

have earned as wages from the date of the discrimination against him to the date of his reinstatement less his net earnings during such period in accordance with the formula set forth in *F. W. Woolworth Company*, 90 NLRB 289, with interest thereon at the rate of 6 percent per annum computed in the manner set forth in *Isis Plumbing & Heating Co.*, 138 NLRB 716.

Because of the variety and the extent of the unfair labor practices engaged in by Respondent, I sense an attitude of opposition to the purposes of the Act in general, and hence, deem it necessary to order that Respondent cease and desist from in any manner infringing upon the rights guaranteed to employees in Section 7 of the Act.

Upon the basis of the above findings of fact and upon the entire record in the case, I make the following:

CONCLUSIONS OF LAW

1. Display Fixture, Smoking Pipe, Plastics & Production Workers Union, Local 2682, United Brotherhood of Carpenters & Joiners of America, AFL-CIO, and Local 325 of the Paper Makers Union are labor organizations within the meaning of Section 2(5) of the Act.

2. Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

3. By discharging Abraham Axelrod on June 25, 1963, thereby discriminating in regard to his hire and tenure of employment and thereby discouraging concerted and union activities among its employees, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a) (3) and (1) of the Act.

4. By interfering with, restraining, and coercing its employees in the exercise of their rights guaranteed them in Section 7 of the Act, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

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

[Recommended Order omitted from publication.]

American Compressed Steel Corporation and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and Local 152, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. *Cases Nos. 9-CA-2932 and 9-CA-2968. May 8, 1964*

DECISION AND ORDER

On January 6, 1964, Trial Examiner Frederick U. Reel issued his Decision 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 Trial Examiner's Decision. The Trial Examiner also found that the Respondent had not engaged in certain other unfair labor practices, and recommended that the allegations of the complaint pertaining thereto be dismissed. Thereafter, the General Counsel and the Respondent filed exceptions to the Trial Examiner's Decision and supporting briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, the Board has delegated its powers in connection with these cases 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.¹ The Board has considered the Trial Examiner's Decision, the exceptions and briefs, and the entire record in these cases, and hereby adopts the findings, conclusions,² and recommendations of the Trial Examiner.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the Board hereby adopts as its Order, the Order recommended by the Trial Examiner, and in conformity with his findings, his Order is hereby amended by:

1. Substituting for paragraphs 1(a) and (b), the following:

(a) Threatening or unlawfully interrogating employees with respect to their membership in, or activities on behalf of, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization.

¹ During the course of the hearing, Respondent moved that the Trial Examiner either hold the hearing open or grant a continuance in order to allow it time to examine the authenticity of the membership cards submitted in support of the Union's majority claim. The Trial Examiner declined to grant either request, but did instruct Respondent that he would, at any time before the issuance of his decision, entertain a motion to reopen the record to take evidence as to authenticity, if Respondent stated with particularity sufficient cause to warrant such action. He noted particularly that, if a motion were made to reopen the hearing for the purpose of challenging the handwriting on the cards—Respondent was given copies of the cards introduced into evidence for the purpose of having them examined by a handwriting expert—he would in all probability grant the motion. He declined, however, to commit himself in advance of the event as to his ruling on any motion that might be filed challenging authenticity of the cards on other grounds. Respondent's counsel did not object on the record, or in his exceptions, to the Trial Examiner's decision as to the period of time given to prepare his defenses on this issue, although he did object to the Trial Examiner's refusal to commit himself to reopening the record if the cards were timely challenged on grounds other than an attack on the handwriting.

Although 54 days passed from close of hearing to issuance of the Trial Examiner's Decision on January 6, Respondent filed no such motion with the Trial Examiner. A motion to reopen was filed with the Board on January 31, 1964, stating simply that "Respondent is prepared to submit testimony that three cards . . . are not genuine and that the signature of one additional card so offered was affixed thereon on April 28, 1963, rather than April 20, 1963, the date indicated on the cards."

We have carefully considered the circumstances which have given rise to the motion, including the Trial Examiner's rulings as to the manner and time available to Respondent to adequately present its case on the validity of the cards. We believe those rulings were eminently fair and reasonable, and afforded Respondent ample opportunity to prepare and present its case. Respondent took no specific exception thereto either at the hearing, in its exceptions to the Trial Examiner's Decision, or in its motion to the Board. Further, its motion neither states with particularity the nature of the evidence supporting its challenge to the authenticity of the cards, nor sets forth the reasons why it did not file a motion with the Trial Examiner within the time limits allowed. For all the foregoing reasons we deny the motion.

² The Trial Examiner in his conclusions of law states that Respondent refused to bargain "on or after April 21, 1963" ("Conclusions of Law," paragraph 3 of his Decision). This was apparently an inadvertent error, and is hereby corrected to read "April 25, 1963," in conformity with his findings in the second paragraph, part B, 3, of his Decision.

(b) Discriminating against any employee because of membership in, or activity on behalf of, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization.

2. Adding to paragraph 1 the following:

(c) Requesting employees to influence other employees to drop out of International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization.

(d) In any other manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed under Section 7 of the Act.

3. Changing the designation of paragraph (c) to (e).

4. Adding to paragraph 2(a) the following: "and embody in a signed agreement any understanding reached."

5. Substituting the Appendix attached hereto for the Trial Examiner's recommended notice.

APPENDIX

NOTICE TO ALL EMPLOYEES

Pursuant to a Decision and Order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify you that:

WE WILL, upon request, bargain collectively with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America as the representative of all the employees in the bargaining unit described below with respect to rates of pay, wages, hours of employment and other conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All production and maintenance employees at our place of business in Cincinnati, Ohio, including truckdrivers, but excluding the weigher, the cashier, part-time employees, watchmen, office clerical employees, and all guards, professional employees, and supervisors as defined in the Act.

WE WILL offer John Greer his former job as an over-the-road driver, and pay him for wages he lost since September 18, 1963.

WE WILL NOT ask employees to influence other employees to drop out of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization.

WE WILL NOT threaten or interrogate our employees with respect to their membership in, or activities on behalf of, the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization.

WE WILL NOT discriminate against any employee because of membership in, or activity on behalf of, the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their rights guaranteed under Section 7 of the Act, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a) (3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959.

All our employees are free to become or remain, or to refrain from becoming or remaining, members in good standing of said International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization.

AMERICAN COMPRESSED STEEL CORPORATION,
Employer.

Dated _____ By _____
(Representative) (Title)

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

Employees may communicate directly with the Board's Regional Office, Room 2023, Federal Office Building, 550 Main Street, Cincinnati, Ohio, Telephone No. 381-2200, if they have any questions concerning this notice or compliance with its provisions.

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

These cases, consolidated by order of the Regional Director, were heard before Trial Examiner Frederick U. Reel at Cincinnati, Ohio, on November 12-14, 1963,¹ pursuant to charges filed August 7 and September 19 and complaints issued September 20 and October 18. At issue are whether Respondent committed various acts of interference, restraint, and coercion, discriminated against three employees because of their union activity, and unlawfully refused to bargain with the Union which represented its employees. Upon the entire record,² including my observation of the witnesses, I make the following:

¹ All dates herein refer to 1963 unless otherwise indicated.

² But without the assistance of briefs from any of the parties, although time for filing such briefs was extended to the date requested by counsel for Respondent.

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT AND THE LABOR ORGANIZATIONS INVOLVED

Respondent, a New Jersey corporation, herein called the Company, is engaged in processing and selling scrap metal in Cincinnati, Ohio, annually ships in excess of \$50,000 worth of goods and products to points outside that State, and is engaged in commerce within the meaning of the Act. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called the Union, and its Local 152, are labor organizations within the meaning of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

Introduction

The Union started to organize the Company's employees in mid-March 1963. By mid-April, a number of employees had signed authorization cards, and the Union requested recognition, but the Company refused. The Union promptly filed a representation petition, which went to hearing, but was later dismissed because of the charges filed in the instant proceeding. General Counsel alleges that the Company committed various acts of interference, restraint, and coercion, that it discharged three employees (directly in one case, and constructively in two others) because of union activity, that its refusal to bargain was based on a desire to undermine the Union rather than on a good-faith doubt of majority, and that an appropriate remedial order should issue, directing, *inter alia*, that the Company reinstate the three employees with backpay and bargain with the Union. The Company denies committing any of the alleged unfair labor practices.

A. Interference, restraint, and coercion

The president of the Company is one Abe Byer, whose two sons, Herbert and Larry, are foremen or managers and admittedly supervisors within the meaning of the Act. The complaint attributes various acts and statements of interference, restraint, and coercion to Herbert Byer, one such statement to Larry Byer, and one such statement to one Goodwin, alleged to be a supervisory employee, and so found in the aborted representation proceeding. Larry Byer impressed me as a thoroughly credible witness and I fully credit his testimony in which he denies making the statements attributed to him. Although Goodwin was not called as a witness, the sole testimony attributing unlawful interrogation to him came from one Johnson, whose testimony in critical respects differed sharply from his pretrial affidavit. I therefore make no finding adverse to the Company based on Johnson's testimony. As noted below, I find violations of the Act based on the conduct and statements of Herbert Byer, and any further violation by Goodwin would be only cumulative. If, on the other hand, I am in error as to Herbert Byer, then the alleged interrogation by Goodwin, even if found, would be isolated and would not warrant remedial relief. In short, the following discussion of Section 8(a)(1) violations herein is confined to episodes involving Herbert Byer.³

1. Baker's testimony

Testimony concerning Byer's acts and statements came from three employees, whose later separations from the payroll are here alleged to have violated Section 8(a)(3); Robert Baker, John Greer, and Sylvester Vaughn. According to Baker, who was employed as a "burner" in the yard, Byer approached him at work about April 10 or 12 and asked if he knew anything about the Union. Baker denied any knowledge of the matter, but Byer professed not to believe him. Byer continued, according to Baker's testimony, that "he wasn't going to have no union in there; and if he'd get a union in there, he'd fire everyone he thought was for the union."

About April 27 or 28, according to Baker, Byer again approached him at work, asked if he had learned any more about the Union, and expressed disbelief at Baker's denial. Byer then asked Baker, according to the latter's testimony, to talk to the employees and get them "to vote for the union out, they wasn't going to get in there; they wasn't going to have no union."

About July 18, according to Baker, Byer asked him to get into Byer's car, and they took a short ride, parking on the riverbank. According to Baker, on this occasion Byer learned from Baker how many hours Baker was working and what his gross pay was, and then said that if the Union came in, Baker would be making less as his

³ Hereinafter the name "Byer" where it stands alone refers to Herbert Byer.

hours would be cut. According to Baker, on this occasion Byer "first said he would fire everybody he thought was for the Union, and then he changed it and said, 'No,' he said, 'I won't fire them.' He said, 'I'll make it so hard, they'll probably fire themselves.'"

2. Greer's testimony

Greer, a truckdriver, and a leading proponent of the Union, testified that on April 22 Byer told him in the course of a conversation that "there wouldn't be a union in there as long as he owned the place, and if we got a union in, he could close the place up. His father and his brother know where they could get their next meal from, but we didn't." On this occasion, according to Greer, Byer expressed disbelief when Greer denied knowledge of the Union, and added that he (Byer) knew every man who had signed a union card. Greer further testified that on this occasion Byer stated: "I can get rid of every one of you just like that and hire new fellows, but I'm not going to fire you, but I'm going to make it so damn hard for you until you quit."

In mid-July, according to Greer, he had a good deal of tire trouble on an intercity trip in a company truck. He testified that when he returned, the first thing Byer said was "to get the union men to find me a damn job." Byer added, according to Greer, that Greer had been having trouble whenever he went on a trip and that he (Byer) had "been having trouble with you ever since you fellows started with that Union." Greer testified that Byer then shook his finger at Greer and said, "You're a big man, John, but it don't mean a damn thing to me." Late in August, according to Greer, Byer said to him, "All your boys are leaving here,⁴ John; what you gonna do?"

The complaint alleges that Greer was transferred to less desirable work and that this transfer violated Section 8(a)(1). This matter is discussed *infra* in connection with Greer's termination.

3. Vaughn's testimony

According to Vaughn, a truckdriver, Byer said to him on April 5, "I heard you was one of those cardholders," and when Vaughn expressed ignorance as to what Byer was talking about, the latter continued: "I know you signed a card, one of those union cards, because my boys said you had . . . I just want to let you know you're on the loser's side." Vaughn further testified that later in April on several occasions Byer would tell him such things as "I never had a union down here; I never will have no union down here; before I will have a union I'll close up first; and a union wouldn't do you no good no ways because it would only hurt you and your pay, because whereas you're making 40 hours a week now you wouldn't be if I had a union in here, because the way I let you work around in the yard after your truck work is done, I wouldn't." Vaughn also recounted an occasion in June when he had tire trouble and Byer said to him that he ruined the tire, that Byer could fire him for it, and "there's nothing the union could do about it . . . Do you think the union could get you a job if I fired you? You'd better get your mind on my business and not union business."

4. Concluding findings as to interference, restraint, and coercion

Herbert Byer categorically denied the various statements attributed to him; and indeed stated that he was unaware of any union activity until the Union requested bargaining in mid-April. Thereafter, according to Byer, his occasional comments to the employees about the Union were confined to stating reasons why he thought they did not need a union, coupled with reassurances that the matter was for them to decide as they saw fit.

We are confronted, in short, with neither more nor less than a flat conflict in testimony, and the need for resolving the credibility of witnesses. No problem is more typical, or—for this Trial Examiner, at least—more difficult than deciding which of two persons who have sworn to tell the truth is not doing so. Certain aids, sometimes present in other cases, are absent here. None of the witnesses involved (Greer, Baker, and Vaughn on the one hand, and Byer on the other) can be termed disinterested. Nothing in the testimony of any of them, insofar as it relates

⁴ My recollection, corroborated by my notes, is that Greer in his testimony said the word "you," not "here" as reported in the transcript of testimony. The sense of the statement, that Greer as a union leader was losing support in the ranks, is unaffected whichever word is correct. In the absence of a motion to correct the transcript, it will stand as reported. Should the parties concur in my recollection, they may stipulate for correction of the record before the Board.

to the above matters, is inherently improbable. Shorn of such extrinsic or intrinsic aids in assessing credibility, one turns to the "demeanor" of the witnesses. As to this, I must state that I found Herbert Byer a puzzling witness. At times he seemed to me to be less than candid, notably when he indicated that he had not heard of the Union until mid-April, did not discuss the matter with counsel until about May 1, and never mentioned it to the employees in the interim.⁵ On other occasions, however, I felt that my adverse reaction to his testimony might merely reflect that his personality was less appealing to me than, for example, that of his brother Larry, who testified after him and whom I find thoroughly credible. And at some points in Herbert Byer's testimony, I felt that he was making a sincere effort to recall accurately and testify as to the exact truth.

On the other hand, I was never assailed by any doubt as to the testimony of Baker, who impressed me as an unusually fine witness, testifying with high regard for the truth as he remembered it. Faced with a conflict in testimony between Baker and Byer, I credit the former. Having thus credited Baker, I likewise credit the testimony of Greer and Vaughn, described above, as it is consistent with that of Baker, in the sense that they attributed to Byer statements similar to those he made to Baker.

In crediting Greer and Vaughn over Byer, I should note that in certain other respects I am not crediting their testimony. Insofar as Greer's testimony differs from Larry Byer's, I accept the latter's version. This does not seriously reflect on the overall veracity of Greer, for Larry Byer's version of their interview suggests that although Larry was discussing the impact of the union contract at another plant, Greer could easily have misunderstood him to be threatening deteriorating conditions at his own. More serious is the problem of crediting Vaughn, for, as appears below, he testified falsely with respect to his own change of employment. But the maxim "*falsus in uno, falsus in omnibus*" is far from absolute (*Virginian Ry. v. Armentrout*, 166 F. 2d 400, 405-406 (C.A. 4)), and while I discredit Vaughn where his testimony concerns his job-seeking efforts, I credit his version of his conversations with Byer in which Vaughn attributes to Byer statements similar to those Byer made to Baker.

In sum, I find that Byer countered the union campaign by threats to close the plant if the Union came in, by threats to fire union adherents or to make conditions so difficult they would quit, by interrogating employees as to what they knew about the Union, and by stating that he knew who had signed union cards. This conduct on the part of Byer manifestly violated Section 8(a)(1) of the Act, and I so find.

B. *The refusal to bargain*

1. The Company refuses recognition; the representation proceeding; the unit

On April 18 the Union orally asked the Company for recognition as the statutory bargaining representative of the employees, claiming that it represented a majority. The Company replied through one of the Byerses that it was not interested in talking to the Union. On the same date the Union sent a registered letter to the Company repeating its request. The Company ignored the letter, and on April 22 the Union filed with the Board a petition for certification.

In due course the representation proceeding thus initiated (Case No. 9-RC-5377) came on for hearing, after which the Regional Director on July 2 issued a Direction of Election. In the Direction of Election the Regional Director noted that the parties were in disagreement as to whether certain employees were included within the bargaining unit. Sustaining the Company's position with respect to certain employees and the Union's position with respect to others, the Regional Director concluded, *inter alia*, that two leadmen, the weigher and the cashier, should be excluded from the unit. With these exclusions, evidence before me establishes that as of April 25 the unit consisted of 61 employees, so that 31 would constitute a majority.⁶ I accordingly find, "based . . . in part upon facts certified following an investigation pursuant to "Section 9(c) of the Act (see Section 9(d)), that the appropriate unit is that found in the representation proceeding, namely, "All production and maintenance employees employed by the Employer at its place of busi-

⁵ Contrast Herbert Byer's grudging admission, "I think I knew an incident in one yard where the union had a union vote," with Larry Byer's candid statements that he had heard of several yards being organized, that "there were plenty of rumors buzzing," and that organizing at other yards had been going on for some time.

⁶ The figure of "61" includes the inside salesman as to whom the Regional Director made no determination. Even if he be excluded, and the unit reduced to 60, the number for a majority would remain 31.

ness in Cincinnati, Ohio, including truckdrivers, but excluding the weigher, the cashier, part-time employees, watchmen, office clerical employees, and all guards, professional employees and supervisors as defined in the Act."

o 2. The Union's majority

At the time the Union demanded recognition on April 18, it believed that the unit consisted of 44 or 45, and it held authorization cards from 26, employees. It did not obtain its 31st card (i.e., enough to constitute a majority of the unit) until April 25. The Union made no further formal demand for recognition except insofar as its continued participation in the representation proceeding evidenced its continuing demand. On August 7, however, the Union filed the charge initiating this proceeding, and alleged therein that the Company committed various illegal acts, some of which have been found above to constitute unfair labor practices. The charge also alleged a violation by the Company of its bargaining obligation, stating that upon the Union's bargaining demand, the Company "refused recognition and began activity to destroy the majority in violation of Section 8(a)(5) of the Act." With the filing of this charge, and the subsequent issuance of the complaint in this case, the election machinery set in motion by the Union's petition for certification was terminated and the representation proceeding was withdrawn on October 3.

3. Concluding findings with respect to the refusal to bargain

General Counsel introduced into evidence 31 cards signed by employees authorizing the Union to act as their bargaining representative.⁷ As noted above, the bargaining unit embraces 60 or 61 employees, and 31 constitutes a majority. The law is well settled that where a union in fact represents a majority of the employees (a fact which may be evidenced, as here, by authorization cards) and the employer thereafter engages in unfair labor practices which tend to undermine the Union's majority and which prevent the holding of a fair election (such as the threats and other unlawful conduct of Herbert Byer as found above) the Board may appropriately remedy the unfair labor practices and restore the *status quo ante* by directing the employer to bargain with the union. See, e.g., *N.L.R.B. v. Model Mill Company, Inc.*, 210 F. 2d 829 (C.A. 6); *N.L.R.B. v. Armco Drainage & Metal Products, Inc.*, 220 F. 2d 573, 577 (C.A. 6), cert. denied 350 U.S. 838.

The instant case differs from the cases cited above in that here the Union lacked a majority at the time of its bargaining request on April 18, and first achieved majority status on April 25. The Company's refusal to bargain, however, was not based on the fact that the Union held only 26 cards on April 18, but rather on an outright rejection of the Union's request without regard to the number of cards held. In the light of this refusal it would have been futile for the Union formally to renew its request after April 25. Cf. *N.L.R.B. v. Burton-Dixie Corporation*, 210 F. 2d 199, 200, 201 (C.A. 10), where the union lacked a majority at the time it requested recognition, but where the request was understood to be of a continuing character. In *Burton-Dixie*, as here, the employer's attitude made it quite clear that a later request would have been futile, and the court's holding there that the Board properly found a refusal to bargain suggests the propriety of a similar holding here. See also *Scobell Chemical Company v. N.L.R.B.*, 267 F. 2d 922, 925 (C.A. 2), where the court, assuming that the union lacked a majority at the time of its bargaining request, found that it had such a majority the next day, and held that in the light of the strike and picketing which there ensued, the union's request for bargaining must be deemed a continuing request. The instant case is like *Scobell* except that here, instead of striking and picketing, the Union pursued its bargaining request through a petition for certification, until the Company's unfair labor practices rendered the

⁷ Although the Company filed no brief, the cross-examination conducted by its counsel suggested that it might seek to challenge the validity of the cards on the theory that the signatures were procured by misrepresentations. I find, however, that the cards, which on their face designate the Union as the bargaining representative of the signatory, were validly procured, and the occasional references to the fact that they would be used to obtain an election did not mislead the employees. See *Joy Silk Mills, Inc. v. N.L.R.B.*, 185 F. 2d 732, 743 (C.A.D.C.), cert. denied 341 U.S. 914; *N.L.R.B. v. Gorbea, Perez & Morell, S. en C.*, 300 F. 2d 886 (C.A. 1); *N.L.R.B. v. Sunshine Mining Co.*, 110 F. 2d 780, 790 (C.A. 9); *N.L.R.B. v. Geigy Company*, 211 F. 2d 553, 556 (C.A. 9); *N.L.R.B. v. Stow Manufacturing Co.*, 217 F. 2d 900, 902 (C.A. 2), cert. denied 348 U.S. 964; *Dan River Mills, Incorporated*, 121 NLRB 645, 648-665, footnote 10, set aside on other grounds, 274 F. 2d 381 (C.A. 5).

election route impassable. Surely the Union here should not be in a worse position than the union in *Scobell* for having followed peaceful procedures in pressing its continuing demand. I find, therefore, that the Company's refusal to recognize the Union after April 25 violated Section 8(a) (5) and (1) of the Act.

Even if the absence of a formal request after April 25 were fatal to the claim of refusal to bargain, moreover, an affirmative bargaining order would be appropriate to remedy the violations found above, and to restore the *status quo ante*. See *Greystone Knitwear Corp.*, 136 NLRB 573, 575-576, enfd. 311 F. 2d 794 (C.A. 2), and see also the decisions of the First, Third, Fifth, and Eighth Circuits cited in *Greystone*, 136 NLRB at 576, footnote 4.

C. The alleged discriminatory discharge

1. Sylvester Vaughn

Vaughn testified that he worked for the Company as a truckdriver from October 1960 until he quit on August 7, 1963. He signed a union card in the spring of 1963, and at that time also obtained the signatures of other employees on such cards. According to Vaughn, in July 1963 after his conversations with Herbert Byer, described above, he was no longer permitted to engage in yardwork for the Company on Saturdays, as had been his custom prior thereto. (On cross-examination Vaughn admitted that on only one occasion in July was he told not to come in on Saturday, and thereafter he did not report on Saturdays because he was not specifically directed to do so.) He further testified that on several occasions in July 1963 he was told to clock out early in the afternoon, whereas prior to that time he had been permitted to do yardwork until 5 p.m. if he had no driving assignment. Finally, according to Vaughn, on August 6, Herbert Byer ordered him out of the restroom at 4 p.m., stating that Vaughn should not use those facilities on his employer's time, and on August 7 he was told to clock out at 2 p.m.

These harassments, according to Vaughn, were the last straws, so he did not return to work on Thursday, August 8, but instead looked for another job.

From the foregoing testimony, as well as from Vaughn's earlier conversations with Herbert Byer, recounted above, General Counsel asserts that Vaughn was "constructively discharged," and more particularly that the Company harassed him because of his union activity until his working conditions became intolerable. But the records introduced by the Company show that Vaughn worked overtime in every week in July except that in which the July 4 holiday fell, that he applied for a job at another company on August 5, before the "critical events" of August 6 and 7, and that on the morning of August 8 he went to work for his new employer who paid him \$2.86 per hour instead of the \$1.25 paid by the Company. In the light of these facts, as well as the fact that Vaughn testified falsely in stating that he had not applied for work elsewhere before August 8 and had not worked on August 8 and 9, I find that the claim of constructive discharge in his case is not supported by the record, and the complaint as to him should be dismissed.

2. Robert Baker

Baker had worked for the Company from 1945 to 1956, except for a 17-month absence in 1952-54, and resumed his employment there in March 1963. He was discharged July 24, 1963, under circumstances described below. He had 16 years' experience as a burner or torch operator, and his job at the time of his discharge involved the use of a gas burner or torch. Baker's conversations with Herbert Byer concerning the Union have been summarized above.

On July 23, after working hours, Baker drove a number of fellow employees to a restaurant some 30 blocks from the plant. At this restaurant he discussed the Union with the group in the booth in which he was sitting. As he left the restaurant, he met Union Representative Felder, and at the latter's suggestion signed a union card. The next morning when Baker arrived at work, Herbert Byer discharged him for an alleged failure to shut off the gas valves when he left work the night before.

Baker stoutly maintained, both at the time and again on the witness stand, that he had shut off the gas before leaving work that night. Contrary testimony was introduced by the Company. All witnesses on the point, including Baker, agreed that failure to turn off the gas involved a risk of explosion. I was very favorably impressed by Baker's demeanor as a witness, but cannot discount entirely the possibility that he simply made a mistake. Whether Baker's mistake—if such it was—should have been penalized by discharge, especially in the light of his long years of service, is not for me to judge. For, on this record, notwithstanding the fact

that he had signed a union card the night before, there is not a scintilla of evidence that the Company knew of his action. To be sure, Herbert Byer had earlier intimated that he thought Baker was in the Union, and Byer had also stated that he knew who had signed union cards, but the Company did not discharge outright any other union members. On the entire record, while my sympathies are with Baker because of his forthright manner and because of his long service, I cannot find that the Company had knowledge of his union activity or that his discharge on July 24 was related thereto. I must therefore recommend dismissal of the complaint as to him.

3. John Greer

Greer at the time of the events in question had been in the Company's employ for approximately 15 years except for brief interruptions. For most of this time he had been a truckdriver and in the years immediately preceding the advent of the Union his primary occupation had been over-the-road hauling from such cities as Louisville and New Albany to Cincinnati. Greer became the chief union protagonist among the employees; of the 30 signed union cards offered in evidence in addition to Greer's own, he had obtained the signatures on 17.

Greer's conversations with Herbert Byer, described above, establish that Byer knew of Greer's union activity, and that Byer, among other threats, said to Greer, "I'm going to make it so damn hard for you until you quit." General Counsel alleges that the Company sought to implement this threat in the summer of 1963 by transferring Greer from his over-the-road hauling to the disagreeable job of hauling tin cans from local dumps, a task which involved picking up, dumping, and frequently raking filthy, vermin-infested cans. The Company admits that Greer received more "can dump" assignments in the summer of 1963, but attributes this to the departure from its employ of one Jenkins, and to the fact that only some of its drivers, Greer among them, were capable of operating the type of truck used to haul and unload cans.

Greer's testimony that prior to the summer of 1963 he rarely went on dump trips, about once a month, is generally substantiated by company records as read into the transcript by Herbert Byer. In March, for example, Greer made three such trips in the second week, but thereafter he had only one such trip in April, and one in each of 3 weeks in May. In the 14 weeks beginning in March, there were nine in which he made no such trips, including one stretch of 8 weeks which found him on such a trip only once. But beginning in June the number of such assignments increased, until it reached 11 in August and 7 for the first 18 days of September. The same records, however, would seem to indicate that Greer exaggerated the decline in his nondump hauling, for they show that in August, Greer made 58 other trips, far more than in any other month. On the other hand Greer's time record does not show any appreciable variance in hours worked during the spring and summer, and we are left to conjecture as to how Greer could make 23 trips in April, 38 in May, and 69 in August.

On the whole, although the matter is shrouded in some mystery, I find that General Counsel sustained his burden of proof with respect to Greer. Roughly speaking, in the last 15 weeks of Greer's employment (he quit September 18 under circumstances described below), he had by the Company's admission nearly 30 dump trips, as contrasted with 7 during the preceding similar period. This shift in work (which began well before the departure of Jenkins),⁸ coupled with Byer's threat to make it hard on Greer, warrants the inference that the Company discriminated against this employee, notwithstanding his long service with the Company, by assigning him undesirable work because of his union activity, thereby violating Section 8(a) (3) and (1) of the Act.

On the afternoon of September 18, Greer, at the direction of Herbert Byer, took the truck he was driving to the company garage for a welding repair on a panel. According to Greer's testimony, he and the welder were standing in the "box" on the truck just behind the driver's cab, with Greer facing the front and holding up the panel as the welder directed, when Byer entered the truck from the rear, struck Greer a severe blow on the back of his upraised right arm, and said, "I hope I didn't interrupt your damn conversation." Greer, according to his testimony, thereupon followed Byer into the office and remonstrated with Byer for having struck him, to which Byer replied, "I'm not going to fire you, but if you're going to leave, don't come back." Greer punched out at 2:17 p.m., went to a doctor who treated him for the bruise on his arm, and quit his job.

⁸ Jenkins was replaced by a white truckdriver; Greer is a Negro. There is no intimation of racial discrimination, however.

The welder, Hibbard, and Byer presented versions of the episode which differed from Greer's. Hibbard's testimony I reject in its totality, as he impressed me as testifying with little if any regard for the truth. In addition to the poor impression he made on me through his general demeanor, his testimony as to whether he agreed with Greer that Byer had hit Greer is confused and equivocal, and his testimony that Byer did not appear irritated at the time is contrary to Byer's own testimony that his irritation was apparent.

Byer's version of the episode is that some 10 or 15 minutes after he told Greer to take the job to the welder, he found the two men on the truck engaged in conversation, and this irritated him so that he "apologized" for interrupting their conversation as he wanted to get the truck back on the road. Some 15 or 20 minutes later, according to Byer, Greer came to the office, accused Byer of hitting him, and walked out. Byer testified that he caught up to Greer on the street and told him that if he left he was out of a job. Byer also testified that he had sustained a severe injury to the middle finger of his right hand shortly before the episode in question, a circumstance which would have prevented his using the flat of his hand to strike Greer, but would not have prevented use of the edge of the hand or the fist.

On the record as a whole, and with due regard for the demeanor of the witnesses, and the corroboration each produced (e.g., Byer's hand injury and Greer's doctor's statement), I credit Greer's version and find that Byer struck him in a fit of irritation over the fact that Greer appeared to be conversing with the welder.

In the light of the entire record, including Byer's hostility to the Union and to Greer as its leader, I deem it a fair inference that Byer when he struck Greer on that occasion was motivated, at least in part, by resentment over Greer's union activity (which Byer may well have thought was the subject of the "damn conversation" he was "interrupting"). As the discriminatory treatment he was receiving, culminating in the blow on his arm, was the cause of Greer's quitting, I find that he was "constructively discharged" as a result of his union activity, and that this "constructive discharge" violated Section 8(a)(3) and (1) of the Act. See e.g., *Polynesian Arts, Inc.*, 100 NLRB 542, 553, enforced as to the employee in question 269 F. 2d 846, 848 (C.A. 6); *N.L.R.B. v. Saxe-Glassman Shoe Corporation*, 201 F. 2d 238, 242-243 (C.A. 1), and the cases there cited.

III. THE REMEDY

The unfair labor practices in this case call for the conventional cease-and-desist remedy, with a broad order in the light of the nature of the violations and the general hostility to employee rights revealed in the threats and other unlawful actions detailed above. Affirmatively, I shall recommend that the Company bargain with the Union upon request (a remedy I would prescribe, as noted above, to remedy the violations of Section 8(a)(1) even if no unlawful refusal to bargain had occurred), and that it reinstate Greer as an over-the-road driver, with backpay in accordance with the formulas set forth in *F. W. Woolworth Co.*, 90 NLRB 289, and *Isis Plumbing & Heating Co.*, 138 NLRB 716. For reasons I have elaborated in *Melrose Processing Co.*, 146 NLRB No. 118, I am including the "Armed Forces" provision in my Recommended Order rather than in the notice which I am recommending.

CONCLUSIONS OF LAW

1. By interfering with, restraining, and coercing employees in the exercise of rights guaranteed in Section 7 of the Act, as found above, the Company engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. By constructively discharging John Greer because of his union activity, as found above, Respondent engaged in an unfair labor practice affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

3. By refusing to bargain with the Union on and after April 21, 1963, the Company engaged in an unfair labor practice affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

On the foregoing findings of fact and conclusions of law, and on the record as a whole, I recommend, pursuant to Section 10(c) of the Act, issuance of the following:

RECOMMENDED ORDER

Respondent, American Compressed Steel Corporation, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Threatening or interrogating employees with respect to their membership in, or activities on behalf of, any labor organization.

(b) Discriminating against any employee because of membership in, or activity on behalf of, any labor organization.

(c) Refusing to bargain with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America as the representative of Respondent's employees in the following unit:

All production and maintenance employees employed by the Respondent at its place of business in Cincinnati, Ohio, including truckdrivers, but excluding the weigher, the cashier, part-time employees, watchman, office clerical employees, and all guards, professional employees, and supervisors as defined in the Act.

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

(a) Upon request, bargain collectively with the above-named labor organization as the statutory bargaining representative of the employees in the above-described unit.

(b) Offer to reinstate John Greer to his former position as a truckdriver engaged primarily in over-the-road trucking, and make him whole in the manner described in the portion of the Trial Examiner's Decision entitled "The Remedy" for any loss of earnings suffered by reason of the discrimination against him.

(c) Notify John Greer if he is serving in the Armed Forces of the United States of his 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.

(d) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms hereof.

(e) Post at its yard at Cincinnati, Ohio, copies of the notice attached hereto and marked "Appendix."⁹ Copies of such notice, to be furnished by the Regional Director for the Ninth Region, shall, after being duly signed by an authorized representative of the Respondent, be posted 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 the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director for the Ninth Region, in writing, within 20 days from the date of the receipt of this Decision, what steps the Respondent has taken to comply herewith.¹⁰

⁹ In the event that this Recommended Order is adopted by the Board, the words "as ordered by" shall be substituted for "as recommended by a Trial Examiner of" 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 of" shall be inserted immediately following "as ordered by."

¹⁰ In the event that 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."

Brunswick Corporation and Local 824, United Brotherhood of Carpenters and Joiners of America, AFL-CIO. Case No. 7-CA-4140. May 8, 1964

DECISION AND ORDER

On October 21, 1963, Trial Examiner Phil W. Saunders issued his Decision 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 af-