A.T.I. Warehouse, Inc. *and* International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 20. Cases 8–CA–4492, 8–RC–6546, and 8–RM–471

February 1, 1968

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN MCCULLOCH AND MEMBERS BROWN AND JENKINS

On September 6, 1967, Trial Examiner Frederick U. Reel issued his Decision in the above-entitled proceeding, finding that Respondent had engaged in and was engaging in certain unfair labor practices within the meaning of the National Labor Relations Act, as amended, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. He also found that Respondent had not committed certain other unfair labor practices alleged in the complaint and that the results of the election held on January 24, 1967, should not be set aside. Thereafter, both the Respondent aand the General Counsel filed exceptions to the Trial Examiner's Decision and supporting briefs, and the Respondent also filed a brief in answer to the General Counsel's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, the National Labor Relations Board has delegated its powers in connection with these cases to a three-member panel.

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, the briefs, and the entire record in these cases, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, except as modified below.

1. The Trial Examiner recommended dismissal of the allegation that Respondent refused to bargain with the Union in violation of Section 8(a)(5) of the Act. While we agree with his conclusion, we do so only for the following reasons.

Like the Trial Examiner, we find that Gauthier was a supervisor and that hence the cards solicited by him could not be counted toward the Union's majority when it requested recognition on November 16. It is well settled that cards obtained with the direct and open assistance of a supervisor are invalid for such purposes.[1] Since the Union did not repeat its request for bargaining at any time when it might have had a valid majority,[2] we need not consider whether the expression of approval for the Union of December 18 amounted to a reaffirmation of the cards solicited by Gauthier,[3] thereby giving the Union a valid majority on that date.

Accordingly, we shall dismiss the complaint insofar as it alleged a violation of Section 8(a)(5) of the Act.

2. The Trial Examiner also found that the Respondent had violated Section 8(a)(1) of the Act on several occasions. We agree with these findings. The Trial Examiner, however, rejected the General Counsel's contention that Respondent's strict enforcement of its no-solicitation rule against prounion employees amounted to disparate treatment of prounion employees in violation of Section 8(a)(1). The evidence indicates that while antiunion employees were advised not to violate the rule, prounion employees were warned that infractions of the no-solicitation rule would result in discharge. We find this disparity in treatment violative of Section 8(a)(1).

The General Counsel also contended that the pretrial interview by Respondent's attorney of employee Padilla violated Section 8(a)(1). In this interview, Respondent's attorney questioned Padilla about telephone conversations which occurred before the election. The attorney asked Padilla to relate the substance of a conversation in which an employee had discussed the Union with Padilla. He also inquired whether a second employee was committed to the Union when this second employee spoke to Padilla on the telephone. We find that these inquiries intruded into employee activities and were not relevant to any legal defense.[4] Accordingly, we hold that Respondent's interview with Padilla violated Section 8(a)(1).

3. Lastly, although the Trial Examiner held that the Respondent violated Section 8(a)(1) during the critical period, he concluded, nonetheless, that the violations were too inconsequential to warrant setting aside the election . We do not agree. After the petition was filed, but before the election was conducted, Hernandez, acting on the Respondent's behalf, stated to employee Ramirez that employees who worked for the Union might be fired. He also stated that election of the Union might result in a shutdown of the plant. Hernandez also told employee Ferris that a union was not necessary and that they could simply form their own union. The

[1] *Welding & Industrial Products, Ltd. & Carbonic Products Corp.*, 167 NLRB 881 (holding that a supervisor's activities tainted the union's majority, notwithstanding the fact that the supervisor, at a later date, reversed his position and threatened employees with loss of work if the union were elected); see, also *J.C. Penney Co., Inc.*, 160 NLRB 279; *Southland Paint Co., Inc.*, 156 NLRB 22, 43, *Leas & McVitty, Inc.*, 155 NLRB 389.

[2] Cf. *Western Aluminum of Oregon Incorporated et al*, 144 NLRB 1191; *J.C. Penney Co., Inc., supra*, which involved an analogous situation.

[3] A demand for recognition could not be based on the petition filed by the Union since it relied on the initial demand and refusal.

[4] *Joy Silk Mills, Inc.*, v. *N.L.R.B.*, 185 F.2d 732 (C.A D.C.); *Sullivan Surplus Sales, Inc*, 152 NLRB 132.

interviews of Gauthier and Padrutt, which the Trial Examiner found were unlawful, also occurred during this period. We cannot agree with the Trial Examiner's finding that conduct of this kind, committed in a unit of 13 employees, is inconsequential. Accordingly, we shall order that the election be set aside and direct that a second election be held.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order of the Trial Examiner, as modified below, and hereby orders that the Respondent, A.T.I. Warehouse, Inc., Toledo, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order, as herein modified:

1. Add the following as phrase A,1(e) to the Trial Examiner's Recommended Order, and reletter the present phrase (e) to (f).

"(e) discriminatorily enforcing its no-solicitation rule against union adherents . . . ."[5]

2. Delete paragraph C of the Trial Examiner's Recommended Order and substitute the following therefor:

"(C) IT IS HEREBY ORDERED that the election conducted on January 24, 1967, be, and it hereby is, set aside."

3. Amend the address appearing at the bottom of the notice to read "Federal Office Building, Room 1695, 1240 East Ninth Street, Cleveland, Ohio 44199, Telephone 522-3738."

[Direction of Second Election[6] omitted from publication.]

[5] After the word "Board," in the WE WILL NOT paragraph of the notice, the following phrase should be added: "or discriminatorily enforcing its no-solicitation rule against union adherents."

[6] An election eligibility list, containing the names and addresses of all the eligible voters, must be filed by the Employer with the Regional Director for Region 8 within 7 days after the date of issuance of the Notice of Second Election by the Regional Director. The Regional Director shall make the list available to all parties to the election. No extension of time to file this list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. *Excelsior Underwear Inc.*, 156 NLRB 1236.

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

FREDERICK U. REEL, Trial Examiner: This proceeding, consolidated by order of the Regional Director, was heard at Toledo, Ohio, on May 23 and 24, 1967. The unfair labor practice case, consisting of alleged interference with employees' Section 7 rights and an alleged unlawful refusal to bargain, originated with charges filed the preceding February 6, and a complaint issued March 23. The representation cases, initiated by petitions filed November 30, 1966, led to an election, held January 24, 1967, to which objections were subsequently filed raising, insofar as here relevant, issues similar to those presented in the unfair labor practice case.

Upon the entire record in these cases [1] including my observation of the witnesses, and after due consideration of the briefs filed by the General Counsel and by Respondent, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT AND THE LABOR ORGANIZATION INVOLVED

Respondent, herein called the Company, an Ohio corporation, engaged at Toledo in the wholesale sale and distribution of automotive supplies and equipment, annually ships products valued in excess of $50,000 to points outside the State, and is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act. The Charging Party, herein called the Union, is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Union Organizes, Seeks Recognition, and Loses the Election*

Late in October 1966 [2] employee Allen Gauthier (whose status as an alleged supervisor at that time is discussed, *infra)* commenced organizing activities on behalf of the Union. By November 16, the Union had obtained signed authorization cards from 6 employees (including Gauthier, who by this date had been transferred to a position which all parties agree was nonsupervisory) in the 13-employee warehouse unit ultimately agreed to as appropriate. The obtaining of a seventh card, that of Richard Cherry, is discussed below, but for reasons hereinafter set forth I find that it could not be counted in computing the Union's majority status until December 18.

On November 16, two union representatives called at the office of Company President Shrader, told him that they represented a majority of his warehouse employees, and requested recognition. At this time they handed him a letter which, in addition to repeating their claim of majority and request for recognition, also contained an offer to submit the authorization cards to an impartial person for examination and count. While the union representatives were in his office, and indeed at their suggestion, Shrader telephoned his counsel, James Fazekas, who spoke to the union representatives and agreed to get in touch with them in a few days. Later that month Fazekas

[1] After the close of the hearing, Respondent moved to introduce as an exhibit the transcript of a portion of a tape-recorded conversation between its president and its counsel, in which the two men indicated their readiness to bargain with the Union if it won the election. As will appear *infra*, General Counsel introduced other portions of that "tape," consisting of interviews between management and certain employees. As I regard the entire magnetic tape as a single document, I will admit the exhibit, over objection, as Resp. Exh. 13, but I regard it as having little, if any, probative value, and have not relied on it in reaching the result in this case.

[2] Subsequent dates in this narrative refer to the fall and winter of 1966-67.

advised the Union that the Company would not extend recognition unless and until the Union won a Board election. On November 30, both the Company and the Union filed petitions for an election. After a hearing on December 15, devoted primarily to determination of the bargaining unit, the Regional Director on January 15, 1967, ordered that an election be held on January 24.

Prior to the election, three union supporters—Gauthier, Ferris, and Ramirez—were discharged. The reasons for the discharges are not disclosed in the record, but the Regional Director, upon investigation, apparently found no merit in the charge that the discharges violated the Act. The Union lost the election, 7 to 3. General Counsel urges, however, that the Union had enjoyed majority support at a time when the Company had had no good-faith doubt thereof, and that in any event the Company engaged in acts of interference, restraint, and coercion of employees so that a bargaining order, based on the Union's preelection majority, should issue to restore the *status quo ante*.

B. *The Union's Majority Status*

1. The bargaining unit

The Union's initial written request for bargaining described the unit as embracing "warehouse workers, truckdrivers, checkers, shipping clerk, receiver, stock pullers, fork-lift drivers." The Company employed no forklift operators and had no classification of "shipping clerk" or "checker." Company President Shrader testified that on the date of the Union's initial demand for bargaining in mid-November, and on January 5, the date of the Regional Director's determination of the appropriate unit, the Company employed 13 named individuals as "warehouse workers" (including three who were also truckdrivers). At the hearing on the representation petitions the Company sought the inclusion, and the Union sought the exclusion, of office clericals and outside salesmen. The Union in its petition included the categories it had named in its original demand, and added the "counterman." The Regional Director declared the following unit appropriate:

> All warehouse employees, truckdrivers, inventory control clerks, the assistant manager of inventory control and the counterman . . . excluding office clerical employees, [and] routemen. . . .

At the hearing before me, the parties stipulated that this unit was appropriate. This unit consisted of the 13 employees identified as "warehouse workers," referred to above.

2. The validity of the cards

a. *Gauthier's supervisory status*

At the end of October 1966, Allen Gauthier was actively engaged in organizing for the Union. He signed a card, procured the signatures of several other employees, and campaigned in the Union's behalf. In mid-November Gauthier became the "counterman," a nonsupervisory position. The Company contends, and General Counsel denies, that prior to this transfer, and hence at a time when he was organizing for the Union, Gauthier was a "supervisor," and the Union's claimed majority is "tainted" by that fact.

Gauthier during the period in question was the "warehouse manager," dispatching the truckdrivers in the morning and handling their inquiries during the day. His testimony minimizes the importance of his job, as he needed approval for any major deviations from the routine, and found that his efforts to "order" the men were not respected. On the other hand, there is some testimony that his views as to the discharge of employees were given weight, and that he directed the employees in their work. I find it unnecessary to go into detail as to Gauthier's work, however, for as early as August 1966, long before the Union activity, the Company posted a notice advising all employees that Gauthier was "in complete charge of the warehouse" from 6 a.m. to 4 p.m. and that "all drivers and warehouse people are expected to report to him and are under his control." The same notice recited that one Calvin Huffman, who all parties agree was a supervisor, would assume the same duties and would be in charge after 4 p.m. In the light of this notice, I find that in the weeks immediately preceding November 16, 1966, Gauthier was a supervisory employee.[3]

b. *Richard Cherry's card*

Cherry, a part-time employee, signed a union authorization card at Gauthier's urging sometime in November. The card is dated November 22, but Cherry testified that the date is not in his writing and that he signed it "right after the girls signed theirs," which places the date as on or "right after" November 14. Gauthier testified that Cherry dated the card himself. The record is clear that Cherry, shortly after he signed the card, asked Gauthier to return it, and according to Cherry this occurred the day after he signed the card and before a conversation, hereinafter described, between him and one Rodney Chryst, which occurred on November 17. Upon considering all the facts, I find that Cherry's card was signed November 14 or 15.

As noted, Cherry asked Gauthier to return the card. According to Cherry, he did this the day after he signed after thinking the matter over and talking to his father. Gauthier persuaded Cherry to hear the Union's "side" before definitely making up his mind, and Cherry agreed to let Gauthier keep the card for this purpose. On December 13, Company President Shrader in a speech to the employees made clear the Company's opposition to the advent of the Union. However, after a union meeting on Sunday, December 18, Cherry decided to support the Union, and after a discussion in the parking lot with several union adherents, Cherry told Gauthier to forward Cherry's card to the Union, thus ratifying an action which Gauthier had mistakenly taken late in November.

After the December 18 meeting the union supporters, who congregated in the parking lot and spoke in support of the Union, included employees Gauthier (no longer a supervisor), Pacelli, Joyce Davis, Carole Ferris, and John Padrutt. Another union supporter, Jane Ramirez, who had signed a card at Gauthier's urging on November 14, was listed by Cherry, a company witness, as one of those who "had their minds made up" for the Union by mid-

[3] It may also be noted that Pacelli, a witness for General Counsel, testified that Gauthier would give him orders such as to "pull orders, if I didn't have anything to do, or work on the trucks, help load trucks, what run I would take, things like that."

December. In short, as of December 18, the record establishes that, counting Cherry, 7 of the 13 employees in the unit were for the Union.

C. *Alleged Interference, Restraint, and Coercion*

1. Prior to the filing of the representation petition

Although the complaint alleges various infringements of Section 8(a)(1) occurring on and after December 5, the testimony establishes that some of the conduct involved occurred on or about November 17, before the filing of the representation petitions. At that time, Rodney Chryst, an officer of the Company and son-in-law of Company President Shrader, spoke in the early evening to part-time employees Cherry and Padrutt, and later in the evening to employees Davis and Ferris. Cherry, a witness for the Company, testified that Chryst told him and Padrutt that if the Union came in, they as part-time employees would lose their jobs or get laid off. Later Ferris overheard Chryst say over the telephone to his father-in-law, Company President Shrader, "I have talked to two of them. I think I have got two of them on our side, and I am talking to the others later."

Later that evening, Chryst, who was substituting on that occasion for Huffman, a supervisor who was ill, talked with Ferris and Davis. The former described the conversation as follows:

> Well, he asked, he told us that men had been out to talk to Mr. Shrader, the man from the Union had come out and talked to Mr. Shrader, and he told us that he had talked to the boys earlier in the evening and he wanted to talk to us about the Union, and he asked us who started the Union, and we didn't answer him.
>
> He said, "Well, that's okay, I pretty well know," he said, "I have talked to Al and he is coming around and changing his way of thinking." Then he went on and he told us that we should think of the boys, because if the Union did get in, because they were part-time help, they would be laid off. Then he told us that the night shift, if the Union got in, that the night shift—we worked nights, and the night shift would be eliminated, and that we would be replaced by men on days.
>
> And he said, "I am sure you wouldn't want to lose your job," he said, "I am sure you need a job or otherwise you wouldn't be working," and he told us that a Union wouldn't help us, that the place was too small for a Union and that we could have—form our own Company Union, that we didn't need any outsiders, and he told us that he understood the situation better than we did because he was in the family and that Mr. Shrader couldn't afford to pay Union wages; that if the Union did come in, that because he couldn't afford to pay us Union wages, then he would have to close down.

Davis' testimony substantially corroborated that of Ferris, and Chryst did not directly deny making the statements attributed to him, although his account of the conversation was more cryptic. I credit Ferris as quoted above.

The Company is plainly responsible for Chryst's statements even assuming, *arguendo*, that he was not regularly employed as a supervisor, for Chryst was not only an officer of the corporation, son-in-law of the president, and acting as a supervisor on the evening in question, but was heard to report to the company president about the probable success of his antiunion threats. Cf. *N.L.R.B.* v. *Des Moines Foods, Inc.*, 296 F.2d 285, 286–288 (C.A. 8), and cases cited. In any event Company President Shrader, testifying at the hearing in the representation case, repeatedly indentified Chryst as a supervisor.

2. Subsequent to the filing of the representation petitions

a. *Hernandez' interviews*

Early in December, acting at the direct request of Company President Shrader, one George Hernandez spoke to employees Ferris and Ramirez about the Union and then reported the conversation back to Shrader. Hernandez was the service manager for Shrader Tire & Oil Company, a corporation headed by Shrader's son, which occupied adjacent premises and is the principal customer of the Company. In the course of his conversation with Ramirez, Hernandez said that if the employees tried to get the Union in they "might get fired for it." He also told her that if the Company could not meet the Union's demands, the Company would "have to close up and everybody would lose their jobs." Hernandez asked Ferris how she felt about the Union, told her "the place was too small to have a union," and that "we could just form our own union with just the employees."

The Company, having sent Hernandez on his mission to the employees, is plainly responsible for his statements.

b. *The interviews in the office*

On December 19, Company President Shrader and his attorney, Robert Affeldt, interviewed several employees in Shrader's office. In the course of interviewing Gauthier, Affeldt asked if Gauthier was aware of a rule recently posted restricting distribution and solicitation. Gauthier replied that he was, and the interview continued:

> Affeldt: And have you been soliciting since then?
>
> Gauthier: No sir.
>
> Affeldt: We don't care what you do on company premises on nonworking time—your lunch period—we are only concerned about one thing: Did you solicit or talk to anybody in the plant concerning union matters during working time in the working area.
>
> Gauthier: No!
>
> Affeldt: Did you solicit any literature whatsoever?
>
> Gauthier: No!
>
> Affeldt: All right. Did you threaten with job loss anybody in this plant who refused to join the union?
>
> Gauthier: No.

In an interview with employee Padrutt, Affeldt inquired as follows:

> Affeldt: There's been rumors throughout the plant that you've been distributing cards. Is that true?
>
> Padrutt: No, it isn't.
>
> Affeldt: Have you at all solicited anyone in the Union?
>
> Padrutt: I have not.

Later in the Padrutt interview the following exchange occurred:

> Affeldt: But you read the notice. You said—
>
> Padrutt: I mean I was aware of it after Saturday, yes.
>
> Affeldt: And after Saturday someone talked to you concerning it, right?

Padrutt: Not—not on company time, no.
Affeldt: During your lunch hour you mean?
Padrutt: No. Nobody's—nobody talked to me Saturday . . . and I just got here now—today.
Affeldt: All right. As far as we're concerned you have a right to talk about union activities in the plant during your own time—your own time. You have no right for any of you people to distribute literature—
Shrader: John has no time here at all. He works from 4 o'clock to 8. He has no lunch time so. . . .

Affeldt and Shrader also interviewed, as a group, Ferris, Ramirez, and Davis on December 19, but merely emphasized that the no-solicitation, no-distribution rule applied to working time and work areas.

On February 13, 1967, apparently in preparation for a Board investigation of the unfair labor practice charge and of the Union's objections to the election, Affeldt and Shrader interviewed Supervisor Huffman and employee Irene Padilla. The latter interview was devoted primarily to the Company's effort to learn from Padilla the details of various telephone conversations she had with Ferris about the Union in January, after Ferris was laid off. The Huffman interview was devoted primarily to preparing Huffman for his interview with the Board's field examiner. When Huffman expressed fear that the Union would "hold it against" him if he gave information adverse to it, Affeldt said: "Believe me when I say this much, I can tell you, no Union's coming in this plant, that is a guarantee . . . I don't care if they won everything, they still wouldn't come in here, believe me."[4] Later in the interview Affeldt directly counseled Huffman to conceal from the Board investigator the extent to which Huffman was involved in the union activity. The text of the interview reads as follows:

Affeldt: In other words, let's not bring up the fact that he [Shrader] mentioned anything about the girls.
Huffman: About the girls where?
Affeldt: Oh, pressuring you—because then . . .
Huffman: Well I mean—they [the Board] will ask me that.
Affeldt: Yea.
Huffman: And for me to say no, my answer would have to be no.
Affeldt: That's right. Because frankly, if you said yes it would help us insofar as the fact that we've got another thing on the girls—they violated the rule—but I don't want to get you involved.
[Interruption by unknown individual from outside the office.]
Affeldt: So, I think very frankly all around—it really doesn't mean much, but—I just—you get my point—in other words, just don't say anything about the girls pressuring you, just say Gauthier did—leave the girls alone.
Huffman: Yea, well actually the girls did, but let's just say Al did.
Affeldt: Pardon?
Huffman: Well let's—I'll just tell them that Al did.
Affeldt: Yea, yea, well that lets that out.

D. *Concluding Findings*

1. As to Section 8(a)(5)

As noted above, Richard Cherry temporarily revoked his designation of the Union before the Company committed any unfair labor practices, and his card may not be counted toward the Union's majority until December 18, when he again authorized its submission. On that date the Union for the first time had a majority of valid signed cards. Some of those cards had been procured by Gauthier when he was a supervisor, and the Company argues that for that reason they should not be deemed valid. But Gauthier had stopped being a supervisor on November 16, and on December 13 the Company had manifested its wholehearted opposition to the Union. In the light of these circumstances the employees' manifestation on December 18 of their continued support of the Union cannot be attributed to any supervisory pressure, and the Union's uncoerced majority as of that date is therefore established. Cf. *N.L.R.B.* v. *Douglas County Electric Membership Corp.*, 358 F.2d 125, 130–131 (C.A. 5); *International Union, U.A.W.* [*Aero Corporation*] v. *N.L.R.B.*, 363 F.2d 702, 707–708 (C.A.D.C.).

As of December 18, moreover, the Union had requested the Company to recognize it as the representative of the employees in the appropriate unit. The petition it had filed with the Board had included several categories not employed by the Company, and had not specified certain classifications connected with inventory control who were later included in the unit now agreed to as appropriate. But Company President Shrader's testimony makes it clear that he understood from the language employed by the Union in describing the unit that the unit consisted of the 13 employees, as later agreed to. The Company's defense based on the inadequacy or indefiniteness of the unit described in the Union's request must therefore fall. See *Priced-Less Discount Foods, Inc.*, 157 NLRB 1143, 1145, footnote 11; *Arkansas Grain Corporation*, 163 NLRB 625, footnote 46.

As of December 18, 1966, therefore, the Union represented a majority of the employees in the unit, and its request for recognition was before the Company, not only by virtue of the Union's demand of November 16, but also through the then pending petition for certification. In the absence of other unfair labor practices, however, it would seem in the circumstances of this case that the Company's continued refusal to bargain and insistence upon an election would not violate Section 8(a)(5) of the Act. To be sure there is some evidence, consisting of Affeldt's statement to Huffman some 2 months later, that the Company was so fundamentally opposed to the principles of the Act that it would not deal with the Union if the latter "won everything," but even such a hostile attitude would not have established a violation prior to December 18, 1966, when the Union did not in fact have a majority. Indeed, if the Company had recognized the Union prior to that date, the Company would have been guilty of unlawfully assisting the Union. *I.L.G.W.U.* [*Bernhard-Altmann Texas Corp.*] v. *N.L.R.B.*, 366 U.S. 731. The line between violation of Section 8(a)(2) and Section 8(a)(5) is narrow enough at times without requiring an employer to keep track (short of unlawful interrogation or surveillance) of the vacillations of an employee like Cherry, on whose "conversion" or "reconversion" the Union's majority hinges. Indeed, a majority thus attained may well be lost by the date of the election, and, so far as Section 8(a)(5) is concerned, the Company was within its rights after December 18 as

[4] On an earlier occasion Affeldt and Shrader had privately agreed that if the Union won the election the Company would bargain with it. See footnote 1, *supra*.

well as before in letting the representation question abide the election. Whether the alleged violations of Section 8(a)(1) lead to a bargaining order to restore the status existing before the election is a matter to which we now turn.

2. As to Section 8(a)(1)

Rodney Chryst's statements to four employees on November 17 that the advent of the Union could cost them their jobs violated Section 8(a)(1) of the Act, as did his questions of some of them as to who started the Union. Chryst's statements were made before the Union filed its petition for certification, and therefore cannot be relied on as grounds for setting aside the election.

Hernandez' statements to Ramirez that "if we tried to get the Union in, we might get fired for it," and his interrogation of Ferris and suggestion that the employees could form their own union likewise violated Section 8(a)(1) of the Act.

With respect to the interviews of Gauthier and Padrutt, General Counsel points out that although the company representatives at times during the interviews correctly stated that the company rule against solicitation and distribution was limited to working time, they also asked questions which probed into the employee's union activity during nonworking hours. Such inquiries would appear to transgress Section 8(a)(1).

I cannot agree with General Counsel, however, that the interviews show any disparate enforcement of the no-solicitation rule. This contention rests on the fact that prounion employees Ferris, Ramirez, and Davis were interviewed on the subject, whereas antiunion employees were merely cautioned by their supervisor not to discuss the Union during working time. The latter episode, however, occurred several weeks after the interviews of Ferris, Ramirez, and Davis, and falls far short of showing disparate treatment. Hernandez' suggestion to Ramirez that she persuade other employees to oppose the Union likewise falls short of establishing any disparate application of the no-soliciatation rule, for even if the rule existed at that time (a matter far from clear on this record), nothing in Ramirez' testimony indicates that she was told to use working time for this purpose. Hernandez' own conduct, at the request of the company president, in discussing the Union on company time would suggest disparate application of the rule, but as just noted, the rule may not have been formalized at that time, and in any event under the *Avondale* case *(N.L.R.B.* v. *United Steelworkers of America* [*Nutone Inc.*], 357 U.S. 357, 362–364), the illegality of Hernandez' conduct, already found, does not establish unlawful application of the no-solicitation rule.

The interviews with Padilla and Huffman, occurring in February after the election, would not furnish a basis for a bargaining order resting on conduct which prevented a fair election. The interview with Padilla was twice prefaced with the comment that she need not discuss the matter at all, and then was concerned largely with her conversations shortly before and shortly after the election with employees who at the time of the election had recently been discharged. I find no violation of the Act in the Padilla interview. In the Huffman interview, on the other hand, the Company brought pressure to bear on its supervisor to induce him to mislead, and to withhold information from, the Board investigator. Such conduct designed to impede a proceeding looking toward the vindication of statutory rights, violates Section 8(a)(1) of the Act. Cf. *N.L.R.B.* v. *Better Monkey Grip Company,* 243 F.2d 836 (C.A. 5), cert. denied 355 U.S. 864; *Grand-Central Chrysler, Inc.,* 155 NLRB 185, 188.

Although I have found several violations of Section 8(a)(1), I am of the view that they are not of the degree necessary to warrant the imposition of a bargaining order. See *Wagner Industrial Products Company,* 162 NLRB 1349; *Hammond & Irving, Incorporated,* 154 NLRB 1071; *Clermont's, Inc.,* 154 NLRB 1397; *Harvard Coated Products Co.,* 156 NLRB 162. The entire congeries of facts seems to me to point in this direction.

The most serious violations of Section 8(a)(1) were Chryst's statements on November 17 to Padrutt, Cherry, Ferris, and Davis. It would be somewhat incongruous, although perhaps lawful, to hold that these statements, made before the Union filed its petition for certification, could not be relied on to set aside the election, but could be relied on to support a bargaining order if the election is set aside for other reasons. Also, the impact of Chryst's statements was manifestly negligible as all four of the employees to whom he spoke were supporting the Union a month later. The violations of the Act inherent in Hernandez' statements to Ramirez and Ferris were less serious than those of Chryst and were no more effective in dissuading them from support of the Union. The "effectiveness" of the unlawful statement, not an element in determing whether it violated the Act, may properly be weighed in determining whether a bargaining order should be based thereon. The interviews with Gauthier and Padrutt contained questions which went beyond legal limits, but cannot be said to have had an impact sufficient to justify a bargaining order. Indeed, all the 8(a)(1) violations found in this case do not reach the level found insufficient to justify a bargaining order in *Hammond & Irving* and the other similar cases cited *supra.*

Finally, I note that the Union, which had the support of seven employees in mid-December, lost three of those employees by discharge prior to the election, and lost the election 7 to 3.[5] Indeed, of three of the four targets of unfair labor practices after the filing of the petition for certification (Gauthier, Padrutt, Ferris, and Ramirez), only one (Padrutt) was an eligible voter. Normal turnover of employees is not a basis for withholding a bargaining order, but where the order can only be justified as a remedy for 8(a)(1) conduct and to restore the status existing prior thereto, it is not altogether irrelevant to note that the Union's loss of majority appears directly attributable to the nondiscriminatory discharge of its supporters rather than to apparently ineffectual, although illegal, statements of company agents. Finally, I note that if the election is not set aside (see *infra),* a bargaining order may not issue. See *Irving Air Chute Company,* 149 NLRB 627, 630; *Kolpin Bros. Co.,* 149 NLRB 1378, 1380.

CONCLUSIONS OF LAW

1. By threatening and interrogating employees with respect to their union activities, and by inducing a supervisor to withhold information from a Labor Board agent

[5] The Regional Director found no merit in the charge that these discharges were unlawfully motivated, and that issue is not before me.

investigating a charge of unfair labor practices, the Company has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. The Company's refusal to bargain with the Union was not an unfair labor practice.

THE REMEDY

I shall recommend that the Company cease and desist from its unfair labor practices and from like or related conduct and that it post an appropriate notice.

With respect to the election, I shall recommend that the Board certify the results thereof. The conduct which might warrant setting aside the election is that of Hernandez and the interviews of Gauthier and Padrutt. Taken together they seem too inconsequential to warrant setting aside the election. In any event, this matter, as usual, borders on the academic, as whether or not the election is set aside, it is highly unlikely that another election would be held prior to January 24, 1968, by which date a valid election could be held even if the first election stands.

Upon the foregoing findings of fact and conclusions of law, and upon the entire record in this case, I therefore recommend, pursuant to Section 10(c) of the Act, issuance of the following:

ORDER

A. Respondent, A.T.I. Warehouse, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interrogating employees as to their union activities or those of fellow employees, (b) threatening employees that advent of a union would result in their losing their jobs, (c) suggesting to employees that they form a labor organization of their own, (d) inducing any person to withhold information from, or deliberately to mislead, agents of the National Labor Relations Board investigating charges filed under the National Labor Relations Act, and (e) in any like or related manner interfering with, restraining, or coercing employees in their 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) Post at its warehouse, at Toledo, Ohio, copies of the attached notice marked "Appendix."[6] Copies of such notice, on forms provided by the Regional Director for Region 8, after being duly signed by an authorized representative of the Respondent, shall be posted 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 said notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director for Region 8, in writing, within 20 days from the date of the receipt of this Decision, what steps the Respondent has taken to comply herewith.[7]

B. The complaint insofar as it alleges a violation of Section 8(a)(5) of the Act is dismissed.

C. The objections to the election are overruled, and it is hereby certified that a majority of votes were not cast for the labor organization.

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[6] 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 the 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."

[7] In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify the Regional Director for Region 8, in writing, within 10 days from the date of this Order, what steps 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:

All our employees have the right to join or assist International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 20, or any other union. They also have the right not to join or assist any union.

WE WILL NOT question any employee as to his union activity or that of fellow employees, threaten any employee that he or other employees will lose their jobs if a union became the bargaining representative of the employees, suggest that employees form their own labor organization, instruct any person in our employ what information to give and what to withhold from investigators of the Board, or in any similar manner interfere with our employees in the exercise of their right to join, or not to join a union.

A.T.I. WAREHOUSE, 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, 720 Bulkley Building, 1501 Euclid Avenue, Cleveland, Ohio 44115, Telephone 621-4465.