privilege notwithstanding that there was not one shred of credible testimony that her past performance was anything but highly satisfactory.

My ultimate conclusion is buttressed by Respondent's belated attempt to justify its selection of Smith for termination on the alleged ground, *first* advanced in its unverified statement in support of the motion to vacate the Board's order of January 5, 1959, and later urged upon the court of appeals that Smith was an "extra." *No evidence to support such a contention was offered at either the original or reopened hearing.* Indeed, Respondent's own witness, Chester J. Malin, general personnel manager for the entire chain, when questioned at the original hearing as to how Smith was classified on the books of the Company, testified not that she was an "extra," but that she was classified as "checker and steno to the grocery manager."

Concerning her status, Malin testified that Smith came to work for Respondent in April 1951 as a checker, took a leave of absence due to illness for a month or so in January 1953, was "terminated because of pregnancy" in August 1954, and came back in February 1955, and worked 20 weeks part time and *full time thereafter,* although 5 weeks in 1956 she worked [an undisclosed number but] less than 40 hours a week; during 1957, from January 1 until April 18, . . . she worked full time." Based on that 6-year record, as supplied by its own witness, and which testimony it chose not to supplement at the reopened hearing though requesting an opportunity to do so, Respondent was not justified in representing to the Board, and to the court, that Smith was an "extra," the implication clearly being that she was in that status when she was selected for termination.[4]

If the order of remand herein for the purpose of taking the proffered testimony was occasioned by the need to consider what effect that testimony might have on the remedy of reinstatement with backpay which I originally recommended on November 28, 1958, I find nothing in Melchior's testimony which causes me to change that remedy. Thus, even if it be assumed, *arguendo,* that Respondent completely discontinued the 91st Street food division on January 31, 1959, thereby making it impossible for Respondent to reinstate Smith to "her former position," that contingency was provided for by the remainder of my recommended remedy—that she be reinstated to "a substantially equivalent position." [5] In an organization of Respondent's size, employing approximately 6,000 permanent employees, more than half of whom are engaged in sales or clerical work, that task should not be impossible or difficult of performance.

CONCLUSIONS AND RECOMMENDATIONS

I discern no reason to alter the findings, conclusions of law, remedy, and recommendations contained in my Intermediate Report and hereby readopt the same. It is further recommended that, unless on or before 20 days from receipt of this Supplemental Intermediate Report by Respondent, the said Respondent notify the Regional Director of the Thirteenth Region that it will comply with the recommendations contained in my Intermediate Report, the National Labor Relations Board issue an order requiring Respondent to take the action aforesaid.

[4] In this connection, it should also be noted that Respondent's own witnesses testified that *only 5-year employees* who are laid off are referred to the central office for assignment elsewhere, a referral which Edwards, the store's personnel manager, testified she made with respect to Smith.

[5] See footnote 12 in my Intermediate Report.

David Weisman t/a Weisman Novelty Company *and* United Retail and Wholesale Employees Union Local 115, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Independent. *Case No. 4-CA-2338. January 10, 1962*

DECISION AND ORDER

On October 12, 1961, Trial Examiner Horace A. Ruckel issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor

practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the Intermediate Report attached hereto. The Trial Examiner also found that the Respondent had not engaged in certain other unfair labor practices as alleged in the complaint, and recommended that these particular allegations be dismissed. Thereafter, the Charging Party filed exceptions to the Intermediate Report with a supporting brief.

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 Fanning].

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 brief, and the entire record in this case, and hereby adopts the findings,[1] conclusions, and recommendations of the Trial Examiner.[2]

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 Respondent, David Weisman t/a Weisman Novelty Company, Philadelphia, Pennsylvania, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interrogating employees concerning their membership in, or activities in behalf of, United Retail and Wholesale Employees Union Local 115, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Independent, or any other labor organization, in a manner constituting interference, restraint, or coercion in violation of Section 8(a)(1) of the Act.

(b) Promising benefits to employees if they repudiate United Retail and Wholesale Employees Union Local 115, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of Amer-

[1] The Trial Examiner found, and we agree, that Respondent violated Section 8(a)(1) of the Act, *inter alia*, by promising its employees paid holidays if they repudiated the Union Although the Respondent thereafter actually fulfilled that promise by paying its employees for the Memorial Day holiday, the Trial Examiner found no violation of that section in this connection on the ground that the Union did not represent a majority of the employees at the time the holiday payment was made. Regardless of whether the Union represented a majority of the employees, the grant of the holiday interfered with their freedom to select or reject a bargaining representative. Accordingly, contrary to the Trial Examiner, we find that Respondent violated Section 8(a)(1) by this conduct and we shall fashion our Order to remedy it

[2] Chairman McCulloch agrees with the dismissal of the refusal-to-bargain allegation in the complaint, but in so doing he relies only on the fact that, as found by the Trial Examiner, the Union did not represent a majority of employees in the appropriate unit at the time it requested recognition. The Chairman does not rely on the Trial Examiner's alternative ground for dismissing this allegation, i.e., Respondent in good faith doubted the Union's majority, in view of the Respondent's unfair labor practices committed immediately after he had received the Union's request for recognition.

ica, Independent, and granting paid holidays to employees to discourage adherence to said labor organization.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their right to self-organization, to form, join, or assist the above-named Union, or any other labor organization, to bargain collectively through representatives of their own choosing, or 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.

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

(a) Post at its place of business in Philadelphia, Pennsylvania, copies of the notice attached hereto marked "Appendix A."[3] Copies of such notice, to be furnished by the Regional Director for the Fourth Region, shall, after being duly signed by an authorized representative, be posted by 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 Respondent to insure that said notices are not altered, defaced, or covered by any other material.

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

IT IS FURTHER ORDERED that the complaint, insofar as it alleges that Melvin Gore, Margie Diggs, and Gwendolyn Brown were discharged in violation of Section 8(a)(3) and (1) of the Act, and insofar as it alleges that Respondent refused to bargain with the Union in violation of Section 8(a)(5) of the Act, be, and it hereby is, dismissed.

[3] 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 A

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 NOT interrogate employees concerning their membership in, or activities on behalf of, United Retail and Wholesale

Employees Union Local 115, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Independent, or any other labor organization, in a manner constituting interference, restraint, or coercion in violation of Section 8(a)(1) of the Act.

WE WILL NOT promise benefits to employees if they repudiate the above-named union, or grant employees paid holidays to discourage adherence to above-mentioned labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their right to self-organization, to form, join, or assist the above-named Union, or any other labor organization, to bargain collectively through representatives of their own choosing, or 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.

DAVID WEISMAN t/a WEISMAN NOVELTY 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.

INTERMEDIATE REPORT

STATEMENT OF THE CASE

Upon an amended charge filed on May 17, 1961, by United Retail and Wholesale Employees Union Local 115, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Independent, herein called the Union, the General Counsel filed a complaint dated June 30, 1961, against David Weisman t/a Weisman Novelty Company, herein called Respondent. The complaint, as amended at the hearing, alleges violation of Section 8(a)(1), (3), and (5) and Section 2(6) and (7) of the National Labor Relations Act, as amended. It charges that Respondent interfered with, restrained, and coerced its employees by interrogating them respecting their union activities, promised them certain benefits if they refrained therefrom, threatened them with layoff because of these activities, on about April 27, 1961, discharged Melvin Gore, Margie Diggs, and Gwendolyn Brown because of their union affiliations, and on or about the same date refused to bargain with the Union as the bargaining representative of Respondent's employees in an appropriate unit.

Respondent filed an answer denying that it had engaged in any unfair labor practices.

Upon due notice, Horace A. Ruckel, the duly designated Trial Examiner, conducted a hearing at Philadelphia, Pennsylvania, from August 14 to 18, 1961. All parties were represented by counsel and were afforded full opportunity to adduce evidence, to examine and cross-examine witnesses, and to file briefs. Respondent submitted a brief which I have carefully considered.

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

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

David Weisman is an individual proprietor doing business under the name of Weisman Novelty Company, and maintains his sole place of business in Philadelphia, Pennsylvania, where he engages in the manufacture and sale of play hats, pennants, and kindred novelty items. During the year previous to the issuance of the complaint, Respondent manufactured, sold, and delivered products valued in excess of $50,000, of which products valued in excess of that amount were shipped from its plant to customers located outside the State of Pennsylvania. During the same period Respondent purchased and delivered to its plant products valued in excess of $50,000, of which products in excess of that amount were transported directly from States of the United States other than the State of Pennsylvania. No issue of jurisdiction is raised.

II. THE LABOR ORGANIZATION INVOLVED

United Retail and Wholesale Employees Union Local 115, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Independent, is a labor organization within the meaning of the Act, and admits employees of Respondent to membership.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Respondent intermittently employs from 10 to 20 employees, all of whom are unskilled or semiskilled labor. As a whole, when hired, they work for comparatively short periods of time, are laid off, and are frequently rehired if they are available and if their work has been satisfactory. Respondent groups them into three categories of "regular," "seasonal," and "casual." Regular employees are those who remain employed past the busy season; the seasonal ones are those who are laid off but, because of satisfactory performance, have a reasonable expectation of being rehired when work picks up again (unless they have obtained jobs elsewhere); and casual workers are those who as a rule have not previously been in Respondent's employ and whom Respondent hires from the rolls of the Pennsylvania Employment Service when a rush work order is received. The employees of whatever category are paid the minimum wage of $1 and hour with the exception of Sarah Turan, whose supervisory status is in dispute. Turan receives $1.50 an hour, and two others, Lester Jarrett and Terrence Peterson, in the regular category receive $1.15 an hour. The most complicated machine used by Respondent is an ordinary sewing machine.

B. *The alleged discriminatory discharges*

Gwendolyn Brown: Brown was hired from the rolls of the Pennsylvania Employment Service on April 21, 1961. Her work was that of putting hatbands on hats and using a riveting machine to fasten miniature guns on the bands—the final decoration on a Confederate cap. She signed a union authorization card on April 24 upon the solicitation of Lester Jarrett, who, along with Terrence Peterson, was one of the employees most active in organizing for the Union.[1] There is no showing that her interest in the Union came to the attention of Respondent. On 1 of the 4 days Brown worked she was twice criticized by Sarah Turan, her supervisor, for

[1] Jarrett, a regular employee, was hired in early April, joined the Union on April 17, and was laid off on May 3 for reasons not alleged to have been discriminatory. His activity in the Union was known to Respondent. Peterson was a regular employee of 3 or 4 years' standing who also was laid off and rehired from time to time He was last employed in early April 1961 and was laid off on May 1. His separation is not alleged to have been discriminatory. He signed a union card on April 15. His union activity was known to Respondent. Employee Leach was another regular employee. He had been employed 8 months, signed a union card on April 14, and was laid off or discharged on May 3. Unlike Jarrett and Peterson, it does not appear that his interest in the Union was known to Respondent. Like them, his name does not appear in the complaint.

poor work. On the second or third day of her employment the riveting machine broke down and she attempted to fix it, although she had previously been told by Lucille Dawson, a regular employee (having worked since February 1960), not to attempt to repair it but to call her if it went out of production. Dawson twice went to Weisman to complain of Brown's work and each time told him she could not get along with her, and would quit if Brown continued to work. At noon on April 27, Brown, having worked 4½ days, was discharged along with Margie Diggs.

Margie Diggs: Diggs was hired on April 26 from the rolls of the Pennsylvania Employment Service. She stuffed paper in novelty hats. She started to work at 8 a.m., having signed a union card a half hour previously as she came into the plant. There is no evidence that her interest in the Union became known to Respondent. She was discharged at noon on April 27, along with Diggs, having worked 1½ days. She stated while testifying that she was twice told that her work was slow and then that it had improved.

Melvin Gore: Gore also was referred to Respondent by the Pennsylvania Employment Service. He started to work on Tuesday, April 25, spraying lacquer on pennants and wetting cardboard to insert in hats. He signed a union card the same day. About 2 p.m. on April 27, after Gore had finished wetting cardboard, and after he had worked 2½ days, he told Weisman he had finished this task and Weisman asked him if he had anything else to do. Gore said that he did not and Weisman said that he might as well go home, and gave him his final paycheck. There is no evidence that Respondent knew that Gore was interested in the Union.

Conclusions as to the Discharges

On the same day that Respondent terminated the employment of Brown, Diggs, and Gore, it also terminated that of Christine Crawford and Cecilia Brown, not named in the complaint. Crawford had been hired the previous day and Cecilia Brown apparently about the same time. Crawford signed a union card on the morning of her discharge. Eliza Jones, also not named in the complaint, was discharged on April 21. She had been hired on April 18, the same day that Brown was hired. All these employees were those most recently employed by Respondent.

Respondent contends that it was moved to terminate five employees on April 27, 1961, three of whom are named in the complaint, because of a serious financial condition which was called to Weisman's attention on the morning of Thursday, April 27, by Sadie Katz, Respondent's bookkeeper, who came every Thursday to the plant to go over the books.

Weisman depended on Katz to an unusual degree to keep track of his financial obligations and his bank balance, to pay the bills, and to draw up paychecks for the Friday payday. On Thursday, April 27, when she arrived at the plant, after examining the checkbook balance and outstanding checks, she advised Weisman that Respondent was overdrawn. The bankbook and the checkbook were examined at the hearing and substantiated Katz' statement. She told Weisman that there would not be enough money to pay employees hired since her last visit. Respondent thereupon laid off or discharged the five employees hired earlier that week and one hired the previous week, including Brown, Diggs, and Gore.

Respondent contends that the unsatisfactory work of Brown, Diggs, and Gore was a factor in selecting them. They were not only the last hired but, according to Weisman, the least efficient. The fact is that Respondent is a marginal operator, most of whose employees have an uncertain and short tenure of employment. Many of them are hired from the Pennsylvania Employment Service, as were those named in the complaint, when some special order for pennants or like specialties is received or is in prospect. They are kept until the order is completed or until a small inventory is built up, and then let go. They are paid the minimum wage.

For example, Weisman hired Gore on a day-to-day basis, according to the former's credited testimony, to help make up an order to be delivered a few days later for 2,000 pennants to celebrate a doubleheader won by the Philadelphia baseball team. Brown and Diggs, according to Weisman, were hired to work on Union and Confederate hats with the object of laying up a small inventory of these items.

In view of Respondent's employment practices, his precarious financial situation on April 27, 1961, and the fact that he kept two older employees who were known to be the principal proponents of the Union, I conclude that the General Counsel has not met the burden imposed upon him of proving by a preponderance of the credible evidence that the discharge or layoff of Brown, Diggs, and Gore was because of their interest in the Union, and I so find.

C. *The alleged failure to bargain*

1. The appropriate unit

The complaint alleges, the answer admits, and I find that at all times material herein all production and maintenance employees of Respondent, exclusive of all office clerical employees, guards, and supervisors, as defined in the Act, constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

2. The Union's representation within the unit

Respondent on April 27, 1961, employed a complement of 20 production and maintenance employees.[2] Of these, 10 were regular employees, 5 were temporary or seasonal employees who had a reasonable expectation of being recalled regularly after their periodic layoffs, and 5, including the 3 named in the complaint, were casual employees hired for a brief period for particular rush jobs, with no reasonable expectation of being recalled after layoff. Of these 20 employees, 10 regular and 5 seasonal employees should be included in the unit, and the 5 casual employees excluded, leaving 15 employees who constitute an appropriate bargaining unit. The General Counsel introduced in evidence seven union authorization cards signed by employees within this unit.

I find that on April 27, 1961, the Union did not have a majority of Respondent's employees within the appropriate unit.

3. The alleged refusal to bargain[3]

About 11 a.m. on September 27, John Morris, business manager for the Union, Robert Coleman, its business agent, and Ray Kuleszewisz, an organizer, called on Weisman in his office. Coleman was not called as a witness. Morris testified that, after introducing himself and the others, he told Weisman that the Union represented a majority of Respondent's production and maintenance employees, and demanded immediate recognition of the Union and that Respondent bargain with it. He had a form of contract with him. Weisman asked how he could know that this was the "right union," whereupon Morris reached in his pocket and brought out a number of membership cards with a rubber band around them and said that they were the cards which the employees had signed. Weisman asked if he could see his lawyer, Morris told him that he could, and the union representatives left. The testimony of Kuleszewisz corroborates that of Morris, except that he testified that after Weisman said he was going to consult a lawyer he added that later he would get in touch with the Union, and that he may have asked to see the Union's cards. Kuleszewisz could not recall definitely whether Morris had the package of cards in his hand or exhibited it to Weisman.

Weisman testified Morris did not have any cards in his hand and that when he asked to be shown the cards Morris responded that he would "show him with a picket line." I credit Weisman's testimony on this point.

Immediately upon the conclusion of the meeting Weisman tried to get in touch with his attorney, Joseph Jaffe, on the telephone but was unable to reach him until about 3 p.m. Jaffe got Morris on the telephone and asked for an opportunity to look into the matter, to which Morris replied that a contract would have to be signed by the following morning or the plant would be picketed. Jaffe and Weisman conferred that night, and I. Herbert Rothenberg, who represented Respondent at the hearing, was retained. Contact between Weisman and Rothenberg was established the following day, April 28, and an employer's petition was filed the same day.

Also on the same day, April 28, upon the opening of the plant, the Union placed a picket at the gate. There was no interruption of work as the result of the picket, or any interference with pickup and delivery.

Conclusions

On the basis of the foregoing facts, I do not find that Respondent refused to bargain with the Union. I find that Morris did not exhibit the Union's authorization

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[2] Excluding Turan, who I find to be a supervisor.

[3] Because of a possible uncertainty as to the composition of the appropriate unit and the Union's representation therein, due to the nature of Respondent's business and its employment practices, I deem it well to consider the question of whether there was a refusal on the part of Respondent to bargain with the Union.

cards to Weisman, though requested. I further find that there was a good-faith doubt in his mind that the Union represented Respondent's employees.

D. *Interference, restraint, and coercion*

Terrence Peterson, whose activity in the Union, along with that of Lester Jarrett, has previously been mentioned, testified that on April 27, after representatives of the Union had called on Weisman, Weisman engaged him in a conversation during which he asked Peterson if he and Jarrett had signed union cards, discussed the general working conditions including wages, and asked whether he and Jarrett would drop the Union if their own wages were raised. Weisman, according to Peterson, renewed the conversation later in the day. Peterson's testimony was corroborated in part by Joseph Leach, who was working nearby and heard scraps of the conversation. Jarrett testified that Weisman had a similar conversation with him during which Weisman told him that if he would forget about the Union and get other employees to do so Respondent would give him a raise in wages and would arrange for two paid holidays for the employees.

Weisman, while testifying, admitted that he initiated discussions with Peterson and Jarrett concerning the Union, but denied the gist of the statements which they attributed to him. I do not credit his denial. I find that by interrogating Peterson and Jarrett concerning the union activity of themselves and others, and by making the promises above related, Respondent interfered with, restrained, and coerced its employees in the rights guaranteed by Section 7 thereby violating Section 8(a)(1) of the Act.

About May 15 Respondent posted a notice stating that it would grant a paid holiday on Memorial Day, 1961. This announcement was later effectuated. As I have found above, the Union was not the representative of Respondent's employees. I do not find that the granting of the holiday in question had a discriminatory purpose or effect or that it constituted interference, restraint, and coercion in violation of Section 8(a)(1) of the Act.

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 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 commerce and the free flow thereof.

V. THE REMEDY

Having found that Respondent has engaged in unfair labor practices, I will recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

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. Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. United Retail and Wholesale Employees Union Local 115, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Independent, is a labor organization within the meaning of Section 2(5) of the Act.
3. By interrogating employees concerning their union membership, and by promising benefits to them if they renounced the Union, Respondent thereby interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed them in Section 7 of the Act, in violation of Section 8(a)(1) thereof.
4. The remaining allegations of the complaint setting forth facts and conduct in violation of Section 8(a)(1) have not been established by a preponderance of the evidence.
5. By discharging Melvin Gore, Margie Diggs, and Gwendolyn Brown, Respondent has not engaged in unfair labor practices in violation of Section 8(a)(3) and (1) of the Act.
6. Respondent has not refused to bargain with the Union in violation of Section 8(a)(5) and (1) of the Act.
7. The aforesaid unfair labor practices are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

[Recommendations omitted from publication.]