

3. On June 19, 1952, International Association of Machinists, AFL, was, at all times since has been and now is the representative of a majority of the Respondents' employees in the appropriate unit described above for the purposes of collective bargaining within the meaning of Section 9 (a) of the Act.

4. By refusing on June 21, 1952, and at all times thereafter, to bargain collectively with International Association of Machinists, AFL, as the exclusive representative of all their employees in the appropriate unit, the Respondents have engaged in and are engaging in unfair labor practices within the meaning of Section 8 (a) (5) of the Act.

5. By discriminating in regard to the hire and tenure of employment of Carmelita Sadler Rogers, thereby discouraging membership in International Association of Machinists, AFL, the Respondents have engaged in and are engaging in unfair labor practices within the meaning of Section 8 (a) (3) of the Act.

6. By the foregoing unfair labor practices and by interfering with, restraining, and coercing their employees in the exercise of the rights guaranteed in Section 7 of the Act, the Respondents have engaged in and are engaging in unfair labor practices within the meaning of Section 8 (a) (1) 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.

8. The Respondents have not discriminated in regard to the hire and tenure of employment of Ray Cain and A. L. West.

[Recommendations omitted from publication.]

MIKE AND JOE CALDARERA, PARTNERS, d/b/a FALSTAFF
DISTRIBUTING COMPANY *and* INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, CHAUFFEURS, WAREHOUSE-
MEN & HELPERS OF AMERICA, LOCAL NO. 878, AFL.
Case No. 32-CA-239. May 5, 1953

DECISION AND ORDER

On February 12, 1953, Trial Examiner Ralph Winkler issued his Intermediate Report in the above-entitled proceeding, finding that the Respondents had engaged in and were engaging in certain unfair labor practices in violation of Section 8 (a) (1), (3), and (5) of the Act and recommending that they cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. The Trial Examiner also found that the Respondents had not violated Section 8 (a) (3) and (1) of the Act by terminating the employment of Delbert K. Young and recommended the dismissal of that portion of the complaint. Thereafter, the Respondents filed exceptions to the Intermediate Report and a supporting brief.

The Board¹ has reviewed the rulings of the Trial Examiner who conducted the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed.² The Board has considered the Intermediate Report, the exceptions and

¹ Pursuant to the provisions of Section 3 (b) of the National Labor Relations Act, the Board has delegated its powers in connection with this case to a three-member panel [Chairman Herzog and Members Houston and Peterson].

² Contrary to the Respondents' contention, we agree with the Trial Examiner's ruling that the 6-month period of limitations established by Section 10 (b) of the Act is not here applicable, as the original charge was timely filed. *Cathey Lumber Company*, 86 NLRB 157, enforced 185 F. 2d 1021 (C. A. 5); *Beaver Machine & Tool Co., Inc.*, 97 NLRB 33.

brief, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, with the following additions and modifications:

1. The Trial Examiner found, and we agree, that the Respondents violated Section 8 (a) (1) of the Act by engaging in acts of interrogation, threats of economic reprisal, and promises of benefit, concerning the union activities of its employees.

2. We agree with the Trial Examiner that the Respondents discriminatorily reduced the wages of employees McReynolds, Burgin, and Fugatt, in violation of Section 8 (a) (1) and (3) of the Act. We do not agree that the Respondents discontinued using the drivers for warehouse work because of their union or concerted activities. The evidence shows, and we find, that the Respondents took this action in an attempt to place the drivers outside the coverage of the Fair Labor Standards Act and thus avoid further liability for overtime pay. Accepting this contention as true, it does not affect the Trial Examiner's finding that the reduction in wages was a violation of Section 8 (a) (1) and (3). The fact remains that there was a disproportionate reduction of take-home pay in relation to the number of hours worked before and after the changes were made. Under all the circumstances, including the Respondents' coercive antiunion conduct, its efforts to induce the employees to abandon their wage-hour suit by promising wage increases, the actual grant of wage increases after withdrawal of such suits, and the failure to explain the elimination of the established weekly "trade allowance" of \$7.50, we find that the Respondents unlawfully reduced the take-home pay of McReynolds, Burgin, and Fugatt to penalize them for their concerted and union activity.³

3. Like the Trial Examiner, we find that the Respondents refused to bargain with the Union in September 1951, in violation of Section 8 (a) (5) of the Act.

Soon after September 17, 1951, when the Union filed its petition for certification of representatives, Shamburger, the Union's attorney, accompanied by a field examiner of the Board, notified the Respondents that the Union represented a majority of the employees and in effect requested recognition for purposes of collective bargaining. Although the Respondents at that time did not flatly refuse to bargain, but instead suggested that their attorney be contacted, we nevertheless find that the Respondents' unlawful conduct, as detailed in the Intermediate Report, which occurred before and after the Union's request for recognition, was tantamount to a rejection of the request and constituted a refusal to bargain within the meaning of the Act.⁴

³See *Sunland Biscuit Company, Incorporated*, 78 NLRB 714. In accord with the Board's usual policy, we shall order that the Respondents make whole the employees for any loss of pay they may have suffered from the date of the Respondent's discrimination against them, October 20, 1951, to December 1, 1951, at which time the reduced wages were substantially restored.

⁴See *Somerset Classics, Inc.*, 90 NLRB 1676, enforced 193 F. 2d 613 (C.A. 2), cert. denied 344 U.S. 816; *Ken Rose Motors, Inc.*, 94 NLRB 868.

Nor can the Respondents justify their refusal to bargain because of the pending representation proceedings or the resultant election. While the Union lost the election, it was set aside because of the Respondents' unlawful interference. The Respondents at no time questioned the Union's majority status so as to give rise to a bona fide question of representation. Under the circumstances, we are satisfied that the Respondents did not refuse to bargain because of the pendency of the representation proceedings, but rather took advantage of those proceedings to gain time to dissipate the Union's strength and thereby avoid their statutory obligation to bargain with the Union.⁵

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 the Respondents, Mike and Joe Calderera, Partners, d/b/a Falstaff Distributing Company, Little Rock, Arkansas, their agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interrogating employees concerning their union membership and activities.

(b) Promising benefits on condition that employees discontinue union membership and other protected concerted activities, including the institution and prosecution of wage-hour actions.

(c) Threatening and/or taking reprisal, including layoffs, discharges, shutdowns, and wage reductions, because of union membership and other protected concerted activities.

(d) In any other manner discouraging union membership by discriminating in regard to hire or tenure of employment or any term or condition of employment.

(e) Refusing to recognize and bargain with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local No. 878, AFL, as the statutory bargaining representative of their beer driver-salesmen, including relief drivers and warehousemen, but excluding office and clerical employees and supervisors as defined in the Act.

(f) In any other manner interfering with, restraining, or coercing their employees in the exercise of the right to self-organization, to form labor organizations, to join or assist International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local No. 878, AFL, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or

⁵See *Joy Silk Mills, Inc.*, 85 NLRB 1263, enforced 185 F. 2d 732, 741-2, 744 (C. A. D. C.), cert. denied 341 U. S. 914; *The M. H. Davidson Company*, 94 NLRB 142, 144-5.

In view of our finding that the Respondents violated the Act in September 1951, we deem it unnecessary to determine whether the case of *International Broadcasting*, 99 NLRB 130, and other allied cases cited by the Trial Examiner, are here applicable.

all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in 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) Make whole Marion McReynolds, Winn Burgin, and Russell Fugatt, and furnish earnings information to the Board, upon request, as set forth above and in the section of the Intermediate Report entitled "The Remedy."

(b) Upon request, bargain collectively with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local No. 878, AFL, as the exclusive representative of the employees in the above-described appropriate unit in respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, and if an understanding is reached, embody it in a signed agreement.

(c) Post at their premises in Little Rock, Arkansas, copies of the notice attached to the Intermediate Report as an appendix.⁶ Copies of said notice, to be furnished by the Regional Director for the Fifteenth Region, shall, after being duly signed in behalf of the Respondents, be posted by them immediately upon receipt thereof, and maintained by them for sixty (60) consecutive days thereafter, in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for the Fifteenth Region, in writing, within ten (10) days from the date of this Order what steps the Respondents have taken to comply herewith.

IT IS HEREBY ORDERED that the complaint herein be, and it hereby is, dismissed insofar as it alleges that the Respondents discriminatorily terminated the employment of Delbert K. Young in violation of Section 8 (a) (3) and (1) of the Act.

⁶This notice shall be amended by substituting for the words "The recommendations of a Trial Examiner" in the caption thereof the words "A Decision and Order." 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 "Pursuant to Decision and Order" the words "Pursuant to A Decree of the United States Court of Appeals, Enforcing an Order."

INTERMEDIATE REPORT AND RECOMMENDED ORDER

STATEMENT OF THE CASE

Upon charges and amended charges filed by International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local No. 878, AFL, a labor organization herein called the Union, the General Counsel for the National Labor Relations Board, by the Regional Director for the Fifteenth Region (New Orleans, Louisiana), issued a complaint on June 30, 1952, against the Respondents (Mike and Joe Calderera, Partners, d/b/a Falstaff Distributing Company), alleging that the Respondents had engaged in specified conduct violating Section 8 (a) (1), (3), and (5) and Section 2 (6) and (7) of the Labor Management Relations Act,

1947, 61 Stat. 136, herein called the Act. Copies of the complaint and charges were served upon the Respondents; the Respondents have denied the commission of the unfair labor practices alleged.

Pursuant to notice, a hearing was held on December 8-10, 1952, in Little Rock, Arkansas, before Trial Examiner Henry J. Kent. The General Counsel, the Respondents, and the Union were represented by counsel, and all parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues. The parties also presented oral argument before Trial Examiner Kent and were given opportunity to file briefs and proposed findings of fact and conclusions of law. The complaint was amended at the hearing to include an allegation of discrimination respecting Delbert K. Young and to strike Young's name from schedule A attached to the complaint in connection with other unfair labor practice allegations.

Trial Examiner Kent having died since the close of the hearing, and before issuance by him of an Intermediate Report, the undersigned was designated to act as Trial Examiner in this matter and, particularly, to prepare and issue an Intermediate Report. See *N. L. R. B. v. Stocker Manufacturing Company*, 185 F. 2d 451 (C. A. 3).

Upon the record in this case, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENTS

The Respondents are exclusive wholesale distributors in Pulaski County, Arkansas, of Falstaff beer made in St. Louis, Missouri. The Respondents' interstate purchases of such beer exceed \$320,000 annually.

I find that the Respondents are engaged in commerce within the meaning of the Act. *Falstaff Distributing Co.*, 97 NLRB 997.

II. THE UNFAIR LABOR PRACTICES

A. Background

The Union began organizing employees of beer distributors in Little Rock, Arkansas, including the Respondents' driver-salesmen, in the latter part of August or early in September 1951. At an organizational meeting held on September 4, 1951, all the Respondents' driver-salesmen (there were four of them at the time) signed union membership cards designating the Union as their bargaining representative. On September 17, the Union filed a representation petition with the Board seeking certification as statutory representative of the Respondents' driver-salesmen (Case No. 32-RC-386). Later that same month John Shamburger, an attorney representing the Union, called upon Respondent Mike Caldarera, Shamburger informed Mike that the Union represented a majority of the employees and he asked whether Mike "would like to do business" with the Union. Mike did not challenge the Union's claimed majority; and whatever his precise response was to the request for bargaining, its effect was in the negative.¹

A hearing in the aforementioned representation case was held on October 10, 1951, following which the Board on January 8, 1952, issued a Decision and Direction of Election (97 NLRB 997). The Board determined that the appropriate bargaining unit consisted of "all beer driver-salesmen, including the relief driver and the warehousemen." An election was held on January 17, 1952, with the ballots equally divided: of 4 eligible voters, 2 cast ballots for the Union and 2 against the Union. The Union filed objections claiming the Respondents had interfered with the conduct of the election; and on March 21, 1952, the Regional Director issued a report on objections finding such interference and recommending that the election results be set aside and a new election held at such time as it might be conducted "in an atmosphere free from interference." No exceptions were filed to this report on objections, copies of which were served on the parties, and on April 8, 1952, the Board issued a Supplemental Decision adopting the Regional Director's recommendations. The second election has not yet been conducted.

The Union called upon the Respondents immediately after the January election was held, again requesting the Respondents to "work out" a contract. The Respondents refused, and on March 8, 1952, this time by letter, the Union once more requested the Respondents to recog-

¹ Mike denied at first that Shamburger claimed a majority or requested bargaining and Mike further testified that he merely referred Shamburger to the Respondents' counsel. Mike later testified, however, that he really did not recall what was said at the time.

nize the Union and bargain with it in behalf of the driver-salesmen. The Respondents did not reply.

B. Interference, restraint, and coercion

The General Counsel contends, in effect, that from the start of the Union's organizational campaign in September 1951 until the election in January 1952, the Respondents engaged in unlawful conduct thwarting the Union's organizational drive and the employees' related concerted activities and undermining the Union's representative status. It may be stated at the outset that when the representation petition was filed on September 17, Respondent Mike knew that his drivers had joined the Union

The Respondents' Contemporaneous Conduct

A union meeting was scheduled to be held on the evening of September 10 and employees Delbert Young, Marion McReynolds, Winn Burgin, and Russell Fugatt testified that Respondent Joe Calderera had told them earlier that day that he "would have no damned union men working for him," that the Respondents "would close the business down before any union man would drive his trucks," that if the employees attended the scheduled meeting the "trucks wouldn't roll the next morning," and that he and his nephew (Bernard) would themselves run the trucks and leave the employees without jobs. According to these witnesses, Respondent Mike affirmed Joe's remarks and Fugatt further testified that either Joe or Mike also stated at the time that "they would never sign a contract with the Union, that they would close their business down before they did." Mike and Joe deny all this testimony

Fugatt and McReynolds testified, and Mike denied, that in September, sometime after they had signed union cards, Respondent Mike offered them a weekly raise of \$5 if they would "withdraw from the Union and forget all about it." And about 2 weeks later, according to McReynolds, Mike told McReynolds that "the men that joined the Union would not be working there after everything had blown over" and that "if we went union we would have to look forward to [the Union] for money or a job to make our living." Burgin also testified that a few days after the aforementioned September 10 incident Mike told him, "I want you to get out and get away from that union and let them guys go on their way. If they won't turn your way, they are going to be out of a job. If you will go my way, you will have a job as long as . . . [the] Company is here, as long as you do right and carry on."

About 5 minutes before the election on January 17, Mike told Burgin, according to the latter's testimony which Mike denied, "Don't you do it. You know where to go. I will take care of you." And Fugatt testified that, on the morning of the election, Supervisor Bernard Calderera (a nephew of the Respondents) told him that the Union would lose 3 to 1 and that he, Fugatt, would be the only one to vote for the Union and that "I [Fugatt] might as well get started looking for a job because as soon as it quieted down--they knew I couldn't be fired then without trouble--that I would be fired and I might as well start looking for a job right now" and that "if it did go union, why they had it figured out anyway that the Company would take bankruptcy and come out under a new name, so it didn't make any difference whether it came out or not." Bernard's version was that he did tell Fugatt to start looking for another job, but because Fugatt's sales were dropping.² Bernard also denied discussing with Fugatt on the day of the election the possible reorganization of Respondents should the Union win the election; according to Bernard, he had told Fugatt on another occasion that he had heard that another beer company would shut down and reorganize should it become unionized and "that way they [the employees] wouldn't gain anything by going union." Bernard also denied telling Fugatt or anyone else that he thought the election would go 3 to 1, but he later admitted having executed an affidavit stating, in part, that he had made such statement but did not remember to whom and that he had also asked Fugatt how the latter thought the election would turn out. Bernard also had told McReynolds during the preelection period, according to McReynolds and which Bernard denies, that the men who joined the Union "would not be working there after the election was over with, providing they didn't go union."

Respondent Joe testified that he had talked to the employees "quite a bit about the union," that he had interrogated each of them concerning their union membership, and that he had asked employee Young whether Young was going to attend a union meeting. Supervisor Bernard testified that he also had questioned employees McReynolds and Fugatt respecting their union membership and that early in September he also had asked employee Burgin "how he felt about the union, what his steps would be toward the Union." Respondent Mike testified that he objected to "dealing with the Union" and that from "time to time" he had discussed

² Joe testified that Fugatt's work was "all right" during this period.

the Union with the employees but without ever conveying such notion to the employees; Mike also denied having ever threatened the employees respecting union membership or activities.

Other Conduct

On or about October 10, 1951, and after all the Respondents' drivers together had consulted with Union Attorney Tisdale, three of the drivers instituted a wage-hour action under the Fair Labor Standards Act against the Respondents. They had been paid on a weekly salary basis averaging \$60 in the case of McReynolds and Fugatt, which included a \$7.50 allowance known as "trade expense" for shortages and other expenses incidental to their work. The Respondents installed a time clock during the week ending October 20, 1951, and immediately changed the rate of pay to an hourly basis. At the same time the Respondents discontinued the established practice of having the drivers unload their own trucks and perform other incidental warehouse duties. The first week these changes were effective, the average pay of McReynolds and Fugatt dropped from the \$60 previously received to about \$39 weekly. On October 27, 1951, the Respondents increased the rate of pay by granting a 2-cent commission on each case of beer sold, which raised the average weekly pay of McReynolds and Fugatt to approximately \$50 during the following 4 weeks. On December 1, 1951, the commission was raised from 2 to 3 cents, giving McReynolds and Fugatt an average weekly salary of approximately \$62 for the first week affected.

By letter dated November 20, 1951, McReynolds and Burgin advised Attorney Tisdale to dismiss their wage-hour suit, and Fugatt took similar action on November 27. Burgin and McReynolds testified that sometime before they wrote their letters, Mike had offered to restore the former wage rates "providing you drop the lawsuit and the Union." Burgin further testified that Mike also threatened to tie up his, Burgin's, property unless the suit were dropped. And McReynolds further testified that about 3 days before sending his (McReynolds') letter, Mike again importuned him to withdraw the suit and drop the Union and that Mike stated that the Respondents would raise the commission rate to 3 cents a case. The Respondents' bookkeeper, Montgomery, prepared the letters which McReynolds and Burgin³ mailed on November 20.

Fugatt also testified that Mike had requested him to drop the suit and withdraw from the Union and had said that "it was a matter of time till I would go if I didn't straighten up and get with [Burgin and McReynolds]." Mike told Fugatt, according to Fugatt's further testimony, that "if I would sign the letter like they [Burgin and McReynolds] did, dismissing the suit and forget the Union, that I would get an increase of one cent per case commission on beer sales." Fugatt testified that he took no action for several days when Mike again asked him about writing the letter and stated that Fugatt's failure to sign such letter was holding up the 1-cent commission. Fugatt then asked Mike, as Fugatt testified, whether the 1-cent commission would apply to that week's sales and that Mike said it would. Fugatt testified that Mike then instructed the bookkeeper to prepare the letter for Fugatt's signature. Fugatt posted the letter that day, November 27, and the 3-cent commission was immediately effective.

According to Respondent Joe, the Respondents installed the time clock and went on an hourly basis in order "to be protected, to be within the law" and they realized that the employees would make "a whole lot less," as they did, as a consequence of the change in pay rate and working conditions. Apart from installing the time clock and instituting an hourly basis of payment, the Respondents offered no reason for taking away the warehouse duties from the drivers and for establishing a net wage rate substantially below the former scale. Mike testified, in regard to the aforementioned letters dismissing the wage-hour action, that McReynolds had told Mike that he (McReynolds) "was tired of all that stuff and . . . wanted to go back to the old salary again" and that Mike replied that "it is out of my hands, I can't do nothing," which Mike explained as meaning that "they joined the union and then he wanted to go back. I couldn't do that so I just told them I couldn't do nothing for them." Mike further testified that McReynolds of his own volition asked if Montgomery would help write a letter dropping the suit. According to Mike, Burgin and Fugatt also came to him--both voluntarily and without any pressure or suggestion from him--seeking assistance in writing their respective letters (Fugatt told Mike, the latter testified, "They are making a goat out of me . . . I am willing to go in there and write a letter too." Mike testified that he thereupon told Fugatt, "now I am not telling you this. You are coming to me" and that Fugatt replied, "That is right.") Respondent Joe testified that the Respondents granted the commissions because of the employees' complaints.

³Burgin testified that he also mailed the letter, and so notified the Respondents, because he was considering another job offer and the other employer had requested him to dismiss the action as a condition to receiving the job.

"The union activity," according to Respondent Joe, "brought the [wage-hour] suit on." Joe also testified that with the advent of the Union and the filing of the wage-hour suit, Fugatt and McReynolds lost their interest in their work and that McReynolds "became poisoned," although Joe further testified that both employees were doing their work "all right."

Conclusions

I have considered the testimony of each witness in this proceeding, separately and in relation to all other testimony, and I have attempted to evaluate such testimony in the light of circumstantial details, including all admissions and uncontroverted testimony, and I am satisfied that the testimony of the General Counsel's witnesses as set forth in this section ("Interference, restraint, and coercion") is credible as against controverting testimony adduced by the Respondents. Upon the basis of such credible testimony, I find that the Respondents have violated Section 8 (a) (1) of the Act by interrogating employees concerning their union membership and activities, threatening employees with loss of employment on the basis of union membership and activities, and promising benefits on condition that employees cease their union membership and activities.⁴ *Southern Furniture Mfg Co. v. N. L. R. B.*, 194 F. 2d 59, 61-62 (C. A. 5), cert. denied 343 U. S. 964; *N. L. R. B. v. Cen-Tennial Cotton Gin Co.*, 193 F. 2d 502, 503-504 (C. A. 5); *Stokely Foods, Inc. v. N. L. R. B.*, 193 F. 2d 736 (C. A. 5), *Collins Baking Co. v. N. L. R. B.*, 193 F. 2d 483, 486 (C. A. 5); *Farmers Co-Operative Co.*, 102 NLRB 144; *Parma Water Lifter Co.*, 102 NLRB 198, *Globe Products Corp.*, 102 NLRB 278

Although I do not find that the Respondents installed an hourly basis of payment for unlawful reasons, I do find that the Respondents established the hourly rate they did and removed the warehouse tasks from the employees as a reprisal for their activities in behalf of the Union and for bringing the wage-hour suit and in order to induce the employees to discontinue this union membership and the suit. The action of the employees as to the wage-hour suit is itself protected concerted activity within the meaning of the Act. *Salt River Valley Water Users Association*, 99 NLRB 849. In the context of this case, I find that the Respondents violated Section 8 (a) (1) and (3) by reducing employees' wages because of their union activities and other concerted activities, including the wage-hour action, and by requiring employees to drop the wage-hour suit before restoring the discriminatory cut in wages. Whether or not, however, this conduct of the Respondents violates Section 8 (a) (3) as well as 8 (a) (1), as I have found it does, I shall recommend the restoration to McReynolds, Burgin, and Fugatt of wages lost through such unlawful conduct.

C. Termination of Young

During the course of a day's work, a driver-salesman may collect as much as \$1,000 in cash for products sold, and the employees are required to turn over these proceeds to the Respondents at the end of each day. To protect themselves under these circumstances the Respondents have always carried fidelity bonds on their salesmen, and the record conversely establishes that they do not retain employees unless they are so covered. It appears that fidelity bonds covering employees in this line of business are not particularly profitable to the insuring company and that such bonds are generally issued only as an accommodation to an account which also supplies more lucrative forms of insurance business.

The Respondents hired Delbert Young on April 28, 1951, and a few days later they requested their insurance agent, Bernard Heinze, to have Young covered by the existing blanket bond on their other employees. A binder covering Young was issued immediately but subject to cancellation depending on an investigation of Young by the home office of the insurance company. By letter dated August 1, 1951, the underwriter advised Heinze and the Respondents that owing to an unsatisfactory investigation the insurance company was canceling coverage on Young, effective August 23, 1951. Heinze thereupon advised the underwriter that the Respondents considered Young to be energetic and efficient, that they were surprised at the investigation report, and that the Respondents desired to be advised as to the nature of the findings. On August 10 the underwriter informed Heinze that it is the policy of the insurance company not to divulge the contents of investigation reports to the assured (the Respondents in this instance) or even to the insurance company's branch offices.

The Respondents, upon being advised of the insurance company's letter of August 1, requested Heinze to do what he could to have Young bonded. Pursuant to Heinze's inquiry, another insurance company stated in effect that it would be willing to issue a bond but with a

⁴The record contains other testimony, which I do not set forth because it deals with matters similar to the unlawful conduct described herein.

\$250 deductible provision. However, the Respondents were unwilling to assume such initial \$250 risk themselves.

The Respondents, meanwhile, had informed Young and the Union's attorney, Tisdale, of the situation. On September 26, 1951, the Respondents advised the Union that they were reluctant to sever Young's employment, but that they would have to do so unless Young presented a surety bond in the amount of \$1,000. The Respondents also inquired whether Young intended to take steps to furnish the necessary surety bond as soon as possible. There was further interchange between the parties--Tisdale advised the Respondents on September 27 that he was "in the process" of having a bond written for Young--and on October 4, 1952, the Respondents finally advised Tisdale that if Young "fails to produce a satisfactory bond in the next few days or show that such a bond will be promptly forthcoming, . . . [we] will have to release him from his present employment." The Respondents also advised Tisdale that they would be pleased with a cash bond should Young be unable to furnish a corporate surety bond.

Tisdale testified that it was quite unusual for an insurance company to take 4 months to investigate a matter of the sort under consideration. He also testified that he could have obtained a bond for Young but with much detail involved, and that Young finally advised him not to proceed further.

Young testified that the Respondents first mentioned the cancellation of his bond after the employees had joined the Union and that Mike finally told him about a week before October 6, 1951, that he would be discharged the following week unless he furnished a bond. Young testified that he quit on October 6, 1951, because of his dissatisfaction with working conditions and because the Respondents were constantly "onto" him about his bond.

The General Counsel contends, in effect, that the Respondents constructively discharged Young for antiunion reasons, and his argument suggests that the Respondents were responsible for causing Young's bond to be canceled. The testimony of the Respondents and the insurance agent is contrarily, but the General Counsel would refute such testimony by the suspicion attaching to the lateness of the investigation report and by consideration in the light of the aforementioned organizational picture of the Respondents' statements to other employees concerning their own bonds.

The other drivers were bonded and the record does not show any question respecting their coverage at the time. Nonetheless, a week or two after the employees signed their union cards, Mike asked employees McReynolds, Burgin, and Fugatt whether they could raise \$1,000 cash bonds. This was the first time the Respondents had ever mentioned such matter to these employees, each of whom had been covered by bonds since his employment began in March 1947 (McReynolds), February 1950 (Burgin), and August 1949 (Fugatt). Moreover, Mike informed Fugatt that "all you guys who have gone union on me . . . are going to have to put up a cash bond of a thousand dollars." The Respondents offered no explanation for questioning these employees about bonds.

I find that by questioning the three employees about bonds and by Mike's statement to Fugatt, the Respondents threatened reprisal because of union membership and that they thereby violated Section 8 (a) (1) of the Act. While Young's case is not free from suspicion, the question as to his bond arose before the Union's organizational campaign began, and I am unable to find a preponderance of evidence to support the allegation of discrimination respecting his termination. I shall therefore recommend dismissal of the complaint in this respect.⁵

D. Refusal to bargain

Respondent Joe testified in the representation case, of which testimony I take official notice,⁶ that at the time the representation petition was filed, the Respondents had in their employ only driver-salesmen, a bookkeeper, and Supervisor Bernard, and that it was not until later that they engaged a relief driver and a warehouseman. The bookkeeper and supervisor are in excluded categories under the Board's aforementioned unit determination (97 NLRB 997), and I find that as of September 4 and 17 and when Shamburger met with Respondent Mike in September, as related above, the Respondent's beer driver-salesmen constituted an appropriate bargaining unit within the meaning of Section 9 (b) of the Act. As the Union represented all the driver-salesmen at such time, I find that the Union was then the statutory bargaining representative for such unit. Based on subsequent events, the Board included a

⁵ It should be pointed out that no question as to Young's character or reputation or abilities is involved in this proceeding. The Respondents stated they were not challenging Young's character in any respect, Respondent Joe said he was a "good" employee, and the General Counsel also offered to show that Young's character is without blemish.

⁶ The parties may show the contrary, should they desire, in exceptions to the Board. See International Longshoremen's and Warehousemen's Union, Local 10, ILWU, 102 NLRB 907.

relief driver and warehouseman in the unit, but this is only an insubstantial modification of the unit which I have found to be appropriate at the times specified above; moreover, the Board's representation decision states that the single warehouseman involved had too irregular a tenure of employment to be eligible to vote (97 NLRB 999).

The record does not show that the Respondents had challenged the Union's majority status when Shamburger requested recognition in September 1951; it does show, in fact, as indicated above, that the Respondents were aware that the Union did represent a majority--indeed all--of their driver-salesmen.

Once the Respondent learned that their employees had joined the Union, they directed their efforts at undermining the representative status of the Union by the unlawful activity described above. Under such circumstances, in addition to the fact that the Respondents in September 1951 had no genuine question concerning the Union's majority status, the established law is to the effect that a refusal to bargain for employees in an appropriate unit is a violation of Section 8 (a) (1) and (5) of the Act and makes a bargaining order appropriate. Poultry Enterprises, Inc., 102 NLRB 211. And the fact that a contemporaneous representation case is instituted does not make for a different result, even though the union in question subsequently loses an election, where, as in this case, the employer's intervening unlawful conduct caused a dissipation of the union's majority status. *Joy Silk Mills, Inc. v. N. L. R. B.*, 185 F. 2d 732, 741-742, 744 (C. A. D. C.), cert. denied 341 U. S. 914; *Dependable Wholesale Company, Inc.*, 102 NLRB 656; *Rehrig-Pacific Company*, 99 NLRB 163; cf. *Spitzer Motor Sales, Inc.*, 102 NLRB 437; *Drummond Implement Company*, 102 NLRB 596. Moreover, even where an employer--unlike the Respondents in the present case--has a bona fide doubt concerning a union's majority, a subsequent election lost by the union does not bar a bargaining order where the request to bargain and the unlawful conduct causing a defection in the union's majority took place before the election. *Holmes Company, Ltd. v. N. L. R. B.*, 179 F. 2d 876, 879-880 (C. A. 5).⁷

I reject the Respondents' claim that Shamburger did not make a clear request for recognition and bargaining in September 1951,⁸ and I conclude that the Respondents in September 1951 failed and refused to recognize the Union and to bargain with it as exclusive bargaining representative of employees in an appropriate unit and that they thereby violated Section 8 (a) (5) and (1) of the Act.⁹ And even if a request for recognition and bargaining had not been made properly and even though no separate finding of Section 8 (a) (5) were made in this case, I still would find a bargaining order to be appropriate under the facts presented. Cf. *International Broadcasting Corporation*, 99 NLRB 130; *Holmes Company, Ltd. v. N. L. R. B.*, *supra*; *Somerset Classics Inc.*, *supra*.

III. THE EFFECT OF UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Respondents set forth in section II above, occurring in connection with the operations of the Respondents 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 of commerce.

IV. THE REMEDY

Having found that the Respondents have engaged in certain unfair labor practices, I shall recommend that they cease and desist therefrom and that they take certain affirmative action designed to effectuate the policies of the Act.

I shall recommend that the Respondents make whole Fugatt, McReynolds, and Burgin for losses in earnings suffered by them as a result of the Respondents' discriminatory reduction in their wages, to be computed on a quarterly basis in the manner established in *F. W. Woolworth Company*, 90 NLRB 289, 291-294. Because I do not find that the mere change to an hourly basis was discriminatory, this make-whole recommendation does not imply that these employees would have earned precisely the same amount after the hourly basis was installed as

⁷Compare *N. L. R. B. v. John Deere Plow Co.*, 187 F. 2d 26 (C. A. 5), enforcing as modified 82 NLRB 69, where the employer had a good-faith doubt and where the bargaining request was not made until after an election which the union lost and preceding which there was no unlawful conduct. (See footnote 11, 82 NLRB 76, where the dissenting members of the Board describe various distinguishing factors, the court having approved their dissent in the case.)

⁸See *Somerset Classics, Inc.*, 90 NLRB 1676, 1680-1681, enforced 193 F. 2d 613 (C. A. 2), cert denied 73 S. Ct. 10.

⁹I do not rely on the Respondents' refusals after the election.

they had been earning theretofore. It does mean that the Respondents should reimburse these employees in the amounts they would have received had the Respondents not imposed a discriminatory scale of hourly payments and not made the other discriminatory changes in working conditions which resulted in a loss of earnings. It will also be recommended that the Respondents make available to the Board, upon request, payroll and other records to facilitate checking the amounts due these employees under this recommended remedy.

I shall also recommend that the Respondents be required to recognize and bargain with the Union for the unit of employees found appropriate by the Board in its Decision appearing in 97 NLRB 997. This cited representation case is not before me for recommended action. I should think, however, that the representation case, in which no definite date for the second election has been scheduled, may be withdrawn upon proper application by the Union. In any event, I do not consider the outstanding representation petition in Case No. 32-RC-386 as barring the recommended bargaining order.

Upon the basis of the above findings of fact and upon the entire record in the case, I make the following:

CONCLUSIONS OF LAW

1. The Respondents have violated Section 8 (a) (1) of the Act by interrogating employees concerning union membership and activities, by promising benefits on condition that employees withdraw from the Union and cease their union activities and other protected concerted activities, and by threatening and taking reprisal because of protected concerted activities.
2. The Respondents have violated Section 8 (a) (1) and (3) by discriminatorily reducing the earnings of employees.
3. The Respondents have violated Section 8 (a) (1) and (5) by refusing to recognize and bargain with the Union as a statutory representative.
4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.
5. The Respondents have not violated the Act as regards the termination of employment of Delbert K. Young.

[Recommendations omitted from publication.]

APPENDIX

NOTICE TO ALL EMPLOYEES

Pursuant to the recommendations of a Trial Examiner 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 NOT discourage membership in International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local No. 878, AFL, or in any other labor organization, by discriminating in regard to hire or tenure of employment or any term or condition of employment.

WE WILL NOT interrogate employees concerning union membership and activities. WE WILL NOT threaten to discharge or lay off or otherwise to discriminate against employees because of union membership and activities or hold out job advantages should they refrain from such membership and activities.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form labor organizations, to join or assist International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local No. 878, AFL, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3) of the Act.

WE WILL make whole the following because of the discrimination against them:

Winn Burgin
Marion McReynolds
Russell Fugatt

WE WILL recognize and bargain with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 878, AFL, in behalf of all beer driver-salesmen, relief drivers, and warehousemen.

MIKE AND JOE CALDARERA, PARTNERS, d/b/a
FALSTAFF DISTRIBUTING 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.

OKLAHOMA FURNITURE MANUFACTURING COMPANY *and*
RAY WIGGINTON, DON HUGHES, LEROY SNEED, W. W.
BARKER, JR., and WM. A. McGLONE *and* GENERAL
DRIVERS, CHAUFFEURS AND HELPERS, LOCAL 886,
AFL. Cases Nos. 16-CA-470, 16-CA-471, 16-CA-473, 16-
CA-474, 16-CA-477, and 16-CA-489. May 5, 1953

DECISION AND ORDER

On February 5, 1953, Trial Examiner Reeves R. Hilton issued his Intermediate Report in the above-entitled consolidated proceedings, a copy of which is attached hereto, finding that the Respondent had not engaged in any unfair labor practices and recommending that the complaint be dismissed in its entirety. Thereafter, the General Counsel filed exceptions to the Intermediate Report and a supporting brief.

The Board¹ 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 General Counsel's exceptions and brief, and the entire record in these cases, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner with the following additions and modifications:

1. We agree with the Trial Examiner that the Respondent did not violate Section 8 (a) (1) and (3) of the Act by discharging employees Ray Wigginton, Don Hughes, Leroy Sneed, and W. W. Barker, Jr.

We have carefully considered the evidence in these cases, particularly the failure of the Respondent to discharge the above-named employees until more than 6 months after their dishonest conduct and the coincidence in time of a 6-day interval between

¹Pursuant to the provisions of Section 3 (b) of the Act, the Board has delegated its powers in connection with these cases to a three-member panel [Members Houston, Murdock, and Styles].