

HOME DAIRIES COMPANY *and* TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL NO. 483, AFL. Case No. 19-CA-691. June 3, 1953

### DECISION AND ORDER

On December 15, 1952, Trial Examiner Martin S. Bennett issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent has engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the Respondent filed exceptions to the Intermediate Report and a supporting brief.

The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the Respondent's exceptions and brief, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, with the modifications and exceptions set forth below.

As set forth in detail in the Intermediate Report, the Union first claimed recognition as bargaining agent on July 18, before it had acquired a majority. The Respondent replied on July 23 and said that it desired to have the question of representation determined by an election. The Union achieved majority status for the first time on July 24, when the members decided to strike unless the Respondent agreed to an election. The following day the Union and the Respondent agreed to a State-conducted election, which took place on July 26, and which the Union lost. It does not appear that after acquiring a majority the Union made any demand upon the Employer other than the request for a consent election.

The Trial Examiner found that, although the Union did not represent a majority of the employees until after the Respondent had already refused to grant exclusive recognition, the Respondent nevertheless violated Section 8 (a) (5) of the Act, as alleged in the complaint. We do not agree. As the Board has frequently held, an unequivocal demand for recognition at a time when the Union has a majority in an appropriate unit is a prerequisite to a finding that there was an unlawful refusal to bargain.<sup>1</sup> It is true that by other conduct - including interrogations, promises of benefit, and establishment of an employee committee to supplant the Union - the Respondent unlawfully coerced and intimidated its employees and thereby interfered with the Union's organizational activity. It does not follow however, that the Respondent's various violations of Section 8 (a) (1) and (2) of the Act, all of which occurred before the Union had reached its majority, can be deemed also to constitute a violation of Section 8 (a) (5).

<sup>1</sup> Wafford Cabinet Company, 95 NLRB 1407

Accordingly, as neither a demand nor a refusal was proved at a time when the Union in fact represented a majority, we find that the record does not support the complaint allegation of refusal to bargain, and we shall therefore dismiss the complaint insofar as it alleges a violation of Section 8 (a) (5) of the Act.<sup>2</sup>

### ORDER

Upon the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that Respondent, Home Dairies Company, Nampa and Caldwell, Idaho, its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Dominating or interfering with the formation and administration of Employees' Committee or any other labor organization.

(b) Recognizing the Employees' Committee, or any successor thereto, as the representative of its employees for the purpose of dealing with it concerning grievances, wages, rates of pay, hours of employment, or any other conditions of employment.

(c) In any manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 483, AFL, or any other labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization, as authorized by Section 8 (a) (3) of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Disestablish and withdraw all recognition from Employees' Committee as the representative of its employees for the purpose of dealing with Respondent concerning grievances, wages, rates of pay, hours of employment, or any other conditions of employment.

(b) Post at its places of business at Nampa and Caldwell, Idaho, copies of the notice attached hereto and marked "Appendix A."<sup>3</sup> Copies of said notice, to be furnished by the Regional Director for the Nineteenth Region, shall, after being signed by a representative of Respondent, be posted immediately upon receipt thereof and maintained for sixty (60) con-

<sup>2</sup>Sam Zall Milling Company, 94 NLRB 749, reversed 202 F. 2d 499 (C. A. 9), March 17, 1953

<sup>3</sup>In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "A Decision and Order" the words "A Decree of the United States Court of Appeals, Enforcing an Order "

secutive days 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.

(c) Notify the Regional Director for the Nineteenth Region in writing within ten (10) days from the date of this Order what steps it has taken to comply herewith.

IT IS FURTHER ORDERED that the complaint be, and it hereby is, dismissed insofar as it alleges that the Respondent violated Section 8 (a) (5) of the Act.

## APPENDIX A

### NOTICE TO ALL EMPLOYEES

Pursuant to a Decision and Order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

WE WILL disestablish and withdraw all recognition from Employees' Committee as the representative of any of our employees for the purpose of dealing with us concerning grievances, wages, rates of pay, hours of employment, or other conditions of employment.

WE WILL NOT dominate or interfere with the formation or administration of Employees' Committee or any other labor organization.

WE WILL NOT in any manner interfere with, restrain, or coerce our employees in the exercise of the right to self-organization, to form labor organizations, to join or assist Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 483, AFL, or any other labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization, as authorized in Section 8 (a) (3) of the Act.

All of our employees are free to become or remain members of the above-named union or of any other labor organization.

HOME DAIRIES COMPANY,  
Employer.

Dated ..... By.....  
(Representative) (Title)

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

## Intermediate Report and Recommended Order

### STATEMENT OF THE CASE

This proceeding, brought under Section 10 (b) of the National Labor Relations Act, 61 Stat. 136, herein called the Act, stems from a charge duly filed by Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 483, AFL, herein called the Union, against Home Dairies Company, herein called Respondent. Pursuant to said charge the General Counsel of the National Labor Relations Board issued a complaint dated October 17, 1952, against Respondent, alleging that Respondent had engaged in unfair labor practices within the meaning of Section 8 (a) (1), (2), and (5) of the Act.

Specifically the complaint, as amended, alleged that on and after July 18, 1952, (1) Respondent had refused to bargain in good faith with the Union as the representative of its employees in an appropriate unit; (2) had interfered with, restrained, and coerced its employees by threats of reprisal and loss of employment if they engaged in union activities or chose the Union to represent them, by promising wage increases if the employees would repudiate the Union, and by interrogating employees and engaging in surveillance of union meetings; and (3) had dominated and contributed support to a labor organization known as "Employees' Committee" by causing its employees to select representatives to the Employees' Committee and meeting with said representatives to discuss wages, hours, and working conditions. Respondent's answer denied that it had engaged in the conduct attributed to it by the complaint and denied that it had engaged in unfair labor practices.

Pursuant to notice a hearing was held at Nampa, Idaho, on November 3, 1952, before the undersigned Trial Examiner, Martin S. Bennett, duly designated by the Associate Chief Trial Examiner. The General Counsel and Respondent were represented by counsel and the Union by its representative. All parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues. At the conclusion of the hearing, the parties were afforded an opportunity to present oral argument and to file briefs and proposed findings and conclusions but waived same.

Upon the entire record in the case and from his observation of the witnesses, the undersigned makes the following:

### FINDINGS OF FACT

#### I. THE BUSINESS OF RESPONDENT

Home Dairies Company is an Idaho corporation whose principal place of business is at Nampa, Idaho, where it is engaged in the business of producing and selling dairy products. It also maintains an office at Caldwell, Idaho, 7 miles distant, for the same purpose. During the year ending in July of 1952, Respondent sold products valued at approximately \$112,500, of which substantially all were shipped to customers outside the State of Idaho. The undersigned finds that Respondent is engaged in commerce within the meaning of the Act.

The corporate stock of Respondent is owned by five persons who also constitute a partnership owning all interest in Woodlawn Dairies, a dairy firm whose place of business is also at Nampa. This latter firm has no plant as such and maintains only a small business office in Nampa. Supervision of both concerns is identical and Woodlawn has but 1 employee, a driver, who operates a milk route 6 days a week. Woodlawn Dairies owns no processing equipment but under an agreement with Respondent, the latter buys, processes, and sells milk to Woodlawn f.o.b. Respondent's Nampa plant. Woodlawn is charged only for the milk, the bottles and cases being owned by Home Dairies which retains title and makes no charge for them. Woodlawn owns 2 trucks but employs only 1 driver, the other truck remaining on a standby basis. These trucks are maintained by Respondent for Woodlawn on a monthly fee basis. Woodlawn also owns some office equipment which however is utilized by Respondent. Each firm pays the other directly for all services rendered.

In view of the foregoing, the undersigned finds that Home Dairies Company and Woodlawn Dairies constitute an integrated unitary enterprise and that the two firms constitute a single employer within the meaning of the Act.

#### II. THE LABOR ORGANIZATION INVOLVED

Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 483, AFL, is a labor organization admitting to membership employees of Respondent.

## III. THE UNFAIR LABOR PRACTICES

## A. The appropriate unit and majority representation therein

The complaint alleges and Respondent's answer admits that all inside plant employees, drivers, salesmen, outside drivers, and milk haulers who are employed in Respondent's plants at Nampa and Caldwell, Idaho, excluding managers, assistant managers, superintendents, office and clerical employees, foremen, guards, and special employees, constitute a unit appropriate for the purposes of collective bargaining.

As set forth above, Respondent and Woodlawn Dairies are an integrated unitary enterprise. The records warrants a finding that there is a community of interest in the working conditions of the one employee of the latter firm, a driver, and the working conditions of the employees of Respondent in the appropriate unit. Accordingly, he is found to be within said appropriate unit. The undersigned finds therefore that the above-described unit, which includes the one employee of Woodlawn Dairies, constitutes a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act.<sup>1</sup>

The parties stipulated that the complement of personnel within the appropriate unit totals 42 in number. The General Counsel contends however, and Respondent disputes, that the 1 employee of Woodlawn Dairies, driver Norman Stathopoulos, should be included in said complement. Having found the unit urged by the General Counsel to be appropriate, the undersigned further finds that Stathopoulos should be included within the unit, thus increasing the unit to 43 in number.

As evidence of its majority, the General Counsel proposed to offer in evidence 23 cards bearing the signatures of employees within the aforesaid appropriate unit. Respondent then stipulated that the signatures, which included that of Stathopoulos, were authentic. Other uncontroverted evidence discloses that 18 of these cards were signed at union meetings on June 18, July 1, and July 9, 1952. The testimony indicates that the remaining 5 cards were signed at a union meeting on July 24. Under the circumstances, the undersigned finds that on July 24, 1952, and at all times thereafter, the Union, by virtue of Section 9 (a) of the Act, has been and now is the duly designated representative of a majority of the employees in the above-described unit for the purposes of collective bargaining.

## B. Sequence of events

Insofar as the record indicates, the organizational campaign described below was the first attempt by the Union or any other labor organization to organize the employees of Respondent. Initially, 2 employees of Respondent became dissatisfied with working conditions and were referred to Business Agent Chester Wuelfken of the Union. Wuelfken distributed some union-application and designation forms to one of the men and arranged a meeting for June 18, 1952. On that occasion, he met with some of the employees of Respondent at a hall and outlined union principles and explained organizational procedure; 5 or 6 applications were signed at that meeting. A second meeting was held on July 1, at which Wuelfken outlined desirable contract provisions to the assemblage. Other signatures were procured on this occasion, making a total of 13 signed cards.

That Respondent was aware of the organizational campaign became apparent on July 1. Jim Muller, a part owner of Respondent and manager of its maintenance department, asked employee Clyde Clevenger how the meetings were going. Clevenger replied that they were proceeding satisfactorily and Muller stated that he wished to ascertain the cause of the trouble. Clevenger said that the men were not being reimbursed for working overtime; that the drivers assigned to night work, unlike other employees in the concern, did not receive an increase or wage differential; and that the men received no extra pay for working on holidays. Muller replied that he wished to get to the bottom of the matter and that if Clevenger could ascertain why the men were "insisting they have the Union" he would like to know the answer in order to "see if I can iron this out." Muller, who did not recall speaking to Clevenger on this occasion, did not speak to him on the topic again.

On the same day, Muller asked maintenance man Gordon Mills to inspect something in a plant building late in the day and Mills replied that he would not be returning to the plant inasmuch as he had planned to attend the union meeting that evening. Muller asked Mills to

<sup>1</sup> In the alternative, it is found that a unit solely of the employees of Respondent, excluding the one employee of Woodlawn Dairies, is also appropriate. As will appear, the question of majority representation is unaffected by his inclusion or exclusion.

explain the cause of the dissatisfaction among the men and Mills replied that there were two main issues, namely the desire of the men for a raise in their hourly rate, or the equivalent thereof, and payment of time and one-half for overtime.

On the following day, Muller asked Mills if he had attended the union meeting and Mills replied that he had. Muller pointed out that a contract providing for time and one-half for overtime would be too expensive for Respondent. He then stated that Respondent actually needed but 1 maintenance man; Mills, who was 1 of the 2 maintenance men, promptly pointed out that but several days before Muller had informed Mills that he did not know how Respondent could catch up with all the work waiting to be done. Nevertheless Muller stated that "if we have a Union we just can't afford it and we are just going to have to lay off some employees." He specifically referred to laying off a checker, one Abbie Roe.<sup>2</sup>

On July 5 or within several days thereafter, Muller took still other action to counteract the union organizational campaign, by forming an independent company union. According to Mills, Muller convened a group of workers in the maintenance department and stated that Respondent would like each department to select a representative to meet with management. And, according to the uncontroverted testimony of employee Clyde Clevenger, Foreman Leonard Cable informed him that a committee was to be formed for the purpose of meeting with the stockholders. Muller admitted that he, together with the other representatives of management, decided to hold a meeting with the men and that he had proposed to each division that it select representatives to serve on the committee. The employees promptly acceded to this request and a committee was formed with representatives from all divisions of the Company; it later met with management on or about July 18.<sup>3</sup>

On July 9 the Union held a third meeting among the employees of Respondent. It was conducted by Secretary-Treasurer F. T. Baldwin of the Union and about five cards were signed. A similar meeting was held on July 24 at which five more cards were signed. On or about July 9, Carroll Lawrence, one of the owners of Respondent, held a conversation with employee Gene Hollenbeck, whose testimony herein is uncontroverted. Hollenbeck explained to Lawrence that he had not been instrumental in introducing the Union to the plant. After some further discussion, Lawrence referred to an employee, Williamson, who was, according to Lawrence, a slow worker; Lawrence then stated that "if they went Union" he did not see how he could "keep a man on and pay him time and a half for the extra work." Lawrence also stated that he had been giving another employee, Abbie Roe, "a break" by keeping him on despite his poor vision and that "the Union would hang on to these men."

On or about July 15, the first contact of management by the Union took place when Secretary-Treasurer Baldwin telephoned Little relative to certain threats allegedly made to the men. At about this time, the Union requested the Idaho Department of Labor to conduct a representation election among the employees of Respondent. And on July 16, the commissioner of labor for the State wrote to Respondent and announced that such an election would be conducted on July 18. Respondent was specifically asked to "designate some official of your Company to act as an observer for the Employer. We will permit the Union to have present one observer." Apparently Respondent did not agree to the holding of the election on July 18 and it was canceled. The parties later agreed to hold an election on July 26, after the Union threatened to strike.

On or about July 18, at the request of Muller, the Employees' Committee held a meeting with management. Present for Respondent were Muller, Carroll Lawrence, Ralph Little, secretary-treasurer and coowner of Respondent, and Respondent's counsel, Eli Weston. Gordon Mills, who was selected by the employees as chairman of the Committee, objected at the outset of the meeting to the fact that Respondent had legal counsel present and that the Committee did not; he stated that the employees did not wish Weston to participate in the discussion. Weston promptly excused himself and left. The meeting then commenced with Mills as the spokesman for the Committee and all three representatives of management participating.

The discussion promptly turned to a consideration of what the men wanted to have in a contract; this appears to have been primarily an improvement in hours and time and one-half

---

<sup>2</sup> The findings herein are based upon Mills' forthright testimony which is substantially uncontroverted by Muller. Muller's testimony on other aspects of Mills' testimony is set forth below and was marked by considerable vagueness and absence of recollection.

<sup>3</sup> Muller testified that Mills suggested the formation of the committee in order to prevent the men from joining the Union. This testimony is somewhat dubious and moreover, even assuming this to be so, the fact still is that Respondent, not Mills, proposed this plan to its employees.

for overtime work. The management representatives stated that they could not afford to pay more money. Little then stated that it was unlawful to bargain with the Committee while the plant was being organized by the Union but that, according to Mills, "after this is all washed aside we can make some adjustments." Similar language was attributed to Little by Hollenbeck. Muller stated that Respondent was contemplating abandoning its route to Cascade on the ground that it was not profitable. It is noteworthy that this route was largely a summer route and that this meeting took place in mid-July. It would follow, if Respondent did have any bona fide plans with respect to elimination of this route, that such plans were directed to the future and did not create a current issue. This was the first time the topic was raised with the employees and the choice of this occasion is significant. To the undersigned, the raising of the issue at that time is indicative of Respondent's bad faith. The meeting ended on this note and, as will appear, significant improvements in working conditions were made almost immediately after the Union lost the State election on July 26.<sup>4</sup>

On July 18, Secretary-Treasurer Baldwin of the Union officially wrote to Respondent, announced that it represented a majority of its employees in the unit heretofore found to be appropriate, and asked Respondent to meet with the Union and negotiate terms of employment. On July 23, Ralph Little replied to Baldwin and acknowledged receipt of the July 18 demand. Little stated that, prior to recognition, Respondent desired to have the question of majority determined by an election and offered to consent to same. The Union did file a representation petition with the Board on July 21 but it was later withdrawn on August 1. On July 24, the Union held a fourth meeting and voted to strike if Respondent did not consent to an election. This position was conveyed to Respondent's counsel on July 25 by the Union; the consent was forthcoming and an election was agreed to for July 26.

A representative of the State commissioner of labor appeared at the plant and held an election on July 26. He permitted one observer to be present for the Union, Baldwin its secretary-treasurer. And, pursuant to the letter asking Respondent to designate one of its officials as an observer, Ralph Little, coowner and secretary-treasurer, served as observer. The Union lost the election 23 to 17.

It will be recalled that at the meeting with the Committee on or about July 18 Little informed the Committee that after matters were adjusted Respondent would "make some adjustments." And shortly before the election, James Muller held a significant conversation with Hollenbeck. After ascertaining from Hollenbeck that the men were dissatisfied because of the overtime they were required to put in on the job, Muller replied that he "thought they would try to work out something for the fellows, they had been planning on it . . . to make up the difference on that overtime." As stated, the Union lost the election on July 26. Respondent within 5 days instituted a wage increase of \$5 per month for all of its employees, effective August 1. This was first reflected in the paycheck of August 17 covering the payroll period of August 1 through 15. At the same time, Hollenbeck's hours and route were reduced despite the increase in his monthly salary.

## C. Conclusions

### 1. The 8 (a) (1) and (2) allegations

The Union commenced its organizational campaign in June and held its first meeting on June 18. Although no contact was made with management until mid-June, Respondent promptly and understandably became aware of this activity in its plants. Thus, as early as July 1, Manager Jim Muller interrogated Clevenger concerning the progress of the union organizational campaign, asked him to ascertain why the men insisted on having a union, and stated that he wished to "iron out" the difficulty. As demonstrated, Respondent soon took steps to completely bypass the Union.

On July 2, having been informed on July 1 by employee Mills that he was attending the July 1 union meeting, Muller informed Mills, a maintenance man, that operation under a union contract would prove to be expensive and that Respondent might have to operate with but one of their maintenance men; this statement overlooked the fact, as Mills promptly informed him, that Muller but several days earlier had commented on the difficulty of catching up with all the work that was to be done. Muller also raised the possibility of the layoff of another employee, a checker. There was no contention by Respondent that it was faced by an economic

<sup>4</sup> Findings herein are based upon the credited testimony of Mills and Hollenbeck. Muller's testimony concerning the meeting was extremely vague and unimpressive as to details. Little supported Mills' version of events leading up to and during the meeting but denied making the last-quoted statement attributed to him by Mills; his denial is not credited.

crisis requiring a reduction in force. Nor is there any evidence that Respondent had considered discharging these employees prior to the advent of the Union. The undersigned finds therefore that Respondent's statements herein to Clevenger and Mills constituted interrogation of employees and an attempt to coerce its employees by fear of economic reprisals if the Union succeeded in organizing them.

A similar pattern was followed by coowner Lawrence, who informed employee Hollenbeck on July 9 that if the plant "went union" he would have to eliminate a named employee. Lawrence further stated that another named employee had been retained by Respondent despite his poor vision, thus implying that the employee might find his position less secure if the Union organized the plant. Here, too, there is no evidence that elimination of this employee had been contemplated prior to the advent of the Union. The undersigned finds that this statement was also calculated to and inevitably did coerce the employees of Respondent.

Muller's desire to "iron out" matters took concrete form on July 5 when, in the face of the union organizational campaign, he proposed that the employees form a company union. The employees promptly complied with this request and an employees' committee was formed with representation from all departments.

On July 15, the Union protested to Secretary-Treasurer Little concerning the interrogation of employees. And, on or about the morning of July 16, Respondent was on notice that the State Commission of Labor proposed to conduct an election among the employees on July 18. Accordingly, on July 18, the Employees' Committee was convened at the request of Muller. He raised the possibility of abandoning one milk route, clearly a threat to the tenure of the driver thereon, and Little informed the assemblage that while Respondent could not bargain with the Committee while the plant was being organized, "after this is all washed up we can make some adjustments." These statements by Muller and Little constituted both a threat of reprisal and a promise of benefit, tending to coerce the employees in their choice of a bargaining representative. The Union lost the election held on July 26, at which Secretary-Treasurer Little of Respondent was an observer. Pursuant to Respondent's promise, the employees were promptly granted a wage increase but 5 days later on August 1; furthermore, at least in the case of Hollenbeck, a salaried employee, his work and hours of work were reduced despite his pay increase.

As found, Respondent, on learning of the union organizational campaign, embarked upon a campaign of interrogation and threats of reprisal to the employees if they selected the Union as their representative. Then, in a patent attempt to undermine the union organizational campaign, Respondent proposed the formation of an independent employees' committee, which the undersigned finds constituted a labor organization, to discuss labor relations. Wrought Iron Range Co., 77 NLRB 487.

This committee, referred to herein as Employees' Committee, was convened by Respondent on July 18, after Respondent had initially refused to agree to an election and the question of union recognition was still imminent, and the employees were promised improvements in working conditions after the union organizational campaign was disposed of. And a promise of improved working conditions was made shortly before the election to Hollenbeck by Muller. Some days thereafter the employees voted against the Union by a narrow margin in an election at which a company owner improperly served as an observer. Then, true to its promise, Respondent some days later granted a plantwide wage increase, and improved working conditions for at least one employee. The evidence is uncontroverted that the wage increase was given solely as a result of the promise given to the Employees' Committee just prior to the election that elimination of the Union from the plant would be suitably rewarded by management. Nor does it make any difference that the wage increase may have been given pursuant to advice that such a procedure was proper after the election. The fact is that the wage increase was promised to the men as an inducement for repudiating the Union, and it is accordingly tainted by this improper motivation.

The undersigned finds that by the foregoing Respondent has dominated and interfered with the formation and administration of a labor organization within the meaning of Section 8 (a) (2) of the Act. This conduct and the other conduct hereinabove found to have been unlawful also constitute interference with, restraint, and coercion of employees within the meaning of Section 8 (a) (1) of the Act.

## 2. The 8 (a) (5)

Initially, as to the State election, it may be noted that a State agency cannot usurp the functions of the Board in determining the question concerning the representation of the employees of an employer engaged in commerce. Thayer Co., 99 NLRB 422. And while an election by a

State agency may, in some circumstances, be an indication of the choice of the employees, such weight may not be attached to it where the clinical conditions uniformly required by the Board have not been followed. It is well established that the Board will not permit a representative of management, and here the facts show that the representative was a coowner, to serve as an observer at an election. The Board will set aside an election conducted under such circumstances. *Burrows and Sanborn*, 84 NLRB 304; *Parkway Sales, Inc.*, 84 NLRB 475; and *Ann Arbor Press*, 88 NLRB 391. It has felt that the presence of such representatives would inevitably have a restraining influence on the freedom of expression of the employees involved and thus destroy the desired laboratory atmosphere for representation elections. And, in any event, the other unfair labor practices described herein would vitiate even a Board election held in this context. Accordingly, the undersigned will not assign any weight herein to the foregoing election and its results.

It has been found that the Union first acquired a majority representation among the employees of Respondent on July 24. It will be recalled that the initial request for recognition, dated July 18, asked Respondent to bargain concerning working conditions. Respondent, on July 23, wrote to the Union for the first time. This letter, sent from Nampa to the union office at Boise was presumably delivered on July 24 or 25; it stated that Respondent desired to have the majority question determined by an election. The record is not clear as to whether this letter was before the Union on July 24 when, at a union meeting, it voted to strike on July 26 if Respondent did not consent to an election; the fact that Respondent had on or about July 16 refused to agree to the proposal of the State labor commissioner to hold an election on July 18 no doubt played a part in this latter decision. In any event, Secretary-Treasurer Baldwin of the Union telephoned Respondent's counsel on July 25 and informed him that the membership would strike on July 26 unless Respondent agreed to an election. The counsel, Eli Weston, returned the call shortly thereafter and agreed to an election on July 26.

The undersigned is of the belief that the Union, in pressing for an election on July 25, was renewing the request for recognition which Respondent had in effect previously refused to grant absent an election. For originally, the Union had desired recognition presumably with or without a card check; Respondent had in effect refused and proposed an election; and the Union had pressed for the election which Respondent agreed to on July 25. It is apparent that, commencing on July 18 and continuing thereafter, the Union was primarily interested in recognition and that its consent to the election initially proposed by Respondent did not constitute any alteration of that position. The undersigned finds, therefore, that the demand by the Union on July 25 for the holding of an election was in effect a restatement of its initial request for recognition.

The record discloses that Respondent then unilaterally instituted improvements in working conditions on August 1, but 5 days after the election. This was, however, tainted by the promise made shortly before the election that elimination of the Union would result in an improvement in working conditions. This wage increase is therefore colored by the unlawful motivation that brought it into being and it constitutes evidence of a rejection of the collective-bargaining principle. For when the matter is boiled down to bare essentials, Respondent promised employees benefits for rejecting the Union and then delivered such benefits pursuant to its promise.

It is correct that an employer can withhold recognition from a labor organization possessed of a majority and require it to demonstrate its majority through an election when the employer's position is one taken in good faith. Where, however, the refusal to grant recognition is predicated on a desire to utilize the intervening period to disrupt the Union's majority, such refusal is not justified and constitutes a violation of the duty to bargain. *Joy Silk Mills, Inc., v. N.L.R.B.*, 185 F. 2d 732 (C. A. D. C. ) cert. den. 341 U. S. 914; *N.L.R.B. v. Van Kleeck*, 189 F. 2d 516 (C. A. 2); and *N.L.R.B. v. Consolidated Machine Tool Corp.*, 163 F. 2d 376 (C. A. 2) cert. den. 332 U. S. 824.

The fact is that Respondent, upon hearing of the union activities, embarked on a campaign on or about July 1 calculated to coerce the employees to refrain from selecting a collective-bargaining representative. It promptly formed a labor organization in the guise of an employee committee; promised improved working conditions in return for elimination of the Union; and upon elimination of the Union, did promptly give employees a wage increase. This demonstrates that Respondent's proposal of and assent to the election were not motivated by a bona fide doubt as to the Union's majority and, under the circumstances, the State election following upon these unfair labor practices calculated to coerce employees in the selection of a bargaining representative and conducted under improper conditions, cannot be of avail to Respondent. See *Franks Bros. v. N.L.R.B.*, 321 U. S. 702.

That Respondent may have received advice that it was permissible to grant these wage increases under the circumstances, does not serve to refute the preponderance of the evidence

that these wage increases were unlawfully motivated. These increases were intended by Respondent as its reply to the Union's desire to bargain collectively. Under the circumstances, the undersigned finds that on and after August 1, 1952, Respondent had refused to bargain collectively with the Union as the collective-bargaining representative of its employees, thereby violating Section 8 (a) (5) and 8 (a) (1) of the Act. *N. L. R. B. v. W. T. Grant Co.*, 199 F. 2d 711 (C. A. 9).

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

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

#### V. THE REMEDY

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

In the view of the undersigned, the unfair labor practices found above warrant an inference that the commission of other unfair labor practices may be anticipated in the future. It will therefore be recommended that Respondent be ordered to cease and desist from in any manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed by the Act.

Upon the basis of the foregoing findings of fact, and upon the entire record in the case, the undersigned makes the following:

#### CONCLUSIONS OF LAW

1. Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 483, AFL, is a labor organization within the meaning of Section 2 (5) of the Act.

2. Respondent's inside plant employees, drivers, salesmen, outside drivers, and milk haulers, excluding managers, assistant managers, superintendents, office and clerical employees, foremen, guards, and special employees, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act.<sup>5</sup>

3. Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 483, AFL, was on July 24, 1952, and now is, the exclusive representative of all employees in the aforesaid appropriate unit for the purposes of collective bargaining within the meaning of Section 9 (a) of the Act.

4. By refusing on August 1, 1952, and at all times thereafter, to bargain collectively with the Union as the exclusive representative of the employees in the aforesaid appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (5) of the Act.

5. By interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed by Section 7 of the Act, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (1) of the Act.

6. By dominating and interfering with the formation and administration of a labor organization, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (2) of the Act.

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

[Recommendations omitted from publication.]

<sup>5</sup>This unit of course includes the driver for Woodlawn Dairies.