

meeting, which followed, was friendly with Sullivan frankly concerned with whether his employees wished representation. Wallace spoke out in favor of representation, and nothing happened to him. Sullivan started the meeting by asking if he had done right in getting rid of Martin. From the show of hands, which no witness could identify, there was no definite response, and the meeting ended. Nothing further happened that can be attributed to Respondent. No threats nor promises were made. There is no evidence that he sought to find out who were union members nor did he question them about their union activities. In the context of all the credible evidence in this case, I find the General Counsel has not established by a preponderance of the evidence a violation of Section 8(a)(1) of the Act.¹⁵

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

CONCLUSIONS OF LAW

1. Respondent, Frank Sullivan and Company, is and has been at all times material herein engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. Local Union No. 950, Brotherhood of Painters, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent, Frank Sullivan and Company, did not engage in unfair labor practices as alleged in the complaint.

[Recommendations omitted from publication.]

¹⁵ "In the recently issued *Blue Flash* case [109 NLRB 591], the Board decided that an employer's interrogation of his employees as to union membership or activities is neither lawful nor unlawful *per se*. Whether it is one or the other depends on the nature of the interrogation and the circumstances under which it takes place. The test of illegality is 'whether, under all the circumstances, the interrogation reasonably tends to restrain or interfere with the employees in the exercise of the rights guaranteed by the Act.' If it does have this tendency to restrain or interfere with employees, it violates Section 8(a)(1) of the Act; otherwise it is lawful. . . . Each case turns on its own particular facts. . . . the time, the place, the personnel involved, the information sought and the employer's conceded preference all must be considered in determining whether or not the actual or likely effect of the interrogation upon the employees constitutes interference, restraint or coercion' [*N.L.R.B. v. Syracuse Color Press, Inc.*, 209 F. 2d 596, 599 (C.A. 2), cert. denied 347 U.S. 966.] *Emma Gilbert, et al, individually and as Co-Partners d/b/a A. L. Gilbert Company*, 110 NLRB 2067, 2071, 2072.

Samuel Cherico, Joseph Cherico and Anthony Cherico, d/b/a
Clarion Fruit Company and United Mine Workers of America,
District 50. Case No. 6-CA-2178. October 4, 1961

DECISION AND ORDER

On July 11, 1961, Trial Examiner George A. Downing issued his Intermediate Report in the above-entitled proceeding, finding that the Respondents had engaged in and were engaging in certain unfair labor practices and recommending that they cease and desist therefrom and take certain affirmative action, as set forth in the Intermediate Report attached hereto. Thereafter, the Respondents filed exceptions to the Intermediate Report and a supporting brief.

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

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 and brief, and the entire record in this case, and hereby adopts the Trial Examiner's findings,¹ conclusions, and recommendations.

ORDER

Upon the entire record in the case, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondents, Samuel Cherico, Joseph Cherico, and Anthony Cherico, d/b/a Clarion Fruit Company, Clarion, Pennsylvania, their officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interrogating employees concerning their union membership, activities, and sentiments in a manner constituting interference, restraint, or coercion in violation of Section 8(a) (1).

(b) Threatening employees with discharge or layoff, with a reduction in wages or working hours, or with a discontinuance of operations unless the employees reject, or withdraw from, or vote against the Union.

(c) Granting wage increases to employees for refraining from becoming or remaining members of the Union, or for giving assistance or support to the Union.

(d) Discouraging membership in District 50, or in any other labor organization of their employees, by discharging them, laying them off, or failing to reinstate them, or by discriminating in any other manner in regard to hire or tenure of employment or any term or condition of employment to discourage membership in a labor organization.

(e) In any other manner interfering with, restraining, or coercing their employees in the exercise of their right to self-organization, to form, join, or assist said District 50, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a) (3)

¹Contrary to the Trial Examiner, we do not find sufficient support in the record for the Trial Examiner's finding that Chester Smith is a supervisor within the meaning of the Act, or that he had apparent authority responsibly to speak for the Respondents in matters affecting their employees. Accordingly, we do not adopt the Trial Examiner's finding that Respondents violated Section 8(a) (1) of the Act by the statements made by Smith.

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 purposes of the Act:

(a) Offer to Raymond Clinger and Clayton Kroh immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of pay which they may have suffered by payment to them of a sum of money equal to that which they normally would have earned from the date of discrimination against them to the date of their reinstatement as previously made, less their net earnings during said period (*Crossett Lumber Company, Inc.*, 8 NLRB 440), said backpay to be computed on a quarterly basis in the manner established by the Board in *F. W. Woolworth Company*, 90 NLRB 289.

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all records necessary to analyze the amount of backpay due and the rights of Raymond Clinger and Clayton Kroh under the terms of this Order.

(c) Post in their warehouse at Clarion, Pennsylvania, copies of the notice attached to the Intermediate Report marked "Appendix A."² Copies of said notice, to be furnished by the Regional Director for the Sixth Region, shall, after being signed by Respondents' representative, be posted by Respondents immediately upon receipt thereof, and be maintained by them for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by any other material.

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

² This notice shall be amended by substituting for the words "The Recommendations of a Trial Examiner" the words "A Decision and Order." In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "Pursuant to a Decision and Order" the words "Pursuant to a Decree of the United States Court of Appeals, Enforcing an Order."

INTERMEDIATE REPORT

STATEMENT OF THE CASE

This proceeding brought under Section 10(b) of the National Labor Relations Act, as amended (61 Stat. 136; 73 Stat. 519), was heard in Clarion, Pennsylvania, on May 22, 1961, pursuant to due notice. The complaint, issued on March 23, 1961, by the General Counsel of the National Labor Relations Board and based on charges duly filed and served, alleged in substance that Respondents engaged in unfair labor practices proscribed by Section 8(a)(3) and (1) of the Act by discharging Raymond L. Clinger and Clayton W. Kroh on February 11, 1961, and

by engaging in certain specified acts of interference, restraint, and coercion (i.e., interrogations, threats of reprisal, promises of benefit, and surveillance), all related to union membership and activities.

Respondents' answer, denying the unfair labor practices and denying the supervisory status of one Chester Smith and of the copartners other than Anthony Cherico, raised mainly factual issues, turning on the credibility of opposing witnesses. Respondents also questioned the jurisdiction of the Board and the Charging Union's status as a labor organization and its compliance with the filing provisions of the Act.

Corrections to the transcript are hereby ordered on the General Counsel's motion and in the absence of objections.

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

FINDINGS OF FACT

I. RESPONDENTS' BUSINESS

Respondents are engaged at Clarion, Pennsylvania, in the wholesale fruit and produce business. During the year from February 1960 to February 1961, Respondents purchased directly from extrastate suppliers goods valued at \$26,514.17. During the same period Respondents purchased from suppliers within the State goods which the latter received from outside the State and which were valued at approximately \$39,250.¹ As Respondents' total receipts from extrastate sources, direct and indirect, exceeded \$65,000, I conclude and find that Respondents are engaged in commerce within the meaning of the Act. *Siemons Mailing Service*, 122 NLRB 81, 85.

II. THE LABOR ORGANIZATION INVOLVED

I find on undisputed evidence that United Mine Workers of America, District 50, is a labor organization within the meaning of the Act. Though Respondents' answer also attempted to raise a compliance issue and to question the Union's right to file charges and the Board's right to proceed with the complaint, the 1959 amendments (Public Law 86-257) repealed the compliance provisions of the earlier act.

III. THE UNFAIR LABOR PRACTICES

A. Introduction; proprietors and supervisors

Respondents are a copartnership composed of Samuel Cherico and his sons, Anthony and Joseph, who employ normally four truckdrivers and warehousemen. The truckdrivers traveled regular routes, making deliveries within a radius of some 50 miles from Clarion, and one of them, Robert Fye, regularly drove to Pittsburgh for produce. To be resolved preliminarily are the questions of supervisory status. Though the active management of the business has been in Anthony Cherico's hands for several years, all the copartners are responsible as proprietors, of course, for the conduct of each in relation to the employees, regardless of any claimed lack of supervisory authority. The status of Chester Smith requires more detailed consideration.

Smith had been with the Company some 41 years in the capacity of buyer and salesman. On his regular weekly buying trips to Pittsburgh, Smith acted as Respondents' "eyes," exercising discretion and independent judgment in selecting, pricing, and purchasing produce. Smith also had the use of a company car which, on occasion, he ordered employees to wash and to "gas up." There was also testimony that Smith gave orders to the drivers concerning their routes and deliveries and the loading of their trucks; and though such orders were largely routine, they were of the same type as those given by the Chericos. Indeed, Kroh testified that on his early morning work (beginning at 4 a.m. on Thursdays) it was mainly Smith who told what to do. Smith also directed Fye where to go and what to load on his weekly trips to Pittsburgh.

Though Smith had no authority to hire or fire or to discipline employees, his direction of them was otherwise such as to qualify him as a supervisor within the meaning of Section 2(11) of the Act. Aside from that, his long-standing connection with the Chericos and his position as buyer allied him with, and identified him as the representative of, management. Cf. *W. W. Chambers Co., Inc.*, 124 NLRB 984, 988; *Plankinton Packing Company (Division of Swift & Co.)*, 116 NLRB 1225, 1228.

¹ After an appropriate deduction of 5 percent in the purchases from one supplier who received only 95 percent of his goods from outside the State.

I conclude, therefore, that whether or not Smith was technically a supervisor within the definition of the Act, his position was such that he had at least apparent authority to speak for management in relation to the employees, and that Respondent "may fairly be said to be responsible for his conduct." *N.L.R.B. v. Mississippi Products, Inc.*, 213 F. 2d 670, 673 (C.A. 5); *Wagner Iron Works, a corporation*, 104 NLRB 445, 462 (Beck); *International Association of Machinists, Tool and Die Makers Lodge No. 35 (Serrick Corp.) v. N.L.R.B.*, 311 U.S. 72, 80; *Harrison Sheet Steel Company*, 94 NLRB 81, 82, enfd. 194 F. 2d 407 (C.A. 7).

B. Organizational activities; the unfair labor practices

1. The evidence

Organizational activity began in mid-January 1961, when two of the drivers, Raymond Clinger and Clayton Kroh, contacted Robert Smedley, a representative of District 50, and signed authorization cards. On January 16, they took Robert Fye to the union offices, and he also signed a card. There followed a series of conversations between union and company representatives and between company representatives and employees, during which—according to the General Counsel's witnesses—Respondents repeatedly stated their opposition to the Union and their intention to lay off some of the drivers and in which they attempted to force withdrawals from the Union.²

The tone was set on January 17 when Smedley called the Company, talked with Samuel Cherico on the telephone, informed him that the Union represented a majority of the employees, and requested a meeting for the purpose of requesting recognition. Smedley testified that Cherico replied that they would not have a union because they were not operating a factory, that he and his sons would do the work, and that he would "lay those fellows off."

Clinger testified that on January 17, Samuel Cherico asked him, "What the god-damn hell is this I hear about you wanting a Union?" Samuel also stated that if Clinger wanted a union, he should go where it would do some good, and he blamed Clinger and Kroh for the union activity. Kroh testified that on January 17, Anthony Cherico stopped him and asked if he liked his job, and when he replied affirmatively, Anthony asked, "Then, what is this bullshit about you guys trying to get a Union in here?"

Kroh testified that on the following day all three partners came to the warehouse and began talking about the Union in the presence of the employees. Samuel stated, among other things, "You are not getting no damn Union in here," that if they wanted a union they should go where it would do some good, and that if the Union got in, the employees would work only 25 hours a week.

Clinger testified that on January 18, Anthony Cherico stated that if the employees wanted their jobs, they should march up to the union office and say they did not want anything to do with the Union; and that on January 19, the three partners came out at different times and said they were going to fire all the employees and that they could do the work themselves. Clinger testified further that on January 20, Samuel Cherico told him that if the employees got a union, the Company would cut the wages and workdays down and would send the employees home on days when they did not need them.

Fye was the last of the three drivers to sign a union card and the first to suffer a change of heart. Called by the General Counsel, it was soon apparent that Fye was testifying with reluctance. The production of a prior written statement did not substantially affect his attitude, as he professed no refreshment of recollection and continued to hedge and to qualify his answers. Despite his reluctance, however, Fye affirmed the following: Anthony Cherico questioned him about signing a union card and about whether the employees wanted a union. On another occasion Anthony said that the partners could get along without the drivers and would run the fruit themselves. Though denying on cross-examination that Cherico ever threatened him or that he heard Cherico threaten others because they joined the Union, Fye admitted on redirect examination that he did not know "exactly" what was meant by "threaten." Testifying further that he would not consider it a threat if he were told, "We will close down the plant if the union comes in," Fye admitted that Cherico said "something like that."

² Though some of those statements, made to union representatives alone, were not unfair labor practices, the evidence was plainly relevant because indicative of an antiunion attitude and of discriminatory motivation and because it was cumulative to and corroborative of similar statements which Respondents made directly to the employees.

Chester Smith (who admitted discussing the Union with Fye as early as January 17) went to the union office on January 19, and talked with Regional Director Lee Heilman about the organizational drive. Heilman testified that Smith referred to the Union's interest in "our place of business," that he proceeded to make disparaging remarks about each of the three drivers who had signed cards, and that he stated that the employee who did the driving to Pittsburgh had been notified more than a week before that he was to be laid off at the end of the week, i.e., January 21. Smith later called Heilman back, identified the Pittsburgh driver as Fye, and stated that a layoff slip was given him almost 3 weeks ago. In the meantime, Heilman called Anthony Cherico, informed him of Smith's visit and of the report that the Company was contemplating a layoff, and warned Cherico the Labor Board might interpret such an action in the middle of a union campaign as an unfair labor practice.

Though Respondents delayed the threatened layoff until after the date set for the election, Heilman's warning did not otherwise deter them from their course of conduct. Both Clinger and Kroh testified to Anthony's actions on the afternoon of January 20 in taking them (and Fye) to the Union's office, and they and Heilman testified to the happenings there. Clinger testified that Anthony called to him and other drivers in the warehouse, "Come on, boys, we are going up to the Union office. If you want to keep your job, you had better come along," and that he told them to keep their mouths shut and not to say anything except that they did not want anything to do with the Union. Kroh testified that before going to the union office, Anthony asked him what he wanted to do (about the Union), and that he replied he did not know. Anthony then stated, "[W]e are going up to the Union office and you are going to tell them that you just don't want a Union."

Upon their arrival at the union office, Heilman assumed that the stranger (Anthony was not immediately introduced to him) was the fourth truckdriver, and began to tell the men what Smith had said about the drivers. Anthony broke in, introduced himself, and stated, "These men want to drop the union." Clinger and Kroh said nothing, but made motions and signs to Heilman, unobserved by Anthony, of disagreement (i.e., thumbs down, etc.), Heilman stated that a union meeting would be held on Monday, January 23; that if the men came to the meeting, the Union would go ahead; but that if they did not come, it would be an indication there was no interest in the Union. Heilman also informed Cherico that the employees' actions that day would undoubtedly be disregarded because influenced by management.

Clinger testified that when he was getting his paycheck for the week ending January 21, Anthony Cherico stated that Clinger had "started this Union stuff and that he [Cherico] was going to finish it." Clinger also testified that on the afternoon of January 23, Smith asked him what the big idea was in getting the Union, stated that he was not going to let Clinger ruin over a million dollars worth of stuff in the warehouse, and that the Company was going to lay off two employees whom they did not need because they would do the work themselves. Clinger and Kroh testified further that they worked late on the 23d to unload a carload of bananas and that, though they went to the union hall, no one was there.³

Smedley testified that on January 27, he met with Anthony Cherico about signing a consent-election agreement and that during their discussions Cherico stated that he saw no need for a union, that he would not have one, and that if the employees voted for the Union they would be laid off and Cherico would do the work.

Clinger testified that around February 1, Smith stated that he was going to see to it that Clinger did not go up to the union office to open his mouth and do any more talking. Kroh testified that on February 3, Smith warned him that, "If you want your job, you won't vote."

The election was scheduled for February 6, at 8 a.m., and the drivers were supposed to meet at the union office at 7:30 a.m. Clinger and Kroh went to the office, but Fye did not show up. Heilman testified that under those circumstances he and Smedley decided to request the Board not to hold the election; and they got in touch with the Board's agent and called the election off.

On the next morning Anthony Cherico called Clinger and Kroh into the office and told them that he was laying them off because of lack of work, but that they could either quit then or work the rest of the week. They chose to work the week out (ending February 11). In the meantime, Kroh testified that around

³ Though an implication was suggested by the General Counsel's evidence that the two drivers were deliberately assigned to work late in order to interfere with their attendance at the union meeting which Heilman had scheduled, the evidence as a whole did not support that inference.

February 9, Smith informed him that if he were to apologize to Anthony for the trouble he had caused, he would probably get his job back.⁴

On March 28, following the issuance of the complaint, Respondents wrote Clinger and Kroh a letter (prepared by their attorneys) which contained a number of self-serving statements and which requested them to return to work, without prejudice to the rights on either side, pending the outcome of this proceeding. Clinger returned to work immediately, and Kroh on April 3.

Samuel Cherico, Anthony Cherico, and Chester Smith, testifying for Respondents, denied much of the testimony against them, particularly insofar as statements of coercive content were involved. Although Samuel Cherico denied on direct examination making the statements which Clinger and Kroh attributed to him, his testimony on cross tended to support their testimony. Thus Samuel admitted telling the employees that the business was too small for a union and asking, "What do we want a Union for?" He also admitted telling them they should go somewhere else, where there was a bigger shop, and where they could do a union job. Samuel testified that he could not recall the telephone conversation with Smedley.

Smith denied making the statements which Clinger and Kroh attributed to him, but admitted that he discussed the Union with Fye, that Fye acknowledged his membership but expressed a desire not to go ahead with it, and that Fye informed him that Clinger and Kroh had joined. Smith also admitted going to the union office and discussing the union activity with Heilman but denied that he made any threats. His testimony contained no specific reference to the layoff of the Pittsburgh driver (Fye) or to any other layoff.

Anthony Cherico admitted receiving a call from the union office concerning a contemplated layoff, but testified he was previously unaware of the Union. He admitted also conferring with Smedley concerning the consent-election agreement, testifying that the conversation consisted of Smedley telling him of the benefits to be derived from a union, but he did not specifically refer to or deny the statements which Smedley attributed to him.

Cherico denied making the alleged threats to discharge or lay off the drivers because of the Union, denied discussing the Union with them, and denied that any of them ever told him they had joined. He testified further that his visit to the union office with the drivers was instigated by Fye, who reported he did not want to join the Union. On Cherico's suggestion that Fye tell that to those who wanted him to join, Fye asked Cherico to accompany him. Clinger and Kroh went along, Cherico testified, because, "Apparently they had spoken around to each other." Cherico did not specifically deny the testimony of Clinger and Kroh concerning his part in inducing them to go with him. As to the meeting with Heilman, Cherico testified that one of the drivers stated that they wanted to withdraw from the Union, and that it was only after Heilman's reference to Cherico's threats to fire all the drivers that Cherico spoke up and introduced himself. Cherico testified to nothing else that was said, through he denied making any threats or saying anything for or against the Union.

Concerning the layoff, Cherico testified that the business is seasonal; that June, July, and August are the busy months and the remainder are slow; that late in 1960, he discussed with the drivers on one occasion the possibility of a layoff because business was "poor"; and that during the call from the union office (his first knowledge of union activity), he affirmed his intention of making a layoff, but because of the call he did not act until after the election was canceled. He then laid off Clinger and Kroh because of lack of work, and testified that though he did not hire anyone in their places, the other drivers were able to do all the work without working substantially longer hours. Cherico admitted, however, that he and his brother made some of the deliveries after the layoff and that he raised the wages of the other drivers by \$5 a week.

Though Cherico denied that business improved after the layoff⁵ and testified that

⁴ Though Clinger and Kroh also testified to occasions when they saw and were seen by Anthony Cherico and Smith at or near the entrance to the union office, the circumstances failed to establish surveillance. The office was located in a building which faced on Main Street in the business section (3 to 4 blocks) of Clarion, whose population is 4,500. Cherico lived only a block and a half away, and the warehouse was only a few blocks away. The General Counsel's evidence was insufficient to overcome the denials of Cherico and Smith that they were engaged in surveillance.

⁵ Cherico testified that cash receipts (collections) dropped from about \$100,000 in January, February, and March 1960, to about \$82,000 in the same months in 1961, but he admitted that those figures did not reflect actual sales and he supplied no information as to the latter.

he still could "do nicely" without Clinger and Kroh, he admitted they were currently working 45 hours a week. He took them back, he explained, because he was advised by the Union or the Board that it would "save embarrassment" to do so. Finally, Cherico admitted (despite the seasonal nature of his business) *that he had never laid off anyone before.*

A part of the General Counsel's case bore on Cherico's preunion reference to a layoff and on Respondents' claim, in their offer of reinstatement, that Clinger and Kroh were selected for layoff because they were the "youngest employees." Clinger testified that in September 1960, he asked for a raise and was refused by Cherico, who stated he could not afford it and was thinking of laying off someone. Again in December, when Clinger asked about a Christmas bonus, Cherico again refused, stating that the way things were going, he might have to "lay a guy off." Kroh corroborated that testimony.

As to length of service, the evidence showed that although Kroh was the newest employee, Fye was next in line. Clinger had been with Respondent for some 7 years as against Fye's 6, and Clinger's most recent employment began June 20, 1959, or more than a year before Fye's return late in 1960, after an absence of 2 years.

2. Concluding findings

As is apparent, the ultimate findings herein turn largely on resolution of the credibility issues. What is most significant in that regard is that the witnesses for the General Counsel testified by and large to the same type of statements made on numerous separate occasions by the Chericos and by Smith, both to employees and to union representatives, beginning with the inception of union activities and continuing until after the election was called off. In a number of instances the testimony was directly and mutually corroborative; and taken as a whole, the cumulative effect, in view of the pattern of conduct disclosed on the part of Respondents' various representatives, was one of mutual corroboration (including even Fye's reluctant testimony). Furthermore, admissions by Respondents' witnesses and their failure to deny significant portions of the opposing testimony also tended to support the General Counsel's case.

Under all the circumstances, I find that Respondents' representatives in fact made the statements which were attributed to them. Accordingly, I conclude and find that Respondents interfered with, restrained, and coerced their employees in the exercise of rights guaranteed by Section 7 of the Act by their following conduct:

- (a) The interrogation of employees concerning their union membership, activities, and sentiments.⁶
- (b) The threats to employees of discharge or layoff, of a reduction in wages and working hours, and of discontinuing operations unless the employees rejected, or withdrew from, or voted against the Union.
- (c) Granting wage increases to the remaining employees after the layoff because they refrained from becoming or remaining members of the Union or giving assistance or support to it. Those increases, given after the layoff of the union adherents, in the face of the claim of slack business and Anthony Cherico's admissions that the drivers worked no longer than before, were plainly calculated to discourage union membership by rewarding the employees who did not support, or who withdrew from, the Union.

As for the layoff of Clinger and Kroh, the General Counsel's evidence clearly made out a *prima facie* case that Respondents laid them off because of their attempts to bring the Union into the warehouse as the collective-bargaining representative of the employees. Indeed, Respondents' intentions in that regard were openly and explicitly stated. Respondents' evidence was insufficient to overcome that case. Though business was slack, that was a normal condition except for the 3 summer months, and Respondents had never before made a layoff. That the earlier suggestions of a layoff as made to Clinger were intended only to deter his attempts to get a raise and a Christmas bonus seemed clearly indicated from the giving of raises immediately after the discharges in the face of Cherico's claim that no additional work was required of the remaining drivers.

Finally, assuming that Respondents in good faith had decided upon a layoff before the union activity began, it was plain from Smith's testimony that only a single

⁶ The interrogation did not stand alone (*Tallapoosa River Electric Cooperative*, 124 NLRB 474, 475), but was an integral part of Respondents' campaign to force the employees to desist from their organizational efforts and to renounce the Union *Independent Linen Service Company of Mississippi*, 126 NLRB 463, 469; *N.L.R.B. v. Firedoor Corporation of America*, 291 F. 2d 328 (C.A. 2).

driver was contemplated and that that driver was Fye. When it ultimately developed, however, that Respondents' various threats had failed as to Clinger and Kroh and that only Fye had withdrawn from the Union, Respondents retained Fye and made good their earlier threats by laying off the two employees whose adherence to the Union was unaffected.

The claim that Clinger and Kroh were chosen because they were the newest employees tended further to expose the sham of Respondents' defenses, because Clinger had longer service than Fye and because Respondents' earlier selection of Fye for layoff showed that length of service was not the real criterion.

The fact that there may have been economic justification for a layoff did not here relieve Respondents of their liability under Section 8(a)(3) since it was plain that they took action because of the employees' organizational activities. Twenty-fifth Annual Report of the NLRB (1960), p. 69, and cases there cited; *N.L.R.B. v. Whittin Machine Works*, 204 F. 2d 883 (C.A. 1). I therefore conclude and find on the entire evidence that by laying off Clinger and Kroh, Respondents engaged in discrimination to discourage membership in the Union, within the meaning of said section.

IV. THE REMEDY

Having found that Respondents have engaged in certain unfair labor practices, I shall recommend that they cease and desist therefrom and that they take certain affirmative action of the type conventionally ordered in such cases, which I find necessary to remedy and to remove the effects of the unfair labor practices and to effectuate the policies of the Act. As Respondents' reinstatement of Clinger and Kroh was not unconditional, I shall recommend that Respondents make them the usual unconditional offer of reinstatement. For reasons which are stated in *Consolidated Industries, Inc.*, 108 NLRB 60, 61, and cases there cited, I shall recommend a broad cease-and-desist order.

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

CONCLUSIONS OF LAW

1. United Mine Workers of America, District 50, is a labor organization within the meaning of Section 2(5) of the Act.

2. By interfering with, restraining, and coercing their employees in the exercise of rights guaranteed in Section 7 of the Act, Respondents engaged in unfair labor practices proscribed by Section 8(a)(1).

3. By laying off Raymond Clinger and Clayton Kroh and by thereafter failing to offer them unconditional reinstatement to their former positions, Respondents engaged in discrimination to discourage membership in the Union, thereby engaging in unfair labor practices proscribed by Section 8(a)(3) and (1) of the Act.

4. The aforesaid unfair labor practices having occurred in connection with the operation of Respondents' business as set forth in section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and substantially affect commerce within the meaning of Section 2(6) and (7) of the Act.

[Recommendations omitted from publication.]

APPENDIX A

NOTICE TO ALL EMPLOYEES

Pursuant to the recommendations of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the Labor Management Relations Act, we hereby notify our employees that:

WE WILL NOT discourage membership in United Mine Workers of America, District 50, or in any other labor organization of our employees, by discharging or laying them off, or failing unconditionally to reinstate them, nor will we discriminate in any other manner in regard to hire or tenure of employment or any term or condition of employment to discourage membership in a labor organization.

WE WILL NOT interrogate our employees concerning their union membership, activities, or sentiments in a manner constituting interference, restraint, or coercion, in violation of Section 8(a)(1) of the Act.

WE WILL NOT threaten employees with discharge or layoff, with a reduction in wages or working hours, or with a discontinuance of operations unless they reject, or withdraw from, or vote against, the Union.

WE WILL NOT grant wage increases to employees because they refrain from becoming or remaining members of the Union or giving assistance or support to it.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of their right to self-organization, to form, join, or assist the above-named or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959.

WE WILL offer to Raymond Clinger and Clayton Kroh immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of pay they may have suffered as a result of our discrimination against them.

All our employees are free to become, remain, or to refrain from becoming or remaining members of United Mine Workers of America, District 50, or any other labor organization.

SAMUEL CHERICO, JOSEPH CHERICO AND ANTHONY
CHERICO, D/B/A CLARION FRUIT COMPANY,

Employer.

Dated----- By-----
(Representative) (Title)

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

Harold Goldsmith and Ada J. Goldsmith, d/b/a Superior Maintenance Company and Sylvester Lynem, Sr. and Della Mae Powell. Cases Nos. 7-CA-3032(1) and 7-CA-3032(2). October 4, 1961

DECISION AND ORDER

On July 24, 1961, Trial Examiner Reeves R. Hilton issued his Intermediate Report herein, finding that the Respondent had engaged in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the Intermediate Report attached hereto. Thereafter, the Respondent filed exceptions to the Intermediate Report and a brief in support thereof.

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 Leedom, Fanning, and Brown].

The Board has reviewed the Trial Examiner's rulings and finds no prejudicial error. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions¹ and brief, and

¹ The Respondent's request for oral argument is hereby denied, as the record, including the exceptions and brief, adequately reflect the issues and the positions of the parties.