and make them whole for any loss of pay suffered as a result of the discrimination against them.

All our employees are free to become or remain or to refrain from becoming or remaining members of Local No. 54, Sheet Metal Workers International Association, AFL–CIO, or any other labor organization.

CLAUDE E. FORSTON, D/B/A THE FORSTON CO.,
Employer.

Dated_____ By_____
(Representative) (Title)

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

Employees may communicate directly with the Board's Regional Office, 6617 Federal Office Building, 515 Rusk Avenue, Houston 2, Texas, Telephone Number, Capitol 8–0611, Extension 271, if they have any questions concerning this notice or compliance with its provisions.

The Diversey Corporation *and* Local 478, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. *Case No. 22–CA–1225. October 29, 1962*

DECISION AND ORDER

On August 7, 1962, Samuel M. Singer 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 attached Intermediate Report. Thereafter, the Respondent filed exceptions to the Intermediate Report and 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 [Members Leedom, Fanning, and Brown].

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

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[1] The Respondent's offer of proof asserted merely the conclusion that Carmine Armenti was a supervisor and contained no allegations of specific facts which, if true, would establish that the Regional Director was arbitrary and capricious in rejecting the Respondent's contention that the Union's showing of interest in the representation case was tainted. The burden of alleging such facts is on the party seeking to attack the action of the Regional Director *Sumner Sand & Gravel Company,* 128 NLRB 1368, 1371–1372, enfd 293 F 2d 754 (C.A 9).

[2] We do not adopt that portion of footnote 10 of the Intermediate Report referring to Section 102.67 of the Board's Rules and Regulations, Series 8, as amended, inasmuch as that section has no application where a consent-election agreement pursuant to Section 102 62(a) of the said rules is involved

ORDER

The Board adopts as its Order the Trial Examiner's Recommended Order.

INTERMEDIATE REPORT AND RECOMMENDED ORDER

STATEMENT OF THE CASE

Upon a charge filed April 18, 1962, by Local 478, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (herein called the Union), the General Counsel of the National Labor Relations Board, by the Regional Director for the Twenty-second Region, issued a complaint on May 31, 1962, alleging that the Respondent refused to bargain collectively with the Union, the certified majority representative of Respondent's employees in an appropriate bargaining unit. Respondent admits that it has refused to bargain with the Union and raises only the validity of the representation election in Case No. 22–RC–1474, upon the basis of which the Union was certified as the statutory bargaining representative of its employees.

Pursuant to due notice, a hearing was held before Trial Examiner Samuel M. Singer in Newark, New Jersey, on July 2, 1962. All parties were present and were afforded full opportunity to be heard and to introduce relevant evidence. Counsel for the General Counsel presented oral argument at the close of the hearing and counsel for Respondent submitted a brief.

Upon the entire record in the case,[1] I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent is an Illinois corporation maintaining places of business and plants in various States, where it is engaged in the manufacture, sale, and distribution of specialized chemicals, clays, electronic dispensing devices, and related products. During the calendar year 1961, a representative period, Respondent at its Newark, New Jersey, plant, the only facility involved in this proceeding, manufactured, sold, and distributed products valued in excess of $100,000, of which products valued in excess of $50,000 were shipped from said Newark plant directly to points outside the State of New Jersey. I find and Respondent admits that it is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

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

A. *The representation proceeding*

On January 29, 1962,[2] Respondent and the Union entered into an agreement for consent election for the conduct of a Board election. Under this agreement, which was approved by the Regional Director, the parties stipulated as to the appropriate collective-bargaining unit,[3] the eligible voters, the date and place of the election, the selection of observers, the manner of counting ballots, and other matters pertaining to the conduct of the election. The parties specifically agreed that:

> Said election shall be held in accordance with the National Labor Relations Act, the Board's Rules and Regulations, and the applicable procedures and policies of the Board, provided that the determination of the Regional Director

[1] Together with his brief counsel for Respondent filed a motion to correct certain errors in the typewritten transcript. This motion is hereby granted and the transcript will be corrected as requested in the motion.

[2] All dates herein refer to the year 1962

[3] All production, maintenance, shipping, receiving, and warehousing employees at the Employer's Newark plant, excluding all office clerical employees, watchmen, guards, professional employees, and supervisors as defined in the Act

> shall be final and binding upon any question, including questions as to the eligibility of voters, raised by any party hereto relating in any manner to the election, and provided further that rulings or determinations by the Regional Director in respect of any amendment of any certification resulting therefrom shall also be final.

In addition, the agreement provided that either party may file objections to the conduct of the election or conduct affecting the results of the election; and, if objections were filed, that the Regional Director would conduct an "investigation" and report thereon. The agreement then stated:

> The method of investigation of objections and challenges, including the question whether a hearing should be held in connection therewith, shall be determined by the Regional Director, whose decision shall be final and binding.

On January 31, Respondent filed a motion with the Regional Director to dismiss the Union's petition for election on the ground that one of the Company's supervisors, Carmine Armenti, "solicited and procured the authorization cards relied upon by the petitioning union herein for their showing of interest in referenced case."[4] On February 6, Respondent moved the Regional Director to set aside the consent-election agreement, dated January 29, 1962, on the same ground, stating:

> . . . it is the Employer's information and belief that the union authorization cards constituting the showing of interest were obtained by a supervisor. Inasmuch as the foregoing allegation rests on the supervisory status of one Carmine Armenti, and in the event the Regional Director is not satisfied that Armenti is a supervisor on the basis of the administrative investigation now being carried on, the Employer submits that the simplest and most economical method for the Government and the parties to resolve the problem is to set aside the consent agreement and order that a hearing be held.

On February 6, the Regional Director denied both of Respondent's motions, stating that—

> . . . on the basis of an administrative investigation of the Employer's allegations and evidence relating to the validity of Petitioner's showing of interest, I am administratively satisfied that Petitioner's showing of interest submitted in support of its petition in the above matter is valid and sufficient, *Georgia Kraft Company,* 120 NLRB 806, see also *O. D. Jennings & Company,* 68 NLRB 516.

The election was thereafter held, as scheduled, on February 7. The Union received four votes: two votes were cast against it and two were challenged.

Thereafter, Respondent filed timely objections to the conduct affecting the results of the election, reasserting its claim that its alleged supervisor, Armenti, had organized Respondent's employees and had engaged in other activities on behalf of the Union Respondent contended that Armenti by his activities "unlawfully" brought pressure upon the employees to join and vote for the Union and that Armenti's conduct prevented "a free and uncoerced expression of choice by the employees." Respondent alleged that it had not been aware of Armenti's activities until after the execution of the consent-election agreement.

On March 8, the Regional Director issued his report on the objections in which he reviewed Respondent's contentions and then concluded:

> The Employer's Objection is another attack upon the Petitioner's showing of interest based on the alleged activities of Carmine Armenti, which matter, as indicated above, has already been properly resolved by an administrative investigation. [Footnote omitted.]
>
> In view of the foregoing, the undersigned finds that the Objections do not raise substantial or material issues with respect to conduct of the election or conduct affecting the results of the election. Accordingly, the Objections are hereby overruled.[5]

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[4] Respondent also stated that it was filing an unfair labor practice charge alleging violation of Section 8(a)(1) and (2) of the Act "on the part of Carmine Armenti, acting as agent of the Employer"

[5] In addition to the objections, Respondent also challenged ballots cast by Armenti (on the ground that he was a supervisory employee), and by another voter, James Underwood, because Underwood was a watchman-guard excluded from the unit The Regional Director sustained Respondent's challenge to Underwood's ballot and directed that it remain

Thereupon, the Regional Director certified the Union as the majority representative of Respondent's employees in the stipulated unit.

B. *The unfair labor practice proceeding*

On April 4, the Union requested Respondent to bargain with it but on April 16, Respondent, expressing its dissatisfaction with the Regional Director's ruling, and claiming that the Union's certification was not valid "because of the conduct of C. Armenti," declined to recognize and meet with the Union.

In its answer to the complaint, Respondent renewed its contention that the certification of the Union was invalid because of Armenti's activities on behalf of the Union, and it asserted this as its sole defense for its admitted refusal to bargain with the Union. At the hearing the General Counsel moved to strike this defense from the answer on the ground that Respondent by its answer now sought to relitigate in the complaint proceeding a matter already decided in the representation proceeding. Considering myself bound by the determination in the representation proceeding in which the propriety of Armenti's conduct had been raised and decided adversely to Respondent, I granted the General Counsel's motion. Thereupon, Respondent made the following offer of proof:

> . . . that if permitted, the Respondent would call witnesses who would testify that one Carmine Armenti, who is a supervisor within the meaning of the Act, or if not, had such apparent supervisory authority as to be looked upon as a management representative, admittedly actively worked on behalf of Local 478 organizing drive; that he was the sole Diversey employee known to Local 478 representatives or had any—or who had any dealings with such union representatives; that he secured signatures on union authorization cards on behalf of Local 478 from most, if not all, employees in the bargaining unit; and that the union activity of Armenti was not discovered by employer representatives until after the consent agreement was executed.

Based on my prior ruling, I rejected the proffered proof.

Conclusions

I now reaffirm my ruling rejecting Respondent's proffered proof.

1. In my view, the question of whether or not Armenti's alleged organizational activities interfered with a free choice in the election—whether or not this question be regarded as raising a substantial or material issue [6]—is not properly before the Board for review. Under the terms of the consent-election agreement, Respondent specifically agreed that the Regional Director's determination "shall be final and binding" as to "any" election question and as to the method of investigation of any question. Thus, Respondent in effect agreed to make the Regional Director "the final arbiter of any questions relating to the election." (*Buffalo Arms, Inc.* v. *N.L.R.B.*, 224 F. 2d 105, 109 (C.A. 2)). In such cases, as the Board has stated, "We will deem the Regional Director's determination . . . to be final in the absence of fraud, misconduct, or such gross mistakes as imply bad faith on the part of the Regional Director, even though we might reach a different result." *Sumner Sand & Gravel Company*, 128 NLRB 1368, 1371, enfd. 293 F. 2d 754 (C.A. 9). At the very least Respondent would affirmatively have to show "nothing short of capricious and arbitrary action by the Regional Director" in order to invalidate his decision. *N.L.R.B.* v. *General Armature & Manufacturing Co.*, 192 F. 2d 316, 317 (C.A. 3), footnote 1, cert. denied 343 U.S. 957 [7]

2. In neither the representation proceeding nor in the complaint hearing, did Respondent contend that the Regional Director's decision was arbitrary or capricious. There is no claim that the Regional Director had, in the administrative investigation, failed to afford Respondent an opportunity to submit evidence or that he had ignored any evidence submitted by it. I construe Respondent's offer of proof at the hearing as nothing more than an offer to show that Respondent has in its possession evidence purporting to show that an actual or apparent supervisory employee had engaged in

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unopened and uncounted In view of his action, the Regional Director found it unnecessary to resolve the challenge to Armenti's ballot as the Union now had a majority without counting this ballot

[6] See *Boggs and Company, Inc.*, 122 NLRB 758, 760; *Parkchester Machine Corporation*, 72 NLRB 1410, 1412; *Brown-Dunkin Company*, 118 NLRB 1603, 1604.

[7] See also *Elm City Broadcasting Corp.* v. *N.L.R.B.*, 228 F. 2d 483 (C.A. 2); *N.L.R.B.* v. *J. W. Rex Co.*, 243 F. 356, 358 (C.A. 3); *N.L.R.B.* v. *Standard Transformer Company*, 202 F. 2d 846, 848–849 (C.A. 6); *N.L.R.B.* v. *Carlton Wood Products*, 201 F. 2d 863 (C.A. 9)

organizational activities which operated to impair a free election. Respondent merely takes issue with the Regional Director's contrary findings and conclusions in the administrative investigation and, disputing his evaluation of the evidence, desires a formal hearing to establish its own version of the facts.[8] However, a mere showing that the Regional Director's factual findings or conclusions are erroneous falls short of establishing that they are arbitrary or capricious. *Elm City Broadcasting Corp.* v. *N.L.R.B.*, 228 F. 2d 483, 485–486 (C.A. 2); *N.L.R.B.* v. *Volney Felt Mills, Inc.*, 210 F. 2d 559, 560 (C.A. 6). Something more than error is necessary to spell out arbitrary or capricious action. *N.L.R.B.* v. *J. W. Rex Co.*, 243 F. 2d 356, 358 (C.A. 3).

3. It is clear that the procedure employed by the Regional Director, in determining the questions raised by Respondent, is in conformity with the procedural requirements of the consent-election agreement and the regulations and policies of the Board and the Act. In passing upon Respondent's preelection claim that Armenti's organizational activities had tainted the petitioning Union's showing of interest, the Regional Director merely followed established and judicially approved Board policy under which such matters are "investigated only administratively" and not determined by formal hearing. *Georgia Kraft Company*, 120 NLRB 806, 808.[9] And the Regional Director's determination not to conduct a formal hearing on Respondent's post-election objections was in full accord with the consent-election agreement and the Board's Rules and Regulations (see Section 102.62(a)) which left this matter solely within his discretion. In short, Respondent itself vested the Regional Director with the choice of the investigatory technique and it "will not now be heard to complain that it should have been given a hearing simply because the Regional Director's opinion conflicted with its view." *N.L.R.B.* v. *J. W. Rex Co.*, 243 F. 2d 356, 358–359 (C.A. 3).

4. Respondent in its brief heavily relies on the recent decision of the Fourth Circuit in *N.L.R.B.* v. *The Lord Baltimore Press, Inc.*, 300 F. 2d 671 (C.A. 4). I do not, however, regard this case apposite. In that case the court held that an employer who, like here, raised the question whether an alleged supervisor's conduct prevented a fair election, raised a substantial and material question upon which he was entitled to a formal hearing. The critical distinction, however, is that in *Lord Baltimore* the employer did not sign a consent-election agreement under which he waived his right to hearing. The employer in that case did not agree that the Regional Director be the "sole election judge" (*Sun Ship Employees Ass'n.* (*Sun Shipbuilding & Drydock Co.*) v. *N.L.R.B.*, 139 F. 2d 744, 745 (C.A. 3)), by stipulating, as Respondent did here, that "the question whether a hearing should be held . . . shall be determined by the Regional Director, whose decision shall be final and binding." Cf. *N.L.R.B.* v. *J. W. Rex Co.*, 243 F. 2d 356, 358 (C.A. 3); *N.L.R.B* v. *Saxe-Glassman Shoe Corporation*, 201 F. 2d 238, 241 (C.A. 1).

5. In addition, Respondent in its brief stresses the fact that the Regional Director's determination does not set forth "the factual basis" of his ruling. Although Respondent does not specifically state so, it now suggests that the Regional Director's failure to disclose the facts upon which he relied to reach his decision constitutes arbitrary and capricious action. Respondent did not raise this point either in the representation proceeding or in the hearing before me, and I find this contention to be a mere afterthought. In any event, I find nothing in the consent-election agreement or in the Board's Rules and Regulations, under which the election was conducted, requiring the Regional Director to furnish the parties a detailed statement of the basis of his determination. Furthermore, even if it be assumed, *arguendo*, that the Regional Director's failure to supply Respondent with a detailed appraisal of the facts found, was arbitrary and capricious, Respondent did not avail itself of the step, open to it in the representation proceeding, to appeal the alleged arbitrary action.[10]

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[8] Indeed, Respondent in the representation case initially requested that the Regional Director "set aside the consent election agreement and order that a hearing be held" if, but only if, the Regional Director did not agree with its views "on the basis of the administrative investigation now being carried on"

[9] See also *O D Jennings & Company*, 68 NLRB 516, 518; *Barber-Colman Company*, 130 NLRB 478. Accord: *N.L.R.B* v. *White Construction and Engineering Co., Inc*, 204 F. 2d 950, 953 (C.A. 5); *N.L.R.B.* v *National Truck Rental Co.*, 239 F 2d 422, 425 (C.A.D.C.), cert denied 352 U.S. 1016.

[10] As I already indicated, *supra*, the Board in the representation proceeding will review a Regional Director's determination where it appears that his action is arbitrary and capricious even when, as here, the consent-election agreement provides that his determination shall be final and binding. Section 102.67 of the Board's Rules and Regulations (which provides for requests for review of Regional Directors' determinations in certain

For all of the foregoing reasons, I find and conclude that the Regional Director's determination is not arbitrary or capricious, that the finality of his determination should not be disturbed, and that his certification of the Union is entitled to full force and effect. I further find and conclude that during all times material herein, the Union has been, and now is, the certified collective-bargaining representative of Respondent's employees in the appropriate stipulated unit within the meaning of Section 9(a) of the Act; and that Respondent, by refusing to bargain with the Union so certified, has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and, derivatively, also Section 8(a)(1) of the Act.

IV. THE REMEDY

Having found the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, I will recommend that it cease and desist therefrom and that it take certain affirmative action designed to effectuate the policies of the Act.

CONCLUSIONS OF LAW

1. All production, maintenance, shipping, receiving, and warehousing employees at Respondent's Newark plant excluding all office clerical employees, watchmen, guards, professional employees, and supervisors as defined in the Act, have constituted and now constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.
2. The Union was on March 8, 1962 and at all material times since that date has been, the exclusive representative of all employees in the aforesaid appropriate unit for purposes of collective bargaining within the meaning of Section 9(a) of the Act.
3. By refusing, on and since April 16, 1962, to bargain collectively in good faith with the Union as the exclusive representative of its employees in the aforesaid appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.
4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

RECOMMENDED ORDER

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record in the case, Respondent, Diversey Corporation, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with Local 478, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the duly certified exclusive bargaining representative of its employees in the following appropriate unit: All production, maintenance, shipping, receiving, and warehouse employees at Respondent's Newark plant, excluding all office clerical employees, watchmen, guards, professional employees, and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the right to bargain collectively through said Union, or any other labor organization of their own choosing.

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

(a) Upon request, bargain collectively with the said certified Union as the exclusive representative of the employees in the appropriate unit described above, with respect to rates of pay, wages, hours of employment, and other terms or conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its plant in Newark, New Jersey, copies of the attached notice marked "Appendix." [11] Copies of said notice, to be furnished by the Regional Director for

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situations even where the parties do not stipulate that his determinations shall be final) likewise requires expeditious appeal *in* the representation proceeding; otherwise the party aggrieved is precluded "from litigating in any related subsequent unfair labor practice proceeding, any issue which was, or could have been, raised in the representation proceeding," Section 102.67(f).

[11] In the event that this Recommended Order be adopted by the Board the words "A Decision and Order" shall be substituted for the words "The Recommended Order of a Trial Examiner" in the notice. In the further event that the Board's Order be enforced by a degree of a United States Court of Appeals, the words "Pursuant to a Decree of the United States Court of Appeals, Enforcing an Order" shall be substituted for the words "Pursuant to a Decision and Order."

the Twenty-second Region, shall, after being signed by a representative of Respondent, be posted by it immediately upon receipt thereof and be maintained 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.

(c) Notify the Regional Director for the Twenty-second Region in writing within 20 days from the date of receipt of this Intermediate Report and Recommended Order what steps it has taken to comply herewith.[12]

[12] In the event that this Recommended Order be adopted by the Board this provision shall be modified to read: "Notify said Regional Director, in writing, within 10 days from the date of this Order, what steps Respondent has taken to comply herewith."

APPENDIX

NOTICE TO ALL EMPLOYEES

Pursuant to the recommended Order 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 bargain collectively, upon request with Local 478, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive bargaining representative of all employees in the bargaining unit described below concerning grievances, labor disputes, wages, rates of pay, hours of employment, and other conditions of work, and, if an understanding is reached, embody it in a signed agreement. The bargaining unit is:

All production, maintenance, shipping, receiving, and warehousing employees employed at the Employer's place of business in Newark, New Jersey, exclusive of all office clerical employees, watchmen, guards, professional employees, and supervisors as defined in the Act.

WE WILL NOT refuse to bargain collectively as aforesaid, nor will we, in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of their right to bargain collectively through said Union.

THE DIVERSEY CORPORATION,
Employer.

Dated_____ By_____
(Representative) (Title)

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

Employees may communicate directly with the Board's Regional Office, 614 National Newark Building, 744 Broad Street, Newark, New Jersey, Telephone Number, Market 4-6151, if they have any question concerning this notice or compliance with its provisions.

Wings & Wheels, Inc. *and* Highway Truck Drivers and Helpers, Local 107, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. *Case No. 4-CA-2420. October 29, 1962*

DECISION AND ORDER

On April 19, 1962, 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 attached Intermediate Report. Thereafter, the Respondent and the General Coun-