immediately upon receipt thereof and be maintained by it for a period of 60 consecutive days from the date of posting, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for the Twenty-eighth 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.[6]

It is also recommended that unless on or before 20 days from the date of the receipt of this Intermediate Report and Recommended Order the Respondent notifies the aforesaid Regional Director in writing that it will comply with the foregoing recommendations, the National Labor Relations Board issue an order requiring the Respondent to take such action.

[6] 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 the 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 National Labor Relations Act, as amended, we hereby notify our employees that:

WE WILL NOT refuse to bargain collectively with Amalgamated Meat Cutter and Butcher Workmen of North America, Local 109, AFL–CIO, as the exclusive representative of all our employees in the appropriate unit described below or in any other manner interfere with the efforts of the aforesaid Union to bargain collectively on behalf of said employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed in Section 7 of the Act.

WE WILL bargain collectively, upon request, with the aforesaid Union as the exclusive bargaining representative of all our employees in the appropriate unit described below with respect to wages, rates of pay, hours of employment, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

The appropriate unit is:

All meat department employees of the Respondent employed at its retail stores in Tucson, Arizona, to wit, those located at Casas Adobes, at 5250 East Speedway Boulevard, and at 1830 South Alvernon, exclusive of all other employees and all supervisors as defined in the Act.

SHARP'S MARKETS, INC.,
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, 1015 Tijeras Street NW., Albuquerque, New Mexico, Telephone No. 243–3536, if they have any question concerning this notice or compliance with its provisions.

Zimnox Coal Company *and* International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, General Teamsters, Chauffeurs, Warehousemen and Helpers, Local 428. *Case No. 8–CA–2811. February 13, 1963*

DECISION AND ORDER

On October 31, 1962, Trial Examiner Joseph I. Nachman 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. He also found that the Respondent had not engaged in certain other unfair labor practices and recommended dismissal of the complaint as to them. 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 [Chairman McCulloch and Members Fanning and Brown].

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

ORDER

The Board adopts the Recommended Order of the Trial Examiner as its Order.[2]

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[1] Respondent's request for oral argument is denied as, in our opinion, the record and the Respondent's exceptions and brief adequately present the issues and the positions of the parties.

[2] The Appendix attached to the Intermediate Report is hereby modified by adding the following immediately below the signature line at the bottom of the notice

NOTE.—We will notify the above-named employee if presently serving in the Armed Forces of the United States of his right to full reinstatement upon application in accordance with the Selective Service Act after discharge from the Armed Forces.

INTERMEDIATE REPORT AND RECOMMENDED ORDER

STATEMENT OF THE CASE

This proceeding which was heard by Trial Examiner Joseph I. Nachman at Steubenville, Ohio, on August 22, 1962, involves allegations that Zimnox Coal Company (herein called Respondent) violated Section 8(a)(1) and (3) of the Act.[1] All parties were represented at the hearing, and were afforded full opportunity to present evidence, examine and cross-examine witnesses, and argue orally on the record. The General Counsel presented oral argument, and Respondent filed a brief, all of which has been duly considered.

Upon the entire record in this case, and from my observation of the witnesses, including their demeanor while testifying, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent, an Ohio corporation, is engaged near Brilliant, Ohio, in the strip mining of coal. Its entire production, valued at over $50,000 annually, is sold to brokers located at Weirton, West Virginia. At the direction of the brokers, Respondent delivers its entire production to the Tidd Generating Division of Ohio Power Company at Brilliant, Ohio, a public utility affecting commerce, and having annual gross revenue in excess of $250,000. The coal brokers pay Respondent for the coal delivered as aforesaid. I find that Respondent is, and at all times material

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[1] The charge was filed May 21, 1962; complaint issued July 18, 1962.

has been, engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, General Teamsters, Chauffeurs, Warehousemen and Helpers Local 428 (herein called the Union), is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES INVOLVED

A. *Introduction; the issues*

As mentioned above, Respondent is engaged in the strip mining of coal which it delivers to the Tidd plant of Ohio Power Company, pursuant to contract with coal brokers. At the time of the events with which this case is concerned, Respondent was under contract to deliver 15,000 tons of coal each month, with the deficit in a particular month to be made up in the succeeding month. For this purpose Respondent maintained a fleet of six trucks, employing the necessary drivers and maintenance personnel, and from time to time, as the need therefor arose, used contract haulers to deliver the necessary tonnage which its own crew failed to deliver, in order to satisfy the contract quota. The issues litigated and disposed of herein are (1) whether Respondent interfered with, restrained, and coerced its employees in the exercise of their rights under the Act; (2) whether the admitted termination by Respondent of hauling coal by means of its own trucks and the termination of its driver employees was for discriminatory reasons, as contended by the General Counsel, or, as Respondent contends, solely for economic reasons; (3) whether the discharge of Alvin Ross was discriminatory, or for cause; and (4) whether, as urged by Respondent in a special defense, the Board is estopped from proceeding with this case.

B. *Sequence of events*[2]

1. Union files representation petition and demands recognition from Respondent

On March 9,[3] the Union sent to the Board's Cleveland, Ohio, Regional Office, a petition seeking certification as the collective-bargaining representative of Respondent's truckdrivers.[4] The same day the Union sent a letter to Respondent advising the latter of the filing of the aforementioned petition. This letter, which was received by Respondent on March 10, also stated that Respondent's truckdrivers were "100 percent affiliated with" the Union, and that if Respondent would grant recognition the petition would be withdrawn.

2. The interrogation of and threats to employees and the discharge of Alvin Ross

After Ross had completed his work on March 12, and was waiting near the mine entrance for his ride home, Zimnox, president of Respondent, came out of the road leading from the mine and stopped to talk to Ross. Zimnox asked Ross what he "knew about the Union." Ross replied that he knew nothing about it except that he had joined it. Zimnox asked, "You joined it?" to which Ross responded, "Yes, so did the other men." Zimnox then asked, "You mean all of them?" to which Ross replied in the affirmative. Zimnox then asked, "How could you do this after all I have done for you, giving you bread and butter?" Ross replied to the effect that as all the other men had joined the Union, he (Ross) would not be able to work for Respondent unless he did join. Zimnox then asked Ross who had "signed him up" and Ross replied, "The union man." Zimnox then stated, "That is all I wanted to know," and drove off. The following morning, when Ross reported for work, he was discharged by Field Superintendent Olivito.[5]

On March 13, Zimnox had four of his truckdrivers meet with him after work at the Company's office. Attending the meeting with Zimnox were Elmer McDonald, Raymond Bailey, Bill Nicholson, and Raymond Cassidy, McDonald being spokes-

[2] The factual findings in this section are based on testimony which I credit, or on testimony which is uncontradicted

[3] All dates are in 1962 unless otherwise stated.

[4] The petition was received and filed by the Region on March 13

[5] On March 14, the Union filed a charge (Case No. 8–CA–2741), alleging a violation of Section 8(a)(1) and (3) of the Act by reason of the discharge of Ross and another employee, John Nelson. As hereafter related, this charge was subsequently withdrawn by the Union.

man for the group. At the outset of the meeting, Zimnox handed McDonald the Union's letter of March 9, and asked him to read it aloud, which McDonald did. Zimnox then said "he could not and would not go along with this, that something had to be done"; that if the men had any grievances they should have taken them up with him rather than take the action they did; that he had been losing money on his trucking operations, and if the men continued with the Union he would "get rid of the trucks" [6] Zimnox told the men that he had to know by Saturday (March 17) what they were going to do about the Union. On March 17, McDonald told Zimnox that the men had decided that they had the right to belong to a union of their choice and that it was their desire to continue with the Union. The only reply Zimnox made was "Thank you."

On March 21, McDonald, at the request of Zimnox, again met with the latter at Respondent's office. At the outset of this meeting Zimnox told McDonald:

> Elmer something is going to have to be done about this. If it is not stopped there will be at least 40 companies up and down the Ohio Valley who will suffer, their employees will suffer and their children will suffer. Your wife and children will suffer. You will not be able to walk the streets of Brilliant without keeping your head bent down and looking at the sidewalks.

McDonald's reply was, "If you are afraid of getting turned in on your income taxes, I have no intentions, nor will I turn in." McDonald testified that in this conversation Zimnox did not refer to the Union, nor did he say what he meant by the above-quoted statement, and that in his opinion Zimnox was referring only to the possibility that McDonald might "turn him in" on alleged income-tax violations.

On March 28, Zimnox went to the home of employee Raymond Cassidy, and told Cassidy that before the latter voted in any Board election, "If I were you, I would do a lot of thinking. It's a secret ballot and the men won't know how you voted" Zimnox then asked Cassidy whether he had another job to go to, and upon receiving a negative answer, commented that Cassidy, and some of the other truckdrivers, had large families and repeated his earlier remark that Cassidy should do a lot of thinking before voting in the election. Zimnox also told Cassidy that while he would rather haul with his own trucks, he could not afford the trucks "if the Union went in," and would sell them. Zimnox added that he had an appointment later that day with two men to talk about selling the trucks to them and Cassidy could attend that meeting if he wished.[7]

About mid-March, Field Superintendent Olivito told truckdriver Nicholson that he (Olivito) had heard some talk about the men joining the Union, and their doing

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[6] At this point McDonald told Zimnox that if he sold the trucks the men would file charges with the Board, and Respondent would have to produce books to demonstrate that the trucking operations were losing money. McDonald added that when the books were produced, he wanted "the right set of books" that correctly reflected the cost of operating the trucks, and not those which included the cost of automobiles and various appliances purchased for employees and for Zimnox's personal use and charged to trucking expense Zimnox charged McDonald with trying to "blackmail" him McDonald denied this, and told Zimnox that we just want an honest accounting because "our jobs will be at stake." This portion of the conversation is referred to here because it throws some light on a subsequent conversation between Zimnox and McDonald, hereafter referred to

[7] The foregoing findings are based on the credited testimony of Ross, McDonald, and Cassidy. Zimnox admitted that he talked to Ross at the time and place recounted by the latter. He did not specifically deny that the Union was discussed, but testified that what he told Ross was that he had received some "bad complaints" about his conduct, and that he (Ross) would have to "straighten up." Zimnox also admitted the conversation with the men in his office on March 13, but gave a somewhat different version of what was said He claimed that when he showed the men the letter from the Union his comment was that he had no proof that the Union was in fact the majority representative, and that he could not afford the increased costs He admitted saying that the presence of the Union "would represent increased costs which was not justifiable at all," and that unless something was done to curtail costs he would "have to quit trucking and let somebody else do the hauling" Zimnox gave no testimony regarding the conversation with McDonald on March 17 and 21, thus tacitly admitting that McDonald correctly related what was said Although Zimnox denied asking Cassidy if he had another job to go to, he admitted that he talked with Cassidy at the latter's home, that the Union was discussed, that he did say, "If I were you, I would have a lot to think about" Zimnox did not impress me as a forthright witness. Under cross-examination he frequently "fenced" with counsel and at times seemed to be purposely evasive. I have not credited his testimony where it is in conflict with that given by other witnesses.

so would result in a "lot of hard feeling," and would cause Zimnox "to get rid of the trucks" Olivito asked Nicholson to "do a lot of thinking" about the matter. On two or three subsequent occasions before the end of March 1962, Olivito repeated substantially the same statements to Nicholson, and asked the latter whether he had "thought it over." [8]

3. Discontinuance of trucking operations and layoff of the drivers

During the evening hours on March 30, the last working day of that month, Respondent admittedly notified each of the truckdrivers then employed by it not to report for work on April 2 (the next workday), because Respondent had terminated its trucking operations [9] On April 2, Respondent attempted to have its coal hauled by trucks belonging to various contract haulers. However, except for a few truckloads hauled on April 2, the employees of the contract haulers refused to cross the picket line which had been established at Respondent's premises, and no coal was hauled therefrom until April 13, when hauling of coal was resumed by Respondent's trucks, as well as with trucks leased from contract haulers, as hereafter set forth.

4. The meeting pursuant to the notice of hearing issued in the representation case

On April 11, the parties met pursuant to the notice of hearing issued by the Regional Director on the representation petition theretofore filed by the Union. The hearing was not formally opened, but after some informal discussion an agreement for consent election was executed.[10] At the same time a list of eligible voters was agreed upon. Zimnox claims that at this meeting the Board's representative negotiated a withdrawal of the Union's then pending charge, in exchange for Respondent joining in the agreement for consent election, with the understanding that the "charges were being dropped and there would be no more to that." [11]

Burke, president of the Charging Union, testified that the Board's representative informed the parties that no election could be held so long as the then pending unfair labor practice charge remained undisposed of, and that to proceed with the election he (Burke), agreed to withdraw that charge so that the parties could "start with a clean slate." [12] Burke inferentially denies that there was any agreement not to file further charges, stating that he and Respondent merely agreed that there would be no picketing and no charges filed until the election.[13] On April 25 the Union filed another charge (8–CA–2781), alleging that Respondent violated Section 8(a)(1) and (3) of the Act. This charge was filed, as Burke testified, because after the election [14] and when the results thereof became known, he (Burke) asked Zimnox

[8] This finding is based on the credited testimony of Nicholson Although Olivito testified subsequent to Nicholson, Olivito did not deny the statements which Nicholson attributed to him.

[9] The complaint alleges that Elmer McDonald, William Nicholson, John Nelson, Alvin Ross, and Bob Risdon were discriminatorily discharged on March 30, 1962 The evidence is uncontradicted that Alvin Ross was discharged on March 13, and was not working for Respondent on March 30. Whether the discharge of Ross was discriminatory will be hereafter discussed.

The complaint also alleges that Harry Flowers was discharged on May 2, 1962 Flowers, who had been employed by Respondent as a *welder,* did not testify. Unless Flowers was discharged on March 30 by the message not to report for work on April 2, there is no evidence to establish that Flowers was in fact discharged, and if he was, when, or under what circumstances. As the message referred to, according to the evidence, went only to *truckdrivers,* I shall assume that Flowers was not discharged on March 30, and there being no other evidence to support the allegation, I shall recommend that the complaint be dismissed insofar as it alleges a discriminatory discharge of Flowers.

[10] This agreement was approved by the Regional Director on April 13, 1962

[11] The facts with respect to this contention are being set forth in detail because they form the basis for Respondent's special defense that under the circumstances the Board is estopped from maintaining this proceeding.

[12] On April 16, the Regional Director notified the parties that the charge in Case No 8–CA–2741 had, with his approval, been withdrawn

[13] Upon the execution of the agreement for consent election, the picket lines were removed, Respondent put its trucks back in operation. Between April 11 and June 9, all the drivers laid off on March 30 were recalled and were employed by Respondent at the time of the hearing.

[14] As a result of the election held on April 25, the Regional Director certified the Union as the representative of the employees involved

about paying the premium on the Blue Cross insurance of some of the employees whom Respondent had terminated but not yet recalled, telling Zimnox that those men were his employees and should be put back to work Zimnox replied, "That is your terminology." From this remark Burke concluded that Zimnox did not intend to recall the men, and for that reason filed the charge.[15]

C. *Concluding findings*

1. Interference, restraint, and coercion

On the basis of the foregoing findings which are derived from the credited evidence, I find and conclude that Respondent violated Section 8(a)(1) of the Act by the following:

a. The statements made by Zimnox to employee Ross. Those statements were, in effect, interrogation of Ross regarding his own activities, and those of his fellow employees, on behalf of the Union, and thus constituted proscribed interference. In view of the other conduct engaged in by Respondent, found herein to constitute unfair labor practices, and the fact that the interrogation of Ross was not engaged in for the sole purpose of ascertaining whether Respondent was legally bound to deal with the Union, the Board's holding in *Blue Flash Express*, 109 NLRB 591, has no application here. *Orkin Exterminating Company of South Florida, Inc.*, 136 NLRB 399.

b. The statements made by Zimnox during the March 13 meeting that "he could not and would not go along with" the Union's demand for recognition, and that he would "get rid of the trucks" if the men continue with the Union. This was clearly a threat proscribed by Section 8(a)(1).

c. The statement made by Zimnox to McDonald at this meeting of March 21. In view of the statements made by Zimnox at the meeting of March 13, which McDonald attended, the statement made by him on March 21 could only have had reference to the Union. It was plainly an attempt to dissuade McDonald from continuing with his activities in support of the Union. The mere fact that McDonald may not have regarded himself as coerced or restrained by the statement which Zimnox made does not negate the fact that said statement was reasonably calculated to restrain and coerce. See *Kohler Co.*, 128 NLRB 1062, 1091, footnote 51; *Drennon Food Products Co.*, 122 NLRB 1353, 1356; *School-Timer Frocks, Inc.*, 110 NLRB 1659, order enforced in its entirety, 224 F. 2d 336 (C A. 4).

d. The statements of Field Superintendent Olivito to employee Nicholson, which is in substance the same statement made by Zimnox at the meeting of March 13.

2. The discharge of Alvin Ross

It is found and concluded that Respondent violated Section 8(a)(3) and (1) of the Act by discharging Alvin Ross because of the latter's adherence to and support of the Union. As found above, Zimnox unlawfully interrogated Ross regarding his union activities on the afternoon of March 12. After conferring with Field Superintendent Olivito later that evening, Zimnox authorized Olivito to discharge Ross when he reported for work the following morning, and Olivito did so. The hostility of Zimnox to the union activities of his employees is fully demonstrated by his statements hereinabove found to be violative of Section 8(a)(1), including specifically the interrogation of Ross, as well as by the fact that he did subsequently, just as he threatened, close down the trucking operations with the intent and purpose of discriminating against his employees because of their union activity.

Respondent contends that Ross was discharged because he was an undependable and unreliable employee; that it had put up with his shortcomings for a substantial period of time, but that in 2 days (March 10 and 12),[16] Ross "tore out" three differentials, and that by reason of those facts and the unusually high record of "break down" on trucks operated by Ross, it was decided to discharge him.

Ross was first employed by Respondent in May 1961 as a truckdriver. He quit in October of that year, after some argument with Supervisor Eroshevich. According to Field Superintendent Olivito, who, among his other duties, dispatched Respondent's trucks and was Ross' immediate supervisor, Ross was unreliable in his attendance, frequently reported for work with liquor on his breath, and had a bad record with respect to breakdown of equipment. In December 1961, when Zimnox

[15] The record does not show what disposition was made of the April 25 charge In any event, a further charge was filed on May 21, and it was on the last-mentioned charge that the complaint herein was issued.

[16] March 11 was Sunday and not a workday.

was giving consideration to rehiring Ross, Olivito discussed with Zimnox all of Ross' shortcomings, and urged Zimnox not to rehire Ross. However, Ross was rehired by Zimnox and worked until his discharge on March 13, 1962.[17] Zimnox apparently placed little credence in the recommendation of Olivito, because Ross credibly testified, and his testimony in that regard was not denied by Zimnox, that Zimnox solicited him (Ross) to return to work, stating that Ross was one of his best truck-drivers, that he wanted him back, but it would take a little time to "smooth it over," presumably with Olivito. Olivito testified that: After Ross was rehired in December 1961, he soon reverted to the "same old pattern of not showing up for work; boozed up when he came to work"; he reported for work virtually every day with liquor on his breath; on occasions he had to keep Ross working in the pit because he doubted that he was sufficiently sober to operate a vehicle on the highways; and Ross had more breakdowns than any other driver on the job. Olivito says that between December 1961 and March 1962 he frequently reprimanded Ross for his conduct, and on occasions talked to Zimnox about Ross' conduct. Although it is claimed that Zimnox told Olivito that he would discuss the latter's complaints with Ross, he admits that until he talked to Ross on March 12 he never criticized Ross for the manner in which the latter performed his duties, or in any way reprimanded him for his conduct.

The events which triggered the discharge of Ross, Respondent claims, were as follows: On March 10 (Saturday) Ross, without explanation or leave, reported for work at noon instead of the usual 7 a.m. reporting time, and was assigned to drive a truck which had, during the morning hours, been used in mining operations. According to Olivito, Ross tore out the rear end of this truck in a very few minutes thereafter, and was assigned to drive a standby truck for the remainder of that day. Over the weekend, the truck which broke down Saturday was repaired, and Ross was again assigned to operate that truck. During Monday morning, the rear end of that truck gave way again, and Ross was assigned to drive another truck, and Ross also tore the rear out of that truck during the afternoon. Olivito claimed that late in the evening of March 12, he reported to Zimnox that in the course of 2 working days Ross had "torn out" three rear ends, and recommended that Ross be discharged; that Zimnox agreed and on the following morning (March 13), when Ross reported for work, he discharged him, telling Ross that his truck was always broken down, and that it had been decided to put a hired truck in his place.

Ross admitted that the rear end "went up" on the truck he was driving on Saturday, but says that he was told by Cassidy, who also did repair work for Respondent, when he went to pick up the truck, that the rear end in it was bad, and that it would not "make it up the hill." Ross says he reported the condition of the truck to Olivito. He denied that he tore the rear end out of any truck on March 12.

I find it unnecessary to resolve each and every minor conflict in the evidence between Ross on the one hand, and Zimnox and Olivito on the other. In the overall, I credit Ross. In the main, I do so for the following reasons, in addition to what I have previously said concerning the testimony of Zimnox. First, the trucks were old, having been used by Respondent in the coal fields and in hauling from the pits to the delivery point since 1957 and 1958. Eroshevich, who was in overall charge of truck maintenance for Respondent, testified that the trucks were in bad mechanical condition from time to time, and that this bad mechanical condition existed from November 1961 through March 1962. Secondly, and certainly of equal, if not greater, significance is the fact that Zimnox spoke to Ross *at the end of the workday* on March 12, as Zimnox was leaving the pit, but according to his own testimony, he said nothing about tearing out of rear ends, which to him stood out as the major factor justifying the discharge of Ross. True, Olivito testified that he did not tell Zimnox that Ross had "torn out" three rear ends until later in the evening hours of that day. On cross-examination Olivito was unable to fix the time of his conversation with Zimnox any closer than between 4:30 and 11 p.m. on October 12. It certainly strains credulity to believe that Olivito would not have told Zimnox when the latter was at the mining operations toward the end of the workday on March 12,

[17] Zimnox claimed that he did this because he knew that Ross' family was virtually destitute, and that Ross faithfully promised to abstain from drinking. At the same time Zimnox withdrew a warrant that had been issued at the behest of Respondent, charging Ross with the theft of an undisclosed quantity of heating oil, and the unauthorized use of a fuel truck utilized in transporting the fuel oil to Ross' home Ross admits that he took the oil and used the truck to transport it, but says that he intended to and did subsequently pay for the same. This incident occurred between October 1961, when Ross quit, and the time of his rehire in December 1961.

about what he regarded as the extensive damage which Ross had done to the trucks, if such was in fact the case,[18] particularly in view of the statement which Zimnox admits he made to Ross that he had received some "bad complaints" about him, and that Ross would have to "straighten up."

Upon the whole record, I am convinced and find that Ross was discharged not because of the breakdown of the trucks, but because he was the first one to openly admit to Zimnox that he (Ross) had joined the Union, and to make an example of him to be held up to the other employees (with whom Zimnox met on the evening of March 13), as to what could happen to them if they continued with their support of the Union.

3. The suspension of the trucking operations and the layoff of the drivers

It is found and concluded that Respondent violated Section 8(a)(3) and (1) of the Act by suspending its trucking operations, and laying off of the drivers—Elmer T. McDonald, William Nicholson, John Nelson, and Bob Risdon, as set forth in section III, B, 3, above. This action by Respondent was, I find and conclude, merely the culmination of its antiunion campaign, and was not motivated by legitimate business considerations, but was intended to punish the employees for their adherence to the Union.

Respondent attempted to establish that hauling by its own trucks was costing nearly double what it would cost to have the work performed by contract haulers,[19] and that the decision to terminate its trucking operations and lay off the drivers was motivated solely by economic considerations. The date of March 30 (the last workday of the month) was selected, it is claimed, because an outlay of some $6,000 to $8,000 for license, insurance, and other expenses was necessary if the trucks were to operate after April 1, and he wanted to save this outlay.[20]

I am by no means satisfied that the computations made by Eroshevich reflect the cost of operating the trucks with any substantial degree of accuracy For example, Zimnox and Eroshevich admitted that the cost of gasoline and other items used solely in the mining operation was charged to trucking expense. Eroshevich says he "estimated" the proportion used only in the mining operations and made "due allowance" for it in his computations The accuracy of this "estimate" and "due allowance" is left to speculation. Also, Eroshevich testified that in the summer of 1961, and again from November 1961 through March 1962, the trucks were in bad mechanical condition, and an extensive program of major repair and rehabilitation was in progress. Apparently the entire expense of this was included in the computations which Eroshevich made It would seem that at least part of this cost would more appropriately be distributed over a longer period than the 9 months covered by the computations.[21] To what extent, if at all, a proper allocation of such costs would affect the result reached by Eroshevich cannot be computed from this record. In any event, I am satisfied, and find, that the motivation for the suspension of the trucking operations and the layoff of the drivers on March 30 was not considerations of economy, but

[18] Respondent places considerable reliance on its allegation that by reason of the fuel oil incident above referred to, Ross was guilty of larceny and of the unauthorized use of a motor vehicle; that he could not be relied upon for attendance and frequently reported for work drunk. Whatever shortcomings Ross may have had in the respects referred to, the fact remains that Respondent condoned them, and it is clear on this record that Respondent did not discharge Ross for any of those reasons I therefore regard the evidence to that extent irrelevant There is also a contention by Respondent that sometime in June 1962 Ross stole and wrecked a bicycle belonging to one of employee McDonald's children Since this incident, if it occurred at all, happened some 2 months after Ross was discharged, it plainly has no relevance in determining the motivating cause of his discharge.

[19] Eroshevich, Respondent's bookkeeper, who testified with respect to the computations he made, which are for the 9-month period July 1, 1961, through March 31, 1962, from which he allegedly deduced that it was costing Respondent $1 128 per ton to deliver the coal with its own trucks. The computations themselves are not in evidence Zimnox testified that by having contract haulers do the work, the cost would be 65 cents per ton

[20] All this is, of course, inconsistent with the statement made by Zimnox to Cassidy, whose testimony in that regard I have credited, that he would rather haul with his own trucks, but would sell the trucks if the Union came in It is significant that this statement was made March 28, just 2 days before the decision to terminate the trucking operations

[21] For example, a new motor should have more than 9 months of useful life.

to deter the employees from engaging in activity guaranteed to them by Section 7 of the Act.

4. Respondent's special defense

The contention that the Board is estopped from proceeding herein because of the agreements which Zimnox and Burke, president of the Union, reached on April 11, when the consent-election agreement was executed, that the then pending unfair labor practice charge would be withdrawn, I find to be without merit. The agreement was a private one, between Zimnox and Burke, and was limited to the withdrawal of the then pending charges so that an election might be conducted The participation of the Board's agent in the discussions was, to a minor extent, limited to informing the parties that an election could not be held in the face of the then pending charge. Even Zimnox, the only witness who testified for Respondent on this subject, attributed to the Board's agent only the statement that the charge was "being dropped and there would be no more to that." I do not construe this as a commitment by the Board's agent that the charge would not be refiled.[22] Moreover, even if the Board's agent did make such commitment, his action in that respect does not estop the Regional Director, the General Counsel, or the Board from proceeding on a subsequently filed charge. *N L.R.B.* v. *Baltimore Transit Company,* 140 F. 2d 51, 54–55 (C.A. 4).

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, B, above, and found in section III, C, above, to constitute unfair labor practices, 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 and obstructing commerce and the free flow thereof.

V. THE REMEDY

Having found that Respondent has engaged in unfair labor practices, it will be recommended that it cease and desist therefrom and that it take certain affirmative action found necessary to dissipate the effect thereof and to effectuate the policies of the Act As Respondent has resumed the trucking operations involved and has called all of the employees, except Alvin Ross, back to work, I shall not recommend that Respondent be ordered to resume the trucking operations. Reinstatement will be recommended only with respect to Alvin Ross. It will also be recommended that Alvin Ross, Elmer T. McDonald, William Nicholson, John Nelson, and Bob Risdon be made whole for any loss of earnings they may have suffered by reason of the discrimination against them, as hereinabove set forth, by paying to them, respectively, a sum of money equal to that which each normally would have earned as wages from March 12, 1962, to the date of Respondent's offer to reinstate, in the case of Alvin Ross, and from April 2, 1962, with respect to McDonald, Nicholson, Nelson, and Risdon, until they were respectively called back to work, less the net earnings of each during the applicable period as above set forth, computed on a quarterly basis as provided in *F. W. Woolworth Co.,* 90 NLRB 289, 291–294, with interest computed at the rate of 6 percent per annum as provided by the Board in *Isis Plumbing & Heating Co.,* 138 NLRB 716.

Upon the basis of the foregoing findings of fact and upon the entire record in this 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. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By the conduct set forth in section III, B, 2 and 3, above, Respondent interfered with, restrained, and coerced its employees in the exercise of rights guaranteed to them by Section 7 of the Act, and discriminated against its employees in regard to their tenure and terms and conditions of employment in order to discourage membership in a labor organization, and thereby engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act

[22] If such were in fact the understanding reached, it is a little difficult to understand why Respondent's counsel, who was present and participated in the discussions, did not insist that such understanding be incorporated in the consent-election agreement, or otherwise reduced to writing.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

5. It has not been established by the preponderance of the evidence that Respondent discriminatorily discharged Harry Flowers, as alleged in the complaint.

RECOMMENDED ORDER

Upon the basis of the foregoing findings of fact and conclusions of law, and pursuant to Section 10(c) of the Act, it is recommended that Zimnox Coal Company, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interrogating any of its employees with respect to their membership in, sympathies for, or other concerted activities on behalf of International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, General Teamsters, Chauffeurs, Warehousemen and Helpers Local 428, or any other labor organization.

(b) Threatening its employees with termination of, or terminating, its trucking operations because said employees select a labor organization as their bargaining representative, or engage in other concerted activities for their mutual aid or protection.

(c) Discharging or otherwise discriminating against its employees because they give support or assistance to any labor organization or engage in other concerted activities for their mutual aid or protection.

(d) 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 International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, General Teamsters, Chauffeurs, Warehousemen and Helpers Local 428, 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 engaging in any such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as authorized by Section 8(a)(3) of the National Labor Relations Act, as amended.

2. Take the following affirmative action found necessary to effectuate the policies of the Act:

(a) Offer to Alvin Ross immediate and full reinstatement to his former or substantially equivalent position without prejudice to his seniority or other rights and privileges.

(b) Make whole Alvin Ross, Elmer T. McDonald, William Nicholson, John Nelson, and Bob Risdon for the loss of pay they may have suffered, respectively, by reason of the discrimination herein found to have been practiced against them, in the manner set forth in the section hereof entitled "The Remedy."

(c) Preserve and, upon request, make available to the agents of the National Labor Relations Board, for inspection or copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary or appropriate in computing the amounts of backpay due as herein provided.

(d) Post at its office in Brilliant, Ohio, and at its mining operation in or near Brilliant, Ohio, copies of the attached notice marked "Appendix A."[23] Copies of said notice, to be furnished by the Regional Director for the Eighth Region of the Board (Cleveland, Ohio), shall, after being signed by an authorized representative of Respondent, be posted by it 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.

(e) Notify the aforesaid Regional Director, in writing, within 20 days from the date of this Intermediate Report and Recommended Order, what steps Respondent has taken to comply herewith.[24]

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[23] If this Recommended Order is 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 is enforced by a decree 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."

[24] If this Recommended Order is 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 the Respondent has taken to comply herewith."

(f) The allegations of the complaint, to the extent that they allege that Harry Flowers was discriminatorily discharged in violation of Section 8(a)(3) and (1) of the Act, be dismissed.

APPENDIX A

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 National Labor Relations Act, as amended, we hereby notify our employees that:

WE WILL NOT interrogate our employees with respect to their membership in, sympathies for, or other concerted activities on behalf of International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, General Teamsters, Chauffeurs, Warehousemen and Helpers Local 428, or any other labor organization.

WE WILL NOT threaten our employees with the termination of, or terminate, our trucking operations because our employees select International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, General Teamsters, Chauffeurs, Warehousemen and Helpers, Local 428, or any other union as their bargaining agent.

WE WILL NOT discharge or otherwise discriminate against our employees because they give support or assistance to International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, General Teamsters, Chauffeurs, Warehousemen and Helpers, Local 428, or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees from exercising their right to form, join, or assist a union, to bargain with us through a representative of their own choice, and to engage in other concerted activities for their mutual aid or protection, or to refrain from any and all such activities, except to the extent that such right may be affected by an agreement requiring membership in a union, as provided in the National Labor Relations Act.

WE WILL offer to Alvin Ross immediate and full reinstatement to his former or substantially equivalent job without prejudice to his seniority or other rights and privileges.

WE WILL make whole Alvin Ross, Elmer T. McDonald, William Nicholson, John Nelson, and Bob Risdon for any loss of pay suffered by them as a result of their discharge or layoff by us.

All our employees are free to become, remain, or refrain from becoming or remaining, members of any union, except to the extent above referred to.

ZIMNOX COAL COMPANY,
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, 720 Bulkley Building, 1501 Euclid Avenue, Cleveland 15, Ohio, Telephone No. Main 1-4465, if they have any question concerning this notice or compliance with its provisions.

Stackhouse Oldsmobile, Inc. *and* International Association of Machinists, Local Lodge 1519, AFL-CIO. *Case No. 8-CA-2800.*

February 13, 1963

DECISION AND ORDER

On September 26, 1962, Trial Examiner Leo F. Lightner 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