

(c) Notify said Regional Director, in writing, within 20 days from receipt of this Decision, what steps have been taken to comply therewith.⁷

⁷In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read "Notify said Regional Director, in writing, within 10 days from the date of this Order, what steps the Respondent has taken to comply herewith."

APPENDIX

NOTICE TO ALL MEMBERS OF AND TO ALL EMPLOYEES OF AKRON ENGRAVING COMPANY

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 coercively follow or threaten with physical violence the employees of Akron Engraving Company or the employees of any other employer if they continue to work for the Company or such other employers who do business with the Company during our strike against it.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of rights guaranteed them by Section 7 of the Act.

CLEVELAND LOCAL NO. 24-P LITHOGRAPHERS AND PHOTO-
ENGRAVERS INTERNATIONAL UNION, AFL-CIO,
Labor Organization.

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 members have any question concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 720 Bulkley Building, 1501 Euclid Avenue, Cleveland, Ohio 44115, Telephone 621-4465.

Ozella Harrington, d/b/a Kimbrough Trucking Co. and Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local 310, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America. Case 28-CA-1293. September 7, 1966

DECISION AND ORDER

On July 1, 1966, Trial Examiner James R. Hemingway 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, Respondent filed exceptions to the Trial Examiner's Decision, and a supporting brief, limited to the Section 8(a) (5) and derivative Section 8(a) (1) findings.

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 Zagoria].

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 Respondent's exceptions, the brief, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.¹

[The Board adopted the Trial Examiner's Recommended Order.]

¹ The Trial Examiner, in the first paragraph of his Decision, no doubt through inadvertence, describes the complaint as alleging violations of "Section 8(a)(1) and (5)," thereby omitting reference to the 8(a)(3) allegation therein. The description of the complaint is, accordingly, corrected to read "Section 8(a)(1), (3), and (5) of the Act."

TRIAL EXAMINER'S DECISION AND RECOMMENDED ORDER

STATEMENT OF THE CASE

This proceeding, under Section 10(b) of the National Labor Relations Act, as amended, 29 U.S.C. Sec. 151 *et seq.*, herein called the Act, was commenced by the filing of a charge by Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local 310, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, herein called the Union, on October 21, 1965, and an amended charge filed on November 30, 1965, pursuant to which a complaint was issued on November 30, 1965, against Ozella Harrington, d/b/a Kimbrough Trucking Co., herein called the Respondent. The complaint alleged that the Respondent had engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) of the Act.

Pursuant to notice, a hearing was held in Tucson, Arizona, on March 31, 1966, before Trial Examiner James R. Hemingway.¹ Following the close of the hearing the General Counsel and the Respondent filed briefs with me.

Upon my observation of the witness, and on all the evidence in the case, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The Respondent is and has been at all times material herein an individual proprietor doing business under the trade name of Kimbrough Trucking Co., with her principal place of business at Benson, Arizona, where Respondent is engaged in furnishing trucking and haulage services. During the year preceding the issuance of the complaint, in the course and conduct of her trucking and haulage operation, Respondent derived gross income equal to, or in excess of, \$50,000 from said operations which were performed for firms within the State of Arizona, which, in turn, made sales to customers outside the State of Arizona, in total in excess of \$50,000 during said period. The Respondent concedes jurisdiction of the Board and I find that it will effectuate the policies of the Act to assert jurisdiction.

II. THE LABOR ORGANIZATION INVOLVED

The Union is a labor organization admitting to membership employees of the Respondent.

III. THE UNFAIR LABOR PRACTICES

A. *Interference, restraint, and coercion*

On August 27, 1965, 6 of the 10 employees of Respondent designated the Union as their collective-bargaining representative. On August 30, 1965, the Respondent

¹ The transcript is replete with errors, mostly in spelling which, in most instances, do not interfere with the reader's understanding of what is meant. However, some errors are sufficiently egregious to require correction, especially in cases where the misspelling might alter the sense of the testimony. Accordingly the transcript is hereby corrected as shown in the attached Appendix B.

received a letter from the Union notifying her that the Union had been designated by the employees as their exclusive bargaining representative and requesting that Respondent meet with the Union at a mutually convenient time for the purpose of negotiating a collective-bargaining agreement. On the same day that this request for recognition and bargaining was received, the Respondent posted a notice to all employees reading as follows:

Effective September 1, 1965, there will not be any gas put in your automobiles from our pumps. Do not charge any parts, etc. for personal use to our accounts. Turn in all bills and expense money, also pay all advances. It will be necessary to have a purchase order for all repairs and parts.

Thank you
Ozella

Before this notice was posted, the employees had been permitted for a number of years to purchase gasoline from the Respondent for use in their personal automobiles at prices generally lower than those charged at most service stations. They would fill their gas tanks themselves and were on their honor to enter the correct number of gallons in a book that was provided for that purpose. At the end of the pay period, the Respondent would determine the amount owed for gasoline by each employee and would deduct it from his pay check. Once, several years before the events herein related, the Respondent had determined that one of the employees was not making correct entries of gasoline taken for private use and discontinued for a short time the privilege of taking gasoline. At an unspecified time, that employee ceased to be employed by the Respondent. Presumably following his departure, the Respondent had resumed the practice of allowing the taking of gasoline for private use as it previously had existed and continued the practice until September 1, 1965, when it was terminated pursuant to the notice of August 30.

The Respondent had also permitted employees to charge automotive parts for their private automobiles to Respondent's account at the dealers from whom the Respondent received a fleet discount. This privilege made a great deal of work for the Respondent when the seller would bill the purchases to the Respondent without indicating whether or not the parts charged were for private automobiles or for trucks. However, the Respondent apparently put up with the inconvenience until the date of the notice, August 30, 1965.

Before that date it had also been a common practice for the truckdrivers to have repairs made on the trucks they drove and to obtain parts in connection with the repairs without the necessity of obtaining a purchase order for them. The Respondent testified that she had from time to time requested the men to get purchase orders but that she would get lax and take care of the employee's purchases without a purchase order. Since August 30, 1965, the Respondent's full-time mechanic has issued the purchase orders as needed.²

When a driver was sent on a trip out of town, it was the Respondent's practice to advance a certain amount of money to cover his expenses. Upon his return, he was supposed to turn in his bills and any excess of expense money remaining. The drivers were careless about this and the Respondent would have to call for an accounting before making out the paycheck for such driver. The reminder in the notice was, therefore, not a change in practice.

It had also, before August 30, 1965, been the practice of the Respondent, at times, to put cases of soft drinks in the refrigerator and to let the drivers help themselves. The Respondent testified that, without her knowledge, the mechanic had taken it upon himself to post a notice on the refrigerator "Pop, 10c" and to put a can on top of the refrigerator in which to put the money. The mechanic's change in the former practice was not alleged in the complaint to be a violation of the Act. However, the deprivations mentioned in the aforesaid notice are all alleged to constitute discrimination in violation of the Act.

The Respondent testified that the posting of the notice had nothing to do with the Union or with the notice of its claim to represent the Respondent's employees, that she had posted it at that time only because it was the first of the month.

² The Respondent had had a full-time mechanic only since June or July 1965.

However, in an affidavit given to the Board on October 29, 1965, the Respondent stated, "The men had been taking advantage of gas, parts, and advances policies that I had prior to August 30, 1965. I was considering doing away with these policies for some time, but I didn't. The men signing up for the Union brought it to a head." From this, as well as from the fact that the notice was quite comprehensive in its coverage, the inference is inescapable that the reason for Respondent's posting of a notice on the very day of receipt of the Union's request for recognition and bargaining was to discourage their continued support of the Union. Accordingly, I conclude and find that, by posting the notice of October 30, 1965, the Respondent discriminated in regard to the terms and conditions of employment of her employees thereby discouraging membership in a labor organization, and interfered with, restrained, and coerced them in the exercise of the rights guaranteed in Section 7 of the Act.³

B. *The refusal to bargain*

1. The appropriate unit

The complaint alleged and the answer admitted that all Respondent's drivers, exclusive of mechanics and helpers, janitors, office clericals, and supervisors as defined in the National Labor Relations Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act, and I so find.

2. The Union's majority

As previously stated, on August 27, 1965, the majority of the employees designated the Union as their representative for the purposes of collective bargaining with the Respondent. The Respondent concedes this, and I so find. The Respondent's only contention is that the Union lost its majority thereafter. This contention will be considered hereinafter.

3. The refusal to bargain

Following the posting of the aforesaid notice of August 30, 1965, the Respondent retained counsel, and on August 31, 1965, this attorney, John Boland, verbally notified the Union that the Respondent recognized the Union as the bargaining representative of the aforesaid employees of the Respondent. On September 2, 1965, Boland confirmed this oral commitment in writing. On September 9, 1965, the Union delivered its proposed contract to Boland, and receipt thereof was later acknowledged by Boland. On October 6, 1965, the first negotiation session between the parties was held in the Respondent's office in Benson, Arizona. At this time, the Union and the Respondent, discussed the Union's proposal and reached tentative agreement on several provisions. Because of mutual commitments, the parties agreed that they would not meet again until sometime after October 15, 1965. Meanwhile on September 16 and October 8 and 11, 1965, employees Ferris, Burton, and Smith, respectively, all of whom had signed union authorization cards, resigned their employment with the Respondent and other employees were hired to replace them.

Upon learning of the three resignations, Attorney Boland, on or about October 20, 1965, telephoned the Union's representative and informed him that, in view of the resignations, the Respondent doubted that the Charging Party continued to represent a majority of Respondent's employees and that the Respondent was, therefore, withdrawing recognition of the Union as the employees' bargaining representative and that it would refuse to negotiate further, although Boland said that the Respondent would agree to abide by the results of an election.

The Respondent, conceding that a collective-bargaining representative's majority may not be questioned within a year following certification by the Board, claims that this is not true where initial recognition has been voluntarily granted without Board action. The Board, however, has already decided against this contention. In *Keller Plastics Eastern, Inc.*, 157 NLRB 583, the Board, after reviewing the law with respect to the effect of a loss of majority following certification, Board orders, and settlement agreements, decided that the same rule applied in cases where the

³ *Hoffman-Taff, Inc.*, 135 NLRB 1819.

collective-bargaining representative had been voluntarily recognized, and it quoted from its language in *Poole Foundry and Machine Company*, 95 NLRB 34, 36;

It is well settled that after the Board finds that an employer has failed in his statutory duty to bargain with a union, and orders the employer to bargain, such an order must be carried out for a reasonable time thereafter *without regard to whether or not there are fluctuations in the majority status* of the union during that period. [Emphasis supplied.]⁴

The Respondent argues that the General Counsel has the burden of proving the majority of the Union at the time of the refusal to bargain and that he has here failed to do so. This argument overlooks the fact that, once a union is validly recognized as the collective-bargaining representative of the employer's employees in an appropriate unit, the collective-bargaining representative acquires a status which continues, absent unusual circumstances, for a reasonable time during which the collective-bargaining process is given an opportunity to reach fruition,⁵ and "mere substantial turnover of employees in the appropriate unit can certainly not be regarded as an indication that the Union's previously established majority was thereby impaired . . ."⁶ Specifically what might constitute a reasonable period of time in which to give the bargaining process a fair chance to succeed is not necessary to be decided here, because, in any event, the single bargaining meeting held in this case was not adequate, and the parties were not at an impasse on October 20, 1965, when Respondent withdrew recognition.

I find, therefore, that on August 27, 1965, and at all pertinent times thereafter, the Union was the exclusive representative of all Respondent's employees in the appropriate unit within the meaning of Section 9(a) of the Act and that, on and after October 20, 1965, the Respondent has failed and refused to bargain with the Union in violation of Section 8(a)(5) and (1) of the Act.

IV. THE REMEDY

The notice of August 30, 1965, altered certain procedures followed by Respondent or required existing procedures to be more rigidly followed. This includes the necessity for obtaining orders from the mechanic for necessary repairs to Respondent's equipment, accounting for and refunding travel advances, reporting private automobile parts charged to Respondent and the like. To the extent that the notice merely tightened up on existing rules, I find that it is not necessary or advisable to require a restoration of lax practices. However, the elimination of the long enjoyed privilege of buying gasoline or automobile parts at the price paid by Respondent was discriminatory, and only by restoration of such privileges will the effect of the unfair labor practices be dissipated. My Recommended Order will include a requirement of such restoration.

I shall also recommend an order that, upon request, Respondent bargain collectively with the Union and, if an understanding is reached, embody such understanding in a signed agreement.

The customary cease-and-desist order will also be recommended.

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. Respondent's drivers, exclusive of mechanics and helpers, janitors, office clerical, 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 See also *Universal Gear Service Corporation*, 157 NLRB 1169.

⁵ In *Frank's Bros. Company v. N.L.R.B.*, 321 U.S. 702, the Supreme Court said: ". . . a bargaining relationship once rightfully established must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed."

⁶ *The National Plastics Products Company*, 78 NLRB 699.

4. On August 27, 1965, and at all times pertinent hereto the Union has been and now is, the exclusive representative of the employees in the appropriate unit herein found, within the meaning of Section 9(a) of the Act.

5. By refusing on and after October 20, 1965, to bargain collectively with the Union, the Respondent has engaged in unfair labor practices within the meaning of 8(a)(5) of the Act.

6. By depriving her employees of certain discount rights and privileges previously enjoyed because they joined or assisted the Union, thereby discouraging membership in a labor organization, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(3) of the Act.

7. By the conduct described in paragraphs 5 and 6 above, the Respondent has interfered with, restrained, and coerced her employees in the exercise of the rights guaranteed in Section 7 of the Act, in violation of Section 8(a)(1) of the Act.

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

RECOMMENDED ORDER

It is recommended that the Respondent, Ozella Harrington, doing business as Kimbrough Trucking Co., her officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discriminating in regard to terms or conditions of employment of any employee of Respondent by depriving him of benefits previously enjoyed because he joined or assisted the Union, thereby discouraging membership in a labor organization.

(b) Refusing to bargain collectively with Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local 310, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, upon request.

(c) In any like or related manner interfering with, restraining, or coercing her employees in the exercise of their right to self-organization, to form, join, or assist labor organizations, including the above-named Union, to bargain collectively through representatives of their own choosing, or to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities.

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

(a) Restore to her employees the privileges of purchasing gasoline and automobile parts as that privilege existed immediately before August 30, 1965.

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

(c) Post at her place of business in Benson, Arizona, copies of the attached notice marked "Appendix A."⁷ Copies of said notice, to be furnished by the Regional Director for Region 28, after being duly signed by Respondent, shall be posted by her immediately upon receipt thereof, and be maintained by her for 60 consecutive days thereafter, in conspicuous places, including all places where notices to her employees are customarily posted. Reasonable steps shall be taken by Respondent to assure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the said Regional Director, in writing, within 20 days from the date of receipt hereof, of what steps Respondent has taken to comply herewith.⁸

⁷ In the event that 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 this notice. In the further event that the Board's Order is 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 is adopted by the Board, this provision shall read: "Notify the Regional Director for Region 28, in writing, within 10 days from the date of this Order, what steps the Respondent has taken to comply herewith."

APPENDIX A

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:

I WILL NOT discriminate against any of my employees in regard to hire or tenure of employment or any term or condition of employment because he has joined or assisted Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local 310, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, or any other labor organization.

I WILL NOT interfere with, restrain, or coerce my employees in the exercise of their right to self-organization, to form or join labor organizations, including Teamsters, Chauffeurs, Warehousemen & Helpers, Local 310, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, or any other labor organization, to bargain collectively through representatives of their own choosing, or to engage in other concerted activity for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities.

I WILL restore to my employees the privileges of buying gasoline or automobile parts for their private automobiles at cost to me

I WILL, upon request, bargain collectively with Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local 310, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, and if an understanding is reached, I will embody such understanding in a signed agreement.

OZELLA HARRINGTON, D/B/A KIMBROUGH TRUCKING Co.,

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, 500 Gold Avenue SW., Albuquerque, New Mexico, Telephone 247-2583.

APPENDIX B

CORRECTIONS IN TRANSCRIPT

Page 1, line 19, change *Aira* to *Ira* here and wherever the name thereafter appears; change *Lant* to *Land*; page 4, line 22, change *to* to *too*; page 5, line 14, change *stipulation* to *stipulated*; page 8, line 12, change *refuses* to *refused*; page 9, line 21, change *August* to *October*; page 11, line 21, insert *to* after *referring*; page 12, line 12, change *affect* to *effect*; page 12, line 19, change *brake* to *break*; page 13, line 17, change *by* to *buy*; page 15, line 14, change *lack* to *lax*; page 16, line 15, change *sence* to *sense*, page 17, line 24, change *baught* to *bought*; page 18, line 16, change *spasmodic* to *spasmodic*; page 18, line 17, change *lacks* to *lax*; page 18, line 18, change *aloud* to *allowed*; page 19, line 11, change question mark to a period, page 20, line 1, change *affect* to *effect*; page 20, line 7, change *liket* to *like u*; page 20, line 11, change *obused* to *abused*; page 20, line 18, change *there priviledge* to *their privilege*; page 21, line 15, change *affective* to *effective*; page 25, line 5, change *have stricken* to *have been stricken*; page 25, line 11, change *ask* to *asked*; page 26, line 17, change *there* to *shot* to *short*; page 28, line 1, change *stratened* to *straightened*; page 28, line 2, *their*; page 26, line 18, change *counterman* to *countermand*; page 27, line 13, change *shot* to *short*; page 28, line 1, change *stratened* to *straightened*; page 28, line 2, change *by* to *buy*; page 28, line 19, change *stollen* to *stolen*; page 29, line 10, change *Bollen* to *Boland* here and wherever the name appears; page 29, line 16, change *to* to *too*; page 31, line 2, change *aloud* to *allowed*; page 31, line 3, change *on* to *own*; page 32, line 5, change *ought* to *ought*; page 33, line 5, between *representation* and comma, insert *election*; page 34, line 3, change *desire* to *desires*; page 34, line 17, change *close* to *closed*.