Southwestern Transportation Company *and* International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 146. *Case No. 27–CA–1704. August 10, 1965*

DECISION AND ORDER

On June 8, 1965, Trial Examiner Wallace E. Royster 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.

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 [Members Fanning, 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 brief, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, as modified below.[1]

The Trial Examiner in his Decision found that the Respondent had coercively interrogated employees in violation of Section 8(a)(1) of the Act. However, he inadvertently omitted such findings in his conclusions of law and his Recommended Order. We hereby amend his conclusions of law accordingly and also amend his Recommended Order as provided herein.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby adopts as its Order the Recommended Order of the Trial Examiner, as modified herein, and orders that the Respondent, Southwestern Transportation Company, Canon City, Colorado, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order, as so modified:

1. Delete paragraph 1(b) of the Trial Examiner's Recommended Order and substitute the following paragraph:

"(b) Refusing to bargain, threatening to discharge, or threatening lessened work opportunities and job loss in the event employees persist

[1] *N.L.R.B.* v. *Southeastern Rubber Mfg. Co., Inc.*, 213 F. 2d 11, 15 (C.A. 5); *N.L.R.B.* v. *Armco Drainage & Metal Products, Inc., Fabricating Division*, 220 F. 2d 573, 576–577 (C.A. 6), cert. denied 350 U.S. 838; *Joy Silk Mills, Inc.* v. *N.L.R.B.*, 185 F. 2d 732, 741–742 (C.A.D.C.), cert. denied 341 U.S. 914

in seeking union representation, coercively interrogating employees about their union activity, or in any other manner interfering with, restraining, or coercing its employees in the exercise of their right to self-organization, to form labor organizations, to join or assist the said Union, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all 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, as authorized in Section 8(a)(3) of the National Labor Relations Act, as amended."

2. Delete the second substantive paragraph of the Appendix of the Trial Examiner's Recommended Order, and substitute the following paragraph:

> WE WILL NOT by refusing to bargain, by threatening discharge, by threatening lessened work opportunities or job loss in the event employees persist in seeking union representation, by coercively interrogating employees about their union activity, or in any other manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to join or assist the above-named Union or any other labor organization, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from 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, as authorized in Section 8(a)(3) of the National Labor Relations Act, as amended.

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

This matter was tried before Trial Examiner Wallace E. Royster in Canon City, Colorado, on March 25, 1965.[1] At issue is whether Southwestern Transportation Company, Canon City, Colorado, herein called the Respondent, upon request, has refused unlawfully to bargain with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 146, herein called the Union. It is alleged that by such refusal and by coercive interrogations of employees, threats to cease business, and predictions of lessened work opportunities, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the National Labor Relations Act, as amended, herein called the Act.

Upon the entire record in the case, from my observation of the witnesses, and in consideration of the briefs filed with me, I make the following.

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The Respondent is a Colorado corporation with a place of business in Canon City, Colorado, where it is engaged in the transportation of mineral ores, household goods, and general freight. During the year preceding the issuance of the

[1] Charges filed November 4 and December 23, 1964. Complaint issued December 29, 1964, and was amended January 8, 1965 All dates mentioned hereinafter are in 1964

complaint, the Respondent performed services valued in excess of $50,000 for Colorado Fuel and Iron Corp. and the Cotter Corporation. Each of these latter entities is located in the State of Colorado and each annually produces and ships goods valued at more than $50,000 directly to points outside the State of Colorado. Respondent's answer admits the accuracy of the foregoing business data and I find that the Respondent is engaged in commerce and in activities affecting commerce within the meaning of Section 2(6) and (7) of the Act.[2]

II. THE LABOR ORGANIZATION INVOLVED

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

Joseph E. Berta and Earl Berta are the sole owners of the Respondent and its only officers. The two are also members of a partnership, Berta Brothers, which is also engaged in some form of hauling by truck. Both operations appear to be conducted from a terminal in Canon City. Respondent's employees, excepting the office force, consist of several truckdrivers and a mechanic. The drivers occasionally do some work in Respondent's warehouse and occasionally assist in truck maintenance. The truckdrivers are paid $1.75 when working on an hourly basis and sometimes receive a mileage rate.

On a number of occasions in October, the Respondent rented trucks to another employer, Goodell Construction Company, which was engaged in some sort of construction in or near Colorado Springs. The Respondent also supplied drivers for the trucks from among its employees. The drivers were paid directly by Goodell and at a higher rate than that paid by the Respondent. In behalf of the Respondent, it is contended that those among the drivers who worked on the Goodell project were at least for the time they were so engaged not employees of the Respondent. I find no merit in this position. One of the drivers, Max Berry, appears to have worked almost exclusively for Goodell pay in October; other drivers, Merlino, Hamilton, Prebble, and Humphrey, spent a good part of the month at the Goodell job. Each of these men was, however, *assigned* to this work by the Respondent, each, with the possible exception of Berry, worked some portion of the month directly for the Respondent, and each, after finishing his stay on the Goodell job, was returned to the Respondent's payroll.

On October 15 Union Organizer Robert Menapace met with a group of Respondent's employees and secured the signatures of the seven men present to cards authorizing the Union to represent them.[3] On October 16 the Union sent a letter to the Respondent asserting that it represented "all Truckdrivers, Warehousemen and Mechanics" in Respondent's employ and requesting a meeting for the purposes of negotiating a bargaining agreement. This demand was received by the Respondent on October 17. Also on October 16 the Union mailed a petition for an election to the Denver office of the Board asking for certification in the same unit.

Robert Hamilton, one of the drivers, testified credibly and without contradiction that on October 17, a Saturday, Earl Berta called him to Respondent's office and asked why the men had acted to have a union and if Hamilton had signed a card. Hamilton replied that he was "going along with the guys" and that he had signed a card. On the same date, according to the undenied and credited testimony of Joseph McBeth, a mechanic, Earl Berta showed him the Union's letter and asked McBeth to tell him what he knew about it. McBeth said that he knew nothing. On Sunday, October 18, according to the undenied and credited testimony of driver Nick Merlino, he was questioned by the two Berta brothers and their father, Joseph J. Berta,[4] concerning his knowledge of the Union's demand letter. Merlino said that

[2] The allegation in the answer that it is not reasonable to assume that the Respondent will have comparable business operations in the coming year finds record support only in speculation and in any event raises an immaterial issue.

[3] All of the individuals who signed the cards, except Paul Prebble, testified to the fact of signing. Prebble did not appear at the hearing, perhaps because he is said now to be working in California. The testimony of others in attendance establishes satisfactorily that he filled out and signed the card at the October 15 meeting. The cards are unambiguous designations of the Union as bargaining representative and evidence taken at the hearing establishes that the signers were aware that this was and is so.

[4] It was stipulated at the hearing that Joseph J. Berta was a supervisor within the Act's meaning. He did not appear as a witness. In the course of the hearing, counsel for the Respondent suggested that Joseph J. Berta was too ill to attend.

the Bertas knew as much about it as he did. Merlino was then asked if he thought that the Respondent "could operate" if the Union represented the men. He answered that he did not know. Tempers began to rise at this point, Merlino recalled, and he left. At some point during the discussion or interrogation, Merlino testified, there was mention by one of the Bertas that "if it had to go union" work opportunities would be affected; the Respondent might not be able to operate. On Monday, October 19, Joseph J. Berta asked driver Cecil Humphrey what he knew about the Union. Humphrey answered that there had been a meeting and that the men had signed cards. Berta became angry at this and said that if he could have his way he would "wipe the board off and hire all new help." The board referred to is a daily or weekly listing of driver assignments maintained in Respondent's terminal. About November 1, still according to Humphrey, President Berta asked him what he thought of the Union Humphrey answered that he was "all for it." Berta then went on to ask why the men thought they should have a union. Humphrey explained that it probably was because of a number of little things. Berta observed that under existing tariffs, he could not operate if he had to pay union scale; he would have to close the doors. Again, about November 15, Humphrey was asked by the two Berta brothers to tell them what his complaints were and how he felt about the Union. None of Humphrey's testimony set forth above was denied and it is wholly credited.

It is unnecessary to decide whether in the circumstances of this case the Respondent was entitled to question its employees about their connection with the Union in an effort to determine whether the Union's claim of majority status had substance, for it is not claimed that the interrogation was so motivated. It stands in the record wholly explained by any witness for the Respondent. In any event the expressed desire on the part of Joseph J Berta to "wipe the board off and hire all new help" because the employees wanted the Union was a threat to continued employment. So, too, were Respondent's articulated fears that the advent of the Union would or might lessen work opportunities or cause the closing of the business. I find that by questioning employees about the Union and in that connection threatening directly or indirectly that their employment because of interest in the Union was in hazard, the Respondent interfered with, restrained, and coerced its employees in the exercise of rights guaranteed in Section 7 of the Act and thereby engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

On October 21, responding to the request of the Board's Regional Office in Denver for such information, the Respondent listed the following individuals as in its employ:

C. M. Anderson	Roy Bogeart	Joe McBeth
Max Berry	Gale Camper	Nick Merlino
Ignace Blatnick	Robert Hamilton	Paul Prebble
	Cecil Humphr[ey]	

At the hearing the Respondent contended and Camper testified that the latter was not an employee of the Respondent in October; that rather he was working then and in later months for the partnership, Berta Brothers. Camper earned $40 in wages from the Respondent in October and testified that he received this pay for some extra work apart from his employment with Berta Brothers. At the time of the hearing Camper was on Respondent's payroll I find it unnecessary to decide what the relationship between the Respondent and Camper may have been in October It is possible, of course, that he was assigned by the Respondent to work for the partnership as others were to work for Goodell. Lacking evidence in that particular I do not find that he was. Having found contrary to the Respondent's contention that those who were assigned to work for Goodell were not its employees, I find that on October 17 when the Union demanded recognition there were nine in the bargaining unit.[5] On that day, excluding the card signed by Camper, the Union had been authorized by six of the nine to represent them for purposes of bargaining. I find that the Union was on October 17 the exclusive representative of Respondent's employees in the appropriate unit

On October 28, representatives of the Respondent and of the Union met with an agent of the Board to discuss an election. Disagreement arose only in respect to an election date. The Respondent offered no objection to eligibility list [6] or unit.

[5] The nine are those named above excepting Camper There is no genuine dispute about the unit I find it to be all truckdrivers, warehousemen, and mechanic employees, excluding office clerical employees, guards, professional employees, and supervisors as defined in the Act

[6] Consisting of the 10 named in the list of October 21.

The Union desired that an election be conducted immediately; the Respondent wanted a delay of a month, allegedly because the Berta brothers had some work to perform in New Mexico.

President Berta was the only officer of the Respondent to testify in this proceeding. He said from the stand that at the time the Union demanded recognition the Respondent "had a good-faith doubt that these men did sign cards or wanted the union for their bargaining agent." He did not refer in his testimony to the occasions when he, his brother, or his father questioned employees about their interest in the Union. Hamilton told Earl Berta that he had signed a card; Humphrey told President Berta that he favored the Union; whether other employees were questioned about card signing does not appear. So the basis, if any, for President Berta's doubt is not evident. The fact that he, his brother Earl, and his father suggested to employees that the advent of the Union might mean less work for them or might force the Respondent to close its business, and the father's reaction that all should be replaced, argues that the Respondent feared and believed the worst: the Union actually had been chosen by their employees. In consequence by threats and predictions the Respondent sought to discourage the desire that the employees had manifested and thus to coerce them to drop their interest in union representation An election in such a small unit could have been conducted quickly. The insistence of the Respondent that an election be delayed for a month is further evidence that it feared to permit the Union's claim to be tested until time afforded it greater opportunity to dissuade the employees by means of threats and predictions.

I find that the Respondent on October 17 held no good-faith doubt concerning the representations of the Union and that it sought thereafter by means of delay and threats to undermine the Union's majority. The Respondent thereby refused unlawfully to bargain with the majority representative of its employees in an appropriate unit and has thereby engaged in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Respondent set forth in section III, above, occurring in connection with its operations 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 thereof.

V. THE REMEDY

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

Upon the basis of the foregoing findings of fact and the entire record in this case, I reach 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 truckdrivers, warehousemen, and mechanic employees of the Respondent employed at its Canon City, Colorado, establishment, exclusive of office clerical employees, guards, professional employees, and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.
4. On October 15, 1964, and at all times thereafter, the Union was and now is the exclusive representative of the employees in the appropriate unit for purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment
5. By failing and refusing to extend recognition to the Union upon receipt of the Union's demand on October 17, 1964, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) of the Act.
6. By the refusal to bargain, by threatening to discharge employees, and by predicting lessened work opportunities or loss of employment should its employees persist in seeking representation by the Union, the Respondent has interfered with, restrained, and coerced its employees in the exercise of rights guaranteed in Section 7 of the Act and has thereby engaged 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 foregoing findings of fact and conclusions of law, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, it is recommended that the Respondent, Southwestern Transportation Company, Canon City, Colorado, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain with the Union as the exclusive representative of Respondent's employees in the appropriate unit.

(b) Refusing to bargain, threatening to discharge, or predicting lessened work opportunities and job loss in the event employees persist in seeking union representation, or in any other manner interfering with, restraining, or coercing its employees in the exercise of their right to self-organization, to form labor organizations, to join or assist the said Union, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain therefrom, as guaranteed in Section 7 of the Act.

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

(a) Upon request, bargain with the Union as the exclusive representative of the employees in the appropriate unit and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its terminal in Canon City, Colorado, copies of the attached notice marked "Appendix." [7] Copies of said notice, to be furnished by the Regional Director for Region 27, shall, after being duly signed by the Respondent, be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that such notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 27, in writing, within 20 days from the date of receipt of this Decision, what steps have been taken to comply herewith.[8]

[7] In the event that this Recommended Order be adopted by the Board, the words "a Decision and Order" shall be substituted for the words "the Recommended Order of a Trial 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".

[8] In the event that this Recommended Order be adopted by the Board, this provision shall read: "Notify the 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, as amended, we hereby notify our employees that:

> WE WILL, upon request, bargain collectively with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 146, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:
>
> > All truckdrivers, warehousemen, and mechanic employees at our Canon City establishment, exclusive of office clerical employees, guards, professional employees, and supervisors as defined in the National Labor Relations Act.
>
> WE WILL NOT by refusing to bargain, by threatening discharge, by predicting lessened employment opportunities or loss of jobs, or in any other manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to join or assist the above-named Union or any other labor organization, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from 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 as authorized in Section 8(a)(3) of the National Labor Relations Act, as amended.

SOUTHWESTERN TRANSPORTATION 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.

If employees have any question concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 609 Railway Exchange Building, 17th and Champa Streets, Denver, Colorado, Telephone No. 297-3551.

Traylor-Pamco *and* Michael Cordisco. *Case No. 19-CA-2808. August 10, 1965*

DECISION AND ORDER

On October 12, 1964, Trial Examiner William E. Spencer 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. He further found that the Respondent had not engaged in certain unfair labor practices alleged in the complaint. Thereafter, the Respondent and the General Counsel filed exceptions to certain portions of the Trial Examiner's Decision and supporting briefs. The Respondent further filed a reply to General Counsel's exceptions to 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 [Members Fanning, 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, Respondent's reply to the General Counsel's exceptions, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.[1]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the Board hereby adopts as its Order the Order recommended

[1] We agree with our dissenting colleague that the assertion of rights arising out of a collective-bargaining agreement is within the scope of Section 7 of the Act. However, the Trial Examiner concluded, and properly so, in our opinion, that Respondent did not discharge either Cordisco or Owen for such reason, but that it did discharge them for insubordinate violation of instructions.