

Catalytic Industrial Maintenance Co. (CIMCO) and International Brotherhood of Electrical Workers, Local 527. Case 16-CA-14374

January 25, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
CRACRAFT AND DEVANEY

On October 5, 1990, Administrative Law Judge William N. Cates issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel and the Charging Party filed reply briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions² and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Catalytic Industrial Maintenance Co. (CIMCO), Texas City, Texas, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

¹The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

²The judge in essence found that the Respondent had no basis for believing that the 34 unit employees would not continue working after December 31, 1989. We agree with his finding, and we therefore adopt the judge's conclusion that the Respondent's asserted business justifications for discharging the employees are not legitimate or substantial. We therefore find it unnecessary to pass on whether, if any of the asserted reasons had merit, the justification would outweigh the invasion of the employees' rights.

Robert G. Levy, II, Esq., for the General Counsel.
Francis M. Milone, Esq. (Morgan, Lewis & Bockius), of Philadelphia, Pennsylvania, for the Company.
Wiley Doran, Esq. (Mitchell & Doran), of Houston, Texas, for the Union.

DECISION

STATEMENT OF THE CASE

WILLIAM N. CATES, Administrative Law Judge. I heard this case in Houston, Texas, on April 23 and 24, 1990. On February 7, 1990, the Regional Director for Region 16 of the National Labor Relations Board (the Board), issued a complaint and notice of hearing (the complaint), based on an unfair labor practice charge filed on January 5 and amended on January 25, 1990, alleging violations of Section 8(a)(3) and (1) of the National Labor Relations Act (the Act).

All parties have been afforded full opportunity to appear, to introduce evidence, to examine and cross-examine witnesses, and to file briefs.

Based on the entire record, on the briefs filed by the parties, and on my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

At times material, Catalytic Industrial Maintenance Co. (CIMCO) (CIMCO or the Company) has been a duly organized corporation with its principal office and place of business in Philadelphia, Pennsylvania, with other offices and places of business throughout the United States including a facility at the Sterling Chemical Plant in Texas City, Texas (the Sterling site), where it is engaged in industrial maintenance and refurbishing this facility. During the year preceding issuance of the complaint, a representative period, the Company, in the course and conduct of its business operations, purchased and received goods and materials valued in excess of \$50,000 directly from points located outside the State of Texas at its Texas City, Texas jobsite and during the same period received gross revenues in excess of \$1 million. The complaint alleges, the parties admit, and I find that the Company is, and at times alleged has been, an employer engaged in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

The complaint alleges, the evidence establishes, and I find that International Brotherhood of Electrical Workers, Local 527 (Local 527 and the International) is, and at times material has been, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Issues*

The fundamental issues may, for discussion purposes, generally be summarized as follows:

1. Whether the Company discharged some 34 specifically named employees¹ on December 29, 1989.²

2. If it is decided in issue 1 that the Company did discharge the referenced employees, did it do so because of their membership in and/or referral from Local Union 527?

3. Whether the Company was motivated in any of its actions at issue by antiunion animus and/or whether its actions were inherently destructive of employees' rights.

4. If it is decided in issue 3 that the Company's actions were inherently destructive of employees' rights, did the

¹The 34 specifically named employees are: C. H. Austin, B. W. Taylor, B. E. Black Jr., Nellie Elizabeth Boles, Ernest R. Chance, F. F. Cheatham Jr., Jesse W. Ciabattini, Jerry Devona, Ronald W. Flake, William Neil Floyd, Owen Lee Groves, Rasheed Hameed, B. J. Henderson, Bert J. Henderson, Louis Hunter, Donald G. Lawson, J. W. McMullen III, W. T. Miller Jr., Charles C. Montes, Johnny J. Ramirez, James E. Ridens, Thomas Rodrigues, Jimmy J. Rogers, Donald R. Rogers, Walter L. Ryan Sr., Thomas Neil Speights, George E. Spiers Jr., Ralph W. Williams, Alonzo J. Wisdom Jr., Byron G. Kemmerling, Edward P. Martinez, J. D. Sumrall, H. F. Simon, and P. A. Busler.

²All dates are 1989 unless otherwise indicated.

Company advance business justifications that would outweigh such adverse effects on employees' rights?

B. Background and Operative Facts

CIMCO is a subdivision of UE & C Catalytic. Both companies provide industrial maintenance and capital improvement modification services to various chemical and related industries throughout the United States. The two (CIMCO, UE & C Catalytic) provide their services at approximately 50 sites across the United States. The Sterling site is the one involved in the instant dispute.

The Sterling site is a chemical processing plant which, as has been noted, is located at Texas City, Texas. The Company entered into a contract with Sterling Chemical in 1986 to perform the maintenance work in question. In performing its services at the Sterling site, the Company utilizes workers from virtually all the building and construction trade crafts. The Company utilized approximately 300 such employees per day in 1987 with a "somewhat" increased work force in 1988 and utilized approximately 600 workers per day in 1989. According to Company Site Manager Woody Silvertooth (Site Manager Silvertooth), the two most critical crafts at the Sterling site are the mechanical and electrical employees with approximately 90 percent of all work performed at the site being supported in some manner by electricians.

Craft employees are referred to the Company by various craft unions pursuant to a General Presidents' Project Maintenance Agreement (the GPA), which was executed by the Company for the Sterling site effective January 5, 1987. The GPA involves approximately 14 international craft unions including the International union. The GPA agreement with the Company was to remain "in full force and effect for a period of one (1) year . . . and . . . continue from year to year thereafter unless sixty (60) days notice of termination is given by either party." Although the International unions were, and are, the parties to the GPA, it is the local unions that actually refer employees to the Company from their local hiring halls. Local Union 527 Business Manager Charles R. Delgado testified Local Union 527 had a specific obligation to refer, on request, employees to CIMCO as a result of the International's participation in the GPA for that site.

It is recognized by all parties that the GPA is a prehire type collective-bargaining agreement covered by Section 8(f) of the Act. The "Intent and Purposes" of the GPA is described at article 1 as:

1. This Agreement is for the joint use and benefit of the contracting parties, and the provisions herein defined and set forth shall be construed as binding upon and effective in determining the relations between the parties and/or subordinate sub-divisions thereof signing hereto: and to set forth herein the basic Agreement covering the rates of pay, hours or work, and conditions of employment to be observed by the parties hereto.

It is mutually understood that the following terms and conditions relating to the employment of workmen covered by this Agreement has been decided upon by means of collective bargaining and that the following provisions will be binding upon the Contractor and the Unions during the term of this Agreement and any re-

newal thereafter. It is further agreed that the employees working under this Agreement shall constitute a bargaining unit separate and distinct from all others. This Agreement may be modified by mutual consent in writing by the parties signatory hereto. (Bulletin #001.)

The wage rates called for under the GPA for the Sterling site was at 90 percent of the wages paid under each local union's construction contracts including the employees at issue, namely, the electricians.

Local Union 527 Business Manager Delgado testified he did not see any need for a GPA arrangement at the Sterling site³ and wanted to negotiate locally for the terms and conditions of employment on any worksite from which workers would be referred by Local Union 527. Delgado testified that in the spring of 1989, he expressed "what problems [he] had" with the GPA concept to International Union President J. J. Barry.⁴

Whether as a result of Delgado's views or otherwise, International Union President Barry in a letter dated August 30, advised CIMCO Labor Relations Manager Bruce Uffelman:

This correspondence will serve as official notification of the IBEW's termination of its participation in the General Presidents' Project Maintenance Agreement presently in effect at the Sterling Chemical facility located at Texas City, Texas.

As you are aware, the General Presidents' Project Maintenance Agreement by Contract states, "This Agreement shall be in full force and effect for a period of one (1) year from the date of signature and shall continue from year to year thereafter unless sixty (60) days notice of termination is given by either party."

Since the Agreement was originally approved on December 31, 1986, and has continued in effect from year to year thereafter with the last approval being granted for the year ending December 31, 1989, the IBEW will terminate its participation at the above referenced site, effective December 31, 1989.

At the time of International Union President Barry's letter, the entire electricians' crew at the Company had been referred to that job by Local Union 527.

After receiving International Union President Barry's letter regarding the Sterling site,⁵ Company Labor Relations Manager Uffelman testified his immediate superior—Iz Cakrane, manager of corporate relations for UE & C Catalytic—contacted the International union for a meeting to discuss the sit-

³Delgado explained "the concept of that [GPA type] agreement was that it would be an agreement used to come into areas where there were non-Union jobs in a non-Union marketplace, to try and initiate and . . . establish at least a first agreement in a non-Union workplace and then to try to bring those agreements up to standard agreements in the future." Delgado did not view the Texas City, Texas area as appropriate for a GPA type agreement.

⁴Delgado said he did not make specific recommendations to International President Barry because he was "not in the habit of asking the president to do any kind of action" but rather just expressed his views to him.

⁵There was also communication involving another worksite in the same geographic area, namely, the Union Carbide site, at which the Company obtained a maintenance contract. That site will be more fully addressed elsewhere in this decision.

uation at the Sterling site.⁶ The meeting took place on or about September 28, at the Washington, D.C. headquarters of the International union. Present for the Company were Uffelman and Cakrane. Present for the International union were International Construction Maintenance Department Director Charles "Bud" Fisher and his immediate assistant International Representative Patrick Reilly. Labor Relations Manager Uffelman testified regarding the meeting as follows:

A. Essentially, I believe Iz Cakrane opened the meeting with . . . the other two gentlemen and myself. First recognizing that these letters had been written and, perhaps, that it was our first time that ourselves, as a contractor, and/or the International had been faced with this kind of a problem where one individual craft had elected to . . . bow out or to rescind their agreement under the General Presidents' Agreement.

. . . .
Sort of unprecedented. And I think we were both . . . parties were a little confused that such a thing had happened. Mr. Cakrane explained that we were there to do anything in our power to . . . try to prevent this and to try to, perhaps, reach some settlement that would permit us not to go through with this and to restore the General Presidents' Agreement to that job. Essentially that's what we were there for. Unfortunately, Mr. Fisher had explained that this was a policy set by the IBEW General President,⁷ a policy that was made on the floor above, I believe he referred to it, and we were all on the floor below, and that certainly and understandably that his position was to reinforce that policy and to uphold that policy, which in a sense was that the General President would not require any Local to work anywhere under the agreement at less than 100 percent wages if, in fact, that Local chose not to do so. This was a dilemma which we all concluded at our levels could not be overcome, and that we were both powerless to alter that policy decision, and it looked like very little could be done to restore the General Presidents' Agreement to that project.

Q. [By counsel for the General Counsel] All right. After your discussion which seemed to indicate that the nature of the problem was not susceptible to being resolved, anything else discussed beyond that?

A. [By Uffelman] Yes. We . . . in light of the fact that it appeared that the IBEW was not going to change their position, nor were there . . . nor was there relatively little felt that could be done, we advised both Mr. Fisher and Mr. Reilly that we had no place to go, no alternative but to comply with our contractual obligations with Sterling Chemical which included providing electrical services, maintenance services. And that under the agreement there is a provision that if the

Local does not supply the men within the 48 hours that we may get them from another source. We explained that in light of our total commitment and belief that Local 527 would not man this job following December 31, 1989, that we would have to in fact solicit gate hires and man that job and fulfill out contractual obligations for the client.

Q. [By counsel for the General Counsel] Yes, sir. Did anyone with the IBEW respond to your announced intentions?

A. [By Uffelman] Response I believe, if I had to characterize it, would have been that they understood our position. I don't think Mr. Fisher or Mr. Reilly wanted to see this kind of thing happen . . .

Q. [By counsel for the General Counsel] Excuse me, sir, but can we stay with your memory of what's being discussed, if you can do it for us, not what you think they may have felt?

A. [By Uffelman] I believe that the general consensus that I personally got out of Mr. Fisher and Mr. Reilly was that they agreed that we didn't have much of a choice.

Q. [By counsel for the General Counsel] Now, does that conclude what occurred at this meeting in September to the best of your memory?

A. [By Uffelman] The best that I can recall, that was . . . the primary purpose of this meeting and that was the meat of the discussion as I recall it.

Q. [By counsel for the General Counsel] All right, sir. Now, up to that point, had the International advised you that the job at Sterling would not be manned?

A. [By Uffelman] Excuse me. Do you mean other than this letter?

Q. [By counsel for the General Counsel] Yes, sir.

A. [By Uffelman] Mr. Levy, I'm not sure I'm following you. They . . . sent us this official letter. . . .

Q. [By counsel for the General Counsel] Yes, sir.

A. [By Uffelman] . . . saying they wouldn't be in there. Do you mean did they give me something else?

Q. [By counsel for the General Counsel] If I am a person with the IBEW, do I say to you, Mr. Uffelman, we're not going to man that job or words to that effect? Does that happen?

A. [By Uffelman] Well, they didn't say it.⁸ They wrote it, sir.

Q. [By counsel for the General Counsel] All right. We'll all read the letter. It says whatever it says. Beyond that, was there any communication from the International that advised they were not going to man the Sterling Chemical job? Did that happen?

A. [By Uffelman] I don't recall specific conversation with Mr. Fisher or Mr. Reilly representing the IBEW beyond that meeting that said any more about them not working. We already concluded they weren't going to work.

⁶Another purpose for the requested meeting was to discuss the situation at the Union Carbide site.

⁷International Union Director of Construction and Maintenance Fisher testified he conveyed International Union President Barry's position to the two company representatives at the September meeting. He explained Barry's position was that "the International would not be a party to the General Presidents' Agreement on the Sterling Chemical job." Fisher's assistant, Reilly, testified it was explained that "it's President Barry's policy that he is not going to force Local Unions to work under a national agreement that provides for less than 100 percent."

⁸Fisher's and Reilly's testimony supports Uffelman's that they did not specifically say the Sterling job would not be manned after December 31. Manager of Labor Relations Cakrane was the only one of the four to so testify. Although all four of the witnesses appeared believable, I am persuaded Cakrane's testimony on this particular point is less reliable than the other three witnesses recollections.

Following this September meeting, the Company (Uffelman and/or Cakrane) engaged in a number of discussions with GPA Administrator Thomas Owens. Owens testified that in the discussions, Uffelman expressed the opinion that Local Union 527 would not man the Sterling site after December 31. Owens said he thereafter communicated with the International union (Fisher and Reilly) and specifically asked whether Local Union 527 would man the Sterling site after that date. Owens testified:

I . . . specifically asked that question, did . . . the letter mean that . . . the IBEW would no longer man this job, and they . . . the answer to that was that would be up to the Local Union, that the International Union would be completely out of this and it would be up to the Local Union to decide that issue.

Owens testified he reported the International union's position to Uffelman. Owens stated he did not, however, at any time contact Local Union 527 about whether it would man the Sterling site after December 31. Owens testified he asked Uffelman if Uffelman had contacted Local Union 527 and was told he had not.⁹

Thereafter on or about December 9, 10, and 11, the Company placed advertisements in local newspapers for electricians to work at its Sterling site. Site Manager Silvertooth testified that before the Company placed its advertisements he had received reports from his three site superintendents (Butler, Cox, and Spears) "that the people on the job was fully convinced that the IBEW would not allow them to work after December 31st."¹⁰ Silvertooth said he reported the superintendents "information" to Uffelman.

Site Manager Silvertooth testified Superintendent Butler, without being instructed to do so, contacted Local Union 527 Business Manager Delgado around mid-December to ascertain if the Local would object to its members continuing to work at the Sterling site after December 31. Silvertooth testified Butler reported to him:

To the best of my memory, he indicated that Mr. Delgado would allow the people on the jobsite to apply for a position without repercussions if we would hire them as non-Union electricians.¹¹

Silvertooth reported Butler's findings to Company Labor Relations Manager Uffelman. Uffelman testified that each of the employees that were onsite at Sterling as of December 29, had, prior to that time, submitted "a resume or an application" for employment in response to the Company's early December newspaper advertisements.¹² Uffelman acknowl-

⁹Manager of Corporate Labor Relations Cakrane candidly admitted he did not at any time contact Local Union 527 to ascertain if the Local would man the Sterling site after December 31. His assistant, Uffelman, likewise did not contact the Local.

¹⁰Silvertooth testified "I instruct[ed] my current staff, Mr. Dewey Butler, Mr. Bill Cox, Mr. Sid Spears, to find out if they possibly could what the feelings of the employees on the job site was."

¹¹Delgado testified Superintendent Butler told him all the onsite electrical employees were in the process of submitting resumes for employment and wanted to know what was going on. Delgado told Butler he assumed they were answering the newspaper advertisements for employment. Delgado testified he told Superintendent Butler "the Union would take absolutely no action whatsoever against any of the employees who were hired."

¹²GPA Administrator Owens testified Uffelman reported to him that all the onsite electricians at Sterling had applied for positions of employment in re-

edged the onsite employees "were very definitely" qualified as electrical workers.

A GPA committee meeting was held on December 14. International Union Representative Reilly was among those in attendance at the meeting. GPA Administrator Owens reported at the meeting that Houston, Texas Building Trades Council Secretary Jim Stinson had advised him a few days earlier that Stinson had been getting telephone calls from various area local unions affiliated with the trades council that Local Union 527 would not be manning the Sterling site after December 31, and was going to picket that site. Owens stated Reilly did not take issue with or object to the comments he made regarding Local Union 527. Owens said he reported that same information to Company Labor Relations Manager Uffelman later that same day.¹³

Thereafter¹⁴ on December 28, Uffelman sent International Union President Barry the following letter via fax:

By letter dated August 30, 1989, you advised Catalytic Industrial Maintenance Company ("CIMCO") of the intention of the International Brotherhood of Electrical Workers ("IBEW") to terminate its participation in the General Presidents Project Maintenance Agreement ("GPA") at the Sterling Chemical site in Texas City, Texas effective December 31, 1989. Please be advised that it is the position of CIMCO that this notice of termination of the GPA is improper, and that the IBEW's action constitutes a breach of that Agreement. CIMCO is willing to resolve any dispute concerning the GPA through the grievance and arbitration procedure of that Agreement. If you choose to rescind your letter of August 30 in a timely fashion, and permit the IBEW to continue to work under the GPA, CIMCO will continue to meet its contractual obligations to the IBEW and its members employed at the Sterling Chemical site.

Because the International and Local 527, in accordance with your letter, are refusing to permit members of Local 527 to continue to work under the terms of the GPA after December 31, 1989, CIMCO has been required to hire qualified personnel to perform craft electrical work at the Sterling Chemical site from a source other than Local 527. Those individuals will commence employment with CIMCO at the Sterling Chemical site after December 31, 1989. CIMCO is taking this action because it has been effectively advised through your letter that the members of Local 527 currently employed at the site will no longer be permitted to work by the IBEW and Local 527 under the terms of the GPA, and because CIMCO has a contractual obligation to the Union parties to the GPA to perform all

sponse to the newspaper advertisements and that Local Union 527 Business Manager Delgado had indicated he had no objection to the Local's members working on a nonunion basis at the Sterling site.

¹³Uffelman later that day presented an unrelated grievance to the GPA Committee. Manager of Corporate Labor Relations Cakrane also attended portions of the GPA committee meeting.

¹⁴Manager of Corporate Labor Relations Cakrane sent memorandums on December 19 and 20 to GPA Administrator Owens and the GPA committee members in which he advised those concerned that the Company intended to hire electricians from sources other than Local Union 527 because it had been advised in writing by the International union that it would no longer work under the GPA at the Sterling site after December 31.

work assigned to it by Sterling Chemical Company, including electrical work, under the terms of the GPA.

It is the intention of CIMCO to take all appropriate steps to meet its contractual obligations to Sterling Chemical, to protect its interests under the GPA, and to hold the IBEW and Local 527 responsible for any injuries suffered as a result of this action by the IBEW.

Neither the International union nor Local Union 527 responded to the above letter.

On December 29 (the last work day in 1989), Site Manager Silvertooth, on instructions from Company Labor Relations Manager Uffelman, held a meeting with all onsite electricians, all of whom attended the meeting. Silvertooth testified:

I opened the meeting up by telling the people that I was sure that they were aware of what had been transpiring for the last couple of months, and if they were not familiar with it I presented the letter that was dated August the 30th by Mr. Barry, indicating that unless this letter would be rescinded that the electricians were withdrawing from the General Presidents' Agreement effective December 31.

Okay. At that point, I said at that point we would consider you as a voluntary quit, that we would provide gate passes for all individuals to remove their tools from the plant that afternoon.

I said that we had started a interview system on resumes, that we had interviewed a number of people for potential positions that would be required after the first of the year, and once our core group had been met that we would consider their resumes along with all the others.

Silvertooth testified the onsite electrical employees did not believe they would be considered for future employment. Silvertooth said the employees also objected to being told they had voluntarily quit their employment. He testified:

They just began to respond very vocally that they couldn't be terminated, they weren't quitting, and they would not accept a voluntary quit as an explanation.

At some point in time, during that conversation, there were so many people trying to talk at the same time, protesting what I said about voluntary quit, I finally basically said to . . . you will be given your passes and that's the end of the conversation.

Company Labor Relations Manager Uffelman testified the onsite electricians were treated as having "voluntarily quit" their employment because they had been referred to the job by Local Union 527.

Site Manager Silvertooth testified the Company decided it needed a core complement of electricians after December 31, that were other than those referred to the Sterling site prior to that date by Local Union 527. Silvertooth stated the Company instructed him to first hire a "core complement" and after that he was free to hire applicants including those who had "voluntarily quit" that had been employed at the site on and before December 29. Silvertooth testified the Company

did not have any electricians onsite as of the first workday (January 2) of 1990.¹⁵ Silvertooth said work was, however, available on that day. Silvertooth testified "calls were made" and "some electricians [were] hired in on January 3." He further testified: "We staggered our work force coming up. There was numbers that came in, I'd say three to four on each day up until we reached in the neighborhood of 20 people."

It is undisputed that after the Company hired a "core complement" of electricians that had not been referred by Local Union 527, it thereafter hired some of the electricians that had worked at the Sterling site on and before December 29 and that had been referred by Local Union 527.

Manager of Corporate Labor Relations Cakrane testified he made the decision to use "gate hires" at the Sterling site after December 31. He testified:

Well, the basis . . . the basis of the decision was really . . . was an evolutionary process. It wasn't one specific thing that occurred. We had started off with the Union Carbide project where Mr. Uffelman and Mr. Morello, I believe it is, met and Mr. Morello indicated very clearly to Mr. Uffelman that they would not man that project at Union Carbide. Certainly, at that point in time, I new we were going to have the same problem at Sterling Chemicals. There was no reason to believe that Local 527 or the IBEW would be inconsistent on two projects within the 527 jurisdiction. So I personally began thinking about it at that time. Then certainly when the letters came in . . . in August of 19 . . . of August 30 of 1989, it was very evident to me what was . . . what was going to occur. In addition to that, we had our meeting in late September with Mr. Fisher and Mr. Reilly. It was obvious. We walked away from that meeting clearly that IBEW 527 wasn't manning the job and that we were going to have to gate hire. Then, in addition to that, the next event was the meeting that's been discussed, the December 14 General Presidents' Committee meeting where Mr. Uffelman and I attended. At that time we . . . Mr. Uffelman gave a presentation with regard to where we saw the problems with regard to Sterling Chemicals and the refusal of 527 to man that project. We had conversation with Mr. Owens at that time. Mr. Owens told us that it was his belief that Local 527 would not man the project come January 1st and that, furthermore, it was his belief that we were going to have a strike similar to what we had at Union Carbide. And Union Carbide played very, very strongly in my decision that I made. It was deja vu. It was just the same situation all over again, still very, very fresh in my mind obviously.

As alluded to elsewhere in this decision, it is undisputed the Company was awarded a contract by the Union Carbide Company for certain maintenance work at its Texas City, Texas facility. The Company executed a GPA for the work to be performed at Union Carbide. The Company on August 29, by fax advised the International union it intended to implement the GPA at the Union Carbide site effective September 18. International Union President Barry advised the Com-

¹⁵ Silvertooth testified the Company had not made commitments to hire any-one as of December 29.

pany (Uffelman) by a faxed letter on August 30, “the IBEW will not participate in the implementation and application of the General Presidents’ Maintenance Agreement at the [Union Carbide] site.” Notwithstanding that notification, the Company on September 15, made a written request to Local Union 527 that it supply electricians to start work on September 18, at the Union Carbide site. Local Union 527 did not respond to the request and the Company employed gate hire” electricians at its Union Carbide site. Thereafter, Local Union 527 engaged in substandard wage picketing at the Union Carbide site. Included among those present during the picketing was Local Union 527’s business manager Delgado. The picketing caused some work disruption at the Union Carbide site.

Analysis, Discussion, and Conclusions

The Company’s contention that the 34 workers involved here voluntarily quit their employment on December 29 is without merit. The actions of the onsite workers as well as Local Union 527’s business manager Delgado belie any such contention by the Company. All the onsite electricians vigorously protested when Site Manager Silvertooth asserted they had voluntarily quit their employment. Each of them had made known their desire to continue their employment at the Sterling site in that all had made application to continue working after December 31. Their union, through Business Manager Delgado, had made it known to the Company through Site Superintendent Butler that no action would be taken against them if they continued to work at the Sterling site after December 31.¹⁶ The Board’s decision in *Jack Welsh Co.*, 284 NLRB 378 (1987), on which the Company relies to justify its having considered all the onsite electricians to have voluntarily quit on December 29, is factually distinguishable. In *Jack Welsh Co.*, employee Gary Welsh on being told the company therein was going “open shop” immediately” stated he would leave the company because he “belonged to a union.” The Board in that case concluded that because the company’s action in going “open shop” was “legally permissible” and in view of Gary Welsh’s immediate response that he would have to quit, the company was justified in considering he had in fact voluntarily quit his employment. In the instant when the 34 onsite electricians learned the International union had withdrawn from participation in the GPA at the Sterling site specifically sought out their status vis-a-vis Local Union 527. After learning no action would be taken against them by Local Union 527, they each specifically and individually made application to continue their employment with the Company after December 31, and adamantly objected to the Company considering they had in any fashion “voluntarily quit” their employment. Thus, I conclude the 34 onsite electricians did not voluntarily quit their employment on December 29 but rather were terminated by the Company.

Having concluded the Company terminated the 34 employees in question on December 29, I shall consider whether its action violated the Act. In that respect, I agree with counsel for the General Counsel that the terminations were “inherently destructive” of employees’ rights within the meaning

¹⁶It is acknowledged that all 34 of the onsite craft electricians were skilled at their craft.

of *NLRB v. Great Dane Trailers*, 388 U.S. 26, 33–34 (1967), and thus violated Section 8(a)(3) and (1) of the Act.¹⁷

In *Great Dane Trailers*, the Supreme Court held:

Some conduct, however, is so “inherently destructive of employee interests” that it may be deemed proscribed without need for proof of an underlying improper motive That is, some conduct carries with it “unavoidable consequences which the employer not only foresaw but which he must have intended and thus bears its own indicia of intent.”

The key to my finding with respect to the 34 onsite electricians is found in Labor Relations Manager Uffelman’s admission that they were terminated¹⁸ on December 29, because they had been referred to the Company by Local Union 527. The evidence supports the contention of counsel for the General Counsel that the Company took the action it did because the International union would not agree to reinstate its participation in the GPA at the Sterling site.¹⁹ The Board in *National Fabricators*, 295 NLRB 1095 (1989), enf. 903 F.2d 396 (5th Cir. 1990), noted that mass discharges or layoffs of union adherents are particularly destructive of rights of employees guaranteed to them in Section 7 of the Act. The Board in *D & S Leasing*, 299 NLRB 658 (1990), held:

With regard to what conduct may be characterized as “inherently destructive,” we have described such conduct as the type “which would inevitably hinder future bargaining or create visible and continuing obstacles to the future exercise of employee rights.” *Swift Independent Corp.*, 289 NLRB 423, 427 (1988), remanded sub nom. *Esmark, Inc. v. NLRB*, 887 F.2d 739 (7th Cir. 1989).

It is clear beyond peradventure that the discharge of all employees of a particular craft because of their affiliation with, and referral from, a union, as was the case here, creates “continuing obstacles to the future exercise of employee rights.”

Having found the Company engaged in conduct “inherently destructive” of employees’ Section 7 rights under *Great Dane Trailers*, supra, the burden shifts to the Company to establish it was motivated by “legitimate objectives,” 388 U.S. 26 at 34. I find the Company has failed to satisfy its burden. The Company’s stated belief that the Sterling site would not be manned by Local Union 527 electricians after December 31, was not well founded in light of all it knew. The Company knew all of them desired to continue working in that each had made application with the Company to do so after December 31. The Company also knew the Union’s position regarding their being allowed to work after December 31, in that Business Manager Delgado had assured Superintendent Butler they could continue their

¹⁷In light of the above conclusion, I find it unnecessary to address the issue of whether the Company’s actions were motivated by antiunion animus under the analysis set forth in *Wright Line*, 251 NLRB 1083 (1980), enf. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

¹⁸Although Uffelman spoke in terms of their having voluntarily quit the evidence as outlined above shows otherwise.

¹⁹The issue of whether the International union could validly withdraw from participation in the GPA at a particular location such as the Sterling site is irrelevant to the issues here.

employment without any action being taken against them by the Union. Simply stated, the record evidence does not support the Company's asserted business justification, that it had to have a "core complement" of electricians that had not been referred to it by Local Union 527 in order to ensure it had a work force to perform its mission at the Sterling site after December 31. Further evidence that its asserted business justification is without merit is found in the fact that after it had ridded itself of all Local Union 527 referred electricians on December 29, it did not immediately attempt to replace them. Even when it did commence replacing the Union referred electricians with nonunion referred ones, it did so only at the pace of "three to four" per day until it reached its stated goal of approximately 20 "core complement" electricians. Thus, its asserted business justification of attempting to meet an urgent need to ensure it was able to carry out its maintenance mission at the Sterling site is not borne out by its own actions. Still further evidence that it was not responding to an urgent need to ensure uninterrupted maintenance is demonstrated by the fact it could have but did not wait until January 3, 1990, to observe whether Local Union 527 electricians reported for work or not on that date. This is so because the Company did not extend offers to hire nonunion referred electricians until on and after January 3, 1990. The Company's haste in ridding itself of electricians referred by Local Union 527 and its unhurried hiring of nonunion replacements indicates it had as an objective something other than ensuring it had a "core complement" of workers to immediately carry out its maintenance mission at its Sterling site. I am, as stated earlier, persuaded the Company was by its actions attempting to bring pressure on the International union to reinstate its participation in the GPA at the Sterling site.

The Company's further assertion that it was justified in terminating its onsite workers based on the International union's August 1989 letter withdrawing from the GPA at the Sterling site and Local Union 527's actions at its Union Carbide site is likewise without merit. First, the International union's withdrawal from participation in the GPA at the Sterling site did not address whether Local Union 527 would permit, or would in any manner interfere with, its members continuing their employment at the Sterling site. It is noted the Company was not told at its September meeting with representatives of the International union that the Sterling site would not be manned after December 31. In fact, GPA Administrator Owens subsequently questioned representatives of the International union on that specific point and was told it was up to Local Union 527 whether to man the Sterling site or not after December 31. GPA Administrator Owens made that information known to the Company. Local Union 527, as is set forth above, made its position known to the Company through Superintendent Butler that it would allow the onsite electricians to continue working at the Sterling site without repercussions. Accordingly and in light of all the above, I am persuaded the Company's speculation that Local Union 527 would not permit its members to continue working at the Sterling site after December 31, does not constitute an adequate business justification for its actions. The Company fairs no better in attempting to justify its conduct by establishing what actions, or lack thereof, the International union and/or Local Union 527 took at its other worksite in Local Union 527's jurisdiction. In that regard there is no dis-

pute that the Company obtained a contract for maintenance work at the Union Carbide Company in Texas City, Texas, nor is there any dispute that the Company asked for and obtained a GPA agreement at that location. However, the International union was never a party to the GPA agreement at that particular location. Local Union 527 never at any time provided or agreed to provide the Company with referrals for that facility. Inasmuch as neither the International union nor Local Union 527 had any relationship with the Company at its Union Carbide site, the Company may not use Local Union 527's actions, of lack thereof, at that site to justify its actions at its Sterling site. It would be nothing more than mere speculation for me to try to assess the Union's overall strategy related to its picketing at the Union Carbide site and its refusal to refer electricians there in light of the fact it had no relationship with the Company at that site.

None of the Company's asserted business justifications taken separately or collectively constitute legitimate and/or substantial justification for its action of discharging its 34 Sterling site electricians on December 29. Even if any or all of the Company's asserted reasons had merit I would still conclude, in striking the proper balance between the asserted business justifications and the invasion of employees' rights, that the evidence here weighs against the asserted justifications and in favor of protecting employees from an invasion of their rights. *National Fabricators*, supra. Accordingly, I find the Company violated the Act as alleged in the complaint when it discharged its 34 onsite electricians on December 29.

CONCLUSIONS OF LAW

1. Catalytic Industrial Maintenance Co. (CIMCO) is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. International Brotherhood of Electrical Workers, Local 527 is a labor organization within the meaning of Section 2(5) of the Act.

3. By terminating and thereafter failing and refusing to reinstate C. H. Austin, B. A. Taylor, B. E. Black Jr., Nellie Elizabeth Boles, Ernest R. Chance, F. F. Cheatham Jr., Jesse R. Ciabattoni, Jerry Devona, Ronald A. Plake, William Neil Floyd, Owen Lee Groves, Rasheed Hameed, B. J. Henderson, Bert J. Henderson, Louis Hunter, Donald G. Lawson, J. A. McMullen III, W. T. Miller Jr., Charles C. Montes, Johnny J. Ramirez, James E. Ridens, Thomas Rodriques, Jimmy J. Rogers, Donald R. Rogers, Walter L. Ryan Sr., Thomas Neil Speights, George E. Spiers Jr., Ralph A. Williams, Alonzo J. Wisdom Jr., Byron G. Remmerling, Edward P. Martinez, J. D. Sumrall, N. F. Simon, and P. A. Busler the Company violated Section 8(a)(3) and (1) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Company has engaged in unfair labor practices in violation of Section 8(a)(3) and (1) of the Act, I shall recommend that it be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

It having been found that the Company discriminatorily terminated employees C. H. Austin, B. W. Taylor, B. E. Black Jr., Nellie Elizabeth Boles, Ernest R. Chance, F. F. Cheatham Jr., Jesse A. Ciabattoni, Jerry Devona, Ronald W. Plake, William Neil Floyd, Owen Lee Groves, Rasheed Hameed, B. J. Henderson, Bert J. Henderson, Louis Hunter, Donald G. Lawson, J. A. McMullen III, W. T. Miller Jr., Charles C. Montes, Johnny J. Ramirez, James E. Ridens, Thomas Rodriques, Jimmy J. Rogers, Donald R. Rogers, Walter L. Ryan Sr., Thomas Neil Speights, George E. Spiers Jr., Ralph A. Williams, Alonzo J. Wisdom Jr., Byron G. Kemmerling, Edward P. Martinez, J. D. Sumrall, H. F. Simon, and P. A. Busler, I shall recommend that it be ordered to offer them immediate and full reinstatement to their former positions, or, if those positions no longer exist, to substantially equivalent positions without prejudice to their seniority or other rights and privileges previously enjoyed and make them whole for any loss of earnings they may have suffered by reason of the discrimination against them with interest. Backpay shall be computed in the manner as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest, as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).²⁰

Likewise, it is recommended the Company be ordered to remove from its files any reference to the above named employees having been terminated and notify them in writing this has been done and that evidence of that unlawful action will not be used as a basis for any future personnel actions against them. Finally, it is recommended the Company be ordered to post a notice to its employees attached hereto as "Appendix" for 60 days in order that employees may be apprised of their rights under the Act and the Company's obligation to remedy its unfair labor practices.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended²¹

ORDER

The Company, Catalytic Industrial Maintenance Co. (CIMCO), Texas City, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Terminating or otherwise discriminating against employees because of their membership in, activities on behalf of, or referral from, International Brotherhood of Electrical Workers, Local 527, or any other labor or organization.

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

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

(a) Offer C. H. Austin, B. W. Taylor, B. E. Black Jr., Nellie Elizabeth Boles, Ernest R. Chance, F. E. Cheatham Jr., Jesse W. Ciabattoni, Jerry Devona, Ronald W. Plake, William Neil Floyd, Owen Lee Groves, Rasheed Hameed, B. J. Henderson, Bert J. Henderson, Louis Hunter, Donald G.

Lawson, J. W. McMullen III, W. T. Miller Jr., Charles C. Montes, Johnny J. Ramirez, James E. Ridens, Thomas Rodriques, Jimmy J. Rogers, Donald R. Rogers, Walter L. Ryan Sr., Thomas Neil Speights, George E. Spiers Jr., Ralph W. Williams, Alonzo J. Wisdom Jr., Byron G. Kemmerling, Edward P. Martinez, J. D. Sumrall, H. F. Simon, and P. A. Busler immediate and full reinstatement to their former jobs, or, if their jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of this decision.

(b) Remove from its files any reference to its unlawful termination of C. H. Austin, B. R. Taylor, B. E. Black Jr., Nellie Elizabeth Boles, Ernest R. Chance, F. F. Cheatham Jr., Jesse W. Ciabattoni, Jerry Devona, Ronald W. Plake, William Neil Floyd, Owen Lee Groves, Rasheed Hameed, B. J. Henderson, Bert J. Henderson, Louis Hunter, Donald G. Lawson, J. W. McMullen III, W. T. Miller Jr., Charles C. Montes, Johnny J. Ramirez, James E. Ridens, Thomas Rodriques, Jimmy J. Rogers, Donald R. Rogers, Walter L. Ryan Sr., Thomas Neil Speights, George E. Spiers Jr., Ralph W. Williams, Alonzo J. Wisdom Jr., Byron G. Kemmerling, Edward P. Martinez, J. D. Sumrall, H. F. Simon, and P. A. Busler, and notify them in writing this has been done and that these actions will not be used against them in any way.

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

(d) Post at its Texas City, Texas facility copies of the attached notice marked "Appendix."²² Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Company's authorized representative, shall be posted by the Company immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Company to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Company has taken to comply.

²²If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

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

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

²⁰Under *New Horizons*, interest is computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendments to 26 U.S.C. § 6621. Interest accrued before January 1, 1987 (the effective date of the amendment) shall be computed as in *Florida Steel Corp.*, 231 NLRB 651 (1977).

²¹If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT terminate our employees because of their membership in, affiliation with, activities on behalf of, or referral from, International Brotherhood of Electrical Workers, Local 527 or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer C. H. Austin, B. A. Taylor, B. E. Black Jr., Nellie Elizabeth Boles, Ernest R. Chance, F. F. Cheatham Jr., Jesse W. Ciabattoni, Jerry Devona, Ronald A. Plake, William Neil Floyd, Owen Lee Groves, Rasheed Hameed,

B. J. Henderson, Bert J. Henderson, Louis Hunter, Donald G. Lawson, J. A. McMullen III, W. T. Miller Jr., Charles C. Montes, Johnny J. Ramirez, James E. Ridens, Thomas Rodriques, Jimmy J. Rogers, Donald R. Rogers, Walter L. Ryan Sr., Thomas Neil Speights, George E. Spiers Jr., Ralph W. Williams, Alonzo J. Wisdom Jr., Byron G. Kemmerling, Edward P. Martinez, J. D. Sumrall, H. F. Simon, and P. A. Busler immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions without prejudice to their seniority or other rights and privileges previously enjoyed and WE WILL make them whole for any loss of earnings and benefits suffered as a result of the discrimination against them less any net interim earnings, plus interest.

WE WILL notify each of them that we have removed from our files any reference to their terminations and their terminations will not be used against them in any way.

CATALYTIC INDUSTRIAL MAINTENANCE CO.
(CIMCO)