYER INVOLVED

Respondent, an Ohio corporation, operates a plant at DuBois, Pennsylvania, for the manufacture and nonretail sale of metal stampings. It annually receives at the DuBois plant goods and materials directly from outside Pennsylvania valued at over \$50,000 and annually ships from DuBois directly to points outside Pennsylvania goods valued at over \$50,000. It is an employer within the meaning of Section 2(2), engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATIONS AND UNION-SECURITY PROVISIONS

The initial union representing company employees was International Union of District 50, United Mine Workers of America (herein called District 50) which on July 16, 1965, was certified by the Board as the collective-bargaining representative of the production and maintenance employees at the DuBois plant. Thereafter District 50 and the Company entered into two successive collective-bargaining agreements, the latest for the period October 31, 1966, to September 15, 1969. On June 20, 1969, Local 66 filed a petition with the Board seeking representation of these employees. Following a Board-conducted election on August 12, 1969, Local 66 was certified by the Board on August 20, 1969, as the new collective-bargaining representative. District 50 and Local 66 are labor organizations within the meaning of Section 2(5) of the Act.

The first District 50 collective-bargaining agreement, noted above, contained no union-security provisions. Strenuous bargaining preceding agreement on the second District 50 contract resulted in the inclusion of provisions requiring union membership as a condition of employment. However, for employees employed prior to September 16, 1966, enforcement of the provisions was postponed for a year.

Following its certification in 1969, Local 66 and the Company negotiated a new contract for the period September 16, 1969, through September 15, 1972. This agreement also included union-security provisions, but they were applicable to all employees in the bargaining unit, with no postponement of the effectiveness of the provisions similar to the earlier District 50 agreements.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Summary of the Facts*

In a nutshell what happened here was that in February 1971 when the Company needed quickly to enlarge its work force, the Union (Local 66), delayed and obstructed the recall of laid-off employees by the way in which it insisted on enforcement of the union-security clause as to 21 recalled employees. While this was going on, Local 66, in answer to company inquiries, advised the Company that two other employees in disability status (Hunter and Holes) not only were not members of the Union, but, in the eyes of the Union, were not employees of the Company. In

Dated _____ By _____
 (Representative) (Title)

This is an official notice and must not be defaced by anyone.

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.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 1536 Federal Building, 1000 Liberty Avenue, Pittsburgh, Pennsylvania 15222, Telephone 412-644-2977.

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

JAMES M. FITZPATRICK, Trial Examiner: This is a unique situation in which an employer invoked a union-security clause to terminate two employees on disability leave who had not joined the Union, even though the Union did not request their termination. The question is whether the terminations were discriminatory. As noted below, I find they were.

This proceeding under Section 10(b) of the National Labor Relations Act, as amended (herein called the Act), initiated with charges filed May 27, 1971 (amended November 22, 1971), by International Union of Operating Engineers, Local 66, AFL-CIO (herein called the Union or Local 66). Based on the charges, a complaint issued November 30, 1971, alleging that McDowell Mfg. Co., Division of Alco Standard Corp. (herein called Respondent or Company) committed unfair labor practices in violation of Section 8(a)(3) and (1) of the Act by discharging Howard L. Hunter, Sr., and Arthur Holes on March 26, 1971, because they had not complied with union-security provisions of the current collective-bargaining agreement with Local 66 by joining the Union, although Local 66 had not requested their termination and they had not been advised of their union-security obligations. Respondent answered, admitting most of the factual allegation of the complaint, including the terminations, but alleging that the terminations were voluntary and effective as of December 1, 1969. The answer also admits that failure to comply with the union-security requirements was the reason for the terminations, and also that Local 66 had not requested the terminations. It asserts that Hunter and Holes knew or should have known of their union security obligations. The answer denies that the terminations were unfair labor practices. The issues were tried before me at Pittsburgh, Pennsylvania, on January 6, 1972.

Upon the entire record, my observation of the witnesses, and consideration of the brief filed by the Respondent, I make the following:

that context the Company terminated Hunter and Holes for failure to comply with the union-security clause.

B. *The Work History of Hunter and Holes*

1. Howard Hunter

Hunter was first employed by the Company on March 29, 1966, as a laborer. At the time of his termination on March 26, 1971, he was classified as a large press operator. In January or February 1938 he was off work for 16 days as a result of an injury. After returning he continued working until August 28 or 29, 1968, when he sustained an injury to his back resulting in his being off work for something over 2 weeks. He then returned to work until October 30, 1968, when he again ceased working because his back bothered him. This time he remained off a full year, returning to the job October 30, 1969. He remained on the job only until November 10 or 11, 1969, when he again ceased working, presumably because of continuing back trouble. He has not returned to work since. The Company continued to carry him on its rolls as an employee in absentee status until March 26, 1971, when it advised him by letter that it considered that he voluntarily terminated his employment as of December 1, 1969, because of his failure to comply with the union-security requirements of the collective-bargaining agreement with Local 66.

2. Arthur Holes

Holes was first employed by the Company on March 24, 1966, as a laborer. He was later promoted to large press operator. On April 18 or 19, 1968, he was injured on the job. As a result of the injury he was unable to work after July 1968 and since then has not worked at the plant except for one day in November 1969 when he returned for the purpose of determining whether he would be able to perform the work and avoid the necessity of an operation. He learned he could not perform the work. On March 26, 1971, he was terminated in the same way as Hunter.

C. *Union Membership of Hunter and Holes*

1. Participation in District 50

During the incumbency of District 50 both Hunter and Holes were members of that organization, and Hunter was chairman of the union grievance committee and active in enforcing the District 50 union-security clause. Both were familiar with union-security clauses.

2. Efforts to join Local 66

Following certification of Local 66 on August 20, 1969, neither Hunter nor Holes actually joined Local 66. However, following the certification Local 66 and the Company engaged in negotiations resulting in agreement on a new contract entered into on October 30, 1969, retroactive to September 16, 1969, and continuing to September 15, 1972. In the meantime Local 66 held meetings of employees for the purpose of reporting on and discussing the progress of negotiations. At one such

meeting in October Local 66 Business Representative Lester Smiley was asked if employees who were not working could be given a reduced rate for union dues. At another such meeting a week later he replied that this was not possible. Hunter, who was not then working but attended the meetings, pointed out that it was impossible for him to pay union dues through a checkoff system while he was off. He offered to pay dues directly if Smiley would advise him the amount and the place to pay. Smiley told him not to worry about checkoff authorization while he was in disability status because he could take care of it when he returned to work, and that his dues could start from that time. Shortly thereafter, on October 30, Hunter returned to work for about a week and a half but he did not authorize a checkoff of dues nor did he formally join Local 66. It was May 1971, about the time charges were filed in the present matter, and long after his termination, when he actually joined.

Although Holes had been a member of District 50, he was not particularly active. After Local 66 took over the representation of the employees at the plant, he learned from Hunter that there was a new union. He then contacted a Local 66 representative Smiley and inquired about the procedure to join Local 66 and pay union dues. Smiley advised him it was not necessary to pay dues as long as he was off work injured because that could be taken care of when he returned to work. He told Holes that all District 50 members were automatically members of Local 66. On that basis Holes testified he believed he was a member of Local 66 although he never had a union card and never paid dues.

D. *The Company Invokes the Union-Security Clause*

1. Background

Historically the Company has opposed union-security clauses, having successively negotiated to keep one out of the first District 50 agreement and to delay the enforcement date for the clause incorporated in the second District 50 agreement. In negotiations with Local 66 union security was a matter of strenuous bargaining, but the Union eventually succeeded in having a union-security clause incorporated in the current agreement. It is undisputed here that the language of the clause is lawful.

The level of Company business fluctuates from time to time. Accordingly its need for personnel is not constant. On October 16, 1970, 21 employees were laid off for lack of work. Hunter and Holes were already on disability at the time.

In February 1971 the Company obtained new orders calling for strict delivery dates for its products. To meet these delivery dates the 21 employees in layoff status (not including Hunter or Holes) were needed. With the help of the union stewards the Company on February 12 began recalling those on layoff in accordance with their seniority. At this point the Company had no idea whether those on layoff were in good standing with Local 66 or not. The first employee recalled reported for duty on Monday, February 15. The Local 66 steward at the plant objected to his working on the ground that he was not a member in good standing. After some discussion he was allowed to work the

balance of the day but was directed by the steward not to thereafter return to work until he was in good standing with Local 66.

The following morning Plant Superintendent Emerson Yount discussed with Local 66 Business Representative Edward Zielinski the Company's immediate need for all employees in layoff status. The Union was unable to immediately clarify its position in the matter, but asked the Company to send it a list of the laid-off employees. In response to this request the Company gave Local 66 a letter setting forth its need to know which employees were in good standing with the Union and asking it to advise the Company which of the laid-off employees were in good standing. It included a list of all employees, including the 21 laid-off employees and the two (Hunter and Holes) listed as absentees. The seniority date of each employee was also indicated.

Three to four days later Local 66 returned the list, indicating thereon which of the layoffs were in good standing and the suspension date of those who were not. With regard to Hunter and Holes the Union indicated "Have no record of application for." Local 66 instructions to the Company regarding recall were to bypass those not in good standing and recall those in good standing. A day later these instructions were revised and the Company was told to recall all laid-off employees in accordance with their seniority, irrespective of whether they were or were not in good standing with the Union, and to have Local 66 stewards advise those not in good standing to achieve that status prior to reporting for work, and upon reporting for work to produce proof of good standing. Some suspended employees had to show receipts for payments of anywhere from \$40 to \$60 to Local 66 before they could begin working.

As a result return of the laid-off employees to work was substantially delayed. Of the 21 layoffs, Local 66 had reported 6 in good standing. These six first returned to work on March 1. Of the 15 remaining on the list who were not in good standing, the first returned on March 9 and it was the end of March before all of the others reported. The delay caused substantial production problems including some additional expense for overtime. Yount credibly testified that had there been no objection he would have contacted all 21 by February 15 and would have known by then who was returning and who was not. In his opinion overtime could have been avoided if the laid-off employees had been able to return promptly.

2. Company efforts to clarify future status of employees on layoff

Sometime in March in a regular meeting with two Local 66 stewards and Business Representative Zielinski, Plant Superintendent Yount explained the production problems caused by the delay, pointing out that neither he nor the stewards had up-to-date information on the membership status of laid-off employees. He inquired of Zielinski what to do if the situation arose again. He asked about the two men on the list (Hunter and Holes) who were not even members of Local 66. Zielinski replied that he did not know them and as far as he was concerned they did not work at the Company and never had.

About the same time in March, Hunter, whose anniversary date of employment was March 29, requested an advance on his vacation pay. Company President Lawrence Parrott refused on the ground that he possibly was no longer an employee since he had not joined Local 66.

In normal practice when an employee passes his anniversary date of employment he becomes entitled to a paid vacation. Employees also receive pay for certain holidays and the Company pays premiums for hospitalization and life insurance for the employees. Although Hunter and Holes were not actively working, they continued to enjoy these benefits as employees in disability status.

3. Termination of Hunter and Holes

In letters of March 26 to both Hunter and Holes the Company quoted the union-security language of the Local 66 contract and noted that Local 66 had advised the Company they had never been members in good standing of Local 66. The letter then declared they had voluntarily terminated their employment on December 1, 1969, and that they would receive no further payments such as holiday or vacation pay nor have insurance premiums paid on their behalf.

Local 66 immediately thereafter on April 1 made it clear that it was not seeking the termination of Hunter or Holes. It contended that the union-security clause was not applicable to disability cases and that the Union would accept their applications at a later time when they had returned to good health. As noted earlier Hunter did subsequently join Local 66 in May 1971.

E. Discussion

It is clear that the Company did not intend to recall either Hunter or Holes at the time it recalled the other 21 from layoff status. It is also clear that the Union did not specifically request their discharge, although at the time it was generally insisting on union membership as a condition of employment for those recalled from layoff. The Company's purpose in discharging Hunter and Holes, as stated by its president at the hearing, were: (1) To bring a resolution to questions regarding the application of the union-security clause and thereby avoid future financial burdens and disruptions in production which might occur if the questions were left unresolved; (2) to terminate existing costs involved by way of insurance premiums and holiday and vacation pay for Hunter and Holes; and (3) to enforce union-security requirements of the contract which Local 66 should have invoked but had failed to do.

The rights of employees to engage in union activity and to of the Act. "Employees shall have the right to self-organization . . . and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3)." Thus the existence of a valid union-security clause such as the one in this case places some limitation on employee Section 7 rights.

Section 8(a)(3), being a prohibitory, addresses the matter in more negative language. Thus an employer is forbidden to discriminate in employment to encourage or discourage

membership in a union. But, nevertheless, valid union-security agreements are permitted in the sense is that an employer does not commit an unfair labor practice by discriminating against an employee pursuant to a valid union-security clause. This reading is further buttressed by language, which, amounts to exceptions to the union-security exception, to the effect that no employer shall justify discrimination against an employee for nonmembership in a union where there is reasonable ground for belief that membership was not available on an equal basis or was denied or terminated for some reason other than nonpayment of dues.

In its termination letters to Hunter and Holes, the Company here relied entirely upon their failure to fulfill the requirements of the union-security clause of the Local 66 contract. The General Counsel argues that for the Company to invoke the union-security clause unilaterally without any request for discharge from the Union is *per se* a violation of Section 8(a)(3) and (1). The essence of this argument is that union security relates to internal union affairs and as such is available exclusively to the Union and is not available to the Company as a device for terminating employment. The General Counsel relies on *Long Transportation Company*, 191 NLRB No. 22. In that case the employer discharged an employee for conduct construed to be inconsistent with continued union membership in a subsequent Board proceeding it sought to justify the dismissal on the grounds of a union-security clause. The Trial Examiner found that the contract containing the union-security clause had expired and the union-security clause had not thereafter continued in effect. He further opined that even if the contract had remained in effect, since the Union had not requested the employee's dismissal pursuant to the union-security clause, the employer could not unilaterally justify the dismissal pursuant to the union-security clause because the retention or revocation of union membership was a matter of internal union concern and of no moment or concern to the employer. In the present matter the General Counsel relies on that reasoning. But in *Long* the majority of the Board panel, which adopted the Trial Examiner's conclusion that the employer had violated Section 8(a)(3), found unequivocally that no contract existed at the time, saying nothing whatever about the additional reasoning of the Trial Examiner assuming continued existence of a union-security clause. Also, the Board plainly found that the employee was discharged for engaging in protected activity, a question which the Trial Examiner did not reach. *Long* is thus distinguishable from the present case because there the Board did not address itself to the union-security question. It is also factually distinguishable because there, in contrast with the present matter, no union-security provision existed at the time of the dismissal.

In further support of his position the General Counsel notes that in *James Luterbach Construction Co. Inc.*, 167 NLRB 39 at 41, the Trial Examiner, whose decision was adopted by the Board, described a union-security clause as "obviously for its [the Union's] sole benefit." The General Counsel contends that one of the philosophical foundations of the Act is the concept that acquisition and

retention of union membership is a matter for the Union alone, referring to the proviso in Section 8(b)(1)(A). Reference to that section, however, is not particularly material because no one here contends that union-security provisions are not a matter for union concern.

The Company contends that it as well as the Union has a right to enforce the union-security clause of the collective-bargaining agreement. In support of its claimed legitimate interest in enforcing the provision it points to the circumstances and history in the present matter, particularly the circumstance that Local 66 was insisting that the Company enforce the union-security provision with regard to the 21 employees recalled from layoff status. The Company relies on *M & M Wood Working Co. v. N.L.R.B.*, 101 F.2d 938 (C.A. 9), in which a union took the general position that the employer should comply with a collective-bargaining agreement but did not request the termination of specific employees; the court held that the employer there did not violate Section 8(3) of the Wagner Act by releasing from employment employees who refused to maintain their membership in the incumbent union where the existing collective-bargaining agreement required such membership.

No recent holding dealing with the question has come to light. I deem it unnecessary to dispose of the matter on a *per se* basis because, as pointed out hereinafter, the Company did not give the two discharged employees adequate notice and opportunity to comply with the contract provision invoked against them.

The General Counsel argues alternatively that even assuming the law allows an employer to unilaterally invoke a union-security clause, the circumstances in the present matter show that Respondent's conduct was unlawful. In this regard he makes three points: (1) The Company failed to give adequate notice and opportunity to Hunter and Holes to comply with the union-security clause; (2) the Company had reasonable grounds to believe that membership in Local 66 was not available to Hunter and Holes on the same terms and conditions as generally available to other employees; and (3) the Company invoked the union-security clause in order to terminate Hunter and Holes but for reasons other than their failure to pay dues and initiation fees.

Concerning the first of these points, that the Company failed to give adequate notice of or opportunity to comply with the union-security clause, the General Counsel notes that a union in invoking a union-security clause had a fiduciary obligation in some circumstances to give the subject employees such notice and opportunity, citing *Aerojet-General Corporation*, 186 NLRB No. 77, and *Philadelphia Sheraton Corporation*, 136 NLRB 888, enf. 320 F.2d 254 (C.A. 3). In *Aerojet*, as in the present matter, the employee's failure to comply with the union-security clause had gone on for several years when the union, without further notice to the employee, requested his discharge and the employer complied. The Board held the union had not fulfilled its fiduciary duty to deal fairly with the employee, saying, "When Johnson [the employee] continued to work for years after that without any attempt by respondent [the union] to enforce against him a union-security provision, he could well have assumed that

respondent was not interested in him as a member and that he could work freely for the employer as a nonmember." As the court of appeals noted in *Philadelphia Sheraton* (at 258), "At the minimum, this duty requires that the union inform the employee of his obligations in order that the employee may take whatever action is necessary to protect his job tenure." In its decision in that case the Board noted that the employees involved (who were new employees) had not been told the amount of dues owed or when such payments were to be made. The Board said (at 896), "To permit a union to lawfully request the discharge of an employee for failure to meet his dues-paying obligations, where the provisions relating to such obligations are not disclosed to the employee, would be grossly inequitable and contrary to the spirit of the Act." In the present matter, as in *Philadelphia Sheraton*, neither Hunter nor Holes was told the amount of dues or how such could be paid although both had sought to learn this information from Union Representative Smiley in October 1969. In effect Smiley put them off by saying it would be soon enough to join the Union when they returned to work. From that both could reasonably believe that membership was not being required of them, at least for the time being, by Local 66.

For its part an employer has an obligation of establishing that employees discharged under a union-security clause have been fully and unmistakably notified of their obligations thereunder (*Pacific Iron and Metal Co.*, 175 NLRB 604), or that the employer has reasonable grounds for believing that they have been so notified (*Conductron Corporation*, 183 NLRB No. 54). Here the Company purported to act, at least in part, because the Union failed to act, and in that sense it stands in the shoes of the Union. The General Counsel urges that it therefore should be held to the same fiduciary obligation to which unions are held when they invoke a union-security clause. I agree. Cf. *Conductron Corporation*, *supra*, Trial Examiner's Decision. In the circumstances it seems to me that the Company should have afforded Hunter and Holes the opportunity to comply with the union-security requirements in order to preserve their employment rights. With respect to Holes, it is clear that no notice whatever was given to him prior to his termination letter of March 26. With respect to Hunter, the matter is not as clear because prior to his discharge he had two conversations with Company President Parrott, the first being around mid-March, in which Parrott voiced the belief that Hunter might no longer be an employee because he had not joined Local 66, and Hunter explained why he had not. Thus Hunter had some notice that union membership could be a current condition of continued employment. But it was not clear, unmistakable, notice. Nothing was said about terminating his employment status if he did not take action. The question of his status was raised in a limited context of his entitlement to vacation pay. In the circumstances I find adequate notice was not given Hunter and that legally he was in the same situation as Holes.

The General Counsel points to these same conversations between Hunter and Parrott as the circumstance which gave the Company reasonable grounds for believing that union membership was not available to Hunter and Holes

on the same basis generally applicable to other employees, because in answer to Parrott's statement that he had not become a member of Local 66, Hunter told Parrott he had made an attempt to join. His testimony is not entirely clear, but I infer that Hunter explained his conversations with Smiley in October 1969. If so, all Parrott learned was that Local 66 had not then insisted that Hunter be a member during his disability and that he could defer joining until he returned to work. This was no indication that membership was not available to Hunter on the same terms and conditions generally applicable to other employees and did not afford reasonable grounds for so believing. There is no evidence at all that this conversation pertained in any way to Holes.

It was around the same time (as the Hunter-Parrott conversations) that Local 66 Representative Zielinski, when queried by Yount about the union status of Hunter and Holes, replied that he did not know them and as far as he was concerned they did not work at the Company and never had. In the circumstances I find that the Company did not have reasonable grounds for believing that membership in Local 66 was not available to Hunter and Holes on the same terms and conditions generally applicable to other employees. Accordingly, General Counsel's reliance upon the second circumstance noted above to support a violation lacks merit.

The third circumstance urged by the General Counsel is that the Company admittedly harbored reasons over and above lack of membership in Local 66 for terminating Hunter and Holes. These included business reasons to guard against future financial costs and the disruptions in production and to put an end to what the Company considered unjust enrichment of Hunter and Holes in the form of paid holidays, paid vacations, and paid hospitalization and life insurance premium, all of which involved some expense for the Company. The argument is that the permissible discrimination under the union-security exception to Section 8(a)(3) is strictly limited to efforts to compel payment of dues and initiation fees and may not be used for any other purpose. If used for another purpose Section 8(a)(3) is violated. The General Counsel cites *A. Nabakowski*, 148 NLRB 876, 882, *enfd.* 359 F.2d 46 (C.A. 6), and *Radio Officers v. N.L.R.B.*, 347 U.S. 17. This general proposition is beyond question. *Nabakowski*, however, is distinguishable. In that case the terminated employees either failed a journeyman test given by the union or refused to take the test and the union for that reason requested their termination pursuant to the union-security clause. Passing the test was a prerequisite to union membership. The Board, with court approval, held that the union-security clause could not be used to enforce that requirement. Here neither Hunter nor Holes actually tendered initiation fees and dues, nor did they in fact join Local 66 prior to their termination. It is uncontroverted that they never satisfied the initiation fee and dues requirements for membership in Local 66, and this record reveals no other prerequisite for membership. Failure to obtain such membership was the reason stated for their termination. If the matter ended there there would be no question. But at the hearing, Company President Parrott indicated there were the additional motivations indicated

above. The fact that these additional reasons existed does not mean that they replaced failure to pay initiation fees and dues as a basis for invoking the union-security clause as was the case in *Nabakowski*. Because of this distinction I find that General Counsel's argument in this regard lacks merit.

In sum, I find that the Company terminated Hunter and Holes for discriminatory reasons, to encourage membership in Local 66, and that this discrimination may not be condoned under the union-security exception in Sections 7 and 8(a)(3) because no adequate notice affording them reasonable opportunity to comply with the union security requirements of the collective-bargaining agreement was given. Accordingly, I find that the terminations were and are unfair labor practices forbidden by Section 8(a)(3) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States. Those found to be unfair labor practices tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce, and are unfair labor practices within the meaning of Sections 8(a)(3) and (1) and 2(6) and (7) of the Act.

V. THE REMEDY

Having found that Respondent violated Section 8(a)(3) and (1) of the Act, I recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. I recommend that Respondent offer to Hunter and Holes immediate, full, and unconditional reinstatement to their former employment status, without prejudice to their seniority and other rights or privileges, and make each of them whole for any loss of earnings suffered by reason of the discrimination against them by paying each a sum of money equal to the amount he would have earned from the date of discrimination on March 26, 1971, to the date Respondent offers such reinstatement, less net earnings during that period in accordance with the Board's formula stated in *F. W. Woolworth Company*, 90 NLRB 289, with interest thereon at the rate of 6 percent per annum as set forth in *Istis Plumbing and Heating Co.*, 138 NLRB 716. I also recommend that Respondent post appropriate notices.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:¹

¹ In the event no exceptions are filed as provided by Section 102.46 of the rules and regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the rules and regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

² In the event that the Board's Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "Posted by

ORDER

Respondent, McDowell Mfg. Co., Division of Alco Standard Corp., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Encouraging membership in International Union of Operating Engineers, Local 66, AFL-CIO, or in any other labor organization of its employees, by discharging, or in any other manner discriminating against any employee in regard to hire or tenure of employment or any term or condition of employment, except as authorized in Section 8(a)(3) of the Act.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, except to the extent that such rights may be affected by an agreement requiring membership in the labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act.

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

(a) Offer Howard L. Hunter, Sr., and Arthur Holes immediate and full reinstatement to their former employment status without prejudice to their seniority or other rights or privileges, and make each whole for any loss of earnings suffered as a result of discrimination against them in the manner set forth in the section hereto entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board and its agents for examination and copying all payroll and other records containing information concerning compliance herewith.

(c) Notify the above-named employees, if presently serving in the Armed Forces of the United States, of their right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

(d) Post at its plant in DuBois, Pennsylvania, copies of the attached notice marked "Appendix."² Copies of the notice on forms provided by the Regional Director for Region 6, after being duly signed by Respondent's representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 6, in writing, within 20 days from the date of the receipt of this Decision, what steps Respondent has taken to comply herewith.³

Order of the National Labor Relations Board" shall be changed to read "Posted pursuant to a Judgment of the United States Court of Appeals enforcing an Order of the National Labor Relations Board."

³ In the event that this recommended Order is adopted by the Board after exceptions have been filed, this provision shall be modified to read "Notify the Regional Director for Region 6, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith."