**F. G. McFarland and S. R. Hullinger, d/b/a McFarland & Hullinger *and* International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 16.**
*Case No. 27-CA-829 (30-CA-829). May 24, 1961*

## DECISION AND ORDER

On December 14, 1960, Trial Examiner William E. Spencer issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged 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. He further found that the Respondent had not engaged in other alleged unfair labor practices and recommended dismissal of the complaint pertaining thereto. Thereafter the General Counsel and the Respondent filed exceptions to the Intermediate Report and supporting briefs.

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 McCulloch and Members Rodgers and Leedom].

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 Intermediate Report, the exceptions and briefs, and the entire record in the case,[1] and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner with the following additions:

1. The Respondent and its predecessor, Superior Transportation, Inc., each rendered services in excess of $50,000 to Union Carbide Nuclear Company during the period from July 1959 to May 1960. During the same period, Union Carbide purchased in the State of Utah and shipped to the State of Colorado uranium ore valued in excess of $100,000 and sold uranium ore valued in excess of $10,000,000 to the Atomic Energy Commission. We find that the Respondent and its predecessor are engaged in commerce within the meaning of the Act, and that, pursuant to the Board's indirect outflow and national defense standards, it will effectuate the policies of the Act to assert jurisdiction herein. *HPO Service, Inc.*, 122 NLRB 394, 395; *Ready Mixed Concrete & Material, Inc.*, 122 NLRB 318, 320.

2. The record shows that the Respondent continued its predecessor's business at first from the same and later from a nearby location, using the same equipment, hauling the same product, and employing 9 out of 14 of Superior's employees under the supervision of Superior's former

[1] The Respondent's request for oral argument is denied as the record, including the exceptions and the briefs, fully sets forth the issues and the positions of the parties

superintendent. The Respondent assumed Superior's contract with Union Carbide as modified prior to the assumption agreement, and obtained the transfer of the operating rights of Superior from the Public Utilities Commission of the State of Colorado, so as to prevent competition by its predecessor. We agree with the Trial Examiner that the Respondent is the successor of Superior [2] and that it is bound by the Board's certification of the Charging Union as bargaining representative of an appropriate unit of truckdrivers of Superior issued in Case No. 30–RC–1800.[3] We therefore adopt the Trial Examiner's finding and conclusion that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Charging Union for the employees in the appropriate unit.

3. We agree with the Trial Examiner's inference that the remarks of Superintendent Ladd Fullmer referred to the employees' action in bypassing Fullmer's authority by requesting a wage increase directly from the management of Superior, that these remarks were concerned solely with establishing and protecting Fullmer's supervisory status with the Respondent and fell short of violating Section 8(a)(1) of the Act. We therefore find no merit in the General Counsel's exceptions to these findings and shall dismiss the complaint with respect to the allegations pertaining thereto.

## 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 that the Respondent, F. G. McFarland and S. R. Hullinger, d/b/a McFarland & Hullinger, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 16, as the exclusive representative of the appropriate unit of all truckdrivers employed by the Respondent at Naturita and later, Uravan, Colorado, excluding office clerical employees, mechanics, and supervisors as defined in the Act, with respect to grievances, labor disputes, rates of pay, wages, hours of employment, and other conditions of employment.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist the above-named 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 pro-

[2] See *Colony Materials, Inc*, 130 NLRB 105; *Ugite Gas, Incorporated*, 126 NLRB 494.
[3] See *Elm City Broadcasting Corporation*, 116 NLRB 1670.

tection, or to refrain from any or all such activities, except to the extent that such rights 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, as modified by the Labor-Management Reporting and Disclosure Act of 1959.

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

(a) Upon request, bargain collectively with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 16, as the exclusive representative of the employees in the previously described appropriate unit, with respect to grievances, labor disputes, rates of pay, wages, hours of employment, and other conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its place of business in Uravan, Colorado, copies of the notice attached hereto marked "Appendix."[4] Copies of the notice, to be furnished by the Regional Director for the Twenty-seventh Region, shall, after being duly signed by Respondent's representative, be posted by the Respondent immediately upon receipt thereof, and be maintained by it for a period of 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.

(c) Notify the Regional Director for the Twenty-seventh Region, in writing, within 10 days from the date of this Order, what steps the Respondent has taken to comply therewith.

IT IS FURTHER ORDERED that the complaint be, and it hereby is, dismissed insofar as it alleges that the Respondent violated Section 8(a)(1) of the Act by certain statements to employees made by Ladd Fullmer.

[4] 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 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, we hereby notify our employees that:

> WE WILL bargain collectively, upon request, with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 16, as the exclusive representative of all our employees in the unit described below, with respect to

grievances, labor disputes, rates of pay, wages, hours of employment, or other conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All truckdrivers employed at Uravan, Colorado, excluding office clerical employees, mechanics, and supervisors as defined in the Act.

WE WILL NOT, by refusing to bargain with the aforesaid labor organization or in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to join or assist the above-named Union or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purposes of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities, except to the extent such rights 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, as modified by the Labor-Management Reporting and Disclosure Act of 1959.

F. G. MCFARLAND AND S. R. HULLINGER,
D/B/A MCFARLAND & HULLINGER,
*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

In this proceeding, heard before the duly designated Trial Examiner in Grand Junction, Colorado, on September 8 and 9, 1960, the Respondent herein was charged with a refusal to bargain with the Union, the duly certified bargaining representative of its employees in an appropriate unit, and with statements amounting to interference, restraint, and coercion within the meaning of the National Labor Relations Act, as amended (61 Stat. 136), herein called the Act. All parties participated in the hearing and subsequent thereto the General Counsel and the Respondent, respectively, filed briefs. The latter also submitted proposed findings of fact and conclusions of law which are adopted only insofar as they are consistent with the findings and conclusions below.

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

### FINDINGS OF FACT

#### I. THE BUSINESS OF THE EMPLOYERS

The General Counsel would assert jurisdiction over Superior Transportation, Inc., herein Superior, and F. G. McFarland and S. R. Hullinger, d/b/a McFarland & Hullinger, herein McFarland & Hullinger or the Respondent, primarily because of the uranium-vanadium ore hauled by each under contract with the Union Carbide Nuclear Company, herein Union Carbide, to mills of the latter in the State of Colorado.

Union Carbide is a division of Union Carbide Corporation, a New York corporation. Its general offices are in New York and it also maintains a subsidiary office in Grand Junction, Colorado. It is engaged in the mining, purchasing, and processing of uranium ore, and operates mills at Uravan, Rifle, and Slick Rock, Colorado. It is also engaged in other operations outside this State. It has a contract with the Atomic Energy Commission under which it sells uranium concentrate to the latter, and can sell nowhere else except with the latter's consent. Most of the uranium ore it processes is sold to the Atomic Energy Commission. During the first 6 months of 1960, uranium concentrate of a value in excess of $10,000,000 was purchased by the Atomic Energy Commission from Union Carbide. That the work of the Atomic Energy Commission is an integral part of our national defense is common knowledge and needs no documentation here. It follows that Union Carbide is engaged in commerce substantially affecting the national defense.[1]

Superior, a Utah corporation with its principal offices in Salt Lake City, Utah, from July 1, 1959, until March 19, 1960, under its contract with Union Carbide and from its Naturita, Colorado, terminal, hauled uranium-vanadium ore from mines in Colorado to mills of Union Carbide at Uravan, Slick Rock, and Rifle, Colorado. For these services Superior received between $250,000 and $350,000. During January, February, and March, 1960, Superior received $100,508.80 for services performed in Colorado under its contract with Union Carbide. In addition and in unknown amounts, Superior hauled uranium-vanadium ore to mills of Union Carbide in Colorado for other shippers. Superior ceased operation under its contract with Union Carbide on March 19, 1960.

The Respondent, a partnership, has its principal office in Tooele, Utah. It is engaged in the ore hauling business and also operates a salt plant, a ranch, a rock quarry, and mines. It hauls ore in various areas of Utah and in southwestern Colorado. It operates under State permits and none of its operations are under permits of the Interstate Commerce Commission. It is assumed, therefore, that in none of its hauling of ore does it cross State lines.

Since October 1959, the Respondent, operating out of its Gateway, Colorado, terminal, has hauled uranium-vanadium ore for shippers other than Union Carbide to mills of Union Carbide at Uravan and Rifle, Colorado. On March 21, 1960, it began hauling ore from the Naturita terminal from which Superior had carried on its ore hauling business, under contract with Union Carbide. Respondent shortly thereafter abandoned the Naturita terminal for its terminal at Uravan. Its operations out of the Naturita and Uravan terminals, successively, were under contract with Union Carbide, substantially the same contract under which Superior had operated until it ceased business at its Naturita terminal on March 19. Under this contract, the Respondent hauls uranium-vanadium ore to mills of Union Carbide at Uravan, Slick Rock, and Rifle. For services rendered under this contract, the Respondent received $16,495.18 during March; $59,302.80 during April; and $61,682.24 during May 1960 from Union Carbide. This amounted to an increase in Respondent's trucking business in Colorado and Utah by about 20 percent. Respondent's contract with Union Carbide is effective through March 31, 1962.

The time of employees and the weight tickets of the operation at Uravan are checked locally and then sent to Respondent's office in Utah, from which office the paychecks are sent to Uravan for distribution. From its office in Tooele, Utah, the Respondent sends to Union Carbide's offices in Grand Junction, Colorado, its invoices for services rendered under contract.

On the basis of the foregoing facts, I am convinced, contrary to the Respondent's position, that the services rendered Union Carbide by Superior and Respondent, each, had a substantial impact on national defense. It appears that uranium-vanadium is a "mixed" ore and therefore there is no basis for determining what proportion of the ore hauled for Union Carbide was uranium, essential to the national defense, or vanadium, not shown to be essential for defense purposes. On the basis of the

[1] Union Carbide also sells vanadium products to purchasers outside the State of Colorado. During the first 4 months of 1960, it purchased in excess of $50,000 in value of ore from outside the State, the said ore being shipped to its mills at Uravan and Rifle, Colorado During February 1960, it purchased some $63,488 94 in value of ore from Standard Uranium Corporation, Moab, Utah; during April 1960, it purchased $96,560 39 in value of ore from the aforesaid Standard Uranium Corporation. Consequently, its operations affect commerce within the meaning of the Act apart from its sales of uranium concentrate to the Atomic Energy Commission. It is not necessary, however, to rely on this portion of its business in determining the Board's jurisdiction over the Respondent herein.

amounts paid by Union Carbide to Superior and the Respondent, respectively, for services rendered in hauling the ore, I think we must assume that uranium in substantial quantities was delivered under the Union Carbide contracts, and the importance of uranium in the national defense can hardly be overemphasized. Assuming therefore that all of the Respondent's and Superior's trucking of ore was intrastate—and this seems to be the fact—the impact of these operations on the national defense under contracts with Union Carbide, is, in my opinion, substantial enough to satisfy the Board's formula for asserting jurisdiction. I shall not, therefore, address myself to further grounds on which jurisdiction might well be predicated.

## II. THE LABOR ORGANIZATION INVOLVED

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 16, herein called the Union, is a labor organization within the meaning of the Act.

## III. THE UNFAIR LABOR PRACTICES

### A. *The alleged refusal to bargain*

#### 1. Basic facts

Prior to March 19, 1960, Superior was engaged in hauling uranium-vanadium ore from mines in Colorado to mills of Union Carbide at Uravan, Slick Rock, and Rifle, Colorado. These operations were performed by Superior out of its Naturita, Colorado, terminal, under its contract with Union Carbide. At its Naturita operations, Superior employed a manager, a part-time office girl, 3 mechanics, and from 14 to 18 drivers. On January 29, 1960, the Union and Superior executed a consent-election agreement, providing *inter alia* for mail balloting, ballots to be mailed on March 11, 1960, and to be counted on March 21, 1960. The agreed-upon appropriate unit was composed exclusively of drivers, as set forth in the Union's representation petition. Some 19 drivers employed by Superior at Naturita were eligible to vote and 16 cast ballots.

On March 17, Superior sold the physical properties of its Naturita operations to the Respondent, and ceased engaging in business at its Naturita terminal. Respondent continued the operations performed by Superior under its Union Carbide contract, but subject to certain modifications of the said contract which will be referred to hereinafter. Of the 14 drivers employed by Superior on the day it ceased doing business, the Respondent, on March 21, hired 9, the remainder not being retained then or thereafter. Two additional drivers were hired by Respondent on March 21. In the interval between March 21 and September 9, the Respondent employed as many as 24 drivers; as of September 9 it employed 16. Shortly after it purchased the Superior properties, Respondent moved all operations previously performed out of the Naturita terminal to Uravan, Colorado, a distance of some 16 miles.

On March 21, pursuant to the consent-election agreement executed by the Union and Superior, the 16 ballots cast in that election were counted. Fourteen favored representation by the Union. On March 30, the Board's Regional Director certified the Union as bargaining representative in the unit agreed upon by the Union and Superior. On March 25, before the certification but after a tally of ballots had been served on the parties, the Union requested the Respondent to bargain with it as representative of its drivers employed out of the Naturita terminal. This request was repeated on April 8. Respondent's response to the first request was that it was premature; to the second, that it had not purchased Superior's business and was under no legal duty to recognize and bargain with the Union.

The issue is basically one of successorship. Respondent in its answer admitted the appropriateness of the unit under which the certification was made but denying, as it does, "successorship" as that term is used in the decisions, is understood to deny that the unit of the certification is appropriate as applied to Respondent's operations. No contention is made that Superior disposed of the physical properties of its Naturita operations, and ceased those operations in order to avoid bargaining obligations, or that the Respondent was in any respects anything except a bona fide purchaser of the Superior properties. Neither is any contention made that the Respondent practiced unlawful discrimination in refusing to hire some of the drivers employed by Superior at its Naturita terminal.

#### 2. Successorship

Respondent's defense on the issue of successorship, as I understand it, is substantially: (1) Respondent did not purchase Superior's business, its trade name, its goodwill, etc., but only certain physical properties owned by it at its Naturita terminal;

(2) the character and mode of Respondent's operations varied substantially from those engaged in by Superior; and (3) whereas Superior's operations at its Naturita terminal were its sole operations in the relevant geographical area, Respondent's operations out of the Naturita and, shortly thereafter, Uravan terminals, were only a fraction of Respondent's total operations. These three categories will be employed generally in assembling and analyzing proof offered by the General Counsel and countervailing evidence adduced by the Respondent.

(1) The testimony is that all that Respondent paid for in its transaction with Superior was the latter's physical properties, consisting of its hauling and loading equipment, as well as various maintenance equipment and parts. To leave the matter here, however, would be to ignore certain crucial features of the sales transaction between Superior and the Respondent. (a) Primarily [2] to insure that Superior would not reenter the trucking and hauling business as a competitor, the sales agreement provided for the transfer of the State Public Utilities Commission's trucking permits from Superior to the Respondent; and (b) the sales agreement also provided for a continuance of trucking operations under Superior's contract with Union Carbide, its principal customer, with the modification that Respondent was released from certain liabilities existing in Superior's contract with Union Carbide. I agree with the General Counsel that it is of no material significance whether Respondent's contract with Union Carbide be regarded as an assignment, as it is titled, a novation, or a new contract. The significant point is that before purchasing Superior's physical properties at Naturita, Respondent made certain that it would have contractual rights to continue hauling for Union Carbide under the terms and conditions of Superior's contract with the exception of the liability clause, and that this understanding was all of a part with the sales transaction.

Respondent's argument is that it paid Superior nothing for the transfer of its trucking permit or for the assignment of its contract with Union Carbide. In a sense this may well be true, but it is also true that lacking an agreement for the transfer of the permit ruling out competition and assignment of the Union Carbide contract, or, in the alternative, definite commitments by Union Carbide for a contract which would enable the Respondent to undertake the trucking of ore for Union Carbide previously performed by Superior, the entire sales agreement would doubtless have failed to materialize. Realistically viewed, therefore, the payment for Superior's equipment encompassed both the transfer and the assignment.

2. I can find in the evidence no substantial change in the basic character of Respondent's operations, although there were some changes in its mode of operations. Superior's lease on its Naturita terminal expired on March 31. Respondent filled the unexpired portion of the lease and shortly thereafter moved all its operations at Naturita to Uravan, about 16 miles away. The general character of the operations, however, remained substantially the same. From its Uravan terminal Respondent continued to truck ore principally for Union Carbide, in the same geographical area covered by Superior. Whereas Superior was unable, with its own equipment, to fill all of its trucking obligations under its contract with Union Carbide, the Respondent, with additional resources and equipment, was able to fill all these requirements. This, however, as argued by the General Counsel, could be regarded as no more than accretion to the unit existing at the time Superior ceased operations. There were some changes in the mode of operations, such as the substitution of "loader" methods for "transfer points"; some changes in the routing of the ore from points of origin to Union Carbide; improved road maintenance, etc., but none of these changes substantially altered the nature of the business transacted by Superior or created such a fracture between Respondent and Superior operations that it reasonably can be said the basic nature of the employing industry was changed. Superior's business was the trucking of ore for Union Carbide; for all its various changes in modes of operation. Respondent's principal business at its Uravan terminal, was and is the trucking of ore for Union Carbide. More equipment is employed at Uravan than Superior had in its Naturita terminal, and employment has risen as high as 24 drivers, but fluctuates between that figure and 16 drivers, the number employed currently, not a very substantial increase over the employment level maintained by Superior at Naturita.

3. Respondent unquestionably has a much larger overall operation than was Superior's, the latter's being confined to its Naturita terminal in the relevant geographical area. It has been engaged in the ore hauling business in Colorado since 1957, and was operating out of its Gateway, Colorado, terminal, before Superior began operations at Naturita. Its position, as I understand it, is that after acquiring

[2] Respondent had certain permits for its then existing operations, and doubtless could have secured a new permit for its operations out of Naturita.

Superior's Naturita properties, it integrated its Naturita and, shortly, thereafter, Uravan operations with its Gateway operations, so that operations previously performed by Superior were swallowed up in the larger integrated unit and thereby lost their identity as a separate unit. It should be noted at once that the existence of a potential appropriate unit embracing both the Gateway and Uravan operations does not of itself negate the existence of an appropriate unit composed solely of Uravan drivers, any more than the certification of a bargaining representative of Uravan drivers negates the possibility, at some future date, of a unit embracing both Gateway and Uravan drivers. The issue is whether the integration was such that separate units are not distinguishable for purposes of collective bargaining. In my opinion the evidence will not support a finding that such a degree of integration exists.

The unit of drivers under Superior at Naturita remained a unit of drivers under the Respondent at its Naturita and, later, Uravan terminal, with no substantial change in the nature of their duties. They were truckers of ore under Superior and they remained truckers of ore under the Respondent. Their foreman and supervising officer under Superior, Ladd E. Fullmer, was from the outset their foreman and supervising officer under the Respondent. While there is doubtless a marked degree of cooperation between Respondent's Uravan and Gateway operations, with each supplementing the activities of the other when required, separate books are kept on these operations, there does not appear to be any uniform system of transfer of personnel from one operation to the other, and, as noted, the supervision is separate and distinct. In short, such integration as exists is not of a degree to in any way impair the efficacy of separate bargaining units, and, consequently, it is not such as to deny Uravan drivers the right of bargaining representation in their own unit.

3. The authorities

The Respondent in its brief relied principally on two decisions in the courts. The first of these, *N.L.R.B.* v. *Birdsall-Stockdale Motor Company,* 208 F. 2d 234 (C.A. 10), is clearly distinguishable. In that case the Trial Examiner, bound by the precedent established by the Board in *The Alexander Milburn Company,* 78 NLRB 747, found that a successor company against whom no charge had been filed and no complaint issued was jointly liable with its predecessor against whom a charge had been filed and complaint issued, for remedying the unfair labor practices of the said predecessor. The Board agreed with its Trial Examiner. The court, in reversing the Board, stated its rationale in these words: ". . . equally important considerations of public policy require that Johnson [the successor] should not be charged with the wrongs of its predecessor and should not be adjudged of wrongdoing on its part without complaint, notice, full opportunity to present its defense and the other essential requirements of due process of law." Accordingly, the court refused to enforce the Board's order against the successor. *N.L.R.B.* v. *Albert Armato and Wire & Sheet Metal Specialty Co.,* 199 F. 2d 800 (C.A. 7), distinguished by the court, is applicable here. No one contends that an issue of due process is involved in the case at bar.

A second case relied on by the Respondent, *N.L.R.B.* v. *Alamo White Truck Service, Inc.,* 273 F. 2d 238, 242 (C.A. 5), is also, in my opinion, distinguishable, though it comes closer to sustaining the Respondent's position than any other decision of which I have knowledge. There, as here, the sale was bona fide and the purchase price was for various equipment with no transfer of the seller's name, going concern value, accounts receivable, etc. However, there was not, as here, a transfer of permits nor an assumption of contract rights. There, the court in denying enforcement of the Board's order, strongly emphasized the change in employee-employer relationships, stating:

> The employee-employer relationship was materially different from the employee-employer relationship in White Motor Company, not just because of a difference in the number of employees or in the turnover, but because the interaction of the employee group with the management of Alamo was completely changed. We mean by this, the difference between the close personal relationship of management and workers characteristic of a small, local business, existing in this case as the record shows, and the disembodied relationship of workers to top management not uncharacteristic of a large corporation when branch workers must accept policies fixed by some far-off head office. We mean also that, although generally a fluctuation in personnel may be immaterial, here the particular workers employed by Alamo as a group had little in common with the group employed by White, particularly in regard to unionism.

Continuing, the court had this to say, and it is of significance in understanding and evaluating its decision:

> If Alamo were ordered to bargain with the Teamsters and machinists, the unions would be bargaining for employees not one of whom belong to either of these unions. This is something less than carrying out the purpose of a statute intended to enable employees to select bargaining agents of their choice to deal with their employer.

I am unable on the evidence in the instant case to find such a change in the employee-employer relationship as the court found decisive in the *Alamo* case. Superior's home office, like the Respondent's, was in Utah and the employees' immediate and significant relationship with their employer, be it Superior or the Respondent, was through the foreman of the terminal where they were employed, a foreman who had the authority to hire and fire, and whose identity remained the same when the Respondent assumed control of the Naturita terminal. Nor is there any evidence whatever that the choice of a bargaining representative by Superior's drivers was affected by the change in ownership: all reasonable assumptions run to the contrary.

4. Conclusions

While fully appreciative of the earnest and able presentation of the Respondent's defense, I must and do find on what I regard as a predominance of the evidence, that the Respondent was a "successor" to Superior as that term is employed in cases where a refusal to bargain is involved.

B. *The appropriate unit and the Union's majority therein*

For various reasons found supporting the theory of successorship, my conclusion is that all drivers employed by the Respondent at the Naturita and Uravan terminal, successively, constituted and constitute a unit appropriate for purposes of collective bargaining within the meaning of the Act. Superior and the Union agreed upon a unit composed exclusively of drivers, and on the basis of a consent election the Union was certified as bargaining representative in the said unit. While this is persuasive of the appropriateness of the unit, it is not necessarily conclusive. It further appears, however, that the drivers with common interests and duties that set them apart as a distinct group, were such a homogeneous group of employees as normally would constitute an appropriate unit, and without countervailing evidence—there was none—conclusion of the appropriateness of the unit is required. As a matter of fact, I understand from the pleadings that the Respondent conceded the appropriateness of the unit with respect to Superior's employees. As previously observed, drivers under Superior remained drivers under the Respondent and there were no substantial changes in Respondent's operations at its Naturita and later, Uravan, terminals such as would render a unit appropriate under Superior inappropriate under the Respondent. I have already found that there was no such integration of Respondent's Gateway and Uravan terminals as to rule out an appropriate unit composed solely of drivers employed at its Uravan terminal.

The Regional Director's certification of the Union as bargaining representative of Superior's drivers, without countervailing evidence, is sufficient, in my opinion, to ground the finding I now make that the Union was on March 30, 1960, and now is bargaining representative of Respondent's drivers in an appropriate unit as described above.

C. *The refusal to bargain*

It is assumed that an election having been held, the Respondent was under no duty to recognize and bargain with the Union until the latter's certification by the Regional Director on March 30. Its refusal of the Union's April 8, 1960, post-certification request for recognition and bargaining, however, was a refusal to bargain within the meaning of Section 8(a)(5) of the Act, and constituted, derivatively, interference, restraint, and coercion within the meaning of Section 8(a)(1) of the Act. This is true by operation of the law on successorships, though I do not question that the Respondent in good faith believed that it was under no legal obligation to recognize and bargain with the Union.

Alleged Interference, Restraint, and Coercion

By letter dated December 23, 1959, Superior's drivers who attached their signatures thereto, complained to Superior that the waiting time rate paid them was unfair and substantially below that paid by another employer operating in the area. Ap-

parently this matter was taken up directly with Superior's home office in Salt Lake City, without the knowledge and assent of Fullmer, who was in charge of the Naturita office. Russell D. Weber, a Superior driver, testified, "We figured we would get better results by sending it direct to the main office." When, later, Eddie Hollett, one of the drivers who signed the letter, was discharged, a group of drivers met with Fullmer and asked him if Hollett was fired for having signed the letter. Fullmer replied, according to Weber, that that was not the reason for the discharge, but "that any further grievances should come to him, and . . . Superior wouldn't do anything about the waiting time without first consulting him." On further questioning Weber testified that Fullmer said, "Eddie had been going over his head, and that was just one more of the events. . . ."

Hollett was only 1 of some 16 drivers who signed the December 23 letter, and no contention is made that he was discharged for union or concerted activities. Weber's testimony that Fullmer made some mention of Hollett going over his, Fullmer's head, if meant to ascribe discriminatory motives to Fullmer in effectuating Hollett's discharge, is not in accord with earlier testimony, given with greater clarity, that Fullmer flatly denied that Hollett's signing of the December 23 letter was a cause of Hollett's discharge.

All of the remaining alleged coercive statements attributed to Fullmer have their origin in the December 23 letter, and were made at the time Fullmer was hiring drivers for the Respondent's operations.

In hiring Marvin Hannigan as a truckdriver for the Respondent, Hannigan had formerly been employed in that capacity by Superior, Fullmer told Hannigan he "didn't want any more union [obscenity] . . ." Hannigan replied that he wanted it understood that he was "just as deep into that union and that letter protesting the waiting time as any of the other men." To this Fullmer said that Hannigan should "forget it, and start all over again." Fullmer then hired Hannigan for the Respondent. On April 4, after notice of the Union's certification and after Respondent's operations had been moved to Uravan, Fullmer told Hannigan "there was talk among the drivers that he did not like, but if someone was dissatisfied, they better leave."

On the occasion of hiring Roy Darrell Loehr, formerly in Superior's employ as a driver, for the Respondent, Fullmer told Loehr that if he had any problems to see him, Fullmer, he (Fullmer) "didn't want any more just organizing, without talking to him."

On the occasion of refusing to hire Russell D. Weber, a Superior truckdriver, for the Respondent, Fullmer told Weber, *inter alia,* that Respondent had made up the list of Superior drivers to be retained by Respondent and that he, Fullmer, had nothing to do with it. Weber mentioned the petition on waiting time, and wanted to know if his participation in the matter was the reason he was not being hired by Respondent. To this Fullmer replied that Weber's work had always been satisfactory but that "he would not have any more of that stuff."

On rehiring Paul J. Nix, according to Nix, Fullmer told Nix he "didn't want any more of that ganging up." Nix testified further, on having his memory "refreshed," that Fullmer also said on this occasion that he "would fire the one responsible"—if there was any more "ganging up."

From all this testimony of the General Counsel's witnesses, denied in general and conclusionary terms by Fullmer, it appears that Fullmer was incensed when in December 1959 the drivers under his supervision went over his head in addressing a letter to Superior's Salt Lake City office with respect to waiting time rates. He felt and said, not unreasonably I think, that grievances such as were represented in this letter, should be processed through him. He testified that he considered the grievance represented in the letter meritorious, and it appears that as a result of it the waiting time rates were increased. In his new employ as Respondent's foreman, he doubtless was anxious to assert his supervisory status and to avoid complications which would embarrass him with his new employer. His various references to "ganging up" clearly had reference to the action of Superior drivers in bypassing him. This action was protected concerted activity but I am not convinced that Fullmer's statements are properly construed as being opposed to either concerted or union activities. They were, rather, aimed at what he regarded as lack of respect for his supervisory status.

Men known to him as active in formulating the waiting time letter, were hired by him when management changed hands, as in the case of Hannigan who openly, on the occasion of his rehiring, proclaimed his participation in the letter incident. I am unable to accord much weight to Nix's testimony that in his reference to "ganging up" Fullmer told him that if there was any more of it he would fire the one responsible for it, since this additional part of Nix's testimony was prompted by the form of the question put to him. Finally, I can read nothing sinister into Weber's

testimony that on being refused rehire by Fullmer, Fullmer told him his work at Superior had been satisfactory but he, Fullmer, "would not have any more of that stuff." This testimony appears to be on a par with Weber's version of the January meeting with Fullmer in which Weber apparently sought to impute a discriminatory motive to Fullmer with respect to Hollett's discharge. There is no reason to believe that Fullmer considered that Weber was any more active with respect to the December 23 letter than any of the other drivers who signed it, and I think it is highly unlikely that he would have made any reference to the incident to a man he had decided not to rehire. There is no allegation in the complaint that Weber was denied rehire because of concerted or union activity. Fullmer was doubtless unwise in his choice of words in some of the interviews he had with Superior drivers, if the latter's testimony is credited in every detail, but I am convinced that he had no antiunion bias, being himself a member of the Union on a withdrawal card, and was concerned solely with establishing and protecting his supervisory status with his new employer, and that the sum total of the remarks he made on these several occasions, given their most reasonable interpretation, fall short of the interference, restraint, and coercion envisaged by Section 8(a)(1) of the Act. Accordingly, I shall recommend dismissal of this portion of the complaint.

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

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

### V. THE REMEDY

It having been found that the Respondent engaged in unfair labor practices by refusing on and after May 3, 1960,[3] to bargain with the Union, the statutory bargaining representative of its employees in an appropriate unit, it will be recommended that on request the Respondent bargain with the Union on all proposals which raise bargainable issues, and, if an understanding is reached, embody such understanding in a signed agreement.

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

### CONCLUSIONS OF LAW

1. The Union is a labor organization within the meaning of Section 2(5) of the Act.
2. All truckdrivers employed by Superior at Naturita, Colorado, and, subsequently, by the Respondent at Naturita and, later, Uravan, Colorado, excluding office clerical employees, mechanics, and supervisors as defined in the Act, with respect to Superior and the Respondent at Naturita constituted, and with respect to the Respondent at Uravan constituted and now constitute, a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act.
3. The Union was on May 3, 1960, and at all times since has been the exclusive representative of all employees of the Respondent at its Uravan, Colorado, operation, in the aforesaid appropriate unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.
4. By refusing on and after May 3, 1960, to bargain collectively with the Union as exclusive representative in the aforesaid appropriate unit, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.
5. By the said refusal to bargain, the Respondent interfered with, restrained, and coerced its employees in the exercise of rights guaranteed them in Section 7 of the Act, and thereby engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.
6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.
7. The Respondent has not engaged in violation of Section 8(a)(1) of the Act independently of its refusal to bargain.

[Recommendations omitted from publication.]

[3] The date of Respondent's letter to the Union refusing to bargain.