

James R. McCaffrey and Edward A. Cook, A Partnership, d/b/a ABC Concrete Company and Kenneth R. Carl and Truck Drivers, Chauffeurs, and Helpers Local No. 100, an affiliate of International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Petitioner. Cases 9-CA-10754 and 9-RC-11759

December 19, 1977

DECISION, ORDER, AND DIRECTION

BY CHAIRMAN FANNING AND MEMBERS
JENKINS AND MURPHY

On July 20, 1977, Administrative Law Judge Anne F. Schlezinger issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its 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 briefs, and has decided to affirm the rulings, findings,¹ and conclusions of the Administrative Law Judge, to modify the remedy so that interest is computed in the manner prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977),² and to adopt her recommended Order, as modified herein.³

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge as modified below and hereby orders that the Respondent, James R. McCaffrey and Edward A. Cook, A Partnership, d/b/a ABC Concrete Company, Westchester, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

Insert the following as paragraph 1(b):

“(b) In any other manner interfering with, restraining, or coercing its employees in the exercise of their rights guaranteed by Section 7 of the Act.”

DIRECTION

It is hereby directed that, as part of the investigation in Case 9-RC-11759 to ascertain a representative for the purpose of collective bargaining with the Respondent Employer, the Regional Director for Region 9 shall, pursuant to the Board's Rules and Regulations and within 10 days from the date of this Decision, open and count the ballots of Michael

Brinck, Kenneth R. Carl, Joe Jasper, Darrell A. Kasson, Terry L. Mayes, George F. Rickers, William A. Watters, and James Wheeler. Thereafter, the Regional Director shall prepare and cause to be served on the parties a revised tally of ballots and thereafter issue the appropriate certification. Case 9-RC-11759 is hereby remanded to the Regional Director for Region 9 for the purpose of carrying out the Board's direction herein.

¹ 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), enfd. 188 F.2d 362 (C.A. 3, 1951). We have carefully examined the record and find no basis for reversing her findings.

² See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

³ The Administrative Law Judge inadvertently failed to conform her recommended Order with her findings. We shall therefore correct her recommended Order accordingly.

DECISION

STATEMENT OF THE CASE

ANNE F. SCHLEZINGER, Administrative Law Judge: Upon a charge and an amended charge filed respectively on October 27 and November 24, 1976,¹ by Kenneth R. Carl, an individual, referred to herein as the Charging Party or Carl, the General Counsel, by the Regional Director for Region 9, issued a complaint and notice of hearing on December 1. The complaint alleges in substance that James R. McCaffrey and Edward A. Cook, d/b/a ABC Concrete Company, referred to herein respectively as McCaffrey, Cook, and Respondent, discharged eight named employees on or about October 26 because of their protected concerted activities, and at all times thereafter failed and refused to reinstate them because of their membership in and activities on behalf of, and to discourage membership in, Truck Drivers, Chauffeurs, and Helpers Local No. 100, an affiliate of International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called the Union, and has thereby discriminated in regard to the hire and tenure of employment of its employees in violation of Section 8(a)(1) and (3) of the National Labor Relations Act, as amended.

Respondent, in its answer duly filed, admits some of the factual allegations of the complaint, but denies that it has committed the alleged unfair labor practices.

On December 17, pursuant to a Stipulation for Certification Upon Consent Election, an election by secret ballot was conducted among certain employees of Respondent to determine whether or not they desired to be represented, for the purposes of collective bargaining, by the Union. On December 30, the Regional Director issued a report on election, challenged ballots, order directing hearing, order consolidating cases, order transferring cases to the Board, and notice of hearing, in which he directed that the issues raised by challenges to 16 ballots in Case 9-RC-11759 be consolidated with Case 9-CA-10754, that the Administra-

¹ All dates hereinafter refer to 1976 unless otherwise indicated.

tive Law Judge designated to conduct the hearing prepare and cause to be served on the parties a Decision containing resolutions of the credibility of witnesses, findings of fact, and recommendations as to the disposition of the said issues, that thereafter the above-entitled cases be transferred to and continued before the Board, and that the provisions of Sections 102.46 and 102.69(f) of the Board's Rules and Regulations shall govern the filing of exceptions.

Pursuant to due notice, a hearing was held before me at Cincinnati, Ohio, on February 24, 25, and March 2, 1977. All the parties appeared at the hearing and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce relevant evidence. Counsel for the General Counsel made an opening statement at the beginning of the hearing. Counsel for Respondent made an opening statement before putting on Respondent's witnesses. The parties waived closing argument. Subsequent to the hearing, on or about March 28, 1977, the General Counsel and Respondent filed briefs which have been duly considered.

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

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent, a partnership, is engaged in the business of manufacturing and delivering ready-mixed concrete at its plant in Westchester, Ohio. Respondent began its operations in February. Since that date, a representative period, Respondent has purchased goods valued in excess of \$50,000 from firms in Ohio, which in turn purchased those goods from outside the State of Ohio and caused them to be shipped directly to their respective locations in Ohio. Respondent's gross revenues exceed \$500,000 annually. The complaint alleges, Respondent in its answer admits, and I find, that Respondent is, and at all times material herein has been, an employer as defined in Section 2(2) of the Act, engaged in commerce and in operations affecting commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

I find, as the complaint alleges and Respondent in its answer admits, that the Union is, and at all times material herein has been, a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The Issues*

The issues herein are (1) whether Respondent, on October 26, discharged Michael Brinck, Kenneth R. Carl, Joe Jasper, Darrell A. Kason, Terry L. Mayes, George F. Rickers, William A. Watters, and James Wheeler because they engaged in protected concerted activities, or whether they were discharged for cause, went on strike, or quit their

jobs; (2) whether Respondent, on and after October 26, refused to reinstate them because of their membership in and activities on behalf of the Union and to discourage membership in the Union, or because they had quit or by their conduct forfeited their jobs; and (3) whether they engaged in an economic or unfair labor practice strike, when the strike began.

The General Counsel called as witnesses Brinck, Carl, Jasper, Kason, Mayes, Rickers, Watters, and Wheeler, who are named in the complaint as the alleged discriminatees, and James Meyer and Marshall Tucker, union business agents. Respondent called as witnesses McCaffrey and Cook, who, Respondent's answer admits, were at all times material herein partners in Respondent, acting as its agents and supervisors within the meaning of Section 2(11) of the Act.²

B. *Respondent's Operations*

Both McCaffrey and Cook had worked for other employers at times with some of the employees here involved, most of whom they had known for years and some of whom were personal friends. When McCaffrey and Cook, while on layoff status from their jobs, were considering formation of their own enterprise, they offered Jasper an opportunity to join them, but after some discussion he declined. The partnership was established, with personal and borrowed moneys, in February. Some of the individuals here involved helped put up Respondent's buildings without pay before employees were hired. The business improved from month to month, and was very good for a period beginning in August.

Cook and McCaffrey were members of the Union holding withdrawal cards. Some of the employees were also members of the same or a different local, and some were also on withdrawal cards while others were current members. Meyer, a business agent of Local 100, the Union here involved, had been a friend for many years of both Cook and McCaffrey. He testified that the wage rates in the area contract were very high, and that he had agreed that this contract would be inapplicable to Respondent in the early stage of its operations.

The work hours of the employees varied considerably depending upon the orders to be filled. When there were no orders to deliver, the men could go home or do building or yard work. They worked long hours on some days, and were paid time and a half for work over 40 hours a week. Jasper and Brinck generally reported to work at 7 a.m., the others at 7:30, unless notified otherwise by Respondent. Mayes and Rickers were frequently late, but their tardiness was tolerated as they were admittedly good workers. Respondent admitted that all eight of the employees here involved were good workers. Both partners worked on various jobs with the men.

Wheeler, who was a mechanic as well as a driver, was hired at \$5 an hour, the highest rate of any of the employees. Others were hired at \$4 or \$4.50. Carl, who was hired at \$4, testified that McCaffrey said he could pay only \$4 then and promised him \$5 when able to pay it, but he

² Pursuant to a request of counsel for Respondent acquiesced in by counsel for the General Counsel, witnesses for the General Counsel including the alleged discriminatees were sequestered before as well as after

they testified. McCaffrey and Cook remained in the hearing room throughout the hearing.

had never asked about a raise. Jasper was hired by McCaffrey at \$4 with a promise of \$5 when the business could pay it. He asked for a raise shortly after he began and went to \$4.50. He testified that he asked several times for the \$5 he had been promised but never received it, and that he had also been promised 50 cents a yard on sales he made but did not get it. Brinck testified that he asked McCaffrey for a raise a few months after he began working, was told to get in his truck and start it, and never asked again. After the business had improved, Wheeler and Jasper asked for raises. McCaffrey told them there was not enough experience yet to raise wages, and that he preferred to and would pay a bonus in good months and at Christmas. The men received a bonus in September.

In October some of the employees began to discuss among themselves trying to obtain a wage increase. They later talked to Wheeler about the possibility of obtaining equal pay for all the drivers at his rate of \$5. Wheeler became a leader in the group discussing this matter. The men also talked about requesting overtime pay for work over 8 hours a day as they very often worked long days when they did not work over 40 hours a week. Cook testified that he saw the men frequently huddling with Wheeler near Wheeler's truck for a period of a few weeks in October.

Wheeler drew up a handwritten document dated October 25, stating that the undersigned wished to be represented by a union organization, which he signed and had notarized. He then obtained the signatures of the other drivers during the evening of October 25, most of them at a restaurant. That evening Watters, Mayes, and Kasson had worked with Cook until about 8:15, and Brinck had worked with McCaffrey until about 8:45. None of them said anything to Cook or McCaffrey about the petition, which was never presented to Respondent. Wheeler told some of the men, when obtaining their signatures to the petition on October 25, that they would try to have a meeting with Respondent the next morning. It was difficult for the men to arrange meetings as they worked irregular hours and spent some of their time out on the trucks.

C. Events of October 26

1. Testimony of the General Counsel's witnesses

a. Conversations in the office

On the morning of October 26, all the employees had arrived at work by 7:30 except Mayes and Rickers. Those present discussed trying to have a meeting that morning. They concluded that Mayes and Rickers were coming late, decided they would go to the office without them, and did so between 7:30 and 7:45. There was some variance in the descriptions by these employees of what occurred, but the substance of their testimony as to what each of them said or heard was in basic agreement. A synthesis of their testimony as to the events of October 26 is as follows.

As Jasper and Brinck were the first to arrive at work, Jasper's truck was in position to be loaded and Brinck's truck was next in line, but no concrete had been loaded yet in either one when the six men walked into the office. Cook was in the office. McCaffrey was in an inner office

speaking on the telephone. Cook asked what the men wanted, and Jasper replied that they wanted to talk to him. When Cook asked what about, no one answered right away. Watters then spoke up and said they wanted equal pay and overtime for work over 8 hours a day. Cook commented that Jasper and Carl sold concrete and were more experienced and faster workers than Watters, but Watters replied that he did the same amount and kind of work.

Watters, Carl, Brinck, Kasson, and Wheeler testified that Cook asked who was the "instigator," then said he knew it was Wheeler as he had seen the men huddled around Wheeler, and that Watters said there was no instigator, they were there as a group. Jasper testified first that Cook asked "Who is the instigator or steward of the bunch?"; that Carl said "Nobody is a steward. We are all in this together"; that Cook then said to Wheeler, "Jim, you must be the instigator because all of the men have been talking to you and have been around you"; and that Wheeler replied, "There is no instigator. We are all together." Jasper later maintained, on cross-examination, that "instigator," a word with which he was unfamiliar, was the term used by Cook, not steward, a word with which he was familiar.

Cook asked Brinck if he was with the others, and Brinck said he was. Cook then went into the inner office and told McCaffrey, who had completed his telephone conversation, that the men wanted more money or would not work. McCaffrey told Cook to send them home. Cook told the men that, as McCaffrey said, they were to go home. The men left the office. While the men denied that any of them told Cook they would not work unless they got more money, none of them disputed what Cook told McCaffrey.

b. Cook's conversations with Mayes and Rickers

As the men walked out of the office with some muttering among themselves, Carl said they should stay calm, drive their cars off Respondent's premises, and obtain union representation. The men drove out to a road in front of Respondent's premises. About that time Mayes and Rickers arrived and were told what happened. Cook at this time came out of the office, approached the group, and asked if Mayes quit with the rest. Mayes said he did not quit but was going along with the group. Cook then asked Rickers what he was going to do, and Rickers also said he was with the group.

As Cook turned to walk back to the office, Rickers spoke to him. During their conversation, Cook said it was just like the men to wait until Respondent was busy to pull a stunt like this and try to put on a squeeze for more money. Rickers said they were not pulling a stunt to put Respondent out of business and would haul concrete for Respondent that day if they could talk later. Cook responded that he would close down before he would take back any of the men. When Rickers repeated that they just wanted a meeting, Cook said that he knew what kind of people they were, that they would ask for \$10 today and \$20 tomorrow, and, again, that he would close down before taking back any of these men. Cook then went back to the office.

c. *Inquiries as to status*

In the meantime Carl left the group to telephone the Board office and found it was not open yet. He later telephoned again and returned to report that he was told they should go in and ask Respondent what their status was. As they went toward the office, McCaffrey got out of the truck he had been driving, and they asked him about their status. He replied that whatever Cook said went for him as he and Cook were partners. As they approached the office, Cook came out, said they were no longer welcome there, and told them to get off the property. Carl said they had to know what their status was. Most of the group testified that Cook merely repeated that they were to get off the property, but Brinck and Mayes testified that Cook also, in reply to Carl's question, said they had all quit as far as he was concerned. The men went back out to the road. Carl testified that he reported to the Board what occurred when the men tried to ascertain their status and was told to file a charge. Later that day Carl and Jasper went to the Board office and filed a charge.

d. *Union representation*

About the time Carl left the group to telephone the Board, Rickers left to telephone the Union. Meyer, a union business agent, arrived that morning just after the men had asked McCaffrey and Cook about their status. The men told Meyer what had happened. He obtained signed union cards from all eight, and then went to the office. McCaffrey was out on a truck but Cook and McCaffrey's wife, both of whom Meyer had known for many years, were in the office. Meyer testified that both were upset about what had occurred; that during the discussion he said all the men had signed union cards; that Cook stated there was no way Respondent could go Union or pay the union rates; that he responded he was not asking that but wanted to work things out; and that Cook said they had to wait and talk to McCaffrey. Meyer went out and reported to the men what was said. He told them that Cook was angry, and that he would go in again when McCaffrey returned.

When Meyer did so, he told McCaffrey he represented the men, and they should work things out. He testified that McCaffrey said the employees were not good union men but, as Meyer knew, McCaffrey and Cook were; that he was "hot" and in no mood to talk but was going home to get a gun; that he would not take back these men, some of whom were close friends, after what they did; and that he could not pay the wages in the area contract. Meyer said he was not talking about those wage rates, and was not going to do anything to hurt a friend's business. He gave McCaffrey his card and suggested McCaffrey call after cooling down. Meyer reported back to the men, and warned them to stay out of McCaffrey's way as McCaffrey was "hot" and was getting his gun. Meyer also told them he was going to file the cards with the Board for an election. He showed them how to make picket signs and left.

McCaffrey called Meyer that night and said he had decided not to take the men back. Meyer asked McCaffrey to call again if he changed his mind, and offered to discuss the matter at any time, including at night or during the weekend. Meyer took strike signs out to the men the next

morning. He and Tucker, another business agent, went to the office to ask if the partners had changed their minds or would try to resolve the issues. Meyer testified that both partners said they were better union members than the employees were, that there was no way they would take the men back, that they would not discuss a union contract or anything else, and that McCaffrey also said he had a gun and the men should stay out of his way.

On October 29, Meyer sent McCaffrey a telegram and a confirmatory letter stating that the Union offered to end the strike and the strikers offered to return to work unconditionally, and asking to be notified when they could return to work. No reply was received. Meyer and Tucker made another visit to Respondent and asked Cook to take the men back, but Cook refused. McCaffrey was out on a job. Meyer went out to the job, asked the same question, and got the same refusal.

The men admittedly never before October 26 discussed the equal pay matter with Respondent, requested in advance a meeting for such discussion, or designated a spokesman for the group. They had made no plans as to what they would do if Respondent refused to talk to them because, as Watters testified, they assumed Cook would get angry but would talk. It was stipulated at the hearing that the men never took a strike vote. The men likewise had never discussed the wage issue with the Union prior to going to the office, or requested union authorization to strike. The employees maintained that none of the men told Respondent on October 26 that they quit their jobs, that they did not insist Cook discuss and work out matters then, and that none of them said they would not work until that was done or unless they were given more money.

Brinck, who was 21 years old, testified that he told the others before they went to the office that he would walk out if Respondent refused to talk to the group, but that he did not hear anyone else talk about walking out. Jasper testified that he did not hear Brinck say he would walk out if they did not get a raise; that none of them wanted to walk out or strike or quit; that they wanted to work, and just wanted to talk about the pay; that, if they had talked, they would not have walked away but would have kept on working; and that they would have worked that day if told they could talk another time. Mayes also testified that he did not hear anyone say they would either get a raise or walk out, that they discussed only wanting to talk, not what they would do, and that he did not understand why the men had been told to go home when they just wanted to talk.

2. Testimony of Respondent's witnesses

a. *McCaffrey*

McCaffrey testified that Jasper's truck was being loaded, and Brinck's truck was next in line to be loaded, at the time the men walked into the office; that it is industry practice for the men to stay at their trucks when they are being loaded; that, although engaged in a telephone conversation in which he was at times engrossed, he saw the men walk into the outer office and "I guess I might have probably been shocked or whatever you'd say, and I heard Joe Jasper say to Ed Cook, 'The boys are not going to work

until you and Jim talk to them about more money.' I heard that. I heard Ed ask Joe, 'Are you with them?' And he asked Mike Brinck the same thing . . . and both of them said, 'Yes' and in the process of taking down an order and talking to customers, I heard brief things such as: I heard, 'steward,' and 'Jim Wheeler.' . . . by the time I hung up the phone, Ed came to me and said, 'These guys aren't going to work until we meet their demands.' I told Ed . . . 'We can't afford more money; let them go.' . . . that's what I said and I would almost — I swear, is word for word, to the best of my knowledge — it's word for word." McCaffrey also testified that he told Cook to let them go in a voice loud enough for the group to hear, and that Cook then told the group, "Boys, you heard it; take off."

McCaffrey testified, on cross-examination, that he heard "steward" mentioned by Cook and heard Wheeler's name mentioned, but did not hear the word "instigator"; that "I really didn't hear anything that Ed said"; and that he heard Watters mention something "to the effect of, equal pay." McCaffrey also asserted that this was a very busy time, that he would have been glad to agree to talk at another time but the men did not ask to do so, that he did not order them to leave but left it up to them if they wanted to quit, and that "when they left, we assumed that they had quit." McCaffrey also maintained that he could not tell the men he would talk later because he understood they demanded discussion right then of their wage demands or they would not work; because he had previously talked to some of them when they sought wage increases and "thought that I had the problem resolved with bonuses and Christmas gifts . . ."; and because, in his experience as a union man, negotiations did not take place without prearrangement at 7:30 in the morning.

McCaffrey had his wife come in to handle the telephone, told her to call the unemployment office for drivers, and delivered a load of concrete in Jasper's truck. He testified that he was getting ready to leave with a second load when the men came back, that Carl asked if they could talk, and that he said he was too busy to talk and agreed with whatever Cook said.

McCaffrey testified that, when he later returned to the office and saw Meyer, he told Meyer he could not talk then because he was "hot" and excited and very busy; that Meyer followed him into the office, where he saw his wife in tears; that she said Meyer "told her that, 'He didn't want this thing to go to the garbage way'"; that this was a common term in the Teamsters Union and he knew, when anyone from the Union used that phrase, it was intimidation; that he told Meyer he was "hot" and he was, and "I probably told Jim at this time that, 'I would get a gun and we would not get our backs to the wall.' . . . I don't recall saying that I would be the aggressor and that I would shoot anybody. I did tell Jim, 'Not to have the men standing in the middle of the driveway trying to stop me or my drivers' and I, and I was truthfully — I was visibly upset." McCaffrey also told Meyer to tell the men to stay out of his way or he would run over them.

McCaffrey explained that, while these men were good employees before this incident, some had worked without pay to help build the plant, and it made no difference to him that the men had signed union cards, he would not talk

to the Union about them because he was convinced they had quit their jobs. He also asserted that their conduct on October 26 had caused business losses. Respondent hired three replacements on October 27, and hired a full complement of replacements in the next few weeks.

b. Cook

Cook testified that Jasper's truck was being loaded with concrete, which requires the driver to stay with his truck, when Jasper and the others walked in; that Jasper said "These boys aren't going to work unless we talk wages with them"; that "I asked him, 'Are you with them men?' And he answered 'Yes' and I asked Mike Brinck, 'Are you with those men?' And he answered 'Yes'; that "I asked who the steward was and pointed at Jim Wheeler and asked if he was the steward and then, Buzz [Watters] spoke up and says, 'No, we're all in it together.' Buzz said that he wanted time and a half — not time and a half — he wanted equal pay for all of the men, and as I turned, Joe says, 'All I want is [a] 50¢ an hour raise.' " Cook testified at various points that the men demanded \$5; that no one mentioned a specific dollar amount but he figured \$5 was the demand because "they wanted equal pay and the highest man there was \$5.00"; and that Jasper, who was making \$4.50, said he wanted a 50-cent raise to \$5 after Watters asked about equal pay and just as he, Cook, turned to talk to McCaffrey.

Cook testified that he told the men to wait, and walked over to McCaffrey; that, after McCaffrey finished the telephone conversation, he said, "These guys wouldn't — they're not going to work until we discuss their wages with them"; that McCaffrey "said that, 'We couldn't afford it and we'd have to just let them go.' So I turned around and said, 'You heard it; hit it'"; and that the men then all turned around and left. Cook admitted that he did not offer to talk to the men at another time.

Cook testified that, when the men "went out and left the premises . . . I considered that they had quit. That was their choice and they could have went and started their trucks and went to work or they could have did what they did. . . . they all walked off of the job and we couldn't afford to give them no raise. We had orders to get out and we had nobody — you know, we had no time to discuss anything."

Cook also testified that, when he saw Mayes and Rickers arrive, he went out to inquire "if they were afraid to come in the gate or, you know, what their case was"; that he asked Mayes, "Did you quit with the other men?" but Mayes did not answer; that he asked Rickers "If he was with the rest of the men," and he replied, "I guess so; I'm a driver"; and that he then turned again to Mayes who, "after hesitating a while, he says, 'I guess so.'" Cook testified further that, as he was walking back to the office, Rickers followed and "said that he wanted to know if we couldn't just talk about it and he said that all he wanted was time after, you know, for eight hours a day work"; that he told Rickers, "If we meet their demands this morning for \$5.00 an hour, tomorrow, they'd want \$10.00 an hour"; and that he walked off with no further conversation.

Cook testified that some of the men came back to the office later, that he was very busy and "I'm naturally nervous and everything when that happens and they come

in the office and . . . Wheeler asked, 'What's our status?' And I said, 'As far as I'm concerned; you quit your jobs.' Then they walked out the door. . . . They could have, at that point, told us that they didn't quit and they'd go to work, but there was never a word mentioned then, you know, that they was willing to come back to work."

With regard to Meyer's visits, Cook testified that he and McCaffrey had known Meyer a long time but he "was really surprised to see him because we've had no involvement with the union as long as we'd been in business"; that McCaffrey's wife asked what Meyer was doing there, and Meyer said the men called him in; that she asked what time they called, and Meyer said he did not know; that Meyer "said that he could sign up with a \$5.00 an hour contract so that it wouldn't hurt us and he says, 'I'd rather see it done that way than the garbage way' "; that to him this meant "just about the dirtiest route you can take. I'm a teamster member and I know what violence there has been in strikes and that — it just ain't the way that you go in and talk to people"; and that, knowing Meyer, he understood that was what was meant. Cook maintained that he was not motivated in any way by the men having obtained union representation as he knew most of them were union members when hired.

Cook testified, on cross-examination, that he used the word "steward" in the office, although the men were not represented by a union then to his knowledge, because it is a common term among union men and he was talking to union men; that no one mentioned "instigator" that he knew of; and that he designated Wheeler because he had seen all the men huddling around Wheeler in the past few weeks. Cook also testified that he told McCaffrey "that 'The men wasn't going to go to work until we talked to them about wages,' and I'm pretty sure that I said, 'meet their demands' "; that he did not state to McCaffrey what the demands were because "I imagine that he heard it because we were all in one little group there; you know"; that when McCaffrey said "Let them go," that "means that they quit their jobs if they want to quit because we can't afford to give them a raise"; that he did not think it meant to fire them and did not mean that to him; that he told the men "You heard it, take off," and they did; and that "They should have taken off and started their trucks." Cook testified further that, during his separate talk with Rickers, he said the men were putting him in a bind; that, concerning whether Rickers said that was not the intention of the men, "he could have; I wouldn't know . . . I don't recall"; that Rickers "said he wanted to talk. He never said he'd haul it"; and that he was not willing to talk then to Rickers or the rest of the men.

3. Testimony of Tucker

On the last day of the hearing, counsel for the General Counsel stated that he intended to recall Meyer as a rebuttal witness but, as Meyer had not appeared, called Tucker instead. Tucker testified that he has been a member of the Teamsters Union since 1940 and a business agent of Local 100 about 13 years; that he went to Respondent's

office on two occasions with Meyer; that he did not hear anyone say the "garbage way" either time; and that he had never used that phrase or heard anyone else use it prior to the hearing.

Concluding Findings

The eight employees impressed me as candid and straightforward witnesses, trying to recall what they said and heard during the discussions here in issue. While there were some variances in their respective versions of the relevant events, I am convinced these variance were due to some in the group having heard certain remarks while others did not, and to some having better memories than others, and not to an attempt to fabricate their descriptions of what occurred. The two union business agents likewise appeared to be frank and believable witnesses. I found McCaffrey and Cook, on the other hand, hesitant, evasive, and unconvincing witnesses. On the basis, therefore, of my observation of the demeanor of the witnesses, the inherent probability of the testimony in all the relevant circumstances, and the entire record, I credit the testimony of the eight employees and the two union business agents where it is in conflict with that of McCaffrey and Cook.

On the basis of the credited testimony, of admissions made in the testimony of Respondent's witnesses, and of the record in its entirety, I find that the six employees went into the office on October 26 to request an opportunity to talk about wages and overtime pay, and did so, and that they had no intention, and expressed none, of quitting or refusing to work unless this request was immediately granted. McCaffrey and Cook were nevertheless admittedly angry at this group attempt to obtain increased earnings. I do not credit the testimony of Cook that he asked who was the "steward" of the group, of McCaffrey that he heard the word "steward," or of both that there was no reference to "instigator." Cook, after checking with McCaffrey, and with no indication they would talk at another time, ordered the men to leave. I find that, whether McCaffrey told Cook to let them go, or Cook told the men to go home, to hit it, or to take off, the phrase used was intended by McCaffrey and Cook, and was understood by the six men, to be an order to leave because they were terminated.³ McCaffrey and Cook maintained that the men were given the option of getting in their trucks and going to work, but they did not tell the men so. And the men did not, as Respondent contends, quit their jobs or go on strike at that time. They did not intend to quit or state they were quitting, and they were summarily terminated before they took or even contemplated any strike action.⁴

Moreover, when Cook went out to talk to Mayes and Rickers, the late arrivals, about what they were going to do, he was told by each that he was with the group. I find that in these conversations, Mayes also told Cook he had not quit his job but was with the group, and Rickers told Cook the men would go to work if Cook would agree to talk at another time. Cook stated to Rickers, however, that he and McCaffrey were determined that they would close down before they would take back any of these men. McCaffrey

³ *Hale Manufacturing Co., Inc.*, 228 NLRB 10 (1977).

⁴ *Hale Manufacturing Co., Inc.*, *supra*.

and Cook did not offer to take the men back when the group went in a little later to ask about their status. In addition, Meyer made several requests, beginning the same day, for reinstatement of the eight men, but McCaffrey and Cook refused to take back any of these men.

Accordingly, on the basis of the record as a whole, I find that the group of six employees went into Respondent's office to ask only for discussion of an increase in wage and overtime rates, that this was action for their mutual aid and protection, and that it constituted concerted activity protected by Section 7 of the Act.⁵ The two employees who arrived late joined with the other six in this activity. I find further that this group action did not lose its character as protected concerted activity because the employees were an unrepresented group with no established grievance or bargaining procedures, no articulated plan, and no designated spokesman; because they made no advance arrangement for a discussion with Respondent; because their action of a few minutes' duration took place during working hours; or because their conduct, occurring at a time when Respondent was very busy, "brought inconvenience and economic loss" to Respondent.⁶

I find also that the employees did not say or indicate by their conduct that they were quitting; that Respondent could not, by saying they quit, convert their attempt to discuss pay rates into a quitting of their jobs; and that there is no reasonable basis in the evidence for Respondent to maintain that they had, irrevocably, quit their jobs.⁷ I find, on the contrary, that both partners were angry about the group's request when they thought they had settled all wage demands by the bonus program, summarily discharged the six employees in retaliation for their protected concerted activity, and, a few minutes later, when Cook ascertained that Mayes and Rickers were part of the group, terminated their employment as well. Respondent thereafter rejected all requests for reinstatement, including requests made on the same day, and proceeded beginning the next day to hire replacements. I find, therefore, on all the relevant evidence, that Respondent discharged the eight employees because they engaged in protected concerted activities, in violation of Section 8(a)(1) of the Act.⁸

I find further that, although McCaffrey and Cook were longtime members of the Union, they were firmly opposed to any representation of their employees by the Union at this early stage of the partnership operation. They so indicated to Meyer, the union business agent, when he urged reinstatement of the men and assured the partners he would not take any action in representing these employees to hurt the operation. On the basis of the credited testimony of Tucker, a union business agent, and all the

relevant circumstances, I do not credit the testimony of McCaffrey and Cook that Meyer told McCaffrey's wife that, unless agreement was reached on his proposal, the Union would go the "garbage way," or that this was a well-known phrase used by Meyer and other union agents as a threat of violence. I find, on the evidence in its entirety, that Respondent refused to reinstate the men at Meyer's request, after all eight had designated the Union as their representative, because it was unwilling to grant the union representative status even to the limited extent proposed by Meyer.⁹ Respondent has presented no convincing or probative evidence of business justification for refusing to take back these admittedly good employees and instead hiring new employees.¹⁰ I find, therefore, that Respondent failed and refused to reinstate the eight employees on and after October 26, 1976, because of their membership in and activities on behalf of the Union and to discourage membership in the Union, in violation of Section 8(a)(3) and (1) of the Act.¹¹ I find further that these employees, who went on strike to protest their discriminatory discharges and Respondent's refusals to reinstate them, were engaging in an unfair labor practice strike.¹²

Accordingly, I find, in conclusion, that Respondent discharged the eight employees on October 26, because they engaged in protected concerted activities, and, on October 26 and at all times thereafter, failed and refused to reinstate them because of their membership in and activities on behalf of the Union and to discourage membership in the Union, and thereby discriminated in regard to the hire and tenure of employment of these employees in violation of Section 8(a)(1) and (3) of the Act. Respondent's motions to dismiss the complaint in whole or in part, made in its answer at the hearing and in its brief, are therefore hereby denied.

IV. THE CHALLENGED BALLOTS

The Regional Director consolidated with the instant complaint case the issues raised by challenged ballots in Case 9-RC-11759, and directed that the Administrative Law Judge prepare and cause to be served upon the parties a Decision containing resolutions of credibility of witnesses, findings of fact, and recommendations as to the disposition of said issues, that thereafter these cases be transferred to and continued before the Board, and that the provisions of Section 102.46 and 102.69(f) of the Board's Rules and Regulations govern the filing of exceptions.

The Regional Director's Report on Challenged Ballots shows that the election results were, of approximately 18 eligible voters, 16 ballots were cast and challenged, and refers for resolution in this proceeding the issues raised by

⁵ *N.L.R.B. v. Washington Aluminum Company, Inc.*, 370 U.S. 9 (1962); *B & P Motor Express Incorporated v. N.L.R.B.*, 413 F.2d 1021 (C.A. 7, 1969); *Toledo Commutator Company*, 180 NLRB 973 (1970); *Hale Manufacturing Co., Inc.*, *supra*; *Dawson Cabinet Company, Inc.*, 228 NLRB 290 (1977).

⁶ *N.L.R.B. v. A. Lasaponara & Sons, Inc.*, a wholly owned subsidiary of *ERE Industries, Inc. and ERE Industries, Inc.*, 541 F.2d 992 (C.A. 2, 1976); *United Merchants and Manufacturers, Inc. v. N.L.R.B.*, 554 F.2d 1276 (C.A. 4, May 9, 1977); *Westmont Tractor Company*, 173 NLRB 1188 (1968); *Newbery Energy Corporation, Industrial Division*, 227 NLRB 436 (1976); *Methodist Hospital of Kentucky, Inc.*, 227 NLRB 1392 (1977).

⁷ *B & P Motor Express Incorporated*, 171 NLRB 1289, 1293 (1968), *enfd.* 413 F.2d 1021, *supra*; *Toledo Commutator Company*, *supra* at 977; *Sibilio's Golden Grill, Inc.*, 227 NLRB 1688 (1977); *Hale Manufacturing Co., Inc.*, *supra*.

⁸ *B & P Motor Express Incorporated*, *supra*; *Toledo Commutator Company*, *supra*; *Swearingen Aviation Corporation*, 227 NLRB 228 (1976); *Hale Manufacturing Co., Inc.*, *supra*.

⁹ *The Howard P. Foley Company*, 229 NLRB 1167 (1967).

¹⁰ *The Laidlaw Corporation v. N.L.R.B.*, 414 F.2d 99 (C.A. 7, 1969); *Methodist Hospital of Kentucky, Inc.*, *supra*.

¹¹ *San Isabel Electric Services, Inc.*, 225 NLRB 1073 (1976); *Jimmy Dean Meat Company Inc. of Texas*, 227 NLRB 1012 (1977); *Methodist Hospital of Kentucky, Inc.*, *supra*.

¹² *Hijos de Ricardo Vela, Inc.*, 194 NLRB 377 (1971); *Vela Distributing Corp.*, *enfd.* 475 F.2d 58 (C.A. 1, 1973); *Michael Muldoon Elder, d/b/a Vorpall Galleries*, 227 NLRB 446 (1976); *Jimmy Dean Meat Company*, *supra*.

the challenged ballots which were sufficient in number to affect the results of the election.¹³ The report states that the ballots of Brinck, Carl, Jasper, Kasson, Mayes, Rickers, Watters, and Wheeler were challenged by the Respondent Employer on the ground that they were no longer employees, whereas the Petitioner Union contended that they were discharged because of their protected concerted activity and/or union activity, and thereafter engaged in an unfair labor practice strike, and were therefore eligible to vote. The report also states that the ballots of Micahel Casey, James Frazier, Richard Neighbors, Norman Pritt, Dennis Simpson, Richard Stath, John Walker, and Richard Watkins were challenged by the Petitioner Union, which contended that they were replacements for the unfair labor practice strikers. The report points out that the Board has long held that replacements for unfair labor practice strikers are not eligible to vote.

I have found above, based on credibility resolutions, the relevant facts, and the record as a whole, that the eight individuals whose ballots were challenged by the Respondent Employer were discriminatorily discharged on October 26, and were thereafter denied reinstatement, in violation of Section 8(a)(1) and (3) of the Act, and that, following their discharges, they engaged in an unfair labor practice strike. I find, therefore, that all eight were eligible to vote in the election.¹⁴

I find further that the eight individuals whose ballots were challenged by the Petitioner Union were replacements for the discriminatorily discharged employees who after their discharges engaged in an unfair labor practice strike, and that all eight were therefore ineligible to vote in the election.¹⁵

I recommend, accordingly, that the challenges to the ballots of the eight replacement employees be sustained, that the ballots of the eight employees who engaged in an unfair labor practice strike following their discriminatory discharges be opened and counted, and that the Regional Director thereafter prepare and cause to be served on the parties a revised tally of ballots based upon this count.

V. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

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

VI. THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices in violation of Section 8(a)(1) and (3)

¹³ The collective-bargaining unit stipulated by the parties to be appropriate is comprised of all truckdrivers, mechanics, and yardmen, excluding all office clerical employees, professional employees, all other employees, and all guards and supervisors as defined in the Act.

¹⁴ *Akron Convalescent Care, Inc. d/b/a Fairlawn Chateau and W & D Enterprises, Inc.*, 221 NLRB 81, 91 (1975).

¹⁵ *Tampa Sand & Material Company*, 137 NLRB 1549 (1962).

¹⁶ *N.L.R.B. v. Express Publishing Company*, 312 U.S. 426, 437 (1941);

of the Act, I find that it is necessary that Respondent be ordered to cease and desist from the unfair labor practices found and from in any other manner infringing upon its employees' Section 7 rights,¹⁶ and to take certain affirmative action designed to effectuate the policies of the Act.

As I have found that Respondent terminated Brinck, Carl, Jasper, Kasson, Mayes, Rickers, Watters, and Wheeler on October 26 because they engaged in protected concerted activities, and thereafter failed and refused to reinstate them because of their membership in and activities on behalf of the Union and to discourage membership in the Union, in violation of Section 8(a)(1) and (3) of the Act, I shall recommend that Respondent be ordered to offer each of these employees reinstatement to his former job, or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and to make each of these employees whole for any loss of pay suffered as a result of the discrimination against him, with backpay computed on a quarterly basis, plus interest at 6 percent per annum, as prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).¹⁷

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

CONCLUSIONS OF LAW

1. Respondent James R. McCaffrey and Edward A. Cook, A Partnership, d/b/a ABC Concrete Company, is an employer as defined in Section 2(2) of the Act, engaged in commerce and in operations affecting commerce as defined in Section 2(6) and (7) of the Act.

2. Truck Drivers, Chauffeurs, and Helpers Local No. 100, an affiliate of International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization as defined in Section 2(5) of the Act.

3. By terminating Brinck, Carl, Jasper, Kasson, Mayes, Rickers, Watters, and Wheeler on October 26, because they engaged in protected concerted activities, and by failing and refusing at all times thereafter to reinstate these employees because of their membership in and activities on behalf of the Union and in order to discourage membership in the Union, Respondent has discriminated against employees in regard to their hire and tenure of employment, and has thereby engaged in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act.

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

N.L.R.B. v. Entwistle Manufacturing Company, 120 F.2d 532, 536 (C.A. 4, 1941).

¹⁷ The remedy necessary to effectuate the policies of the Act would, in the present circumstances, be identical whether Respondent's conduct is found to be violative of Sec. 8(a)(1) or (3) of the Act. See *Hijos de Ricardo Vela, Inc.*, *supra* at 383; *Howard Manufacturing Company, Inc.*, 227 NLRB 1858 (1977).

ORDER¹⁸

The Respondent, James R. McCaffrey and Edward A. Cook, A Partnership, d/b/a ABC Concrete Company, Westchester, Ohio, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Terminating or otherwise discriminating against employees in regard to their hire or tenure of employment because they engaged in protected concerted activities or because of their membership in or activities on behalf of, or to discourage membership in, Truck Drivers, Chauffeurs, and Helpers Local No. 100, an affiliate of International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization.

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

(a) Offer Brinck, Carl, Jasper, Kasson, Mayes, Rickers, Watters, and Wheeler 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.

(b) Make Brinck, Carl, Jasper, Kasson, Mayes, Rickers, Watters, and Wheeler whole for any losses of pay each of them may have suffered as a result of the Respondent's discrimination against him, in the manner set forth in the section of this Decision entitled "The Remedy."

(c) 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 amounts of backpay due under the terms of this recommended Order.

(d) Post at its place of business in Westchester, Ohio, copies of the attached notice marked "Appendix."¹⁹ Copies of the notice, on forms provided by the Regional Director for Region 9, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, 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.

(e) Notify the Regional Director for Region 9, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS HEREBY DIRECTED that, as part of his investigation in Case 9-RC-11759 to ascertain representatives for the purpose of collective bargaining with the Respondent Employer, the Regional Director for Region 9 shall, pursuant to the Board's Rules and Regulations, sustain the challenges to the ballots of Casey, Frazier, Neighbors, Pritt, Simpson, Stath, Walker, and Watkins; open and count the

ballots of Brinck, Carl, Jasper, Kasson, Mayes, Rickers, Watters, and Wheeler; and thereafter prepare and cause to be served on the parties a revised tally of ballots, including therein the count of the opened ballots.

¹⁸ 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.

¹⁹ In the event that the Board's 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 terminate or otherwise discriminate against employees in regard to their hire or tenure of employment because they engage in protected concerted activities or because of their membership in or activities on behalf of, or to discourage membership in, Truck Drivers, Chauffeurs, and Helpers Local No. 100, an affiliate of International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 of the National Labor Relations Act.

WE WILL offer the following named employees 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 WE WILL make them whole for any losses of pay each of them may have suffered as a result of the discrimination against him:

Michael Brinck
Kenneth R. Carl
Joe Jasper
Darrell A. Kasson

Terry L. Mayes
George F. Rickers
William A. Watters
James Wheeler

JAMES R. McCAFFREY AND
EDWARD A. COOK, A
PARTNERSHIP, D/B/A ABC
CONCRETE COMPANY