whole for any loss of pay incurred as a result of their discharge with interest thereon at 6 percent per annum.

All our employees are free to become or remain members of the above-named Union or any other labor organization. We will not discriminate in regard to hire or tenure of employment or any term or condition of employment against any employee because of membership in or activity on behalf of any such labor organization.

MID-STATE TRUCKING SERVICE,
Employer.

Dated_____ By_____
(Representative) (Title)

NOTE.—We will notify any of the above-named employees presently serving in the Armed Forces of the United States of their right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act of 1948, as amended, after discharge from the Armed Forces.

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. If employees have any question concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, Room 703, 830 Market Street, San Francisco, California, Telephone No. Yukon 6–3500, Extension 3191.

Indiana Ready Mix Corporation *and* Coal, Ice, Building Material, Supply Drivers, Heavy Haulers, Warehousemen and Helpers, Local Union No. 716, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. *Case No. 25–CA–1535. March 20, 1963*

DECISION AND ORDER

On September 6, 1962, Trial Examiner C. W. Whittemore issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety, as set forth in the attached Intermediate Report. Thereafter, the General Counsel filed exceptions to the Intermediate Report and a supporting brief.

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

Unlike our dissenting colleagues, we agree with the Trial Examiner's conclusions that the Union did not make an unconditional application for reinstatement on behalf of the strikers, and therefore that Respondent was under no legal obligation to reinstate the strikers and did not violate Section 8(a)(1) and (3) by not accepting the Union's application.

The essential facts on this issue are as follows: On August 10, 1961, Respondent, a newly formed corporation, took over the business of

a predecessor company, and thereafter accorded continued recognition to the Union as the exclusive bargaining agent of the employees. After initial unsuccessful contract negotiations with Respondent on September 1, 7, and 25, the Union called a strike on September 26, and all seven employees of Respondent walked out. On October 13, the Union advised Respondent orally that the men were ready to go back to work, without at that time attaching any stated condition thereto. However, when Respondent in response took the position that it required a 60- or 90-day no-strike guarantee to restart its business, the Union on October 14 counteroffered in writing a no-strike guarantee for a "thirty day period of negotiations," with it being ". . . further agreed and understood by the parties hereto, that at the end of the said thirty (30) day period, either party shall have the right, in the event they cannot reach an agreement, to use all legal and economic action they deem necessary." Moreover, when the Union by letter on October 17 made another application for reinstatement of the strikers, it first made reference to its prior application and the refusal thereof and in effect repeated the terms of that application.

The two applications for reinstatement to be considered, therefore, are the Union's written application of October 14 and its written renewal of that application on October 17.[1] The Union had already struck once after an initial approximate 30 days of negotiations with this new employer had failed to produce agreement on a contract. Moreover, its October 14 application for reinstatement carried with it not only a counteroffer of a no-strike period which was specifically geared and confined to a "thirty day period of negotiations," but which further gave the Union the "right" to strike again if no agreement on a contract were reached in "said thirty (30) day period." In these circumstances, we, like the Trial Examiner, construe the Union's October 14 application for reinstatement as in essence only an offer of a 30-day respite in the strike unless during such period the Union could gain an acceptable contract from Respondent. Accordingly, such application, and its renewal on October 17, being conditioned on a return of the strikers for a limited period of 30 days, were only conditional applications for reinstatement. We find, therefore, in agreement with the Trial Examiner, that, as there was no unconditional application for reinstatement by the Union, Respondent was under no legal obligation on October 14 or 17 to reinstate the strikers and therefore did not violate Section 8(a)(1) and (3) by its refusals to do so at those times.[2] On the same basis, we find further, con-

[1] Whatever the nature of the Union's original oral application on October 13, and though the Respondent's no-strike guarantee position may have prompted the Union's October 14 action, the fact remains that the Union did substitute therefor its October 14 application, and the original application no longer remained in effect

[2] Our dissenting colleagues, on the basis of their position that there had been an unconditional application for reinstatement, pose and answer in the negative the question

trary to our dissenting colleagues, that there was no unlawful discrimination in Respondent's reinstating during the week of November 21 only those five employees who had repudiated the Union and filed unconditional individual applications for reinstatement, and in effect refusing to consider the prior union applications on behalf of the two remaining union adherents.

[The Board dismissed the complaint.]

MEMBERS LEEDOM and BROWN, concurring in part and dissenting in part:

We agree that the Respondent did not unlawfully refuse to bargain with the Union. However, unlike the majority we would find that Respondent's refusal to reinstate its striking employees pursuant to the Union's request for such reinstatement at a time when none of them had been replaced violated Section 8(a)(1) and (3) of the Act.

In September 1961 negotiations between the Union and the Respondent ran into difficulties over the question of seniority. On the 26th of that month the Union called a strike and all seven employees walked out. On October 13, the union representative, while on the picket line, told Respondent's superintendent that the men were ready to return to work. In response to the October 13 request for reinstatement, however, the Respondent took the position that it would not take the employees back unless the Union agreed to a 60- or 90-day strike moratorium, contending that it needed such a no-strike guarantee in order to get and complete orders for concrete. The Union on the next day counteroffered a 30-day, no-strike agreement which the Respondent rejected as too short a period in which to obtain and complete contracts with its customers. Four days later the Union sent the Respondent a letter again stating it was "ready to have the employees return to work and to negotiate a contract." This October 17 reinstatement request was rejected on the ground that Respondent had no work for the employees.

The Trial Examiner reasoned that the October 13 offer was not unconditional because (1) the Union, after making the offer, continued picketing, and (2) it was in essence only an offer of a 30-day respite in the strike. He concluded therefrom that, as there was no unconditional application for reinstatement, the Respondent was under no legal obligation to put the employees back to work and therefore did not violate Section 8(a)(1) and (3) of the Act.

Unlike the majority, we think the Trial Examiner's conclusions are erroneous. In the first place, all that is necessary to satisfy the re-

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following therefrom whether Respondent could in the circumstances lawfully lock out its employees under the *Betts Cadillac* doctrine In view of our finding that there was no such application, we, of course, do not reach that question

quirement of an unconditional application for reinstatement is an undertaking to abandon a strike and its concomitant picketing if the request for reinstatement is granted. But the Board has held, contrary to the Trial Examiner and our colleagues of the majority, that employees do not forfeit the right to continue the strike as well as the picketing if the offer is denied.[3] Secondly, in appraising the character of the Union's offer not to strike for a 30-day period, it should be remembered that it was the Respondent who interjected the matter of a definite no-strike pledge into the situation, and that the dispute was not over whether the reinstatement application was unconditional, but over the duration of the no-strike period. Significantly, there is no evidence in the record that bargaining had reached an impasse or that the Union intended to renew the strike once the pledge period ran out or at any other time. Indeed, it is evident to us that the Union merely wished to remain free to strike after a 30-day, rather than 60- or 90-day period, if, in its view, circumstances *then* warranted such action. We fail to see how the Union's desire to preserve a statutory right can in the circumstances be construed as a limitation on an otherwise unconditional request for reinstatement of the strikers. Moreover, even assuming that there was some ambiguity in the Union's application on October 13, the Union, in its letter of October 17, made its position quite clear. It there spelled out in writing that it was ready to stop the picketing, to have the employees return to work, and to continue negotiations on a contract. Respondent rejected this offer not because it was conditional or because it needed a no-strike pledge, but rather for the asserted reason that work was not available. It follows from the above, and we would find, that the request for reinstatement on October 13 and, in any event, on October 17, was unconditional,[4] that as unreplaced economic strikers, these employees were entitled to reinstatement,[5] and that the Respondent's continued refusal to take them back constituted a lockout of the employees.

The question is, therefore, whether the Respondent could in the circumstances lawfully lockout its employees, because of the Union's refusal to surrender the employees' statutory right to strike for the

[3] *Hawaii Meat Company, Limited*, 139 NLRB 966.

[4] See *Texas Gas Corporation*, 136 NLRB 355.

[5] See *N L R B.* v. *MacKay Radio & Telegraph Co*, 304 U.S. 333, 345, 346; *N.L R.B* v *Remington Rand, Inc.*, 130 F. 2d 919, 927 (C.A. 2).

We would find no merit in the Respondent's argument that on the 17th it had no work for the employees The record shows that during the period in question Respondent was turning down local business orders for ready-mixed concrete on the grounds its employees were on strike. Furthermore, when five employees abandoned the Union and made individual requests for reinstatement around November 21, the Respondent almost immediately took them back.

period of time insisted upon by the Respondent. It cannot be denied that a lockout for such reasons trenches upon the exercise by employees of rights protected by the Act, and that it has the effect of discriminating against them with respect to terms and conditions of employment. Consequently, the lockout must be held unlawful unless *unusual* economic hardships or operational difficulties justified, as the Respondent contends, its resorting to such a self-protective measure in the face of a mere possibility of renewed union-strike action after a 30-day, no-strike period expired.[6]

The Respondent argues in justification that it required at least an assurance of 60 to 90 days respite from a strike in order to obtain and to complete contracts, and thereby avoid serious financial loss. The Respondent's business is divided between small local orders and large "bridge" orders for ready-mixed concrete. With respect to the former, it is not even claimed that strike action posed any threat of substantial economic loss. In fact, some such orders could apparently have been accepted and completed within the 30-day no-strike period offered by the Union. As for large "bridge" orders, none was available when the Union requested reinstatement of the employees. However, around mid-November the Respondent accepted two such orders which did take some 6 months to complete. With respect to these, the Respondent alleged that potentially serious economic loss could result from a strike before completion. However, it failed to introduce any evidence supporting this allegation.[7] There is also no showing with respect to either the large or small orders, that a strike before their completion would create serious operational problems or substantial inconvenience or involve hazards to the public.[8] Consequently, the Respondent has failed to support or substantiate in any way its position that the lockout of its employees was resorted to as a defensive self-help measure to avoid unusual economic loss or operational difficulties. Rather, it is evident to us from our findings above that the lockout was an offensive retaliatory measure against the Union and employees for engaging in protected strike activity and for refusing to surrender, as the Respondent wished, their statutory right to strike in the future.[9] Accordingly, we would find that the Respondent by locking out its employees rather than reinstating them pursuant to

[6] See, e.g., *Betts Cadillac Olds Inc., et al.*, 96 NLRB 268; *Quaker State Oil Refining Corporation* v. *N L R B.*, 270 F. 2d 40, 43–45 (C.A. 3), cert. denied 361 U.S. 917; *Texas Gas Corporation, supra.*

[7] Further, we fail to see how Respondent's proposed 60- to 90-day no-strike pledge would obviate the possibility of serious economic loss from strikers interrupting a contract requiring 6 months to complete.

[8] Cf. *Building Contractors Association of Rockford, Inc.*, 138 NLRB 1405.

[9] Cf. *Lion Oil Company* v. *N.L.R B.*, 245 F. 2d 376, 378–379 (C A 8); *Texas Gas Corporation, supra.*

their unconditional requests for reinstatement violated Section 8(a)(1) and (3) of the Act.[10]

[10] We would also find unlawful discrimination in Respondent's reinstating during the week of November 21, 1961, only those five employees who had repudiated the Union and filed individual applications for reinstatement. To be sure, at that time the Union was no longer the majority representative of the Respondent's employees However, it remained the agent of the two employees who had not repudiated it, and, consequently, its unconditional applications for reinstatement made on October 13 and 17 continued to be effective during November and thereafter with respect to those two employees, one of whom, at least, had seniority over employees reinstated. Thus, by refusing to consider the union applications as they affected the two union adherents and by failing to reinstate them, the Respondent clearly discriminated against them because they refused to abandon the Union. Such conduct was, in our view, a plain violation of Section 8(a)(3) and (1) of the Act.

INTERMEDIATE REPORT AND RECOMMENDED ORDER

STATEMENT OF THE CASE

Upon a charge filed by the above-named labor organization on February 23, 1962, the General Counsel of the National Labor Relations Board issued and served a complaint and notice of hearing on May 18, 1962. A written answer by the above-named Respondent Employer was received on May 28, 1962. The complaint alleges and the answer denies that the Respondent has engaged in unfair labor practices in violation of Section 8(a)(1), (3), and (5) of the National Labor Relations Act, as amended Pursuant to notice, a hearing was held in Shelbyville, Indiana, on June 27, 28, and 29, 1962, before Trial Examiner C. W. Whittemore.

At the hearing all parties were represented and were afforded full opportunity to present evidence pertinent to the issues, to argue orally, and to file briefs. A brief has been received from General Counsel.

Disposition of the Respondent's motion to dismiss the complaint, upon which ruling was reserved at the hearing, is made by the following findings, conclusions, and recommendations.

Upon the record thus made, and from his observation of the witnesses, the Trial Examiner makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

Indiana Ready Mix Corporation is an Indiana corporation with principal office and place of business in Shelbyville, Indiana, where it is engaged in the business of supplying concrete to contractors engaged in building roads and bridges on Federal and State highways including Interstate Highway No. I–74.

The Respondent, which began operations within the year preceding issuance of the complaint, has reasonable expectation of furnishing during 1962, to the following employers who are engaged in building roads and bridges on Federal Interstate highways and who will, during 1962, each to in excess of $50,000 business on such projects, the following amounts in value of concrete, to be delivered to them during 1962, such expectation being based upon letters of intent which the Respondent has received from them:

Warrick & Warrick, Sellersburg, Indiana	$7, 950. 00
Kahl & Mahon, Liberty, Indiana	15, 000. 00
Smith & Johnson, Inc., Indianapolis, Indiana	50, 625. 00
Total	73, 575. 00

During the period between August 10, 1961, and June 18, 1962, Kahl & Mahon, Smith & Johnson, Inc., and J S. Sweet Construction Company, of Cambridge, Indiana (all contractors in the construction industry), and J. W. Evans Concrete Products. Inc., of Shelbyville, Indiana, the last mentioned a manufacturer of pipe and related products, each purchased materials and supplies valued at more than $50,000 from suppliers outside the State of Indiana, such goods being shipped across State lines directly to Indiana sites. And during the period from August 10, 1961, to August 10, 1962, the Respondent sold and shipped directly to the above-named concerns goods and materials valued at more than $50,000.

The Respondent is engaged in commerce within the meaning of the Act.

II. THE CHARGING UNION

Coal, Ice, Building Material, Supply Drivers, Heavy Haulers, Warehousemen and Helpers, Local Union No. 716, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization admitting to membership employees of the Respondent.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Setting and major issues*

From August 1, 1959, to July 31, 1961, the Charging Union was a party to a collective-bargaining agreement with E. T. Burnside, Inc., of Shelbyville, Indiana, covering Burnside's employees. On August 10, 1961, the Respondent, a newly formed corporation, took over the operation of the business previously conducted by Burnside, but "did not take over or assume any of the liabilities of Burnside including any obligation under the National Labor Relations Act." [1]

Also on August 10, Superintendent Melvin H. Horton, who for many years had been Burnside's superintendent, hired five employees who had been on Burnside's payroll, and a few days later two more. At the time of their hire by the Respondent these seven employees were still represented by the Charging Union.

On the same date a vice president of the new corporation asked for and obtained a copy of the expired Burnside-Local 716 contract. Thereafter negotiations for a contract between the Respondent and the Union were begun. No agreement was reached.

The chief issue in the unsuccessful negotiations was seniority. It was the Respondent's firmly maintained position that the seniority of the seven employees should be based upon the date of their hire by the Respondent, while the Union insisted that such seniority should be carried over from their employment by Burnside.

As more fully described below, the Union called a strike on September 26, 1961.

On November 10, in the presence of Union Representative Poling, a majority of the seven employees voted to accept terms offered by Horton and go back to work. Poling referred the members' decision to Carlson, head of the local, who declined to give his approval.

Dissatisfied with this action by their agent the employees sought some method of dissociating themselves from the local. One of them approached a Board agent, who advised them of the legal procedure set up by the Act. Thereafter five of the seven individuals in the unit signed a letter disavowing the Union as their bargaining agent, delivered it to the Regional Office of the Board, and a decertification petition was filed.

The employees advised Horton of their action, and asked for work. As soon as orders could be obtained for delivery of cement (the plant had not operated during the strike) Horton hired the five individuals who applied. No new employees were thereafter hired until the spring of 1962, and then not until after the two employees of the original seven who had not yet been reemployed, had been offered but refused jobs.

This in quick summary is the setting in which General Counsel claims that violations of the Act occurred.

In brief, he contends that in October and November the Respondent refused to sign an agreement with the Union, although its terms had been agreed upon, thereby violating Section 8(a)(5) of the Act. He also urges that on October 13, all seven employees unconditionally offered to return to work, but were refused in violation of Section 8(a)(3) of the Act.[2]

B. *The facts*

Although its answer contains a denial, the Respondent offered no evidence to refute the allegation in the complaint, as to appropriateness of the unit of the seven employees here involved, and during the hearing conceded that the Union was their lawful bargaining representative up to November 17, when five of the seven formally revoked their designation. And there is no question but that the course of negotiations from the beginning and at least up to November 17, demonstrates the fact that during this period the Respondent recognized and dealt with the Union as the exclusive bargaining agent of all employees in the unit.

Negotiating meetings were held on September 1, 7, and 25 before the strike was called on the morning of September 26. At the first meeting Horton agreed to look

[1] The quotation is from a stipulation entered into by the parties at the hearing

[2] The complaint also alleged, as a violation of Section 8(a)(5), that the Respondent "initiated a movement to withdraw its employees' authorization of the Union as their collective bargaining representative" Upon motion by the Respondent, this allegation was stricken at the conclusion of General Counsel's case-in-chief.

over and consider the various proposals submitted by the local through Carlson. At the second meeting two major points were in dispute: (1) the question of seniority as previously described, and (2) the payment of vacation money accrued while the same employees were working for Burnside.

As previously noted, the Respondent maintained that the five employees hired by it on August 10, when operations began, should have equal seniority, and that the other two employees should have seniority according to their later dates of hire. The Union insisted that seniority under the Respondent should be as it had been under Burnside.

As to the accumulated vacation pay under Burnside, Horton took the position that this matter was not the Respondent's responsibility. Finally, at the end of this second meeting, Carlson agreed that he would approach Burnside in an effort to persuade him to make the payments due.

It is undisputed that on September 18, Carlson visited E. T. Burnside, who still occupied office space at the Respondent's plant while winding up his business affairs. Apparently dissatisfied with Burnside's response to his appeal Carlson told him, according to Burnside's uncontradicted testimony, that he "thought he would have to call a strike." It is also uncontradicted that as he left Burnside, Carlson was asked by Horton what his success had been and that he replied: "There will probably be a strike." [3]

On September 25, according to his own testimony, Carlson "instructed Mr. Poling to pull the men out on strike September 26." Picket signs thereafter carried indicated that the strike was against both Burnside and the Respondent.

The Respondent made no effort to continue operations during the strike and no replacements were hired.

On October 13, as Horton passed Union Representative Poling on the picket line, the latter asked why they did not "get this thing settled." The superintendent agreed that this should be done if possible. Poling then told him that the men were "agreeable to drop the seniority demands and go back to work." Horton said that would be "fine," but said he would have to have some assurance that the men would not walk out the next day or the next week. He suggested that Poling provide him with "some letter or something to assure him of no strike within the next 60 or 90 days, so he could let contractors know he could provide cement for some reasonable period. Poling agreed to put the question up to Carlson.[4]

The next day Poling brought Horton an unsigned thermofax copy of a document addressed to Horton proposing that the seven striking employees be returned to work at once, that negotiations continue, and that for a period of 30 days the parties agree that:

> There shall be no strike or stoppage of work by the Union and there shall be no lock-out by the Corporation during the said thirty day period of negotiations. It is further agreed and understood by the parties hereto, that at the end of the said thirty (30) day period, either party shall have the right, in the event they cannot reach an agreement, to use all legal and economic action they deem necessary.

When Poling presented this document to him Horton pointed out that the "letter isn't even signed. How do I know Carlson even read it" and also that "thirty days was too short a period in which to get and fill contracts." Although Horton, as a witness, did not state specifically that he did not sign this thermofax, unsigned copy presented to him, surrounding circumstances warrant the inference that he did not.[5]

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[3] Asked about making this statement to Burnside, Carlson replied: "Not to my recollection." As to making a similar statement to Horton he testified: "I don't recall that conversation." The Trial Examiner cannot consider such equivocal responses as valid contradictions of the testimony of Burnside and Horton.

[4] The quotations are from the credible testimony of Horton. The Trial Examiner cannot accept Poling's recollection as accurate where it varies from that of the superintendent. As the record shows, Poling's memory failed him on important matters in cross-examination. His claim that it was Horton who suggested a period of 30 days' respite in the strike is unreasonable on its face As found above, Carlson did propose a 30-day period in a letter Had this been the period Horton suggested, no good reason is advanced as to why he would not have accepted Carlson's written proposal

[5] Poling's credibility is further diminished by his insistence, on direct examination, that he had given Horton the original proposal signed by Carlson Not until it developed that General Counsel had placed in evidence the one original and signed document, which he had obtained from the Union, and after further examination, did Poling finally admit that he had given Horton an unsigned copy.

Later on October 13, or the next day, Poling informed Horton that the men "had agreed to go back to work and drop the seniority demands." Horton told him "that's fine" and suggested that a negotiating meeting with Carlson be arranged as soon as possible.

A meeting was held on October 17. Horton greeted Carlson by stating that "because the boys have dropped the seniority demands" he thought they were "getting somewhere." Carlson promptly declared "we haven't dropped any seniority demands." Faced with opposing statements from the two union representatives, Horton insisted that Poling, then on the picket line, be called to the telephone. Poling then claimed that "we meant they dropped them temporarily." [6]

Confronted with these shifting and conflicting demands and statements by the union officials, Horton nevertheless continued to negotiate with Carlson and the employee committee concerning subjects raised in the Union's demands, both on October 17 and 18. No final agreement was reached; the picketing continued.

After the meeting of October 17, apparently Carlson wrote and sent the following letter to Horton:

> On Friday, October 13, 1961, Mr. Harry Golding, Business Representative of Teamsters Local Union No. 716, by authorization of your employees, unconditionally offered to remove the picket line and the employees return to work, that offer was refused. On October 17, 1961, Mr. Edward T. Carlson, President of Teamsters Local Union No. 716, in a meeting at the Union office attended by Mr. Smith and Mr. Mitchell again requested and offered to remove the picket line, and the employees return to work, you again refused, the Union is at any time ready to have your employees return to work and negotiate the labor contract.

On October 19, Horton replied as follows:

> This will acknowledge receipt of your letter of October 17, 1961. It will interest you to know that the pickets are still at the Ready Mix Plant and the strike is evidently still in effect.
>
> Because of this strike we have no business and so we cannot put any of the men back to work at this time. We pointed out to you and the men that contractors are afraid to buy ready mix from a plant that is having labor difficulty because they cannot wait for their concrete in the middle of a job. On account of this we do not anticipate much work in the near future but we will keep in mind that the men are ready to go back to work without a contract when we have any work to be done.

The parties met with a Federal mediator on October 31, while picketing continued. It appears that both parties maintained their previous positions as to seniority, and no agreement was reached.

On November 3, five of the seven employees and Poling met with Horton in the plant office and discussed the various contract demands. This time, according to Poling's own testimony, "negotiations fell through again" over the point of a termination date of any contract signed.[7]

Five employees, Poling and Horton again met on November 10. This time the employees agreed to accept the Company's proposal as to a 2-year contract, provided they were given a small raise. Horton agreed. Four of the seven striking employees voted to accept, in the presence of Poling. Poling then called Carlson, who refused to accept the agreement the majority had voted for.

Understandably disturbed by the fact that, as principals, their "agent" had vetoed their own agreement, the striking employees began seeking some way out of the dilemma. One of them, Braswell, went to the Regional Office in Indianapolis, where he consulted a Board agent, pointing out that his fellow employees were dissatisfied with the Union in their efforts to get back to work and earn wages. The Board agent declined to write a letter to the Union for them, but pointed out provisions of the Act which permitted decertification.

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[6] Poling admitted that he was thus called to the telephone on October 17

[7] The unreliability of Poling's testimony, where unsupported by more credible evidence, is further demonstrated by the fact that shortly after testifying for General Counsel that negotiations "fell through" on the afternoon of November 3, he testified for counsel for the Charging Union that an "offer for the men to return to work" was made at the same time and that they did return "the following Monday." His latter testimony is contrary to facts stipulated by all parties earlier in the hearing—no one returned until November 21, 1961.

With the help of his wife, Braswell then prepared the following letter, addressed to the local:

> We no longer desire to have the Local No. 716 to represent us in our employment at the Indiana Ready Mix Corp., Shelbyville, Ind.
> We desire to file a decertification petition with the N.L.R.B. and to do whatever is necessary to end our relations with Teamsters Local #716.

On November 17, five of the seven employees signed the above letter: Smith, Eck, Buckler, Fuchs, and Braswell, and the document was delivered to the Board office, at which time a decertification petition was filed.

On November 18, employees Braswell, Smith, and Eck informed Horton of their action in disavowing the local and in filing a decertification petition, and asked for their jobs. By November 27, upon their application for work, all five individuals who are named in the paragraph next above were back on the job.

Because of the winter season—there is no real dispute that this type of business is seasonal—no other employees were needed or hired until early April 1962. At this time, it is undisputed, Horton went out to the picket line and asked the two employees of the original seven—Mitchell and Spurlin—if they wanted work. They refused the offer, whereupon Horton hired a driver who had previously worked for Burnside.

C. *Conclusions*

As noted in subsection A above, the two chief issues raised by the complaint are: (1) an alleged refusal by the Respondent on October 13 and November 3 to sign a written agreement containing terms agreed upon, and (2) an alleged refusal to return employees to work upon their unconditional offer to return.

The preponderance of credible evidence, in the opinion of the Trial Examiner, fails to sustain either of these allegations. There is in the record no credible evidence to indicate that at any time did the Respondent refuse to sign a contract submitted to it containing terms it had agreed upon. On the contrary, it appears that both on October 13 and November 3 Carlson, as head of the local, arbitrarily altered or vetoed certain terms which the majority of the employees, in Poling's presence and with his apparent approval, had come to an agreement upon with Horton. Indeed, the very circumstance of the belated filing of a charge in February 1962 defies belief that the situation could have been one of refusing to sign an agreed-upon contract in the preceding October and November. Carlson is no novice in the field of collective-bargaining negotiations and an actual refusal to sign an understanding reached has been found since the early days of the Act to be an unlawful refusal to bargain.

General Counsel's own witness, Braswell, supported by the testimony of other employees, establishes beyond reasonable question—so far as this record is concerned—that the majority of the employees in the appropriate unit, with no inducement or persuasion on the part of the Respondent, decided to revoke their delegation of bargaining rights to the local. This right the law provides. A majority of the employees in the unit on November 17 having disavowed the Union as their agent, and since no contract or Board certification existed, after that date they were in effect free "principals," and the Respondent was under no obligation to deal with the Union as the majority representative.

As to the question of reemployment, the evidence does not support a finding that at any time were any of the employees refused employment after an "unconditional" offer to return. At all times the picketing continued. Because of the nature of the business—supplying concrete to contractors upon order, and not for "stock"—it would appear that Horton was fully justified in not considering a mere 30-day respite in the strike as an unconditional offer to return to work. The testimony of Horton and the employees is in agreement that upon their "unconditional" application for jobs, after disclaiming the Union as their agent, they were hired as need and opportunity arose. It is also undisputed that the only two who have not been put back to work refused to return when opportunity was offered by Horton in April 1962.

In short, the Trial Examiner does not believe that the evidence in this record is sufficient to sustain General Counsel's allegations that the Respondent has violated Section 8(a)(1), (3), and (5) of the Act.

It will therefore be recommended that the complaint be dismissed in its entirety.

RECOMMENDED ORDER

Having found that the Respondent has not violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act, as amended, the Trial Examiner recommends that the complaint in this case be dismissed in its entirely.