

Division of Mueller. There is no interchange of employees between Central and Badger, but the Central patternmakers occasionally use the foundry premises, and the foundry employees go into the Central shop for their pattern-repair work. The Central employees have different wage rates, overtime, and holiday benefits than those of the Badger employees. Moreover, they do not punch timeclocks as do the Badger employees. Although the Mueller-Midwestern president is ultimately responsible for both operations, the Central employees are directly supervised by their own manager, while the Badger employees are supervised by the foundry superintendent and the foundry management. Separate payroll and tax records are kept for each division by the Badger bookkeeper, whose time on Central work is charged to that firm.

On the basis of the entire record, we are of the opinion that either a separate unit of Central patternmakers and helpers or a unit consisting of the employees currently represented by the Union at the Badger foundry together with these Central patternmakers and helpers may constitute a unit appropriate for the purposes of collective bargaining. We shall, therefore, make no determination with respect to the Central employees at this time, but shall first ascertain their desire as expressed in the election directed herein.<sup>8</sup>

We shall direct an election among the following employees: All patternmakers and helpers at the Employer's Central Pattern Shop Division, South Milwaukee, Wisconsin, excluding all other employees and supervisors as defined in the Act.

If a majority of the employees in the voting group cast their ballots for the Union, they will be taken to have indicated their desire to be part of the existing production and maintenance unit at the Employer's Badger Malleable & Manufacturing Company foundry at South Milwaukee, Wisconsin, and the Regional Director will issue a certification of results of election to that effect. If a majority of the employees in the group cast their ballots against the Union, they will be deemed to have expressed their desire to remain unrepresented.

[Text of Direction of Election omitted from publication.]

<sup>8</sup> See *Scrivner Stevens Company*, 104 NLRB 506, 507.

**Cone Brothers Contracting Company and Raymond W. Norman.**  
*Case No. 12-CA-1406. July 26, 1961*

#### DECISION AND ORDER

On September 23, 1960, Trial Examiner John C. Fischer issued his Intermediate Report in the above-entitled proceeding, finding that  
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the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the General Counsel filed exceptions to the Intermediate Report and a supporting brief. The Respondent filed a brief in support of the Intermediate Report.

The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds 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, and hereby adopts the Trial Examiner's findings, conclusions, and recommendations, with the single exception<sup>1</sup> noted below.

[The Board dismissed the complaint.]

MEMBERS FANNING and BROWN took no part in the consideration of the above Decision and Order.

<sup>1</sup> The Trial Examiner made various findings concerning the explosive atmosphere existing in Tampa at the time of the hearing and the "incendiary" circumstances under which this case was tried. In so doing, he made reference to news articles (appearing in Tampa newspapers contemporaneously with the hearing) which reported that a State court had issued an injunction against violence and that certain individuals had been sentenced for weapons law violations, in connection with a then current strike against the Respondent. No record evidence was adduced to support these findings and they are not essential to a disposition of this case. Accordingly, we do not adopt them. However, we conclude, on the basis of our review of the entire record, that the Trial Examiner's credibility resolutions are adequately supported by a preponderance of the evidence.

## INTERMEDIATE REPORT

### STATEMENT OF THE CASE

Upon charges filed by Raymond W. Norman, the General Counsel of the National Labor Relations Board caused a complaint to be issued on May 20, 1960, alleging that Cone Brothers Contracting Company had engaged in unfair labor practices in violation of Section 8(a)(1) of the National Labor Relations Act, as amended (61 Stat. 136), by interrogating its employees concerning their union membership, concerted activities, and desires in connection with the Union; by threatening employees with discharge or other reprisals if they became or remained members of said Union, or gave any active support to the Union; by promising its employees economic benefits, and other benefits, if they refrained from becoming or remaining members of said Union, or if they refrained from giving any assistance or support to said Union. Respondent filed an answer, denying that it had engaged in any of the unfair labor practices alleged.

A hearing was held before Trial Examiner John C. Fischer on July 6 and 7, 1960, in Tampa, Florida. Thereafter, on August 11, counsel for Respondent submitted a brief which has been duly considered.

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

### FINDINGS OF FACT

#### I. RESPONDENT'S BUSINESS

At all times material herein, Respondent has maintained its principal office and place of business at 309 Caesar Avenue, in the city of Tampa, State of Florida, where it is engaged in the business of a general contractor constructing highways, drains, sewers, and excavations. It also maintains two work stations called Skipper Road "Batch" Plant and Lansing Mine, as well as a shop at Jefferson Street in Tampa, Florida. Respondent, during the past 12 months, which period is representative of all times material herein, realized gross receipts in excess of \$3,000,000, of which in

excess of \$1,000,000 was derived from the State of Florida for constructing, maintaining, and repairing the said State's highways. Of its total annual purchases of approximately \$2,500,000, it received approximately \$50,000 worth from directly outside of the said State of Florida. Respondent is now, and has been at all times material herein, engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

## II. THE LABOR ORGANIZATION INVOLVED

The International Union of Operating Engineers, AFL-CIO, Local Union No. 925, herein called the Union, is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

## III. THE UNFAIR LABOR PRACTICES

### Orientation

The atmosphere at the time of the hearing of this case on July 6 and 7, 1960, was explosive. That emotional feeling was running high is borne out in the record by comments of participating attorneys. The Trial Examiner advised all parties that he would take judicial notice of matters of common knowledge existing in Tampa, which atmosphere obviously was affecting testifying witnesses and bore on the credibility resolutions. Particularly, witnesses over or understated their versions of events.

For example, the afternoon edition of the Tampa Times of July 6 carried a news article that three nonstriking employees of Respondent Cone firms were given suspended sentences for weapons law violations growing out of the strike. Another article in the same newspaper stated that my hearing was the first of several expected to result from charges and countercharges between Cone Brothers employees, the Teamsters Union, and Operating Engineers Union. The front page of the morning Tampa Tribune of July 7, featured by heavy headlines recited that one of the State circuit judges had issued a temporary injunction banning violence in the 5-week-old strike of the two unions against Respondent Cone Co. and warned that violators of the order "will be dealt with sternly." Shooting, beating, coercing or intimidating employees, strikers, or families was prohibited by the order. It was under such auspices or aura that this hearing was held.

These facts of life, in the opinion of the Trial Examiner, colored the testimony of witnesses in a case which, without the emotion generated in the supercharged atmosphere, very likely would have presented an ordinary or usual unfair labor practice case which complained that a minor supervisor interrogated its employees concerning their union membership, threatened employees with discharge or other reprisals if they joined or supported the union, or promised economic benefits if they refrained from joining or assisting the union. (Only 34 out of 1,500 to 2,000 Cone Co. employees were involved in these charges in this case.) The fact, however, that this case was tried under incendiary circumstances does not change the law applicable to the facts as found, nor is the judgment of the trier of the facts to be influenced by such extraneous conditions. The only possible bearing is on the truth or falsity of the testimonies in the record. The old legal maxim that "each tub sets on its own bottom" applies.

### Cogent Facts

Late in February or early in March 1960, Operating Engineers Union started an organizing campaign among Cone Brothers employees. The operation for hauling roadbuilding rock from a quarry and requiring 2 shifts, day and night, comprised a unit of 34 truckdrivers supervised by day foreman, Walter Cooper, and night foreman, Henry Herndon. All of the charges of interference, restraint, and coercion in this case are attributed to Foreman Cooper after some of his men became interested in the union organizing campaign. Other units of Respondent Company and the remaining 1,466 to 2,000 employees were not concerned and did not become even remotely involved until a general strike occurred on May 24, 1960. In this strike Operating Engineers and Teamsters had combined their organizing drives and struck Cone and all its subsidiaries.

The original charge in this case filed April 1, 1960, by Raymond W. Norman, alleged that on or about March 31, 1960, Respondent Company by Supervisor Cooper terminated the employment of Raymond W. Norman, a rock driver, because of his membership and activities in behalf of International Union of Operating Engineers, Tampa Local No. 925. The complaint was predicated on an amended charge which alleged acts of interference, restraint, and coercion of employees under Section 8(a)(1) of the Act and the allegation of discharge and discrimination under Section 8(a)(3) of the Act was eliminated by the Regional Director. The whole case hangs on whether or not Foreman Walter Cooper unlawfully interrogated and threatened

men in his unit ament to their protected union activities. Extensive testimony was given by six witnesses called by the General Counsel and four witnesses by the Respondent's Counsel.

General Counsel Moran, supported by Operating Engineers Union Counsel Hamilton, contended that on or about the beginning of March of 1960, the truckdrivers of Cone Brothers Contracting Company decided to organize, and in this organizational move they contacted Local 925 of the Operating Engineers, which is the Local in Tampa, and that shortly thereafter this organizational work began. Then Cone Brothers, through its supervisor, Walter Cooper, began interrogating the truckdriver employees, as to whether they were interested in the Union, whether they had signed cards, and delivered various threats, and also promised employees benefits if they would refrain from organizational activity, and by doing so the Employer herein, Cone Brothers Contracting Company, thereby interfered with, restrained, and coerced these employees who attempted to join the union.

#### Respondent's Contention

Respondent Counsel Muller in his comprehensive brief to the Trial Examiner states the issues: (1) whether the General Counsel has established, by the required preponderance of evidence, violations of Section 8(a)(1) of the Act; (2) whether, even if believed, the alleged incidents of 8(a)(1) statements are so isolated as to not effectuate the policies of the Act to issue a remedial order based thereon; (3) whether, even if they occurred, the alleged 8(a)(1) statements, isolated in nature, were disavowed and dissipated by the Respondent's letter to all employees advising that it was their own personal choice to join or not join a labor organization (Charging Party's Exhibit No. 1).

#### The Skipper Road Discussion

As previously indicated the Operating Engineers' organizational drive started around March 1, 1960. There is no question that it was an open and above-board drive. Charging Party Norman and driver Alfred Pruitt went to the union hall, secured application cards, and secured signatures of fellow drivers. Talk about the Union, pro and con, was a matter of general discussion. The first time Foreman Cooper became involved was near the timeclock at the truckers' operating headquarters called Skipper Road Batch Bin in Tampa. (They also based at Lansing Mine near Brookville.) This incident occurred at shifting time on March 7 or 8 at 4:30 in the afternoon. Several drivers, six or seven, were present in the group. In response to counsel's query as to what Foreman Cooper said, Norman testified: "Well, he brought up the statement, something about union, and he said that Cone, J. L. Cone, Jr., would never sign a union contract with any company whatsoever, but if the men would organize themselves that Mr. Cone might talk to the Company union, but he would never sign a contract with a union. . . . He also, I mean just general talking, he made the statement that if anybody signed any union cards they would be starved out, and just general discussion about the union. . . . He said if Skipper Road did go union that Mr. Cone would close it down completely, park all the trucks on the lot." Cooper denied this version and I credit his denial for reasons appearing hereinafter.

After this glib but vehement recital, in answer to General Counsel's question as to how this conversation came about, Norman replied: "Mr. Cooper was giving the men a kind of pep talk, to speed the operations up, and he didn't want to see nobody trying to mess into the company, or something like that, and that some guys were late on the shipments, I mean on the job, or something, and he was just trying to pep the men up, and then it got into the union situation." [Emphasis supplied.] The Trial Examiner came to the conclusion after seeing and hearing all the witnesses, including Cooper, that the last recital told the story. The evidence of record shows that Cooper was a hard driver. His men were falling behind in their deliveries. He wanted three round trips per truck per day, even if the speed law was violated, according to testimony. He demanded production and did not want the union in his unit. That was his privilege as a representative of management and he was merely expressing his opinion. All witnesses queried testified to this.

Cooper's version of the Skipper Road discussion was that he called the drivers together at shift time and told them that they had to "get on the ball and start getting more trips . . . we were losing money with the loss of trips, too much goofing off on the job. Most of it was just general discussion of the care and upkeep of the trucks." Cooper stated that right at that time there were a lot of union discussions—that it was an every day topic. He stated that he was asked what he thought about it, credibly testifying: "I said that as far as the union was concerned, that we were going to run those trucks. The men were free to do as they pleased, join the union or not, but we were going to run the trucks, and if they did walk out

and leave us I was going to try to find men to put on them; if we didn't, we would park the trucks." Cooper, queried as to whether he talked about anything else in this conversation, stated: "Yes. I did this on numerous occasions. From my own personal experience that I had several years ago, back prior to my employment with the company, I gave it to the fellows at face value, told them my own personal experience, back I would say several years ago, that I beat the streets out here in Tampa for several solid weeks, I walked the streets." Cooper amplified this as follows: "I told them that I had walked the streets here in Tampa those six weeks, and Christmas Eve day I was on a street corner here in my home town, with a placard on my chest, one of my babies in my arms, no groceries at home, or no toys or anything for my children or my wife at Christmas; that even today I am still paying off a mortgage on my home from that very thing, to get myself back on my feet. I related those experiences to them, I told several of them, in a way that I would appreciate my father talking to me." The Trial Examiner considered Cooper to be the most reliable of the 10 witnesses who testified to the same or similar situations as hereinafter set forth. Six of General Counsel's witnesses were interested strikers and three of Respondent's were interested nonstrikers. Respondent's fourth witness was hospitalized and his affidavit testimony was refused—presumably substantiating other nonstrikers' testimony. The Trial Examiner concluded that the threats alleged were merely opinions of Cooper given as to what would happen if the employees went out on strike.

#### The Union Button Interrogation

General Counsel Moran asked Norman whether he recalled any subsequent conversation with Cooper, either alone or in a group, concerning the union organizational activity. Norman stated: ". . . No, not at the present time; it may be later on."

Q. Do you recall whether or not Mr. Cooper said anything about what would happen if you went union?

A. Oh, at the present time he said that—He said if anybody ever went union, signed a card, they would be starved out. He said it more times than one, not just that particular time I mean; more times than one. I don't recall the exact date.

Q. Who else was present, if you can recall?

A. Well, there was—Mr. Martin was there, Mr. Winters, Mr. Bishop was there, I think Mr. Quinn was in there, too; I am not sure.

Q. Did you have any other conversations, either in a group or anything like that, with Mr. Cooper, concerning this union organizational activity, that you recall?

A. I don't recall it, no.

Q. You said before that there were many times that Mr. Cooper said that you would be sorry, whoever went union would be sorry, that they would be starved out. Did this also continue on, or did he stop that type of talk?

A. No, sir, it continued right on until they laid off the night shift.

Cooper's accepted explanation of this incident is as follows:

Norman walked in, and he had on this jacket that had—I don't remember what kind, bright buttons down the front, and I made the comment when he walked in, in a joking way, that Norman had more buttons on his jacket than I did, but I did have one; and if Norman answered me one way or the other I don't recall him saying anything, but he did turn around and walk on outside. Well, I had an old button in my pocket, and one of the cards that had been given to me that morning out at one of the mines, one of the Nobleton mines by one of the fellows, I don't even remember which one of the fellows gave me the button; his truck was broken down at the Nobleton Mine, and the mechanic was working on it. I walked over, and the driver asked me, still in a joking way, he said, "have you not joined up yet?" I said "No"; and he handed me a card, one of the little blue cards, and an old button, an old union button; and I stuck the card in my billfold and put the button in my pocket. Later on that day, back in Skipper Road, then this incident with Norman came up, and that is when I threw the card and the button down on the desk, and I said, "I have got one button and I have got my card," still in a joking way.

General Counsel offered evidence in rebuttal through his witness, Pruitt, that Cooper stated he was given a blue card whereas an Operating Engineers' card was white and no other witness remembered buttons being passed around. This testi-

monial discrepancy, if in fact it is a discrepancy, does not destroy a witness whom the Trial Examiner considered the most reliable of those offered—especially in the atmosphere of this case.

#### Allegation of Coercion

J. C. Martin testified extensively to three conversations with Cooper; one at Skipper Road, the second on the highway near Brookfield, and the third, with reference to Norman's filing his original charge with the Board for allegedly firing Norman, on April 1. With reference to this last conversation concerning union activities, Martin testified: "Well, I was leaving the Lansing Mine, and Mr. Cooper came up and asked me, or made the statement, he said, 'I thought you were a friend of mine.' I said, 'I am. I am not a friend or foe.' I said 'Why?' He said, 'Well, this letter or petition that you are circulating around.' I said, 'I am not circulating any petition or letter around.' I said, 'You know, I told you before that if I had anything to do I would come to you and tell you.' And I said, 'The only letter or petition that I know anything about is the affidavit that Mr. Norman has made out.' And Mr. Cooper seemed to be surprised at the time that Mr. Norman had made an affidavit, and he said that Mr. Norman could get into serious trouble for making it. I told him that I was coming down here and also make an affidavit, since so far as my name had been brought into the affidavit that Mr. Norman had made."

Q. You were coming down where?

A. To the Labor Relations Board.

Q. Did Mr. Norman file an affidavit with the National Labor Relations Board?

A. He had already filed one.

Q. Is that what Mr. Cooper was talking about and you were talking about?

A. Yes, sir.

General Counsel Moran argued in this connection: "We contend here, of course, that by telling an employee, in this case Mr. Martin, that another employee was going to get into serious trouble for making an affidavit in connection with any NLRB case, in turn it was coercion and intimidation of an employee." The Trial Examiner, however, is not in accord with this thesis, but rather accepts Cooper's explanation.

Cooper's testimony in this instance was:

Q. Tell us what was said by you and what was said by Martin, if you can recall.

A. Well, there was so much pro and con going on right along then, and one morning, up at the scale house at Lansing I asked Mr. Martin words to the effect, did he—something about an affidavit or petition or something concerning Norman, and he made the statement to me that he hadn't signed any such thing, but if he had he didn't know anything about it, but that he was going to make, I think, an affidavit of his own, or words to that effect.

I might have made, I think I made the comment that he and I were considered good friends, I relied on Mr. Martin, I put a lot of confidence in him and confided in him a lot, and I felt free to go to him and talk to him at any time about anything. So that is the reason I wasn't backward or hesitant about going up to Mr. Martin and asking him anything about anything.

Q. What, if anything, was said concerning the affidavit made by Norman?

A. I had heard—still hearsay as far as I was concerned, because I hadn't seen any petition or affidavit or anything else, but I had heard that Norman had come down to the NLRB and made a charge that I or Herndon, I don't know which one was supposed to have done it, had fired him on this particular date or the day before, and there had been no firing going on, we hadn't fired anybody. It was during all this flood stage we were having here, and Norman was on the night shift. The batch bin was just at a standstill, we weren't doing anything. We were letting the men come out, show up; "nothing to do, fellows;" they would get two hours show-up time and go back home.

Q. All right. Then if I understand your testimony correctly, your comment to Martin was that Norman had said he was fired, when actually he was not; is that correct, or isn't it?

A. Well, in that affidavit that is what was supposed to have been in it, yes.

Q. And did you hear the testimony yesterday of Mr. Martin, that you had said, "Norman could get into serious trouble for giving such an affidavit?"

A. Yes, sir. That was my own interpretation, that if Norman had come down here and filed a charge that we had fired him, yet the next night he was back on the job at work, to me it sounded like he would be in some trouble up here, because he had signed an affidavit or a petition to the effect that he

had been fired, and yet the next night he was back on the job working. That is what I had reference to as far as Norman getting into trouble about the affidavit.

Alfred J. Pruitt, the witness who followed Norman on the stand and had heard Norman's testimony, testified substantially to the same things as did Norman. (Cooper, credited in the overall by the Trial Examiner, denied making such statements.) However, on cross-examination Pruitt equivocated and ended up by confirming the Trial Examiner's conclusion that Cooper's remarks were in context of what might happen if the employees struck. This is borne out by his quoting Cooper as saying: "He said he [Cone] could have the railroad haul the material" and "if you all went out on strike it is not going to hurt us." Pruitt stated that all these discussions were with a group rather than with individuals. The statement attributed to Cooper "if the men would stick with Mr. Cone, Mr. Cone would stick behind them" was not in the nature of a promise of a benefit for refraining from union activity, and if made, was just an expression of opinion by Cooper. In fact, Pruitt himself hooted at this, illustrating that at the time of the flood when the drivers were not getting in enough time to pay rent: "He made no effort to let the men draw out any money to help them out on that."

From the manner in which he testified, it was clear to the Trial Examiner that Pruitt as well as the other striking witnesses were bitter toward Cone at the time of testifying during the strike which had been called on May 24 by Operating Engineers Union because a contract had not been negotiated. Teamsters had merged their efforts in the strike against various segments of the Cone operation since they represented Tampa Sand, a Cone subsidiary and other drivers. It was a matter of common knowledge that Cone Brothers did not welcome union representation of employees. This fact was brought out by General Counsel Moran over the objection of Counsel Muller. General Counsel contended, during his rebuttal that Respondent had been continuously antiunion as evidenced by cases of unfair labor practices previously adjudicated by the Board against Respondent. For purposes of background evidence, at request of General Counsel, the Trial Examiner takes judicial notice of such cases as cited by General Counsel. General Counsel's underlying reason for citing these prior Board proceedings was to attack the credibility of Cooper. The Trial Examiner was well aware that the situations existing and confronting Cooper early in March during an organizational drive affecting his small unit followed by a general strike on May 24, with strike violence, were different. Withal, I found him to be the most reliable and objective of the testifiers. I conclude statements attributed to him were mere expressions of his opinion, predicated on the eventualities of a possible strike—with results to his unit—similar to those experienced by him on a past Christmas.

#### The Strike Notice

That the situation had worsened and what Cooper had foreseen was about to come to pass is illustrated by a notice to employees issued on May 18, 1960, by Respondent. That notice distributed to all employees reads as follows:

#### CONE BROTHERS CONTRACTING COMPANY

Tampa, Florida

#### NOTICE TO EMPLOYEES

##### Vehicle operators

It has come to our attention that the Operating Engineers will probably strike our Vehicle Drivers on Thursday morning or some time shortly thereafter. The purpose of this notice is to advise you of your rights and those of the company and what the company expects to do in the event of the strike.

The law says that you, as an employee, have a legal right to strike. The same law says that we, as your employer, have a legal right to operate our business. In the event you feel that striking is in your best interest, you have a right to do so and we recognize this right. On the other hand, we plan to operate our vehicles and feel that we can do so. As soon as the strike commences and it can be determined who is striking, we will take immediate steps to hire replacements. Those who are replaced will no longer have a job with Cone Brothers. Any who return to work before their job is filled will, of course, have a legal right to return to their job without discrimination.

We hope that you as individuals will not find it to be in your best interests to try to strike. Those who do not strike may come to work as usual and if any effort is made to interfere with you in doing so, we will see that it is stopped. If pressure is being put on any employee not to work and he will communicate with his supervisor, we will take immediate steps to remove the pressure. Any employee engaging in misconduct on the picket line, or making threats to employees, or engaging in any other unlawful activity will not be eligible for reinstatement even though their job may not be filled prior to the time they ask to return to work.

We believe that we can hire sufficient personnel to man the vehicles and take care of our work. This is what we intend to do. 5/18/60

As previously stated six witnesses testified in behalf of General Counsel's case. All were strikers. Three witnesses testified for Respondent. They were not strikers. A fourth nonstriking witness, by reason of illness, was unable to appear. Thus 10 out of 34 involved individuals were available to testify. The testimony of the six witnesses called by the General Counsel testified to substantially the same incidents as had been covered by Norman and Pruitt. Their testimonies covered incidents of interrogation laid to Foreman Cooper. The Trial Examiner concluded that all these incidents occurred in context of a potential strike envisioned by Cooper—which came to pass—and were expressions of his opinion as to what would happen if the employees struck Cone Company. The informality that existed during the early part of this organizational drive is illustrated by the fact that General Counsel's witnesses admitted that the group meetings at shift-times when Cooper spoke were "bull sessions," and the occasions were characterized by joking on the part of Cooper in referring to the buttons on Norman's coat and of one of the employees handing Cooper a card and a union button. None of the comments attributed to Cooper were in the nature of threats of reprisal or promises of benefits which under other circumstances might have been found violative of the Act.

Respondent's witnesses, Frank Cobey, Carl Smith, and James Conway, all testified that Cooper made no threats or promises and that Cooper's participation in group conversations at the timeclock dealt with how the Company would operate if the employees went out on strike. Respondent Counsel Muller dealt in great detail in his brief with the testimony of each of the witnesses. In this brief he answered and explained the testimonies of the various witnesses in line with the Trial Examiner's concept of the evidence as a whole. The Trial Examiner has carefully considered the General Counsel's summation of the case as set forth in his closing argument. However, in light of the entire record, it is the conclusion of the Trial Examiner that the General Counsel did not establish the allegations contained in his complaint by a preponderance of the entire evidence of record.

#### Résumé of Testimony.

A résumé of Pruitt's extensive testimony is similar to Norman's with reference to Cooper's testimony that the Skipper Road operation would be closed and the trucks parked if the unit went union. The cross-examination showed that these comments were in context of what might happen if the employees went out on strike. His testimony that J. L. Cone would never sign a union contract boils down to a well-known fact that the Company would not voluntarily "go union." Like Norman, Pruitt was the only other witness to testify that J. L. Cone might be interested in a company union. Pruitt's charge that Cooper said that if the men unionized they would be blackballed is not believed by the Trial Examiner to have been made by Cooper.

Carl E. Fowler's testimony that Cooper stated that the men would be starved out is found by the Trial Examiner to be only one of Cooper's predictions based on Cooper's previous distressing experience. Fowler's testimony was similar to that of the previous witness, Norman. Fowler stated that it was only natural for Cooper to know who was interested in the Union. Fowler was the least objective witness and his entire testimony was suspect. (Fowler incidentally was discharged for cause for engaging in a fight with Cooper.)

James Martin's testimony that Cooper inquired "if I was active in the Union and an instigator in working or getting the union cards signed, and asked me if one of the other drivers, Mr. Hucks, was soliciting for the Union; and I told him to the best of my knowledge that Mr. Hucks had not signed the card, and that he was not working toward the Union, but that I was, that I had signed the card and that I was

for organizing the Union," the Trial Examiner finds to have been made at a time when he, Cooper and Dewey Hays got around to talking about the union activities after they had been engaged in a discussion involving road trips and the time drivers were making on their trucks. The Trial Examiner does not believe that Cooper, "a hard pusher," drove out in the company pickup truck to the Lansing mine, flagged him down, and engaged in a union discussion. The Trial Examiner concluded that these remarks, if made, were incidental to Cooper's main purpose which was getting rock hauled. In other context and under other circumstances such interrogation may be held as an implicit violation of the Act, but in the diffused state of testimony of General Counsel's witnesses, it is not believed that the purposes of the Act would be effectuated by finding this isolated incident to be a violation.

James Blackstock's testimony followed the pattern of General Counsel's previously called witnesses, which as indicated, followed Norman's and Pruitt's versions. The Trial Examiner has hitherto ruled that Cooper's comments were in context of what would happen if a strike were called and further, that Cooper's comments with reference to who were or were not active in the Union were, at most, parts of casual conversation which was generally being indulged in by all of Cooper's drivers, of whom 30 signed up for the Union. Blackstock spoke about a conversation occurring around the middle of March at Mascotte during the lunch hour when Cooper drove up in his pickup truck. Some seven or eight drivers were there. The burden of Cooper's complaint in this instance was that the drivers were spending too much time talking union instead of keeping their trucks rolling. The same ground was covered by Cooper and the drivers as previously described—and with the same results. Blackstock stated that Cooper, if not a pretty tough boss, "he was a pusher." On this occasion Cooper referred to Blackstock as "a big shot in the Union, he is a steward," to which Blackstock replied: "No, I am not a steward." Then I went to tighten up my drive shaft, I didn't pay any more attention to the discussion at all." Blackstock referred to a similar conversation 4 days before the strike at the Nobleton mine.

James Dixon stated that he was present at Mascotte and quoted Cooper as saying that they would be starved out. However, he did not recall the circumstances because he paid little attention to it at that time: "I didn't have no confidence in it." He explained that he was busy running up the tailgates on his trailer and that Cooper said "Dick, they tell me they sucked you and Emory in," to which Blackstock replied "Yes, they all the time are sucking me and Emory in." On cross-examination he explained that the term about starving the fellows out was, he supposed, used in connection of what would happen if they went out on strike. The Trial Examiner finds that certain language as quoted by Respondent's Counsel Muller in *Lanthier Machine Works*, 112 NLRB 1028, approved by the Board, expresses his view of the general rule to be applied in this case:

It is now well settled that the test as to whether interrogation of employees concerning their union membership or activities is unlawful is whether, under all the circumstances, the interrogation reasonably tended to coerce, restrain, or interfere with the employees in the exercise of rights guaranteed by the Act. In this case, the interrogation consisted of a casual and perfunctory inquiry. It was not part of a planned or systematic effort to learn the identity of the union adherents. Nor was it conducted in an "aroma of coercion."

Accordingly, it will be recommended that the complaint be dismissed in its entirety.

Upon the basis of the foregoing findings of fact, and upon the record as a whole, the Trial Examiner makes the following:

#### CONCLUSIONS OF LAW

1. Cone Brothers Contracting Company is engaged in, and during all times material was engaged in, commerce within the meaning of Section 2(6) and (7) of the Act.
2. International Union of Operating Engineers, Local 925, is a labor organization within the meaning of Section 2(5) of the Act.
3. The allegations of the complaint that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act has not been sustained by a preponderance of the substantial evidence.

[Recommendations omitted from publication.]