

or remaining, members of International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, AFL-CIO, or any other labor organization, except to the extent that such right may be affected by an agreement in conformity with Section 8(a)(3) of the Act, as modified.

SPRANGER SPRING COMPANY,
Employer.

Dated----- By-----
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

Flora Construction Company and Argus Construction Company d/b/a Flora and Argus Construction Company and Casper Building and Construction Trades Council, AFL-CIO.
Case No. 27-CA-789 (formerly 30-CA-789). August 7, 1961

DECISION AND ORDER

On March 13, 1961, Trial Examiner Maurice M. Miller issued his Intermediate Report in the above-entitled proceeding, finding that the Respondents had engaged in and were engaging in certain unfair labor practices and recommending that they cease and desist therefrom and take certain affirmative action, as set forth in the Intermediate Report attached hereto. Thereafter, the Respondents filed exceptions to the Intermediate Report and a brief in support of their exceptions.

The Board¹ 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 Intermediate Report, the exceptions and brief, and the entire record in the case,² and hereby adopts the findings, conclusions,³ and recommendations of the Trial Examiner, with the following modifications.

As to McCaslin, the complaint alleged that this employee was unlawfully discharged on December 11, 1959, and was not *reinstated unconditionally* until January 12, 1960. In his brief to the Trial Examiner, the General Counsel argued that because the Respondents failed to provide McCaslin with transportation after reinstating him on January 12, McCaslin's resignation on January 15 was a constructive discharge. The Trial Examiner found, and properly so, that the

¹ Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to a three-member panel [Members Rodgers, Fanning, and Brown].

² The Respondents' request for oral argument is denied as the record, including the exceptions and brief, fully sets forth the issues and the positions of the parties.

³ Member Rodgers agrees that the Respondents had knowledge of the union activities of its employees, but he would not adopt the Trial Examiner's finding that because of the limited scope of the Respondents' operation and the small number of employees, the Respondents had knowledge of the December 6 meeting between employees and a union representative.

complaint clearly implied that McCaslin's January 12 reemployment involved unconditional reinstatement, and that the Respondents were not effectively notified that liability for McCaslin's January 15 resignation was an issue. Accordingly, the Trial Examiner rejected the General Counsel's contention. However, in his recommended remedy, the Trial Examiner, for the same reason given by the General Counsel in support of his contention, found that McCaslin was not properly reinstated on January 12, and he recommended that the Respondents be ordered to offer him reinstatement, and that he be made whole for any loss of pay from December 11. For the reason given by the Trial Examiner in rejecting the General Counsel's contention, we shall not require the Respondents to offer McCaslin reinstatement, and shall direct that the Respondents make him whole for any loss only to January 12, the date of his unconditional reinstatement.

ORDER

Upon the basis of the entire record in this case, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondents, Flora Construction Company and Argus Construction Company d/b/a Flora and Argus Construction Company, their officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interfering with, restraining, or coercing their employees in the exercise of the rights of self-organization, to form labor organizations, to join or assist Casper Building and Construction Trades Council, AFL-CIO, any of its constituent labor organizations, or any other labor organization, to bargain collectively through representatives of their free choice, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities, 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, as amended.

(b) Discouraging membership in Casper Building and Construction Trades Council, AFL-CIO, any of its constituent labor organizations, or any other labor organization, by the discharge of any of their employees, or by discrimination in any other manner with respect to their hire and tenure of employment, or any term or condition of their employment, except as authorized under Section 8(a) (3) of the Act, as amended.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Offer to Steve Bolan, Jack Cuddy, Vince Jahner, Samuel J. Wilson, Herbert Schuchardt, and Jerry Sutton immediate and full

reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole in the manner set forth in that section of the Intermediate Report entitled "The Remedy."

(b) Make D. R. McCaslin whole for any loss of pay suffered by reason of his discriminatory discharge on December 11, 1959, to January 12, 1960, the date of his unconditional reinstatement, in the manner set forth in that section of the Intermediate Report entitled "The Remedy."

(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 and compute the amount of backpay due.

(d) Post at their places of business in the Casper, Wyoming, area, the notice attached hereto marked "Appendix."⁴ Copies of said notice, to be furnished by the Regional Director for the Twenty-seventh Region, shall, after being signed by the Respondent's representative, be posted by them immediately upon receipt thereof, and be maintained by them 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 Respondents to insure that said notices are not altered, defaced, or covered by other material.

(e) Notify the Regional Director for the Twenty-seventh Region, in writing, within 10 days from the date of this Order, what steps they have taken to comply herewith.

⁴In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "Pursuant to a Decision and Order" the words "Pursuant to a Decree of the United States Court of Appeals, Enforcing an Order."

APPENDIX

NOTICE TO ALL EMPLOYEES

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

WE WILL NOT discourage membership by any of our employees in Casper Building and Construction Trades Council, AFL-CIO, any of its constituent labor organizations, or any other labor organization, by the discharge or layoff of any or all employees, or by discrimination against them in any other manner in regard to their hire or tenure of employment except as authorized in Section 8(a)(3) of the Act, as amended.

WE WILL NOT interfere with, restrain, or coerce our employees

in any other manner, in the exercise of their right to self-organization, to form, join, or assist Casper Building and Construction Trades Council, AFL-CIO, any of its constituent labor organizations, or any other labor organization, to bargain collectively through representatives of their own free choice, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities, 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, as amended.

WE WILL offer the employees named below immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority and other rights and privileges, and make them whole for any loss of pay or other incidents of the employment relationship which they may have suffered by reason of the discrimination practiced against them:

Steve Bolan
 Jack Cuddy
 Vince Jahner

Samuel J. Wilson
 Herbert Schuchardt
 Jerry Sutton

WE WILL make D. R. McCaslin whole for any loss of pay or other incidents of the employment relationship which he may have suffered by reason of the discrimination practiced against him.

All our employees are free to become, remain, or refrain from becoming or remaining members of any labor organization, except as that 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) of the Act, as amended. We will not discriminate in regard to the hire or tenure of employment or any term or condition of employment against any employee because of membership in or activity on behalf of any labor organization.

FLORA CONSTRUCTION COMPANY AND ARGUS
 CONSTRUCTION COMPANY D/B/A FLORA
 AND ARGUS CONSTRUCTION COMPANY,
Employer.

Dated _____ By _____
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

INTERMEDIATE REPORT AND RECOMMENDED ORDER

STATEMENT OF THE CASE

Upon a charge and amended charges, duly filed and served, the General Counsel

of the National Labor Relations Board caused a complaint and notice of hearing to be issued and served upon Flora Construction Company and Argus Construction Company d/b/a Flora and Argus Construction Company, designated as the Respondents in this report. Therein, the General Counsel alleges that the Respondents have engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) of the National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519. By their answer, duly filed, the Respondents have admitted the complaint's jurisdictional allegations and certain factual allegations; however, the commission of any unfair labor practice has been denied.

Pursuant to notice, a hearing with respect to the issues was held at Casper, Wyoming, on February 17 and 18, 1960, before the duly designated Trial Examiner. The General Counsel and the Respondents were represented by counsel. Each of the parties was afforded a full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence pertinent to the issues. Upon the completion of their testimonial presentation, counsel indicated their desire to file briefs. These briefs have been received and considered.

Upon the entire testimonial record in the case, the documentary evidence received, and my observation of the witnesses, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENTS

Flora Construction Company and Argus Construction Company are both Wyoming corporations engaged in the construction business. Early in 1959 these corporate enterprises formed a joint venture—operative as the Flora and Argus Construction Company specifically—for the purpose of bidding upon a \$575,000 contract to be let for the completion of certain construction work at the Fremont Canyon powerhouse project of the United States Bureau of Reclamation located in the vicinity of Casper, Wyoming; the principal office of the joint venture was established, ultimately, in that community. On or about May 13, 1959, the joint venture's bid was accepted; notice to proceed with construction was received from the Bureau of Reclamation on October 21, and about November 2, 1959, work at the project site commenced. During the year immediately prior to the issuance of the General Counsel's complaint, the Respondents purchased materials outside the State of Wyoming valued in excess of \$50,000 for use at their Fremont Canyon project.

When the complaint issued, Flora Construction Company was likewise engaged in the performance of work on a Government national defense project, at the Cheyenne, Wyoming, missile base. Flora's contract in connection with that project called for work valued at \$79,219 approximately.

Upon the jurisdictional allegations of the General Counsel's complaint, which the Respondents have not challenged, I find that, throughout the period through which this case is concerned, the Respondents have been employers within the meaning of Section 2(2) of the Act, and are engaged in commerce and business activities which affect commerce within the meaning of Section 2(6) and (7) of the Act, as amended. With due regard to the jurisdictional standards which the Board presently applies—see *Siemons Mailing Service*, 122 NLRB 81, and related cases—I find that assertion of the Board's jurisdiction in this case would be warranted and necessary to effectuate the statutory objections.

II. THE LABOR ORGANIZATIONS INVOLVED

Casper Building and Construction Trades Council, AFL-CIO, to be designated as the Council in this report, functions as an organization of local labor unions, representing employees with various craft skills. Together with these craft organizations, the Council exists for the purpose of dealing with employers as an employee representative, with respect to wage rates, hours of work, and conditions of employment. Upon the available evidence I find, despite the formal denial entered by the Respondents herein, that the Council functions as a labor organization within the meaning of Section 2(5) of the Act, whose constituent organizations admit employees of the Respondents to membership. See *General Engineering, Inc., and Harvey Aluminum*, 123 NLRB 586, 588; *Plains Cooperative Oil Well*, 123 NLRB 1709, 1710, in this connection.

III. THE UNFAIR LABOR PRACTICES

A. Background

Essentially, the Bureau of Reclamation's Fremont Canyon project—throughout the period with which this case is concerned—involved the construction of a gate-

house, tunnel, and powerplant adjacent to the Fremont Canyon damsite. Prime contracts for this work were apparently awarded to a construction enterprise, Coker-Kewitt and Cunningham, not involved in the present case. Under a separate contract, however, the Respondents were authorized to install and complete to the Bureau of Reclamation's satisfaction, within the powerhouse area, hydroelectric power turbines, switch gear, necessary pipes, outside transmission lines, and a power substation. No completion date was set for the work; the Bureau's contract, however, provided that different phases of the project would have to be completed within a specified number of calendar days.

During October 1959, two joint venture participants—specifically, Bill Wagner and Jack Tretheway, president and vice president of Argus Construction Company, respectively—terminated their Argus connection and left the Casper area. Their departure, apparently, left the affairs of the Respondents joint venture somewhat confused; the record suggests that they had been expected to provide necessary supervision for the Fremont Canyon project. President Walter Flora of Flora Construction Company, though occupied fully with supervisory responsibility for his own firm's project at the Cheyenne missile base, and another Las Vegas, Nevada, project, came to Casper to initiate Fremont Canyon work. His testimony, which I credit in this connection, establishes that:

Right at that time we got a notice to proceed, and I came in here with never no intentions of originally being on this job; I came in here to try to pick up the pieces.

When work began about November 2, Flora interviewed and hired most of the laborers and craftsmen employed for the joint venture's project. Available evidence, however, establishes the joint venture's simultaneous search for someone competent enough to supervise the work. (Flora testified, credibly, that four men—names to be noted—were given trial assignments as project "take charge" men within a 4-week November period, approximately; not one of these appears to have been considered satisfactory. According to Flora, these provisional supervisors may have employed some men; however, every employee witness testified that Flora, personally, functioned as the employer.)

During his employment interviews, Flora—previously a recipient of two invitations from the Casper Building and Construction Trades Council, AFL-CIO, to discuss the recruitment of construction craftsmen for the project—informed various job applicants that the Fremont Canyon project would be run as an open-shop job; that the project might be picketed, in which case men who wished to work would be expected to pass the picket lines; that he preferred to hire his own men; and that he did not like to deal with union business agents, having had some disagreeable experiences with such representatives. Several applicants also were apprised of Flora's awareness with respect to their "union" status. The particular applicants with whom Flora broached the subject appear to have conceded their union adherence; however, no contention is made by the General Counsel that applicants for work were rejected because of their union membership.

For most of the period with which this case is concerned, the Respondents' crew apparently included 10 employees, approximately; the group was comprised of both skilled craftsmen and laborers. Some of the craftsmen, apparently, received the area wage rate current for heavy construction labor, part of the time, and current area wage rates for their craft specialties when they were so employed.

From the outset, however, dissatisfaction with the conditions of project employment appears to have been general; the record establishes that various employees exchanged views with regard to their conditions of employment—specifically, such matters as safety equipment which they deemed inadequate, the lack of a proper water supply, and the failure of the Respondents to establish rates of pay greater than those which the *Davis-Bacon* Act would require on Federal Government projects—at frequent intervals.

B. *The discharge of Schuchardt*

Millwrights Herbert O. Schuchardt and Steve Bolan began work at the Fremont Canyon project on November 10, 1959; they were hired to serve under James Marinus, then designated as the Respondent's probationary project superintendent. (The record establishes that Schuchardt and Bolan had previously applied for work on October 15, initially. Pursuant to a suggestion made by Naomi Becker, the joint venture's secretary-treasurer, they had reapplied November 1; when interviewed by Norman Schuett, previously designated as the Respondents' first project superintendent—and by Flora, personally—they had been promised employment when the project was organized and "ready" for their services. On November 10 they had been

instructed to see James Marinus, Shuett's successor, at the powerhouse.) Late in the morning of Schuchardt's first day, however, Marinus introduced Robert Powell; according to Schuchardt, Powell was designated by Marinus as "another" superintendent.

During the late afternoon of Saturday, November 14, 1959, Powell advised Schuchardt that Marinus had been relieved of responsibility; he reported that he (Powell) had been designated project superintendent. Schuchardt's credible testimony in this connection—which the Respondents made no effort to contradict—reveals a confession by Powell with respect to his lack of experience in powerhouse construction; he is reported to have said that he was "very glad" to have a good machinist foreman at the project—one Jack Cuddy, whose employment history will be noted—and two good millwrights, Schuchardt and Bolan, on whom he could rely. Subsequently, I find, Powell gave Schuchardt and Bolan several work assignments.

On Monday, November 16, during the lunch hour, employee Samuel Wilson—whose employment history will be reviewed elsewhere in this report—expressed his gratification at the thought that he would thereafter be able to relinquish his temporary work assignments as a laborer and turn to work as a pipefitter, thereby qualifying for a wage rate increase to \$3.91 hourly. However, electrician Carl Osburn declared that, under the contract between the Respondents and the Bureau of Reclamation, he would receive only \$3.42 hourly. Osburn observed, also, that:

If you throw your union book out the window and stay with Flora you will be much better off

When work resumed, Osburn and Superintendent Powell were seen in conversation. Schuchardt's credible testimony establishes that Osburn pointed out his luncheon companions during this conversation. And I so find.

Machinist Cuddy, previously mentioned in this report, appears to have functioned, throughout the period with which this case is concerned, as Schuchardt's and Bolan's leadman. (During the trial of this case Schuchardt referred to him as the machinist foreman on the project, but the Respondents have made no contention that he possessed supervisory authority.) Although hired with the millwrights, his project employment had commenced on November 11, 1 day later. On November 18, 1959, I find he had a conversation with Schuchardt. The millwright's testimony with respect to that conversation, which I credit, reads as follows:

Cuddy came from Idaho and was unfamiliar with the local working conditions and wage conditions, so I gave him an empty [blank] copy of the local contract. On Wednesday, November 18th, at quitting time, he gave that contract to me in the presence of Carl Osburn and Bob Powell. . . . He gave the contract back to me and said, "here, Dutch, is your contract back." Carl Osburn, who was standing about three feet on my right, says, "you know, Dutch, that the Flora will never sign a contract." I said, "this contract is not intended for Flora, this contract was just intended so that Mr. Cuddy could familiarize himself with working and wage conditions in this locality." Powell, who stood on my right, on my left about five to ten feet, gave me a dirty look and passed me, but didn't say anything.

Late on the afternoon of Thursday, November 19, Powell handed Schuchardt his paycheck in full, and advised him that he was laid off. When the millwright requested a statement as to the reason for his termination, Powell withheld immediate response; ultimately, however, he declared that there was too much "union talk" around the project.

That evening, Schuchardt sought confirmation of the reason for his discharge from Secretary-Treasurer Becker. However, when told that employment matters were out of her normal jurisdiction, Schuchardt confined his talk with Becker to a discussion of project working conditions. (Becker's testimony that Schuchardt expatiated upon his own competence and Powell's lack of competence may reflect some of Schuchardt's comments; her implication that such comments represented the principal subject of discussion, however, warrants rejection as extreme.) On November 23, when Flora became available, Schuchardt was advised that Powell had been replaced by Garies Bush as project superintendent. The millwright was introduced to Bush; Flora told the new project superintendent, I find, that Schuchardt should be reinstated if his services could be utilized. Bush, however, deferred action; Schuchardt was merely instructed to report for work on Monday, November 30, absent a summons before that date. When he did report as requested, Secretary-Treasurer Becker of the Respondents informed him that Lew Holden had replaced Bush as the project's superintendent. Confronted with Schuchardt's request for reinstatement that night, Holden requested time to become familiar with the project;

the new superintendent suggested that Schuchardt "contact" him at week's end. However, on Saturday, December 5, he was informed that Holden was no longer associated with the project. Later, under circumstances to be noted elsewhere in this report, Schuchardt visited Fremont Canyon with two union business representatives; however, the available evidence with respect to his visit establishes that he merely conversed with former fellow employees.

On Saturday, December 12, 1959, Schuchardt made his final reinstatement application. He reported to the Respondents' Casper office. Secretary-Treasurer Becker was there. The millwright's testimony with respect to their conversation, which I credit, reads as follows:

I asked Miss Becker how the job was going along and she told me that the job had been shut down yesterday by Walter Flora. I was surprised to hear that, and I asked her why. She told me that they had been informed that some mechanics on the job were trying to organize the laborers. Who informed them she didn't tell. She further told me if I want to work for them again I should throw away my union book, otherwise I could not work for them.

Miss Becker also informed Schuchardt that she had heard of his visit to Fremont Canyon with the union business representatives. (Becker's general denial that she ever made the representations noted cannot, I find, be credited. Schuchardt impressed me as a forthright witness, with well-substantiated recollection.) After reaffirmation of his freedom to travel without restriction, the millwright left the Respondents' office.

C. Other developments affecting project employees

Reference has been made, previously, to November 2, 1959, as the date when Respondents initiated work on the Fremont Canyon project. The growth of the joint venture's employee complement, thereafter, has not been detailed completely for the record; available evidence with respect to the employment and subsequent history of project employees has been limited to seven men, designated in the General Counsel's complaint as discriminatory discharges. With respect to these men, for example, evidence establishes that Vince Jahner had begun work at the Fremont Canyon jobsite on November 2. Previously a Flora employee elsewhere, Jahner had been brought to Casper apparently for service as a laborer and part-time crane operator. (For work in the first-designated capacity, the joint venture paid him \$2.40 per hour, initially; after 2 weeks, his rate of pay as a laborer had been cut to \$1.875 hourly. When assigned to work as a crane operator, however, he had received \$3.04 hourly.) Early in November, also, Samuel J. Wilson had been hired. Though qualified as a pipefitter, Wilson had been told that pipe was not available and that his craft skill would not be required immediately. He had been offered employment, however, because of his apparent willingness to begin work as a laborer and ironworker. The offer had been accepted. (Wilson had begun work, also, at the \$2.40 laborer's rate. His testimony, which has not been disputed, establishes Flora's agreement, however, that he would receive pay at various appropriate rates for any work which might require craft skills. Such arrangements, indeed, appear to have been standard joint venture practice.)

The employment of Schuchardt and Bolan on November 10 has already been noted, followed by the employment of Machinist Jack Cuddy the next day. Shortly before Thanksgiving, also, Jerry Sutton—generally considered to be Pipefitter Wilson's buddy—was hired as a laborer; Lew Holden, apparently, was in charge of the project when he began work. On December 2, finally, Electrician D. R. McCaslin was hired. Testimony which I credit establishes Flora's comment during the electrician's employment interview that he (Flora) knew McCaslin to be a union member. This McCaslin admitted. The record establishes his employment for \$3.60 per hour—said to be 17½ cents over the area *Davis-Bacon* electrician's rate—plus jobsite transportation to be provided by project supervisors.

By Thursday, December 3, Superintendent Holden had been relieved of responsibility for the powerhouse project; for approximately 3 days Flora supervised the Fremont Canyon work personally. On the date noted, for example, Flora directed Wilson to operate a sandblaster; the pipefitter was told that he would receive the \$2.40 laborer's rate. When Wilson thereupon refused to proceed, Flora requested him to run the sandblaster at \$3.42 per hour—equivalent to the prevalent *Davis-Bacon* pipefitter's rate—for the rest of the day, and to visit the Casper office later. (Flora's testimony that Wilson simply refused to operate the sandblaster and resigned, because of his lack of experience and dislike for the assignment, did not impress me as credible.)

When Wilson appeared at the Respondents' office, pursuant to Flora's request, the

men argued about the job; then Flora queried him with respect to his willingness to accept steady year-round employment with Flora enterprises, compensable at prevalent *Davis-Bacon* pipefitter rates within the various areas to which he might be assigned, regardless of the nature of his work assignments. Upon Wilson's indication that he might be willing to consider the suggestion, Flora declared that—contingent upon the pipefitter's engagement for steady work—he would be well advised to purchase a trailerhouse, presumably calculated to increase his mobility from project to project. And Wilson's testimony, which I credit in this connection, establishes Flora's additional comment that, if the suggested arrangement proved mutually satisfactory, the pipefitter would have to dispose of his union book. Wilson replied that he would take a withdrawal card from his union, if necessary.

(With respect to this conversation, Flora testified that his willingness to see Wilson—if the pipefitter wished to "come talk" with him—had been communicated to the latter, through another employee, sometime after their jobsite discussion about the sandblaster assignment. According to Flora, Wilson, when he arrived, had been queried as to the reason for his dissatisfaction with the assignment; he had indicated that he had never done such work, and that he had, therefore, considered his assignment punitive. Allegedly, Wilson had then complained about working for laborer's pay while pipework remained unavailable. Flora testified that the pipefitter had expressed a desire for permanent employment with Flora, pursuant to an arrangement similar to Carl Osburn's; according to the Respondents, Wilson was told that Osburn, though an electrician by trade, merely received \$3.15 hourly as a guaranteed minimum wage regardless of work assignments, with an opportunity to work at higher wage levels whenever craft work within his capacity became available. Wilson allegedly expressed interest; the Respondents' testimony would indicate that the pipefitter queried him as to the amount of pipework which might be available on various Flora projects for someone permanently employed pursuant to a similar arrangement. Flora insisted that his subsequent inquiry about Wilson's freedom to accept work at different locations, coupled with his further inquiry as to whether the pipefitter would purchase a trailerhouse to move his family from project to project, derived naturally from a general discussion of the problems faced by a family man with peripatetic employment. According to the Respondents, Wilson was advised to consider whether he really wished to undertake employment which might cause his familial relationships to deteriorate; he promised to discuss the matter with his family, and was invited to resume work. Flora's version of the conversation now in issue—though superficially coherent and plausible—did not impress me as worthy of credence. While a witness, the joint venturer was frequently vague; he displayed a tendency, also, to misconstrue questions or deliberately to interpret them narrowly, so that his responses would reflect digressions from some line of inquiry which his questioner might wish to follow. Flora conceded his inability to recall or be positive about some aspects of the situation under review, because of his preoccupation with many other problems during the period under consideration. Wilson's recollection, also, with respect to their December 3 talk, impressed me as less affected by rationalization. Upon due consideration, I have found it credible. The partial corroboration of Flora by Becker and McCullen cannot be considered sufficient to render his testimony acceptable.)

Finally, Flora asked Wilson if he would be willing to resume work the next day; he promised to communicate with his Cheyenne and Las Vegas projects, to determine where the pipefitter's services might be most urgently needed, and to provide that information Saturday morning. On Friday, December 4, Wilson and Sutton were back at work.

On the 5th, however, pursuant to prearrangement, the pipefitter and his buddy reported to the Casper office. Declaring himself unable to "get in touch" with his other projects, Flora, nevertheless, advised Wilson and Sutton that they could retain their Fremont Canyon jobs until sometime after Christmas and then transfer. Again, Wilson was offered steady work, compensable at prevalent *Davis-Bacon* hourly pipefitter rates. The pipefitter, however, raised a question as to payment of his away-from-home expenses, and indicated that he might wish to command a guaranteed income, with a weekly or monthly salary, dependent upon the Respondent Flora's offer. During this conversation, I find, Flora repeated his advice that Wilson purchase a trailer; this was coupled, however, with a renewal of the employer's prior suggestion that he dispose of his union book. The pipefitter indicated his willingness to take a union withdrawal card, but gave no indication that he would "throw away" his union membership book. (According to Flora, Wilson reported that his family would not travel, but that he was interested in steady employment, particularly in Las Vegas, where the pipefitter's scale was high. When told that Flora's Las Vegas project was not ready for pipe work, but that such work might be available at the Cheyenne project, Wilson allegedly expressed interest; he was purportedly told by

Flora that the Cheyenne superintendent would have to be consulted to determine the status of the work there. Flora's testimony would indicate that Wilson was advised to continue work on the Fremont Canyon project until Cheyenne's need for pipefitters could be determined. According to the Respondents the conversation ended with Wilson's agreement to accept steady laborer's work wherever assigned, with a basic wage of \$3.15 hourly. For reasons noted previously, Wilson's testimony with respect to this December 5 conversation has been credited, and that of Flora, summarized herein, rejected.)

When the conversation ended, Flora merely instructed Wilson and Sutton to return to work the next Monday, until "something more definite" could be ascertained with respect to the possibility of their employment elsewhere.

D. The mass discharge

On Sunday, December 6, 1959, pursuant to a suggestion made by Wilson and Machinist Cuddy, five joint venture employees met with a union business agent at the Casper Building and Construction Trades Council hall. Possible organization of the Fremont Canyon project employees was discussed. Nothing definite appears to have been arranged; however, the men agreed to meet on the 15th of the following month.

When work resumed, Monday, December 7, Flora advised Wilson and several others of his plan to leave the project later that day. However, instructions were issued with respect to the work which he wished the men to complete during the week.

(Two additional jobsite developments, later during the day indicated, appear to warrant notice. First, Gene DeFeo—subsequently introduced to the joint venture employees as a new project superintendent—was observed at the powerhouse site, becoming "familiar" with the project. Secondly, Wilson's testimony, which I credit, establishes that Flora observed him in conversation with another employee, and commented testily that "something" appeared to be happening on the project, which he proposed to discover. Flora's report that such a statement—possibly made—did not refer to employee union activity, failed to impress me persuasively.)

That night, Flora left the Casper area. On Tuesday, December 8, Wally McCullen—identified for the record as an engineer trainee and office employee of the Respondents with varied responsibilities—accompanied Gene DeFeo to the Fremont Canyon jobsite; there, I find, he introduced DeFeo to Wilson and McCaslin as the joint venture's new project superintendent. (As a witness McCullen denied that DeFeo was thus introduced; his denials in this connection, however, have not been credited.) DeFeo was also introduced to Bolan as the project superintendent. Thereafter, according to record evidence which I credit, he made several work assignments and responsibly directed employees. In this connection, Millwright Bolan's credible testimony—which the Respondents have failed to contradict—establishes that:

. . . So I was down in the draft tube and I was grinding a weld, and Mr. DeFeo came down into the draft tube and he asked me what specifications were on that weld what did the Bureau want. And I told him that the Bureau wanted a flat weld, and they didn't want no roll in the weld. And Mr. DeFeo says that he would tell me when to get off that weld, when it was done. So the next morning Mr. DeFeo come down there and he looked the weld over, and he says that that was good enough for him. That he thought the Bureau would accept it

Under the circumstances, DeFeo's supervisory status would seem to be established beyond controversy.

On Wednesday, December 9, Business Representatives Brewer of the Carpenters and Giesick of the Laborers Union visited the jobsite to observe working conditions; Schuchardt's arrival with them has been noted elsewhere in this report. Brewer attempted conversation with DeFeo; however, when the latter discovered the identity of the business representative, he turned around and walked away—according to Brewer's undisputed testimony. While visiting the project, Brewer conversed with McCullen and several employees.

On December 10, 1959, Flora was in Miles City, Montana, 430 miles distant. (Standard Highway Mileage Guide, Rand McNally and Company.) He returned to Casper late that afternoon—early enough, however, to discuss the project's progress briefly with Charles S. Rippon, the Bureau of Reclamation's resident construction engineer. (Flora's testimony indicates that he made the trip in 5½ hours, approximately; this would suggest that he traveled at an *average* speed of 78 miles per hour. He, himself, testified that he drove "very hard" at a "terrific rate" of speed. His motivation for such a hurried trip will be discussed elsewhere in his report.) Rippon's credited testimony establishes an expression of opinion by Flora that the joint venture's Fremont Canyon project should be curtailed for lack of materials and re-

organized. Available evidence, however—considered in the light of the Respondents' amended answer—will warrant a determination that Rippon was not asked to express concurrence with Flora's judgment in this respect, and that he did not actually concur. Eventually, Flora conceded on the witness stand that the Bureau, throughout, pressed the joint venture to proceed with the work.

On Friday, December 11, work at the Fremont Canyon project began pursuant to established routine. Most of the employees were present. Machinist Cuddy appears to have been absent because of illness; Vincent Jahner was also absent. Shortly before 9:30 a.m., however, Flora telephoned DeFeo at the powerhouse site; the project superintendent reported to various employees, thereafter, that he had been instructed to shut down the job, and to send the joint venture's entire employee complement into the Casper office. (Flora's testimony that DeFeo telephoned to report Cuddy's absence—and that he was merely instructed to send the crew into Casper for a talk—may be true, but does not rebut the testimony of employees as to what DeFeo told them.) Pursuant to these instructions, DeFeo informed Pipefitter Wilson to store the tools which he and a group of laborers then were using. Wilson was told that Flora intended to do some "reorganizing" and wished to see everyone in the Casper office.

Millwright Bolan—while engaged in the performance of an assignment which DeFeo had given him earlier—heard from the project superintendent that "We are going to shut the job down." His testimony continues: ". . . and I says, 'What for?' and he says, 'Well,' he says, 'there's a few men around here talking about the union too much.' . . ." Bolan was also advised to gather up the tools in his charge. When DeFeo reported Flora's desire to see the project crew in the joint venture's office, Bolan asked DeFeo whether he should take his personal tools with him. DeFeo advised him to do so; Bolan thereupon packed his own tools and left.

Most of the project crew agreed to assemble at the Council hall, from which they planned to proceed to the Respondents' office together. While en route to Casper they encountered Jahner and apprised him of the situation. Cuddy was informed by Wilson, also. Thereafter, Cuddy, Wilson, McCaslin, Sutton, and Jahner, together with several others, reported to the Casper office of the Respondents.

When the group assembled, Flora informed Cuddy that he was being laid off for lack of work due to material shortages; the machinist accepted his layoff without comment and gave Flora the telephone number of a union business agent through whom he could be reached later, if needed. Flora then turned to Pipefitter Wilson and said, "Sam, I thought we had all of our difficulties ironed out but apparently we haven't." He advised Wilson that he did not have any more pipe work for him and that he would be contacted, if needed, later. (The testimonial record establishes, without contradiction, that Wilson had been paid the *Davis-Bacon* pipefitters' area scale from December 4 to 11, without interruption.) McCaslin was told that Flora considered him a good electrician, but that he would have to accept a layoff for lack of materials. The Respondents promised to communicate with McCaslin, however, shortly after the first of the year, when the joint venture had materials with which to proceed. The electrician testified that Flora said the joint venture would concentrate on "mucking mud" thereafter; this testimony may reflect a colloquial reference to the preoccupation of the Respondents with concrete work; Wilson so interpreted Flora's remark. No employee witness could recall Sutton's termination; Flora, however, testified to his belief that Sutton "just went along" with Wilson, and was merely told the Respondents would not require his services further.

With respect to Jahner, some testimonial conflict appears. Flora reported, essentially, that he had chided this complainant with respect to the quality of his work, ticked off certain instances of questionable performance, and finally admonished him to be more careful; Jahner, according to Flora's testimony, had attempted to shift blame for his deficiencies and had attempted to describe himself as a victim of circumstances, winding up with a question as to whether he was being discharged. The Respondents' testimony concluded with a comment that—after acknowledging Jahner's solicitation of discharge—he (Flora) merely advised the complainant to be careful and watch himself, suggesting that he report for work the next week. Jahner's version of their conversation, however, included testimony that:

. . . He said he was firing me on account of—he said I was the center of all the talk and everything going on out at the job, and he also said if I could do better with a union card, I should go ahead and get one. . . .

The complainant conceded that Flora had also taxed him with certain incidents connected with his employment, for which he had been previously censured or disciplined. However, when cross-examined with respect to Flora's ultimate comment, Jahner confirmed the latter's reemployment offer, conditioned upon his will-

ingness to "shape up and get serious" with respect to project work, but insisted, additionally, that:

. . . He said if I would forget about all the talk about everything I was doing on the job that I could go back to work He said that if I would forget about all this talk, and everything, I could come back to work Monday

According to the complainant, Flora indicated that he would receive \$1,875 per hour. Jahner testified that he decided to reject Flora's offer, and that he made no effort to report for work as requested. Since December 11, he has received no renewed employment offer from the Respondents. Upon the entire record, and from my observation of the witnesses, Jahner's version of his December 11 terminal conversation impresses me as worthy of credence; I find that it reflects what occurred. Shortly after completion of the office conversations noted, the complainants present were paid off in full. (Employees Palmer and Moore were told that they could return to work on Monday; however Palmer refused the offer.) During the afternoon of December 11, Bolan—then at home—sent his wife to the Casper office of the Respondents to pick up his final check. Secretary-Treasurer Becker delivered the check to Mrs. Bolan without comment; nothing in the record would indicate that the millwright was thereafter offered reinstatement.

E. Subsequent developments

During the 1959 holiday season, Pipefitter Wilson sought reemployment, pursuant to Flora's invitation, at the joint venture's Casper office; however, he was merely told that he *might* be rehired when pipe became available. (Sutton, though associated closely with Wilson, made no personal application for work; there is no indication that he ever received any similar promise of employment.) On January 11, 1960, Electrician McCaslin received a registered letter from the Respondents which enclosed an offer of temporary employment. When he communicated with Flora, this complainant was told that his previous \$3.60 wage rate would not be changed. On the morning of January 12, therefore, he resumed work. Previously apprised by Flora, I find, that he would find someone named Wolfe charged with responsibility for the project, McCaslin was approached, when he reached the jobsite, by the individual thus designated; names were exchanged, and McCaslin resumed the work which had been interrupted by his dismissal.

The complainant had assumed that transportation to the jobsite would be provided for him, consistent with the joint venture's practice in his case prior to the December 11 layoff. During his first day back, indeed, Wolfe did offer him transportation to work in a company truck, beginning the following morning. McCaslin accepted the offer, designating a gasoline station as his pickup point. On the morning of the 13th, however, Wolfe drove past him without a word; McCaslin found himself forced to solicit transportation from another jobsite contractor. Later that morning, Wolfe—credibly identified by McCaslin as the man in charge of the project—reported to the complainant that Flora had ordered him not to provide transportation. The next day, Project Superintendent Wolfe and McCaslin had a further conversation; the undisputed testimony of the electrician with respect to Wolfe's part therein, which I credit, reads as follows:

He said, "I had better tell you this now," he said, "you might not want to stay the rest of the day." But he said, "[I] have orders," he said, "if you talk of any union activities or anything on the job," he said, "you will be discharged." That's his very words.

On the morning of the 15th, McCaslin resigned because of the refusal of the Respondents to provide him with transportation.

Analysis and Conclusions

A. Interference, restraint, and coercion

Considered as a whole, the testimonial record provides ample justification for the General Counsel's contention that Respondents have interfered with, restrained, and coerced employees in the exercise of rights statutorily guaranteed. Without regard to the impact of various discharges—noted elsewhere in this report—the Respondents must be held liable for conduct statutorily proscribed in the following respects:

(1) The effort of the Respondents, through Walter Flora, specifically, to discourage union adherence by Pipefitter Wilson and Jerry Sutton by the promise of steady employment—either at the Fremont Canyon project or elsewhere—accom-

panied by a suggestion that Wilson would be well advised to "throw away" his union membership book. See *Pease Oil Company*, 123 NLRB 660, 666, in this connection.

(2) The comment of Superintendent DeFeo to Millwright Bolan, concurrently with an announcement that the Respondents' Fremont Canyon project was being shut down, that such action was being taken because there were a few men on the job "talking too much" about union organization.

(3) The December 12 statement of Secretary-Treasurer Becker to Schuchardt—then an applicant for employment—that Fremont Canyon project operations had been suspended because Respondents had received information that some mechanics on the job had attempted union organization. See *Piasecki Aircraft Corporation*, 123 NLRB 348, 369–370, 372, in this connection.

Other statements persuasively calculated to restrain or frustrate employee activity directed toward self-organization—legitimately attributable to the Respondents—have been noted. In the General Counsel's complaint, however, no effort has been made to characterize these statements as separately cognizable unfair labor practices; proof with respect to such statements was adduced, presumably, merely to buttress the General Counsel's contention with respect to the impropriety of Schuchardt's discharge and the December 11 layoffs. Under such circumstances, no determination with respect to the presumptive impropriety of the statements mentioned, under Section 8(a)(1) of the statute, would appear to be necessary or appropriate.

B. *The discharge of Schuchardt*

Available evidence establishes, beyond cavil, Flora's knowledge of Schuchardt's union adherence. When the millwright was hired, however, Flora went out of his way to make it clear that he proposed to build his own crew without interference from union business agents. Considered in context, such remarks would seem to suggest Flora's readiness to employ men without regard to their union adherence—contingent, however, upon their willingness to eschew any demand for current union representation or union conditions at the Fremont Canyon project. Within 1 day after the joint venture's project superintendent discovered Schuchardt's readiness to utilize a local union-negotiated contract form to provide information regarding "working conditions and wage conditions" in the Casper area, the millwright's employment was terminated. The conclusion that Schuchardt's transmittal of the local contract form to Machinist Cuddy, for the latter's information, motivated his discharge would certainly seem to be warranted.

Proof of the close temporal relationship between the previously noted Schuchardt-Cuddy-Osburn conversation and the millwright's subsequent dismissal, however, provides merely one element of evidentiary support for a determination that Schuchardt's dismissal was improperly motivated. When pressed to explain the millwright's termination, Superintendent Powell, despite his avoidance of a direct reply, observed that there had been too much "union talk" around the project. The revelatory character of his comment would seem to be patent. Significantly emphasized by Secretary-Treasurer Becker's December 12 observation that Schuchardt would have to dispose of his union book to achieve project reemployment, Powell's statement would certainly seem to justify—perhaps even require—determination that the millwright was dismissed because of the joint venture's fear that his reference to the local union-negotiated contract as a compendium of wage rates and working conditions applicable to the Fremont Canyon project presaged an employee demand for union representation, and a demand for compliance with union standards by the respondents.

Alternatively, Respondents argue that Schuchardt lacked experience in the type of work which he had been hired to perform; consistently, the contention is made that his discharge derived from his demonstrated lack of qualification for his project tasks. Available evidence, however, establishes this complainant's experience in millwright work, machine construction, and machine erection. Schuchardt's testimony—received without objection and permitted to stand without contradiction—reveals that his apprenticeship as a millwright was served in Germany, 42 years ago. Since 1918 his employment has included service as a millwright, millwright foreman, and millwright superintendent. During 1921, he participated in the construction of a hydroelectric plant near Munich, Germany; since this, while in this country, he has worked on Boulder Dam at Boulder, Nevada, on the Niagara Falls hydroelectric powerhouse at Niagara Falls, New York, and on a hydroelectric powerplant near Warsaw, Wisconsin. (While Schuchardt did concede that his Warsaw, Wisconsin, employment dated back to the late 1930's, he opined that the principles of powerhouse construction have not changed during the last 50 or 60 years. Respondents made no effort to challenge this expression of opinion.) As the General Counsel has pointed out, the Respondents adduced no evidence that Schuchardt was ever chal-

lenged as inexperienced or reprimanded for incompetence prior to his November 19 discharge. To the contrary, we find his credible testimony that Superintendent Powell, newly designated, confessed his own lack of experience and expressed gratitude on November 14 for the presence of a qualified machinist foreman and two good millwrights on the Fremont Canyon crew.

Powell, despite his immediate participation in Schuchardt's termination, was not called as a witness in the Respondents' behalf. While his service at the Fremont Canyon project had been terminated prior to the hearing, Respondents neither suggested nor established his unavailability to give testimony. (The Respondents have advanced no serious contention that Powell was not a supervisor. As a witness, Flora characterized him as a superintendent. The record establishes his introduction to the project crew as their superintendent, it also establishes that he assigned work to crew members, that he "terminated" Schuchardt, and that he functioned as the sole instrument of authority in the joint venture's behalf at the powerhouse site, from the date of his predecessor's removal to November 23, approximately. His status as the joint venture's agent, for the purpose of effectuating Schuchardt's discharge, must be considered established.) Under the circumstances, Powell's failure to testify might well warrant a determination that the Respondent's affirmative defense concerning Schuchardt's incompetence and lack of experience—cited to justify his termination—calls for rejection as not proven. I so find. And—even with an assumption, *arguendo*, that the millwright's performance may really have been deficient in some respects—the existence of such a presumptively valid ground for discharge would not be sufficient to carry the day for the Respondents, in the face of un rebutted evidence that the millwright's discharge was not thereby motivated. *N.L.R.B. v. Whittin Machine Works*, 204 F. 2d 883, 885 (C.A. 1). Existence of a justifiable cause for discharge cannot prevent a determination that any dismissal reflects the commission of an unfair labor practice, if other circumstances reasonably indicate that the dischargee's union activity weighed more heavily in the decision to effectuate his termination than dissatisfaction with his work performance.

Upon the entire record, I find that the prime motivation for the decision of the Respondents to effectuate Schuchardt's discharge lay in the desire of its responsible officialdom to prevent or forestall employee union activity, and thereby to interfere with, restrain, and coerce employees in the exercise of rights statutorily guaranteed.

C. The mass discharge

The available evidence, considered as a whole, seems to provide substantial justification for the General Counsel's contention that Respondents effectuated the December 11 mass layoff to discourage union activity by the Fremont Canyon crew. Logically, analysis of the discharges—directed to a determination of the Respondent's motivation—may begin with the record evidence which establishes general opposition by the Respondents to any union representation of Fremont Canyon employees. Specifically, reference should be made to credited testimony that: (1) Flora told employment applicants, during his early November hiring interviews, that the Respondents proposed to maintain an open-shop project; that employees desirous of work would be expected to cross any possible picket lines; that he (Flora) preferred to hire his own men; and that he did not like to deal with union business representatives; (2) Superintendent Powell commented to Millwright Schuchardt, concurrently with the latter's discharge, that there was too much "union talk" on the powerhouse project; and (3) under circumstances previously noted, Flora promised Pipefitter Wilson steady employment with higher average income, partially conditioned upon his abandonment of union adherence.

By December 11, Respondents were fully aware of the possibility that dissatisfied employees might ultimately designate some union spokesmen—presumably with council affiliation—to represent them in negotiations. While efforts have been made to show that Respondents had no knowledge of the December 6 conference which various Fremont Canyon employees had with a council representative, such a conclusion would certainly warrant rejection, considering the limited scope of the powerhouse project and the small number of employees involved. This Agency's conclusion with respect to company knowledge, however, need not rest merely upon inference. The testimonial record establishes that council representatives had actually visited the Fremont Canyon project on December 9, when they had attempted conversation with Project Superintendent DeFeo and had spoken to several employees. (Although Respondents contend that DeFeo was not a supervisor, available evidence requires rejection of this contention. Reference has already been made to the relevant testimony in this regard. See *West Virginia Pulp and Paper Company*, 122 NLRB 738, 741-744, in this connection. Clearly, DeFeo possessed supervisory status; his knowledge with respect to the project visit of the business agents, there-

fore, must be imputed to the Respondents.) Finally, statements legitimately attributable to responsible joint venture representatives clearly reveal the December 11 mass layoff to have been effectuated for the purpose of discouraging the project crew's union membership and activity. When queried about the reason for the curtailment, DeFeo advised Millwright Bolan, specifically, that the project was being shut down because of too much union talk. On December 12, also, Secretary-Treasurer Becker confirmed the suspension of project operations because of information available to the Respondents that some mechanics had been trying to organize the project laborers. (Significantly, Becker also referred to the presence of her auditor—Millwright Schuchardt—at the project location on December 9, with council representatives. Clearly, DeFeo's knowledge with respect to the December 9 visit of Brewer and Gieseck to the jobsite had been communicated to the joint venture's managerial representatives.) And further indication that the December 11 layoff had derived from motives statutorily proscribed may be found in McCaslin's undisputed testimony that, after his later temporary reemployment, Ed Wolfe, the current project superintendent, told him that if he discussed union activities while on the job he would be dismissed.

Alternatively, Respondents contend that economic considerations—primarily management problems and material shortages—motivated the December 11 project curtailment. With respect to the first of these contentions, certainly, Flora's persistent search for a satisfactory project superintendent has been noted elsewhere in this report. With respect to the second contention, available evidence—which has not been detailed herein—will concededly support a determination that material shortages did impede, somewhat, efficient prosecution of the joint venture's project. Considered as a whole, however, the testimonial record cannot be said to provide real support for the Respondent's contention that management difficulties or material shortages on December 11 dictated substantial curtailment of the project.

Despite Flora's contention that a layoff and significant project slowdown or suspension had been planned, prior to his December 7 departure from the Casper area, the record sufficiently establishes DeFeo's presence at the jobsite early on that date, and his effective designation the very next day as project superintendent. Respondents have made no attempt to explain their designation of a sixth project superintendent within 5 days of their projected operational curtailment. Nor has any contention been made that the project was suspended, thereafter, because of DeFeo's lack of competence.

No adequate business justification has been proffered, either, for Flora's precipitate return from Miles City, Montana, on December 10, allegedly to confer with the Bureau of Reclamation's resident engineer regarding a curtailment of project operations. Firstly, assuming *arguendo*, that Respondents would have found it expedient to explain or justify any project slowdown or suspension to Bureau representatives, no evidence has been offered to explain their failure to present such an explanation or justification prior to Flora's December 7 departure; clearly, this would have been possible, since Rippon's testimony indicates that he had conversations with Flora "almost" daily. Secondly, testimony by Construction Engineer Rippon—which I credit—with respect to Flora's December 10 remarks, reveals that he was merely asked to concur with Flora's observation that progress on the powerhouse project had been slow; nothing in the record will warrant a conclusion that he was asked to concur with any professed judgment by Flora that work on the project would have to be significantly curtailed because of a lack of concrete or other material shortages. (Flora's testimony that he drove at high speed for 5 hours, over wintry highways, merely to pursue a business conversation established as thus limited in scope warrants rejection as incredible.) Upon the record, the Respondents' conduct—which has not been rationally explained—would certainly seem to call for an inference that his real motivation might well be found in some sort of report by DeFeo with respect to the December 9 project visit of two union representatives.

With respect to the joint venture's alleged shortage of materials, also, several comments would appear to be warranted. Respondents have alleged delay by their suppliers in the shipment of pipe, electrical equipment, and other material previously ordered for the project's successful completion. Witnesses proffered in behalf of the joint venture, however, have admitted that no letters of inquiry or other communications, calculated to expedite material deliveries, were dispatched to suppliers within any reasonable period shortly prior to the December 11 layoffs. The record establishes, also, that the joint venture's managerial representatives never really tried to seek alternative suppliers, partially or completely qualified to meet their demands for material. Reference should be made to Flora's effort, on December 3 and 5, to retain Pipefitter Wilson and Sutton as employees; if sufficient pipe to keep the former occupied as a pipefitter for any substantial part of his worktime was not actually

available or foreseeably due, the joint venture's position with respect to that aspect of its total situation would have been just as apparent on December 3 and 5 as it was on the day when the employees designated were terminated. One cannot escape the conclusion that Flora's obvious willingness to retain Wilson early in December derived from considerations independent of pipe availability for the Fremont Canyon project, and that his change of heart with respect to the pipefitter's retention, thereafter, likewise derived from considerations independent of the joint venture's limited pipe supply.

Similarly, the December 5 employment of Palmer and McCaslin's prior employment as an electrician on December 2, 1959, despite the project's shortage of various electrical items, would appear to belie Flora's contention that a lack of adequate materials influenced the joint venture's personnel policy. I so find. (There is some indication in the record that needed electrical equipment could have been secured, partially, from the Bureau of Reclamation's local supply depot.) Considerable testimony was proffered with respect to the project's purported shortage of concrete, which the joint venture required to encase a portion of its powerhouse installations. While the record, concededly, will sustain a determination that Flora's previously committed concrete supplier could not deliver material prior to December 11—and that Flora had been made aware, some time earlier, of the fact that his supplier would not be ready to deliver concrete by that date—it will also establish his concurrent knowledge with respect to the availability of an alternative supply source from which concrete could be secured sufficient to encase one of two turbine draft tube installations which the joint venture had been engaged to complete; concrete encasement of this installation would have permitted the Respondents to devote their available manpower to the completion of preliminary work which had already begun on the second turbine draft tube installation. (Coker-Kewitt and Cunningham, previously identified as a construction enterprise extensively engaged with the Fremont Canyon project, then had a batch plant supply source for ready-mix concrete, large quantities of which they needed. And Project Superintendent Roberts of Coker-Kewitt and Cunningham testified, credibly, that Flora was told his firm probably would be able to deliver sufficient concrete to the respondents—before December 11 or by that date—to permit the substantial encasement of any completed turbine draft tube installation. Flora's claim that Roberts merely promised to deliver 80 yards of ready-mix concrete upon request, for a first pour, and that such a limited quantity would not have been sufficient to permit the joint venture's work to proceed, was definitely countered by the rebuttal testimony of Roberts, to the effect that Flora, himself, had presented the limited request noted, and that any request by the joint venture for some larger quantity could actually have been met. I so find. It should be noted, also, that when Flora actually received and began to pour concrete at the powerhouse project, during January 1960, he utilized only 96 yards for the initial encasement of the turbine draft tube installation sufficiently to meet specifications.) Upon the entire record, therefore, it would seem to be apparent that the joint venture's supposed temporary shortage of concrete could have been eliminated by timely requests addressed to Coker-Kewitt and Cunningham; the Respondents cannot be heard to contend that lack of concrete dictated their curtailment of the Fremont Canyon project.

Additionally, note should be taken of the fact that the joint venture did actually continue major operations at the Fremont Canyon powerhouse for several days—specifically, the placement of a 20,000-pound penstock ancillary to 1 turbine installation—immediately after the December 11 layoff. One employee was transferred from the joint venture's shop to serve as a crane operator in this connection. Several other employees were retained to perform various project tasks. Some men may have been hired; however, the record cannot be said to establish the employment of replacements for the discharges, definitively. The Respondents concede, nevertheless, that work for a millwright was available immediately after Bolan's separation.

Upon the entire record—particularly evidence which establishes the effectuation of a mass layoff within several days after some employees conferred with union representatives, and within 2 days after such representatives appeared at the jobsite; evidence which establishes the joint venture's failure to give prior notice of any layoff intentions, either to DeFeo or the project employees; and evidence-sufficient to rebut the contention that curtailment of the project had been motivated by economic considerations—I find that the employment of Wilson, Cuddy, Sutton, McCaslin, Bolan, and Jahner was terminated, regardless of the reasons which Flora gave these employees, because of their prior indication of some possible interest in union representation and employer conformity with union standards on the Fremont Canyon project. Layoff action thus motivated, clearly constitutes discrimination in regard to the employment tenure of the workers terminated, reasonably calculated to discourage their union membership.

Even with an assumption, for the sake of argument, that economic considerations

might have played some part in the decision of the Respondents to curtail operations, the enterprise cannot, legitimately, claim absolution when testimonial evidence, considered as a whole, establishes the concurrent presence of some motivation statutorily proscribed as a principally causative factor. See *Akin Products Company*, 99 NLRB 1270, enf. 209 F. 2d 109 (C.A. 5), in this connection.

Respondents would argue, apparently, that the December 11 terminations of Bolan and Jahner were voluntary. Upon the entire record, however, such contentions must be rejected.

No effort has been made to refute or contradict Bolan's testimony that DeFeo had actually characterized Flora's December 11 action as a shutdown of the Fremont Canyon project, or that the millwright had concurrently been advised to collect and remove his personal tools. Construction craftsmen traditionally consider instructions to remove personal tools from their work locale—particularly when accompanied by a shutdown notice—tantamount to layoff or discharge. No real contention can be made, therefore, that Bolan left the powerhouse area voluntarily. And his apparent disposition to consider DeFeo's jobsite comment, with respect to a shutdown, definitive—evidenced by his failure to report to the Casper office with other crew members—cannot convert his termination into a resignation. The Respondents make no serious contention that Bolan would have been notified of his retention as an employee if he had reported. When Mrs. Bolan subsequently came to the Casper office for his payroll check, the soundness of Bolan's judgment with respect to his termination was not effectively questioned; nor does the record establish that the millwright was ever urged to reconsider or that he was advised Flora might desire to retain or renew his services. Upon the entire record, therefore, Bolan's termination—like that of the other complainants herein—would seem to warrant characterization as a discriminatory discharge. I so find.

Elsewhere in this report, Jahner has been characterized as a December 11 dischargee. Credited testimony has been found to establish his dismissal by Flora with the statement that he was the "center of all the talk and everything going on" at the Fremont Canyon jobsite; elsewhere in this report it has been found that he was also told if he could do better with a union card to go ahead and get one. With the record in this posture, a conclusion would clearly be warranted that Jahner's December 11 termination reflected discrimination with regard to his employment tenure, reasonably calculated to discourage union membership and activity. I so find. Concededly, Jahner was advised subsequently that he could have his job back if he would forget about "all the talk" which Flora considered ascribable to him on the powerhouse project. (While the record does reveal conversational references by the Respondents to several incidents alleged to have involved some negligence or dereliction of duty on Jahner's part, the testimony, considered as a whole, would appear to warrant a conclusion that Flora's offer was conditioned upon the complainant's willingness to eschew any further discussion of prospective union representation, or the applicability of union work standards on the powerhouse project. I so find.) Under the circumstances, Flora's willingness to reconsider his discharge action, conditioned as it was upon Jahner's promise to refrain from the future exercise of rights statutorily guaranteed, cannot legitimately be considered a withdrawal of the complainant's dismissal.

Upon an assumption, *arguendo*, that it might be so construed, Jahner's rejection of Flora's conditional offer cannot be considered equivalent to a resignation. See *Ra-Rich Manufacturing Corporation*, 120 NLRB 503, 505-507; *Marathon Electric Mfg. Corp.*, 106 NLRB 1171, 1175, 1193-94, 1199. Employees have previously been found constructively discharged, contrary to Section 8(a)(3) of the statute, where respondent employers have conditioned future employment upon their abandonment of union adherence or activity. This situation would warrant a similar disposition.

The General Counsel, contending that McCaslin was a December 11 dischargee, charged in his complaint that the electrician had not been *reinstated unconditionally* until January 12, 1960, approximately. Record evidence with respect to McCaslin's January employment was proffered and received without challenge or contradiction; it establishes that, during his first day on the job, he was offered future transportation to and from the powerhouse project by the man then in charge, but that such promised transportation was not provided, pursuant to Flora's order. With matters in this posture, the General Counsel has argued, within his brief, that the Respondents' failure to provide McCaslin with transportation after his January 12 reinstatement—pursuant to a promise legitimately attributable to the enterprise—involved a pay reduction for the electrician and constituted a constructive discharge, violative of Section 8(a)(3) of the statute, even though McCaslin may have resigned thereafter.

Since the General Counsel's complaint, however, clearly implies that McCaslin's January 12 reemployment involved unconditional reinstatement, which the Respondents had previously failed and refused to proffer, one cannot find counsel for the Re-

spondents' enterprise effectively notified that an issue had been raised with respect to any liability of the joint venture for McCaslin's January 15 resignation. While the facts with respect to that resignation have been sufficiently established, counsel was never apprised that evidence with respect thereto was being adduced for the purpose of establishing an additional ground of statutory liability. The General Counsel's present contention that McCaslin was constructively discharged must, therefore, be rejected.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of respondents set forth in section III, above, occurring in connection with the 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

Since it has been found that Respondents engaged in and have continued to engage in certain unfair labor practices, it will be recommended that they cease and desist therefrom, and take certain affirmative action, including the posting of appropriate notices, designated to effectuate the policies of the Act, as amended.

Specifically, it has been found that Respondents terminated the employment of Herbert Schuchardt on November 19, 1959, to discourage union membership and activity in violation of Section 8(a)(3) of the statute. Respondents have also been found liable for the discriminatory layoff or discharge of six additional employees—Steve Bolan, Jack Cuddy, Vince Jahner, D. R. McCaslin, Jerry Sutton, and Samuel J. Wilson—for statutorily proscribed reasons. Thereby, employees of the Respondents, generally, were interfered with, restrained, and coerced in the exercise of rights statutorily guaranteed. Although the record reveals a putative reemployment offer to Schuchardt, subsequent to his termination, he was never really reinstated. Upon the entire record, also, with respect to McCaslin's purported reinstatement on January 12, 1960, I am satisfied that Flora's reemployment offer—since it did not cover the Respondents' previous commitment to provide McCaslin with transportation to and from the powerhouse project—cannot be considered effective reinstatement of the electrician to his former or substantially equivalent employment. Under the circumstances noted, McCaslin's purported reemployment cannot absolve the Respondents of their obligation to make a firm and sufficient reinstatement offer. *Combined Century Theaters, Inc., et al.*, 123 NLRB 1759; *Stokely Foods, Inc.*, 91 NLRB 1267, 1280, 1289, enfd. 193 F. 2d 736 (C.A. 5); cf. *Electric City Dyeing Co.*, 79 NLRB 872, 897, enfd. 178 F. 2d 980, 983 (C.A. 3); *Continental Oil Company*, 12 NLRB 789, 806. It will be recommended therefore that Respondents offer Schuchardt and each of the December 11 discriminatees immediate and full reinstatement to his former or a substantially equivalent position, without prejudice to his seniority or other rights and privileges. See *Chase National Bank of the City of New York, San Juan, Puerto Rico, Branch*, 65 NLRB 827, for a definition of the phrase "former or substantially equivalent position" as here used. Additionally, it will be recommended that the Respondents make each of the employees discriminatorily terminated whole for any loss of pay, or other incidents of the employment relationship, which they may have suffered by reason of the discrimination practiced against them, by the payment to each of a sum of money equal to the amount which he normally would have earned in the Respondents' employ, between the date on which discrimination was practiced against him and the date of any unconditional reinstatement offer which Respondents may hereafter make pursuant to the recommendations made elsewhere in this report, less his net earnings during the period indicated. *Crossett Lumber Company*, 8 NLRB 440, 497, 498; *Republic Steel Corporation v. N.L.R.B.*, 311 U.S. 7. The pay losses for which it is recommended that each of these employees be made whole should be computed on a quarterly basis, pursuant to the formula which the Board now utilizes. *F. W. Woolworth Company*, 90 NLRB 289, 291-294; *N.L.R.B. v. Seven-Up Bottling Company of Miami, Inc.*, 344 U.S. 344. In this connection, also, it will be recommended that the Respondents, to facilitate expeditions compliance with the recommendations made above in regard to backpay, preserve and, upon request, make available to the Board and its agents, all pertinent payroll records.

The course of conduct attributable to Respondents, herein, found to be improper, goes to the very heart of the statute and indicates a purpose, generally, to limit the lawful rights of employees. I am persuaded that the unfair labor practices found are closely related to similar unfair labor practices, the future commission of which can reasonably be anticipated, in view of the course of conduct found attributable

to Respondents in this report. The preventive purposes of the statute will be frustrated unless the remedial action recommended in this case, and any order which may prove to be necessary, can be made coextensive with the threat. In order, therefore, to make the interdependent guarantees of Section 7 effective, prevent any recurrence of the unfair labor practices found, minimize industrial strife which burdens and obstructs commerce, and thus effectuate the policies of the statute, it will be recommended that Respondents cease and desist from infringement, in any other manner, upon the rights guaranteed by the aforesaid statutory provisions.

In the light of the foregoing findings of fact, and upon the entire record in this case, I make the following:

CONCLUSIONS OF LAW

1. Flora Construction Company and Argus Construction Company, Wyoming corporations doing business as a joint venture under the name of Flora and Argus Construction Company, are Employers within the meaning of Section 2(2) of the Act, engaged in commerce and business activities which affect commerce within the meaning of Section 2(6) and (7) of the Act, as amended.

2. Casper Building and Construction Trades Council, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act, as amended, composed of local labor unions admitting employees of Flora and Argus Construction Company to membership.

3. By interference with, restraint, and coercion of its employees in their exercise of rights guaranteed in Section 7 of the Act, Flora and Argus Construction Company engaged and has continued to engage in unfair labor practices within the meaning of Section 8(a)(1) of the Act, as amended.

4. By the discharge or layoff of seven employees named below, and by its subsequent failure or refusal to offer any of the designated employees effective and complete reinstatement, Flora and Argus Construction Company engaged in and have continued to engage in unfair labor practices within the meaning of Section 8(a)(1) of the Act, as amended:

Steve Bolan
Jack Cuddy
Vince Jahner

D. R. McCaslin
Herbert Schuchardt
Jerry Sutton

Samuel J. Wilson

5. The unfair labor practices found are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act, as amended.

[Recommendations omitted from publication.]

Barker Automation, Inc., successor to Barker Poultry Equipment Company, Barker Egg Equipment Company¹ and District 105, International Association of Machinists, AFL-CIO, Petitioner. *Case No. 18-RC-4391. August 7, 1961*

SUPPLEMENTAL DECISION, ORDER, AND SECOND DIRECTION OF ELECTIONS

On January 4, 1961, the Board² issued a Decision and Direction of Election herein,³ finding appropriate "separate units of all the production and maintenance employees at (1) Barker Poultry Equipment Company's plant at 802 South Madison, Ottumwa, Iowa; (2) Barker Egg Equipment Company's plant at 905 South Madison,

¹ The Employer's name appears as amended.

² Pursuant to the provision of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to a three-member panel [Members Rodgers, Fanning, and Brown].

³ Not published in NLRB volumes