

3. 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 foregoing findings of fact and conclusions of law, and pursuant to Section 10(c) of the Act, it is recommended that Packaging Corporation of America, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Refusing to consider a grievance not in conflict with an existing bargaining agreement, filed with it as a result of collective action by its employees, or some of them; restricting the filing of such grievance to individuals; utilizing the restriction of privileges of employment enjoyed by its employees in retaliation for the filing of collective grievances, and/or to discourage such activities.

(b) In any like or related manner interfering with, restraining or coercing its employees in their right to present grievances not in conflict with an existing bargaining agreement, or to engage in other concerted activities for the purpose of their mutual aid and/or protection.

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

(a) Post at its Denver, Colorado, place of business, copies of the notice marked "Appendix." [Board's Appendix substituted for Trial Examiner's Appendix.]² Copies of said notice, to be furnished by the Regional Director for Region 27, Denver, Colorado, shall, after being duly signed by a representative of the Respondent, be posted by the Respondent 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 to insure that such notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director for Region 27, in writing, within 20 days from the date of the receipt of this Decision, what steps the Respondent has taken to comply herewith.³

²In the event that this Recommended Order be adopted by the Board, the words "a Decision and Order" shall be substituted for the words "the Recommended Order of a Trial Examiner" in the notice. In the further event that the Board's Order be enforced by a 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"

³In the event that this Recommended Order be adopted by the Board, this provision shall be modified to read: "Notify said Regional Director, in writing, within 10 days from the date of this Order, what steps the Respondent has taken to comply herewith"

Struksnes Construction Co., Inc. and International Union of Operating Engineers, Local No. 49, AFL-CIO. Case No. 18-CA-1696. September 28, 1964

DECISION AND ORDER

On March 10, 1964, 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 affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent filed exceptions to the Trial Examiner's Decision and a supporting brief and the Charging Party filed a brief in support of the Trial Examiner's Decision.

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 Leedom and Brown].

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and briefs, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner only to the extent that they are consistent with the Decision herein.

The Trial Examiner found that the Respondent violated Section 8(a) (5) and (1) of the Act by refusing to bargain in good faith with the Union as the representative of the Respondent's employees. He rejected the Respondent's contention that it had a good-faith doubt as to the Union's majority on the ground that it had unlawfully polled its employees to determine whether or not they wished it to bargain and sign a contract with the Union and had threatened to cut hours if they voted for the Union. We find merit in the Respondent's exceptions to all these findings for the reasons set forth below.

The facts show that the Union began to organize at the Respondent's jobsite in the latter part of July 1963, and continued into the early part of August. During this period, several of the Respondent's employees joined the Union; some of the others had been members for various periods prior thereto. The Respondent had knowledge of this organizing activity but in no way interfered with it or discriminated against those it knew to be Union members; in fact, it hired employees during this period who it knew were Union members.

On August 7, when Struksnes, the Respondent's president, was out of town, McPherson, the union representative, went to see the Respondent's attorney. McPherson asked him to arrange a meeting with Struksnes to discuss a contract with the Union which, McPherson claimed, represented a majority of the Respondent's employees. On August 9, McPherson received a letter from the Respondent's attorney asking the number of employees the Union represented and the dates on which they joined. On August 12, McPherson replied that the Union represented 20 employees, but did not reply to the inquiry about dates of joining. The Respondent had 26 employees in the appropriate unit, and the Trial Examiner found that during the relevant period 14 of them were Union members.

On August 13, Struksnes, with the aid of Supervisors Nelson and Vogel, asked each employee, at the end of his shift, to sign a paper which stated:

TO THE MEN OF STRUKSNES CONSTRUCTION CO. DO YOU WANT ME TO BARGAIN WITH AND SIGN A CONTRACT WITH OPERATING ENGINEERS LOCAL 49? PLEASE SIGN YOUR NAME AND ANSWER, YES, OR NO.

According to Struksnes and the two supervisors, they assured the employees that it made no difference how they voted, and one employee, Erickson, affirmed this at the hearing. Vogel also testified that several employees asked him what effect a Union contract would have on the prevailing practice of considerable overtime work, and that he replied, "It would be up to the Union officials." Five employees testified consistently with this testimony.

The Trial Examiner, however, credited the testimony of employee Sandau, who was the only witness whose testimony on this matter was inconsistent with that of Respondent's officials. Sandau at first did not recall any conversation with Nelson about "being represented by the Union," but later testified that, in response to a question by him about overtime work, Nelson replied that "If I [Sandau] don't sign it, we will probably get down to forty hours." Nelson testified as to this conversation that Sandau had trouble understanding the questionnaire; that he, Nelson, told Sandau it was absolutely up to him which way he wanted to vote or whether he wanted to vote at all; and that there was no conversation with respect to hours of work.

The result of the poll was that 15 voted "No," 9 voted "Yes," and 1 refused to vote. On August 16, the Respondent's attorney wrote a letter to McPherson stating that a majority of the employees involved had advised the Respondent that they did not want it to negotiate with the Union.

We agree with the Trial Examiner's finding that the evidence establishes that, on August 7, 1963, a majority of the employees of the Respondent in the appropriate unit were members of the Union. We are nevertheless convinced, contrary to the Trial Examiner, that the Respondent's poll of its employees was not unlawful and that it has not been established that the Respondent's refusal to recognize the Union was motivated by other than a good-faith doubt as to its majority status.

The Trial Examiner found the poll unlawful on the ground that it was not within the scope of *Blue Flash Express, Inc.*¹ In that case, the Board held that an employer's interrogation of its employees was lawful where (1) its sole purpose was to ascertain whether a union demanding recognition actually represented a majority, (2) there were assurances against reprisal, and (3) the polling occurred in a background free from union animus. It did not hold, as the Trial Ex-

¹ 109 NLRB 591.

aminer suggests, that secrecy is a necessary ingredient of a lawful poll, for there the interrogation was not secret.

We are convinced, under the circumstances of this case, that the Respondent's purpose for conducting the poll was, as permitted by *Blue Flash*, to ascertain whether the Union represented a current majority. Thus the record discloses that the Union was relying in support of its majority claim not only on new authorizations obtained during its current organizational campaign, but also on the Union membership of employees who had joined the Union years before this demand for recognition. The record also shows that some of these latter employees were delinquent in their dues payments. Moreover, we note that Struksnes did not conduct this poll until after the Union had declined to answer its query concerning the dates on which the members had joined. In view of these factors, and the lack of evidence of union animus on the part of the Respondent, we are convinced that it was merely seeking, however, inartfully, to determine whether the Union's claimed majority was reasonably current.

We are satisfied, furthermore, that there were assurances against reprisal. Struksnes, Supervisors Nelson and Vogel, and employee Erickson all testified affirmatively that there were such assurances, and only Sandau's testimony was relied on by the Trial Examiner to find the contrary. However, Sandau's testimony, taken at face value, does not indicate that the Respondent said the hours would be reduced if he voted "for" or "against" the Union, but only if he did not sign at all. We therefore do not agree with the Trial Examiner that Sandau's testimony negated the evidence of assurances against reprisal, or that it establishes that the Respondent threatened to reduce hours in violation of the Act.

- Our dissenting colleague assumes, from the fact that the responses to the poll were inconsistent with the prior Union designations, that there was a failure to answer truthfully, and implies that this demonstrates that the poll constituted restraint and coercion. We do not agree that the evidence establishes that there was a failure to answer truthfully. It is equally reasonable to assume that the employees, some of whom had designated the Union many years before the events here in question and while employed by a different employer, did not want the Union as their current bargaining representative. Even assuming, however, that some employees did fail to answer the questionnaire truthfully, we are satisfied, on the entire record, that such answers did not result from any threats of reprisals by the Respondent.² We note, moreover, that the Board in *Blue Flash* commented

²As we have noted above, one employee refused to sign the poll. There is no evidence that this employee was threatened with reprisals for refusing to sign, or that he was penalized in any way for such refusal. We do not agree, therefore, with our dissenting colleague that the Respondent "extracted from each employee a permanent record of his vote bearing his signature by insisting that he sign the questionnaire."

on the fact that the employees gave false answers to the employer poll, but the Board nevertheless found the poll lawful.

As there is not other evidence of animus, we find, accordingly, that the Respondent's polling of the employees under the circumstances of this case did not carry an implied threat of reprisals or in any other way interfere with, restrain, or coerce employees in the exercise of their rights guaranteed in Section 7 of the Act.

We likewise do not agree with the Trial Examiner's finding that the Respondent's lack of a good-faith doubt as to the Union's majority is shown by the facts (1) that the Respondent did not raise the issue of majority status at the meeting of August 7 between McPherson and the Respondent's attorney, and (2) that it did not request a check of the cards or file a petition with the Board. As to (1), Struksnes was out of town on August 7, and the meeting of that date was held for the limited purpose of arranging a subsequent meeting between the Union and Struksnes. Moreover, 2 days later, the Respondent's attorney did inquire as to the number of employees the Union represented, and, on August 13, 1 day after receiving the Union's reply, Struksnes did seek to verify that reply by conducting a poll of its employees, which we have found above was not unlawful. As to (2), while it is true that the Respondent made no effort to check the Union's cards and did not file a petition with the Board, the Union never offered to submit to a check of the cards; in any event, in the circumstances here we do not believe that the Respondent's failure to take such affirmative action is enough standing alone to establish its bad faith.

Accordingly, in view of the foregoing and all the circumstances of the case, we find that the General Counsel has failed to establish that the Respondent's expressed doubt of the Union's majority was not made in good faith, and he has thus failed to establish a violation of Section 8(a)(5) and (1) of the Act. We shall therefore dismiss the complaint in its entirety.

[The Board dismissed the complaint.]

MEMBER BROWN, dissenting:

Contrary to my colleagues, I agree with the Trial Examiner that the Respondent violated Section 8(a)(1) and (5) of the Act. Thus, its poll of employees was in violation of Section 8(a)(1), as it was intended to and did constitute an attempt to coerce them in the exercise of their Section 7 rights. This activity, in the face of a pending demand for recognition by the majority representative of the employees, demonstrated Respondent's bad-faith refusal to extend such recognition in violation of Section 8(a)(5) of the Act.

As stated in the majority opinion, Respondent knew of the Union's organizational activities and also knew that a substantial number of its

employees were union members. Indeed, it is clear that a majority of the employees were already union members when they were employed, a fact apparently reflected on their employment records, and an additional number had made application for membership. In response to the Union's demand for recognition, Respondent did not challenge the Union's majority status, but instead inquired only as to how many of the employees were *union members* and the dates on which each had joined. Upon receipt of a reply as to the number of union memberships claimed, Respondent's owner, with the aid of his two supervisors, proceeded to conduct an open survey requiring each employee to answer and sign a questionnaire asking, not whether they had designated the Union as their representative, but whether they wanted Respondent to bargain and sign a contract with the Union. Thus, Respondent did not question the fact that a majority of its employees had validly designated the Union as their representative.

As noted by the Trial Examiner, an employer is permitted in certain limited circumstances and with specific safeguards to verify a union's claim to majority representation by inquiring of the employees themselves whether they had in fact made such designations. However, Respondent cannot claim that privilege here for several reasons. First of all, Respondent was not even questioning the union's majority status, much less undertaking a verification of the existence of designations. Rather, it solicited from employees expressions of whether they desired their employer to negotiate and sign a contract with their Union. Indeed, it could be said that by soliciting from employees information relating to the effect they desired those designations to have Respondent was intruding itself into the relationship between the employees and their Union in an effort to nullify the statutory authority of the representative.³

My colleagues attempt to bring the polling within the privilege of direct verification by attributing to Respondent the purpose of determining the currency of the Union's majority due to the Union's failure to supply membership dates as requested. And they attempt to justify the need to check for current designations by the fact that some old members were delinquent in dues payments. However, there is no showing that dues delinquency was a matter within Respondent's knowledge. In any event, in the polling Respondent did not even ask when each employee designated the Union by authorization or membership. Therefore, even if ascertaining the currency of a majority designation would be a lawful motive, Respondent cannot claim to have acted within that privilege here.

³ See *N.L.R.B. v. Wooster Division of Borg-Warner Corporation*, 356 U.S. 342, 350, for treatment accorded such intrusion in another context.

Moreover, even assuming without conceding that this was an inartful attempt on the part of Respondent to ascertain the Union's current majority status, Respondent failed to comport itself within the limits permitted for direct verification. As found by the Trial Examiner, Respondent failed to give employees assurances against reprisals. Rejection of this conclusion by my colleagues is based upon their disagreement with the Trial Examiner's credibility findings, a difference which I do not find justified and to which I, therefore, cannot subscribe.⁴ The majority opinion attempts to rationalize overturning the Trial Examiner in this respect on the ground that there really was no conflict in the testimony involved because "Sandau's testimony, taken at face value, does not indicate that the Respondent said the hours would be reduced if he voted 'for' or 'against' the Union, but only if he did not sign at all." In my view there is no validity to the distinction attempted. The assurances against reprisal required by the Board in *Blue Flash Express, Inc.*,⁵ and related cases are not limited to the choice made with respect to representation but relate generally to the protected employee rights set forth in Section 7, which certainly include the right to refrain from giving the employer a written and signed statement reflecting a choice with respect to such rights. If degrees of coercion are to be evaluated, surely an actual threat of reprisal is equally as abhorrent as failure to assure against reprisal. Furthermore, as I understand the record herein, the Trial Examiner discredited management witnesses that assurances were given. Nevertheless, the majority is also overruling this credibility resolution without saying so.

Respondent also conducted the poll in a coercive manner in other respects. Thus, it extracted from each employee a permanent record of his vote bearing his signature by insisting that each sign the questionnaire. It also conducted the poll in such a manner that each employee could see how his fellow employees voted.⁶ That lack of secrecy destroys group support, is clearly indicated by the fact that the responses were inconsistent with the prior union designations. Although not determinative, failure to answer truthfully is an accepted element in testing whether there has been any restraint and coercion caused by

⁴ See *Standard Dry Wall Products, Inc.*, 91 NLRB 544, enf'd. 188 F. 2d 363 (C.A. 3).

⁵ 109 NLRB 591.

⁶ Contrary to the implications of the majority opinion, *Blue Flash* was not an open survey but involved individual interviews in a private office. See *Blue Flash* decision, at 592. The lack of complete secrecy was not rejected as a relevant factor there but was only found not to be alone determinative in the circumstances of that case. Moreover, the Trial Examiner here did not find, as suggested by my colleagues, that a secret ballot was an element necessary to lawful direct verification of majority, nor did he find that for that reason alone the criteria established by the Board in *Blue Flash* had not been met. He did, and rightly in my opinion, find the open polling together with other elements indisputably basic to privileged verification, indicative of Respondent's unlawful conduct.

the interrogation.⁷ Similarly, in testing the effect of open polling, I would regard inconsistency as evidence of coercion.

On this record, I would find in agreement with the Trial Examiner that the Respondent conducted an unlawful poll of its employees, refused to bargain with the Union, and threatened to reduce hours of work if the employees selected the Union, all in violation of Section 8(a) (1) and (5) of the Act.

⁷ See *Bonnie Bourne, an individual, d/b/a Bourne Co. v N.L.R.B.*, 332 F. 2d 47 (C.A. 2).

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

Upon a charge filed on August 26, 1963, by International Union of Operating Engineers, Local No. 49, herein called the Union, the General Counsel issued a complaint dated October 31, 1963,¹ against Struksnes Construction Co., Inc., herein called the Respondent or the Company. The complaint alleges that Respondent engaged in unfair labor practices within the meaning of Sections 8(a)(1) and 8(a)(5) and 2(6) and (7) of the National Labor Relations Act. In a duly filed answer the Company denied the unfair labor practice allegations. Pursuant to due notice, a hearing was held before Trial Examiner Phil W. Saunders at Minot, North Dakota, on December 10. All parties were represented by counsel, appeared at the hearing, and were given full opportunity to examine and cross-examine witnesses, to introduce relevant evidence, to argue orally, and to file briefs.

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

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The Respondent is a North Dakota corporation, whose place of business is at Minot, North Dakota. During the year ending September 1, 1963, Respondent received more than \$50,000 in payment for its work on State and Federal roads and purchased \$150,500 in supplies originating outside the State of North Dakota from companies within the State. Respondent admits it is engaged in commerce within the meaning of the Act, and I so find.

II. THE LABOR ORGANIZATION INVOLVED

International Union of Operating Engineers, Local No. 49, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

The complaint alleges that the Respondent interrogated its employees by polling them as to whether or not they wished the Company to bargain and sign a contract with the Union. It is alleged that the Respondent warned its employees that if they voted for the Union, their hours of work would be cut. The complaint further alleges that the Respondent refused to bargain in good faith with the Union after it had been designated by a majority of Respondent's employees in an appropriate unit, in violation of Section 8(a)(5) of the Act.²

The Union's organizational efforts started during the latter part of July and continued into the early part of August. During this period Union Representative McPherson was successful in getting several of the Respondent's employees to join the Union.³ On August 7 McPherson contacted the Respondent's attorney, Van Sickle, and requested that he arrange a meeting with the owner of the Company, Struksnes, to discuss the signing of a contract with the Union. McPherson also advised Van Sickle at this time that the Union had a majority of the employees.

¹ All dates are 1963 unless specifically stated otherwise.

² The unit, as hereinafter set forth, constitutes an appropriate one for the purposes of collective bargaining. The complaint so alleges, the Respondent concedes, and I so find.

³ It appears from this record that some of the other Respondent employees were or had been members of the Union for various lengths of time prior to the organizational efforts noted above.

On or about August 9 McPherson received a letter from Van Sickle inquiring how many employees the Union represented. On August 12 McPherson replied that the Union represented approximately 20 employees.

This record further reveals that on or about August 13 the Respondent's owner, Struksnes, and supervisors, Nelson and Vogel, asked employees assembled in different groups to sign their name and thereby answer "yes" or "no" to the following question: "Do you want me to bargain with and sign a contract with Operating Engineers Local 49?"⁴ Fifteen voted "no," nine voted "yes," and one refused to answer. Struksnes testified that he had informed his supervisors, Nelson and Vogel, not to say anything when they presented the above question to employees asking for signatures and their vote.⁵ Vogel testified that when he contacted employees about the questionnaire several questions were asked about it. Vogel further testified and admitted that he was asked about "losing time" on a scraper machine, which operation gave extra shifts to some of the employees. Vogel replied, "Well, if we go union, it is up to the union officials whether they want to send a man out to run it, or leave us put a man on it and give him extra time." Employee Sandau credibly testified that when Supervisor Nelson brought the questionnaire around he asked him what it was all about, and that Nelson then replied, "If I [Sandau] don't sign it, we will probably get down to forty hours."

By letter dated August 16 the Respondent informed Union Representative McPherson that a majority of the employees had advised the owner that they did not want the Company to negotiate a contract with the Union. McPherson first learned of the questionnaire or polling of the employees on or about August 20. In early September the Company suggested that if the Union felt anything wrong had been done they would be willing to have a consent election. McPherson replied that because of the questionnaire he felt that the employees had been intimidated, and therefore, he would not agree to a consent election. The Company never filed a representation petition.⁶

Final Conclusions

The Respondent argues that the Company did have a good-faith doubt as to the Union's representation and that the questionnaire, as aforesaid was to resolve this doubt. As hereinafter indicated, I reject this contention.

Until August 16 the Company at no time stated to the Union that it doubted the majority status of the Union. In the initial meeting with Van Sickle on August 7 the Union requested discussions on the signing of a contract and informed the Respondent that it represented a majority. It is noted further that the Respondent was admittedly aware of the physical presence of McPherson at the jobsite on several occasions prior to August 7, and thereby fully aware of his organizational efforts for the Union. It appears to me that if there was any good-faith doubt of the Union's majority—the meeting on August 7 presented an ample opportunity for the Respondent to raise this issue. No effort of any kind was made by the Company to avail itself of this opportunity. On or about August 9 McPherson received a letter asking how many employees the Union represented, and on August 12 the Union replied, as aforesaid. There was no effort by the Company in contacting McPherson to verify his reply showing a majority. Again it appears to me that had the Respondent entertained any good-faith doubt some direct contact or communication would have been made with the Union. There was none. At no time did the Company request a verification of the authorization cards by McPherson, or request a checking of the cards through some disinterested third party or parties—a procedure long recognized and well established under Board law, nor was a petition filed with the Board to resolve the question of majority by an election.⁷ Certainly all of the above have a direct bearing in my ascertainment and finding that the Respondent did not have a good-faith doubt as to the Union's majority.

Respondent's good-faith doubt is further compromised by its conduct on August 13 described above, consisting of a warning to cut hours, and the unlawful interrogation of employees by conducting the poll of individual employees through the questionnaire. Both of the Respondents' supervisors, Nelson and Vogel, admitted that when they circulated the questionnaire several employees asked them certain ques-

⁴ General Counsel's Exhibit No. 7.

⁵ Struksnes testified that the purpose of the questionnaire was to "get clear" whether or not the employees wanted the Union.

⁶ This record reveals that in the period material hereto there were 26 employees in the unit, and 14 were members of the Union.

⁷ In this respect it is pointed out that it was not until early September when the Respondent first raised the possibility of an election.

tions. There is credited testimony attributed to Nelson that in his answer to one question he replied that if employee Sandau did not sign the questionnaire his hours would be cut. Such statement involving a threat or warning of economic reprisals under the circumstances here is a clear violation of the Act.

Furthermore, the poll conducted by the Company was not a proper method to determine the desires or wishes of the employees. In this respect it should first be noted that this was an open poll. It was conducted in such a manner that each employee could see how his fellow employees voted, and afterward the Respondent then had a permanent written record of how each employee voted with the employee's individual name registered directly opposite his choice. Such a procedure in the interrogation of employees cannot help but produce an unlawful and improper influence on the choice of a bargaining agent. Throughout the existence of the Board it has gone to great lengths in preserving the secrecy of the ballot so that undue influence of this kind can be scrupulously avoided.

In making my finding herein I am fully aware of certain Board decisions holding that an employer may lawfully poll his employees concerning their desires as to representation. It is noted, however, that in these decisions the interrogations to be privileged *must* meet the following conditions: (1) It must be clear from the record that the only purpose was to ascertain whether a union demanding recognition actually represented a majority; (2) the employees must be given assurances against reprisals; and (3) the questioning must take place in a background free from hostilities to unions.⁸ In the instant case here, under consideration, all three of these elements are lacking and clearly, in my opinion, the situation here does not fall within the scope of the Board's safeguards. In contacting one group of employees, Supervisor Nelson told an employee that his hours would be cut, thus indicating an antipathy toward the Union. Supervisor Vogel admitted that there were questions and discussions about the effect of union recognition on the hours available to work. At no time during the contacting of the employees by management were employees ever told that they would not be subject to any reprisals for engaging in union activities. Moreover, assuming here, *arguendo*, that the Respondent had good-faith doubts as to the Union's majority, and even with this factor granted for argumentation purposes, the conduct of the Respondent would still be violative. The poll and voting were not secret, there were no assurances against reprisals, and the polling did not take place against a background free from union hostilities.

It is noted also that the inquiry which appeared as the heading on the polling document or questionnaire (General Counsel's Exhibit No. 7), sought to elicit information as to whether the employees wanted the Respondent to sign a contract with the Union. It appears to me that such an inquiry does not actually reflect any sincere effort to determine the majority or minority status of the Union.⁹ From all the circumstances, I find that the poll was intended to and did constitute an attempt to coerce the employees in the exercise of their right to join a labor organization.

For all the foregoing reasons and upon the findings heretofore made, it is found and concluded that the Respondent has violated Section 8(a)(1) and 8(a)(5) of the Act as alleged in the complaint.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

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

V. THE REMEDY

Having found that the Respondent has engaged in unfair labor practices, I shall recommend that it cease and desist therefrom, and that it take certain affirmative action designed to effectuate the policies of the Act.

Because Respondent has unlawfully refused to bargain with the Union as the representative of their employees in an appropriate unit, it will be recommended that Respondent, upon request, bargain with the Union and, if an understanding is reached, embody such in a written and signed agreement.

⁸ *Blue Flash Express, Inc.*, 109 NLRB 591; *Burke Golf Equipment Corporation*, 127 NLRB 241; *Frank Sullivan and Company*, 133 NLRB 726.

⁹ *Crystal Laundry and Dry Cleaning Company*, 132 NLRB 222.

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. The Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. All employees of the Company, including heavy equipment operators, mechanical and maintenance personnel, greasers, push-cat operators, packer operators, dozer operators, and patrol operators, but excluding water-truck drivers, office clerical employees, professional employees, guards, and supervisors, as defined in the Act, constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.
4. International Union of Operating Engineers, Local No. 49, AFL-CIO, was on August 7, 1963, and at all times material thereafter, has been and now is the exclusive representative of all employees in the aforesaid appropriate unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.
5. By their conduct on August 13, 1963, and by failing and refusing on and after August 7, 1963, to recognize and bargain with the Union as the exclusive representative of the employees in the aforesaid appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.
6. By the conduct described above, and by warnings or threats of economic reprisal and polling their employees on or about August 13, 1963, the Respondent has interfered with, restrained, and coerced their employees in the exercise of the rights guaranteed in Section 7 of the Act, and have thereby engaged in and are engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.
7. 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, it is recommended that Struksnes Construction Co., Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:
 - (a) Refusing to bargain collectively with International Union of Operating Engineers, Local No. 49, AFL-CIO, as the exclusive representative of all the employees in the appropriate unit as heretofore defined.
 - (b) Unlawfully conducting polls, and warning or threatening employees in the exercise of their rights as guaranteed by Section 7 of the Act.
 - (c) In any like or related manner, interfering with, restraining or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist the above-named Union 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; and 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 the Union named herein as the exclusive representative of all employees in the appropriate unit, heretofore defined, and, if an understanding is reached, embody such in a signed agreement.
 - (b) Post at their plant or facility in Minot, North Dakota, copies of the attached notice marked "Appendix."¹⁰ Copies of said notice, to be furnished by the Regional Director for Region 18, shall, after being duly signed by an authorized representative of the Respondent, be posted by the Respondent immediately upon receipt thereof and be maintained by it for a period of 60 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.

¹⁰In the event that this Recommended Order be adopted by the Board, the words "a Decision and Order" shall be substituted for the words "the Recommended Order of a Trial Examiner" in the notice. In the further event that the Board's Order be enforced by a 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."

(c) Notify the Regional Director, Region 18, in writing, within 20 days from the date of the receipt of this Decision, what steps they have taken to comply herewith.¹¹

I also recommend that, unless on or before 20 days from the date of receipt of this Decision and Recommended Order that Respondent notify the said Regional Director, in writing, that it will comply with the foregoing recommendations, the National Labor Relations Board issue an order, requiring the Respondent to take the action aforesaid.

¹¹ In the event that this Recommended Order be adopted by the Board, this provision shall be modified to read: "Notify said Regional Director, in writing, within 10 days from the date of this Order, what steps the Respondent has taken to comply herewith."

APPENDIX

NOTICE TO ALL EMPLOYEES

Pursuant to the Recommended Order of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

WE WILL NOT refuse to bargain collectively with International Union of Operating Engineers, Local No. 49, AFL-CIO, as the exclusive representative of the employees comprising the appropriate unit described below.

WE WILL NOT unlawfully poll employees to determine their union sympathies and desires.

WE WILL NOT threaten employees with economic reprisals.

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

WE WILL, upon request, bargain collectively with International Union of Operating Engineers, Local No. 49, AFL-CIO, as the exclusive bargaining representative of all employees in the following bargaining unit with respect to rates of pay, wages, hours of employment, and other conditions of employment:

All employees of the Company, including heavy equipment operators, mechanical and maintenance personnel, greasers, push-cat operators, packer operators, dozer operators, and patrol operators; but excluding water-truck drivers, office clerical employees, professional employees, guards, and supervisors, as defined in the Act.

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

STRUKSNES CONSTRUCTION Co., INC.,
Employer.

Dated..... By.....
(Representative) (Title)

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

Employees may communicate directly with the Board's Regional Office, 316 Federal Building, 110 South Fourth Street, Minneapolis, Minnesota, Telephone No. 339-0112, Extension 2601, if they have any question concerning this notice or if they have information that its provisions are being violated.

Thor Power Tool Company and Donald A. Tinsley. Case No.
13-CA-5904. September 29, 1964

DECISION AND ORDER

On March 18, 1964, Trial Examiner Frederick U. Reel issued his Decision in the above-entitled proceeding, finding that the Respondent-
148 NLRB No. 131.