APPENDIX

NOTICE TO ALL EMPLOYEES

Pursuant to the Recommended Order of a Trial Examiner of the National Labor Relations Act, as amended, we hereby notify our employees that:

WE WILL NOT discourage membership and activity in International Union of Operating Engineers Local 370, AFL–CIO, or in any other labor organization of our employees, by discriminating in any manner in regard to hire, tenure, or any other term or condition of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the right to self-organization, to form labor organizations, to join or assist the above-named or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from engaging in any or all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment in conformity with Section 8(a)(3) of the Act.

WE WILL make whole the employees listed below for any loss of pay suffered as a result of the discrimination against them, from February 10, 1964, following their unconditional offer to return to work, until the date on which we offered them reinstatement:

Jim Storer, Theodore Totorica, Harold Hamilton, Albert Karnowski, Otto Vanderschell, Nathan Wallace, Glenn Newkirk, Hank Bauer, Orville Baldwin, Carl Burgess, Don Stevens, Dave Johnson, Raulley Fuller.

All our employees are free to become or remain, or to refrain from becoming or remaining, members of the above-named or any other labor organization.

J. A. TERTELING & SONS, INC. d/b/a WESTERN EQUIPMENT COMPANY,
Employer.

Dated_____ By_____
(Representative) (Title)

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

Employees may communicate directly with the Board's Regional Office, 327 Logan Building, Seattle, Washington, Telephone 682–4553, if they have any questions concerning this notice or compliance with its provisions.

Donald Skillings, d/b/a Yankee Distributors *and* Truck Drivers, Warehousemen and Helpers Union Local #340 affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. *Case No. 1–CA–4617. May 28, 1965*

DECISION AND ORDER

On February 12, 1965, Trial Examiner Benjamin B. Lipton 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 further found that the Respondent had not engaged in certain other unfair labor practices alleged in the complaint.

Thereafter, the Respondent filed exceptions to the Trial Examiner's Decision and a brief in support thereof, and the General Counsel 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, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel [Chairman McCulloch and Members Brown 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 Trial Examiner's Decision, the exceptions and briefs, and the entire record in the case, and hereby adopts the findings, conclusions,[1] and recommendations of the Trial Examiner.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby adopts at its Order the Order recommended by the Trial Examiner and orders that Respondent, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.

[1] In the absence of exceptions thereto, the conclusions of the Trial Examiner with respect to the discharge of MacMillan are adopted *pro forma*.

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

Upon a complaint issued by the General Counsel [1] that Respondent violated Section 8(a)(1), (3), and (5) of the Act, a hearing was held before Trial Examiner Benjamin B. Lipton in Portland, Maine, on August 17 and 18, 1964. All parties were represented and participated in the hearing, and at the close, oral argument on the record was waived. General Counsel and Respondent filed briefs, which have been duly considered.

Upon the entire record in the case, and from my observation of the witnesses, including their demeanor on the witness stand, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Donald Skillings, an individual proprietor doing business as Yankee Distributors, maintains an office and place of business in Portland, Maine, where he is engaged in the sale and distribution of beer, ale, carbonated beverages, and related products. In the course of the business, Respondent annually purchases from points outside the State of Maine products valued in excess of $50,000. Respondent admits, and I find, that it is engaged in commerce within the meaning of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Truck Drivers, Warehousemen and Helpers Union Local #340 affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called the Union, is a labor organization within the meaning of the Act.

[1] The charge by the Union was filed and served on May 26, 1964, and the complaint thereon was issued on July 10, 1964.

III. THE UNFAIR LABOR PRACTICES

A. *Essential issues*

In substance, the General Counsel alleges that, following the selection of the Union by a majority of the employees in the bargaining unit, Respondent refused the Union's recognition request and instead embarked upon a course of coercive and discriminatory conduct to destroy the Union's majority status. More specifically, it is asserted that Respondent, on various dates, interrogated employees and threatened them with changes in working rules and policies, loss of benefits and favors, elimination of jobs, and reduction of hours; discharged Albert MacMillan; engaged in individual bargaining with the employees in derogation of the Union; and generally in bad faith refused to bargain collectively with the Union. In defense, Respondent denies commission of the unfair labor practices alleged.

B. *Supervisors*

Donald Skillings, Respondent's owner, participates actively in the overall supervision of the employees, consisting of about three salesmen, two office clericals, and seven to nine truckdrivers.

Roy DePallo testified that he is the supervisor-manager of all the employees, and "is in charge when Mr. Skillings isn't around." Among other things, he performs sales work, and spends a substantial part of his time away from the warehouse visiting customers.

Arthur La Rochelle, who functions as a dispatcher, presents the sole supervisory issue. For reasons described *infra,* I find that, with respect to material events herein, he was a supervisor or agent of Respondent.

C. *Employees' organizational meeting and subsequent events*

On Monday, May 4, 1964,[2] one of the drivers telephoned David Hastings, the Union's president and business agent, and arranged for him to meet with employees that evening at his office. The meeting took place, and was attended by six drivers; i.e., Herbert L. Donaldson, Barry E. Mains, Albert MacMillan, William M. Ingraham, Joseph O. Malloy, and Robert Markley.[3] The drivers told Hastings they had made up their minds to join the Union, and wanted the Union to represent them and obtain a contract with Respondent. Hastings inquired into matters pertaining to the bargaining unit and outlined to the drivers the procedures to be followed. Among other things, they would have to sign membership applications; the Union would then notify Respondent of its representation; and it would file with the Board a petition for an election. Each of the six drivers at this meeting filled out and signed membership applications and "shook hands on it."[4]

Later the same evening, as Skillings testified, he received a telephone call from Donaldson, who informed him of the union meeting and identified the drivers who were there. Donaldson told him not to worry about it, that he, Donaldson, could handle everything.[5]

By letter dated May 5, the Union requested recognition, offered to prove its majority status through a neutral party, indicated it was filing an election petition with the Board, and cautioned the Respondent to refrain from any form of pressure against the employees for exercising their organizational rights.

On the morning of May 5, La Rochelle testified, his brother-in-law, Malloy, told him while driving to work that the men had signed up at the union meeting, that he and Markley decided they wanted no part of it, and that they wished Skillings to be told. Skillings testified that at or about 6:45 a.m. that morning La Rochelle informed him of the foregoing.

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[2] All dates are in 1964 except as otherwise specified.

[3] One other driver employed on this date, Jim Haynes, was not present.

[4] Donaldson and MacMillan testified they were members of the Union before this meeting.

[5] Skillings testified that when he gave an affidavit to a Board agent he was aware of the May 4 conversation with Donaldson, but did not reveal it because he "respected the confidence to this point"; however, he ceased to respect the "confidence" after Donaldson testified in this proceeding (as General Counsel's witness). Donaldson, it is noted, was not asked about this conversation in his testimony.

On May 7,[6] in the early morning at the warehouse, Skillings called the drivers together [7] and spoke to them on the subject of the Union. He first inquired if there was any truth in the rumor that they were talking about joining the Union, and received no answer. He wanted them to hear his side of the story. They were better off without the Union. If they wanted to join the Union, he would get a lawyer and talk to the Union, but "there will be no favors like loaning money or loaning you a car." They would have employment in the summer (during the busy season), but in the winter they "would be on the losing end." At Portland Distributors, which has a union shop, the men are not allowed to borrow money or a company car; although they are paid by the hour, they do not work in the winter. He suggested they form their own union and "come up and talk it over." He would give them $1.78 an hour if that is what they wanted, but "It will be run like a union shop. If you come in 5 cent short, I will consider that stealing. You break one bottle I have grounds to fire you." [8]

Skillings testified, *inter alia,* that he began by saying that he understood the drivers had been down to the union hall, and asked why they did not come to him first. He volunteered that upon the "huge silence" that followed, he said to himself, "Let me scare them a bit." He indicated that they now had certain benefits which they do not get in "union houses" and specified that at Portland Distributors the men are laid off in the winter and are not given the loan of a company car. If they wanted a union, that is the way the shop would be run. He denied making threats about their coming in 5 cents short or breaking a bottle, but did not remember whether he suggested that the employees form their own union.[9]

Shortly after the Skillings speech, La Rochelle asked Donaldson if he knew anything about the Union. Donaldson said he did not, and that he thought it was a "lot of bull." La Rochelle remarked, "Well there will never a union shop anyway so." Later that morning, La Rochelle again approached Donaldson. He had "noticed some type from the Union" (presumably the Union's letter of May 5), and told Donaldson, "It is not a lot of bull." Donaldson replied, "Obviously not." La Rochelle then asked, "How do you go about organizing the shop?" Donaldson said he did not know.[10]

After work that day, La Rochelle summoned MacMillan into an office and inquired, "What do you fellows want?" MacMillan asked what he meant, and La Rochelle specified, "Do you want the Union?" He said, "We can give you $1.70 an hour and put time clocks in if you want that." MacMillan stated it was not up to him, the men "were all in this as a group," and he would weigh both sides.[11]

On May 7, Skillings came over to Cott Bottling Co. while Business Agent Hastings was visiting there. Skillings told Hastings he had received papers from the Board that morning and wanted to talk about them. They discussed election procedures and contract terms in effect at Portland Distributors [12] Skillings asked various questions on the subject of disciplining employees and grounds for their discharge, e.g., drinking on the job, dishonesty, and "giving the customers a hard time." Hastings indicated that these were matters usually covered by contract, and that "we usually agree that proven drinking on the job or dishonesty is cause for discharge and other things can be a cause for discharge and that could be taken up when it arises." Concerning the representation question, Hastings suggested that Skillings see his attorney. He stated that the employees who met with him were scared they would be fired for joining the Union and requested Skillings to "keep the status quo."

On May 9, La Rochelle told Mains that Skillings wanted to see him; Mains went in. Skillings asked what was going on Mains described the meeting at the union hall and the signing of applications. Skillings stated that they "wouldn't benefit by this,"

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[6] Skillings fixed the date as May 5, and Donaldson as May 7 While the discrepancy is not significant, the May 7 date appears corroborated by undenied testimony of Donaldson of a conversation with La Rochelle later that morning indicating Respondent's receipt of the Union's letter of May 5

[7] La Rochelle was also present, but not driver Mains

[8] Based substantially on Donaldson's credible testimony

[9] La Rochelle's brief testimony on the subject in part supported Skillings.

[10] Donaldson's testimony, denied by La Rochelle

[11] Uncontradicted testimony of MacMillan

[12] Hastings described that contract as providing for a normal workweek of 50 hours with wages at $1 60 an hour for 40 hours, and time-and-a-half pay for the additional 10 hours (With Respondent, the drivers worked 5 days (the number of hours unspecified) and 7 hours every other Saturday)

he could hold them to 40 hours a week and they would not take home $50; he would cut out all benefits, such as insurance and uniforms;[13] he could eliminate the trailer trucks, as he did not need them anyway; and in the winter he would release all but three or four men. But if what they wanted was an hourly wage, he would pay $1.70 and go on the timeclock. At Cotts, the men "don't even make a decent living." At Portland Distributors, the pay is $1.60 an hour on a guaranteed 50-hour week, but Respondent "wouldn't have to go by the contract." Skillings asked what he thought the employees would start at. Mains replied "probably $1.40." Skillings said "that is what he would try for." During the conversation, which lasted about an hour, Skillings cautioned that "anything said between you and I is my word against yours."[14]

About May 14 or 15, La Rochelle approached Mains and asked him what the employees thought they would be satisfied with. Mains said he did not know and suggested that Respondent make an offer. Sometime the next week, La Rochelle asked Mains how $95 and a 5-day week sounded. Mains replied that it was all right with him.[15]

On May 20, Respondent's attorney, Herbert Bennett, telephoned Hastings about the Union's letter requesting recognition and asked whether the Union required an answer or would "rather go to an election." Hastings said the purpose of the letter was to show the Union represented a majority, and he had no objection to an election. On May 22 Bennett again called Hastings. He related that one of the drivers was seen at a bar drinking on the job, and that Respondent wanted to discharge another driver who had been given leave but did not return when expected. Hastings agreed that drinking on the job was cause for discharge but advised Bennett to make sure he knew what the facts were.

On or shortly before May 23, Skillings had conversations with Mains in which, *inter alia,* he said that he could have discharged Mains "for cause,"[16] but he had talked to his attorney about it and they decided not to release him. He asked Mains why the employees did not come to see him instead of going to the union hall, and said their differences could have been settled by him. He indicated he was willing to pay $1.70 an hour, with time and a half, if that is what the employees wanted.

In the early morning on May 23, MacMillan had been discharged, as discussed *infra.* Mains told La Rochelle that he was quitting and gave a week's notice. About an hour later, Skillings sought him out. Mains said he was angry and asked why he "didn't get it" instead of MacMillan, as he was "the one who got him into the whole mess," and he was one of the "yes votes" in the election. Skillings said, "Your votes don't mean anything. Now you are beaten before it even comes up. As far as I can see there is only you and Mac [MacMillan] and we don't know how Cushy [Ingraham] is going to vote."[17] Skillings also told Mains that he was expected to pay back a debt of $60[18] he owed Respondent before the election the next week. In final result, Mains stayed on and agreed to pay $10 a week toward the debt.[19]

D. *Discharge of MacMillan*

On Saturday morning, May 23, MacMillan was called in by Skillings and told he was fired for drinking beer on the job at the Eldorado Cafe on May 20. On both

[13] The cost of health insurance and uniforms was shared equally between Respondent and the employees.

[14] The foregoing is based upon Mains' credible testimony. Skillings entered denials in part. Among other things, his version was that Mains came to him and said he thought he could get the men to drop their union activities if Skillings would consent to $1.70 an hour with time and a half.

[15] Mains' testimony was uncontroverted.

[16] On Thursday of the previous week, Mains had obtained permission from La Rochelle to leave town on a family emergency matter. The next night he telephoned La Rochelle to see if he would be needed that Saturday and was told to get back right away, which he did.

[17] Skillings referred to this or a similar conversation as having occurred at an earlier date (apparently May 9). He testified that he told Mains he had certain of the men "committed" to him, naming Markley, Malloy, Donaldson, Haynes, La Rochelle, and Chadwick (a new employee), and that the Union had only three employees, which "didn't make a majority vote."

[18] According to Skillings, it was about $79.

[19] Skillings did not disclose his conversation with Mains to the Board agent taking his affidavit, because, as in Donaldson's case, he considered it confidential until Mains had testified.

sides there are numerous conflicts and implausibilities in the testimony. However, upon consideration of MacMillan's own account of the incident and certain undenied and corroborated aspects of Respondent's evidence, MacMillan's testimony that he had not engaged in any drinking is not credited.

The circumstances were essentially as follows: On May 20 La Rochelle assigned MacMillan to make 10 deliveries in the area of Portland. In the morning MacMillan made his delivery of one barrel of beer to the Eldorado Cafe. About 2 p.m. Manager DePallo was driving by the Eldorado and noticed a company vehicle parked outside. From his car, DePallo glanced inside the cafe and recognized MacMillan sitting at the bar with a glass of beer in front of him.[20] When he returned to the warehouse, he spoke to La Rochelle, who said MacMillan had no right being there. About 2:30 p.m. Skillings drove his car by the Eldorado and saw MacMillan's truck parked in front. From his car, he looked inside the cafe and saw MacMillan sitting up at the bar drinking a glass of beer. Skillings testified that he then called La Rochelle, instructed him to question MacMillan when he came in, and said that he was on his way to see a lawyer to determine his rights. Shortly after 3 p.m., when MacMillan returned to the warehouse, La Rochelle asked him what he was doing at the Eldorado in the afternoon. MacMillan retorted that "whoever said he was there was a god damn liar and to come and tell him to his face." [21] La Rochelle testified that he smelled beer on MacMillan's breath.

MacMillan testified that on his way back to the plant about 3 p.m. on May 20, he had stopped at the Eldorado to buy cigarettes, that he was used to stopping there because the woman wanted him to tap the barrel for her when she needed it, that he bought the cigarettes, tapped the barrel, then talked for a minute or two and left, and that he had no drink there of any kind.

On May 23 at 8:30 a.m., MacMillan was called into Skillings' conference room, with DePallo and La Rochelle present. Skillings told MacMillan that he was seen at the Eldorado, that he had lied to La Rochelle, and that he did not want MacMillan to lie to him. He wanted to know what MacMillan was doing there. MacMillan said he had gone in for a pack of cigarettes, and denied the charge that he was having a glass of beer. DePallo remarked that he had seen MacMillan there on May 22, but agreed with MacMillan's reply that he was just talking to a friend outside. Asked why he lied to La Rochelle, MacMillan replied that he thought that La Rochelle was "kidding." Skillings stated that it was he who had seen MacMillan drinking at the Eldorado and he did not intend to be called a "god damn liar." He referred to the company rule against drinking while driving a vehicle and told MacMillan to finish out the morning and pickup his check.

E. *Supervisory status of La Rochelle*

Much testimony was adduced, all of which need not be recited, as there is ample evidence for a conclusion. Principally, La Rochelle acts as dispatcher and gives the drivers their work instructions. He opens the place in the morning and closes it in the evening. He is in charge when Skillings and DePallo are out, which occurs for substantial periods, during which, *inter alia,* he grants employees' requests for time off. He sits in with management in discussions of employee grievances and working conditions, and employees come to him independently with their complaints. He had approached MacMillan about working for Respondent, notified him, through driver Mains, that he was hired, and told him what his duties would be. Several specific instances were shown of La Rochelle's assertion, vis a vis the employees, of management authority. For example, on one occasion he told Ingraham, who wanted to stay in the shop, that he had "a run to do" and to get his pay if he did not like it. Markley came in late one day, and La Rochelle threatened in effect that if he did not get in on time he would cause Markley's dismissal. Skillings testified that he told La Rochelle to "get rid of" McDermott, when this employee refused to take a trip assigned to him. La Rochelle notified Southworth that he was discharged because he was at work in an intoxicated condition.[22] (La Rochelle's testimony that he first spoke to DePallo, who told him to dismiss Southworth, does not significantly detract from the effect of his action.) He had earlier remarked to Mains that he was going

[20] DePallo also saw MacMillan on May 22 standing outside the Eldorado talking to a friend. MacMillan testified he was aware that DePallo had seen him on May 20 and on May 22.

[21] MacMillan admitted that he probably did make such a statement, as he was "pretty well peeved."

[22] Donaldson testified that he had then observed Southworth in this condition and that "it was quite a habit with him, I guess."

to fire Southworth when he came back from deliveries. From the entire record it is clear that La Rochelle was a supervisor within the meaning of Section 2(11) of the Act, that he was held out by Respondent and believed by the employees to be a supervisor, and that he was in any event an agent of Respondent during all times material.[23]

F. *Interference, restraint, and coercion*

Section 8(a)(1) violations are found in the following conduct of Respondent:

(a) On May 7 Skillings' direct or implied threats to the employees that, with union representation, he would adversely alter their working conditions (e.g., with respect to loaning money, cars,[24] giving them employment in the winter) and would seize upon minor grounds (e.g., 5 cents short or breaking one bottle) to discharge them.

(b) On May 7 Skillings' suggestion to the employees that they form their own union and "come up and talk it over." [25]

(c) On May 7 La Rochelle's interrogation of Donaldson concerning his knowledge of the Union, and his implied threat that "there will never be a union shop." Later that day, his interrogation of MacMillan.

(d) On May 9, the threats relating to the Union which Skillings conveyed to Mains—to limit the employees' earnings, eliminate the trailer trucks, release employees in the winter, and cut out all benefits (e.g., insurance and uniforms).

(e) On or about May 23, Skillings' remarks to Mains that he could have fired him for cause (implying a future threat of discharge); that he knew how the employees were going to vote in the Board election; and that Mains was expected to pay back money he owed Respondent prior to the election next week.

G. *The alleged 8(a)(3) violation*

Respondent's witnesses, Skillings and La Rochelle, sought to establish that the discovery of MacMillan drinking beer at the Eldorado was wholly fortuitous. In light of all the evidence, this testimony is discredited. Thus, as found, Skillings had early knowledge of the employees' organizational meeting on May 4, and promptly thereafter set out to coerce the employees into abandoning their indicated desire for union representation. On May 7 Skillings approached Business Agent Hastings regarding causes for discharge which the Union would not contest, referring specifically to drinking on the job. Concerning the events on May 20, La Rochelle testified that about 1.30 p.m., MacMillan was overdue at the plant from his rounds, that his truck was needed because deliveries were "piling up," and that Skillings had an appointment downtown and volunteered to try to find MacMillan. However, Skillings testified that La Rochelle wanted to locate "some of the trucks" and that he, Skillings, undertook to find one of the trucks which was the shortest distance away from the plant. When Skillings found MacMillan he made no effort to speak to him or have the needed truck returned to the warehouse. He was "really mad" and, though he had an appointment in town, he decided forthwith to see his lawyer to determine his rights about discharging MacMillan. He later shifted his testimony to say that he merely made a telephone call to an attorney, Bennett, who was "out" and instead arranged an appointment for 9 a.m. on May 22. He met Bennett as appointed, on which occasion he retained Bennett for the first time,[26] theretofore he had not discussed with an attorney anything concerning the case. His decision to discharge MacMillan was made 15 minutes after he spoke to Bennett. However, he did not seek or speak to MacMillan until May 23, as he had to be away from the plant on various appointments. In the interim, although he was in touch with the plant by phone, he left no instructions to discharge MacMillan, who continued to perform his driving duties. Manager DePallo, who testified he had seen MacMillan with a glass of beer at the Eldorado on May 20 about 2 p.m. (i.e., before Skillings came on the scene), purportedly did nothing about it. Nor did he mention at the discharge interview on May 23 that he had seen MacMillan on May 20, although he spoke up about seeing MacMillan on May 22 on the outside of the Eldorado.

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[23] Certainly La Rochelle was in a "strategic position to translate [to employees] the policies and desires of management" *International Association of Machinists, Tool and Die Makers Lodge No 35 (Serrick Corp.)* v. *N L R B.*, 311 U S 72, 80, 81, cf. *N L R B* v *Solo Cup Company*, 237 F 2 521, 523–524 (C.A. 8).

[24] See *Savoy Leather Mfg. Corp.*, 139 NLRB 425.

[25] See *James Hotel Company, a Corporation, d/b/a Skirvin Hotel and Skirvin Tower*, 142 NLRB 761.

[26] As earlier noted, Bennett phoned Hastings on May 20 about the Union's letter demanding recognition.

In general, I find that Respondent's testimony regarding MacMillan's discharge contains in a large measure contradictions, improbabilities, and vagueness in significant areas. It is sufficiently evident that part of Skillings' design was to capitalize upon any grounds which would constitute "cause" to discharge and eliminate known union adherents prior to the election. His actions with regard to MacMillan are explicable in this context. The implication is strong that on May 20 he was alerted through DePallo, or other source, of MacMillan's presence at the Eldorado and personally drove over with the purpose of obtaining evidence against MacMillan.

However, the foregoing notwithstanding, I am impelled to find that MacMillan was in fact imbibing in some intoxicating drink at the Eldorado when he was seen by DePallo and Skillings, and that La Rochelle did smell alcohol on his breath upon his return to the plant. His explosive reply to La Rochelle that "anyone who says he was there is a god damn liar," knowing the contrary to be true, was not the kind of response made to a "kidding" question nor a reasonable reaction if he had merely gone in for a pack of cigarettes and to "tap a barrel." Rather, it was obviously an instinctive attempt to cover up and is revelatory of a sense of guilt At the hearing, MacMillan admitted making the statement and his attempted explanations are plainly incredible. In other respects, MacMillan's testimony impressed me as lacking in candor.

Respondent declares a policy of discharging drivers for drinking on the job, citing, among other things, the requirements of its insurance carrier and the demands of its customers. Particularly in the occupation of these drivers, who deliver beer, such a policy is incontestably reasonable. Drivers Southworth and Markley were fired for this reason, one before and the other after MacMillan. It is probable that in any circumstances of finding MacMillan drinking on the job, Respondent would have discharged him His affiliation with the Union provides no immunity under the Act against discharge for clear cause. While Respondent was seeking and hoping to find such a ground before the election to terminate known union adherents, as MacMillan, this evidence alone cannot establish the alleged violation. Respondent was entitled to discharge MacMillan for the reason that it did, and no holding of pretext will lie that the principal and motivating cause was unlawfully discriminatory. Especially in such a situation, the employees must carefully avoid giving a legitimate basis for discharge, while the employer must be positive that the offense was committed and the discipline was not disparately applied. Accordingly, the Section 8(a)(3) allegation will be dismissed.[27]

H. *The refusal to bargain*

It is found that the appropriate unit for purposes of collective bargaining within the meaning of Section 9(b) of the Act, as alleged in the complaint,[28] consist of all truckdrivers and warehousemen employed at the Portland, Maine, plant, excluding office clerical employees, salesmen, guards, and all supervisors, as defined in the Act.[29]

On May 4, six of the seven employees then in the appropriate unit signed membership application cards which stated, *inter alia.* [30]

> By my signature hereto, I hereby authorize the Truck Drivers, Warehousemen and Helpers' Local Union 340, to represent me and in my behalf, for the purposes of collective bargaining to negotiate and conclude all agreements in respect to rates of pay, wages, hours of employment, or other conditions of employment in accordance with the provisions of the Labor-Management Relations Act of 1947.

On May 5, as earlier shown, the Union wrote Respondent requesting recognition in the appropriate unit The request was in effect refused.

Early on May 5, according to La Rochelle and Skillings, Malloy told La Rochelle to convey to Skillings the message that he and Markley "wanted no part of" the Union Skillings apparently made no effort to verify or pursue the matter further

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[27] *Alamo Expresses, Inc., et al*, 127 NLRB 1203. And see *Duval Engineering and Contracting Company*, 132 NLRB 852.

[28] And denied by Respondent.

[29] The same unit was stipulated as appropriate in the agreement for consent election executed by the parties on May 13, 1964, in Case No 1–RC–7894 The union petition in the case was subsequently withdrawn and the election originally set for May 29 not held

[30] The application contained an item—"Note: Full initiation fee must accompany application." Contrary to Respondent's argument, it is immaterial that the initiation fee was not paid with the applications, as the pertinent question is not one of actual membership but authorization to the Union to represent the signatory employee

with these two drivers, nor did Respondent call either of them to testify.[31] This kind of testimony is indeed very thin, particularly when considered against the evident purpose of Respondent, immediately upon knowledge, to dissipate the Union's majority. In all the circumstances, including their demeanor, La Rochelle and Skillings cannot be credited. Their testimony in any case is scarcely sufficient to overcome the authenticated application cards subscribed by Malloy and Markley.[32]

From payroll records it appears that on May 5 Respondent hired a new driver, Chadwick.[33] Skillings testified that Chadwick had previously worked for Respondent and had been "temporarily suspended" in March 1964 because of a customer complaint that he had failed to give the customer credit for cases returned. Skillings stated that he told Chadwick at the end of April to start work on May 5, a Tuesday, and explained that his reason was that "Monday is usually very slow." [34] Chadwick was not called to testify. Again Skillings' testimony is unacceptable. Chadwick's employment promptly following Respondent's awareness on May 4 of the employees' organizational meeting must be regarded as more than a coincidence; rather, it fits well with Skillings' design by unlawful means to forestall the Union from proving a majority. However, irrespective of the precise date and purpose of Chadwick's hire, the Union, when it requested and was refused recognition, clearly represented six of the seven or eight employees in the bargaining unit I find therefore that the Union was on May 4, and has been at all times since, the exclusive representative of all the employees in the appropriate unit for purposes of collective bargaining within the meaning of Section 9(a) of the Act.

As already found, following its knowledge of the Union and receipt of the recognition request, Respondent commenced a course of coercive conduct, of serious character, in violation of Section 8(a)(1).

Additionally, Respondent sought to, and did, engage in bargaining individually with the employees Thus, as outlined earlier, Skillings first invited such bargaining in his speech on May 7 in which he proposed that the employees form their own union and "come up and talk it over." Later, on May 7, La Rochelle attempted to negotiate terms with and through MacMillan to the exclusion of the Union. Similarly, about May 14 or 15, and in the week following, he attempted such bargaining with Mains. In conversations with Mains on May 9 and 23, Skillings indicated he was willing to pay $1 70 an hour, if that was what the employees wanted. Skillings also told Mains on May 23 he could have settled the employees' "differences" if they came to him instead of going to the union hall, implying in the circumstances a current proposal to settle privately with the employees. These endeavors of Respondent plainly were calculated to undercut and undermine the Union, and to avoid having to bargain with it. Such conduct alone was violative of Section 8(a)(5).[35]

Respondent cannot be heard to claim any good-faith reliance upon a pending Board election. Its campaign of unlawful activity, as described, effectively refutes any contention that it had a good-faith doubt that the Union represented a majority of the employees. Rather, the nature and scope of Respondent's unfair labor practices, demonstrably undertaken to gain time to destroy the Union's majority status, brings this case squarely within the *Joy Silk Mills* doctrine.[36] Accordingly, it is concluded that, by its overall conduct, Respondent engaged in a refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

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

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[31] It is noted that Markley, like Donaldson, MacMillan, and Mains, indicated on his signed membership application that he was previously a member of the Union.

[32] See, e.g., *Aero Corporation*, 149 NLRB 1283.

[33] Donaldson testified that Chadwick was not present at Skillings' speech on May 7, while Skillings said he was. MacMillan fixed Chadwick's arrival about May 16.

[34] The payroll week began on Friday.

[35] E.g., *Wings & Wheels, Inc.*, 139 NLRB 578; *Edward Fields, Incorporated*, 141 NLRB 1182.

[36] *Joy Silk Mills, Inc.* v. *N.L.R.B.*, 185 F. 2d 732 (C.A.D.C.). And see, e.g., *Gotham Shoe Manufacturing, Co., Inc.*, 149 NLRB 862; *Aero Corporation, supra.*

V. THE REMEDY

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

It has been found that Respondent unlawfully refused to bargain with the Union as the exclusive representative of its employees in an appropriate unit. It will therefore be recommended that Respondent, upon request, bargain collectively with the Union, and in the event an understanding is reached, embody such understanding in a signed agreement.

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

CONCLUSIONS OF LAW

1. Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By interfering with, restraining, and coercing employees in the exercise of rights guaranteed 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.
4. Since May 4, 1964, the Union has been the exclusive representative of all employees in the following appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All truckdrivers and warehousemen employed at Respondent's Portland, Maine, plant, excluding office clerical employees, salesmen, guards, and all supervisors, as defined in the Act.

5. By refusing to bargain collectively with the Union as the exclusive representative of its employees in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.
6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.
7. In discharging Albert MacMillan on May 23, 1964, Respondent did not violate Section 8(a)(3) of the Act as alleged.

RECOMMENDED ORDER

Upon the basis of the above findings of fact and conclusions of law, and upon the entire record in the case, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, it is recommended that Respondent, Donald Skillings, d/b/a Yankee Distributors, Portland, Maine, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with Truck Drivers, Warehousemen and Helpers Union Local #340 affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America as the exclusive representative of all Respondent's employees in the appropriate bargaining unit described hereinabove.

(b) Interrogating employees in a coercive manner concerning their union activities or sympathies.

(c) Threatening employees with elimination of benefits, changes in their working conditions, reductions in work and earnings, discharge, or other reprisal because they selected the Union or engaged in activity on behalf of the Union.

(d) Telling employees it knows how the individual employees will vote in a Board election.

(e) Suggesting that the employees form their own union.

(f) Engaging in individual bargaining with the employees, or proposing such a course of bargaining to the employees, while the Union is their exclusive bargaining representative.

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed in Section 7 of the Act.

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

(a) Upon request, bargain collectively with the above-named Union as the exclusive representative of all the employees in the appropriate unit, and embody in a signed agreement any understanding reached.

(b) Post at its Portland, Maine, plant, copies of the attached notice marked "Appendix." [37] Copies of said notice, to be furnished by the Regional Director for Region 1, shall, after being duly signed by Respondent, be posted immediately upon receipt thereof, in conspicuous places, and be maintained for a period of 60 consecutive days. Reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 1, in writing, within 20 days from the receipt of this Trial Examiner's Decision and Recommended Order, what steps Respondent has taken to comply herewith.[38]

It is further recommended that the complaint be dismissed insofar as it alleges violations of the Act not specifically found herein.

[37] If this Recommended Order is adopted by the Board, the words "a Decision and Order" shall be substituted for the words "the Recommended Order of a Trial Examiner" in the notice. If the Board's Order is enforced by a decree of a United States Court of Appeals, the notice will be further amended by the substitution of the words "a "Decree of the United States Court of Appeals, Enforcing an Order" for the words "a Decision and Order."

[38] If this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify the Regional Director for Region 1, in writing, within 10 days from the date of this Order, what steps the Respondent has taken to comply herewith."

APPENDIX

NOTICE TO ALL EMPLOYEES

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

WE WILL NOT refuse to recognize Truck Drivers, Warehousemen and Helpers Union Local #340, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America as the exclusive representative of the employees in the appropriate bargaining unit described below.

WE WILL NOT coercively interrogate our employees concerning their union activities; threaten to eliminate favors and benefits, change their working conditions, reduce their hours, or engage in other reprisals because they selected the Union or engaged in activity on behalf of the Union, or tell employees we know how the individual employees will vote in a Board election.

WE WILL NOT propose or encourage the employees to form their own union, or invite or engage in individual bargaining with the employees, in derogation of the exclusive bargaining status of the Union.

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

WE WILL, upon request, bargain collectively with the above-named Union as the exclusive bargaining representative of all employees in the bargaining unit with respect to rates of pay, wages, hours of employment, and other conditions of employment, and if any understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All truckdrivers and warehousemen employed at Respondent's Portland, Maine, plant, excluding office clerical employees salesmen, guards, and all supervisors, as defined in the Act.

DONALD SKILLINGS, D/B/A YANKEE DISTRIBUTORS,
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 at Boston Five Cents Savings Bank Building, 24 School Street, Boston, Massachusetts, Telephone No. 523–8100, if they have any questions concerning this notice or compliance with its provisions.