

**Abe Munn Picture Frame Manufacturing, Inc.<sup>1</sup> and  
Local 3127, United Brotherhood of Carpenters and  
Joiners of America, AFL-CIO. Case 2-CA-13098**

July 19, 1974

**DECISION AND ORDER**

BY MEMBERS FANNING, KENNEDY, AND PENELLO

On March 29, 1974, Administrative Law Judge James V. Constantine issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions.

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 Decision in light of the exceptions and has decided to affirm the rulings, findings,<sup>2</sup> and conclusions<sup>3</sup> of the Administrative Law Judge, as modified herein.<sup>4</sup>

**ORDER**

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Abe Munn Picture Frame Manufacturing, Inc., New York, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Threatening to deprive employees of work or to close the plant if they became unionized.

(b) Telling employees to forget the Union if they wanted to work for Respondent.

(c) Threatening to go out of business if the employees chose a union.

(d) Offering employees a raise in wages but only to those who did not leave the plant or who immediately returned to work without the Union.

(e) Discouraging membership in the Union or any other labor organization by discharging or locking out employees or otherwise discriminating in any manner in respect to their tenure of employment or any term or condition of employment.

(f) In any other manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

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

(a) Make whole each of the following employees:

R. Sanches                      T. Rivera

W. Townsend                  J. Perez

J. Otero                         L. Diaz

L. DeStradi                    J. Sanches

A. Giacalone                  A. Concepcion

for any loss of pay each may have suffered by reason of Respondent's discrimination against him, with interest at the rate of 6 percent.

(b) Bargain collectively, upon request, with Local 3127 as the exclusive representative of the employees found to constitute an appropriate unit and, if an agreement is reached, embody such agreement in a written, signed contract.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its premises at New York, New York, copies of the attached notice marked "Appendix."<sup>5</sup> Copies of said notice, on forms provided by the Regional Director for Region 2, after being duly signed by an authorized representative of Respondent, 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 2, in writing, within 20 days from the date of this Order,

<sup>5</sup> In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board"

<sup>1</sup> Respondent's name appears as amended at the hearing

<sup>2</sup> The Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enf'd 188 F.2d 362 (C.A. 3, 1951). We have carefully examined the record and find no basis for reversing his findings.

In affirming the 8(a)(1) violations found, we note that the Administrative Law Judge failed to mention the presence of other employees when Munn and Hernandez conversed on the morning of September 27, and, in the first line of the seventh paragraph of sec. 2, inadvertently used the word "after" instead of "before" in referring to the "discharges or lockouts." Munn's remarks to employees Perez and Townsend, including references to no work so long as they had anything to do with the Union, took place prior to the general lockout of the employees.

<sup>3</sup> For the reason stated by the majority in *Steel-Fab, Inc.*, 212 NLRB No. 25 (1974), we do not adopt the Administrative Law Judge's finding that Respondent violated Sec. 8(a)(5) of the Act, but rather entered a bargaining order as a remedy for the serious unfair labor practices committed by Respondent. We shall modify the Administrative Law Judge's recommended Order and notice accordingly. Consistent with his dissent in *Steel-Fab* Member Fanning would find a violation of Sec. 8(a)(5), as did the Administrative Law Judge.

<sup>4</sup> Inasmuch as R. Sanches, W. Townsend, J. Otero, L. DeStradi, T. Rivera, J. Perez, and L. Diaz have returned to work, we shall not enter an order for their reinstatement as the Administrative Law Judge did.

what steps the Respondent has taken to comply herewith.

## APPENDIX

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

We hereby notify our employees that:

WE WILL NOT discourage membership in Local 3127, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, or any other labor organization, by discharging or locking out any of our employees or in any other manner discriminating against them in regard to their tenure of employment or any term or condition of employment.

WE WILL NOT threaten to deprive employees of work or to close the plant if they became unionized.

WE WILL NOT tell employees to forget said Local 3127 if they wanted to work for us.

WE WILL NOT threaten to go out of business if our employees chose a union.

WE WILL NOT offer employees a raise in order to keep them in the plant or to induce them to return to work without the Union.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed to them by Section 7 of the National Labor Relations Act.

WE WILL make whole each of the following persons for any loss of pay he may have suffered by reason of his being discriminated against, with interest at the rate of 6 percent per annum:

R. Sanches	A. Concepcion
W. Townsend	A. Giacalone
J. Otero	T. Rivera
L. DeStradi	J. Perez
J. Sanches	L. Diaz

WE WILL, upon request, bargain collectively with said Local 3127 as the exclusive bargaining representative of all the employees in the bargaining unit described below with respect to rates of pay, wages, hours of employment, and other conditions of employment, and, if an understanding is reached, embody such understanding in a written, signed agreement. The bargaining unit is:

All our production, maintenance, shipping, and receiving employees, excluding office clericals, watchmen, guards, supervisors as defined in Section 2(11) of the National Labor Relations Act,

and all other employees.

All our employees are free to become and remain, or refuse to become or remain, members of said Local 3127 or any other labor organization.

ABE MUNN PICTURE FRAME  
MANUFACTURING, INC.  
(Employer)

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, 36th Floor Federal Building, 26 Federal Plaza, New York, N.Y. 10007, Telephone 212-264-0330.

## DECISION

### STATEMENT OF THE CASE

JAMES V. CONSTANTINE, Administrative Law Judge. This unfair labor practice case was brought under Section 10(b) of the National Labor Relations Act, herein called the Act, 29 U.S.C. §160(b). The complaint, issued on November 28, 1973, by the General Counsel of the National Labor Relations Board, herein called the Board, through the Regional Director of Region 2 (New York, New York), names Abe Munn Picture Frame Manufacturing, Inc., as the Respondent. That complaint is derived from a charge filed on September 27, 1973, by Local 3127, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, herein called the Union.

In substance, the complaint avers that Respondent committed acts violating Section 8(a)(1), (3), and (5) of the Act, and that such conduct affects commerce within the meaning of Section 2(6) and (7) thereof. Respondent has answered, admitting some allegations of the complaint but denying that it perpetrated any unfair labor practices.

Pursuant to due notice, this case came on to be heard, and was tried before me, at New York, New York, on January 16, 17, and 29, 1974. All parties except the Union were represented at and participated in the trial, and had full opportunity to introduce evidence, examine and cross-examine witnesses, file briefs, and present oral argument. The General Counsel argued orally. A brief has been submitted by Respondent.

This case presents the following issues:

(a) Whether Respondent has unlawfully refused to recognize the Union.

(b) Whether the Union is the exclusive representative of the employees in a unit appropriate for the purposes of

collective bargaining.

(c) Whether Respondent threatened reprisals against employees who were members of or engaged in activities on behalf of the Union.

(d) Whether Respondent discharged employees for being members of or engaging in activities on behalf of the Union.

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

FINDINGS OF FACT

I AS TO JURISDICTION

Respondent, a New York corporation, is engaged at New York City in manufacturing, selling, and distributing picture frames, carved moldings, and related products. During the year preceding the issuance of the complaint, which is representative of its annual operations generally, it produced products valued in excess of \$50,000, of which products valued in excess of \$50,000 were shipped from its New York plant directly to points and places located outside the State of New York. I find that Respondent is an employer within the meaning of Section 2(2), and is engaged in commerce within the meaning of Section 2(6) and (7), of the Act, and it will effectuate the policies of the Act to assert jurisdiction over Respondent in this proceeding.

II THE LABOR ORGANIZATION INVOLVED

The Union is, and at all times material herein has been, a labor organization within the meaning of Section 2(5) of the Act.

III THE UNFAIR LABOR PRACTICES

A. *General Counsel's Case*

Victor N. Hernandez, a business agent for the Union, gave testimony substantially as follows. On or about September 21, 1963, employee Townsend telephoned the Union's office stating that Respondent's employees desired to meet with the Union. As a result Hernandez met with such employees after work on the same day. On this occasion he handed out union authorization cards to those present, and succeeded in obtaining signed cards from five employees. (See G.C. Exhs. 2A through 2E.) On September 24, 1973, Hernandez again met with Respondent's employees. Again he passed out union authorization cards. This time six additional employees signed such cards. (See G.C. Exhs. 3A through 3F.)

Then on September 26, 1973, the Union filed a petition (Case 2-RC-16330) to represent a unit composed of Respondent's production, maintenance, shipping, and receiving employees. (See G.C. Exh. 4.) Right after lunch on the same day Hernandez, accompanied by Business Agent DiCicco, visited Respondent's shop to request recognition for the Union. Upon arriving there, employee Jose Sanches told him that Sanches had just been fired. Soon Hernandez and DiCicco called on Respondent's president, Abe Munn, and, claiming a majority, requested recognition of the Union. President Abe Munn replied that he wanted no

union; that the Union did him a favor by said request, as he was going out of business; and that the Union should find jobs for Respondent's employees.

Thereupon, Hernandez invited the employees into Munn's office and Hernandez insisted that Munn could see that the Union enjoyed a majority. At the same time, Hernandez handed Abe a "recognition agreement blank." (See G.C. Exh. 5.) Hernandez also requested that Sanches be reinstated on a probationary basis, so that he could be let go "if he did anything wrong during that time." Munn then reinstated Sanches, the other employees returned to work, and Hernandez left with DiCicco.

The following day, September 27, Hernandez arrived at Respondent's shop at around 7 a.m. About 7.15 a.m., Abe Munn came to the plant. Munn accosted Hernandez with "I thought this was all finished . . . I thought this whole union business was finished." At this point Abe left, but soon employees came to Hernandez to report to him the shop was closed and they could not get in to go to work. They also told him that Munn said to them, "There will be no work if the people wanted the Union. I am out of business. I am closing down. If you want to work here, forget about the Union." Thereupon, Hernandez directed employee Wesley Thompson and another employee to go into the shop to find out what was going on.

Soon Thompson returned with other employees and reported to Hernandez that Abe Munn told them that "there will be no work as long as the Union is out there. If you people want to work, you have to forget about the Union." So Hernandez went upstairs with other employees, only to find that the door was locked. When Hernandez knocked on the door, Abe Munn opened it and spoke to Hernandez. Munn said, "You did me a favor. I am out of business. Take them and give them jobs. Let the Union give them jobs." Thereupon, Hernandez and the employees left.

Jose Sanches, a former employee of Respondent, testified for the General Counsel. An abridgment of his testimony ensues. On September 21, 1973, he attended a meeting with Hernandez at which he signed a union authorization card. (See G.C. Exh. 2E.) At about 1 p.m. on September 26, Abe Munn fired him and added, "go into the Union and let the Union find you a job." Immediately thereafter Sanches reported this to Hernandez whom he met in the street. Later that day Sanches was reinstated by Respondent. (As related elsewhere herein, Hernandez induced Munn to take back Sanches.)

Sanches reported for work on September 27 at about 7:50 a.m. Two employees, one of whom was his brother, informed him "there is no work." Soon four more employees told him there was no work and that "it was a lockout." Shortly thereafter Sanches and some other employees went into the shop with Hernandez. At this point Abe Munn told Hernandez, "Take them and let the Union find them a job." Following this, Sanches sought to enter the shop while accompanied by Hernandez. But Abe Munn told Hernandez that the latter "should take the employees out, there is no work."

Another witness for the General Counsel, Rafael Sanches, an employee of Respondent, gave testimony which may be adequately compressed as follows. He attended the September 21 meeting described above, at which he signed a

union authorization card (see G.C. Exh. 2D), and another meeting on September 24 conducted by Hernandez.

At about 7:50 a.m. on September 27, he reported for work at Respondent's shop. He "went upstairs and work like normal." Shortly after 8 a.m., Abe Munn laid him off and simultaneously gave him a paycheck with the words there was no more work. Yet Friday was the normal payday. When Rafael went downstairs after that, he encountered Hernandez to whom he mentioned that Abe Munn had laid him, Rafael, off for lack of work. Thereupon, Rafael and Hernandez returned upstairs to see Abe Munn. Upon accosting Munn, Hernandez said, "I represent the Union and the guys, the employees want the Union." Munn replied that he wanted no union, and that if the men wanted a union "tell the Union to find them jobs." As Hernandez and "the guys" started to return downstairs, Munn offered them a raise and said, "Whoever goes won't have the raise back."

Still another employee who testified is Thomas Rivera, whose testimony may be condensed as follows. On September 27, 1973, when he arrived at his work station at about 7:45 a.m., he noticed that the others were not working. One of the employees informed him that the factory was closed. Soon they accompanied Hernandez to Abe Munn's office. But Munn ordered Hernandez to "take them all out." So they left and went downstairs. Rivera had signed a union authorization card on September 21, 1973. (See G.C. Exh. 2B.)

Wesley H. Townsend, a gilder for Respondent, gave substantially the following testimony. He attended the September 21 and 24, 1973, meetings held by Hernandez and also on September 21 signed a union authorization card. (See G.C. Exh. 2A.) On September 26, Townsend met Hernandez during the lunch hour and then the two of them, accompanied by Union Business Agent DiCicco, went upstairs to call on Abe Munn. When Hernandez told Munn that the former represented the Union, Munn retorted that he was not interested in the Union and did not want anything to do with it. Then Hernandez handed a document to Munn's accountant, who was present, but Munn did not sign it. In addition, Hernandez induced Munn to rehire Jose Sanches whom Munn had just discharged.

At 7:45 a.m. on September 27, Townsend came to the shop to work. Employees who had arrived there before him informed him "there was no work. [Munn] wasn't letting anybody into the shop." At this stage, i.e., about 8 a.m., Hernandez told Townsend and employee Perez to go upstairs to speak to Mr. Munn, and they did so proceed. However, Munn informed them, "There is no work as long as you have anything to do with the Union. There is work if you forget the Union." Munn added that he would "sell his business first" and that "there wouldn't be any raises if you didn't come back now." Then Townsend and Perez went downstairs and recounted the foregoing to Hernandez.

Following this, Hernandez, accompanied by a group of employees, went upstairs to call on Abe Munn. They spoke to Munn outside the door. Munn insisted he did not want anything to do with the Union and instructed Hernandez to "take them all out . . . you do me a favor by taking them out. . . . Let the Union give them jobs." Hernandez claimed a majority and demanded recognition. Immediately thereafter Munn locked the door. So the Her-

nandez group departed.

Jose Perez, another employee of Respondent, also was a witness. A synopsis of his testimony follows. He attended the meetings with Hernandez on September 21 and 24, 1973, and on September 24 signed an authorization card for the Union (See G.C. Exh. 3B.) On September 27, he accompanied Townsend when the latter spoke to Abe Munn. When Townsend inquired if there was work Munn replied, "there was work, but without the Union."

It was stipulated at the trial that General Counsel's witnesses would testify that on September 27, 1973, all the employees whose names are set out in paragraph 13(a) of the complaint were either locked out or discharged; that all of said employees, except Jose Sanches, Antonio Giacalone, and Antonio Concepcion, returned to work on or about November 5; that Jose Sanches never returned to work; that Concepcion left for Puerto Rico; and that Giacalone has obtained employment with another employer.

#### B. Respondent's Defense

Abe Munn owns Respondent corporation. A synopsis of his testimony on behalf of Respondent is related here. At about 12:30 p.m. on September 26, 1973, he received a telegram claiming that his employees were unionized because 11 of them had signed union authorization cards. This was the first time he learned that the employees were interested in a union. Shortly thereafter Hernandez and DiCicco from the Union came to Munn's office. In addition to Munn, there were in his office on this occasion his accountant, Rottenbach, and Mrs. Portugay, a secretary.

On the foregoing occasion, Hernandez informed Munn that "the workers have unionized . . . he [Hernandez] has eleven signatures, and he wants to sit down and talk." A phone call during this conversation caused Munn to look out the window. Since he observed some of his employees "carrying cards saying 'strike,'" Munn mentioned this to Hernandez. The latter answered, "It is not true," but did not go to the window. Soon Hernandez gave Munn a paper and said, "Sign it, and everything will be fine . . . show it to your lawyer and think about it overnight." (See G.C. Exh. 5.)

Munn admits that at said meeting he told Hernandez that the Union had done him a favor; that, because for 3 years Respondent's business was in trouble financially, he wanted to sell the business; and that Hernandez "took off a stone from my chest. I didn't have the nerve to lay them off, half of them, and to keep half." Hernandez responded that Munn was joking and soon departed with DiCicco. Although the lunch period had ended, none of the men went back to work, and some of them continued to picket.

Not long after this on the same day, Hernandez, accompanied by employees Perez and Townsend, came back to Munn's office. Hernandez said, "Mr. Munn, let's forget about what everything is. Would you take back the workers and Sanches? . . . Take them back and everything will be all right . . . everything is finished." (Munn had discharged Sanches before the lunchbreak.) When Munn responded in the negative, Hernandez pleaded with him to rehire Sanches and promised that he would not object to such employee being fired by Munn if his work was unsatisfactory. This assurance caused Munn to take back Sanch-

es. Immediately thereafter Hernandez went downstairs and all the employees went back to work. Munn did not see "the picket signs any more that afternoon."

When Munn arrived at the plant about 7:30 a.m. on September 27, he found Hernandez in front of it. Not long after entering the building Munn went outside and asked Hernandez what the latter's purpose was in being there. Hernandez replied, "It is not finished . . . we are going to fix you up." Thereupon Munn said, "If it is not finished for you it is finished for me," and went back to his office.

Then the employees came up to the working area, but they did not go to work. So Munn asked them if he had mistreated them, or did them any wrong, or given them pay raises without their asking for them. They replied, "No." Then he asked them, "What happened?" Since no one explained their failure to start working, he told them that the door was open for anyone who wanted to work and whoever wanted to strike was free to do so.

Soon Hernandez came to Munn's door and accused the latter of locking out the employees. Munn said that the door was open but would not allow Hernandez to enter. So Hernandez told the employees to leave with him and they did. But Munn denies that he ever told any employees that they could not work if they had a union. None of said employees worked that day. They did not return to work until November 5, 1973, but picketed during that period. They returned after one "Sol" from the Union requested Munn to take them back "and forget the whole thing."

On the foregoing occasions when the employees or Hernandez called on Munn, the second floor door to the plant was locked and Munn had to unlock it to permit anyone to enter. In the past such door had not been locked, so that anyone could enter the plant. Respondent occupies only the second floor as a tenant in a building housing other tenants on other floors. Such locking of the door was "unusual," according to Munn.

On cross-examination, Munn agreed that he told the employees he had mentioned to Hernandez on September 26 and 27, 1973, that "it was up to them whether they worked or not." Also, on cross-examination, Munn admitted that in his affidavit to the Board he did not in it mention (a) that Hernandez said he was "going to get" or "fix" Munn, and (b) that Respondent was picketed at any time.

Joan Marie Portugay, one of Respondent's secretaries, gave testimony for it. An abstract thereof follows. About 12:15 p.m. on September 26, 1973, a phone call caused her and Abe Munn to look out the window. This phone call was from the telegraph company advising Respondent that the Union "represents all your employees . . . We are prepared to demonstrate a majority and negotiate a collective bargaining contract. Victor M. Hernandez, business manager." (See Tr., p. 303.) She saw a picket, Sanches, outside with signs bearing the legend "Strike, A. Munn Picture Frames." About 1 p.m., Hernandez and an associate came to see Abe Munn. Hernandez announced that he had signed union cards from all 11 of Respondent's production workers, that Hernandez represented them, and that they were "downstairs at a meeting waiting for Mr. Hernandez to go back down and tell them to come to work." Hernandez added the men would return to work when Hernandez assured them that Munn would talk with them. Munn ex-

pressed ignorance "about what you are talking about." Hernandez handed Munn an "agreement" and asked the latter to sign it, but Munn refused on the ground that he did not know its contents. Then Hernandez and his "associate" left to speak to the "men" downstairs.

But the "men" did not return to work when their lunch hour was over. Shortly thereafter Hernandez, together with employees Perez and Townsend, returned to Munn's office. Hernandez requested that Jose Sanches, who had just been discharged, be taken back and Munn consented. Then Hernandez went downstairs and returned with "all the workers." In Munn's presence, Hernandez instructed the workers that Munn was their boss, that they "were to listen to Mr. Munn," and that the Union could not aid them if they "did not perform their jobs correctly." Soon after this the men returned to work.

Miss Portugay arrived at work about 7:55 a.m. on September 27. She observed Hernandez downstairs at the time. When she reached the plant on the second floor, she noticed all "the men" sitting in the showroom. Munn asked the men if he had not been a fair boss and had "always given them raises without their asking." They gave a favorable reply. Then he directed the men to start working. But Townsend said that "each man had to do according to his own conscience."

Soon Hernandez came into the outer room and accused Munn of locking in the men, but Munn replied, "they can leave if they want to." Consequently, Hernandez asked Munn to open the door to admit the former, but Munn refused. Hernandez said, "I will get you. I will fix you." But when Hernandez asked Munn to let the men out Munn "opened . . . the locked door" and said the men could do whatever they felt like doing. This caused Hernandez to request the men to leave and they slowly, a few at a time, left. During this time Hernandez and Townsend each cried out, "Lock out." One of the men leaving, Raphael Sanches, asked for and received his paycheck. At no time did Munn declare that there would be no work if there was going to be a union.

On cross-examination, Miss Portugay admitted that in her affidavit to the Board she did not mention observing any pickets outside Respondent's plant. Although on cross-examination she stated that on September 27 both Hernandez and Townsend said in Munn's presence that it was "a lockout," this was not mentioned in her affidavit to the Board.

Donsey Crawford's testimony as a witness for Respondent may be succinctly summarized as follows. She is employed as a secretary by Respondent. On returning from lunch on September 26, 1973, about 2 p.m., she overheard Hernandez tell the employees that "if the men didn't listen to [Munn] or didn't do an honest day's work, then Mr. Munn had the right to throw them out or fire them." After this, Hernandez announced that "everything was forgotten." Then the men returned to work.

When she reported to work the next day, September 27, at a little after 8 a.m., she noticed Hernandez in front of the building and saw the employees assembled upstairs in the showroom. Munn informed the assembled employees in said showroom that "there is work and if they are willing to work, they can work . . . it is up to them if they want to

work . . . he was not stopping them.”

A few minutes later Hernandez knocked on the locked door of the showroom. When Munn came to the door, he refused to talk to Hernandez. Nevertheless, the latter asked why Munn was “locking your employees in.” Munn denied locking them in and then unlocked the door. Soon Hernandez asked Munn “to sign the agreement,” but Munn refused. Thereupon, Hernandez ordered the assembled employees to leave and told them he would “fix” Mr. Munn. But she did not mention the “fix” part in her affidavit to the Board. Mrs. Crawford saw Hernandez in front of the entrance to the building daily after that until November 5, 1973.

Saul N. Rottenbach, a certified public accountant, testified for Respondent. His testimony may be epitomized as follows. As Respondent’s accountant, he is familiar with its financial condition. In his opinion, Respondent “has been losing money quite steadily for approximately three, three and a half years.” And on September 26, 1973, not only was it “not in a money-making position,” but it “was quite in debt.”

On said September 26, he was in Respondent’s office when representatives of the Union came there. Soon Munn looked out the window and commented that “there are pickets outside.” Thereupon, Rottenbach went to the window and although he, too, observed two “picket signs,” he was unable to discern the legend they carried. He “assumed” two employees were “carrying the placards.” Not long after this Munn told Hernandez “you have already started picketing before you came up” notwithstanding “you fellows are coming here asking for recognition.” Although Hernandez replied, Rottenbach did not recall what the former said.

During the foregoing meeting, Hernandez stated that he had obtained cards from 11 employees and that his Union represented the employees, and he requested Munn to sign a “recognition agreement.” Munn refused to sign on the ground that he “didn’t understand these things.” This caused Hernandez to assert that “the employees were out at this time and he would not permit them to come back unless the recognition agreement was signed.” Actually the employees were out on their “lunchbreak” at the time. Munn replied, “Remove the big stone from my shoulders or heart.” Munn also said, “If you won’t permit the men to come back to work, you have made a decision for me that I would not want to make myself.” Then Hernandez departed.

About 45 minutes later, Hernandez returned to the office, but the employees still remained away from work. This time Hernandez announced that he would not permit the men to resume working unless Munn reinstated employee Sanches, who had been laid off that morning. Following some discussion, Munn agreed to take back Sanches. Thereupon, the employees returned to work and Hernandez withdrew.

At this point Respondent concluded its defense.

#### *C. General Counsel’s Rebuttal*

Some rebuttal was presented by the General Counsel. It is set forth here.

Meyer Chait, financial secretary of the Union, described the Union’s “procedure . . . when a business agent and/or

other agent of the union desires to request picketing permission.” According to him such picketing must be approved either by the Union’s president, or, in the absence of the president, by the financial secretary. (Testimony by Hernandez corroborated the foregoing testimony.) On September 26, 1973, the Union’s president, Mr. Saul, was out of the city, so that on that day only Chait could grant permission to picket by the Union. But neither Hernandez nor any other person sought such permission from Chait on said September 26 to picket Respondent’s premises; nor did anyone inform Chait that Respondent was being picketed.

On September 27, 1973, Hernandez telephoned Chait requesting “lock-out signs made up for Abraham Munn Picture Frame.” (Hernandez confirmed this aspect of Chait’s testimony.) Chait promised that their signs “would be down” later in the afternoon. Chait then caused such signs to be assembled and had them delivered by another person to Hernandez outside of Respondent’s shop.

Employee Townsend, who went downstairs and into the street in front of Respondent’s entrance to the building between 1 and 1:30 p. m. on September 26, 1973, testified that he did not observe any picket signs during this period or between 12 noon and 2 p. m. (Hernandez by testimony substantiated this.) However, he did picket Respondent on the next day, September 27. Employee Sanches testified to the same effect as Townsend, i. e., that there was no picketing of Respondent on September 26 and he, Sanches, picketed Respondent on the next day.

#### *D. Concluding Findings and Discussion*

##### *I. As to the refusal to recognize the Union*

I find that a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act consists of Respondent’s production, maintenance, shipping, and receiving employees employed at its plant, excluding all other employees, office clericals, watchmen, guards, and supervisors as defined in Section 2(11) of the Act. Further, I find that on September 24, 1973, 11 persons were employed in said unit and that the Union had obtained valid authorization cards from all of said employees. It follows that the Union had a majority and had been designated as the exclusive representative of the employees in an appropriate unit, and I so find.

Additionally, I find, crediting Hernandez, and not crediting testimony inconsistent with his, that on September 26, 1973, he made a valid request upon President Abe Munn for recognition of the Union by Respondent, at the same time informing Abe Munn that the Union represented a majority of the employees in such unit. He also presented a recognition agreement to Munn. On this occasion, Hernandez proved his majority to Munn by inviting the unit employees into Munn’s office and stating to Munn that Munn could see that the presence of the employees demonstrated said majority. Munn declined recognition by his reply; however, said denial was not because of a good-faith doubt as to majority, but, as the 8(a)(1) and (3) violations below demonstrate, in order to gain time to dissipate that majority.

Elsewhere in this Decision I have found that Respondent engaged in unfair labor practices forbidden by Section

8(a)(1) and (3) of the Act. It is my opinion, and I find, that said activities by Respondent interfered with the exercise of a free and untrammelled choice if an election were held and tended to foreclose the possibility of holding a fair election. Accordingly, I find that Respondent has committed a violation of Section 8(a)(5) of the Act by refusing to recognize the Union in an appropriate unit under the circumstances set out above, that a bargaining order is proper, that an election is not required, and that employee sentiment once expressed through cards will, on balance, be better protected by a bargaining order without an election. *N.L.R.B. v. Gissel Packing Co., Inc.*, 395 U.S. 575, 614-615 (1969).

2. Whether Respondent engaged in conduct prohibited by Section 8(a)(1) of the Act

(a) At the meeting on September 26, 1973, at which Hernandez requested recognition of the Union, Munn replied that he wanted no union. While this indicates hostility to unions, I find that it does not contravene the Act. On this occasion Munn also stated that the Union did him a favor by asking for recognition because he was going out of business, and that the Union should find jobs for Respondent's employees. His denying said utterance is not credited. I find that this is a veiled threat to close the plant if it became unionized, and that such threat contravenes Section 8(a)(1) of the Act.

(b) On September 27 at about 7:15 a.m. Munn told Hernandez, "I thought this whole union business was finished." This does not violate the Act and I so find. Soon some employees told Hernandez that the shop was closed and they could not get in to work. Since it has not been shown that this occurred after 8 a.m., their time to commence work, I find that such closing does not amount to an unfair labor practice. Said employees also told Hernandez that Munn told them there would be no work if they wanted a union, and to forget a union if they wanted to work. I do not credit Munn's denial thereof. This constitutes a threat of reprisal contravening Section 8(a)(1) of the Act.

On the same day Hernandez directed some employees to go into the shop to ascertain what was going on. When they came back they told him that Munn had apprised them that there would be no work "as long as the Union is out there," and that they would have to forget the Union if they wanted work. I do not credit Munn's contradictory testimony. This, too, is a threat of reprisal prohibited by Section 8(a)(1) of the Act, and I so find. As a result of this knowledge Hernandez went to see Munn in the office. Although the door was locked, Munn opened it when Hernandez knocked on it. In conversing with Hernandez, Munn said that he, Munn, was going out of business and that the Union should give jobs to the employees. I do not credit Munn's gainsaying this statement. I find that it is a threat of reprisal amounting to an unfair labor practice which Section 8(a)(1) of the Act interdicts.

(c) It is admitted that Jose Sanches was discharged by President Munn on September 26, 1973, and that such conduct did not violate the Act. On that occasion Munn told Sanches to go to the Union and let it find Sanches a job. While I find that this statement reveals union animus by the Respondent, I further find that it does not amount to an

unfair labor practice.

The next day when Sanches reported to work some employees told him "there is no work . . . it is a lockout." Since this is a conclusion I shall disregard it as lacking probative value. Shortly thereafter, Hernandez, accompanied by some employees, called upon Munn. During the conversation, Munn told Hernandez there was no work and that Hernandez "should take them out." I find that this in effect amounts to a discharge or lockout of the employees. And I find that such discharge or lockout was motivated by antiunion considerations, so that it contravenes Section 8(a)(3) of the Act. As Hernandez departed with the employees, Munn offered them a raise but added that it would not be given to those who left. I find that this is both a promise of benefit and a threat of reprisal condemned by Section 8(a)(1) of the Act.

As delineated above, Munn discharged or locked out some employees. One of those was Rafael Sanches, who actually worked for a short while before Munn laid him off on the ground there was no more work and gave him a paycheck. I find this also constitutes a discharge or lockout violating Section 8(a)(3) of the Act as it was inspired by antiunion considerations.

On the same day shortly after said discharges or lockouts, Hernandez instructed employees Perez and Townsend to speak to Munn about this situation. Munn informed them that there was no work as long as they had anything to do with the Union and that there was work if they would "forget the Union." Continuing, Munn told them he would sell his business first and that there would not be any pay raises if they did not come back to work "now." These statements constitute both a threat of reprisal and a promise of benefit not sanctioned by the Act.

In arriving at the findings recited in this subsection (c), I have credited the General Counsel's witnesses and have not credited Respondent's witnesses to the extent their testimony is not consonant with that of the General Counsel's witnesses.

(d) In its brief Respondent has requested that I "disregard" the affidavits of certain witnesses for Respondent which were used by the General Counsel to cross-examine such witnesses. This request is hereby granted. No part of the foregoing findings is based upon said affidavits or the General Counsel's cross-examination to the extent it is based upon such affidavits.

(e) If material, I find that the Union did not picket Respondent on September 26, 1973, and that the former's picketing of the latter was not instituted until September 27. This finding is based on the fact that notwithstanding that Respondent's witnesses asserted they observed picketing on September 26 and claimed that placards were being carried by Respondent's employees, such witnesses did not mention the same in their affidavits to the Board. In addition I credit the General Counsel's evidence that no one at the Union empowered to do so authorized picketing on September 26. Hence, I credit the General Counsel's witnesses that the Union did not picket on September 26.

(f) Finally, on the basis of a stipulation of the parties, I find that, except as noted in the next sentence, all employees set forth in paragraph 13(a) of the complaint returned to work on or about November 5, 1973. Said stipulation fur-

ther provides, and I find, that Jose Sanches never returned to work, Antonio Giacalone has obtained employment with another employer, and that Antonio Concepcion left for Puerto Rico. On the basis of this stipulation, I further find that the three employees mentioned in the preceding sentence are not entitled to be reinstated but should receive backpay, if any is due them, up to November 5, 1973.

#### IV THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent found to constitute unfair labor practices 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 and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

#### V THE REMEDY

It having been found that Respondent has engaged in certain conduct prohibited by Section 8(a)(1), (3), and (5) of the Act, I shall recommend that it be enjoined to cease and desist therefrom and that it take specific affirmative action, as described below, designed to effectuate the policies of the Act. Since the discriminatory discharges or lockouts go "to the very heart of the Act" (*N.L.R.B. v. Entwistle Manufacturing Company*, 120 F.2d 532, 536 (C.A. 4, 1941)), I shall recommend that the Order to be issued safeguard employees against infringement in any manner of the rights vouchsafed to them by Section 7 of the Act. *R & R Screen Engraving, Inc.*, 151 NLRB 1579, 1587 (1965).

Since three employees are not entitled to reinstatement, no provision will be recommended to restore them to the positions from which they were locked out or discharged. Their names are set forth in the next paragraph.

Having found that Respondent discriminatorily discharged or locked out several employees, I shall further recommend that it offer each of them (except Jose Sanches, Antonio Giacalone, and Antonio Concepcion) immediate and full reinstatement to his former position or, if such no longer exists, one which is substantially equivalent thereto, without prejudice to his seniority and other rights and privileges. It will further be recommended that all discharges (including Jose Sanches, Antonio Giacalone, and Antonio Concepcion) be made whole for any loss of earnings suffered by each as a result of the discrimination against him. In making each whole Respondent shall pay to him a sum of money equal to that he would have earned as wages from the date of such discrimination to November 5, 1973, less his net earnings during such period. Such backpay, if any, is to be computed on a quarterly basis in the manner prescribed by *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest thereon at 6 percent per annum calculated in the manner set forth in *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962). It will also be recommended that Respondent preserve and make available to the Board or its agents, upon reasonable request, all pertinent records and data necessary to aid in analyzing and ascertaining whatever backpay may be due. It will also be recommended that

Respondent post appropriate notices.

Since the unfair labor practices found elsewhere herein would interfere with the Board's election processes and tend to render the holding of a fair election unlikely, a bargaining order based on the Union's card majority in an appropriate unit is proper. *N.L.R.B. v. Gissel Packing Co.*, 395 U.S. 757, 610, *et seq.* (1969).

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

#### CONCLUSIONS OF LAW

1. The Union is a labor organization within the meaning of Section 2(5) of the Act.

2. Respondent is an employer within the meaning of Section 2(2) and is engaged in commerce as defined in Section 2(6) and (7) of the Act.

3. By engaging in the following conduct Respondent committed unfair labor practices contrary to the provisions of Section 8(a)(1) of the Act: (a) threatening to deprive employees of work or to close the plant if they became unionized; (b) telling employees to forget the Union if they wanted to work; (c) threatening to go out of business if the employees chose a union; and (d) offering employees a raise in wages but only to those who did not leave the plant or who immediately returned to work.

4. By discriminating in regard to the tenure of employment of those mentioned in this paragraph, thereby discouraging membership in the Union, a labor organization, Respondent has engaged in unfair labor practices prohibited by Section 8(a)(3) and (1) of the Act.

J. Sanches	A. Concepcion
R. Sanches	T. Rivera
W. Townsend	J. Perez
J. Otero	L. Diaz
L. DeStradi	A. Giacalone

5. All production maintenance, shipping, and receiving employees of Respondent at its plant, excluding office clericals, watchmen, guards, supervisors as defined in Section 2(11) of the Act, and all other employees, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

6. On September 26, 1973, and at all times material thereafter, the Union has represented a majority of the employees in the above unit and since has been, and is now, the exclusive bargaining agent of all employees in said unit; and Respondent is now, and has been at all times material since September 26, 1973, legally obliged to recognize and bargain collectively with the Union as such representative.

7. By failing and refusing to recognize and bargain collectively with the Union in regard to the employees in said appropriate unit on and since said September 26, 1973, Respondent has engaged in an unfair labor practice prohibited by Section 8(a)(5) and (1) of the Act.

8. The above-described unfair labor practices affect commerce within the contemplation of Section 2(6) and (7) of the Act.

9. Respondent has not committed any other unfair labor practices alleged in the complaint.

[Recommended Order omitted from publication.]