WE WILL NOT unilaterally change existing rates of pay, wages, commissions, bonuses, contests, or other terms or conditions of employment of the employees in the unit described above.

WE WILL NOT refuse to negotiate and discuss with the above-named labor organization matters relating to rates of pay, wages, commissions, bonuses, or contests administered or controlled by Superior Motor Sales, the duration of the contract, union-security provisions, and related matters.

WE WILL NOT refuse to meet on request of the above-named labor organization for purposes of collective bargaining.

WE WILL NOT demand that the Union submit a package contract based on an open shop.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form labor organizations, to join or assist Automobile Salesmen's Union of Chicago and Vicinity or any other labor organization, to bargain collectively through representatives of their own choosing, or 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 Act as modified by the Labor-Management Reporting and Disclosure Act of 1959.

WE WILL, upon request, submit to Automobile Salesmen's Union of Chicago and Vicinity a statement in writing showing current rates of pay, wages, commissions, bonuses, contests, vacation benefits, hours of employment, and other benefits of employment in effect for new- and used-car salesmen employed by us at the said location.

WE WILL, upon request, bargain collectively with Automobile Salesmen's Union of Chicago and Vicinity as the exclusive representative of our regularly employed new- and used-car salesmen, excluding all other employees, and supervisors as defined in the Act, with respect to rates of pay, wages, commissions, bonuses, or contests controlled or administered by Superior Motor Sales, vacation benefits, hours of employment, and other conditions of employment, and embody in a signed agreement any understanding reached.

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

SUPERIOR MOTOR SALES, INC.,
Employer.

Dated_____ By_____
(Representative) (Title)

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

If employees have any question concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 881 U.S. Courthouse and Federal Office Building, 219 South Dearborn Street, Chicago, Illinois 60604, Telephone 828-7570.

Ador Corporation *and* General Truckdrivers, Warehousemen & Helpers Union Local 235, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America.

Case 21-CA-6858. November 15, 1966

DECISION AND ORDER

On July 18, 1966, Trial Examiner George L. Powell issued his Decision in the above-entitled proceeding, finding that the Respond-

ent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. The Trial Examiner also found that the Respondent had not engaged in certain other unfair labor practices, as alleged in the complaint, and recommended dismissal of those allegations. Thereafter, the Respondent filed exceptions to the Trial Examiner's Decision and a brief in support thereof.

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 exceptions and brief, and the entire record in this case, and hereby adopts the findings,[1] conclusions,[2] and recommendations of the Trial Examiner, with the modifications set forth below.

[The Board adopted the Trial Examiner's Recommended Order with the following modifications:

[1. Substitute the following language in paragraphs 1(a) and 1(b), and add immediately thereunder, a new paragraph 1(c), as follows:

["(a) Discouraging membership and activities in General Truckdrivers, Warehousemen & Helpers Union Local 235, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, by discriminating in regard to the hire and tenure of employment of any of its employees by discharging such employees in order to discourage membership or activities therein."

[1] Respondent contends that it discharged Nesnick because he refused to obey its order to ride double, and that such order was neither novel nor unreasonable because (1) the Company had long considered adopting such a practice, and (2) riding double permitted employees to make more trips and, therefore, ". . . did not result in a substantial loss of pay to [them] . . . ." We find no merit in this contention and agree with the Trial Examiner's finding, which is supported in the record, that riding double was a voluntary practice adopted by some of the drivers for their mutual assistance. Further, an order which requires employees to accept a 50-percent cut in pay, or to work twice the hours previously worked to earn the same pay, on pain of being discharged, cannot be considered reasonable. Therefore, and in view of Nesnick's known leadership in the union activities herein, and Respondent's expressed opposition thereto, the Trial Examiner correctly found that Respondent's asserted reason for the discharge was pretextual.

[2] Respondent contends that Stainton's remarks to the line drivers on July 10, concerning their activities on behalf of Teamsters, were protected because the drivers are covered by an existing collective-bargaining agreement with another union. We reject this contention. For, even assuming such coverage, it would be immaterial, as it does not follow therefrom that the Respondent was free to interfere with its employees in their activities on behalf of a rival union.

["(b) Interfering with, restraining, or coercing its employees by threatening to sell its operation in order to discourage adherence to the Union; by requesting its employees to withdraw their authorization cards from the Union; and, by interrogating them with respect to their activities on behalf of the Union."

["(c) In any other manner interfering with, restraining, or coercing its employees in the exercise of their rights to self-organization, to form labor organizations, to join or assist the above-named Union or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in any 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. The attached notice [3] is substituted for that recommended by the Trial Examiner.]

APPENDIX

Notice to All Employees

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

> We will not discourage membership in General Truckdrivers, Warehousemen & Helpers Union Local 235, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, or any other labor organization, by discharging employees or otherwise discriminating in any other manner with respect to their tenure of employment or any term or condition of employment.
>
> We will not interfere with, restrain, or coerce our employees by interrogating them with respect to their union or protected activities; by requesting that they withdraw their support from the above-named or any other labor organization; and by threatening them with adverse economic consequences in the event they select the Union as their bargaining representative.
>
> We will not in any other manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form labor organizations, to join or assist the above-named Union or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in any other protected concerted activities for the pur-

[3] In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "a Decision and Order" the words "a Decree of the United States Court of Appeals Enforcing an Order"

pose 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 conforming to the provisions of Section 8(a)(3) of the National Labor Relations Act, as amended, requiring membership in a labor organization as a condition of employment.

WE WILL offer to Edward M. Nesnick immediate and full reinstatement to his former or substantially equivalent position without prejudice to his seniority or other rights and privileges, and make him whole for any loss of earnings he may have suffered by reason of the discrimination practiced against him.

ADOR CORPORATION,
Employer.

Dated_____ By_____
(Representative) (Title)

NOTE.—We will notify the above-named employee if presently serving in the Armed Forces of the United States of his right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

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, Eastern Columbia Building, 849 South Broadway, Los Angeles, California 90014, Telephone 688–5229.

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

With Respondent represented, this proceeding was heard before Trial Examiner George L. Powell in Los Angeles, California, on January 11, 12, and 13, 1966, on complaint of the General Counsel of the National Labor Relations Board and answer of Ador Corporation, herein called the Respondent,[1] The pleadings posed the issues of whether Respondent violated Section 8(a)(3) of the National Labor Relations Act, herein called the Act, by discharging employees Edward Nesnick on July 21, 1965, and Calvin Kerns on September 30, 1965, because of their membership in and activities on behalf of General Truckdrivers, Warehousemen and Helpers Union Local 235, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called the Charging Party or Teamsters, and independently violated Section 8(a)(1) of the Act by other conduct to be detailed hereinafter. The parties waived oral argument at the conclusion of the hearing. Briefs received from the General Counsel and the Respondent on February 21, 1966, have been duly considered.

[1] The complaint which issued on October 6, 1965, amended on November 29, 1965, is based upon a charge and an amended charge filed respectively on July 23 and October 18, 1965. All dates are for 1965 unless otherwise noted.

Upon the entire record and my observation of the witnesses, including their demeanor while on the stand, I hereby make the following:

FINDINGS OF FACT AND CONCLUSIONS

I. THE BUSINESS OF RESPONDENT

Respondent, a California corporation having a principal office and place of business at Fullerton, California, is engaged in the manufacture and sale of aluminum doors and windows. In the course and conduct of its business it annually sells and causes to be shipped goods valued in excess of $50,000 directly to customers located outside the State of California. The complaint alleges, the answer admits, and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The complaint alleges, the answer admits, and I find that the Charging Party is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The contentions*

The General Counsel contends that Respondent discharged employee Edward Nesnick on July 21, 1965, in violation of Section 8(a)(3) of the Act because he engaged in union activity and protected concerted activity for purposes of collective bargaining or mutual aid or protection, and joined, or supported, or assisted the Teamsters. He further contends that Respondent violated Section 8(a)(1) of the Act: by acts of interrogating employees as to their union activities and sympathies, and by interrogating them as to whether they had signed union cards; by soliciting the withdrawal of employees' support of the Teamsters; by promising increased benefits if they did withdraw; by threatening employees that it would sell its long-line operations rather than allow the Teamsters to represent its long-line driver employees; and by offering employees promotions to dissuade them from supporting the Teamsters. By an amended complaint, the General Counsel adds that Respondent violated Section 8(a)(3) of the Act by discharging employee Calvin Kerns on September 30, 1965, for the same reasons that employee Nesnick was discharged. The Respondent denies the essential allegations of the complaint but does admit the discharges on the given dates stating, however, that the discharges were for just and sufficient cause including among other causes the fact that Nesnick and Kerns participated in activities in which Respondent suffered losses by theft.

B. *The events*

Nesnick and Kerns together with employees Michael Robuck and Carl Gonderman constituted the line drivers in Respondent's over-the-road hauling done under the name of its wholly owned subsidiary R.H.J. Trucking. Respondent hauled its own products by its own trailers under this trucking setup. The Respondent, at the time involved in these proceedings, had a split operation. It had one plant at Cherry Street in Long Beach and a second plant in Fullerton. In the Long Beach plant the Respondent made and assembled sliding aluminum windows, doors, and screens. At the Fullerton plant it primarily engaged in extruding and anodizing aluminum parts but also did some assembly work. The Fullerton plant, in general, provided the parts that were assembled at the Long Beach plant. Respondent had approximately 150 employees including these four truckdrivers.

1. The Nesnick discharge

Nesnick and Kerns made a trip to the Northwest to Portland, Oregon, "riding double" commencing on Monday, July 12.[2] They returned to Respondent's Long Beach plant from the trip in the late evening hours of Saturday, July 17, or the early morning of July 18. Awaiting them at their arrival in the dispatcher's office were written instructions to take another trip to the Northwest "riding double."

[2] Kerns testified that this trip commenced on the Monday following the meeting of the employees on Saturday, July 10.

After reading the instructions, Kerns called Lou Hie, dispatcher, to arrange for expense money for the new trip. Nesnick also talked to Hie telling him that he (Nesnick) would not go out on the assigned run because he was not going to ride double any longer. Later on in the morning of the same day Hie called Russell Stainton, plant manager, and told him that Nesnick had refused to take the trip assignment. Early the next morning he reported the same to Kirk Maxwell, production supervisor.

The following day, Monday, Nesnick and Hie were in Maxwell's office when Maxwell told Nesnick, "Ed, Lou [Hie] told me that you refused to go out over the weekend back up north with Cal Kerns." Nesnick replied, "yes." Nesnick also stated "I am not going to drive for $.05 a mile. I'll take my trip up to Portland on this coming weekend." Following this meeting Maxwell telephoned Stainton to tell him that he wanted to terminate Nesnick for refusal to pull a load out. Stainton told him to "hold off" as he wanted to do some checking first. Stainton then checked with Jerome A. Stewart, his superior; with Dick Moen, Respondent's accountant; and with Roy E. Potts, Respondent's lawyer. The next day Stainton called Maxwell telling him to prepare the paper work for the discharge and have Nesnick see him at the Fullerton plant.

When Nesnick reported to Stainton, Stainton told him he was being discharged for refusing to go out on a run. Nesnick told Stainton that he thought that this was a "trumped up charge" and that he felt that Respondent was discharging him for his activities in the Teamsters Union. Stainton denied that his union activities were the basis for his discharge but rather that he was being discharged for refusing to obey a reasonable order. Stainton tendered Nesnick the warning slip which had been made out by Maxwell. The slip carried the following notation, "refusal to obey orders. Called supervisor at 1:30 Sunday morning and stated that he was no longer going to pull a load to the Northwest with two drivers." Stainton told Nesnick that if he had any remarks to make about the notice that there was room at the bottom for him to make such remarks. Accordingly, Nesnick noted, "My unit #5 was not taken out of Service therefore I should be allowed to drive it. Instead they put another man on it."

As these remarks are not responsive to the statement that he had refused to obey orders, it is well to find out what Nesnick was talking about. It is accepted by the parties that Nesnick started the practice of riding double shortly before this occasion. It started when Kerns' truck was out of service which meant that Kerns was receiving no pay. Nesnick, knowing of Kerns' particular need for income, secured permission from Respondent to let Kerns ride with him and share in the driving. Respondent approved this voluntary arrangement as it only would pay the regular driver of the truck the usual $10 per mile in any event and the driver in turn would split his pay with his rider, giving him $.05 per mile. Now, on the July 12 to 17 trip, Kerns was repaying the favor by letting Nesnick ride with him while Nesnick's truck was out of service. But just before completion of the return trip on July 17, Kerns and Nesnick learned from another driver that Nesnick's truck was not out of service but instead was being driven. Hence Nesnick was insisting on driving his own truck for $.10 per mile rather than voluntarily share a truck with another at $.05 per mile.

2. Nesnick's union activities and discharge and the meeting of July 10, 1965

Respondent admits that it knew that Nesnick was active in organizing the employees for the Teamsters. Following his activities, the Teamsters wrote Respondent a letter dated July 1, 1965, claiming to represent a majority of Respondent's employees in a bargaining unit consisting of:

> All production and maintenance employees, including shipping and receiving employees, warehousemen and truckdrivers, excluding all office clerical employees, guards, professionals, and supervisors as defined in the National Labor Relations Act, as amended.

In this letter, the Teamsters requested recognition as the exclusive bargaining representative for the unit and asked for a convenient date for a bargaining conference. Respondent was also notified that the Teamsters were filing a petition for an election with the NLRB but if Respondent was satisfied as to its majority representative status they would withdraw the petition and bargain on a card check recognition arrangement. This letter was delivered to Respondent on July 6. On July 10 Stainton called a meeting. Because of confusion as to times and dates of a

meeting, or meetings, I specifically find those who attended this meeting were Stainton, Maxwell, Hie, Robuck, Kerns, and Nesnick.[3]

Stainton admitted asking the drivers, "what the problem was, since we had received the petition from the Teamsters Union regarding organizing the drivers." He asked them if they had signed cards for the Teamsters Union and they replied that they had done so. As for problems, they mentioned vacations, paid worktime, and uniforms.[4] His testimony follows:

> I asked them why they felt that they had to go there to the Teamsters when I was under the impression that our present union—which was the Carpenters Local 530—represented truckdrivers. It was in the contract. The discussion was mostly carried on between Ed Nesnick and myself with Ed doing most of the answering there for the boys.
>
> And I suggested to Ed that he let some of the others—the other two boys—do the answering to get their impressions; to see what they had to say. In talking directly to Cal Kerns, I reminded him that since he had come out of the local drivers setup, that he was already a member of the Carpenters Union Local 530, and just at that point the object was of having to go to the Teamsters.
>
> I did state somewhere in the conversation that while I had no authority to make this type of decision, I would recommend that the Company sell the R.H.J. Trucking Division rather than have two unions in the same plant.
>
> We talked about the paid vacations, worktime, and uniforms.

He asked them to consider withdrawing their cards from the Teamsters Union and the drivers left the meeting to consider this proposal among themselves. According to Stainton's testimony on this point:

> Q. What was their answer?
>
> A. Around about 5 minutes, they returned, and Ed Nesnick again acted as spokesman for the group, and he said that they had decided to go along with the Teamsters Union.

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[3] I credit the Respondent's witnesses Stainton and Maxwell as to who attended this meeting. Witnesses for the General Counsel were so confused and confusing on this point that I do not credit them. As an illustration of their confusion they (Nesnick, Kerns, Robuck, and Gonderman) testified that there were two meetings held by Stainton. The first of these meetings, they said, was on July 3. Nesnick remembered this date very well because on the evening of July 2 as he was looking at the bulletin board he noted the meeting for the following day. As for Robuck, he had no doubt that it was July 3 when the first meeting with Stainton was held Gonderman testified that he only attended the second meeting which was held on July 10 and did not attend the first meeting which was held on July 3. Kerns also testified that the first meeting was on July 3 and the second meeting was on July 10 and the General Counsel's witnesses were unanimous that the following people were at the July 3 meeting: Robuck, Kerns, Nesnick, Stainton, and Hie. They were unanimous that the following people attended the second meeting on July 10: Stainton, Maxwell, Hie, Gonderman, Kerns, and Nesnick. But, when Respondent established through Nesnick that he could not possibly have attended a meeting on July 3 nor could he possibly have been at the plant on July 2 in order to see the notice because at that time he was on a trip from the Northwest, Nesnick changed his testimony to say that a second meeting was held on July 13. This also could not have taken place because Kerns had testified (before Nesnick changed his testimony) that on July 12 he and Nesnick had gone on a trip to the Northwest from which they were returning on the evening of July 17, as noted earlier. Also Gonderman had testified (before Nesnick changed his testimony) that he only attended the second meeting and it was on July 10. There was no room in his testimony for a meeting on July 13. The General Counsel's witnesses, as they testified at this hearing, gave me the impression that they were parroting their testimony. On their demeanor as they testified I would not credit and do not credit their testimony. In addition I am unable to find that the General Counsel has established that more than one meeting took place after July 6. It is further noted that the complaint as originally issued referred to the times for two meetings as June 26 and July 3, but, at the hearing, the General Counsel amended the complaint to have the dates read July 3 and 10, 1965, respectively.

[4] On May 27 Stainton had a meeting with Nesnick, Kerns, and Gonderman at which working conditions of the drivers were discussed. This involved paid vacations, worktime, and uniforms.

Q. Was there anything else said after that?
A. I asked Cal if that was his feelings. He said yes. I asked Mike if that was his feelings. And he said yes. I said, "There is nothing further we can talk about here."
Q. That ended the meeting?
A. That ended the meeting.
Q. Was there any subsequent meeting with the employees concerning Teamster activities, or any organizational activities?
A. No.
Q. That meeting was on the 10th?
A. Correct.

On cross-examination, Stainton admitted that before he received the letter from the Teamsters on July 6 he had heard rumors that the R.H.J. employees were thinking about going into the Teamsters. He also admitted that after receiving the letter he had conversations with General Manager Stewart and that they discussed "that it wouldn't be advisable to have the Teamsters in the plant." Stainton understood following the meeting with Stewart that Stewart did not want the Teamsters to represent the line drivers for R.H.J. Trucking, and Stewart asked him to hold the meeting to explain his position.

Conclusions as to Nesnick's Discharge

The General Counsel has established the fact that Ed Nesnick was the spokesman for the long line drivers in seeking representation by the Teamsters Union. Stainton observed this in the meeting of July 10 when he testified that Ed Nesnick did most of the talking and did most of the answering of his questions. The fact is also established that the practice of riding double was initiated by Nesnick in an effort to help out a fellow driver, and that he in turn was riding with Kerns on the July 12 to 17 trip to the Northwest because his tractor was to be repaired. However, instead of repairing Nesnick's tractor, Respondent was having another driver take it out. Nesnick knew of this in the morning of July 18 when he refused to return with Kerns riding double. Riding double had been voluntary and the regular driver split his pay with the other driver. When Nesnick was given the warning slip he wrote on the slip the fact that as his tractor was being used he wanted to drive it rather than to split the pay by riding double anymore. Under these circumstances, the Company's job assignment cannot be considered "reasonable."[5] Rather it was "reasonable" for Nesnick to want to use what he considered to be his own equipment. It would appear that when Respondent assigned the equipment normally assigned to Nesnick to another driver with no reason whatsoever given of this action, that it might be discriminating against Nesnick. At that point, if Nesnick had quit instead of refusing to run with Kerns, such a quitting could be interpreted as a constructive discharge.

But not all acts of discrimination or constructive discharges are violative of Section 8(a)(3) and (1) of the Act. The Act is violated when discrimination is engaged in to encourage or discourage membership in a labor organization. I find that the reason given by Respondent for Nesnick's discharge was a pretext with the real reason being concealed.

The question of the true reason is the hard nut to crack in this case. Respondent indicated in its answer that the real reason for the discharge was the fact that Nesnick participated in activities in which Respondent suffered losses by theft. The General Counsel's theory is that the true reason for the discharge was to discourage concerted activities for the Teamsters. In support of his theory is Stainton's admission that Stewart did not want the Teamsters plus the fact that Stainton told Nesnick, Kerns, and Robuck on July 10 that if it were up to him he would get rid of the long line operation.[6]

Conceivably, Respondent could have been looking for a reason, any reason at all, to let Nesnick go in view of his relationship with a former employee, Hughes. Respondent had recently fired Hughes for alleged embezzlement of company funds

[5] Respondent called the job assignment of riding double "reasonable"

[6] The General Counsel had a witness who supplied the precious missing link by testifying that after Nesnick's discharge Maxwell told him that he had been "out to get" Nesnick because of his Teamsters activities. Kerns is the witness and Kerns is not credited (see *infra*). I do not find this statement to have been made.

while working as the dispatcher for the long line drivers. Apparently Hughes had been having materials hauled on return trips without routing the hauls through the regular records. Thus he could pocket the receipts. He even had Nesnick receive a check for $250 in his own name, cash it, and keep some money Hughes owed him, paying the balance in cash to Hughes. This did not get on the books. Nesnick further admitted to Respondent, when questioned about this whole matter in June before the advent of the Teamsters, that he was suspicious that Hughes was not honest with Respondent but he did nothing about it. Respondent did not fire Nesnick then but kept him in order to give him time to recall instances when Hughes had carried cargoes on return trips without official orders. Respondent was attempting to discover the extent of the alleged embezzlement. Kerns likewise was involved in this, but his case will be developed later.

Understandably it is much easier on all concerned if the reason for a discharge can be said to be "insubordination" rather than "suspicion of embezzlement." The latter might actually result in a suit for libel or slander or defamation of character. But the situation need never get to this point. Management can hire and fire for any reason or for no reason at all. Hence there was no need to find a pretext to fire Nesnick for his activities with respect to the Hughes matter. Accordingly there remains as the only true reason for the discharge, the Teamsters activities of Nesnick and I so find that the reason given was a pretext to shield a discriminatory discharge within the meaning of the Act.

Conclusions as to the July 10 Meeting

Admittedly Respondent's agent, Stainton, called a meeting on July 10, attended by Stainton, Maxwell, Hie, Nesnick, Kerns, and Robuck, following receipt of the letter from the Teamsters requesting recognition. There may be an excuse for an employer to meet with his employees, and, free of any coercion or interference with their rights to freely select a bargaining agent, explain to them any problems management might have should the employees engage in union activities. But there are definite risks such management takes because of the word "interfere" in Section 8(a)(1) of the Act.[7] In a limited way, an employer may ascertain if his employees do desire a union but there is no need to develop this further under the facts in this case.[8] Here the Respondent suggested that its employees withdraw their membership in the Teamsters. This it cannot do under the Act. The employees are *free* to select their bargaining agent. If there is in fact another union representing a majority of the employees in an appropriate unit, as there might be in this case, the way to decide that issue is provided for in the Act and it does not include letting the employer interfere with his employees' choice. Accordingly this act of the Respondent interfered with its employees' Section 7 rights and violated Section 8(a)(1) of the Act.

Further, when Stainton told the employees he would recommend that Respondent get rid of its long line operations after he had learned from them that they would not withdraw from the Teamsters, Respondent coerced its employees within the meaning of Section 8(a)(1) of the Act.

3. The discharge of Calvin Kerns

Respondent's contention is that Kerns was discharged as a result of truck repairs authorized by him in direct disobedience to specific directions.

On approximately August 22, 1965, Kerns was hauling a load of Respondent's merchandise to the Northwest when his tractor broke down in the San Francisco Bay area. He telephoned Maxwell and reported the breakdown. Maxwell directed

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[7] Sec 8. (a) It shall be an unfair labor practice for an employer (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, 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, and shall also have the right to refrain from any or all such activities except to the extent . . .

[8] See *Blue Flash Express*, 109 NLRB 591.

him to get the truck to a garage, find out the damage, and call back. Later that same day Kerns telephoned Maxwell reporting that the fifth gear was jammed and that the truck had a cracked transmission case. Stainton was on the extension telephone at the time and Respondent's mechanic was present to answer his and Maxwell's questions while Kerns was on the telephone. Kerns reported that the mechanic in San Francisco had told him that the gear case could be welded or it could be replaced with a new case. Apparently replacement would cost $400 and would require a very short period of time whereas a welding job would cost $75 and would take 2 to 3 days. Upon further questioning it was determined from Kerns that the total repair job including the repair of the cracked case, if it were welded, would run approximately $250. Stainton instructed Kerns to have the gear case welded, gave him a purchase order number to be used on the job and placed a cost limitation of from $250 to $300 upon the repairs. During the conversation, Kerns suggested that while the transmission was pulled out he would like a new clutch. Stainton checked with Respondent's mechanic, was advised that the mechanic had checked the clutch just before the truck had gone out and that no new clutch was needed, and related this to Kerns. Kerns argued the matter stating "Well, the clutch isn't right. The pedal is low." Stainton again checked with the mechanic who told him, "It is a matter of adjustment. There is nothing wrong with the clutch." Stainton then told Kerns not to replace the clutch and to have the transmission welded. Repairs to the truck were duly made and Kerns continued with his trip.

When the bill for the repairs was received, it was found to exceed the authorization. Stainton investigated it. He telephoned the garage in San Francisco and discussed the statement. The repair cost was $858.09 and this included the installation of a new clutch. The shop foreman of the San Francisco garage told Stainton that not only had Kerns ordered the installation of a clutch but also he had authorized the substitution of a more expensive clutch bearing than the bearing which came in the standard clutch kit ordinarily used. After this investigation, Kerns was called in and told he was being discharged for failing to obey instructions in that he had authorized the clutch replacement when especially told not to do so. Kerns did not deny the authorization. Instead he stated, "Oh, this is a trumped-up deal, just like Ed Nesnick's."

Kerns and Hughes

Respondent's answer to the complaint includes Kerns with Nesnick in adding as another cause for their discharge their participation in activities in which Respondent suffered losses by theft. As in the case of Nesnick, above, the association with Hughes may have weakened their security with Respondent but it didn't actually cause their discharge.

The suspicious fact with respect to Kerns is that he received a check payable to himself from the same customer who had given Nesnick the $250 check noted above. The check to Kerns carried a notation on it of "Freight." Nesnick's check had carried the notation "Freight R. H. J. Trucking." Nesnick also had another check from the same customer for $25 with the word "Freight" on it. Both Kerns and Nesnick swore that the $25 checks were for helping the customer unload another cargo and had nothing to do with Respondent's business. Respondent had investigated this in June before the Teamsters started organizing and had not fired either man. I find the actions of Kerns in this respect weakened his security with Respondent but it was not the trigger for his discharge.

Kern's testimony regarding this check of $25 does show his extreme bias in this case. He at first refused to admit that the word "Freight" was on the check when he received it. This left the implication that someone favorable to Respondent had tampered with the evidence. When confronted by me with making a choice of recommending an investigation leading either to an action of perjury or falsification of record evidence, Kerns then admitted that the check when given him could have had the word "freight" on it.

Conclusions as to Kerns

Obviously there was cause for the discharge of Kerns and the question before me is whether Kerns was discharged for this reason or for his union activities. Kerns engaged in no union activity, but the theory of the General Counsel apparently is that inasmuch as Nesnick had been riding with Kerns the Company could

assume that Kerns also was in favor of the Teamsters. In this respect the General Counsel did introduce evidence through employee Robuck who testified that on Saturday morning, July 17, Maxwell asked him how he would feel running double with Kerns. According to Robuck, Maxwell said he wanted to get Kerns away from Nesnick "because Kerns had been a good company man up to this point, and he was afraid that Ed [Nesnick] was going to influence him." Robuck then testified that he then told Maxwell that he did not want to run with anybody because he could not afford a cut in pay. He had not previously gone double with anyone nor had he since ridden double. He also testified that before he and Maxwell broke up in the conversation that Maxwell again told him that he wanted to break Nesnick and Kerns apart and he wanted to keep the other drivers away from Nesnick. I do not credit this testimony of Robuck. As I observed him on the stand his testimony seemed memorized and not a natural recollection of the events. Further, after hearing Maxwell testify I cannot believe that he would have said to Robuck what Robuck testified he had said. Additionally, if Respondent were seriously interested in separating Nesnick from Kerns it could have done so by sending Kerns out alone and giving Nesnick back his own truck. Until Nesnick had started the practice of riding double no one had been riding double. In conclusion, Robuck's story is inconsistent with the theory of the case that Respondent was trying to discriminate against Nesnick by requiring him to ride double. He had never ridden double with a driver other than Kerns. If Robuck were to be credited, Respondent was trying to get him to ride with Kerns. Apparently Nesnick would then be free to ride alone and get his full pay. He would not be discriminated against and Robuck refused the Kern's assignment. Accordingly I do not credit Robuck's statement that Maxwell was trying to separate Kerns from Nesnick's union influence.

Under the above facts, I find that the General Counsel has not established by a preponderance of the evidence that Kerns was engaging in union activities, that Respondent had knowledge of it, and that Respondent discharged him in order to discourage membership in the Teamsters as alleged in the complaint. Rather the weight of the evidence appears to show that Respondent discharged Kerns for failure to obey its instructions with respect to the work repair on his tractor. I will recommend that the allegation in the complaint as to Kerns be dismissed.

Additional Allegations of Independent Violation of Section 8(a)(1)

In his brief, the General Counsel urges the finding of independent violation of Section 8(a)(1) of the Act on promises of benefit made by Stainton at *both* meetings of the employees and by an alleged offer by Stewart to make Nesnick a supervisor in order to remove him from the unit.

As I have already found, the General Counsel has not established that there was a meeting after knowledge of Teamsters activity, other than that of July 10. There was a meeting or meetings before the Teamsters arrived on the scene at which Respondent had discussed certain benefits with the line drivers. Stainton also admits mentioning certain things in the July 10 meeting as set out above, which could be interpreted as merely a report on a previous meeting held before the Teamsters came in. But this is too vague to satisfy the burden of proof that Respondent was offering certain benefits in order to induce the employees to withdraw from the Teamsters. In any event, the order in the case will require the posting of a notice that Respondent will cease and desist from interfering with, coercing, or restraining employees in the exercise of their Section 7 rights. I cannot, from this record, be more precise.

The final allegation of a violation of Section 8(a)(1) is dependent upon the testimony of Nesnick that he was offered Hughes' dispatcher job after the Teamsters demand for recognition was pending in an attempt to remove him from the bargaining unit and divert his support from the Teamsters. Nesnick's testimony in this respect is not credited. This credibility determination is based upon his demeanor while testifying. His general unreliability is noted elsewhere in this Decision. Accordingly, I will recommend that this allegation in the complaint be dismissed.

IV. THE REMEDY

It having been found that Respondent violated Section 8(a)(1) and (3) of the Act, and in order to effectuate the policies of the Act, it will be recommended

that it offer to reinstate Edward M. Nesnick with backpay computed in accordance with the formula set forth in *F. W. Woolworth Company*, 90 NLRB 289, and *Isis Plumbing & Heating Co.*, 138 NLRB 716, and that it post an appropriate notice. The nature of the unfair labor practices is such that a broad cease-and-desist order appears warranted. *N.L.R.B.* v. *Entwistle Mfg. Co.*, 120 F.2d, 532, 536 (C.A. 4).

It having been found that Respondent did not violate Section 8(a)(1) and (3) of the Act as to certain particulars, it will be recommended that these portions of the complaint be dismissed.

Accordingly on the basis of the foregoing findings and conclusions and on the entire record, I recommend, pursuant to Section 10(c) of the Act, issuance of the following:

RECOMMENDED ORDER

A. Respondent Ador Corporation, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discriminating against any employee in regard to the hire or tenure or terms or conditions of employment to discourage membership in or activities on behalf of General Truck Drivers, Warehousemen & Helpers Union Local 235, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization.

(b) Interrogating or threatening employees as to their union membership or activities, discriminating against them, or threatening to do so, for engaging in concerted activity for mutual air or protection or in any other manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

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

(a) Offer to reinstate Edward M. Nesnick to his former or substantially equivalent position without prejudice to his seniority or other rights and privileges, and make him whole in the manner described in the portion of the Trial Examiner's Decision entitled "The Remedy" for any loss of earnings suffered by reason of the discrimination against him.

(b) Notify Edward M. Nesnick if he is serving in the Armed Forces of the United States of his right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

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

(d) Post at its premises at Los Angeles, California, copies of the attached notice marked "Appendix." [9] Copies of such notice to be furnished by the Regional Director for the Region 21 after being duly signed by an authorized representative of Respondent, shall be posted immediately upon receipt thereof, and be maintained by it for a period of 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for the Region 21, in writing, within 20 days from the date of the receipt of this Decision, what steps the Respondent has taken to comply herewith.[10]

B. In all other respects the complaint is dismissed.

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[9] In the event that this Recommended Order is adopted by the Board, the words "an Order" shall be substituted for "a 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" shall be inserted immediately preceding "an Order."

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