

and "unremitting" effort to show what would happen to employees if a strike should take place. Not only was a strike portrayed as inevitable, but so also was strike violence and physical harm to employees. A motion picture was shown to illustrate the point. Also, the employer, it was said, would hire permanent replacements for the strikers. The employer himself would so conduct any negotiations with the Union that a strike would result. The Board characterized this campaign as "not an attempt to influence the employees by reason, but an appeal to fear." I do not find that to be so in the instant case, and find Respondent's reference to the possibility of a strike not to be sufficient grounds for setting aside the election of September 23.

CONCLUSIONS OF LAW

1. Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent has not engaged in the unfair labor practices alleged in the complaint.

RECOMMENDED ORDER

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record in this case, it is recommended that the complaint in Case 23-CA-2172 be dismissed. It is further recommended that Petitioner's Objection 1 to the election conducted on September 23, 1965, be dismissed.

Rotax Metals, Inc. and Frederick Douglas Paige, an Individual. Case 29-CA-513.

February 21, 1967

DECISION AND ORDER

BY CHAIRMAN McCULLOCH AND MEMBERS FANNING AND ZAGORIA

On September 27, 1966, Trial Examiner James V. Constantine issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent and the General Counsel filed exceptions to the Trial Examiner's Decision, and the General Counsel filed a supporting brief.

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

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial

Examiner's Decision, the Respondent's exceptions, the General Counsel's exceptions and brief, and the entire record in this case,¹ and hereby adopts the findings,² conclusions,³ and recommendations of the Trial Examiner.

ORDER

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

¹ Because, in our opinion, the record and the exceptions and briefs adequately set forth the issues and positions of the parties, the Respondent's request for oral argument is hereby denied.

² The Trial Examiner states that for an employee's claim against his employer pursuant to the terms of a bargaining agreement to be within the protection of the Act, the claim must be colorable, even though it may ultimately fail. The General Counsel contends that the proper test is whether or not the claim is made in good faith. As the facts of this case show that the claim of employee Paige was both colorable and made in good faith, we need not pass on this issue. The presence of both factors clearly brought Paige's claims within the area of concerted activities protected by the Act.

³ The General Counsel has excepted to the Trial Examiner's failure to find that Respondent's discharge of Paige violated Section 8(a)(3) as well as Section 8(a)(1). We find it unnecessary to rule on this exception, since a remedial order based upon a finding of 8(a)(3) would not materially enlarge upon the remedial order herein based upon our finding of an 8(a)(1) violation.

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

JAMES V. CONSTANTINE, Trial Examiner: This is an unfair labor practice case initiated by a complaint issued on May 31, 1966, pursuant to Section 10(b) of the National Labor Relations Act. See 29 U.S.C. Sec. 160(b). It is based on a charge filed on February 10, 1966, by Frederick Douglas Paige against Rotax Metals, Inc., the Respondent herein. In essence the complaint alleges that Respondent has violated Section 8(a)(1) and (3), and that such conduct affects commerce within the meaning of Section 2(6) and (7) of the National Labor Relations Act, herein called the Act. Respondent has answered, admitting some facts but putting in issue the commission of any unlawful act.

Pursuant to due notice this cause came on to be heard and was tried before me on July 13, 1966,¹ at Brooklyn, New York. All parties were present or represented at the hearing and were granted full opportunity to introduce evidence, examine and cross-examine witnesses, offer oral argument, and present briefs. The General Counsel has submitted a brief. At the close of the hearing Respondent and the General Counsel argued orally.

The issues in this case are:

(a) Whether the Charging Party, Frederick Douglas Paige, was discriminatorily discharged, or whether his employment was terminated for lawful cause; and

¹ All dates mentioned hereafter refer to 1966, except where otherwise specified.

(b) Whether Respondent threatened its employees with discharge and other reprisals if they engaged in activities protected by the Act.

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

FINDINGS OF FACT

I. ON JURISDICTION

Rotax, a New York corporation, is engaged in Kings County, city and State of New York, in selling and distributing at wholesale nonferrous metals and related products.

During the year preceding the issuance of the complaint, Rotax sold and distributed products valued in excess of \$50,000, of which products valued in excess of \$50,000 were shipped outside the State of New York. I find that Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the purposes of the Act to assert jurisdiction over Respondent in this proceeding.

II. THE LABOR ORGANIZATION INVOLVED

Local 810, International Brotherhood of Teamsters, herein called Local 810 or the Union, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

As noted above, this case presents two questions: (1) whether Paige was unlawfully discharged and, (2) whether Respondent unlawfully threatened employees with discharge and other reprisals. Since the main issue related to Paige's discharge, it will be considered first.

A. *The Discharge of Frederick Douglas Paige*

1. General Counsel's evidence

a. *Testimony by Paige*

Paige was hired as a warehouseman on October 4, 1965. At that time, and at all times material, the employees of Rotax, including its warehousemen, were represented by Local 810 as their collective-bargaining agent. The contract between Rotax and Local 810 contained a clause requiring employees to join the Union after 30 days of employment with Rotax. See General Counsel's Exhibit 2, page 1. Shortly after November 3, 1965, Booker T. Jones, the Union's job steward, gave Paige an application for membership in Local 810. After completing it, Paige handed it to Jones who told Paige "if it were approved [Paige] would be informed."

Later that day Respondent's President Rosenthal told Paige "there was a six weeks waiting period, not a thirty days waiting period." When Paige conveyed this information to job Steward Jones, the latter promised that he would report it to the Union. About November 10, a "union representative" spoke to Paige. In this conversation Paige referred to "the thirty days waiting period." Thereupon the representative went "to the office" and, upon returning, stated that Mr. Rosenthal did not consider Paige "in the Union" because "there was a six weeks waiting period, and not a thirty days."

Soon thereafter President Rosenthal requested Paige to work on November 11, 1965, "Veterans Day." The

collective-bargaining contract provides for payment of double time for work performed on any holiday; and "Armistice Day" (which I officially notice is celebrated on November 11) is designated as a holiday. See General Counsel's Exhibit 2, pages 2-3. Paige worked on November 11, but he was not immediately paid double time therefor. Although "the union delegate told Paige that he was entitled to double time for working on November 11," President Rosenthal denied this on the ground that Paige "was not a member of the union." When Paige told Shop Steward Jones about Rosenthal's contention, Jones showed Paige the contract whereby Paige "was supposed to have been in the Union after thirty days."

In perusing the contract Paige "also noticed . . . a number of violations" of its provisions by Respondent, including that (1) the employees of Man Power, Incorporated, an employment agency supplying temporary help for Rotax, "was not a member of the union shop," (2) employees of Rotax were being "underpaid," and (3) no bulletin board was furnished in the shop. When Paige informed Shop Steward Jones of this, Jones promised to pass this on to Local 810.

About the second week of December 1965, a new "delegate" of the Union, Mr. Silverman, was appointed for the employees of Rotax. Paige called to Silverman's attention the question of underpaying employees, Paige's holiday pay for November 11, and "about [Paige's] being a member of the Union." Silverman replied that the holiday pay question would be "settled in arbitration."

On about January 10, 1966, Paige arrived at work about a half hour late. This was caused by his walking to and from work as a result of a transit strike. He normally takes public transportation to work. When Paige sought to take a coffeebreak at 10 a.m., President Rosenthal objected on the ground that Paige reported to work a half hour late and threatened to "dock" Paige's pay if he took the break. Replying, Paige insisted that he was entitled to his break under the contract, and added that Rosenthal was further not abiding by the contract "concerning Man Power,² and . . . our being underpaid . . ." Further, Paige told Rosenthal that he, Paige, would write to Local 810 "listing my complaint." Rosenthal then accused Paige of being insubordinate and that he "was firing him." Nevertheless Paige took the break. When he returned to work, he found the door closed, but it was opened by a clerk about 10 or 15 minutes later. Paige then entered and resumed work. He was the only warehouseman who worked that day.

On January 13, Paige injured his right thumb in the course of his employment. President Rosenthal authorized him to leave work to consult a doctor. Thereupon Paige visited Dr. Michaels who treated him, told him not to work the remainder of the day if the injury bothered him, and directed him to return for further treatment the following evening. The next day President Rosenthal, having ascertained from Paige that he had seen a doctor, instructed Paige to execute a workmen's compensation report. Paige did so in the office, but was unable to produce a temporarily misplaced doctor's certificate. Within a few minutes, Rosenthal accused Paige of not seeing a doctor and informed Paige that he would not be paid for the period of time he did not work the day before.

² When Respondent needs temporary employees, it obtains them from Man Power. In such cases Man Power pays such employees and is reimbursed therefor by Respondent.

On payday Paige was deducted [sic] for that time. That same day, a Friday, Paige found the "doctor's slip" in his locker and showed it to Job Steward Jones who told Paige to hand it in to the office. Paige did so. This "slip" is a written statement by Dr. Michaels that he treated Paige on January 13 for an injured right thumb. See General Counsel's Exhibit 3. Paige was again treated by Dr. Michaels in the evening of January 14.

About January 17 Paige wrote, but did not mail, a letter to Mr. Silverman, the president of Local 810, listing "complaints and violation of the contract." About January 19 Paige handed it to Silverman. Later in the day Silverman told Paige that he would be paid for the time he took sick leave to see the doctor, and also that no more employees would be supplied by Man Power. Shortly thereafter Silverman went to Respondent's office and soon invited Paige to enter also. However, President Rosenthal at first excluded Paige. Nevertheless Silverman succeeded in having Paige admitted. Job Steward Jones was also present. When Rosenthal asked Paige if Paige had gone to the doctor, the latter replied that he had. At this point Silverman left the office.

A short while later Silverman asked Paige whether Paige cursed or threatened Rosenthal. Upon receiving Paige's denial, Silverman asked employee Simon, in Paige's presence, whether Paige threatened or cursed Rosenthal. Simon answered he could not recall. Later that day Silverman told Paige that Rosenthal complained to Silverman that Paige had deliberately dropped some coil. Paige denied this and explained to Silverman in detail how the coil accidentally fell. President Rosenthal and Warehouse Manager Blade were also present during this conversation. As he left Silverman warned Paige to be careful as President Rosenthal "is looking to fire" Paige.

About January 18 President Rosenthal discussed Paige's complaints with him. These related to contract violations by Respondent and denial of overtime pay to Paige for work performed on November 11. Paige replied he was interested in "getting my wage." In this conversation Rosenthal made derogatory remarks about Negroes. Paige is a Negro. A day or two later Warehouse Manager Blade told Paige to take off a day the following Tuesday on pay to compensate for his failure to receive double pay on November 11. Paige replied he would rather get paid without taking a day off. A few moments later President Rosenthal confirmed and repeated Blade's decision as to Paige's overtime for working on November 11. Rosenthal also accused Paige of "arrogance" and causing "nothing but union trouble," and threatened to fire him for insubordination if he failed to take a day off in lieu of overtime pay for November 11. When Paige presented the matter to the Union, President Silverman told Paige not to take a day off and assured him that he would be paid in cash for overtime on Veterans Day.

After January 10, President Rosenthal and Warehouse Manager Blade harassed Paige. Examples of this are: they ordered him to remove working gloves while at work, although he had previously been directed to wear them as a safety measure; they refused to let anyone work with Paige; they constantly watched Paige or caused him to be watched at work.

In late January Paige complained to Warehouse Manager Blade that a recent hire was "getting the union wage and [Paige] wasn't." Blade replied that Paige "was supposed to be getting the same wages," and confirmed this after returning from the office.

In late January or early February Paige asked President Rosenthal for a half hour off to attend a union meeting at 6 p.m. on February 9. The working day ends at 5 p.m. Job Steward Jones had invited Paige to attend it as a substitute for Jones and designated Paige as such. See General Counsel's Exhibit 5. The actual typing was performed by Paige with the approval of Jones. Rosenthal refused to grant Paige's request, although Paige showed him the typed designation signed by Jones; i.e., General Counsel's Exhibit 5.

About February 3, Paige complained to Job Steward Jones that work was interfered with because too many people were supervising. Salesman Pete Testaverde, who was present, opposed this because it "would only cause conflict between [Jones] and [Paige], just what Mr. Rosenthal wanted."

The following day, i.e., February 4, Union President Silverman informed Paige at the shop that "Mr. Rosenthal don't want you here any longer." No reason was assigned for this. Nevertheless Silverman advised Paige to "write a grievance" at the union hall if Paige had "any complaints." Soon thereafter office employee Davis gave Paige his pay, including overtime for November 11, and Paige then left.

At no time was Paige's work criticized. In fact, President Rosenthal complimented Paige on his work the second week of Paige's employment, gave Paige a raise of 25 cents an hour, and assured Paige that he would also receive a Christmas bonus. Paige did receive a Christmas bonus in 1965, Rosenthal telling him at the time to "keep up the good work."

b. *Testimony by Job Steward Booker Jones*

Jones, who is job or shop steward for Local 810, showed Paige a copy of the collective-bargaining contract between the Union and Respondent and allowed Paige to take it home overnight to study. When he returned it, Paige complained that he was being underpaid and that there were "some violations in there about Man Power and stuff like that." Jones thereafter asked the union delegate to come to the plant to "explain it" to Paige.

On one occasion, Jones told President Rosenthal that the latter was being "too hard" on Paige "for the moment." Jones explained "too hard" as comprising directions, while Paige was "doing something," to "do this, then do that . . ." Rosenthal also gave orders to Jones "in the same way," and Jones declared this "would be a little hard." Although this once caused Jones to "just go away [and] get a little water," he was not fired, disciplined or branded insubordinate therefor.

When Jones attended union meetings, he did not request time off for that purpose.

At one time, when Jones transmitted an order to Paige, the latter suggested there were too many bosses and that "when you are working for too many bosses somebody is going to mess up when everybody gives you orders." In the discussion which ensued, it was concluded that one man, such as Warehouse Manager Blade, should give orders "instead of everybody saying this and everybody saying that."

c. *Other evidence on behalf of the General Counsel*

On January 18, 1966, Arbitrator Thomas E. Fitzgerald rendered an award (1) finding Respondent "in violation of the labor-management agreement in that they are not

paying the employees, in the bargaining unit, in accordance with the terms of the contract," and (2) ascertained the correct rate of pay for employees. See General Counsel's Exhibit 6. Further, Arbitrator Fitzgerald found such violation resulted from an oral agreement between Respondent and Local 810 whereby the wage scale was set at 10 cents below the rates in the schedule affixed to the contract, and that it was proper for the Union to repudiate said oral agreement and insist that the terms of the written contract be "restored."

2. Respondent's evidence

a. *President Ronald Rosenthal's evidence*

Respondent has recognized and bargained with Local 810 for a period of 10 years. Its warehousemen are dispatched to it by Local 810. When Local 810 is unable to supply men, Respondent obtains them from agencies, one of whom is Man Power, Incorporated.

Paige was hired in early October 1965. He was guilty of insubordination on various occasions, enumerated here. When Rosenthal asked him on January 20 to make up an order, Paige replied, "Don't bug me." Again Paige gave the same reply the next day when Rosenthal asked him to put an order on the truck. This went on "every day, backwards and forwards." On one occasion Paige "completely ignored" Rosenthal's request, in the presence of a customer, to cut a sample. Thereupon Rosenthal wrote on a piece of paper, "Please cut me a sample," and handed it to Paige; but the latter "just ignored me completely."

About January 26, Rosenthal, in the presence of the truckdriver, asked Paige to "fix up an order." However Paige "threw the merchandise down and went away." Nevertheless Paige did start on the order 10 or 15 minutes later. "This goes on and goes on . . . every day." Since Rosenthal "couldn't handle it anymore," he instructed Warehouse Manager Blade thereafter to give the orders to Paige. Sometime after that Blade reported to Rosenthal that Paige would not take orders from Blade. As a result Rosenthal complained to Job Steward Jones about Paige's habits and asked Jones to transmit Rosenthal's orders to Paige.

In mid-January, Rosenthal told Union President Silverman that Paige's actions were intolerable in that Paige would not take orders from anyone. Silverman replied, "If it happens once more, we put him on probation," and, if Rosenthal complained again, "we will have to take [Paige] off his job."

On February 4, Rosenthal called Silverman to the shop. After extended discussion of Paige, who had "the whole organization in upheaval," Rosenthal called in Paige and told Paige he was dismissed. Paige then "got his pay."

On one occasion, Paige called President Rosenthal "a creep, you steal money off me." Rosenthal denies that Paige ever asked him for time off to attend a meeting of Local 810, and, further, that it was not necessary to take a half hour off to attend a 6 p.m. meeting. Paige gave Rosenthal a doctor's note on January 15 for treatment on January 13, but Paige was not paid for sick leave until the Union requested it.³

Paige worked on Armistice Day, November 11, 1965. He was not paid double time therefor until later when the union interceded on Paige's behalf, and called it to

Rosenthal's attention. Paige was a good employee until December 31, 1965. Rosenthal considered Paige a good employee except when Paige "refuses orders and provokes things." Paige received both a raise in pay and a Christmas bonus in 1965.

Subsequent to Paige's discharge, the New York Board of Mediation made an award that Mr. Paige was discharged for just cause. At this arbitration hearing Paige was represented by Union President Silverman and Henry Brickman, counsel for Local 810. See Respondent's Exhibit 1.

Following his discharge Paige applied for unemployment compensation benefits. The New York Division of Employment rendered a determination which denied compensation on the ground of "failure to heed employer's directions," which is a "provoked discharge" constituting a "voluntary leaving . . . without good cause." See Respondent's Exhibit 3.

Nothing in said arbitration award or unemployment compensation determination indicates that the question arose or was litigated as to whether Paige engaged in activities safeguarded by the National Labor Relations Act, whether such sheltered conduct entered into the decision to discharge him, or whether Paige's insubordination was used as a pretext to disguise a discharge for such protected activity.

b. *Testimony of Peter Testaverde*

Peter Testaverde is Respondent's general sales manager. His position includes authority to supervise and give orders to Paige. In early January, Testaverde heard Job Steward Jones and Paige engaged in a heated discussion in the rear of the warehouse. Paige was refusing to obey an order of President Rosenthal relayed to him through Jones on the ground that he, Paige, should not have to take orders from Jones, a union man, and because too many people were giving orders. Paige also insisted that his orders should come from one person, and, therefore, Jones should mind his own business. At this point Testaverde told Paige that "we are all employees here. If the boss comes to me and tells me to give you an order, it's my job to give you an order. Whether you do it or not, is not my business. This goes to [Jones]. When [Jones] gives you an order, the boss gave him an order . . . don't argue with [Jones]." Thereupon, Jones said to Paige, "Why don't you do what you are told?" On this aspect of the case, I credit Paige and Jones, whose testimony is recited elsewhere in this decision, and do not accept Testaverde's version thereof.

On another occasion, Testaverde asked Paige for a sample, but Paige walked away. It is possible that Paige did not hear him for Testaverde "thought [Paige] was hard of hearing." Still another time President Rosenthal asked Paige for a sample in the presence of Testaverde and a customer. Paige "either . . . did not hear him or ignored him and caused Mr. Rosenthal to be embarrassed" in front of a customer. In addition, Paige engaged in "minor instances along the line which . . . happen normally daily."

c. *Testimony of Herbert J. Balady*

Balady, who is generally called Blade at the shop and has been so mentioned herein, is Respondent's general manager. On one occasion, Blade observed Paige moving

³ Before the Union so asked, Rosenthal had verified Paige's call at the doctor's office by telephoning the doctor, but still Paige was not paid for sick leave until the Union claimed it for Paige. The contract provides that "An employee injured during working

hours shall receive the rest of the day off without loss of pay, provided that the injuries are such that a doctor orders the employee not to return to work" G.C. Exh. 2, p.7

copper coils. Their nature requires "rather careful" handling. One coil dropped because the side of the case containing it opened up. "Normally" in such situation the case should be immediately "strapped up" to prevent further damage, but Paige did nothing about it. As a result another coil dropped. Thereupon Blade instructed Paige to "stop and put the thing down." However, Paige refused to stop and consequently dropped still another coil. This caused Blade to demand that Paige cease that operation.

Respondent has a practice whereby an individual warehouseman who works on an order signs or initials the written requisition for materials. Thus, the identity of employees filling an order may be quickly ascertained for any purpose. On one occasion, Blade asked Paige to fill an order and to initial the written instrument describing its contents. However, Paige refused to sign on the ground that he "did not have to sign anything." Although Blade then stated that signing was required by President Rosenthal solely to know who worked on the order, Paige persisted in his refusal.

On other occasions when Blade gave Paige something to do, Paige sometimes would respond and sometimes would not. But Blade always insisted that Paige obey instructions. Paige's reply generally was that he wanted to do one thing at a time and that he resented orders "from everybody," because they "changed him back and forth" and "rushed him." Blade assured Paige that this was necessary if need arose to cause Paige to drop what he was going and immediately assign him to different tasks. Blade also testified that Paige was "antagonistic towards him, President Rosenthal, and the men, because Paige did not like what was going on."

Paige once complained to Blade that he, Paige, was underpaid under the contract, and another time that he did not receive double time for having worked on Veterans Day, 1965. Blade replied that Paige was entitled to whatever the contract provided. Blade also testified that he never heard Paige use profane language.

d. Testimony of Harry Smith

Harry Smith is a self-employed independent truckman. Rotax is one of his customers. Paige "quite a few" times did not follow orders "and so on." Thus, there were times when Paige would refuse to load the truck or would make up an order but fail to put it on the truck, and other occasions where instructions from the office of Respondent were ignored by Paige, thus causing Smith to wait needlessly for materials to be transported. Often such waiting by Smith was caused by "an argument," but the disputants were not identified by him. Many times Smith loaded the truck himself to avoid delay.

Once Paige was being assisted by another employee in loading Smith's truck. During the course of the loading, President Rosenthal called off his employee to assist elsewhere on a rush job. Thereupon, Paige went into a rage, "threw up" the bundles he was loading, smashed the bundles on the floor, and then went away for 10 or 15 minutes. Smith decided to load the truck himself.

Smith testified that he had daily squabbles with Paige "in the nature of . . . asking Paige to get the truck loaded and him telling [Smith] that [Smith] had no authority to give him orders."

3. Frederick Paige's rebuttal testimony

At the arbitration hearing relating to Paige's discharge, Paige started to raise the question of wages but Mr. Isaacs,

counsel for Rotax, objected. Paige also requested union counsel to bring up complaints enumerated in a letter addressed by Paige to Union President Silverman, but Brickman declined to do so because it would be embarrassing to the Union. Paige then sought to "bring out . . . these issues" again, but was stopped by Mr. Brickman.

Once General Manager Blade asked Paige to sign an order. Since Paige was working on top of some crates he asked Blade to sign for him. Paige was never told at any other time to sign orders. I credit Paige on this aspect of the case and do not credit Blade to the extent his testimony clashes with Paige's.

CONCLUDING FINDINGS AS TO THE DISCHARGE OF FREDERICK DOUGLAS PAIGE

In order to find that Paige was unlawfully discharged, it must initially be established that he was engaged in some activity sanctioned and protected by the Act. This is because the Act does not immunize an employee against discharge for nondiscriminatory reasons. *Wellington Mill v. N.L.R.B.*, 330 F.2d 579, 586-587 (C.A. 4); *N.L.R.B. v. Park Edge Sheridan*, 341 F.2d 725 (C.A. 2); *Mitchell Transport*, 152 NLRB 122, 123. "No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged . . . for cause." See Section 10(c) of the Act.

It is my opinion, and I find, that Paige engaged in protected activity by complaining to his bargaining representative, Local 810, of contract violations by Respondent. In effect, such complaints constitute grievances. The fact that the contract failed to provide for prescribed steps in a grievance procedure does not detract from this conclusion, for the presentation of grievances to a bargaining agent is a right conferred by the Act. *Farmers Union Co-operative Marketing*, 145 NLRB 1, 3. In this connection, it may be noted, and I find, that the contract in essence recognizes that grievances will be presented to the employer, for it not only mentions "presentation of grievances" as one of the functions of a shop steward, but also provides that unresolved grievances shall be submitted to arbitration. General Counsel's Exhibit 2, page 4.

The contract violations which Paige protested as grievances both to Respondent and the Union I find to be the following:

a. Underpaying employees contrary to the contractual wage schedule. Objecting to this alleged inequity is a protected activity. *Bunney Bros. Construction Company*, 139 NLRB 1516, 1519. In my opinion merely claiming a breach of contract does not suffice to bring the activity within the security of the Act; there must also be a colorable claim, even though it may ultimately fail. On this aspect of the case I find a colorable claim, for an arbitrator upheld Paige's contention that employees were being compensated at rates 10 cents an hour less than those set forth in the contract. See General Counsel's Exhibit 6.

b. Refusal to pay Paige double time, pursuant to article VI of the contract, for working on November 11, a holiday under article IX of the contract. Again I find that Paige's claim to be paid for this overtime was colorable. In fact I find that his said claim was actually meritorious, that the Union presented it to Respondent as a grievance, controversy, or dispute, and that Respondent ultimately paid it.

Further, I find that Respondent originally denied this overtime on the grounds that only union members were entitled to it, and that Paige did not then belong to the

Union. But I find that this contention cannot be supported by any language in the contract. Therefore I find that the ultimate payment of this overtime was not a gratuity or a matter of grace, for Respondent's refusal to pay is not well taken. Hence I find, as noted above, that Respondent's said contention did not render Paige's claim unmeritorious and, as noted above, that Paige's claim was colorable.

c. Respondent hired temporary employees through Man Power, Incorporated, contrary to the provisions of article IV of the contract. See page 1 of General Counsel's Exhibit 2. I find that Paige protested this practice to Local 810 and that a colorable violation of the contract is shown by the record, especially since Respondent stopped hiring through Man Power after the Union objected to it.

d. Respondent failed to pay Paige for sick leave resulting from an injury suffered during the course of his employment. See article XXX of the contract. In this connection I credit Paige and find that he injured his right thumb during working hours, that he was directed by Respondent to consult a doctor, that he received treatment from Dr. Michael Michaels who told him to stay out of work the remainder of the day if his thumb bothered him, that it did bother him, and that he did not therefore return to work that day (January 13).

Further, I find that Paige's claim to be paid for such leave is colorable, especially since President Rosenthal telephoned Dr. Michaels to ascertain the facts. On this issue I find that Paige qualified for such payment pursuant to article XXX of the contract whereby "An employee injured during working hours shall receive the rest of the day off without loss of pay, provided that the injuries are such that a doctor orders the employee not to return to work." I further find that Respondent ultimately paid for this sick leave, that such payment was not a gratuity or a matter of grace, and that such payment was made after Local 810 complained to Respondent that Paige was entitled to it.

e. In connection with the above grievances, I find that, in addition to presenting them to the Union to process, Paige also personally called them to the attention of Respondent. Such personal grieving by Paige, without more, may be thought to lose the statutory protection. See *Farmers Union Co-operative*, 145 NLRB 1, 3. But I find that Paige did not go "over the head" of his bargaining agent to press his individual claims, for I find that he asked the Union to prosecute his grievances, that the Union did so, and that Respondent satisfied the grievances only after the Union had acted on Paige's requests. Hence I find that Paige did not forfeit the protection of the Act because he also personally complained to Respondent of breaches of contract which affected him as well as other employees. *Norfolk Conveyor*, 159 NLRB 464, is distinguishable.

f. The General Counsel contends that Respondent interfered with a statutory right when it denied Paige time off to attend a Union meeting. On this aspect of the case I find that a union meeting was to be held at 6 p.m. on February 9, that Paige's working day ends at 5 p.m., that Shop Steward Jones designated Paige to attend this meeting in his stead, that Paige asked for time off to attend this meeting, and that such request was denied by Respondent.

Nevertheless I find that Respondent did not unlawfully deprive Paige of a legislative right by denying him time off. This is because I find that, in the past, employees attending 6 p.m. union meetings were able to arrive at them on time by leaving Respondent's premises at 5 p.m., and that Paige did not need more than an hour to travel to the meeting. Hence I find that Paige's request amounted to no more than a request to take time off for personal convenience, and that time off for such a purpose is not protected by the Act.

"Engaging in protected, concerted activity . . . does not perforce immunize employee against discharge for legitimate reasons." *Mitchell Transport, Inc.*, 152 NLRB 122, 123. Respondent stresses that Paige was discharged for a legitimate cause; i.e., insubordination. If, in fact, he was terminated for that reason such action must be upheld, regardless of its soundness, wisdom, or severity. For the Board does not sit in judgment on nondiscriminatory discharges for cause. *N.L.R.B. v. Prince Macaroni Co.*, 329 F.2d 803, 809 (C.A. 1); *N.L.R.B. v. United Parcel Service*, 317 F.2d 912, 914 (C.A. 1); *Thurston Motor Lines*, 149 NLRB 368. "Without question an employer may discharge an employee for any reason provided the reason is not conduct protected by the Act." *Interboro Contractors, Inc.*, 157 NLRB 1295. See *N.L.R.B. v. Brennan's Inc.*, 366 F.2d 560 (C.A. 5).

On the other hand, the fact that a lawful cause for discharge exists or is available will not justify a discharge actually motivated by the employee's protected activities. *N.L.R.B. v. L. E. Farrell Co., Inc.*, 360 F.2d 205 (C.A. 2); *N.L.R.B. v. Ace Comb Co.*, 342 F.2d 841, 847 (C.A. 8); *N.L.R.B. v. Symons Mfg. Co.*, 328 F.2d 835 (C.A. 7); *Portable Tools v. N.L.R.B.*, 309 F.2d 423, 426 (C.A. 7). The question then is whether Paige was dismissed for insubordination or a reasonable belief that he was insubordinate,⁴ as Respondent asserts, or whether this was used as a pretext to cover a discharge generated by his protected activities.

It is my opinion, and I find, that Paige was discharged for activities safeguarded by the Act and that the reason given for his termination, i.e., insubordination, is a cloak to disguise the real reason. Initially I find that Paige was not insubordinate, and that if he failed to heed any of Respondent's commands it resulted from his being hard of hearing and not from intentional disregard of instructions from superiors. On this branch of the case I accept the testimony of Paige and Shop Steward Jones, and do not credit Respondent's evidence inconsistent therewith. And I find that Jones did not refuse to sign an order, as Blade testified, for I find that Jones asked Blade to initial it for him.

Nevertheless, the fact that Paige was not guilty of insubordination does not dispose of the issue, because rejection of a defense will not constitute affirmative evidence to sustain the General Counsel's burden of proof⁵ that Paige was unlawfully terminated. *N.L.R.B. v. Joseph Antell, Inc.*, 358 F.2d 880 (C.A. 1); *Guinan v. Famous Players*, 167 N.E. 235, 243 (Mass.). Of course affirmative evidence includes inferences, especially when direct evidence is not obtainable. *N.L.R.B. v. Putnam Tool Co.*, 290 F.2d 663, 665 (C.A. 6). See *Radio Officers Union of Commercial Telegraphers (A.H. Bull. S.S.) v. N.L.R.B.*, 347 U.S. 17, 48-49.

⁴ *N.L.R.B. v. Prince Macaroni*, 329 F.2d 803, 809 (C.A. 1), holds that a reasonable belief that the employee engaged in misconduct, and that such belief prompted the discharge, is sufficient to exonerate an employer accused of illegally terminating an employee. Hence it is immaterial that Paige was not in fact

insubordinate if the employer reasonably believed he was and discharged him because of such belief.

⁵ The burden is on the General Counsel at all times to establish that Paige was illegally terminated. *N.L.R.B. v. Park Edge Sheridan*, 341 F.2d 725 (C.A. 2), *Interboro Contractors, supra*.

The ultimate finding that Paige was illegally discharged is based on the entire record and the subsidiary findings immediately following below.

a. Timing is important. I find that Paige was discharged shortly after engaging in protected activity which resulted in financial⁶ disadvantage to Respondent. *Arkansas-Louisiana Gas Co.*, 142 NLRB 1083, 1085; *Texas Industries*, 156 NLRB 423; *N.L.R.B. v. Mira-Pak*, 354 F.2d 525 (C.A. 5). No fault had been found with his work until this financial detriment was visited upon Respondent. In this respect it is significant that Respondent found Paige an exemplary employee until December 31, 1965, and gave him a substantial increase in wages (25 cents an hour) as well as a Christmas bonus before the end of 1965. Cf. *Barton Brass Works*, 78 NLRB 431, 436. It is reasonable to infer, and I do so, that after early January 1966, when Paige's protected conduct cost Respondent added financial outlays, Respondent would seek to obtain some plausible cause to release Paige from its employ.

b. Also, I find that the manner of discharge has probative value. Thus, Paige was not directly warned that his so-called insubordination imperiled his job. Rather such warning was conveyed to him by Union President Silverman and even then Silverman did this on his own initiative. At no time did Respondent, prior to the discharge, warn, reprimand, or reprove Paige. To the extent that Respondent's evidence is to the contrary, I do not credit it.

Hence I find that Paige was abruptly discharged without prior warning or notice. Yet the contract (article XII) assures employees that "Before any employee is discharged, the Employer must give one (1) working day's notice in writing to the Union." This was not done. "The abruptness of a discharge and its timing are persuasive evidence as to motivation." *N.L.R.B. v. Montgomery Ward & Co.*, 242 F.2d 497, 502 (C.A. 2), cert. denied 355 U.S. 829; *N.L.R.B. v. L. E. Farrell Co.*, supra, 207-208. And failure to reprimand or warn is probative. *N.L.R.B. v. Melrose Processing Co.*, 351 F.2d 693 (C.A. 8); *N.L.R.B. v. Whittin Machine Works*, 204 F.2d 883, 887 (C.A. 1).

On this aspect of the case Respondent's witness Harry Smith testified to some instances of Paige's refusal to take directions from Smith. I find this is true. But I further find that, since Smith was neither an agent nor supervisor of Paige, the latter could disregard Smith's demands. Moreover, I find that this alleged disobedience by Paige was not forthwith mentioned by Smith to Respondent and, in any event it was not called to Paige's attention at any time by Respondent. Hence I find that these incidents did not contribute to the decision to terminate Paige.

c. Respondent did not discipline employee Jones for failing to follow at least one command. In this respect I credit Jones. Disparate treatment of offenders or transgressors, being harsher on those engaged in protected activity, is some indication that such harshness is prompted by an employee's protected activities. *N.L.R.B. v. A. P. Green Fire Brick Co.*, 326 F.2d 910, 915-916 (C.A. 8); *Cosco Products Co.*, 123 NLRB 766, 768, footnote 4.

d. Finally, it is not necessary to establish that the only reason for the discharge is the protected activity of Paige. Hence the fact that Paige could have been discharged for his alleged insubordination or Respondent's reasonable belief thereof will not salvage the discharge as lawful. "In

order to supply a basis for discrimination, it is necessary to show that one reason for the discharge is that the employee was engaging in protected activity. It need not be the only reason but it is sufficient if it is a substantial or motivating reason, despite the fact that other reasons may exist." *N.L.R.B. v. Whittin Machine Works*, 204 F.2d 883, 885 (C.A. 1). I find that Paige's protected activities were a substantial or motivating reason for his discharge. *N.L.R.B. v. D'Arminege*, 353 F.2d 406 (C.A. 2). Cf. *Aeronca Mfg. Co.*, 160 NLRB 426.

Two additional defenses of Respondent must be considered: (1) whether the arbitrator's award of April 18 (Respondent's Exhibit 1) will defeat reinstatement and backpay for Paige, and (2) whether the initial determination of the New York State Division of Employment denying Paige unemployment compensation (Respondent's Exhibit 2) will deprive Paige of relief in this proceeding.

In order to encourage the voluntary settlement of labor disputes the Board has held that it will respect arbitration awards where all parties have acquiesced in a reference to arbitration, provided "the proceedings appear to have been fair and regular, all parties had agreed to be bound, and the decision of the arbitration panel is not clearly repugnant to the purposes and policies of the Act." *Spielberg Manufacturing Company*, 112 NLRB 1080; *New Britain Machine Co.*, 116 NLRB 645, 646, reversed on other grounds 247 F.2d 414 (C.A. 2). However, the issue before the Board must have been "fully and fairly litigated before an impartial arbitrator" if the Board is to honor the award. *International Harvester Co.*, 138 NLRB 923, 928.

On the record before me I find that the questions of whether Paige was discharged for protected activities was not litigated before the arbitrator, and that Paige sought unsuccessfully to raise that issue. Hence, I find that the arbitrator's award does not preclude consideration by me of the issue of whether Paige was discharged for engaging in activities guaranteed by the Act. "It manifestly could not encourage the voluntary settlement of disputes or effectuate the policies and purposes of the Act to give binding effect in an unfair labor practice proceeding to an arbitration award which does not purport to resolve the unfair labor practice issue . . . and which is the very issue the Board is called upon to decide in the proceeding before it." *Monsanto Chemical Company*, 130 NLRB 1097, 1099. Comparable to the rule in actions at law, where a judgment is not *res judicata* of issues which were not litigated therein (2 *Freeman on Judgments* (1455-56 (5th ed.)) the Board's doctrine likewise ignores an arbitrator's award when he "did not have before him, nor did he pass upon the question, now presented to the Board," whether a discharge was based upon conduct safeguarded by Congress. *Ford Motor Company*, 131 NLRB 1462, 1463-64. See *Walsh Construction Company*, 131 NLRB 260, 263.

In many respects the instant case resembles *Raytheon Company*, 140 NLRB 883. There the Board, in rejecting an arbitrator's award emphasized that "the difference lies in the fact that the two proceedings posed different issues and hence different evidentiary considerations" (at 886). Similarly, I find that the issue presented to the arbitrator in Paige's case did not involve, nor was evidence received on, the questions of whether Paige engaged in protected activity and whether he was discharged therefor. Hence I find that the arbitrator's award is not an impediment preventing the Board from passing upon those issues in the instant unfair labor practice case now before it.

⁶ An example of the cost to Respondent of Paige's protected activity is the arbitrator's award of January 18 increasing wages 10 cents an hour

It is true that the arbitrator did pass upon the question of whether Paige was insubordinate and decided it adversely to Paige. On the other hand, I have found that Paige was not insubordinate. Ordinarily, an arbitrator's award should be followed by a Trial Examiner. But I do not do so here because I find that the arbitrator did not have before him all the evidence surrounding Paige's discharge; i.e., evidence of protected activities and of pretext. Cf. *Dubo Mfg. Corp.*, 148 NLRB 1114, 1116-17. Hence it is speculative whether the arbitrator would have found as he did if all such evidence had been presented to him and he had evaluated all the evidence. His finding, therefore, lacks force because it is based on only some of the evidence adduced at the unfair labor practice hearing. In any event, even if I should find that Paige was in fact insubordinate, I adhere to my finding above that his insubordination was used as a pretext to mask the true reason for his termination; i.e., engaging in protected activities.

Finally, Respondent urges that the initial determination of the New York State Division of Labor (Respondent's Exhibit 2), made by its Industrial Commissioner on June 14, establishes that Paige was lawfully discharged. That determination adjudges that Paige "quit your job without good cause. This determination is based on the following: Causing your dismissal because of failure to heed employer's direction is considered a 'provoked' discharge and under unemployment insurance law this is the same as a voluntary leaving." This initial determination was made without a hearing. A right to a hearing by a party adversely affected thereby may be had by requesting one within 30 days. Such hearings are held before an impartial referee. At the date of the unfair labor practice hearing herein the said 30 days had not yet expired.

State decisions relating to unemployment compensation benefits have been held by the Board to be relevant in ascertaining the legality of a discharge in an unfair labor practice case. *Aerovox Corporation*, 104 NLRB 246, 247. But such decisions are not controlling or binding. *Cadillac Marines* 115 NLRB 107, footnote 1 (3). Further, such decisions must be final; i.e., the time for appeal, if appeal is available, must have expired. I construe the right to request a hearing before an impartial referee as tantamount to an appeal. At the hearing herein I informed the parties that I would presume that Paige asked for a hearing before an impartial referee unless I was notified by any of them to the contrary. Such notification has not been received. Hence, the initial determination of the State Industrial Commissioner is not laden with probative value as I presume Paige has sought review thereof.

Assuming that Paige has not asked for a hearing before an impartial referee, the said initial determination is relevant and must be assessed along with other evidence on the issue. For the purposes of this case, I so assume. Merely because it is a decision at the first stage of the administrative process will not detract from its evidentiary value as long as it is a final, unappealed adjudication which is not subject to further review. Cf. *West v. A. T. & T. Co.*, 311 U.S. 223, 236-237. Nevertheless, evaluating this initial determination in the light of the entire record, I conclude and find that Paige was unlawfully discharged and that the reason given for his discharge, i.e., insubordination, is a disguise to conceal the true reason.

The foregoing findings concerning the discharge of Paige disclose a violation of Section 8(a)(1) of the Act as

alleged in paragraph 11 of the General Counsel's complaint. No finding is made whether said discharge also contravenes Section 8(a)(3) of the Act, as set forth in paragraph 12 of the complaint, since the remedy (i.e., reinstatement with backpay) would be the same. *Interboro Contractors, Inc.*, 157 NLRB 1295, footnote 16; *Bunney Bros. Construction Co.*, 139 NLRB 1516, 1519, footnote 5. It would seem that, since the discharge was not motivated by Paige's union activities, if any, no violation of Section 8(a)(3) is disclosed. *Pacific Electriccord Company*, 153 NLRB 521, affd. 261 F.2d 310 (C.A. 9).

B. Threats of Discharge and Other Reprisals

On January 10, President Rosenthal denied a coffeekick to Paige because Paige reported for work a half hour late that morning. When Paige replied that this was unfair (because he had to walk to work because of a transit strike) and that he would complain to Local 810 in writing about it, Rosenthal charged Paige with being insubordinate and "was firing Paige." This threat to fire Paige for taking a coffeekick is not forbidden by the Act since Paige was pressing a personal grievance without the intervention of the bargaining agent. This method of grieving, i.e., bypassing the Union, "looses the statutory protection." *Farmers Union Co-operative*, 145 NLRB 1, 3. I do not construe Rosenthal's remark as a threat to discharge Paige in case Paige complained to his Union; rather, as found above, I regard it as a threat to discipline Paige for taking a coffeekick which had been forbidden. Accordingly, I find no violation of the Act in Rosenthal's foregoing conversation with Paige.

About January 19, President Rosenthal took up with Paige the question of overtime pay for Paige's work on November 11. As a disposition thereof, Rosenthal told Paige to take off the following Tuesday with pay to make up for Respondent's failure to reimburse Paige with double time on November 11. When Paige replied that he preferred to receive the overtime pay rather than a paid day off, Rosenthal accused Paige of arrogance and causing "nothing but union trouble," and threatened to discharge Paige for insubordination if he refused to take a day off in lieu of overtime compensation for November 11. I further find that Paige had before this (a) presented a grievance to Local 810 protesting Respondent's refusal to pay him overtime for November 11, and (b) President Silverman of Local 810 took up this grievance with Respondent. Hence I find that when Paige spoke to President Rosenthal on about January 19, Paige's said grievance had already been made known to, and was being processed by, Local 810, and Local 810 had submitted it to Respondent.

Since Paige's grievance had already been presented to Respondent through the Union, I find that this conversation on about January 19 with President Rosenthal did not constitute a "going over the head" of a bargaining agent but, instead, concerned a pending grievance which Local 810 was prosecuting for Paige. Accordingly, I find that Paige's claim for overtime on this occasion was protected by the Act. *Farmers Union Co-operative*, 145 NLRB 1, 3. Further, I find that when an employee's grievance has been presented by his bargaining agent to his employer, the employee is under no obligation to compromise that claim, that an unwillingness to settle the claim for less is protected by the Act, and that a threat to discharge an employee for refusing to accept an unsatisfactory adjustment of such claim is proscribed by Section 8(a)(1) of the Act.

However, the foregoing finding that a refusal to compromise a grievance is a protected activity is premised expressly upon the companion finding that, and applies only to situations where, the grievance has been filed pursuant to a contract to correct an inequity under the contract and the employer's obedience to the terms of the collective-bargaining agreement is brought in issue thereby. Where, however, "an employee does not utilize his contractual right to grieve or 'goes over the head' of his bargaining agent to press his individual claim, his grievance becomes 'personal' and loses the statutory protection." *Farmers Union Co-operative, supra*.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

Those activities of Respondent found to constitute unfair labor practices, as set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

It having been found that Respondent has engaged in certain conduct prohibited by Section 8(a)(1) of the Act, it will be recommended that Respondent cease and desist therefrom and that it take specific affirmative action, as set forth below, designed to effectuate the policies of the Act. Generally, discriminatory discharges have been considered as going "to the very heart of the Act." *N.L.R.B. v. Entwistle Mfg. Co.*, 120 F.2d 532 (C.A. 4). But on the record developed in this case I find that Respondent has not demonstrated general hostility to the purposes of the Act. Hence the order to be issued should be no broader in scope than to provide a remedy correcting the violations found and preventing repetition thereof and similar or related conduct. More extensive relief is not warranted.

Having found that Respondent illegally discharged Frederick Douglas Paige for engaging in protected activities, it will be recommended that Respondent offer him full and immediate reinstatement to his former position or one substantially equivalent thereto without prejudice to his seniority and other rights and privileges and make him whole for any loss of earnings suffered by reason of said discharge. In making Paige whole, Respondent shall pay to him a sum of money equal to that which he would have earned as wages from the date of such discharge to the date of reinstatement or a proper offer of reinstatement, as the case may be, less his net earnings during such period. The backpay is to be computed on a quarterly basis as prescribed in *F. W. Woolworth Company*, 90 NLRB 289, with interest thereon at 6 percent pursuant to the formula adopted in *Isis Plumbing & Heating Co.*, 138 NLRB 716. It will also be recommended that Respondent preserve and make available to the Board or its agents, upon reasonable request, all pertinent records and data necessary to analyze and calculate the amount, if any, of backpay due.

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

CONCLUSIONS OF LAW

1. Local 810 is a labor organization within the meaning of Section 2(5) of the Act.

2. Respondent Rotax Metals, Inc., is an employer within the meaning of Section 2(2) and is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

3. By illegally discharging Frederick Douglas Paige, thereby discouraging activity having for its purpose the submission, presentation, and processing of grievances pursuant to the terms of a collective-bargaining agreement, and by threatening to discharge said Paige for refusing to accept a settlement of such grievances relating to overtime pay not in accordance with the terms of such contract, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. The aforesaid unfair labor practices affect commerce within the meaning of 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, it is recommended that Respondent, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging employees from engaging in activity having for its purpose the submission, presentation, and processing of grievances pursuant to the terms of a collective-bargaining agreement, by discharging or in any other manner discriminating against any of its employees in regard to their tenure of employment or any term or condition of employment.

(b) Threatening to discharge employees who refuse to settle grievances arising under the terms of a collective-bargaining agreement in a manner not in accordance with the provisions of said agreement.

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

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

(a) Offer Frederick Douglas Paige immediate and full reinstatement to his former position or one substantially equivalent thereto, without prejudice to his seniority or other rights and privileges previously enjoyed by him, and make him whole for any loss of pay he may have suffered by reason of the discrimination against him, with interest at the rate of 6 percent per annum.

(b) Notify Frederick Douglas Paige, if presently serving in the Armed Forces of the United States, of his right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

(c) Preserve and, upon reasonable request, make available to the Board or its agents, for examination and copying, all payroll records and reports and all other records necessary to ascertain the amount of backpay due under the terms of this Recommended Order.

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

(e) Notify the Regional Director for Region 29, in writing, within 20 days from the receipt of this Decision, what steps Respondent has taken to comply herewith.⁸

⁷ In the event that this Recommended Order is adopted by the Board, the words "a Decision and Order" shall be substituted for the words "the Recommended Order of a Trial Examiner" in the notice. In the further event that the Board's Order is enforced by a decree of a United States Court of Appeals, the words "a Decree of the United States Court of Appeals Enforcing an Order" shall be substituted for the words "a Decision and Order"

⁸ In the event that this Recommended Order is 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 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 employees from engaging in activity having for its purpose the submission, presentation, and processing of grievances pursuant to the terms of a collective-bargaining agreement, by discharging or in any other manner discriminating against any of our employees in regard to their tenure of employment or any term or condition of employment.

WE WILL NOT threaten to discharge employees who refuse to settle grievances arising under the terms of a collective-bargaining agreement in a manner not in accordance with the provisions of said agreement.

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

WE WILL offer Frederick Douglas Paige immediate and full reinstatement to his former position or one substantially equivalent thereto, without prejudice to his seniority and other rights and privileges, and make him whole for any loss of pay he may have suffered by reason of the discrimination by us against him, with interest at the rate of 6 percent per annum.

ROTAX METALS, INC.
(Employer)

Dated _____ By _____ (Representative) (Title)

Note: We will notify the above-named employee if presently serving in the Armed Forces of the United States of his right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

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

If employees have any question concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 16 Court Street, Fourth Floor, Brooklyn, New York 11201, Telephone 596-5386.

F. J. Buckner Corporation, d/b/a United Engineering Company and Oil, Chemical, and Atomic Workers International Union, Local 1-128, AFL-CIO, Long Beach Local No. 1-128, OCAWIU, AFL-CIO. Case 21-CA-9621.

February 23, 1967

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZAGORIA

On August 10, 1966, Trial Examiner E. Don Wilson issued his Decision in the above-entitled proceeding, finding that Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent filed exceptions to the Decision and a supporting brief, and the General Counsel filed an answering brief.

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

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and briefs, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.¹

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor

¹ We find without merit the Respondent's contention that *Escobedo v. Illinois*, 387 U S 478, is applicable in this proceeding. See *Crown Imports Co, Inc*, 163 NLRB 24

The Respondent contends that the complaint should be dismissed because of the General Counsel's alleged failure to return documents belonging to the Respondent. As it has not been established what, if any, papers were not returned, or how the Respondent was prejudiced, we find no merit in this contention.