

(d) Each shall notify the Regional Director for the Third Region, in writing, within 20 days from the date of the issuance of this Intermediate Report and Recommended Order, what steps it has taken to comply herewith.⁶⁹

(e) It is further recommended that the complaint, as to the following cases, be dismissed:

Case No. 3-CA-1595	Case No. 3-CA-1747-2
Case No. 3-CA-1602-1	Case No. 3-CA-1748
Case No. 3-CA-1602-2	
Case No. 3-CA-1603-1	Case No. 3-CA-1753
Case No. 3-CA-1603-2	
Case No. 3-CA-1605	Case No. 3-CA-1756

⁶⁹ If this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify the Regional Director for the Third Region, in writing, within 10 days from the date of this Order, what steps the Respondents have taken to comply herewith"

American Lady Department Stores and Department and Variety Store Clerks Union, Local No. 170, Retail Clerks International Association, AFL-CIO. *Case No. 20-CA-2512. December 12, 1963*

DECISION AND ORDER

On August 14, 1963, Trial Examiner David F. Doyle 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 National Labor Relations Act, the Board has delegated its powers in connection with this case to a three-member panel [Chairman McCulloch and Members Fanning and Jenkins].

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the Respondent's exceptions and brief, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.¹

¹ The Respondent excepts to the Trial Examiner's finding that Vesteen White, who was laid off on December 29, 1962, was "senior in point of service to two other employees." It contends that Connie Castillo who was retained had more seniority. The record shows that White began her employment for the Respondent early in May 1962 when the Respondent purchased the men's department from its previous owner and took over its personnel. Castillo began her employment in January 1962 as a regular part-time employee in the women's department. A few weeks after the Respondent took over the men's department Castillo was transferred to that department as a full-time employee. Thus, it appears that while White had more seniority on a departmental basis, she was junior to Castillo on the overall basis. Goldstone's testimony shows that the length of service of an employee for the Company was not the sole and controlling factor in the selection of employees for the layoff. Other factors also were considered. As White admittedly was an "excellent"

ORDER

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

and the highest paid selling employee, performed certain special functions, was the one more familiar with the overall operations of the store, was the leading union adherent in the store, and, finally, as the Trial Examiner did not credit Goldstone's testimony as to why White was selected for the layoff, we adopt his ultimate conclusion that White was selected for the layoff because of her activities in behalf of the Union.

² The Recommended Order is hereby amended by substituting for the first paragraph therein, the following paragraph

Upon the entire record in this case, and pursuant to Section 10(c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that Respondent, American Lady Department Stores, its officers, agents, successors, and assigns, shall:

The following shall be added immediately below the signature line in the Appendix attached to the Intermediate Report

NOTE—We will notify the above-named employee if presently serving in the Armed Forces of the United States of her 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.

INTERMEDIATE REPORT AND RECOMMENDED ORDER

STATEMENT OF THE CASE

This proceeding came on regularly to be heard by Trial Examiner David F. Doyle at Fresno, California, on April 30 and May 1, 1963, upon a complaint of the General Counsel and an answer of the above-named Respondent.¹ The issues litigated were whether the Respondent had committed unfair labor practices in violation of Section 8(a)(1), (3), and (5) of the Act. At the hearing the parties were represented by counsel and were afforded full opportunity to present evidence, examine and cross-examine witnesses, and to present oral argument and briefs on the issues.

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

FINDINGS AND CONCLUSIONS

I. THE BUSINESS OF THE COMPANY

The pleadings and a stipulation of the parties establish that the Company is a California corporation with its main office and principal place of business at Los Angeles, California. It operates stores located in various cities within the State of California, including the city of Fresno. The Company engages in the retail sale of clothing and related merchandise. In the 12-month period prior to the issuance of the complaint, the Company, in the course and conduct of its business operations, effected sales valued in excess of \$500,000. The Company in the same period purchased and received, at its California operations, products valued in excess of \$50,000 directly from places located outside the State of California.

Upon the above facts, I find that the Company is an employer engaged in operations affecting commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Upon the pleadings and a stipulation of the parties, I find that the Union is, and at all times pertinent hereto has been, a labor organization within the meaning of Section 2(5) of the Act.

¹ In this report, Department and Variety Store Clerks Union, Local No 170, Retail Clerks International Association, AFL-CIO, is referred to as the Union, American Lady Department Stores as the Respondent or the Company, the General Counsel of the National Labor Relations Board and his representative at the hearing as the General Counsel, the National Labor Relations Board as the Board, and the Labor-Management Relations Act, as amended, as the Act.

The original charge herein was filed by the Union on December 27, 1962. A first amended charge was filed on January 7, 1963; a second amended charge, on February 4, 1963; a third amended charge, on March 5, 1963; and the instant complaint was issued by the Regional Director, Twentieth Region, on March 18, 1963

III. THE UNFAIR LABOR PRACTICES

A. *The issues*

The complaint alleges that the Company has violated the specific sections of the Act by: (1) Refusing to bargain with the Union; (2) bypassing the Union and offering a health and insurance plan directly to the employees; and (3) laying off Velma Vesteen White because of her activities in behalf of the Union.

The answer of the Company denies the commission of any unfair labor practices. At the hearing the Company contended that the layoff of Velma Vesteen White was required by a decrease in volume of business after the Christmas rush.

B. *The undisputed facts; the appropriate unit*

At the hearing, the parties stipulated that the employees named hereafter constituted a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act described as follows: "All selling and non-selling employees at the Respondent's Fresno, California, operation, excluding guards, and all supervisors as defined in the Act."

The parties further stipulated that on December 20, 1962, the appropriate unit described above was composed of the following employees: Velma Vesteen White, Connie Castillo, Adeline Castillo, Pearl Samuelson, Lucille Patterson, and William Schwabenland.

It is likewise undisputed that all of the above-named employees had been members of the Union for approximately 6 months prior to December 3, 1962.

It is also undisputed that the Company is a concessionaire of a discount house operating at Fresno, California, under the name and style of AFCO. The latter-named corporation offers to its customers approximately the same range and variety of merchandise as does the ordinary city department store. The Company utilizes sufficient space for its needs within the general premises of AFCO.

It is undisputed that on December 12, 1962, the Board conducted an election by secret ballot in an appropriate unit of employees of AFCO in Case No. 20-RM-485. The results of this election were: approximate number of eligible voters—38; void ballots—1; votes for the Union—9; votes cast against the Union—23. The valid votes counted—32.

It must be noted that the employees of the Company were not in any way involved in the election in this unit on December 12, 1962.

1. The demand for recognition on December 20, 1962

It is undisputed that the only store of the Company involved in this proceeding is the Fresno store and that Gilbert Goldstone is the management official in charge. Goldstone was called as a witness by the General Counsel and examined pursuant to rule 43(b) of the United States district court rules; he was also called by counsel for the Company. In the course of his testimony, Goldstone stated that he was the only management representative of the Company at the Fresno store and that he had no management assistants. He said that he directs the employees of the Fresno store in their duties and functions and that he had hired and fired employees at the store. He also had authority to grant time off, schedule vacations, and, within certain limits, determine rates of pay. Goldstone assigned work to the employees, directed their activities, and had authority to discipline employees.

Furthermore, various employees of the store testified that Goldstone was the manager of the store and the person who directed them in the performance of their duties and the one to whom they would present any questions pertaining to their work.

The Company concedes that Goldstone had the authority stated above, but it contends that Goldstone did not have authority to recognize the Union when the Union demanded recognition, as will be related hereinafter.

Joseph Mitchell, the secretary-treasurer of the Union, testified in a most creditable manner that in the latter part of November 1962 he requested employee Vesteen White to distribute union application cards among her fellow employees. Although all of the employees were at that time, and had been for many months, members of the Union, Mitchell desired to have fresh, recently signed applications for membership to exhibit to the management of the Company when he requested recognition of the Union as representative of the employees of the Fresno store. All of the employees in the appropriate unit signed the cards, and Vesteen White collected them and returned them to Mitchell shortly thereafter.²

² These cards are in evidence as General Counsel's Exhibits Nos. 11 through 16. Throughout the hearing Velma Vesteen White was referred to as Vesteen White.

On December 20, 1962, Mitchell went to the Fresno store and spoke to Goldstone. He told Goldstone that the purpose of his visit was to ask for recognition of the Union. He handed the application cards of the employees to Goldstone and told him that if Goldstone had any doubt that the Union represented all his employees, the cards would prove their unanimous affiliation with the Union. Goldstone asked Mitchell what he meant by "recognition" and Mitchell replied that if Goldstone recognized the Union as the representative of the employees on the basis of the application cards, that the men could then sit down and negotiate a contract. Goldstone replied that he had no authority to recognize the Union. Mitchell then asked him if he would pass the word to the management official who had the authority to recognize the Union and obtain an answer for him. Goldstone indicated that he would bring it to his superior's attention immediately. According to Mitchell, Goldstone volunteered the opinion that the Company would not recognize the Union. Thereafter, Mitchell received no communication from the Company in regard to recognition, so on December 27, 1962, the Union filed the original charge herein.

Goldstone's version of the conversation with Mitchell on December 20, 1962, was practically the same as Mitchell's. Goldstone testified that Mitchell asked him to recognize the Union as the bargaining representative of the employees, and that he replied that it was not up to him to make that decision. Goldstone said that Mitchell explained that if he recognized the Union, they could sit down and negotiate a contract but if the Company did not recognize the Union, the Union could seek a Board-conducted election. Goldstone testified that when he saw the application cards, presented to him by Mitchell, there was *no doubt* in his mind that all of his employees had signed the cards and were union members. According to Goldstone, Mitchell did not ask him to notify the Los Angeles office of the Company about Mitchell's request for recognition, but immediately after Mitchell left the store he notified the Los Angeles office of the fact of Mitchell's visit.

2. The meeting or group discussion of December 23, 1962

It is undisputed that on the above date Goldstone, accompanied by Swimmer, identified only as a vice president of AFCO, met with the employees

Adeline Castillo testified that a "group discussion" of employees occurred on this date. According to this witness, Swimmer, Goldstone, Samuelson, Patterson, and her sister Connie were present. White arrived late. She said that she had an unclear recollection of this discussion; that Swimmer told them about the insurance plan at his company but she didn't really understand much of it. She said that Goldstone was present but did not say anything. She said that in the course of the discussion the subject of the union cards, which the employees had signed, was brought up, but she did not remember who it was that introduced that topic. One of the men asked if the employees were still paying their union dues. This witness and employee Patterson both answered in the affirmative. Pearl Samuelson at that point stated that Vesteen White had been the one who had brought the union cards into the store for the employees to sign. Later in her testimony, the witness said that Swimmer stated that the employees listening to him could participate in the plan if they wished.

Connie Castillo testified that she attended this discussion but spent some time in a back room and did not hear much of what was said. Later in her testimony she said that the only thing she heard discussed was a party that was to be held at Christmas time. Goldstone and Swimmer discussed the party. She said that she did not recall anything being said about an insurance plan. The witness did recall that "Swimmer or someone" or "one of the girls" asked if the girls were still paying their dues to the Union. This witness spoke up and said that she was *no longer paying her dues*.

Pearl Samuelson testified that she was present at this group discussion. She testified that AFCO was going to have a Christmas party and Swimmer came to invite them to participate. According to Samuelson, they thanked him for the invitation. Then someone asked him about insurance, but she was not sure who asked this question. She did not recall any of the conversation thereafter except that in some way the Union was mentioned and Samuelson told the group that the union cards had been brought to the store by Vesteen White and that the employees had signed them. This witness was not sure of Goldstone's presence at the time she said this.

Vesteen White testified that when she reached the store on this date she saw the other employees and Goldstone and Swimmer engaged in a discussion. White hung up her coat. When she joined the group she heard Swimmer discussing a "medical plan." White understood this to be some kind of insurance plan for employees, but White did not understand much of what Swimmer said, except that it was some kind of a deductible insurance. White said that Goldstone was present throughout the discussion.

All these employee witnesses were presented as witnesses for the General Counsel. In connection with the testimony of Samuelson it should be noted that Goldstone testified that Samuelson volunteered the information to him on this date, that Vesteen White was the employee who had brought the union cards into the store and had gathered the signed cards from the employees.

3. The layoff of Vesteen White on December 29, 1962

Vesteen White testified credibly that on December 29, 1962, Goldstone, at the morning coffee break, asked her to have a cup of coffee with him. Taking their coffee, they went to the stockroom. There, Goldstone told her that the ladies' department was making more than the men's department and that he would have to lay her off for about a month. When she asked when the layoff was to be effective, Goldstone replied, on that day. At 5:30 p.m. when she was leaving the store, Goldstone came to her and said that the Company would like to have her back. White told him that was beside the point, that he had hired two girls after her and that he was laying her off. She said she didn't understand that. Goldstone again told her that she would be called back in about a month. At that point White said, "I know it is because of this union deal," and to this, Goldstone made no answer; he just dropped his head.

Tilford E. White, the husband of Vesteen White, testified credibly that when he learned of his wife's layoff, on the day it occurred, he went to the Fresno store and asked Goldstone why his wife was laid off. Goldstone replied that "it wasn't his idea, that it was like losing his right arm, he also had bosses." White told Goldstone that he believed his wife had been laid off because of "the union cards that she had brought down." To this Goldstone made no comment, but turned away.

It is undisputed that White was an excellent employee who carried out several important functions and duties, in addition to her regular selling tasks. She was the highest paid rank-and-file employee at the Fresno store.

The Company contends that White was laid off because business had declined after the Christmas rush. However, it is undisputed that White performed certain duties which were of a clerical character in addition to her sales duties and that she had been taught these duties and functions by Goldstone himself. From all the evidence it is clear that the termination of White was without notice and occurred without any sort of warning. Although White had been informed that she would be recalled to work in approximately 1 month, at the date of the hearing, approximately 4 months after her layoff, she had not been recalled.

Goldstone testified that after Christmas 1962 the store suffered a large decrease in its volume of business. Because of this, Goldstone and Marrow, a vice president of the Company, located in Los Angeles, conferred by telephone. They decided that someone should be laid off. It finally came to a choice between Connie Castillo and Vesteen White. Goldstone testified that White was chosen for layoff because White had the higher rate of pay and Goldstone considered their abilities as approximately the same. Also, Connie Castillo could speak Spanish which was an advantage, since the store had Spanish-speaking customers.

Goldstone testified that the union activities of individual employees did not play any part in the selection of White for layoff because he knew that all of the employees were members of the Union.

4. The Company's answer to the union demand

Jerry Rhodes, vice president of the Company, testified that shortly after the New Year, he returned to his office to find a copy of the original charge in this case in the mail. He showed it to Schwartz, president of the Company, who told Rhodes to take care of the matter. He then phoned Goldstone who told him that on December 20, 1962, Mitchell had come to the store, presented his union cards, and asked for recognition by the Company. Rhodes then asked Goldstone what the latter thought of the situation and Goldstone replied that he thought the employees would not want to go union, because the AFCO employees had voted out the Union, and his employees would not want to be a little island in the big store. Rhodes then consulted with Swimmer, an official of AFCO, who had much the same view as that expressed by Goldstone. When asked, Swimmer recommended Paul R. Doty, a Fresno lawyer, as a competent person to represent the Company. Rhodes then called Doty, and, after reviewing the situation with Doty, retained that counsel to act for the Company.

It is undisputed that on January 3, 1963, Doty, by letter to a field examiner of the Board, notified the Board that he represented the Company in the present case.

The next development occurred on February 8, 1963, when Doty addressed the following letter to the Regional Office of the Board:

Attention: Earl D. Brand, Field Examiner

Re: AMERICAN LADY DEPARTMENT STORES Case No. 20-CA-2512

DEAR MR. BRAND: On behalf of the above client, I am declining to enter into a stipulation of settlement of the above charge.

Our client *never agreed to abide* by the check-off of authorization cards. The employee who checked same *has no labor relations authority* or wage settling authority. The Employer had a *good faith doubt* as to the Union's majority status *before and after this meeting*.

We are willing to submit the matter to election and let the employees determine if they want the Union to represent them. We are willing to file a petition or consent to a Union-filed petition. This is the proper way to settle questions of representation, in our opinion. If the Union will consent to an election, the entire matter can be settled in a few days.

If the Union will not so agree, then if the Board is so inclined, we are ready to go to hearing.

[Emphasis supplied.]

Sincerely yours,

(S) Paul K. Doty,
PAUL. K. DOTY

5. The General Counsel's motion to reopen the record

Paragraph X of the complaint alleged that on December 23, 1962, the Company, by Goldstone in particular, bypassed the Union and offered directly to its employees a health and insurance plan.

As has been noted previously, the General Counsel called Goldstone, manager of the Fresno store, as a witness under rule 43(b) of the United States District Court rules. The General Counsel examined Goldstone on the refusal to bargain and on the discharge of Vesteen White, but did not question Goldstone concerning the initiation of the health and insurance plan.

When the General Counsel rested his case, counsel for the Company moved that paragraph X of the complaint be dismissed on the ground that the General Counsel had failed to make out a *prima facie* case. The General Counsel opposed the motion, taking the position that the evidence was sufficient. After hearing argument from both counsel, the Trial Examiner ruled that the evidence was insufficient to establish a *prima facie* case and dismissed this particular allegation of the complaint. In doing so, he pointed out that the record was devoid of any evidence to establish that Swimmer was at any time the agent or authorized spokesman for the Company.

On the next morning, the General Counsel moved that: (1) The Trial Examiner reconsider and rescind his order dismissing paragraph X of the complaint; (2) the Trial Examiner permit the General Counsel to reopen his case-in-chief; and (3) the Trial Examiner permit the General Counsel to present additional evidence in support of paragraph X of the complaint. Counsel for the Company opposed these motions.

The General Counsel in support of his motion said that he wished to recall Goldstone, whose testimony would establish that Swimmer had been authorized to speak for the Company. The General Counsel said that the testimony he wanted to elicit was contained in an affidavit made by Goldstone for an agent of the Board on January 11, 1963.

The Trial Examiner then pointed out to the General Counsel that: (1) This evidence was obtained by General Counsel's representatives on January 11, 1963, approximately 4 months before the hearing; (2) Goldstone had been sworn as a witness by the General Counsel and examined at length in General Counsel's case-in-chief; and (3) he had not been questioned concerning this phase of the case. The Trial Examiner then ruled that the motions of the General Counsel were not timely or legally sufficient at that point in the case, and dismissed them.

In his brief the General Counsel has renewed these motions on the ground that it is the duty of the Trial Examiner "to see that all the facts are set forth and the record fully developed."

The Trial Examiner is mindful of that duty, but he has other duties of equal importance. This is an adversary proceeding conducted pursuant to the Administrative Procedure Act and the rules of the United States district courts. If the General Counsel, who has the burden of proof, fails or neglects to prove a *prima facie* case in his case-in-chief, the Respondent on proper motion is entitled as a *matter of right* to the dismissal of that part of the complaint as to which there is a failure of proof. Here, that occurred. In the judgment of the Trial Examiner, if he were to permit such reopening, rescind his order of dismissal, receive the belated testimony, and on the basis of it find the Respondent guilty of an unfair labor practice, counsel

for Respondent would have some reason to complain that the Trial Examiner had not acted as an "impartial and fair trier-of-the-fact," but had treated the General Counsel as a favored litigant to the prejudice of the Company. The General Counsel's motions in this regard are again denied.³

Concluding Findings

It is undisputed that the Union, at all times pertinent hereto, represented all the Company's Fresno employees in an appropriate unit. At the hearing, each employee in the unit was called as a witness and testified that he or she had signed a union card. Furthermore, the record discloses that these employees had been fully paid-up union members for at least a period of months prior to the Union's demand for recognition on December 20, 1962. On that date, Mitchell informed Goldstone that the Union represented the Fresno employees and that the Union desired the Company to recognize the Union as the bargaining representative of its Fresno employees. Mitchell told Goldstone that if he would recognize the Union, they could immediately begin to negotiate a contract.

The Company contends that Mitchell did not make an unequivocal demand for recognition in his conversation with Goldstone on December 20, 1962, because, according to Goldstone, in that conversation Mitchell said that if the Company did not recognize the Union, the Union could ask for a Board-conducted election. In the light of all the evidence, I credit the testimony of Mitchell and find that in that conversation, Mitchell, on behalf of the Union, made a valid demand for recognition and bargaining. It is settled law that a demand for recognition need not follow a prescribed form so long as it is clear from the attendant circumstances that the union represents a majority of the employees and requests the company to acknowledge that fact by recognition of the union as bargaining representative. From the evidence here it is also clear that Goldstone was well aware of the fact that the Union represented *all* of the employees in the appropriate unit, and it is equally clear that he communicated to his superiors the substance of the Union's demand for recognition and informed them of the fact of the Union's majority status.

The testimony of Rhodes discloses that his holiday vacation occasioned some delay in the Company's consideration of Mitchell's demand. While his testimony may explain the Company's slowness in considering or dealing with the demand, it does not change the legal situation. When Mitchell requested recognition from Goldstone, he had made his request to the only management official in Fresno, and at that time and place it became the duty of Goldstone and his superiors to give the Union an answer. When the Company failed to reply to the Union's request for recognition by December 27, 1962, the Union had a right to file its charge of refusal to bargain with the Board.

But the Company, long before December 27, 1962, had effectively given its answer to the Union by its conduct. In the group discussion or meeting of December 23, the Company had learned that Vesteen White was the leading union adherent who had gathered the union cards. In that meeting it had polled the employees as to whether they were still paying their union dues and had learned that Connie Castillo was no longer paying her dues. Also, the conduct of Samuelson in informing on White could hardly have escaped the notice of Goldstone. On December 29, 1962, Vesteen White was laid off preemptorily and without notice.

After that point in the sequence of events, Doty's offer to consent to a Board-conducted election was an empty gesture which the Union had every right to reject. This brings us to a consideration of the layoff of Vesteen White.

It is undisputed that Goldstone told White, on December 29, 1962, that she was being laid off for approximately 1 month. At the hearing, some 4 months after her layoff, White testified that she had never been recalled by the Company. The Company attempted to justify the layoff of White on the ground that there was a decline in business after the Christmas rush. However, Goldstone admitted that White was an excellent employee and that she had been instructed by Goldstone

³ Cf. *Indianapolis Glove Company*, 88 NLRB 986, 987, in which the Board set aside an Intermediate Report saying, "Nevertheless, we feel that it is essential not only to avoid partiality and prejudice, and intimidation of witnesses in the conduct of Board proceedings, but also to avoid even the appearance of a partisan tribunal." This decision also refers to the opinion of the Supreme Court in *NLRB v. Donnelly Garment Company*, 330 U.S. 219, 237. "It takes time to avoid even the appearances of grievances. But it is time well spent even though it is not easy to satisfy interested parties, and defeated litigants, no matter how fairly treated, do not always have the feeling that they have received justice."

in performing certain special tasks so that of all the employees she was the one most familiar with the overall operation of the store. Furthermore, she was the highest paid selling employee at the Fresno location, and was senior in point of service to two other employees. In the light of these circumstances, the abrupt layoff of White, without any notice, does not appear to be a routine, normal, seasonal layoff. According to Goldstone, the choice for layoff finally narrowed down to White, the leading union adherent in the store, or Connie Castillo, who had told Goldstone that she was no longer paying her union dues. In the light of all the evidence, I cannot and do not credit Goldstone's testimony as to why he selected White for layoff. In my judgment, based upon all the evidence, White was laid off because of her activities in behalf of the Union, and her layoff constitutes a violation of Section 8(a) (3) and (1) of the Act.

This brings us to the question of the Company's alleged good-faith doubt as to the Union's majority status in the appropriate unit. This claim of the Company, in my judgment, does not merit serious consideration. According to Goldstone, he was well aware of the fact that for some months prior to the Union's demand for recognition, all his employees were members of the Union. Goldstone testified that he informed his superiors of this fact. Under those circumstances, there was no question to be resolved by an election. The employees were members of the Union, and management admittedly knew it. But the meeting of December 23, 1962, and the layoff of White was conduct which coerced the employees and undermined the standing of the Union in the unit. After that conduct a fair, uncoerced election became impossible. Therefore, in the light of all the evidence, I find that the Company did not have at any time a good-faith doubt as to the majority status of the Union in the unit of employees. On the contrary, I find that the Company knew the Union possessed majority status in the unit of employees, but refused to bargain with the Union while it set about destroying the majority status of the Union by coercing its employees and laying off White. I find that this conduct constitutes a refusal to bargain; a violation of Section 8(a) (5) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Company set forth in section III, above, occurring in connection with the operations of the Company described in section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and constitute unfair labor practices which tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that the Company has engaged in unfair labor practices violative of Section 8(a) (1), (3), and (5) of the Act, it will be recommended that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having also found that the Union represented, and now represents, a majority of the employees in the appropriate unit, and that the Company has refused to bargain collectively with it, the Trial Examiner will recommend that the Company, upon request, bargain collectively with the Union with respect to wages, rates of pay, hours of employment, or other conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

Having also found that the Company has discriminated in regard to the tenure of employment of Vesteen White, it shall be recommended that the Company offer to her immediate and full reinstatement to her former or substantially equivalent position, without prejudice to her seniority and other rights and privileges, and make her whole for any loss of pay she may have suffered by reason of the discrimination against her by payment to her of a sum of money equal to that which she would have earned as wages from the date of such discrimination to the date of reinstatement, or a proper offer of reinstatement, as the case may be, less her net earnings during such period; the backpay to be computed on a quarterly basis in the manner established by the Board in *F. W. Woolworth Company*, 90 NLRB 289, with interest at the rate of 6 percent as established and computed in *Isis Plumbing and Heating Co.*, 138 NLRB 716.

Upon the above findings of fact, and upon the entire record in the case, the Trial Examiner makes the following:

CONCLUSIONS OF LAW

1. American Lady Department Stores is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Department and Variety Store Clerks Union, Local No. 170, Retail Clerks International Association, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By discriminating in regard to the tenure of employment of its employees by the discriminatory layoff of Vesteen White, the Company has violated Section 8(a)(1) and (3) of the Act.

4. All selling and nonselling employees at the Company's Fresno, California, operation, excluding guards and all supervisors as defined in the Act, form a unit appropriate for the purposes of collective bargaining.

5. The Union was on December 20, 1962, and at all times thereafter has been and is, the exclusive representative of all the employees in the aforesaid unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

6. By refusing on December 20, 1962, and at all times thereafter, to bargain collectively with the Union as the exclusive representative of all its employees in the aforesaid appropriate unit, the Company has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act, as amended.

7. By the aforesaid refusal to bargain and the aforesaid discriminatory layoff of Vesteen White, the Company has interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act, and has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act, as amended.

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

RECOMMENDED ORDER

Upon the basis of the above findings of fact and conclusions of law, and upon the entire record in the case, the Trial Examiner recommends that the Respondent, American Lady Department Stores, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with the Union as the exclusive representative of all selling and nonselling employees at the Company's Fresno, California, operation, excluding guards and all supervisors as defined in the Act.

(b) Discouraging membership in Department and Variety Store Clerks Union, Local No. 170, Retail Clerks International Association, AFL-CIO, or any other labor organization of its employees, by discharging, laying off, or refusing to reinstate or in any other manner discriminating against employees in regard to their hire or tenure of employment or any term or condition of employment.

(c) In any other manner interfering with, restraining, or coercing its employees in the exercise of their right to self-organization, to form labor organizations, to join or assist Department and Variety Store Clerks Union, Local No. 170, Retail Clerks International Association, AFL-CIO, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities.

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

(a) Upon request, bargain collectively with Department and Variety Store Clerks Union, Local No. 170, Retail Clerks International Association, AFL-CIO, as the exclusive bargaining representative of all the employees in the aforesaid appropriate unit with respect to wages, rates of pay, hours of employment, or other conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Offer Vesteen White immediate and full reinstatement to her former or substantially equivalent position, without prejudice to her seniority and other rights and privileges, and make her whole for any loss of pay she may have suffered by reason of the discrimination against her, in the manner set forth in the section of this report entitled "The Remedy."

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, time-cards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Recommended Order.

(d) Post at its store in Fresno, California, copies of the attached notice marked Appendix.⁴ Copies of said notice, to be furnished by the Regional Director for

⁴ 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

the Twentieth Region, shall, after being duly signed by the Company's representative, be posted immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. The Company shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for the Twentieth Region, in writing, within 20 days from the date of receipt of this Intermediate Report, what steps the Company has taken to comply herewith.⁵

It is further recommended that, unless the Company shall within 20 days from the date of receipt of this Intermediate Report notify said Regional Director, in writing, that it will comply with the foregoing Recommended Order, the National Labor Relations Board issue an order requiring the Company to take the action aforesaid.

Examiner" in the notice. In the further event that the Board's Order be enforced by a decree of a United States Court of Appeals, the words "A Decree of the United States Court of Appeals, Enforcing an Order" shall be substituted for the words "A Decision and Order."

⁵ 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 Company 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 you that:

WE WILL bargain collectively, upon request, with Department and Variety Store Clerks Union, Local No. 170, Retail Clerks International Association, AFL-CIO, as the exclusive representative of all employees in the bargaining unit, described herein, with respect to wages, rates of pay, hours of employment, or other terms or conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All selling and nonselling employees at our Fresno, California, operation, excluding guards and all supervisors as defined in the Act.

WE WILL NOT discourage membership in the above-named Union, or any other labor organization of our employees, by discharging, laying off, or refusing to reinstate, or in any other manner discriminating against them in regard to their hire or tenure of employment, or any term or condition of employment.

WE WILL offer Vesteen White immediate and full reinstatement to her former or substantially equivalent position, without prejudice to her seniority or other rights and privileges previously enjoyed, and make her whole for any loss of pay suffered by her as a result of our discrimination against her.

WE WILL NOT in any manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form labor organizations, to join or assist the Union named above, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purposes of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities.

All our employees are free to become or remain, or to refrain from becoming or remaining, members of Department and Variety Store Clerks Union, Local No. 170, Retail Clerks International Association, AFL-CIO, or any other labor organization.

AMERICAN LADY DEPARTMENT STORES,
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, 830 Market Street, San Francisco, California, Telephone No. Yukon 6-3500, Extension 3191, if they have any question concerning this notice or compliance with its provisions.