

ceive how the dispatcher can supervise the traincrews since he has only radio and no physical contact with them. We are satisfied that the haulage boss and the jigger bosses are the immediate supervisors of the haulage crews and that the direction of the traincrews by the dispatcher is not supervisory within the meaning of the Act.<sup>3</sup> Accordingly, we find that the dispatchers are included in the production and maintenance unit for which Mine Mill is the certified bargaining representative.

[Text of Direction of Election omitted from publication.]

**MEMBER JENKINS** took no part in the consideration of the above Third Supplemental Decision and Direction of Election.

<sup>3</sup> On October 1, 1957, the Employer's mine superintendent distributed a circular to all mine supervisors listing the "Rules for Disciplinary Action." In this bulletin it is stated that only supervisors of foreman status, which includes assistant foremen, can discharge an employee. However, "a direct supervisor or boss will exercise disciplinary action by:

1. Giving proper warning to employees.
2. Give employees the proper number of days off for his offense.
3. When necessary, recommend an employee's transfer or discharge to his foreman.

All bosses have the direct right to immediately send a man out from underground or off the job when he becomes insubordinate, insulting and abusive. Whether he will be penalized or discharged can be reviewed and determined later."

The dispatchers admittedly do not issue warnings to employees or layoff employees for violation of rules. Further, there is no credible evidence that they have ever recommended transfer or discharge as a disciplinary measure, or have sent a man out from underground because of insubordination or insulting or abusive conduct.

**Adams Dairy, Inc. and Mikal Wallace. Case No. 14-CA-1532.**  
*March 24, 1958*

## DECISION AND ORDER

On June 14, 1957, Trial Examiner Lee J. Best issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had 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.<sup>1</sup>

Pursuant to the provisions of Section 3 (b) of the Act, the Board has delegated its powers in connection with this case to a three-member panel [Members Rodgers, Bean, and Jenkins].

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Inter-

<sup>1</sup> The Respondent's request for oral argument is hereby denied as the record, exceptions, and brief adequately present the positions of the parties.

mediate Report, the exceptions and brief, and the entire record in the case and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner only insofar as they are consistent with our decision herein.

1. We agree with the Trial Examiner that the Respondent violated Section 8 (a) (4) and (1) of the Act by refusing to reinstate Mikal Wallace on April 9, 1956, because of his failure to present a signed statement renouncing and withdrawing charges filed with the Board and by requiring on May 7, 1956, as a condition of his reinstatement, his withdrawal of these charges.

2. We, however, do not agree with the Trial Examiner that the preponderance of the evidence establishes that the Respondent on August 1, 1956, terminated Wallace's route and transferred him to another job as a special driver because of his activities on behalf of the International Union of Operating Engineers, AFL-CIO, Locals 2, 2A, 2B and 2C (hereinafter called the Operating Engineers). In finding discriminatory motivation, the Trial Examiner relied upon the circumstances surrounding Wallace's discharge which occurred more than 4 months earlier, and which the Trial Examiner found was due to Wallace's efforts to have the Independent Wholesale Dairy Products Salesmen's Association (hereinafter called the Independent) affiliate with the Operating Engineers. We find that the circumstances of Wallace's discharge are entirely too doubtful to support a finding of discrimination in his later transfer.

The relevant facts are briefly these: For a number of years the Operating Engineers has been the bargaining representative of the Respondent's maintenance employees. The Independent, since its certification by the Board in 1954, has represented the driver-salesmen. Wallace, a driver-salesman, was active in the Independent. Relations between the Respondent and these unions have apparently been friendly. Before the events leading to Wallace's discharge, the employees engaged in much union discussion and argumentation while working. This was serious enough to cause the Respondent at a regular grievance meeting with the Independent's executive committee on March 6, 1956, which Wallace attended, to complain about the state of affairs and to demand that it cease. When Wallace asked as to whom he referred, the Respondent's general manager replied that "It must be you, I want it put on the record that I want it discontinued." It appears that Wallace was one of the most boisterous and argumentative of the employees.

Thereafter, on March 24, while trucks were being loaded on the dock, Wallace became involved in a dispute with the Independent's president, Powell; its secretary, Bridges, and Frye, a member of the executive committee, over an invitation Wallace had extended to

representatives of the Operating Engineers to attend a meeting of the Independent's membership to consider possible affiliation with the Operating Engineers. It appears that Wallace, Powell, and Bridges were interested in affiliating with the Operating Engineers and had previously interviewed representatives of that organization about it. Upon learning of Wallace's participation in the commotion on the dock, the Respondent discharged him. The Independent thereafter unsuccessfully sought Wallace's reinstatement. However, after the Operating Engineers picketed the Respondent, the Respondent reinstated Wallace on May 7, 1956. About 3 months later, the Respondent consummated an earlier decision to reorganize certain routes for asserted business reasons. This required the elimination of Wallace's route. Instead of dismissing him, the Respondent assigned Wallace to a job as special driver. A few months later, following another reorganization, Wallace was given another route.

As indicated previously, there is no evidence in the record showing that the Respondent's relations with the Operating Engineers were other than friendly. It is also significant that no clear evidence was produced to show that the Respondent was opposed to affiliation.<sup>2</sup> Moreover, it appears that long before Wallace's transfer, any idea of affiliating had been abandoned. In addition, the record is devoid of any evidence showing that Wallace, after his reinstatement, engaged in any activities on behalf of the Operating Engineers or was even interested in that organization. Concededly, no events had intervened which would justify imputing a desire on the part of the Respondent to penalize Wallace for activities on behalf of the Operating Engineers. Otherwise, there would be no reason for the Trial Examiner's reverting to the original discharge to find a ground for Wallace's transfer.

In view of the foregoing, we find, contrary to the Trial Examiner, that the evidence does not establish that the Respondent terminated Wallace's route and transferred him to another job because of a desire to penalize him for his early affiliating activities rather than because of business considerations. Accordingly, we shall dismiss the portion of the complaint that alleges that the Respondent discriminated against Wallace in violation of Section 8 (a) (3) of the Act.

The Trial Examiner also found that the reason for the termination of Wallace's route and his transfer was his filing of charges with the Board and that the Respondent thereby violated Section 8 (a) (4) of the Act. We do not agree. Not only does the complaint not allege such a violation, but the evidence also does not support such a finding.

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<sup>2</sup>There is some evidence that the Independent's Vice President Hockensmith asked General Manager Adams for his opinion regarding affiliation and Adams replied that he would have to think it over before giving an answer and simply cautioned them to watch their step.

## ORDER

Upon the entire record in this case, and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders the Respondent, Adams Dairy, Inc., St. Louis, Missouri, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Requiring any employee to withdraw any charge filed by him as a condition of reinstatement or in any other manner interfering with the right of employees to file and prosecute charges and to give testimony under the Act.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action:

(a) Post at its plant in St. Louis, Missouri, copies of the notice attached hereto marked "Appendix."<sup>3</sup> Copies of said notice to be furnished by the Regional Director for the Fourteenth Region, shall, after being duly signed by the Respondent's representative, be posted by the Respondent immediately upon receipt thereof and maintained by it for a period of 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 Respondent to insure that said notices are not altered, defaced or covered by any other material.

(b) Notify the Regional Director for the Fourteenth Region in writing, within ten (10) days from the date of this Order, as to what steps the Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the complaint, insofar as it alleges that the Respondent violated the Act by discriminating against Mikal Wallace, be, and it hereby is, dismissed.

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

## APPENDIX

## 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, as amended, we hereby notify our employees that:

WE WILL NOT require any employees to withdraw any charge filed by him as a condition of reinstatement or in any other manner interfere with the right of employees to file and prosecute charges and to give testimony under the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed in Section 7 of the Act.

ADAMS DAIRY, INC.,  
*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

These proceedings authorized and conducted under Section 10 of the National Labor Relations Act, as amended, 61 Stat. 136, herein called the Act, were heard before the Trial Examiner in St. Louis, Missouri, on January 14, 15, and 16, 1957, and on February 7, and 8, 1957. Upon charges filed by Harold Gruenberg as attorney for Mikal Wallace, Charging Party, the General Counsel for the National Labor Relations Board issued a complaint against Adams Dairy, Inc., herein called Respondent, alleging that Respondent engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (1), (3), and (4) of the Act, affecting commerce within the meaning of Section 2 (6) and (7) of the Act. The complaint, as amended, more particularly alleges in substance that the Respondent (1) since on or about April 5, 1956, refused to reinstate Mikal Wallace (employee) to his former or substantially equivalent position of employment unless and until he agreed to withdraw a charge filed by his attorney on his behalf in Case No. 14-CA-1480 and execute an affidavit to the effect that said charge was without merit and not authorized by him; and (2) on or about August 1, 1956, discriminated in regard to hire or tenure of employment to encourage or discourage membership in a labor organization by removing Mikal Wallace from his regular route as a driver-salesman, demoting him to the position of special driver at greatly reduced earnings, and denying him certain privileges customarily granted to driver-salesmen, because he engaged in protected concerted activities with fellow employees for the purposes of collective bargaining and other mutual aid or protection.

Copies of the charges, complaint, and other pertinent process were duly served upon the Respondent. In due course the Respondent filed answer to the complaint admitting jurisdictional allegations with respect to commerce, but denying all allegations of unfair labor practices.

Pursuant to notice, all parties appeared at the hearing, and were represented by counsel. Full opportunity was provided for all parties to be heard, to examine and cross-examine witnesses, to introduce evidence pertinent to the issues involved, to argue orally upon the record, and thereafter file written briefs and proposed findings of fact and conclusions of law. Briefs filed by counsel for the General Counsel and the Respondent have been given due consideration. No separate brief was filed by counsel for the Charging Party.

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

### FINDINGS OF FACT

#### I. BUSINESS OF RESPONDENT

Adams Dairy, Inc., is a corporation duly organized and existing by virtue of the laws of the State of Missouri, with its principal office and place of business located at 5425 Easton Avenue in the City of St. Louis, where at all times pertinent herein it engaged in the processing, sale, and distribution of dairy and related products consisting principally of milk. In the course and conduct of its business during the 12-month period ending November 30, 1956, the Respondent processed, sold, and shipped milk and dairy products valued in excess of \$100,000 in interstate commerce from its St. Louis plant to points outside the State of Missouri.<sup>1</sup>

<sup>1</sup>E C. Adams, Jr., is vice president and general manager of Respondent. Walter Deschamp is his supervisory assistant, and a supervisor within the meaning of the Act.

I find, therefore, and Respondent concedes that it is engaged in commerce within the meaning of Section 2 (6) and (7) of the Act.

## II. THE LABOR ORGANIZATIONS INVOLVED

The International Union of Operating Engineers, AFL-CIO, Locals 2, 2a, 2b, and 2c (herein called the Operating Engineers), and the Independent Wholesale Dairy Products Salesmen's Association (herein called the Independent Union), are labor organizations within the meaning of Section 2 (5) of the Act.

At all times pertinent to this case Herman B. Jones was business representative of the Operating Engineers. The officers and executive committee of the Independent Union included George F. Powell (president), David T. Hockensmith (vice president), Lawrence (Larry) D. Bridge, Jr., (secretary), John H. Hartshorn (treasurer), James A. Frye, and Mikal Wallace.

## III. THE UNFAIR LABOR PRACTICES

### A. *The bargaining agreement*

Prior to July 1954 two labor organizations represented employees of Respondent for the purposes of collective bargaining. The International Union of Operating Engineers, Local 2, was, and still is, the recognized bargaining agent for all maintenance employees, and the International Brotherhood of Chauffeurs, Warehousemen and Helpers of America, Local Union #603, represented all inside dairy workers and driver salesmen. During the summer of 1954 the driver-salesmen group organized the Independent Dairy Products Salesmen's Association, which pursuant to a consent election in July 1954 was certified as exclusive bargaining representative for all employees in an appropriate unit comprising "All wholesale driver-salesmen, including relief drivers and special drivers, exclusive of inside dairy workers, office employees, supervisory employees, executives, and professionals."

Effective for a term of 2 years from September 1, 1954, to August 31, 1956, the aforesaid Independent Union and the Respondent entered into a written collective-bargaining agreement containing, *inter alia*, provisions for a union shop, seniority, grievance procedure, minimum wage scale, and commissions based upon a point system, establishment and elimination of routes, et cetera. Article XII of the written agreement contained provisions, as follows:

Employer agrees not to consolidate or take off a route that is in commission on the points set forth under "Method for Determining Points" unless a four (4) month guarantee of the employee's basic pay and commission is paid. . . .

It is expressly agreed that in those instances where a route exceeds 50,000 points, said route may then be reduced to a minimum of 50,000 points with no guarantee, however, if said route is reduced below 50,000 points, within following four (4) months the full original guarantee must be paid.

Effective April 11, 1955, the written agreement was amended in writing, as follows:

1. Route drivers shall receive  $1\frac{1}{8}\phi$  per point from scratch with an absolute guarantee of \$600.00 per month. In the event that a route should fall below 40,000 points per month, it is agreed that the route may be adjusted by the Company. It is further agreed that all overtime shall be based on \$85.00 per week.

\* \* \* \* \*

3. The Union, in recognition of the economic condition of the milk market in this area, agrees that the Company, in connection with its present right to consolidate routes as set forth in the working Agreement, shall in order to more effectively meet the present market conditions, have the right to eliminate routes without regard to the present seniority provisions contained in the present working Agreement and further without regard to the guarantees as set forth in Article XII of the Agreement pertaining to guarantee.

### B. *Discharge of Mikal Wallace*

Mikal Wallace was originally hired by the Respondent as a driver-salesman on December 8, 1949. He operated route 15, and was commended by Supervisor Walter Deschamp as having less returns and special orders than any other operator. He was one of the organizers of the Independent Union, was elected and served as

treasurer of that organization until July 1, 1955, and was thereafter elected a member of its executive committee. At all times he aggressively participated in the business administration of that union. The Independent Union had no office or regular meeting place for the transaction of business, and in the absence of any prohibiting company rule driver-salesmen frequently discussed their problems at the loading dock on company premises. At a grievance meeting with the executive committee on March 6, 1956, concerning other matters, General Manager E. C. Adams, Jr., complained about discussions and arguments around the plant and demanded that they be discontinued. Mikal Wallace raised an issue by inquiring who he had reference to, whereupon, Adams said, "It must be you, I want it put on record that I want it discontinued." In the early part of March 1956 some of the driver-salesmen were considering and discussing the possibility of the Independent Union becoming affiliated with the Operating Engineers. Mikal Wallace and Larry D. Bridge interviewed Business Representative Herman B. Jones at his office concerning such a proposal. During the third week in March, Mikal Wallace, Larry D. Bridge, and George F. Powell had a second conference with Jones to discuss the proposition, after seeking information from the Regional Office of the National Labor Relations Board with respect to legal requirements and procedure. Thereafter President George F. Powell posted a notice calling a membership meeting of the Independent Union at the St. John's Community Center on the late afternoon of March 24, 1956, to discuss and vote on the affiliation question. In the meantime Powell instructed David T. Hockensmith (vice president) to find out how General Manager Adams of the Respondent Company felt about such an affiliation. When approached by Hockensmith on March 22, 1956, and also by Arthur J. Riley (driver-salesman), Adams made statements to the effect that he would have to think it over before giving an answer, and cautioned them to watch their step. After discussion with Larry Bridge, but without consulting President George F. Powell, Mikal Wallace invited representatives of the Operating Engineers to attend the meeting set for March 24, 1956.

When the driver-salesmen reported for work about 5 a. m. on Saturday, March 24, 1956, the trucks of George F. Powell and Mikal Wallace were being loaded at opposite ends of the dock. Larry D. Bridge mentioned to Powell the fact that Mikal Wallace had invited Business Representative Herman B. Jones and Harold Gruenberg, attorney for the Operating Engineers, to attend the meeting of the Independent Union that afternoon. Powell expressed his disapproval of the invitation, and Bridge relayed that information to Wallace at the other end of the dock. Thereupon, Mikal Wallace, Larry D. Bridge, and James F. Frye went together to talk the matter over with Powell. Wallace inquired of Powell what was the trouble that he was not in favor of the engineers any more and Powell said, "No, I have been doing some investigating and I don't think it would be the thing to do. We will discuss it at our meeting to-night." Wallace said, "Well, I have invited the Operating Engineers to be at the meeting," and Powell replied, "Well, you can just call them and tell them not to come because they wouldn't get in." Considerable argument and loud talking ensued between the four men present, but there was no fighting or name calling. As a result of the misunderstanding, President George F. Powell notified members of the executive committee that the meeting was canceled or postponed. No management representative or supervisor was present at the plant when the argument occurred.

Supervisor Walter Deschamp stopped at the plant about 8:30 a. m. on March 24, 1956, enroute to an Easter Parade downtown in which the Respondent was participating. Some employee reported to him that an argument between the driver-salesmen had occurred on the dock. Without further investigation Deschamp reported the occurrence to General Manager Adams at the Jefferson Hotel while waiting for the parade to start. Thereupon, Adams instructed Deschamp to discharge Mikal Wallace at once, and then proceeded to Florida by automobile at the conclusion of the parade without returning to the plant. Supervisor Deschamp called Wallace into his office on Monday, March 26, 1956, and discharged him. None of the other participants in the argument on the dock were disciplined or even questioned by the Respondent for any breach of conduct. In compliance with his request for reasons of discharge, Respondent furnished Wallace with a letter, as follows:

DEAR MR. WALLACE: Our records disclose that you were first employed by Adams Dairy, Inc., on December 8, 1949, and continued in our employ until the date of notice of discharge, March 26, 1956.

Your duties while in our employ being that of milk wagon wholesale driver.

The reasons for your discharge are:

1. Your inability to work in close harmony with your fellow workers.
2. Your expressions of disloyalty to the Company, its officers and supervisors.

Yours truly,

(Signed) ADAMS DAIRY, INC.,  
Walter Deschamp,  
WALTER DESCHAMP.

WD/vb

### *C. Reinstatement of Mikal Wallace*

Immediately following his discharge Mikal Wallace filed, and requested the Independent Union to process, a grievance against the employer under provisions of the collective-bargaining agreement. A meeting with Respondent was scheduled for Tuesday, March 27, 1956, but was thereafter postponed until Friday, March 30, 1956. On the day of discharge Wallace also consulted Harold Gruenberg, attorney for the Operating Engineers, expressed a desire to file a charge with the National Labor Relations Board and authorized him to do so whenever he deemed it necessary. Consequently, Attorney Gruenberg filed a charge in Case No. 14-CA-1480 and caused it to be served upon Respondent on or about March 29, 1956. Thereafter, the executive committee of the Independent Union including Mikal Wallace on March 30, 1956, met with Supervisor Walter Deschamp and Company Attorney J. Leonard Schermer to consider the grievance. In the absence of General Manager E. C. Adams, Jr., Respondent took the position that the grievance would not be processed because a charge had been filed and was being investigated by the Board. Members of the executive committee and their attorney, Carroll Gilpin, expressed surprise that a charge had been filed, and requested a recess to confer privately with Mikal Wallace. Following the recess Wallace made a statement to the effect that the charge had been filed sooner than he expected, and expressed his willingness to repudiate and withdraw the charge in order to proceed with grievance negotiations. The attorneys present for the negotiating parties were in agreement that the charge should be withdrawn, and after considerable discussion it was agreed that Attorney Carroll Gilpin would prepare a written statement for the signature of Mikal Wallace and pursue the grievance further with General Manager E. C. Adams, Jr. No further agreement was reached or conditions proposed at that meeting.

General Manager Adams returned from Florida on or about April 6, 1956, and in the absence of Mikal Wallace on the next day held a meeting with President George F. Powell, Secretary Larry D. Bridge, and Attorney Carroll Gilpin. Supervisor Deschamp was present. In negotiations at that meeting Respondent reluctantly agreed to reinstate Mikal Wallace upon conditions (1) that he sign a written statement repudiating and withdrawing the charge; (2) discontinue his official status with the Independent Union; (3) forfeit back pay for 2 weeks; and (4) continue his employment on probation for a period of 60 or 90 days. President George F. Powell thereupon communicated with Wallace by telephone, and thereafter notified Respondent that he would agree to reinstatement on those conditions and report for work on the following Monday. Thereafter on Sunday, April 8, 1956, President George F. Powell presented to Mikal Wallace an undisclosed written statement, presumably prepared by Attorney Carroll Gilpin in accordance with the agreement, but Mikal Wallace refused to sign it. Nevertheless, Wallace reported for work at Respondent's plant on Monday, April 9, 1956, and found General Manager Adams and Supervisor Deschamp standing at the time clock. With respect to what occurred at that time, Mikal Wallace credibly testified in substance that:

Mr. Deschamp said: "Where is that paper you were supposed to have?" I said: "What paper?" He said: "That affidavit that George brought to your house last night to sign." I said: "I don't have to." And Mr. Adams spoke up and said that it is necessary for me to have that paper in order to remove the labor charge, and I said, "I have been informed that it is not necessary to sign a statement like that in order to remove the labor charge." And he said, "Yes, it is. I have to have that statement." And I said, "Do I go to work or don't I?" And he said, "Nope, not until you sign that statement." And with that I turned and left.

Thereafter on April 16, 1956, Harold Gruenberg, as attorney for Mikal Wallace filed an amended charge against Respondent in Case No. 14-CA-1480. In the meantime President Powell and Secretary Larry D. Bridge of the Independent Union

procured the signature of Mikal Wallace on the undisclosed written statement, aforesaid, and tendered it to General Manager Adams on April 18, 1956, but Respondent refused to accept it. Thereupon, further processing of the grievance was abandoned by the Independent Union.

Thereafter on May 3, 1956, the Operating Engineers picketed the plant of Respondent, and Mikal Wallace carried a banner on the picket line. Business Agent Herman B. Jones credibly testified in substance that about 3 o'clock that afternoon General Manager E. C. Adams, Jr., came to the picket line with his attorney, and requested a meeting; that a meeting was scheduled for 10 o'clock the next morning, and as a matter of courtesy the picket line was taken down immediately. At this meeting both sides were represented by attorneys, but at the suggestion of Supervisor Deschamp left the room, because he felt that a settlement could better be accomplished by representatives of the Union and the Company without legal representation. Following a preliminary discussion in the absence of Wallace, Supervisor Deschamp as spokesman for Respondent in the presence of General Manager Adams outlined the following conditions under which Mikal Wallace might be put back to work:

- (1) That the unfair labor practice charge be removed;
- (2) Back pay to Wallace less pay for 2 weeks' vacation;
- (3) Disestablishment of the picket line;
- (4) Probation for 90 days.

Thereafter on Monday, May 7, 1956, Mikal Wallace reported for work and was reinstated by Respondent in his former position as driver-salesman on route 15. On the same day Harold Gruenberg, as attorney for Mikal Wallace, filed with the Fourteenth Regional Office of the National Labor Relations Board a formal written request (NLRB Form 601) for withdrawal of the charge in Case No. 14-CA-1480, which was thereafter approved by the Regional Director on May 9, 1956. The only document signed by Mikal Wallace in person reads, as follows:

#### RELEASE

FOR THE SOLE CONSIDERATION of Two Hundred Seventy-Two and  $\frac{57}{100}$  Dollars (\$272.57), the receipt of which is hereby acknowledged, I do hereby release and forever discharge Adams Dairy, Inc., a corporation, from all claims, demands, rights of action and charges, whatsoever, whether by law or in equity, which I ever had, which I now have, or which I can have, resulting from my employment by the Company and its termination thereof, on or about March 26, from the date of the starting of my employment with Adams Dairy, Inc.

It is to be further agreed that the payment of the above sum is not to be construed as an admission by or on behalf of Adams Dairy, Inc. of any wrongful action on its part in regard to my employment and termination.

(Signed) Mikal Wallace,  
MIKAL WALLACE.

Dated: May 9-56.

#### D. The abolition of route 15

After his reinstatement on May 7, 1956, to the position of driver-salesman on route 15, Mikal Wallace faithfully and uneventfully served the probation period imposed by Respondent throughout the months of May, June, and July. Effective August 1, 1956, the Respondent abolished route 15 in its entirety, and unilaterally assigned him to the status of a special driver at a flat salary of \$120 per week. The elimination of his regular route was accomplished by transferring one customer stop to Driver-Salesman Arthur J. Riley, Jr., on route 2, and all other customer stops in his territory to Driver-Salesman Gilbert C. Pounds on route 28. To further equalize these routes the Respondent also transferred two original customer stops from route 28 to route 2. At the hearing Supervisor Walter Deschamp admitted on cross-examination that Respondent contemplated this adjustment of routes in April and May 1956, but upon the advice of counsel decided not to take such action by reason of the pending charges before the National Labor Relations Board and the picketing of its plant by the Operating Engineers.

Following his demotion to special driver Mikal Wallace filed a charge against the Respondent in the instant Case No. 14-CA-1532, which was legally served by registered mail on Saturday, August 11, 1956. On the first workday thereafter, Monday, August 13, 1956, Office Manager Max Fox for the Respondent instructed Wallace to stay out of the plant office and carry on his business transactions with the office personnel through a small window or peephole from the drivers' room, which had been provided for that purpose. No such instructions were given to

other drivers, and the Respondent did not enforce any such rule with the other drivers who continued to enter the office at will to pick up delivery orders from a hook file on the receptionist desk. In response to his inquiry about it, Office Manager Fox told Wallace that Mr. Adams was "pretty mad, pretty mad."

Since it is alleged in the complaint that the foregoing conduct of Respondent constituted discrimination in violation of the Act, a determination of Respondent's motive in eliminating route 15 is required.

#### *E. Motive for elimination of route 15*

Respondent contends that the elimination of route 15 was an economic adjustment under its contract with the Independent Union to equalize routes commensurate with the guarantee of \$600 per month. Route 28 was a critical route and had consistently operated below the guarantee since October 1955 when a large customer stop (A & P Store) was destroyed by fire. This store was being rebuilt, and expected to reopen for business upon completion of the construction work. It did reopen on September 12, 1956. In addition thereto a new Kroger store also opened for business on route 28 in October 1956. Prior thereto, however, the earnings on this route had decreased to \$244.57 in July 1956. In that month the reported earnings on contiguous routes 2 and 16, exclusive of holiday overtime on July 4, 1956, decreased to \$582.47 and \$584.15, respectively. The reported earnings in July for route 15 were \$720.83, and on all other routes were substantially above the guarantee. Except on the eastern end of a narrow segment extending to the Mississippi River, route 15 was completely encircled by contiguous routes 1, 2, 16, 28, and 34.

The collective-bargaining agreement with the Independent Union, as amended April 11, 1955, authorized Respondent to adjust any route falling below 40,000 points (\$450) in earnings, and, if required by economic conditions, to eliminate routes without regard to seniority provisions and the guarantees set forth in the contract. Absent discrimination prohibited by the Act, the process of adjustment and equalization of routes under the contract was a function of management.

By reason of the elimination of his regular route Mikal Wallace was demoted to special driver at a flat salary of \$120 per week. The Respondent thereby gained no financial advantage, because it continued to pay him a salary in excess of guarantee payments required by the contract to routes 2 and 28, but the earnings on those routes increased to \$912.96 and \$720.18 in August, \$1123.66 and \$1514.06 in September, \$1208.87 and \$1961.23 in October, and \$1226.53 and \$1738.92 in November 1956, respectively. The foreseeable opening of aforesaid stores in September and October so overbalanced the earnings on route 28 that another adjustment was imperative.

Effective September 1, 1956, Respondent entered into a new contract with the Independent Union, and agreed to equalize all routes as soon as possible. In December it made a consolidation affecting routes 2, 4, 28, and 34; and created new route 3 in the same general area in which route 15 had been eliminated in August. The new route 3 was then awarded to George F. Powell, and Mikal Wallace was restored to the status of a regular route driver by assigning him to route 8, which had been relinquished by Powell to accept the newly created route 3.

#### **Concluding Findings**

It has never been determined whether the discharge of Mikal Wallace on March 26, 1956, was discriminatory, because the charge filed on his behalf in Case No. 14-CA-1480 was withdrawn as a condition of his reinstatement on May 7, 1956. The Respondent first reached an agreement with the Independent Union to reinstate Wallace if he would sign a written statement repudiating and withdrawing the charge. Wallace refused to sign a statement presented to him by George F. Powell, president of the Independent Union, but nevertheless reported to Respondent's plant for work on April 9, 1956. Respondent thereupon refused to employ him because he failed to sign and deliver the written statement. Thereafter, on April 18, 1956, representatives of the Independent Union presented a written statement signed by Wallace to the Respondent, but Respondent refused to accept it. Negotiations with respect to the discharge as a grievance were then abandoned. Thereafter, on May 5, 1956, the Operating Engineers established a picket line at Respondent's plant. Respondent then negotiated a settlement of the dispute with that organization to include disestablishment of the picket line, removal of the unfair labor practice charge in Case No. 14-CA-1480, and reinstatement of Mikal Wallace. Withdrawal of the charge was made one of the conditions of reinstatement, and Wallace returned to work on May 7, 1956.

Notwithstanding any agreements reached with either the Independent Union or the Operating Engineers, I am constrained to find that Respondent discriminated against Mikal Wallace, within the meaning of Section 8 (a) (4) of the Act, (1) by refusing to reinstate or employ him on April 9, 1956, because of his failure and refusal to present a signed statement renouncing and withdrawing charges filed with the National Labor Relations Board, and (2) by requiring the withdrawal of charges filed with the Board as a condition of his reinstatement on May 7, 1956. To find otherwise would tend to divert processes of the Board to the settlement of private grievances without regard to the public interest.<sup>2</sup>

With respect to the elimination of route 15 on August 1, 1956, the previous conduct of Mikal Wallace is not an issue, because Respondent has attributed his demotion to special driver solely to economic causes. Respondent contemplated such an adjustment in April and May 1956, but deferred the matter upon advice of counsel because of pending charges before the Board and the picketing by the Operating Engineers. The economic adjustment of route 28 in August was less urgent because the completion and opening of new stores on that route was imminent, the fall months of increasing sales were approaching, and Respondent was negotiating a new collective-bargaining agreement with the Independent Union. The adjustment resulted in no substantial financial benefit to Respondent and a serious loss to Mikal Wallace. To the drivers on routes 2 and 28 it was a windfall. The Respondent had no special need for another special driver, and could well foresee that such an adjustment of route 28 would be only a temporary expedient. It completely ignored route 16 with earnings also below or at the guarantee level being operated by a driver with less seniority than Mikal Wallace. I am convinced, therefore, that the elimination of route 15 was not an economic adjustment.

In the absence of an economic motive, I am convinced that the conduct of Respondent on August 1, 1956, relates back to the events of March, April, and May, and was a continuation of its discrimination against Mikal Wallace by reason of his union activities in behalf of the Operating Engineers and the filing of charges with the Board. Under Section 10 (b) of the Act all conduct engaged in by the Respondent not more than 6 months prior to the filing of the charge in the present case on August 9, 1956, may be considered as evidence and made the basis of finding unfair labor practices.

Having already found discrimination against Mikal Wallace within the meaning of Section 8 (a) (4) on April 9, 1956, and on May 7, 1956, I am now convinced from a preponderance of the evidence and the entire record in the case, and so find, that Respondent on or about August 1, 1956, discriminated in regard to his hire and tenure of employment to discourage membership in the Operating Engineers within the meaning of Section 8 (a) (3) of the Act, and because he had filed charges under the Act within the meaning of Section 8 (a) (4) of the Act.<sup>3</sup>

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

The activities and conduct of Respondent set forth in section III, above, occurring in connection with the operations described in section II, 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.

#### V. THE REMEDY

Having found that Respondent discriminated against Mikal Wallace (employee) with regard to his hire and tenure of employment, to discourage membership in a labor organization, and because he filed charges under the Act, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. Inasmuch as the former route 15 no longer exists and Mikal Wallace has already been reinstated to a substantially equivalent position as driver salesman on a regular route, it will be recommended that Respondent also make him whole for any loss of pay suffered by reason of the discrimination against him.

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

#### CONCLUSIONS OF LAW

1. The International Union of Operating Engineers, AFL-CIO, Locals 2, 2a, 2b, and 2c, herein called the Operating Engineers; and the Independent Wholesale Dairy

<sup>2</sup> *Briggs Manufacturing Company*, 75 NLRB 569-575 (Quatro).

<sup>3</sup> See *N. L. R. B. v. Syracuse Stamping Company*, 208 F. 2d 77 (C. A. 2).

Products Salesmen's Association, herein called the Independent Union, are labor organizations within the meaning of Section 2 (5) of the Act.

2. By refusing to reinstate or reemploy Mikal Wallace on April 9, 1956, because he failed and refused to sign a written statement repudiating and withdrawing a charge filed in his behalf with the National Labor Relations Board, and by thereafter on May 7, 1956, requiring the withdrawal of said charge as a condition of reinstatement to his former position, the Respondent engaged in unfair labor practices within the meaning of Section 8 (a) (4) of the Act.

3. By eliminating route 15 on or about August 1, 1956, thereby removing Mikal Wallace from employment as driver-salesman on a regular route, because of his previous union activities in behalf of the Operating Engineers and the filing of charges under the Act, the Respondent discriminated in regard to hire and tenure of employment, to discourage membership in a labor organization, and thereby engaged in unfair labor practices within the meaning of Section 8 (a) (3), and (4) of the Act.

4. The aforesaid unfair labor practices are also unfair labor practices within the meaning of Section 8 (a) (1), and affect commerce within the meaning of Section 2 (6) and (7) of the Act.

[Recommendations omitted from publication.]

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**Local 926, International Union of Operating Engineers, AFL-CIO and Armeo Drainage and Metal Products, Inc.** *Case No. 10-CC-308. March 24, 1958*

### DECISION AND ORDER

On May 24, 1957, Trial Examiner Sidney Asher issued his Intermediate Report in this proceeding, finding that the Respondent had engaged in certain unfair labor practices within the meaning of Section 8 (b) (4) (A) of the Act, 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 General Counsel filed exceptions to the limited scope of the recommended order, and the Respondent filed a statement in lieu of exceptions, indicating that it did not wish to file exceptions.

Pursuant to the provisions of Section 3 (b) of the Act, the Board has delegated its powers in connection with this case to a three-member panel [Chairman Leedom and Members Bean and Jenkins].

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 exceptions, the statement in lieu of exceptions, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner with the modifications in the order noted below.

The statement in lieu of exceptions raises no question material to a decision by the Board. The Respondent's willingness to comply with the recommendations of the Trial Examiner cannot impair the right