

**R & H Masonry Supply, Inc. and General Teamsters, Warehousemen and Helpers Union Local 890, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America.** Case 32-CA-530

September 29, 1978

### DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS JENKINS  
AND PENELLO

On July 25, 1978, Administrative Law Judge Richard D. Taplitz issued the attached Decision in this proceeding. Thereafter, the General Counsel filed a brief in support thereof, and the Respondent filed exceptions.

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

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,<sup>1</sup> and conclusions<sup>2</sup> of the Administrative Law Judge and to adopt his recommended Order.<sup>3</sup>

### ORDER

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

<sup>1</sup> The Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enf'd, 188 F.2d 362 (C.A. 3, 1951). We have carefully examined the record and find no basis for reversing his findings.

<sup>2</sup> The Respondent has requested that the hearing be reopened for the consideration of additional evidence which has recently become available since the issuance of the Administrative Law Judge's Decision. The Board denies the Respondent's motion inasmuch as there is nothing in the Respondent's supporting affidavit as to what new evidence it seeks to present. Moreover, Respondent did not make a motion to postpone the hearing until a week prior to the scheduled hearing, and such motion at that time was deemed untimely.

<sup>3</sup> In adopting the Administrative Law Judge's recommendation that Respondent be ordered to reestablish its trucking operation, we find it necessary to clarify a statement in the remedy section of his Decision that "The Board has not ordered such a *status quo ante* remedy in situations where it could be punitive because it would cause undue economic hardship," citing *Great Chinese American Sewing Company*, 227 NLRB 1670 (1977). The *Great Chinese* case involved a unique situation, and the majority, rather than forcing the reestablishment of an unprofitable operation, found that the policies of the Act were sufficiently fulfilled by a full make-whole order covering the employees of the terminated plant. Chairman Fanning would have ordered the respondents to reopen the closed plant.

We continue to adhere to the well-established principle that, in cases involving discriminatory conduct, the restoration of the *status quo ante* is the proper remedy unless the wrongdoer can demonstrate that the normal remedy would endanger its continued viability. See *N. C. Coastal Motor Lines, Inc.* 219 NLRB 1009 (1975), enf'd, 542 F.2d 637 (C.A. 4, 1976); *Townhouse T. V. & Appliances*, 231 NLRB 716 (1974), enforcement denied 531 F.2d 826 (C.A. 7, 1976).

tions Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, R & H Masonry Supply, Inc., Salinas, California, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

### DECISION

#### STATEMENT OF THE CASE

RICHARD D. TAPLITZ, Administrative Law Judge: This case came to hearing at Monterey, California, on March 21, 1978. The charge was filed on November 10, 1977, by General Teamsters, Warehousemen & Helpers Union Local 890, *International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America*, herein called the Union. The complaint and amended complaint<sup>1</sup> issued respectively on December 29, 1977, and March 14, 1978, alleging that R & H Masonry Supply, Inc., herein called Respondent, violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act, as amended.

#### Issues

The primary issues are:

1. Whether Respondent violated Section 8(a)(1) of the Act by interrogating employees concerning their union activities and by telling employees that they were being discharged because of their support for the Union.

2. Whether Respondent violated Section 8(a)(3) and (1) of the Act by discharging employees Rory Ross, Joseph Lippe, Gary Castro, Paul Marquez, and Larry Lucas because of their union activity; by contracting a portion of its work previously performed by employees because of their union activity; and by attempting to convert one employee to a managerial employee and another employee to an independent contractor to interfere with its employees' right to select the Union as their bargaining representative.

3. Whether Respondent violated Section 8(a)(5) and (1) of the Act by refusing to recognize or meet with the Union, which had been certified by the Board as the collective-bargaining agent of its employees.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Briefs, which have been carefully considered, were filed on behalf of the General Counsel and the Respondent.

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

#### FINDINGS OF FACT

##### 1. THE BUSINESS OF RESPONDENT

Respondent, a California corporation with an office and principal place of business in Salinas, California, is engaged

<sup>1</sup> The amended complaint was further amended at the opening of the hearing.

in the retail and nonretail sale of masonry products. During the past 12 months Respondent derived gross revenues in excess of \$500,000. During the same period Respondent purchased and received goods or services valued in excess of \$5,000 which originated outside of California. The complaint alleges, the answer admits, and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

## II. THE LABOR ORGANIZATION INVOLVED

The Union is a labor organization within the meaning of Section 2(5) of the Act.

## III. THE ALLEGED UNFAIR LABOR PRACTICES

### A. *The Sequence of Events*

#### 1. Background

Respondent sells concrete blocks for commercial buildings, as well as fire brick and other materials for home construction. Ninety percent of its business is to building contractors. Respondent generally delivers goods to the contractors. Though years ago some of the deliveries were made by independent contractors, in recent years, until mid-August 1977, deliveries were made by Respondent's employees in Respondent's trucks. After mid-August deliveries were made by an independent contractor and by a former employee whom Respondent sought to make an independent contractor.

Roy Guillemin is president and John Grant is manager of Respondent. Both are supervisors within the meaning of the Act.<sup>2</sup>

At the time the alleged unfair labor practices occurred, Respondent employed six employees as drivers and yard employees. They were truckdrivers Joseph Lippe, Rory Ross, Paul Marquez, Larry Lucas, and yardmen David Garza and Gary Castro. Marquez, who was hired in 1968, was the most senior employee, and Garza, who was hired on July 13, 1977, was the least senior. Near the end of July 1977, all six of these employees signed authorization cards on behalf of the Union. By letter dated August 1, 1977, the Union requested that Respondent recognize it as the representative of its employees. On the same date the Union filed a petition for an election in Case 20-RC-14382. An election was held on August 30, 1977, pursuant to a Stipulation for Certification Upon Consent Election. The Union won the election and on September 8, 1977, the Union was certified by the Board as the exclusive representative of Respondent's employees in the following unit:

Truck drivers, forklift drivers, over-the-road drivers, yard men, helpers, maintenance mechanics employed by the Employer at its Salinas, California facility; excluding supervisors, office clerical employees, and guards as defined in the Act.

#### 2. Respondent contracts out bargaining unit work to Ray & Jim Trucking

The Union's demand for recognition was mailed on August 1 and received by Respondent on August 2, 1977. On August 10 or 11, Respondent's manager, Grant, called Raymond Rodriguez, the proprietor of a trucking concern known as Ray & Jim Trucking, and told him that Respondent's President Guillemin wanted to see him. The same or the following day, Rodriguez went to Respondent's premises and had a meeting with Guillemin and Grant. Before that meeting Rodriguez did not know what the subject of the meeting would be. Guillemin asked Rodriguez whether Rodriguez was interested in buying trucks from Respondent, and Guillemin told Rodriguez what the cost and conditions would be. Rodriguez replied that he had to discuss the matter with his partner, Jim Oksen. Later the same day, Rodriguez spoke to Oksen, and they decided to accept Guillemin's offer. The following day Rodriguez told Guillemin of his acceptance. Guillemin's attorney prepared the necessary documents, and they were signed on August 15, 1977. No one had spoken to Rodriguez about the possible purchase of the trucks until the meeting of August 10 or 11. The contract provided for the sale of the trucks, with payment on a monthly basis, and with Respondent maintaining a lien on the trucks. Respondent sold two trucks and two forklifts to Ray & Jim Trucking for about \$28,000. Ray & Jim Trucking pays Respondent about \$960 per month on a promissory note. Also on August 15, 1977, Respondent and Ray & Jim Trucking executed an agreement under which Ray & Jim Trucking was to do hauling services for Respondent at specified rates as an independent contractor. The contract term was for 1 year (September 1, 1977, through August 31, 1978). There was no provision that work would be done exclusively by Ray & Jim, nor was there any provision for a fixed amount of work to be performed.

The above findings are based on the credited testimony of Rodriguez. Grant testified that the meeting with Rodriguez in which Respondent offered to sell the trucks was held on August 1, 1977, rather than August 10 or 11 as testified to by Rodriguez. Grant averred that he did not know of any union activity until August 2. Grant also averred that Guillemin told him sometime in June or July that an offer was made to Ray & Jim Trucking. Rodriguez testified that no offer was made until the meeting of August 10 or 11. Guillemin, who is living outside of the United States, did not testify. Rodriguez is a convincing witness who appeared to have an accurate recollection of the events. If he had any interest in the proceeding, it was to protect his contractual relationship with Respondent, yet his testimony was that the first contact Respondent made to him about the sale of the trucks was on a date after Respondent obtained knowledge of the union activity. Grant's demeanor on the stand did not inspire confidence. I credit Rodriguez where his testimony differs from Grant's. Grant also averred that Guillemin spoke to him in January 1977 about the possibility of selling the trucks. As I believe that Grant was less than candid with regard to his attempt to predate the negotiations with Rodriguez, I do not credit his uncorroborated assertion that he had prior conversations with Guillemin about such matters.

<sup>2</sup> Grant hires, fires, and directs the work of employees.

Since August 15, 1977, much of Respondent's driving work had been performed by Ray & Jim Trucking with trucks formerly owned by Respondent. The trucks are driven by two drivers who are assigned to work at Respondent's premises, and Grant retains full control of the trucks. One of the drivers is Rory Ross, who worked for Respondent before the sale of the trucks. Grant gives Ross his dispatch orders, and Ross' duties have not changed since the transfer of the trucks. He drives the same truck he drove before the transfer, and the truck is identified on its side as a truck of Respondent. Ross had a key to Respondent's yard and office before the transfer. After the transfer the locks were changed, and Ross was given a key only to the yard. Ross' pay remained the same both before and after the transfer. Guillemin assisted Ross in obtaining a job with Ray & Jim Trucking.

### 3. The interrogation

In the beginning of August 1977, Grant had a conversation with Rory Ross in Respondent's office. Grant showed Ross the Union's letter requesting recognition and asked Ross whether he had signed one of the union cards. Ross replied that everyone had. Grant replied that he just wanted to make sure that the Union wasn't trying to shove it down everyone's throat.

In early August, Grant asked Marquez whether he had signed a union card, and Marquez answered that he had. Also in early August, Grant spoke to Lippe in Respondent's office. Grant asked if Lippe had signed a union card, and Lippe replied that he had.<sup>3</sup>

### 4. The discharge of Marquez, Ross, Lippe and Castro

On August 12, 1977, Respondent discharged Marquez, Ross, and Lippe.

Marquez was called into Respondent's office where Grant and Guillemin were waiting for him. Grant told Marquez that Guillemin had sold the trucks and that Marquez' services were no longer needed.

Ross was called into the office where Guillemin told him that the trucks had been sold and that Ross did not have a job. Guillemin also told Ross that he could help him find a job with another outfit. Ross was thereafter employed by Ray & Jim's Trucking, as is discussed above.

Grant also spoke to Lippe and told him that the equipment had been sold and that Respondent did not need him any longer. Lippe said "This was a good way for Roy Guillemin to take care of the Union." Grant responded "Well, how would you like it if you had a business and somebody came in and told you how to run it?" Ross said there were good and bad points about the Union, and Grant replied that he did not like unions. Grant also said "All of this wouldn't have happened if you hadn't gone to the Union or try to organize the Union."

<sup>3</sup> The above findings are based on the credited testimony of Ross, Marquez, and Lippe. Grant in his testimony acknowledged that in late July or early August, Lucas told him that all the employees had signed authorization cards, but Grant denied that he ever discussed with the employees their sympathies toward the Union. I credit the employees and do not credit Grant.

Castro was on vacation when the others were discharged on August 12, 1977. He returned to work on August 15 and found that the gate was locked. Grant came by and opened the door. Grant told Castro that a lot of "shit" went on Friday. Grant also said that they had sold the equipment and that left Castro without a job. Grant asked Castro whether he had signed a card and said that if he had signed a card, he would know more about what happened the previous Friday. Castro said that he had signed. Castro was allowed to complete that day's work. While he was working, Guillemin saw him and asked Grant what Castro was doing there. Guillemin said, "I told you to get rid of him." Later, Guillemin mentioned something about the Union to Castro and said, "How would you like somebody to tell you how to run your business?"<sup>4</sup>

### 5. The attempt to convert Lucas from an employee to an independent contractor

Larry Lucas was nominally discharged with the other employees on August 12, 1977. However, he continued to work at Respondent's premises under a new arrangement. On August 15, Lucas and Respondent entered into an agreement under which Lucas purchased a truck and trailer from Respondent for a purchase price of \$20,000, to be paid in monthly installments of \$636. The truck and trailer were the same ones that Lucas had formerly driven. Respondent retained a lien interest in the equipment. By a further agreement dated August 15, 1977, Lucas leased the equipment to Respondent at a rental to be computed on the basis of how much the equipment was used at a rate of 40 cents per mile and \$10 for each unloading. However, despite the agreements, title to the equipment has not been transferred from Respondent to Lucas because Lucas has not yet obtained a Public Utilities Commission license. Respondent's name on the body of the truck has not been changed. Lucas continues to provide the same driving services for Respondent that he had formerly provided, and he is still dispatched by Respondent in the same manner. He continues to be covered by Respondent's group insurance health and welfare plan, but he now reimburses the Company for the cost. He purchases fuel from Respondent's fuel pump at Respondent's cost. He performs services for no one other than Respondent.

Lucas has continued to perform the same work that he previously did, with the use of the same equipment. The agreements he entered into with Respondent have not been fully put into effect, and title to the equipment has not been transferred to him. With regard to his work, Respondent retains the right to and does control, not only the end to be achieved, but also the means to be used in reaching the end. Lucas performs functions that are an essential part of Respondent's normal operation and does not operate an in-

<sup>4</sup> The above findings are based upon the credited testimony of Marquez, Ross, Lippe, and Castro. Grant testified that on August 12, 1977, he told Lippe that the trucks were being sold and that there was no longer a position for him. According to Grant, Lippe said that that was happening because they tried to get the Union in, and Grant replied, "I didn't say that, you said that." I credit Lippe's version of the conversation rather than Grant's. Where Grant's testimony differs from that of the employees with regard to the termination interviews, I credit the employees.

dependent business. He has a continuing working arrangement with Respondent. He does business in Respondent's name and is dispatched by Respondent. He does not have the opportunity to make decisions which involve risks taken by independent businessmen which may result in profit or loss. I find that he continues to be an employee of Respondent rather than an independent contractor. See *Standard Oil Company*, 230 NLRB 967 (1977); *National Freight, Inc.*, 146 NLRB 144 (1964). Respondent did, however, change the manner in which he was paid and the amount of his pay.

#### 6. The attempt to convert Garza to a managerial employee

David Garza was not discharged with the other employees on August 12, 1977. His duties as a yardman included making up orders, waiting on customers, loading and unloading pallets and trucks, and delivering small orders in town. Before August 12, he was paid \$4 an hour and worked with one other yardman, Gary Castro. He had not been told that he was entitled to any vacation benefits. On August 12, Guillemín called him into Respondent's office and asked him how he would like to work under a new corporation. Garza asked what Guillemín meant, and Guillemín replied that he had sold all the equipment and that he would pay Garza \$1,000 a month plus overtime and would give him 2 weeks of vacation time. Garza agreed to the new arrangement. After August 12, he continued to perform all his old duties and in addition was given some limited new ones. He now spends about 1 hour a week working in the office, where he puts away certain papers and mails out billing forms. Between August 12 and the date the trial opened on March 21, 1978, Grant gave Garza about 20 minutes of training with regard to such things as invoices and cash sales. However, Garza was never asked to perform work related to that training. He does no dispatching and does not write up tickets to give to the drivers. Garza does not have any authority to hire or fire anyone, and there is no employee under him. The only day that Grant did not come to work his son did, and his son told Garza what to do.<sup>5</sup>

Garza continues to be an employee in the bargaining unit. Any duties he has in the office are too nominal to change his status.

#### 7. The refusal to bargain

The Union was certified as the collective-bargaining representative of Respondent's employees on September 8, 1977. Shortly thereafter, David Lindell, a business representative for the Union, went to Respondent's office and asked Grant to sit down and begin negotiations. Grant re-

<sup>5</sup> These findings are based on the testimony of Garza. Grant testified that after August 12 he used Garza to help with the billings and occasionally to dispatch and give orders to the truckdrivers. He averred that Garza filled in for him. Later in his testimony Grant averred that Garza is still a yardman and that to some extent he wants to train Garza into an office position. He averred that he spoke to Garza about office procedures on two occasions and will do so more in the future. I credit Garza's testimony where it conflicts with that of Grant.

plied that it was up to Guillemín and that Guillemín was out of town and would not return for a long time. They arranged to have Guillemín phone Lindell at the union office. On September 16, Guillemín did call Lindell. Lindell told him that the Union wanted to meet to begin negotiations. Guillemín replied that he had nothing to negotiate for and that he had terminated all his employees, except for one in the yard who was in a management training program. Respondent has taken no action to recognize or to negotiate with the Union since that time.

#### 8. Respondent's defense

Grant testified that he had received customer complaints about Castro, that he was not satisfied with Castro's work, and that he intended at some future date to discharge him. He averred in substance that Lippe was of limited use to Respondent because of insurance problems relating to traffic tickets Lippe received before he was hired. He also testified that for the last 7 years he had not gotten along well with Marquez and that he intended at some future time to discharge him. However, there is no serious contention or probative evidence that the events that took place on about August 12 were keyed to such matters. Respondent in its brief contends that the sale of the trucks and the discharge of the related employees were motivated by financial necessity and were, therefore, economically justified.

Grant averred that for the past couple of years business had been getting worse and worse, primarily because of the difficulty in obtaining supplies. Respondent's income tax return for 1976 showed profits of \$16,000, while Respondent was usually in the \$24,000 to \$25,000 bracket. Respondent's records show that it suffered a loss each month from January through April 1977. However, those records show that the picture started improving in March 1977. In February 1977, the loss was \$5,825.32. In March the loss dropped to \$723.43, and in April the loss dropped to \$219.16. From that time on Respondent showed profits. There was a profit of \$3,722.57 in May, \$3,056.27 in June, \$1,956.14 in July, and \$4,912.21 in August.<sup>6</sup>

Grant testified that prior to August 1977, he discussed with Guillemín the possibility of selling the trucks. As is set forth in more detail above, I am unable to credit that testimony.

Viewing Respondent's records as a whole, it appears that Respondent's financial problem did not reach a peak about the time Respondent made the changes in question. Respondent's difficulties went back at least to July 1976, and by May 1977, the picture was improving.

<sup>6</sup> Respondent's records show the following profits and losses:

1976		1977	
July	6,970.48	Jan	1,291.84
Aug	12,611.68	Feb	-5,825.32
Sept	-7,969.79	Mar	-723.43
Oct	3,130.17	Apr	-219.16
Nov	4,068.70	May	3,722.57
Dec	2,048.99	June	3,056.27
		July	1,956.14
		Aug	4,912.21
		Sept	8,668.30
		Oct	4,196.28

### B. Analysis and Conclusion

Respondent learned of its employees' union activity when it received the Union's demand for recognition and a copy of the petition for an election on about August 2, 1977. Respondent's reaction was immediate and decisive. Within a matter of a few weeks, Respondent interrogated employees and found that all had signed cards; sold some of its trucks to Ray & Jim Trucking and made a contractual arrangement to have Ray & Jim Trucking perform trucking services for it on an independent contractor basis; discharged Ross, Lippe, Castro, and Marquez; made a paper sale, without transfer of title, of one of its trucks to Lucas, under which Lucas continued to perform the work he had always done with the same truck but was to be considered an independent contractor; and gave nominal managerial duties to Garza in an unsuccessful attempt to remove him from the bargaining unit. Respondent's attempt to explain its conduct in terms of economic need was completely unconvincing. If Respondent's financial condition needed improvement, that need had existed for a number of years. It was only when its employees engaged in union activity that Respondent took action. Respondent's manager, John Grant, admitted to employee Joseph Lippe the reason for Respondent's action in the conversation in which Lippe was discharged. Grant told Lippe that all of this would not have happened if the employees had not gone to the Union or tried to organize the Union. I find that Respondent's actions were motivated by antiunion considerations.

By discharging Ross, Lippe, Castro, and Marquez and by contracting out part of its trucking operation, Respondent violated Section 8(a)(3) and (1) of the Act. *Krebs and King Toyota, Inc.*, 197 NLRB 462 (1972); *Jay Foods, Inc.*, 228 NLRB 423 (1977) enfd. except for remedy 573 F.2d 438 (C.A. 7, 1978).<sup>7</sup>

As part of its antiunion activity, Respondent attempted to remove Lucas and Garza from the bargaining unit. Respondent designated Lucas as an independent contractor and Garza as a managerial trainee. Both attempts were unsuccessful, but Respondent nonetheless refused to bargain with the Union after the certification by claiming that it had terminated all of its employees except for one in a management training program. Under those circumstances, Respondent violated Section 8(a)(1) of the Act by attempting to remove Lucas and Garza from the bargaining unit. Cf. *Pilot Freight Carriers, Inc.*, 221 NLRB 1026, enforcement denied 558 F.2d 205 (C.A. 3, 1977). In attempting to remove those employees from the bargaining unit, Respondent changed their wages and conditions of employment. By doing so, it violated Section 8(a)(3) and (1) of the Act.

<sup>7</sup> In *Harper Truck Service, Inc.*, 196 NLRB 262, fn.2 (1972), the Board held:

We find it unnecessary to comment upon the Trial Examiner's view that *N.L.R.B. v. Darlington Manufacturing Co.*, 380 U.S. 263, does not apply to the "partial closing" of an operation. Unlike *Darlington*, the instant case involves the closing of a part of Respondent's operation and the contracting out of such work to independent contractors. Because this was done for antiunion reasons we find a violation of Section 8(a)(3). In *Darlington*, the Supreme Court analogized such a situation to a "runaway shop" (380 U.S. at 272, fn. 16), and the Board thus does not apply the "chilling" requirement to cases of antiunion subcontracting. *Walker Company*, 183 NLRB No. 136, at fn. 6.

In early August 1977, Respondent's Manager Grant individually interrogated Lippe, Ross, and Marquez concerning whether each of them had signed authorization cards for the Union. Grant learned that all the employees had signed cards. Grant acted on that information to unlawfully discharge Lippe, Ross, Marquez, and Castro and to take the other unlawful action set forth above. That interrogation was coercive and violative of Section 8(a)(1) of the Act.<sup>8</sup>

On August 12, 1977, when Grant told Lippe that the equipment had been sold and that Lippe was no longer needed, Grant also told him that it wouldn't have happened if the employees had not gone to the Union or tried to organize the Union. In addition to being evidence of motive for the Section 8(a)(3) violation, Grant's remark also independently violated Section 8(a)(1).<sup>9</sup> *Wisconsin Bearing Company*, 193 NLRB 249, 252 (1971), enfd. 414 F.2d 822 (C.A. 7, 1973).

On September 8, 1978, the Union was certified by the Board as the representative of Respondent's employees. After discharging four employees and unlawfully attempting to remove the remaining two employees from the bargaining unit, Respondent refused to recognize or bargain with the Union, on the ground that it had discharged all but one employee and that employee was a management trainee. Respondent cannot use its unlawful conduct as a defense to a refusal to bargain. As the four employees were unlawfully discharged, they never lost their status as employees and Respondent will be ordered to reinstate them. The other two employees never left the bargaining unit, even though Respondent unlawfully sought to remove them. Respondent violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union on and after September 8, 1977, the day of certification.

<sup>8</sup> In *Struksnes Construction Co., Inc.*, 165 NLRB 1062 (1967), the Board held:

In our view any attempt by an employer to ascertain employee views and sympathies regarding unionism generally tends to cause fear of reprisal in the mind of the employee if he replies in favor of unionism and, therefore, tends to impinge on his Section 7 rights. As we have pointed out, "An employer cannot discriminate against union adherents without first determining who they are." *Cannon Electric Company*, 151 NLRB 1465, 1468. That such employee fear is not without foundation is demonstrated by the innumerable cases in which the prelude to discrimination was the employer's inquiries as to the union sympathies of his employees.

In that case the Board held that a violation would be found in a polling situation unless the purpose of the poll was to determine the truth of the Union's claim of majority; that purpose was communicated to the employees; assurances against reprisal were given; the employees were polled by secret ballot; and the employer had not engaged in unfair labor practices or otherwise created a coercive atmosphere. The Board has applied this *Struksnes* criteria to interrogation cases where no poll was taken. *Lorraine Urbauer d/b/a Kimmel's Shop Rite*, 213 NLRB 440, 446 (1974). Even "friendly" interrogation can be coercive. *Quemetco, Inc.*, 223 NLRB 470 (1976).

<sup>9</sup> As Lippe was unlawfully discharged, his status as an employee continued, and the Order herein will call for reinstatement. Grant's remark, therefore, has a future impact and a remedy is appropriate. The General Counsel also contends that Grant's remarks to Castro when Castro was discharged also implied that the union activity was a reason for the discharge. However, Castro's testimony was somewhat ambiguous in that regard, and such a finding is not warranted.

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

The activities of Respondent, set forth in section III above, occurring in connection with the operations of Respondent described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several states, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

#### V. THE REMEDY

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

Respondent sold some of its trucking equipment to Ray & Jim Trucking and discharged four employees. Ray & Jim Trucking hired one of Respondent's discharged drivers and used its new equipment to perform services for Respondent on an independent contractor basis. The trucks continued to carry Respondent's marking and were used to perform work for Respondent. The agreement under which Ray & Jim Trucking performed work for Respondent ran from September 1, 1977, through August 31, 1978, but did not provide for any minimum amount of work to be performed and did not provide that Ray & Jim were the exclusive supplier of trucking services for Respondent. Respondent continued to use one of its own employees, who had been mislabeled an independent contractor, to perform some of its trucking needs. Respondent violated Section 8(a)(3) and (1) of the Act by contracting out bargaining unit work and discharging employees in order to undermine the employees' right to organize. Board remedies attempt to put the parties in the position they would have been but for the unfair labor practice. Where an employer contracts out bargaining unit work and discharges employees in order to interfere with their statutory rights, it is appropriate to order the employer to reinstate the employees with backpay and to discontinue the contracting out of the work that those employees had performed. However, the Board has not ordered such a *status quo ante* remedy in situations where it would be punitive because it would cause undue economic hardship. *Great Chinese American Sewing Company et al.*, 227 NLRB 1670 (1977). The Board and the courts have not always agreed in determining what constituted an undue economic hardship. See *Jay Foods, Inc.*, *supra*; *Richboro Community Mental Health Council, Inc.*, 228 NLRB 1198 (1977); *N. C. Coastal Motor Lines, Inc.*, 219 NLRB 1009, *enfd.* 542 F.2d 637 (C.A. 4, 1976); *Townhouse TV and Appliances*, 213 NLRB 716 (1974), *enforcement denied* 531 F.2d 826 (C.A. 7, 1976); *Krebs and King Toyota, Inc.*, *supra*. In the instant case I do not believe that it would be an undue hardship for Respondent to resume its trucking operation. In a similar situation in *Townhouse TV and Appliances*, *supra*, the Board held:

The Administrative Law Judge apparently was influenced in his denial of the reinstatement remedy requested by the General Counsel by Respondent's statement that the economic burden of purchasing new

trucks and resuming its delivery-installation operations would endanger the continued viability of Respondent. No evidence was offered to support this statement. An official of Rizzo Bros. to whom Respondent subcontracted the delivery and installation work testified that Respondent's oral contract with Rizzo Bros. may be terminated at any time by Respondent. In order to resume deliveries, Respondent need not purchase new trucks. Leasing may do as well. We perceive no undue hardship in requiring Respondent to reestablish the *status quo ante*. To the extent that the reinstatement remedy may be financially burdensome, Respondent's illegal conduct was the cause of it. Not to require Respondent to resume its former operations and reinstate the discriminatorily discharged employees would not completely remedy Respondent's unfair labor practices. If there is hardship caused by this remedy, it is only fair that the wrongdoer rather than the wronged should bear it. Moreover, a meaningful bargaining order can be fashioned only by directing Respondent to reinstate the former delivery system and the discriminatorily discharged employees.

I recommend that Respondent be ordered to reestablish its trucking operation, and to reinstate Ross, Lippe, Castro, and Marquez, and to make them whole for any loss of earnings and other benefits resulting from their discharges by payment to each of them of a sum of money equal to the amount each normally would have earned as wages and other benefits from the date of his discharge to the date on which reinstatement is offered, less net earnings during that period. The amount of backpay shall be computed in the manner set forth in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest thereon to be computed in the manner prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977).<sup>10</sup>

Respondent violated Section 8(a)(1) of the Act by attempting to remove Lucas and Garza from the bargaining unit. That attempt was unsuccessful and both are still employees. No affirmative order of reinstatement is necessary. Garza's pay was increased, but it would not be appropriate to order Respondent to reduce his pay to the old level. Lucas' wages and conditions of employment were substantially altered. I shall therefore recommend that Respondent be ordered to offer Lucas the wages and conditions of employment he received prior to Respondent's attempt to make him an independent contractor and to make him whole for any loss of earnings and other benefits he may have suffered with interest to be computed in the manner set forth above. While Respondent must make that offer, Lucas may elect to reject it and continue working under current wages and conditions.

In view of the seriousness of Respondent's violations, I recommend that Respondent be ordered to cease and desist from in any manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed to them in Section 7 of the Act.<sup>11</sup>

<sup>10</sup> See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

<sup>11</sup> *N.L.R.B. v. Entwistle Mfg. Co.*, 120 F.2d 532, 536 (C.A. 4, 1941); *Boston Pet Supply, Inc.*, 227 NLRB 1891 (1977).

In order to insure that the employees will be accorded the statutorily prescribed services of their selected bargaining agent for the period provided by law, I recommend that the initial year of certification begin on the date that Respondent complies with the Order set forth below.

It is recommended that Respondent be ordered to preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due.

It is further recommended that Respondent be ordered to recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees in the above-described bargaining unit.

#### CONCLUSIONS OF LAW

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

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act by:

(a) Coercively interrogating employees concerning union activities.

(b) Telling an employee that employees were discharged because of their union activity.

(c) Attempting to remove Garza and Lucas from the bargaining unit in order to interfere with its employees' union activities.

4. Respondent violated Section 8(a)(3) and (1) of the Act by:

(a) Discharging Ross, Lippe, Castro, and Marquez because of the union activity of its employees.

(b) Contracting out bargaining unit work because of the union activities of its employees.

(c) Changing the pay and working conditions of Garza and Lucas as part of its attempt to remove them from the bargaining unit.

5. The following unit is appropriate for the purposes of collective bargaining:

Truck drivers, forklift drivers, over-the-road drivers, yard men, helpers, maintenance mechanics employed by the Respondent at its Salinas, California facility; excluding supervisors, office clerical employees, and guards as defined in the Act.

6. The Union is the Board-certified, exclusive collective-bargaining representative of the employees in the above-described unit.

7. By refusing since September 8, 1977, to recognize and bargain with the Union as the exclusive collective-bargaining representative of its employees in the appropriate unit set forth above, Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

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

Upon the foregoing findings of fact and conclusions of

law, upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

#### ORDER<sup>12</sup>

The Respondent, R & H Masonry Supply, Inc., Salinas, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Coercively interrogating employees concerning union activities.

(b) Telling employees that employees were discharged because of their union activity.

(c) Attempting to remove employees from the bargaining unit in order to interfere with its employees' union activities.

(d) Discharging or otherwise discriminating against any employee because of the union activities of its employees.

(e) Contracting out bargaining unit work because of the union activities of its employees.

(f) Refusing to recognize and bargain with General Teamsters, Warehousemen and Helpers Local 890, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, as the exclusive collective-bargaining representative of its employees in the following unit:

Truck drivers, forklift drivers, over-the-road drivers, yard men, helpers, maintenance mechanics employed by the Respondent at its Salinas, California facility; excluding supervisors, office clerical employees, and guards as defined in the Act.

(g) In any other manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed to them in Section 7 of the Act.

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

(a) Reestablish its own trucking operation.

(b) Offer Rory Ross, Joseph Lippe, Gary Castro, and Paul Marquez 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, and make them whole for their loss of earnings in the manner set forth in the section of this Decision entitled "The Remedy."

(c) Offer Larry Lucas the same wages and conditions of employment he enjoyed prior to August 12, 1977, and make him whole for any loss of earnings he may have suffered in the manner set forth in the section of this Decision entitled "The Remedy."

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

(e) Upon request, recognize and bargain with General Teamsters, Warehousemen and Helpers Union Local 890,

<sup>12</sup> In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, as the exclusive collective-bargaining representative of its employees in the bargaining unit set forth above, with respect to wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(f) Treat the initial year of certification as beginning on the date this Order is complied with.

(g) Post as its Salinas, California, place of business copies of the attached notice marked "Appendix."<sup>13</sup> Copies of the notice on forms provided by the Regional Director for Region 32, after being duly signed by Respondent's authorized representative, shall be posted by it immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(h) Notify the Regional Director for Region 32, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

<sup>13</sup> In the event that 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

WE WILL NOT coercively interrogate employees concerning union activities.

WE WILL NOT tell employees that employees were discharged because of their union activity.

WE WILL NOT attempt to remove employees from

the bargaining unit in order to interfere with our employees' union activities.

WE WILL NOT discharge or otherwise discriminate against any employee because of the union activity of our employees.

WE WILL NOT contract out bargaining unit work because of the union activities of our employees.

WE WILL NOT refuse to recognize and bargain with General Teamsters, Warehousemen and Helpers Union Local 890, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, as the exclusive collective-bargaining representative of our employees in the following unit:

Truck drivers, forklift drivers, over-the-road drivers, yard men, helpers, maintenance mechanics employed by us at our Salinas, California facility; excluding supervisors, office clerical employees, and guards as defined in the Act.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of their rights guaranteed to them in Section 7 of the Act.

WE WILL reestablish our own trucking operation.

WE WILL offer full reinstatement to Rory Ross, Joseph Lippe, Gary Castro, and Paul Marquez with backpay, plus interest.

WE WILL offer Larry Lucas the same wages and conditions of employment he enjoyed prior to August 12, 1977, with backpay, plus interest.

WE WILL, upon request, recognize and bargain with said Union as the exclusive collective-bargaining representative of our employees in the bargaining unit set forth above with respect to wages, hours, and other terms and conditions of employment, and, if an understanding is reached, WE WILL embody such understanding in a signed agreement.

WE WILL treat the initial year of certification as beginning on the date that we do the things set forth in this notice.

R & H MASONRY SUPPLY, INC.