

WE WILL NOT threaten, coerce, or restrain Continental Grain Company, or any other person engaged in commerce or in an industry affecting commerce, where an object thereof is to force or require the aforesaid employers, or any other employer or person, to cease doing business with Upper Lakes, Ltd.

GRAIN ELEVATOR, FLOUR AND FEED MILL WORKERS, INTERNATIONAL  
LONGSHOREMEN ASSOCIATION, LOCAL 418, AFL-CIO,

*Labor Organization.*

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

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

Employees may communicate directly with the Board's Regional Office, Midland Building, 176 West Adams Street, Chicago, Illinois, Telephone No. Central 6-9660, if they have any questions concerning this notice or compliance with its provisions.

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**Hunter Metal Industries, Inc. and Local 810, Steel, Metals, Alloys and Hardware Fabricators and Warehousemen, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America. Cases Nos. 29-CA-50 (formerly 2-CA-9939) and 29-CA-50-3 (formerly 2-CA-9939-3). October 29, 1965**

#### DECISION AND ORDER

On August 9, 1965, Trial Examiner Samuel Ross issued his Decision in the above-entitled proceeding, finding that Respondent had engaged in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action to remedy such unfair labor practices. On the same date, the case was transferred to the National Labor Relations Board. On August 24, 1965, the Trial Examiner issued an errata thereto dated August 23, 1965.

Thereafter, on September 13, 1965, Respondent filed "Exceptions by the Employer to the Trial Examiner's Decision."<sup>1</sup> The Board, in its consideration of the matter, found that the document filed as exceptions by the Respondent did not conform with the requirements set forth in Section 102.46(b) of the Board's Rules and Regulations, Series 8, as amended, for the filing of proper exceptions. The Board thereupon, by order dated September 23, 1965, gave notice to the Respondent that it must submit proper exceptions on or before October 4, 1965, and that if none were received within the time provided, the Board would reject and strike the document referred to above and would adopt as its Order the Recommended Order of the Trial Examiner. Thereafter, counsel for Respondent notified the Board by letter that, in his opinion, the exceptions were proper and should have been accepted by the Board. Counsel did not undertake to file a brief or any additional or revised exceptions.

<sup>1</sup> At the request of the Respondent, the Board extended the time for filing exceptions to September 13, 1965, and the time for filing briefs to September 20, 1965.

Pursuant to Section 3(b) of the National Labor Relations Act, as amended, the Board has delegated its powers with respect to this case to a three-member panel [Members Fanning, Brown, and Zagoria].

Section 102.46(b) of our current Rules and Regulations establishes the standards for the proper filing of exceptions. The rule states in pertinent part that each exception "(1) shall set forth specifically the questions of procedure, fact, law, or policy to which exceptions are taken; (2) shall identify that part of the trial examiner's decision to which objection is made; (3) shall designate by precise citation of page the portions of the record relied on; and (4) shall state the grounds for the exceptions and shall include the citation of authorities unless set forth in a supporting brief. . . . Any exception which fails to comply with the foregoing requirements may be disregarded."

Respondent's exceptions are in summary form and merely assert that the Trial Examiner erred in his conclusion that Respondent knew of the discriminatee's union activity and fired him for engaging therein. Respondent also contended that the Trial Examiner committed error in receiving evidence of certain 8(a)(1) conduct which Respondent had previously admitted. Respondent filed no briefs in explanation of its position and does not call the Board's attention to any specific error in the Trial Examiner's findings of fact, his reasoning, or his application of law. Under these circumstances, we must disagree with Respondent's contention that no citation of authority or statement of grounds in support of its position is necessary.<sup>2</sup> We find, rather, that Respondent's exceptions fail to set forth specifically those questions of procedure, law, fact, or policy to which it objects as required by Rule 102.46(b).<sup>3</sup> Accordingly, we shall reject and strike the document submitted by Respondent entitled "Exceptions by the Employer to the Trial Examiner's Decision."<sup>4</sup>

As no proper statement of exceptions has been filed with the Board, we shall abide by Section 102.48(a) of the Rules and Regulations, which provides that in the event timely or proper exceptions are not filed, the findings, conclusions, and recommendations of the Trial Examiner as contained in his Decision shall, pursuant to Section 10(c) of the Act, automatically become the Decision and Order of the Board and become its findings, conclusions, and order, and all objections and exceptions thereto shall be deemed waived for all purposes.

[The Board adopted the Trial Examiner's Recommended Order.]

<sup>2</sup> Cf. *Screen Print Corporation*, 151 NLRB 1266.

<sup>3</sup> In addition, and contrary to Rule 102.46(b), Respondent's exceptions fail to designate those portions of the record relied upon. Respondent's counsel asserts that Respondent could not purchase a transcript of the record. However, a copy thereof is available for examination, upon request, in either the Board's Regional Office or its Washington office. See Section 102.117 of the Board's Rules and Regulations.

<sup>4</sup> *Patrick F. Izzvi d/b/a Pat Izzvi Trucking Co.*, 149 NLRB 1097, aff'd. 343 F. 2d 753 (C.A. 1).

## TRIAL EXAMINER'S DECISION

## STATEMENT OF THE CASE

Upon charges filed on April 6 and May 1, 1964, by Local 810, Steel, Metals, Alloys and Hardware Fabricators and Warehousemen, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, herein called Local 810, the General Counsel issued a consolidated complaint dated June 30, 1964, against Hunter Metal Industries, Inc., herein called the Company or the Respondent, alleging that it had engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the National Labor Relations Act, as amended, herein called the Act. In substance the complaint alleges that coincident with an organizational campaign by Local 810, the Respondent, by interrogating employees concerning their membership in and activities on behalf of Local 810, by indicating to employees that their Local 810 union meetings, meeting places, and concerted activities were under surveillance by the Company, by warning and directing employees to refrain from assisting or supporting Local 810, and by threatening employees with discharge, loss of pay raises, and other reprisals unless they became members of another union, interfered with, restrained, and coerced employees in the exercise of rights guaranteed by the Act. In addition the complaint alleges that the Respondent discriminated against two employees, Carlos Del Valle and James Kimlin, by discharging them because they joined and assisted Local 810 and refused to join another union. The Respondent filed an answer denying the substantive allegations of the complaint and the commission of unfair labor practices.

Pursuant to notice, a hearing was held in Brooklyn, New York, before Trial Examiner Samuel Ross on March 8 and 9, 1965. All parties were represented at the hearing by counsel and were afforded full opportunity to be heard, to introduce evidence, to examine and cross-examine witnesses, and to present oral argument. None of the parties filed a brief although time to do so was granted.

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

## FINDINGS OF FACT

## I. COMMERCE

The Company is a New York corporation which is engaged at East Patchogue, New York, in the manufacture and sale of metal furniture and related products. During the past year, a representative period, the Company manufactured, sold, and shipped products valued in excess of \$50,000 from its plant in the State of New York to points and places outside the said State. During the same period, the Company purchased and received materials valued in excess of \$50,000 which were shipped directly to its plant in the State of New York from places outside the State. On the foregoing admitted facts, it is found that the Company is engaged in commerce and in operations affecting commerce within the meaning of Section 2(6) and (7) of the Act.

## II. THE LABOR ORGANIZATION INVOLVED

The Respondent admits and it is therefore found that the Charging Union, Local 810, is a labor organization within the meaning of Section 2(5) of the Act. The Respondent also admits and it is found that Lumber, Plants, Warehousemen and Allied Products, Local 1205, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (herein called Local 1205), is a labor organization within the meaning of Section 2(5) of the Act.

## III. THE UNFAIR LABOR PRACTICES

A. *The background history of labor relations at the Company's plant*

## 1. The representation of the Company's employees by UE

On June 14, 1961, United Electrical, Radio and Machine Workers of America, Independent (herein called UE), was certified by the Board as the collective-bargaining representative of Respondent's production, maintenance, and shipping employees,<sup>1</sup> and thereafter entered into a collective-bargaining agreement with Respondent, effective until June 30, 1964, which contained a valid union-security clause

<sup>1</sup> Case No. 2-RC-10886.

## 2. The Company's recognition of Local 1205

On November 21, 1963, Local 1205 filed a petition with the Board seeking representation of the Respondent's employees, but this petition was dismissed by the Regional Director on the ground that UE's contract was a bar to the election.<sup>2</sup> On January 23, 1964, UE's shop steward at Respondent's plant filed a union-security deauthorization petition with the Board,<sup>3</sup> which resulted on March 2, 1964, in a certification by the Regional Director that a majority of the Company's employees had voted to revoke UE's union-security authorization. Thereupon, on the demand of Local 1205 for recognition, a card check was conducted by an independent arbitrator on March 3, 1964 (the day after the certification of the union-security deauthorization results), and he certified that a majority of the Respondent's employees had designated Local 1205 as their bargaining representative. Subsequently, on April 2, 1964, although its collective-bargaining agreement with UE had not expired, the Company executed a collective-bargaining agreement with Local 1205, effective until April 1, 1967, containing, *inter alia*, a union-security clause requiring membership in Local 1205 after 30 days, and a dues checkoff provision.

A few days later, on April 7, 1964, UE requested negotiations with the Respondent for modification of its still current and unexpired contract.<sup>4</sup> On the following day, the Company by letter responded that it doubted UE's majority status and would not meet with it unless that status was reestablished.<sup>5</sup>

## 3. The organizational campaign of Local 810

The Charging Union, Local 810, began its current organizational activities in December 1963 by calling a meeting of Respondent's employees. Thereafter, starting in March 1964, Local 810 organizers frequented the plant site and spoke to employees outside the plant, authorization cards were passed out by organizers and employees, and weekly meetings with employees were conducted. Admittedly, the Respondent's President Harry Stoll was aware of Local 810's organizational activity in March 1964, before the collective-bargaining agreement with Local 1205 was executed. On April 23, 1964, Local 810 filed a petition with the Board for certification as the representative of Respondent's employees.<sup>6</sup> UE and Local 1205 intervened. The Company and Local 1205 contended that their collective-bargaining agreement of April 2, 1964, was a bar to the proceeding. On July 7, 1964, the Regional Director ruled that since the contract was signed during the term of the Company's existing contract with UE, it could not serve as a bar to Local 810's petition, and he directed an election with UE, Local 1205, and Local 810 on the ballot. UE subsequently was permitted to withdraw its name from the ballot, and at the election on July 20, 1964, Local 810 received a substantial majority of the votes cast. The Company filed timely objections to the election which were overruled by the Regional Director. Thereafter, the Company's request to the Board to review the Regional Director's decision was denied.

### B. *The Respondent's admissions*

As previously noted, the complaint alleges that in connection with Local 810's organizational campaign, the Company unlawfully: interrogated employees concerning their membership in, activities on behalf of, and sympathy for, Local 810; indicated to employees that Local 810's meetings, meeting place, and activities were under surveillance by the Company, warned employees to refrain from assisting or supporting Local 810; threatened employees with discharge, loss of pay raises, and other reprisals unless they became members of Local 1205; and discharged Carlos Del Valle and James Kimlin because of their membership in and assistance to Local 810, and their refusal to join Local 1205. Early in the hearing in this case, the Respondent amended its answer which denied the commission of the above unlawful conduct, and admitted all the allegations of violation, excepting only the allegation that James Kimlin was discharged because of his activities on behalf of Local 810 and his refusal to join Local 1205. During the hearing, the Respondent offered Kimlin reinstatement to his former or substantially equivalent position, which the latter promptly

<sup>2</sup> Case No 2-RC-13103.

<sup>3</sup> Case No. 2-UD-118.

<sup>4</sup> Similar demands had been made by UE in November 1963 and January 1964 but had been rejected by Respondent as untimely.

<sup>5</sup> The findings in sections III, A, 1 and 2 above are based on the Regional Director's Decision and Direction of Election in Case No 2-RC-13386 (General Counsel's Exhibit No. 2) which was received by stipulation of the parties for background purposes.

<sup>6</sup> Case No. 2-RC-13386.

accepted. Thus, the only issue which remains for disposition is whether Kimlin is entitled to reimbursement for lost earnings because his discharge was motivated by his activities on behalf of Local 810 and/or his refusal to join Local 1205.

### C. Kimlin's employment and discharge

James F. Kimlin was interviewed for employment by Respondent's Vice President Seymour Schwartz on April 7, 1964,<sup>7</sup> and was hired as a machine operator. During the interview, Kimlin was told by Schwartz that "after thirty days you will join the union [Local 1205] and you will get a nickel raise."<sup>8</sup> Kimlin reported for work as directed on April 8 and was assigned the job of spotwelder under the immediate supervision of Tino Caruso.<sup>9</sup>

At the completion of his first day of work Kimlin attended a meeting of Local 810 and signed an authorization card designating that union to represent him. On the following day, April 9, Vice President Schwartz accosted Kimlin and said, "I know you went to the [Local] 810 meeting last night." Kimlin replied, "How do you know?" Schwartz responded, "Never mind, I just know." Kimlin then volunteered, "I'm no [Local] 810 member." Schwartz answered, "You better not be. We don't want any 810 members here."

During the next few weeks, Kimlin participated in Local 810's organizational campaign, solicited employees in the machine area of Respondent's plant to sign authorization cards for Local 810, signed up three employees to such cards, attended the weekly meetings of Local 810 every Wednesday, and together with Carlos Del Valle and Anibal De Jesus, the other two employee solicitors for Local 810, conferred frequently at quitting time with that union's organizer just outside the plant.

On April 22, notwithstanding that Kimlin had been employed by Respondent for only 2 weeks, Vice President Schwartz spoke to Kimlin regarding his lack of membership in Local 1205. On this occasion, Schwartz said to Kimlin in the plant, "I hear you have not signed a [Local] 1205 card." Kimlin conceded that he had not. Schwartz then said, "Well you better have [sic] or you will find yourself out of a job."<sup>10</sup>

During his entire period of employment by Respondent until the day of his discharge, Kimlin worked at his original assignment of spotwelder, and admittedly received no reprimands or complaints about his work or deportment from either Caruso, under whose immediate direction he worked, John Blake, Respondent's production foreman, or any other official of the Company. On the morning of April 24, Foreman Blake said to Kimlin, "Come with me. You are going to work in the paint shop." Kimlin replied, "I was hired as a spot welder." Blake responded, "You work where I tell you." Thereupon, notwithstanding that Kimlin complained to Blake that paint fumes "bothered him," he followed Blake into the paint shop and worked there the balance of the day.

According to Kimlin's credited testimony, about 2 p.m. that same day, Foreman Blake returned to the paint room and in the presence of William O'Shaughnessy, Local 1205's shop steward at Respondent's plant, said to Kimlin, "I hear you still have not signed a 1205 card yet." Kimlin answered, "No, what's the difference?" Blake replied, "If you haven't signed a 1205 card, you will not get a twelve and a half cent raise like the other members of the plant." Kimlin responded, "For a lousy, stinking twelve and a half cent raise, I will not sell out." Blake retorted, "That isn't all. If you don't sign the 1205 card now with Mr. O'Shaughnessy, you will be fired today." Kimlin replied, "I will not sign. I do not like what you are trying to do here." Blake answered, "Fine," and O'Shaughnessy added, "You can tell the rest of your 810 members that you [all] will be out by May 2."<sup>11</sup>

<sup>7</sup> All dates hereinafter refer to 1964 unless otherwise specified.

<sup>8</sup> The Respondent's collective-bargaining contract with Local 1205 provided, *inter alia*, that "new employees who are hired as unskilled help shall receive" an increase of 5 cents per hour "after completion of [a] thirty (30) day probationary period." As noted above, the contract also contained a 30-day union-security clause.

<sup>9</sup> The Respondent contends that Caruso is a leadman and not a supervisor within the meaning of the Act. Although that issue was fully litigated, its determination is not regarded necessary in view of the conclusion hereinafter reached.

<sup>10</sup> The findings above regarding Kimlin's hire, employment, and conversations with Vice President Schwartz are based on Kimlin's uncontroverted and credited testimony. At the time of the hearing, Schwartz was no longer connected with Respondent, and assertedly was unavailable as a witness. However, the Respondent declined my offer of a subpoena and a continuance of the hearing to obtain his attendance.

<sup>11</sup> This date, May 2, was exactly 30 days after the execution of the collective-bargaining agreement between Respondent and Local 1205.

About 4 p.m. that same day, one-half hour before the usual quitting time, Respondent's paymaster, Mr. Rubin, gave Kimlin his paycheck and said it was "final." Kimlin asked Rubin why he was being fired, and the latter told him, "See Mr. Schwartz." Kimlin then visited Schwartz in his office and asked him the reason for his discharge. Schwartz told him, "See Mr. Blake." Kimlin then asked Blake why he was being dismissed, and the latter replied, "I told you the reason this afternoon."

*D. The Respondent's asserted reasons for Kimlin's discharge*

Production Foreman Blake denied that he ever spoke to Kimlin "about [Local] 1205 or joining the union or things of [sic] this effect." Blake also denied any knowledge of Kimlin's union activities, and he testified that Kimlin's dismissal had no relation to such activities.

According to Blake, about 4 days before Kimlin's termination, he observed Kimlin sitting "on top of a work bench with another spot welder . . . with his knees crossed, hands clasped over them, pretty well relaxed, laughing [and] having a good time with the other operators." Blake admitted, however, that he did not tell Kimlin either to get off the bench or to stop talking and get to work. Blake also conceded that although he had previously observed Kimlin at work during his frequent trips through the plant, this was the first "bad move" that he had seen Kimlin make. Later that day, according to Blake, he checked with Tino Caruso, under whose direction Kimlin worked, and Caruso told him that Kimlin talked a lot and was away from his machine excessively.<sup>12</sup> Accordingly, Blake testified, he "started to observe" Kimlin for the next "two or three days," and saw him "talking very heartedly," and making "frequent trips" with "very light loads" of material so that he was away from his machine "more often than he should have been." Blake admitted that he never spoke to Kimlin about any of these alleged shortcomings, nor made any attempt to have them corrected by Kimlin. His only excuse for not so doing was that under the contract with Local 1205, Kimlin was a probationary employee and a "probationary isn't given that chance."

Blake further testified that on the day of Kimlin's discharge, he was short of helpers on the "dip line" in the paint room, that he told Kimlin to come with him, and that when Kimlin "got into the paint room," he said to Blake, "I was hired as a spot welder and not to work in the paint room." Blake then "corrected" Kimlin, saying, "You were hired as a general helper to work anywhere in the plant. You had no specific duty when you were hired here." Kimlin did not reply but proceeded to "work in the paint department." Thereupon, without either observing or inquiring about the adequacy of Kimlin's work in the paint department, and without telling Kimlin about it, Blake assertedly decided at that moment to discharge Kimlin because of the "arrogant attitude" displayed by Kimlin when he was transferred and "claimed he was a spot welder," although "he was hired out by the Company as a general helper . . . for every department." Accordingly, after he left the paint department and without notice to Kimlin, Blake proceeded to process his discharge form.

Significantly, Blake failed to deny Kimlin's testimony that after notification of his dismissal, when Kimlin asked Blake the reason therefor, the latter said, "I told you the reason this afternoon." Moreover, although on direct examination Blake testified about Kimlin's other alleged shortcomings, he gave only Kimlin's "arrogant attitude" as the reason for his termination, but on cross-examination Blake testified that he also discharged Kimlin because of his earlier conduct of sitting on the workbench.

In respect to Kimlin's asserted "arrogant attitude" by claiming to having been hired as a spotwelder rather than a general helper for all departments, Blake admitted on cross-examination that he was not present when Kimlin was hired, and therefore had no knowledge of what Kimlin had been told when he was hired. Blake also admitted that before discharging Kimlin, he made no effort to ascertain from Vice President Schwartz who hired Kimlin<sup>13</sup> whether or not Kimlin had been told that he was hired as a machine operator or spotwelder.

In respect to Kimlin's other alleged shortcomings, Blake admitted that other employees laugh and talk. Moreover, as previously noted, another spotwelder was observed by Blake sitting on the bench at the time that Kimlin allegedly was so engaged. However, there was no testimony that any disciplinary action was taken against that other employee. In addition, the record also discloses that as part of Kimlin's job, it was necessary for him to leave his bench, at least on some occasions, to pick up material to work on from other machines, but the proper number of such trips not disclosed by Blake or any other witness for Respondent, and Kimlin admittedly was never told that this practice was not satisfactory.

<sup>12</sup> Caruso was not called by Respondent to corroborate this hearsay testimony.

<sup>13</sup> Schwartz was then still connected with Respondent.

### E. Concluding findings

#### 1. The issue presented and the legal principles involved

The issue presented for resolution by the foregoing record is whether, as alleged in the complaint, Kimlin was discharged because of his union activities on behalf of Local 810 and/or his refusal to join Local 1205.

The legal principles applicable to this issue are well settled:

. . . the Act does not interfere with the employer's right to conduct his business, and, in doing so, to select and discharge his employees. It proscribes the exercise of the right to hire and fire only when it is employed as a discriminatory device.<sup>14</sup>

"The question involved is a pure question of fact."<sup>15</sup> "Anti-union bias and demonstrated unlawful hostility are proper and highly significant factors for Board evaluation in determining motive."<sup>16</sup> Accordingly, the record will now be considered in the light of these principles.

#### 2. Respondent's hostility to Local 810

The Respondent's President Harry Stoll and its Foreman Blake testified that the Company's policy towards the competing unions was one of neutrality and "strictly hands off." However, the undisputed record discloses that: (1) Kimlin was told by Vice President Schwartz, "We don't want any 810 members here"; (2) in violation of Section 8(a)(1) of the Act, Respondent "warned and directed its employees from becoming or remaining members of Local 810, and to refrain from giving any assistance or support to it, and from soliciting employees to join Local 810";<sup>17</sup> and (3) in further violation of Section 8(a)(3) and (1) of the Act, it discharged Carlos Del Valle because he joined and assisted Local 810. In the light of the foregoing record, the conclusion is inescapable and it is accordingly found that Respondent was actively opposed and hostile to the representation of its employees by Local 810.<sup>18</sup>

#### 3. Respondent's knowledge of Kimlin's activity on behalf of Local 810

As noted above, Foreman Blake testified that before discharging Kimlin, he had no knowledge of Kimlin's membership in or activity on behalf of Local 810. Notwithstanding Blake's denial, it is fairly evident from the record that Kimlin's interest in and activity for Local 810 was known by Respondent. This conclusion is based on the following evidence in the record: (1) Kimlin's uncontradicted testimony that on the day after he attended his first Local 810 meeting, that fact was known by Respondent's Vice President Schwartz; (2) Kimlin was observed "constantly" by Blake according to the latter's own testimony, and Blake thus had ample opportunity to observe Kimlin when the latter solicited adherents for Local 810 in the plant; (3) on the day of his discharge, Kimlin in effect acknowledged to Blake that he was an adherent of Local 810 when he refused "to sell out" by joining Local 1205; and (4) Kimlin's frequent conferences with Local 810's organizer outside the plant were visible to plant officials from their offices.<sup>19</sup>

#### 4. Conclusions in respect to the motivation for Kimlin's discharge

In the light of the findings above that the Respondent was opposed to the representation of its employees by Local 810, that Respondent engaged in interference, restraint, and coercion of employees to discourage affiliation with that union, that Respondent discharged Carlos Del Valle because of his activities on behalf of Local 810, and that Respondent had knowledge of Kimlin's like activities in support of

<sup>14</sup> *N.L.R.B. v. Wagner Iron Works and Bridge, Structural & Ornamental Iron Workers Shopmen's Local 471 (AFL)*, 220 F. 2d 126, 133 (CA 7).

<sup>15</sup> *Hartsell Mills Company v. N.L.R.B.*, 111 F. 2d 291, 293 (CA. 4).

<sup>16</sup> *N.L.R.B. v. Dan River Mills, Incorporated, Alabama Division*, 274 F. 2d 381, 384 (CA. 5).

<sup>17</sup> This quotation is from paragraph 11 of the complaint, which, as previously noted (see section III, B, above), was admitted by the Respondent during the hearing.

<sup>18</sup> The contrary testimony of Foreman Blake and President Stoll regarding Respondent's "strictly hands off" and neutral policy towards the competing unions is therefore regarded as unworthy of credence or belief.

<sup>19</sup> Significant in this regard is the testimony of Anibal De Jesus who testified that Vice President Schwartz pointed out of the office windows to employees of Respondent who were talking to Local 810's organizers outside the plant, and asked De Jesus, "You see those guys [Respondent's employees]? What are they trying to prove?"

Local 810, the sudden termination of Kimlin's employment admittedly without any prior warning that either his work or deportment was unsatisfactory, clearly establishes, *prima facie*, that Kimlin's discharge was motivated by Respondent's hostility to Local 810. The same conclusion is also required by Kimlin's credited testimony that on the day of his discharge, Kimlin was threatened by Foreman Blake with dismissal unless he joined Local 1205 that day, that he nevertheless refused to sign up with Local 1205, and that as threatened, he was fired later that day and told by Blake that the reason therefor was that given him earlier in the day.

In the light of the foregoing conclusion, consideration is now required of the grounds for Kimlin's dismissal as asserted by Respondent. For the reasons herein-after explicated, the said grounds, testified to by Foreman Blake, are regarded as quite obviously insubstantial, implausible, and as pretexts to conceal the real motive for Kimlin's termination.<sup>20</sup>

Thus, as previously noted, Blake first testified that the reason for his discharge of Kimlin was the latter's "arrogant attitude" assertedly displayed when Kimlin claimed, in objecting to his transfer to the paint department, that he had been hired as a spotwelder. Not having participated in Kimlin's hire, Blake admittedly had no basis for knowing whether Kimlin's claim was true or not. Moreover, after Kimlin was told by Blake that he was a "general helper" and was required to work "anywhere in the plant," Kimlin worked in the paint department without further protest. Under the circumstances, the mere assertion by Kimlin that he was hired as a spotwelder, which, for all Blake knew, might be true, could not reasonably be regarded as "arrogant." Blake admittedly made no effort to ascertain the truth of Kimlin's claim before he fired him, and Blake's testimony is generally regarded as unreliable. Accordingly, his assertion that this was the reason for Kimlin's discharge is not believed, and is regarded by me as a pretext to conceal the true motive for Kimlin's termination.

As further previously noted, on cross-examination, Blake also assigned as additional reasons for Kimlin's discharge, his conduct of once sitting on the workbench, his talking and laughing, and his too frequent trips for materials. For the reasons hereinafter stated, these asserted reasons are regarded by me as afterthoughts on the part of Blake and as further pretexts to conceal the illegal motivation for Kimlin's termination.

1. Since laughing and talking by other employees are admittedly tolerated by Respondent, it is difficult if not impossible to conceive how Kimlin's like conduct is either a shortcoming on his part, or reasonably could be regarded as such, especially since he admittedly was never told that he was not supposed to laugh and talk. Accordingly, this asserted reason for his dismissal is regarded as pretextual.

2. Even if it is assumed that Kimlin was not supposed to sit on the workbench, he did so only once, and that was 4 days before his discharge. Another employee engaged in the same "offense" at the same time, and, so far as this record discloses, was not in any way disciplined. On the single occasion when Kimlin sat on the bench, he was not reprimanded or told not to engage in such conduct. In any event, since the "offense" was not repeated by Kimlin despite the absence of reprimand, it could not reasonably have motivated his dismissal 4 days later. Accordingly this asserted reason for Kimlin's discharge is regarded as another pretext.

3. The record discloses that as part of Kimlin's duties as a spotwelder, it was necessary for him to leave his bench to pick up material to work on. According to Blake, Kimlin's such trips were too "frequent" and he carried "very light loads." However, aside from these conclusions, Blake furnished no testimony regarding what constitutes a proper number of trips, or what a proper load should be. Significantly, Blake did not testify that there was anything wrong with either the quantity or quality of Kimlin's work. In the light of the foregoing, the general unreliability of Blake's testimony, and especially since Kimlin admittedly was never told that he was

<sup>20</sup> Aside from all other considerations, I regard Blake's testimony as generally unworthy of credence or belief. As previously noted, Blake's testimony regarding Respondent's "strictly hands off" and neutral policy towards the competing unions was obviously untrue and was not credited (see footnote 18, *supra*). In addition, Blake's testimony was in some respects self-contradictory. On other occasions, especially on cross-examination, Blake was evasive and avoided direct answers to questions. In general, Blake impressed me as an unreliable witness. For example, Blake testified on one occasion that he "started to observe" Kimlin after he first saw him sitting on the bench, but later contradictorily testified that he had observed Kimlin "constantly" from the inception of his employment by Respondent. Blake obviously was reluctant to concede that Kimlin objected to his transfer to the paint department because the paint fumes bothered him, and did so only after his memory was prodded by that admission in his affidavit to the Board agent.

away from his machine more often than he should be, or that this method of operation was improper, this asserted reason for his discharge is regarded as just another pretext.

4. As noted above, Blake's only explanation for not calling Kimlin's attention to any of his alleged shortcomings and for not reprimanding Kimlin was that a "probationary isn't given that chance." Since the Respondent hired Kimlin and undertook the trouble and expense of teaching him to spotweld, it would be natural to assume that the Respondent would also train him in proper performance and conduct, to the end that he would become a valuable employee. Under the circumstances, the absence of any reprimands suggests either that Kimlin's conduct and performance were not improper, or if so, not sufficiently so to require correction.

5. In his closing argument, Respondent's counsel in effect concedes that the reasons asserted for Kimlin's discharge could properly be regarded as "rather flimsy" and "fishy" if applied to an employee of longer tenure. Whether or not grounds for discharge that are "flimsy" or "fishy" for longer term employees are not equally so when applied to a probationary employee, I so regard the reasons asserted for the discharge of Kimlin, an employee who received no reprimands for either his work or department prior to discharge.

For all the foregoing reasons, including the pretextual grounds asserted for his dismissal, I find and conclude that Kimlin's employment was terminated by Respondent because of his active role in support of Local 810 and his refusal to join Local 1205,<sup>21</sup> and that thereby the Respondent discriminated against Kimlin and engaged in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

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

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

Having found that the Respondent has engaged in certain unfair labor practices, I will recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent discriminated against Carlos Del Valle and James F. Kimlin by terminating their employment, I will recommend that to the extent that the Respondent has not already done so,<sup>22</sup> it be ordered to offer them 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 earnings they may have suffered by reason of the discrimination against them, by the payment to each of them of a sum of money equal to the amount which he normally would have earned as wages from the date of his discharge to the date of his reinstatement, less his net earnings during said period, with backpay computed on a quarterly basis in the manner established by the Board.<sup>23</sup>

I will also recommend that the Respondent make available to the Board upon request, payroll and all other records necessary to facilitate the determination of the amounts due under this recommended remedy.

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

#### CONCLUSIONS OF LAW

1. Local 810, Steel, Metals, Alloys and Hardware Fabricators and Warehousemen, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, and Lumber, Plants, Warehousemen and Allied Products, Local 1205, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, are labor organizations within the meaning of Section 2(5) of the Act.

<sup>21</sup> Since Kimlin had only worked 16 days for Respondent when discharged, it is obvious that he was not yet required to join Local 1205 under the terms of the contract between Respondent and that union.

<sup>22</sup> At the outset of the hearing all the parties conceded that Carlos Del Valle had already been reinstated. As previously noted, during the hearing Respondent offered Kimlin reinstatement which the latter accepted.

<sup>23</sup> *F. W. Woolworth Company*, 90 NLRB 289. Backpay shall include the payment of interest at the rate of 6 percent per annum to be computed in the manner set forth in *Isis Plumbing & Heating Co*, 138 NLRB 716.

2. By discouraging membership in a labor organization through discrimination in employment, and by interfering with, restraining, and coercing employees in the exercise of their rights under the Act, the Respondent has engaged in and is engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act.

#### RECOMMENDED ORDER

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

1. Cease and desist from:

(a) Discouraging membership in and activities on behalf of Local 810, Steel, Metals, Alloys and Hardware Fabricators and Warehousemen, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization of its employees, by discharging or refusing to reinstate any employee, or in any other manner discriminating in regard to hire or tenure of employment, or any term or condition of employment, except to the extent permitted by the proviso to Section 8(a)(3) of the Act.

(b) Interrogating employees concerning their union affiliation, activities, or sympathies in a manner constituting interference, restraint, or coercion in violation of Section 8(a)(1) of the Act.

(c) Making statements to employees which indicate or create the impression that their union meetings or other union or concerted activities are under surveillance.

(d) Threatening employees with loss of employment, economic sanctions, or other reprisals to discourage union affiliation or adherence.

(e) In any other manner interfering with, restraining, or coercing employees in the exercise of their right to self-organization, to form labor organizations, to join or assist Local 810, Steel, Metals, Alloys and Hardware Fabricators and Warehousemen, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from engaging in 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 by Section 8(a)(3) of the Act.

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

(a) To the extent it has not already done so, offer Carlos Del Valle and James F. Kimlin 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 earnings they may have suffered as a result of the discrimination against them in the manner provided in the section of this Decision entitled "The Remedy."

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

(c) Notify Carlos Del Valle and James F. Kimlin if presently serving in the Armed Forces of the United States of their right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act of 1948, as amended, after discharge from the Armed Forces.

(d) Post at its plant in East Patchogue, New York, copies of the attached notice marked "Appendix."<sup>24</sup> Copies of said notice, to be furnished by the Regional Director for Region 29, shall, after being duly signed by Respondent, be posted by it immediately upon receipt thereof and maintained by it for a period of 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

<sup>24</sup>In the event that this Recommended Order be adopted by the Board the words "a Decision and Order" shall be substituted for the words "the Recommended Order of a Trial Examiner" in the notice. In the further event that the Board's Order be enforced by a decree of a United States Court of Appeals, the words "a Decree of the United States Court of Appeals, Enforcing an Order" shall be substituted for the words "a Decision and Order"

(e) Notify the Regional Director for Region 29, in writing, within 20 days from the date of the receipt of this Decision and Recommended Order, what steps it has taken to comply herewith.<sup>25</sup>

<sup>25</sup> In the event that this Recommended Order be adopted by the Board, this provision shall be modified to read: "Notify said Regional Director, in writing, within 10 days from the date of this Order, what steps the Respondent has taken to comply herewith."

## APPENDIX

### NOTICE TO ALL EMPLOYEES

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

WE WILL NOT discourage membership in or activities on behalf of Local 810, Steel, Metals, Alloys and Hardware Fabricators and Warehousemen, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, or any other labor organization, by discharging or refusing to reinstate any of our employees or in any other manner discriminating against our employees in regard to their hire or tenure of employment, or any term or condition of employment, except as permitted by the proviso to Section 8(a) (3) of the Act.

WE WILL NOT coercively or unlawfully interrogate our employees regarding union affiliation, activities, or sympathies.

WE WILL NOT make statements to our employees which will indicate or create the impression that their union meetings, or other union or concerted activities, are under surveillance.

WE WILL NOT threaten employees with loss of employment, economic sanctions, or other reprisals to discourage union affiliation or adherence.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form labor organizations, to join or assist Local 810, Steel, Metals, Alloys and Hardware Fabricators and Warehousemen, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, or any other labor organization, to bargain collectively through representatives of their own choosing, 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.

WE WILL offer to Carlos Del Valle and James F. Kimlin, to the extent we have not already done so, immediate and full reinstatement to their former or substantially equivalent positions without prejudice to any seniority or other rights and privileges previously enjoyed, and make them whole for any loss of pay suffered as a result of the discrimination against them.

WE WILL notify the above-named employees if presently serving in the Armed Force of the United States of their right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act of 1948, as amended, after discharge from the Armed Forces.

All our employees are free to become or remain, or to refrain from becoming or remaining, members of Local 810, Steel, Metals, Alloys and Hardware Fabricators and Warehousemen, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, or any other labor organization.

HUNTER METAL INDUSTRIES, INC.,  
Employer.

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

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

If employees have any question concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 16 Court Street, Brooklyn, New York, Telephone No. 596-5386.