

**Hogan Manufacturing, Inc. and Shopmen's Local No. 790, International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO.** Case 32-CA-11713

December 16, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT  
AND RAUDABAUGH

On March 31, 1992, Administrative Law Judge William J. Pannier, III, issued the attached decision. The Respondent filed exceptions and a supporting brief.

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 brief and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions 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, Hogan Manufacturing, Inc., Escalon, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

<sup>1</sup> The 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.

In the 11th paragraph of sec. B of the judge's decision, substitute "Dial" for "Hogan" in the clause that reads, "and that President Mark Hogan had threatened to retaliate against Hogan."

*Jeffrey L. Henze, Esq.*, for the General Counsel.  
*Richard A. Leasia and David D. Kuhl, Esqs. (Littler, Mendelson, Fastiff & Tichy)*, on brief, for the Respondent.  
*Paul Supton, Esq. (Van Bourg, Weinberg, Roger & Rosenfeld)*, for the Charging Party.

DECISION

STATEMENT OF THE CASE

WILLIAM J. PANNIER III, Administrative Law Judge. I heard this case in Manteca, California, on August 1, 2, and 5, 1991.<sup>1</sup> On April 30 the Regional Director for Region 32 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing, based on an unfair labor practice charge filed on March 15, alleging violations of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). All parties have been afforded full opportunity to ap-

<sup>1</sup> Unless stated otherwise, all dates occurred in 1991.

pear, to introduce evidence, to examine and cross-examine witnesses, and to file briefs. Based on the entire record, on the briefs that were filed, and on my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

At all times material, Hogan Manufacturing, Inc. (Respondent) has been a California corporation with an office and places of business in Escalon, California, where it engages in the manufacture and nonretail distribution of steel products. In the course and conduct of those business operations during the 12-month period preceding issuance of the complaint, Respondent purchased and received goods or services valued in excess of \$50,000 directly from suppliers located outside the State of California. Therefore, I conclude, as admitted in the answer to complaint, that at all times material Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

At all times material, Shopmen's Local No. 790, International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO (the Union) has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background and Issues*

The primary issue presented by the complaint arises as a result of Respondent's layoff of 45 employees on February 26. As set forth in subsection II, supra, Respondent manufactures and distributes steel products in Escalon. There it operates four plants. At two of them, plants one and four, Respondent builds wheelchair lifts for municipal buses. Structural steel for buildings, round vessels, and miscellaneous plate structures are built to customer specifications at plants two and three. A decline in structural steel business during the latter part of 1990, and continuing during the first 2 months of 1991, as well as a reduction in the need for manual welding due to introduction of robot welders, led to a management meeting on February 14 at which a decision to lay off employees was announced. That meeting was attended by Respondent's personnel manager, Lon Rose; by its co-owner and vice president of operations, Jeff Hogan, and Plant Superintendent Roland Heard, the two officials who manage structural steel operations at plants two and three; and, by its general manager, Paul Reichmuth, and Plant Superintendent Herman Boone, the two officials who manage wheelchair lift manufacturing at plants one and four.

Although the layoff decision had been primarily the result of a decline in business at plants two and three, Respondent did not confine the layoffs to employees working at those two plants. Instead, its officials, in effect, realigned personnel by selecting employees in job classifications from all four plants for layoff, in the process transferring valued, but not then fully occupied by work, employees from plants two and three to plants four and, more especially, one. The transferred employees took the jobs of certain plants one and four employees who were, in turn, laid off.

Among the plant one employees laid off on February 26 was Charles Dial, a journeyman welder who had worked for Respondent since early 1988 and who, since June 21, 1990, had performed the job of welding hubs onto master and slave arms for lifts, a job herein referred to as hub welding. Dial had been the most active of Respondent's employees in an organizing campaign that led to a representation election on June 20, 1990, an election whose outcome was pending Board resolution of certain issues at the time of the hearing in the instant case. For example, in October 1989 Dial had presented to Respondent, on behalf of its employees, a letter requesting wage increases. After receiving what Dial and many, if not all, of the other employees regarded as an unsatisfactory response, Dial contacted the Union, thereby setting in motion the organizing campaign that led to the representation election. Not only was Dial the most active employee in supporting the Union, but it is conceded that Respondent's officials, as well as its employees, regarded Dial as the "number one" union proponent. Furthermore, Dial's union activity continued after the election. That was shown most graphically by the fact that Dial testified as a witness for the Union during the hearing conducted as part of the process for resolving determinative challenges to ballots cast during the representation election and, further, by the fact that he sat with the Union's attorney at the counsel table at all other times during that hearing.

As a result of Dial's union activity, although there is no challenge to Respondent's need for a general layoff on February 26, nor to the procedure that it followed for selecting over 40 of the employees laid off on that date, the General Counsel does challenge the selection of Dial for inclusion as one of the employees laid off on that date. That is, the General Counsel alleges that Dial's selection had not been dictated by legitimate business considerations, but rather that Respondent had simply taken advantage of the concededly economic need to lay off employees and had included Dial as one of the employees selected for layoff because he had been the number one union supporter. By that selection for that motive, argues the General Counsel, Respondent violated Section 8(a)(3) and (1) of the Act.

Not surprisingly, Respondent disputes that argument, particularly contending that the General Counsel has shown neither animus nor proscribed motive in connection with Dial's selection for layoff and, affirmatively, that Respondent's officials have established a legitimate reason for Dial's inclusion among the 45 employees laid off on February 26. Addressing the animus portion of that contention, the General Counsel points to certain remarks assertedly made by Plant One Foreman Jack Wilson, an admitted statutory supervisor and agent of Respondent, and by Leadman Frank James Silveria, whom the General Counsel alleges, contrary to Respondent, has been a statutory supervisor and agent of Respondent at all times material. In addition, the General Counsel points to certain other remarks about the Union, in general, and Dial, in particular, and argues that they demonstrate animus. To meet Respondent's affirmative contention, the General Counsel points to certain objective factors that, it is argued, undermine the facial legitimacy of Respondent's defense to Dial's selection and, viewed in conjunction with his union activity and with the animus statements of Respondent's officials, demonstrate that Respondent's motivation for Dial's selection had been an unlawful one.

As discussed more fully post, I conclude that credible evidence does establish that Wilson made one of the remarks alleged in the complaint to have been unlawful and, further, that certain other remarks were made that show hostility to Dial because of his role as the principal union supporter among Respondent's employees. In light of that role and of Respondent's conceded knowledge of it, those remarks and the sometimes unexplained and uncorroborated, and other times inconsistent, defense to Dial's selection for layoff establish by a preponderance of the evidence that the layoff of Dial was unlawfully motivated, in violation of Section 8(a)(3) and (1) of the Act. However, the credible evidence does not establish that Silveria addressed any unlawful remarks to Dial and, in light of that conclusion, it is unnecessary to resolve the issues of Silveria's supervisory or agency status.

#### B. *Statements Attributed to Respondent's Officials*

As discussed further in subsection III.C, *infra*, Plant One Superintendent Boone had selected Dial for inclusion among the employees laid off on February 26. Dial described two specific instances when Boone had made comments pertaining to the union campaign. In January of 1990, testified Dial, Boone had approached as Dial worked alone in a fixture storage area of the outside machine shop and had warned, "if you guys walk, I got applications, three, four inches thick on my desk. I can replace you and have them lined up on the sidewalk tomorrow," adding "something to the effect, even if we did go union, that Mark would tie it up in the courts for two or three years. And if there was anybody else, any of you left here at the time, something to that effect." Dial further testified that on May 22, Boone had approached a group of employees, one of whom had been Dial, in the plant one break area during afternoon break and had said to Dial, "hey, something to the effect, I just got rid of three more of your yes votes. . . . You better work the new hires or you won't have any votes left when the election comes."

Boone disputed those descriptions, testifying that he never had a conversation with anyone in which he had said that he could replace the entire crew if the Union struck and that, in any event, Respondent would tie the matter up in the courts for years. Moreover, Boone denied ever having told anyone at any time that Respondent had gotten rid of three union votes by firing them and that the Union had better get new hires organized. In fact, testified Boone, during the period leading to the election, "I got rid of more than three people, termination for one reason or another. And every time I got rid of one, they told me I was getting rid of union employees," but "I did not respond to that."

The reliability of Dial's description of the first conversation was somewhat diminished by his admitted uncertainty concerning the precise words spoken. Indeed, that uncertainty was further illustrated by comparison of his testimonial account to the one in his prehearing affidavit. In the latter he stated that Boone's remark about replacements had been predicated on the employees' decision to go union (in contrast to his testimonial account that replacement would follow a strike) and further, there was no mention of Mark Hogan, Respondent's president, in the affidavit's recital of the conversation in January 1990. Instead, according to the affidavit, Boone had warned, "we could tie it up in the courts for a couple of years if any of you are still here then"

(emphasis supplied). In fact, during cross-examination Dial conceded that he could not recall if Boone had specifically mentioned Mark Hogan during this particular conversation. Nevertheless, these deficiencies are relegated to the status of mere imperfections of recollection in light of the relatively considerable support lent by other factors to the substance of Dial's testimony.

In the first place, several objective considerations tend to support to Dial's description of Boone's remarks. Boone admitted that the subject of a strike had been "in the air" during January 1990. He further admitted that he had begun collecting applications from potential new hires during that month because "[w]e was [sic] trying to move from 60 to 70 lifts per week and so I was in doing interviews ready to hire," and, moreover, that "I had a stack about two inches high in one and about an inch high that I've already waded through and just kind of disregarded those already." Relevant to the second conversation described by Dial was Boone's admission that three employees—Gary Baca, Ron Garrett, and Scott Lanto—had been terminated in May of 1990. At one point Boone denied that he had "play[ed] any role in the decision to terminate them." But, he then reversed himself and conceded that he had been the official who had decided "to actually go ahead and terminate them" and, further, had written three termination notices for them. That is, he ultimately admitted, as Dial described him as having said, that he had been the official who had terminated Baca, Garrett, and Lanto.

Lending further support to Dial's description of Boone's remarks was the latter's own expressed uncertainty regarding what he might have said to Dial about the applications. That is, while he testified, "I don't think I had a personal one on one with" Dial regarding the stack of applications that had been collected in January 1990, Boone conceded that he did not recall whether he had told Dial about the stack. Further, he admitted that he had discussed with employees the stack of applications on his desk and possibly could have discussed the stack with Dial, although he claimed that if he had done so, it likely would have been "at a coffee break or something like that," rather than during a "one on one" conversation. In short, Boone expressed greater uncertainty in his denials than Dial had expressed in trying to recreate Boone's words in January 1990. Furthermore, at no point did Boone describe with particularity what he had said about the stack of applications when he had admittedly discussed it with employees, including possibly Dial.

Of course, it would not have been possible for the General Counsel to provide corroboration for Dial's description of Boone's remarks in January 1990, since Dial testified that no one had been present, other than the two of them. However, Dial testified that 10 or 12 other employees had been present during the break when Boone had commented that he had "just got rid of three more of your yes votes." Interrogated more specifically during cross-examination, Dial identified four of them who had definitely been there and three others who "may have been there." In fact, the General Counsel did provide as witnesses two of the employees who had been present at the break that day: Gordon Loveless, a layout man in plant one whose job title is brake operator, and Donald E. Hawkins, a trainee two in plant one. Each one essentially corroborated Dial's description of the remarks made by Boone in May 1990, thereby, in the process, contradicting

Boone's relatively general denial about having made them. Thus, Loveless testified that Boone had said to Dial, "I just got rid of three of your union folks. You better start working on the new folks. Now, that's my words." Similarly, Hawkins testified that Boone had said to Dial, "you just lost three more union votes. And then he said, well, you better start signing the new hires."

Boone was not a convincing witness. Not only did he contradict himself concerning whether or not he had decided to lay off three employees in May 1990, but his denials concerning the remarks attributed to him during that month by Dial were unconvincing and were contradicted by Hawkins and Loveless, two credible witnesses who were working for Respondent at the time of the hearing. As described in subsection III.C, *infra*, Boone's testimony in connection with Dial's selection for layoff was also sometimes at odds with other considerations. Accordingly, I do not credit his denials of the remarks attributed to him by Dial during January and May 1990. By contrast, while Dial did not always seem to be testifying candidly, as discussed below, his description of Boone's remarks on those two occasions appeared to be advanced with candor. Consequently, I credit Dial in that regard.

Among the other officials to whom remarks evidencing animus were attributed were Vice President Jeff Hogan and, his brother, President Mark Hogan. Following the representation election on June 20, 1990, a group of employees gathered at a nearby bar with one or more union agents. Jeff Hogan came there for a brief period. Jeff Hogan did not appear as a witness. Thus, it is undenied that, before leaving the bar, he had shouted out that the union people were no good. After he had left the bar, Jeff Hogan and an official of the Union became embroiled in a physical altercation outside, leading to arrival of the police and arrest of Jeff Hogan. In the process, one of the officers asked Dial what had happened. As Dial spoke with the officer, Mark Hogan approached. Like his brother, Mark Hogan did not appear as a witness. As a result, it is undenied that as he listened to what Dial was saying to the officer, Mark Hogan shouted that Dial was a liar and was "history" because, in effect, Mark Hogan intended to retaliate against him.

On the following morning, June 21, 1990, Dial reported for work and clocked in at a location near where his supervisor, Foreman Wilson, was sitting. Wilson appeared as a witness for Respondent, but did not deny having told Dial, as the latter clocked in, that he (Wilson) was going to lose one of the best men that he ever had, adding that he had so far been successful in building a fence around Dial, by trying to shut him up and calm him down, but that Dial had torn that fence down and there was nothing else that he (Wilson) could do for Dial.

Respondent advances the contention that, in effect, these remarks by Mark Hogan and by Wilson are as susceptible to interpretation as references to the asserted untruthfulness of Dial's report to the police, about the altercation outside the bar, as to interpretation as references to Dial's support for the Union and its agent. At first blush there is some appeal to Respondent's argument. After all, Mark Hogan had prefaced his threat of retaliation by accusing Dial of being a liar and, following the altercation and arrest of Jeff Hogan, Respondent had filed a civil action against the Union and Dial for, *inter alia*, civil conspiracy and false arrest. Yet, Re-

spondent's contention loses much of its force in light of its failure to produce evidence supporting this alternative interpretation about an assertedly false report to the police. Wilson appeared as Respondent's witness. However, he never claimed that his remark to Dial had been rooted in the substance of Dial's report to the police. Mark Hogan never appeared as a witness for Respondent, although there was no representation that he was not available to Respondent as a witness. Consequently, there is no evidence, which only he could supply, of the intended reason for his threat that Dial was "history" and Respondent would retaliate against him.

In fact, there is no evidence that, when he had accused Dial of being a liar, Mark Hogan had truly believed that Dial was lying to the police, as opposed to having simply been voicing an objection to any statements favoring the Union's agent and adverse to the interests of his brother Jeff. For, so far as the evidence shows, Mark Hogan had no actual knowledge about the altercation at the time that he had appeared on the scene, as Dial spoke with the police. Instead, the record discloses only that there had been a postelection altercation between Vice President Jeff Hogan and a union agent, that Dial had been the Union's chief proponent and had given a report to the police that tended to support the agent's account of that altercation, and that President Mark Hogan had threatened to retaliate against Hogan—a threat that was reinforced the following morning by Wilson. These facts tend more to support the conclusion that those threats had been aimed at Dial's support for the Union and its agent, rather than at the truth or falseness of what Dial may have said to the police. Absent an explanation by Mark Hogan and Wilson concerning a different actual meaning, Respondent's alternative interpretation lacks evidentiary support and is relatively speculative.

The complaint does not allege that the Act was violated by Wilson's comment to Dial on June 21, 1990, presumably because that comment occurred more than 6 months before the filing and service of the charge. However, the complaint does allege that the Act was violated by remarks made by Wilson on two occasions within the 6-month period preceding filing and service of the charge: on December 14, 1990, when Wilson allegedly threatened that Dial would be the first employee selected should there be a layoff, and on January 17, when Wilson allegedly threatened that Dial was "number one" on Respondent's "hit list" for layoff.

As it turned out, the General Counsel conceded failed to adduce firsthand evidence of any threat by Wilson on January 17. In his brief, counsel for the General Counsel moves to amend the complaint to allege, instead, that "at various times between December 14, 1990 and February 22, 1991" Wilson made such comments. However, the evidence adduced in that regard presents problems for so extended an allegation. Wilson admitted that the term "number one" had been used to refer to Dial. But, in contrast to the absence of an explanation for his comments to Dial on June 21, 1990, Wilson explained that the "number one" comment had referred to Dial's status as the leading union proponent, as opposed to pertaining to an order of layoff.

Although Hawkins and Loveless each initially testified in a fashion that tended to support the proposed amendment, further interrogation led to answers showing that they had been interpreting Wilson's meaning and, moreover, showing that Wilson's explanation was the more natural explanation

for what had actually been said by him. Thus, as direct examination proceeded, Hawkins testified that he had never heard Wilson speaking about Dial being number one in connection with a layoff and that Wilson had been referring to Dial as "the number one union rep[.]" Similarly, Loveless testified that Wilson had applied the "number one" monicker to Dial even before rumors of layoffs had begun circulating. Further, Loveless agreed that on none of the occasions after those rumors arose did Wilson specify that his references to employees by number meant for layoff, as opposed to degree of participation in support of the Union's organizing campaign. Indeed, former journeyman Gilbert D. Johnson, who had quit working for Respondent in September 1990, testified that, over time, numbers had been attributed to different employees whenever something wrong occurred or was done: "you did something wrong so it's your turn."

That testimony by Johnson should not be overlooked. Wilson testified that when referring to Dial as number one, "I always thought it was referring to Check as the number one employee that was in the union group, top of the group," and that, "it was a joke." In fact, in a prehearing affidavit, Dial, himself, confirmed that interpretation of Wilson's normal "number one" comments: "it was sort of a joke about my being the first one to go. I would say almost daily to Wilson, who is number one, meaning for layoffs, and he would say you are." However, although Dial interpreted his own remarks as pertaining to layoffs, there is no evidence that he had normally conveyed that meaning to Wilson—nor that Wilson had normally understood that to be the meaning of Dial's references to "number one." However, while that had been the normal situation, there was one occasion when, testified Dial, that connection—between "number one" and layoffs—had been made explicit.

Dial testified that after layoff rumors had surfaced, he had tried to prod Wilson for more specific information about the subject. Further, testified Dial, when he had again done so during the morning break on December 14, 1990, Wilson "referred to me, he says, you're number one, Andy is number two and pointed over to Gordon, he's number three. And as he walked off he said that the only difference is that yours is permanent." Wilson denied generally that he had told Dial at any time in December 1990 that Dial would be the first employee laid off in the event of a layoff because of his union membership in, or activities on behalf of, the Union. However, he did not deny that he had said that Dial would be laid off permanently. Moreover, he admitted that he had normally joined employees at coffeekbreaks about once a week and he did not deny having done so on December 14, 1990. Further, he claimed that he was unable to recall whether he had been asked by employees about a layoff and he did not deny with particularity the sequence of remarks attributed to him by Dial on December 14, 1990.

In the final analysis, the evidence is too ambiguous and tenuous to support the essentially general amendment proposed by the General Counsel. Accordingly, while I grant the motion to amend, I conclude that the amended allegation is unsupported by credible specific evidence that Wilson had repeatedly referred to Dial as the number one employee to be selected for layoff. In contrast, Dial gave specific evidence, undenied with particularity by Wilson, of a threat on December 14, 1990, that Dial, and two others, would be laid off and that Dial would not be recalled. In so testifying, Dial

appeared to be testifying candidly. Accordingly, I conclude that on that date Wilson did specifically apply the “number one” terminology to the order in which Dial would be selected for layoff. Against a background where that terminology had normally been applied by Wilson to Dial’s role as the foremost union proponent among Respondent’s employees, its use in connection with the order for layoff selection naturally appeared to be a euphemism for layoff selection based on union support. Therefore, it constituted a threat of retaliation for Dial’s support of the Union’s organizing campaign and violated Section 8(a)(1) of the Act.

In addition to the foregoing remarks attributed to Respondent’s officials, as described in subsection III,A, supra, the complaint alleges that Leadman Silveria had been a statutory supervisor and agent of Respondent at all times material. It further alleges that in January, Silveria had told Dial that Respondent wished it would find a reason to terminate him because of his union activities and, further, in February had informed Dial that Respondent was fed up with him and was ready to pay him off because of those activities. Respondent denies that Silveria had been either a supervisor or its agent. Silveria disputed Dial’s description of what had been said in January and February.

At some point during January balls of 100-mile-an-hour (2-inch wide silver) duct tape had been thrown around plant one. One morning that month, testified Dial, he and other employees were having coffee at the desk used by Silveria and “I asked” Silveria “something to this effect. It might not be verbatim. I said, I’ll bet you would like to catch me throwing those tape balls.” According to Dial, “I think he just didn’t respond then. He nodded in the affirmative.” Dial further testified that, in effect, discussion of that subject had been pursued: “I’m not sure if I said it or one of the other guys, but it was said that boy, if he could catch Chuck throwing tape balls that would be a feather in you hat and you’ll probably get a big bonus or a raise out of it.” In response to the former suggested result, Dial testified that Silveria had replied, “Two feathers,” and had held up two fingers. With reference to the suggested bonus or raise, Dial testified that Silveria had said “it would be a big one.”

Dial testified that the February conversation arose because on February 6 Don Hawkins “came up to me and said, hey, where are you going . . . and he said, well, Jim had just offered . . . me your job. He said you’re not going to be with us much longer.” In light of that report, testified Dial, “I approached Jim on that. I asked him if he was looking for somebody to replace me. He advised me at that time that, no, I think Mark is just fed up with it. He’s going to pay you off and be done with it.”

Silveria denied ever having told Dial that Respondent was fed up with him and was ready to pay him off. Moreover, he denied that, prior to the February 26 layoff, any manager or official of Respondent had ever said that Respondent wanted to lay off, fire or get rid of Dial, or would just pay off Dial and fire or get rid of him to be done with the problem. Furthermore, Silveria denied ever having said that he wished that he could find reasons to terminate Dial. He agreed that there had been two occasions when he had approached Dial, as well as every other employee, in connection with the tape balls. However, testified Silveria, when Dial had said, on one of those occasions, “that it would be a real feather in [Silveria’s] cap if you could get me,” he

had not responded “other than giving him a peace sign and walking away.” Silveria further testified that on the other occasion, Dial had retorted, “oh boy, if you can catch me, you would really be doing great.” In fact, Silveria testified, on more than one occasion when he had been checking work in Dial’s area, Dial had “said to me, well, I bet you wish you could fire me. The company would really like you for it.” According to Silveria, in response he had “just raised my hands and said, I don’t want no part of it.”

In so testifying, Silveria appeared to be doing so candidly. On the other hand, in contrast to his descriptions of earlier remarks by Respondent’s officials, Dial’s descriptions of remarks by Silveria seemed hesitant and confused. There was no corroboration for any of the above-described remarks attributed to Silveria. Hawkins appeared as a witness for the General Counsel, but did not describe any conversation in which he had reported to Dial about being offered the latter’s job. Moreover, although Hawkins described remarks by Mark Hogan, by Boone and by Wilson, he never testified that Silveria had offered him the job being performed by Dial in February—the offer that assertedly had led Hawkins to make the purported remark to Dial that, in turn, allegedly led Dial to approach Silveria and the latter to make allegedly unlawful remarks about Respondent paying Dial off to be rid of him. In like vein, there was no corroboration of Dial’s description of the alleged two feathers and big bonus or raise comments that Dial attributed to Silveria. In addition, though called as a rebuttal witness, Dial did not dispute Silveria’s testimony that he (Dial) had repeatedly, in effect, made remarks that appeared designed to provoke responses showing that Respondent would reward Silveria should the latter devise an excuse to facilitate Dial’s termination. In sum, it appeared that Dial attributed unlawful remarks to Silveria in an attempt to fortify his case against Respondent. I credit Silveria’s denials that he had made them.

### C. *The Circumstances of Dial’s Selection for Layoff*

Turning to Dial’s inclusion among employees selected for layoff on February 26, it must be remembered that “the pivotal factor is motive” (citation omitted), *NLRB v. Lipman Bros.*, 355 F.2d 15, 20 (1st Cir. 1966), because the ultimate “determination which the Board must make is one of fact—what was the *actual motive* of the [layoff]?” *Santa Fe Drilling Co. v. NLRB*, 416 F.2d 725, 729 (9th Cir. 1969). As described in subsection III,A, supra, it was primarily a decline in structural steel business, reducing the work at plants two and three, that led Respondent to decide to reduce its employee-complement at all four plants. Unneeded, but valued, plants two and three employees were transferred to plants one and four where they were assigned jobs of employees at those two plants who were, in turn, laid off. The decision to lay off employees was announced at a management meeting on February 14 and, at that meeting, the officials present went down the list of job classifications, from the most skilled one of layout man through new hires. They chose the number of employees from each classification who performed jobs that did not need to be performed and, also, jobs that could be performed by transferred employees who would be needed if structural steel business picked up.

Respondent argues that Dial’s selection for layoff had been no more than a logical consequence of the decisions at the February 14 meeting, particularly of the subsidiary deci-

sion during that meeting to lay off journeyman welders, whom Personnel Manager Rose described “as easier to replace than are some of the other classifications such as layout. Welders are easy to replace. There’s a lot of them out there.” However, while there was a decision at the February 14 meeting to lay off journeyman welders, Respondent’s threshold argument that Dial’s selection had followed from that decision founders on the shoal of its own plant superintendent’s testimony.

As described in subsection III.B, *supra*, Respondent attributes the decision to select Dial for layoff to Boone and Boone testified that he had been the official who had made that decision. However, Boone admitted that he had made that decision before the February 14 meeting. That is, he testified that on February 13 he had been instructed by Reichmuth to select some people to accommodate what the latter anticipated would be an announced reduction in plant one manpower. As a result, admitted Boone, even before arriving at the February 14 meeting, he had prepared a list of six employees for layoff: two new hires, three fitters, and Dial. Inasmuch as Boone admits that Dial had already been selected for layoff before the February 14 meeting, that admission removes any possibility that layoff criteria formulated during that meeting, such as classification as journeyman welder, had actually influenced his choice of Dial for layoff.

Certain other aspects of Dial’s pre-February 14 selection for layoff are significant. “The employer alone is responsible for its conduct and it alone bears the burden of explaining the motivation for its actions.” *Inland Steel Co.*, 257 NLRB 65 (1981). Yet, at no point did Boone explain his reason for his pre-February 14 decision to eliminate Dial from the plant one employee-complement. Indeed, as that subject was pursued, Boone contradicted himself. After testifying initially that he had been told by Reichmuth to “just put some names together,” and after denying that Reichmuth had told him how many names should be listed, Boone then contradicted himself by testifying that he and Reichmuth had decided how many plant one layoffs there would be and, moreover, that they had jointly selected the employees to be laid off. Nevertheless, even with regard to his by-then portrayal of a joint decision, Boone did not explain the motivation for Dial’s inclusion on that list. While there was no representation that Reichmuth was unavailable to testify, Respondent never called him as a witness. Accordingly, the record is devoid of any explanation by Reichmuth for his purported decision, or joint decision, or agreement to Boone’s decision to select Dial for layoff. As a result, not only is the record devoid of an explanation of the motivation for the pre-February 14 selection of Dial for layoff, but Respondent’s failure to adduce one permits an adverse inference concerning the motivation for that decision. See, e.g., *American Petrofina Co.*, 247 NLRB 183, 192 (1980), and cases cited therein.

Despite Boone’s motivation for selecting Dial on February 13 for layoff, Respondent might well have shown that Dial’s layoff, itself, had been lawfully motivated by showing that Dial would have been selected for layoff as a logical consequence of decisions made at the management meeting on February 14. See, e.g., *Hoffman Plastic Compounds*, 306 NLRB 100 (1992) (Manuel V. Osuna). As set forth in subsections III.A and B, *supra*, at that meeting a decision was announced to lay off a group of employees because of de-

clining structural steel business, as well as declining work for plant one employees as a result of robotic welding. Moreover, to select specific employees for layoff, it was decided at that meeting to review each job classification, from the highest level of layout man to the lowest of new hire, to decide how many employees from each classification could be laid off or transferred to other jobs, thereby staffing jobs needed for the current level of work and, also, retaining employees for jobs that would need to be performed if structural steel business picked up.

As described in subsection III.A, *supra*, Dial was a journeyman welder. After the layoff, layout man Ray Valdez was reassigned to hub welding. At the February 14 management meeting a decision was made to retain layout men, because, as a group, they were the most skilled employees and, further, to lay off journeyman welders because, consistent with Rose’s explanation quoted in subsection III.B, *supra*, they were readily replaceable. If, in fact, that course had been followed—all layout men retained and all journeyman welders laid off—there might be little basis for concluding that Dial’s selection for layoff had been unlawfully motivated. But, in fact, the decisions to retain layout men and to lay off journeyman welders were not implemented rigidly. Two layout men were laid off. Two journeyman welders were retained. Accordingly, the record does not allow evaluation of Dial’s layoff selection to be concluded on the simple bases that he had been a journeyman welder and that his replacement had been a layout man. For, the evidence shows that some discretion had actually been exercised within each of those classifications in selecting particular employees for layoff and retention. Furthermore, unexplained inconsistencies are revealed by comparison of the criteria for those selections to Dial’s situation in February.

Respondent’s officials testified that one of the layout men had been selected for layoff because he possessed only limited skills and the other one had been selected because of attendance problems. Moreover, they testified, two journeyman welders had been retained because they performed unique jobs that needed to continue being staffed. For example, one of the two journeyman welders retained was Ed John, the most senior journeyman welder, who ran the Caron Wheels department of 12 to 13 employees in plant three and who was the most qualified employee for that job. Yet, while there had been some decline in hub welding during the period immediately preceding the layoff, due to the introduction of robot welders, Respondent concedes that there had continued to be a need for hub welding to be performed full time after the layoff and, so far as the evidence shows, Dial had been the only plant one employee performing that work prior to the layoff. Consequently, although hub welding is not complex, as was true of the two journeyman welders retained after the layoff, Dial had been performing a unique job and there was an ongoing need for someone to perform that job on a full-time basis following February 26.

Respondent argues that the replacement by Valdez was perfectly consistent with Respondent’s general preference for retaining employees classified as layout men, rather than the easily replaceable ones classified as journeyman welders. Yet, the seeming logic of that argument loses much of its force by examination of Valdez’ employment record in the context of some other decisions made by Respondent in connection with the employees chosen for layoff and retention.

As pointed out above, one layout man was laid off because of attendance problems. And the record shows that Valdez also had been experiencing attendance problems during the 6-month period immediately preceding February 26. In fact, so serious did Respondent regard Valdez' attendance deficiencies that on February 22 it issued a verbal warning to him for five unexcused absences during the preceding 6 months.

Respondent argues that this fact is not inconsistent with its defense, because that warning did not issue until after the February 14 meeting and, moreover, not until a few days before the layoff decision had been implemented. However, most of Valdez' absences that led to the warning had been known to Respondent before February 22. Furthermore, the list of employees to be laid off was not set in concrete on February 14. To the contrary, Boone admitted, "About a week later I added some names to it." But, while he acknowledged that absenteeism had been a factor in selecting employees to be laid off, Boone did not explain why Valdez' unexcused absences had not been considered, at least, in connection with his decision to add "some names to" the layoff list. So far as the evidence discloses, nothing would have prevented him from doing so.

Not only was Valdez classified as a layout man in February, but he had been the hub welder prior to June 21, 1990, when Respondent had switched the jobs of Dial and Valdez, the latter moving to the tray area and the former from the tray area to hub welder. Consequently, argues Respondent, there was an inherent logic to replacement of Dial by Valdez as hub welder. However, whatever strength Respondent's argument derives from those facts is dissipated by certain other ones. Rose testified that "in about May of '90 Mr. Valdez helped develop and set the department up and actually was involved with the first production runs of the hub department during that month," after which he had been assigned full time to work as hub welder. But, since Valdez was transferred to the tray department on June 21, 1990, his actual experience in hub welding had been no more than a few weeks in duration. By contrast, not only had Dial's experience in hub welding been more recent than that of Valdez immediately prior to the layoff, but it had been substantially longer in duration: from June 21, 1990, or for a period of 8 months. Viewed in this context, Valdez' prior experience as a hub welder, of itself, is not the persuasive factor that Respondent argues it to be. Rather, the factor of prior experience in hub welding appears to favor Dial, in the same fashion as it favored retention of journeyman welder John to run the Caron Wheels department.

In fact that appearance is reinforced by the high regard that existed for Dial's performance. For example, Boone testified that, as compared to other journeyman welders, Dial had been "a productive welder" who had no problems with productivity or speed. Similarly, Dial's leadman, Silveria, described him as "a role model as far as an employee goes. He was a hard working man." Indeed, so highly regarded was Dial's performance that during 1990, while he was still working in the tray department at the job to which Valdez would later be transferred, Respondent had offered Dial promotion to the position of leadman. That promotion did not occur, but only because Dial declined it. Nevertheless, that declination does not alter the fact that Respondent felt that Dial's performance was so impressive that promotion to

leadman, a more highly remunerated position than layout man, was warranted.

Indeed, of itself, Valdez' classification as layout man is not so impressive a factor as Respondent now seeks to portray it. Valdez was not so classified until September 3, 1990, less than 6 months before the group layoff—and after Dial had already been offered and declined promotion to leadman. Prior to his reclassification, Valdez, like Dial, had been classified as a journeyman welder. More significantly, there is no showing that, following reclassification, Valdez had performed any functions other than the ones in the tray department that he had been performing since June 21, 1990—and that Dial had performed before that date. That is, there is no evidence that Valdez had performed any of the more highly skilled functions of layout man after his reclassification on September 3, 1990. In consequence, there is no evidence that Valdez' experience at actually performing layout work had even been limited. Yet, while Respondent chose to lay off one layout man because of limited skills, there is no evidence that Valdez' actual experience had been similarly evaluated. Instead, so far as the evidence shows, Respondent simply transferred him to replace the highly regarded, but already pre-selected for layoff, Dial as hub welder, without any consideration of Valdez' attendance record or skill as a layout man. In light of the foregoing facts, the facial logic of retaining Valdez and of laying off Dial, because of their respective job classifications, is neither as compelling nor persuasive as Respondent seeks to have it regarded.

In so evaluating Respondent's defense, it should be kept in focus that I am neither shifting to Respondent a burden of proving that it did not lay off Dial for union activity nor substituting my own subjective impression of business decisions that Respondent should have made to implement layoffs on February 26. The General Counsel has established a prima facie case. Dial had been the Union's leading proponent during the organizing campaign. He had been known to Respondent as the Union's leading proponent. In light of those facts, his layoff tends to "give rise to an inference of violative discrimination." *NLRB v. First National Bank of Pueblo*, 623 F.2d 686, 692 (10th Cir. 1980).

"Timing alone may suggest anti-union animus as a motivating factor in an employer's action." *NLRB v. Rain-Ware, Inc.*, 732 F.2d 1349, 1354 (7th Cir. 1984). Here, Dial was selected for layoff while final resolution of the representation proceeding was still pending. Only 2 to 3 months before his layoff he had actively participated as employee-advisor to the Union's counsel in a hearing conducted in connection with resolution of that proceeding. Further, so far as the evidence discloses, the layoff on February 26 had been the first one effected by Respondent since June 20, 1990.

Not only is timing of Dial's selection for layoff a persuasive factor, but it followed Boone's warning, in January 1990, that employees could be replaced—which, of course, is precisely what happened to Dial—for engaging in protected activity, as well as President Mark Hogan's express threat that Dial was "history" for supporting the Union, rather than Jeff Hogan, and Wilson's specific threat that Dial would be the number one employee chosen for layoff. There is no evidence even tending to show that, by February 26, any one of those officials had changed his mind and felt any differently toward union activity and Dial's involvement in it. Given that fact, as well as the ongoing representation pro-

ceeding, there is no basis for disregarding those statements by Boone, Mark Hogan, and Wilson as somehow stale.

Although Loveless was not laid off on February 26, as Wilson had threatened 2 months earlier, Wilson had not been the official who selected employees for layoff on February 26. In any event, as Justice Powell, speaking for a majority in a case involving discrimination, albeit of the racial type, pointed out, a single act of discrimination “would not necessarily be immunized by the absence of such discrimination in the making of other comparable decisions.” *Village of Arlington Heights v. Metropolitan Housing Development*, 429 U.S. 252, 266 fn. 14 (1977). That same analytical approach has been applied to allegations of discrimination arising under the Act. See, e.g., *NLRB v. W. C. Nabors Co.*, 196 F.2d 272, 276 (5th Cir. 1952), cert. denied 344 U.S. 865 (1952); *Nachman Corp. v. NLRB*, 337 F.2d 421, 424 (7th Cir. 1964). Consequently, the union support of other employees is not determinative of the motivation for Dial’s selection.

In view of the foregoing facts establishing a prima facie case, the burden shifted to Respondent and it is in that context that Respondent’s defense must be evaluated. However, while Boone attributed the decision to lay off journeyman welders to Jeff Hogan—“Jeff said they were going to lay off all . . . journeymen [sic] welders, welder A’s and welder B’s”—Rose, in contrast, attributed the decision to lay off plant one journeyman welders to Reichmuth: “Paul Reichmuth did tell us, or state that he does not need journeyman welders.” While there may have been no absolute inconsistency in that testimony by Boone and Rose, the fact remains that neither Jeff Hogan nor Reichmuth appeared as witnesses. Consequently, there is no firsthand evidence describing whatever factors had motivated decision(s) concerning journeyman welders by one or both of them and no explanations of the reason(s) for it (them).

Lacking such firsthand evidence, the record is left with secondhand descriptions of the decisions concerning journeyman welders made by Jeff Hogan or by Reichmuth, or by both of them. Yet, that secondhand evidence—the descriptions of Boone and Rose—was contradicted or, at least, diminished at each step by objective facts.

Whatever decisions were made about retaining layout men and laying off journeyman welders, those were not rigid ones: some layout men were laid off and some journeyman welders were retained. While the two retained journeyman welders performed somewhat unique jobs, so too did Dial, Respondent’s only hub welder. Although Dial’s replacement, Valdez, had experience hub welding, it was neither as recent nor of so long a duration as that of Dial. While Valdez was classified as a layout man, he had been reclassified from journeyman welder to layout man only a few months before the layoff and Dial’s work had been so highly regarded that he had been offered the position of leadman in the department in which Valdez had been working immediately prior to February 26. Furthermore, Valdez had experienced attendance problems sufficient to warrant a formal verbal warning about his unexcused absences shortly before February 26 and it had been attendance problems that had specifically led Respondent to select a layout man for layoff on that date. This apparent inconsistency was never explained by Respondent. Nor did it explain why another layout man had been selected for layoff on the basis of limited skills, but Valdez had been

transferred and retained, even though he had only limited hub welding experience and, so far as the record discloses, no more than limited experience in actually performing the work of layout man.

Not only were there objective inconsistencies in Respondent’s secondhand evidence regarding the layoff selection decisions made by Respondent in the context of Dial’s selection for layoff, but, as concluded in subsection III,B, supra, Boone was not a credible witness and, further, Rose appeared to be testifying in a fashion intended to fortify Respondent’s position. Consequently, Respondent’s evidence fails to credibly show that Dial would naturally have been selected for layoff as a result of whatever criteria decisions were formulated by Respondent’s officials on and after February 14. Furthermore, Boone’s testimony establishes that Dial’s layoff selection had no relation whatsoever to those decisions. For, Dial was deprived of a level playing surface in those decisions by Boone’s admitted pre-February 14 selection of Dial for layoff and, consequently, there is no credible basis for concluding that he would have been selected for layoff in the ordinary course of whatever decisions were made on and after February 14. Therefore, I conclude that a preponderance of the credible evidence establishes that Dial had been laid off on February 26 because of his union activities and that his layoff violated Section 8(a)(3) and (1) of the Act.

#### CONCLUSION OF LAW

Hogan Manufacturing, Inc. has committed unfair labor practices affecting commerce by laying off Charles Dial because of his union activity, in violation of Section 8(a)(3) and (1) of the Act, and by threatening to select employees for layoff on the basis of their union support, in violation of Section 8(a)(1) of the Act, but has not violated the Act in any other manner.

#### REMEDY

Having found that Hogan Manufacturing, Inc. engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and, further, that it be ordered to take certain affirmative action to effectuate the policies of the Act. With respect to the latter, it shall be ordered to offer to Charles Dial immediate and full reinstatement, as a journeyman welder, to the position of hub welder for master and slave arms for lifts, dismissing, if necessary, anyone who may have been hired or assigned to perform the work from which he was laid off on February 26, 1991. If that position no longer exists, it shall be ordered to reinstate Dial to a substantially equivalent position, without prejudice to his seniority or other rights and privileges. It also shall be ordered to make Dial whole for any loss of pay and benefits he may have suffered because he was unlawfully laid off, with backpay to be computed on a quarterly basis, making deduction for interim earnings, *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and with interest to be paid on the amounts owing as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>2</sup>

<sup>2</sup>If 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

## ORDER

The Respondent, Hogan Manufacturing, Inc., Escalon, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Laying off or otherwise discriminating against Charles Dial or any other employee because of support for Shopmen's Local No. 790, International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO or any other labor organization.

(b) Threatening to select employees for layoff because of their support for the above-named labor organization or for any other labor organization.

(c) 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 Charles Dial immediate and full reinstatement as a journeyman welder to the position of hub welder for master and slave arms for lifts, dismissing, if necessary, anyone who may have been hired or assigned to the position from which he was unlawfully laid off or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of pay and benefits he may have suffered as a result of his discriminatory layoff, in the manner set forth above in the remedy section of the decision.

(b) 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 and reinstatement rights due under the terms of this Order.

(c) Post at its Escalon, California plants copies of the attached notice marked "Appendix."<sup>3</sup> Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent 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 Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

adopted by the Board and all objections to them shall be deemed waived for all purposes.

<sup>3</sup>If 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."

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

IT IS FURTHER ORDERED that the complaint be, and it hereby is, dismissed insofar as it alleges violations of the Act not found herein.

## 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.

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 lay you off or otherwise discriminate against you because you engage in union activity on behalf of Shopmen's Local No. 790, International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO or on behalf of any other labor organization.

WE WILL NOT threaten to select you for layoff because of your support for the above-named labor organization or any other labor organization.

WE WILL NOT in any like or related manner interfere with any of your rights set forth above which are guaranteed by the Act.

WE WILL offer to Charles Dial immediate and full reinstatement as a journeyman welder to the position of hub welder for master and slave arms for lifts, dismissing, if necessary, anyone who may have been hired or assigned to perform the work which he had been performing prior to his unlawful layoff or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and WE WILL make Dial whole for any loss of pay and benefits he may have suffered as the result of the discrimination directed against him, with interest on the amounts owing.

HOGAN MANUFACTURING, INC.