

**Ace Doran Hauling & Rigging Company and Truck Drivers, Chauffeurs, and Helpers Local Union No. 100, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case 9-CA-5643**

May 28, 1971

## DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND KENNEDY

On December 15, 1970, Trial Examiner Marion C. Ladwig issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices alleged in the complaint 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 the Respondent had not engaged in other unfair labor practices alleged in the complaint, and recommended that such allegations be dismissed. The Charging Party filed limited exceptions to the Trial Examiner's Decision and a brief in support of part of the Decision and of its limited exceptions. The Respondent filed exceptions to the Trial Examiner's Decision and arguments in support thereof, in addition to a reply to the Charging Party's exceptions.

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.

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 brief, the arguments, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.<sup>1</sup>

## 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 and hereby orders that the Respondent, Ace Doran Hauling & Rigging Company, Cincinnati, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's recommended Order.

<sup>1</sup> The Charging Party's motion to consolidate this case with Case 9-CA-5657, heretofore issued (189 NLRB No. 48), is hereby denied as serving no useful purpose

## TRIAL EXAMINER'S DECISION

### STATEMENT OF THE CASE

MARION C. LADWIG, Trial Examiner: This case was tried at Cincinnati, Ohio, on August 24-25, 1970,<sup>1</sup> pursuant to a charge filed on May 11 by Truck Drivers, Chauffeurs, and Helpers Local Union No. 100, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called the Union, and pursuant to a complaint issued June 30. The primary issues are whether the Respondent, Ace Doran Hauling & Rigging Company, herein called the Company, (a) engaged in unlawful interrogation, (b) caused the discriminatory discharge of an employee of a related employer, and (c) discriminatorily laid off and refused to reinstate four employee drivers of Company-owned equipment in order to undercut the Union's representation of drivers of both Company-owned and leased equipment, in violation of Section 8(a)(1) and (3) of the National Labor Relations Act.

Upon the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel, the Company, and the Union, I make the following:

### FINDINGS OF FACT

#### I THE BUSINESS OF THE COMPANY AND THE UNION INVOLVED

The Company, an Ohio corporation, is engaged in tractor-trailer truck hauling of steel and machinery from various terminals in the northeast United States, including terminals in Cincinnati, Ohio, where it annually receives revenue in excess of \$500,000, of which \$50,000 or more is derived solely from hauling for customers located outside the State. The Company admits, and I find, that it engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

#### II THE ALLEGED UNFAIR LABOR PRACTICES

##### A. Introduction

The Company has 23 terminals in an area covering 12 northeastern States and the District of Columbia. With the exception of some equipment at its home terminal on Blue Rock Road in Cincinnati, it operates entirely with leased tractors and trailers, driven by 250-300 so-called "single owner-drivers" (or "brokers") and "nonowner-drivers," herein collectively called "lease drivers." Its own equipment was driven by four so-called "company drivers," who were employees on its direct payroll.

The Union began organizing the company and lease drivers at the Company's two Cincinnati terminals in December 1969, and filed an election petition on March 4 (in Case 9-RC-8470). The Company took the position at the April 14 and 30 hearings in the representation case that the lease drivers were not its employees, contending that they were either independent contractors or employees of independent contractors. The Regional Director found to the contrary, and directed an election on June 8 in a unit of "All single owner-drivers and all nonowner-drivers operating equipment under lease to the Employer, and all drivers operating the Employer's equipment out of the Blue Rock Road and Kellogg Avenue terminals of the Employer's Cincinnati, Ohio operations." The drivers' votes, counted on July 31, were 18

<sup>1</sup> All dates are in 1970 unless otherwise indicated

to 1 in favor of union representation. The Union was certified on August 10.

Meanwhile, for about 2 months beginning around the first of April, a strike by FASH (Fraternal Association of Special Haulers) in the Michigan, Indiana, Ohio, and Pennsylvania area caused a partial shutdown of the Company's operations. The strike was accompanied by considerable violence, and one of the lease drivers was wounded in the head by a rifle bullet shot through the windshield of his truck. Notwithstanding the violence, the Company continued to operate during the strike on a limited basis as conditions permitted, but only with lease drivers. On April 10 (4 days before the first hearing in the representation case), it laid off all four of its company drivers, formally notifying them by telegram: "Due to business conditions and the general conditions of the trucking industry in the Midwest we are forced to lay you off until conditions improve." Since the strike, the Company has engaged additional lease drivers, but has not recalled the company drivers. On two occasions, lease drivers have been assigned to drive the Company's equipment. At the trial on August 24-25 (about 3 months after the FASH strike), Company President Robert Doran testified that he intended to recall the company drivers when "conditions get better." However his brother, Company Vice President Richard Doran, had testified the day before that the Company's trucks, formerly driven by the company drivers, were for sale.

The General Counsel and the Union contend that the layoff of the four company drivers, and the Company's refusal to reinstate them, were discriminatorily motivated. The Company contends that it acted for economic reasons. These issues are discussed later, following resolution of the issues concerning interrogation and the discharge of an employee of a related employer.

#### B. Interrogation

The complaint alleges that Dispatcher Robert Bacon (an admitted supervisor) coercively interrogated an employee concerning his union activity and support. The employee, laid-off driver William Lackey, when asked what he recalled was said, answered (apparently without having reviewed his pretrial affidavit): "I don't exactly remember. But I believe I said something about I guess the Union will be getting in or something. And if I was laid off *maybe I would get some back pay or something there for being laid off and them hiring other brokers and working the ones that was up there and not working us*. And he said he didn't think it would ever work. He didn't think I'd get it . . . I don't know what date it was . . . Well, maybe [he] ask me how I thought the Union was going on, or where it was going on, or what the guys thought about it or something like that . . . I think he told me that he didn't think they had a chance of going in . . . Well, I think I told him maybe it was all sewed up, *that there was maybe twenty-seven men was down at the meeting down there and there were all twenty-seven of them signed and paid their sixteen bucks to the Union.*" (Emphasis supplied.) Lackey appeared to have a sufficient recall of some of what he himself had said (as emphasized above), but was unable to remember clearly what Bacon had asked. (Upon objection by the Company, the General Counsel was not permitted to show the witness his pretrial affidavit while the witness was on the stand). I therefore find that although the testimony is not denied, the General Counsel has failed to establish that Lackey was coercively interrogated by Bacon.

Lackey had a better recollection of his interrogation by Safety Director Mark Berns. (The June 8 Decision and Direction of Election, in evidence without objection, states that the parties are in agreement that Berns, as well as Vice President Richard Doran and Dispatchers Bacon and Tom Winterman,

are "managerial employees or supervisors.") Lackey testified that in February, after getting his truck loaded, "the union men" stopped him on his way back to the terminal, whereupon student employee Gregory Back (discussed later) drove up and came alongside his truck. Later, after Back informed Berns of the incident, Berns called Lackey into the office and asked him if the union men had talked to him, what they had said, whether they had asked him to sign a union card, and what else they said. Berns then asked him what he told them, and Lackey replied, "I was with the crowd, whatever the crowd done, why, all the rest of the drivers, that I'd go along with them." In a later conversation, Berns asked Lackey directly if he had ever signed a card. Lackey then said that he had talked to them three or four times: at a machine company, on the road, and at the Radco garage (discussed later). On another occasion, shortly before the April 14 representation hearing, Lackey was present when Berns was at the Radco garage, talking to the garage foreman, Lester Thomas, about the Union's organizing efforts. Berns said that one of the Company's "office help" had asked him, "Well, how could the Union just pick on us and pick on nobody else," and that he had responded, "Well, I told them, well, just look around and you'll see why they're picking on you." Berns did not say anything directly to Lackey on this occasion.

The General Counsel contends in his brief that Safety Director Berns' repeated interrogation of driver Lackey violated the Act. However, the General Counsel did not include such allegations in the complaint, and failed to offer any amendment at the trial to add them. In the absence of such allegations, the Company offered no defense to the evidence. Therefore the matter was not fully litigated and I do not rule on whether the interrogation was coercive. On the other hand, I deem this credited, undisputed testimony (which was introduced without objection) to be material when considering the Company's opposition to the Union, its knowledge of the employees' union activities, and the relationship between the Company and Radco, as discussed next. Furthermore, in connection with the Company's motivation for not reinstating the company drivers, as well as the Company's knowledge of the union activity, I deem to be material Lackey's above-quoted, credited testimony concerning what he told Dispatcher Bacon during the time when the election was pending (about maybe getting backpay from the Company for laying off and not working the company drivers while working the lease drivers and hiring new ones, and about all 27 of the drivers who attended the union meeting having signed union cards and having paid the \$16 initiation fee).

#### C Discharge of Gregory Back

Company President Robert Doran owns 10 percent of the stock in a separate corporation, Radco Enterprises, Inc., which services and maintains the Company's equipment. Robert Doran's brother, Company Vice President Richard Doran, is president of Radco. Although student employee Gregory Back (a utility man at the garage) was employed by Radco and not by the Company, he attended the above-mentioned April 14 representation hearing, involving the Company's Cincinnati drivers. Three days later, Back was discharged. A separate complaint was issued against Radco, and a separate trial was held before me on August 24, immediately before the trial of the present case (over the strong protests of the Union, which contended that the cases should be tried together). The Trial Examiner's Decision in the Radco case (TXD-656-70), was issued on November 9, finding Back's discharge to have been discriminatorily motivated.

In the present case, the complaint alleges that President Robert Doran "caused and/or effected the discriminatory layoff and/or discharge of" Back.

Robert Doran denied having anything to do with Radco's labor practices, testifying that Richard Doran and Shop Foreman Lester Thomas controlled them. However Gregory Back (who appeared to be an honest, forthright witness) testified that Robert Doran would come to the Radco garage, would occasionally ask him what he was doing, and "it sort of gave me that impression" that Robert Doran was a boss: "Because it seemed to me that everybody else was sort of afraid of him . . . They were always worried about what, you know, Bob Doran was going to say."

Indications that Robert Doran did have influence over the Radco labor practices and that there was well-known union animus on Doran's part, are shown by warnings employee Back received in February and on April 14, before his discharge on April 17. In February, when Back was talking about going to the union meeting (for the Company's drivers), Radco Foreman Thomas warned him (as Back credibly testified): "Don't go because if Bob Doran ever found out, you know, he's going to talk to Rich [Radco President and Company Vice President Richard Doran] and you'll be through." Back did not attend the meeting at the union hall. Then on April 14, when Back returned from the representation hearing which Robert Doran had attended, "Mr. Thomas said that by the time Bob Doran told Richard Doran that I had attended that [hearing] that I'd be in trouble."

Earlier, the Company's concern over the Union's organizing efforts was shown by the Company's safety director, Mark Berns, telling Radco employee Back that if he saw any union activity, to let Berns know what was going on. (The drivers drove their trucks to and from the Radco garage, where Back worked.) Back reported to Berns the above-mentioned truck-stopping incident in February (when driver Lackey talked to the union representatives), and also discussed the union activity with Berns a number of times at lunch and at the Radco garage, in the presence of Company Dispatcher Bacon on one or two of the occasions. As Back credibly testified, Berns would ask him about what union activity he had observed, the names of the drivers involved, and how many drivers he thought had signed union cards. Similarly, Radco President (and Company Vice President) Richard Doran also discussed the Union with Back. Once, when Back drove Richard Doran to the airport, Doran commented, "I see the union boys have been around," and asked Back if he was seeing them, if they were being successful in organizing the Company's drivers, and why he thought the drivers wanted the Union in.

The foregoing indicates that until April 14, when employee Back attended the representation hearing (showing his interest in the Union), the Company believed Back to be an anti-union employee, cooperating with the Company in its efforts to determine which employees were supporting the Union and how extensive was the union support. (I discredit Robert Doran's testimony that Safety Director Berns never told him about any union activity, and that he never had any conversation with Berns "regarding any individuals who might be involved in the Union." It appears quite unlikely that Berns would have been engaging in such interrogation and union surveillance without Robert Doran's knowledge. Robert Doran did not impress me as being a candid witness.)

Employee Back was not permitted to work any more after he returned from the April 14 hearing. On both April 15 and 16, Radco Foreman Thomas told him that there was no work for him. Then on April 17, as Back credibly testified, Thomas told him, "Well, Rich Doran said to me to tell you to take a little vacation until this union deal was settled," and gave him his paycheck. He was never recalled.

Because of the close relationship between the two companies and their officers, the timing of the discharge (3 days after Robert Doran saw Back at the representation hearing), the previous belief that Back was antiunion, and Robert Doran's well-known union animus, it would seem that a reasonable inference could be drawn, in the absence of direct evidence, that Robert Doran did induce Back's discharge, as alleged in the complaint. However, it would seem that the contrary inference could just as reasonably be drawn: that Thomas alone notified Richard Doran about Back's union support, and that Richard Doran himself decided to have Back discharged—to discourage possible organization of Radco employees, or because he (like Foreman Thomas) believed that Robert Doran would desire Back's discharge. (Although Richard Doran was also vice president of the Company, the complaint did not allege that he was acting upon behalf of the Company when having Back discharged.) Under these circumstances, I find that the General Counsel has failed to prove by a preponderance of the evidence that President Robert Doran caused the discriminatory discharge of the Radco employee.

#### D. Alleged Discriminatory Layoff of Company Drivers.

##### 1. Additional lease drivers engaged

At the time William Lackey, Frank Koehler, Harold Brigner, and Clyde Brigner were laid off on April 10, the Company was utilizing these 4 company drivers and 10 lease drivers—totaling 14 drivers—at its home terminal on Blue Rock Road. (The Company does not challenge the accuracy of these figures in the Regional Director's June 8 Decision and Direction of Election, which is in evidence without objection.)

By June 17, the date of the Company's "Excelsior" list in the representation case, one additional lease driver was being used at the Blue Rock terminal, making a total of 11 lease drivers. (This was about 2 weeks after the FASH strike had ended.) In late June or early July (while the election was still pending), the following occurred when Lackey, one of the laid-off company drivers, telephoned the supervisor, Dispatcher Tom Winterman, about returning to work. As Lackey credibly testified, "I called him to ask about working conditions and if they had anything I could do. I told him, I said, 'My family is getting hungry. I've got a family to keep up here.' And he said, 'Well,' he said, 'I'm covered up with freight. I've got about nine loads sitting over there in the lot that they haven't got a tractor to pull them with.'" (Emphasis supplied. Winterman was not a witness.)

A few weeks later, the Company added at least three more lease drivers at the Blue Rock terminal, and on August 18 (as discussed later), utilized a lease driver from another terminal to drive one of its company trucks. Two of the new lease drivers were laid-off company drivers Lackey and Clyde Brigner. (On July 27, Lackey began driving for a broker who had purchased a second truck to lease to the Company. Clyde Brigner was hired, about the same time, by a broker to drive a lease truck which was not being used.) President Robert Doran acknowledge that "it could be" that additional brokers were "taken on" since the layoff of the Company drivers. When the union counsel read him a list of names on cross-examination, he recognized the name of one lease driver, a Mr. West, who was working at the Blue Rock terminal. He also testified that he thought another person on the list, a Mr. Kelley, was working at the Company's second Cincinnati terminal, which is operated by the Company's agent, Schneider's Trucking Service. (The other names were never identified.) President Doran admitted that none of the 11 lease drivers who were on the June 17 "Excelsior" list for the

Blue Rock terminal (and none of the 8 lease drivers at the Schneider terminal) had been terminated, or their leases terminated, at the time of trial in late August. Furthermore, Lackey confirmed that new lease drivers were working at the Blue Rock terminal, credibly testifying that on the morning of August 24, before coming to the trial, he saw two new lease drivers there with their trucks. After considering all the evidence, I find that at the time of trial, the number of lease drivers at the Blue Rock terminal was at least 14 (the number of company and lease drivers utilized there at the time of the layoffs on April 10).

On August 18, a lease driver was brought from the Company's Louisville, Kentucky, terminal to drive one of the company trucks formerly driven by laid-off driver Lackey. The truck, equipped with a fourth axle on the tractor (to make a seven-axle tractor-trailer unit) was needed to haul a heavy gun-mount load to California. (Some of the Company's own tractors were equipped with this fourth axle, to haul not only the heavy gun-mounts but also heavy and/or oversize machinery and other equipment.) Although the Company's central dispatch was located at its Blue Rock terminal, the gun-mount hauling for the Navy had always been controlled from the Company's Louisville terminal by the Company's agent there, the Bowman Company, which also overhauled the gun mounts. Lackey credibly testified that when John Doran (Robert Doran's son, who was president of the Bowman Company) "needed any of those gun mounts . . . going west, I had the truck that was set up for it. He generally called and asked for me to come down." This time, however, Lackey saw John Doran at the Blue Rock terminal. Lackey asked him, "John, are you going to take that truck down to Louisville?" John Doran answered yes, "I might buy it." Lackey asked, "Well, why don't you give me a job driving it?" John Doran answered, "*They've got enough problems with you up here instead of me taking them down there with me . . . I guess the reason you guys is getting hungry around here is that maybe twenty, twenty-five of you guys is trying to tell my dad and Uncle Rich [the Company's president and vice president] how to run the Company.*" (Emphasis supplied.) Shortly thereafter, Lackey and Koehler saw the truck being driven to the back of the yard, and "They went out the back gate and around with it. They didn't come out the front gate." (Emphasis added.) Although John Doran is not a respondent, he was acting on behalf of the Company's agent at the Louisville terminal. The Company was changing its method of hauling the gun mounts, using a company truck with a lease driver, instead of permitting any of the laid-off company drivers, as before, to drive the specially equipped truck. Undoubtedly John Doran had spoken to his father, President Robert Doran, about the reason for the change in company procedure. Under these circumstances, I deem the fact that John Doran made the statement about "the reason you guys is getting hungry around here," merits some consideration when weighing all the evidence (including the apparent plans to remove the truck surreptitiously from the terminal) to determine the Company's motivation

## 2. The April 10 layoffs

As the week of April 6 progressed, the violence was intensifying in the area of the FASH strike. Company driver Lackey, on his way home from Maine, was dispatched to Philadelphia to get an overdimension gun-mount load to be hauled to Louisville. The riggers began loading his truck on Thursday, April 9, and completed the loading by late Friday. The Company had routed the load through Washington, Pennsylvania, where there was considerable strike violence. However, the oversize load required special state permits, and it could not be moved anyway until Monday, because of the

restrictions against moving permit loads on weekends or at night. Instead of re-routing the truck through West Virginia, outside the violence area (as it did about 10 days later), the Company instructed Lackey to leave the loaded truck and return home immediately. Earlier that afternoon, the Company had sent out the telegrams to the four company drivers, laying them off indefinitely "until conditions improve." The following Monday morning, Lackey asked Dispatcher Winterman or Norv Doran in the office if Lackey was going to be permitted to go back for the truck, stating that he had spent a day and a half loading it and coming in, and that he thought he should be the one to make the trip. He got no reply. On April 10 or 11, a lease driver was assigned to drive the truck to Louisville.

When President Doran, upon being called as an adverse witness, was asked questions about why he decided to send the layoff telegrams to the company drivers, he answered:

Well, the general conditions, the strike conditions, and the refusal of the drivers to run certain loads, and different things like that. I made the decision to lay up all of our company equipment . . . Those people that were complaining about running from April the 1st on, when this strike, the afternoon it started—So rather than have these fellows out getting equipment torn up and the drivers refusing to pick up certain loads, why, we made a decision. I made the decision to lay them off April the 10th . . . [Lackey] was having difficulty and was calling in each day to the dispatchers. All of them were. The brokers were, too. They would say, well, we're not going to run due to the conditions in the area . . . [The four company drivers] would just refuse or give our dispatchers static about taking loads into certain areas. Under those conditions we didn't want the drivers hurt in any way and we didn't want our equipment torn up.

Thus, President Doran's only stated reasons (at that stage of the trial) for sending the notices of indefinite layoffs were the reluctance of the company drivers (like the lease drivers) to drive into the danger areas, and his decision not to risk damage to the trucks. (He later admitted that earlier, he had paid \$50 each to company drivers Lackey and Koehler to cross a picket line.) When asked why he sent one of the telegrams to company driver Harold Brigner, who had told the dispatcher he did not want to be dispatched, Doran appeared to be uncertain what to answer. He first answered, "They were all as—We considered them all subject to call. And they were the only four men that we had." When the question was repeated, he answered, "Well, it was just procedure. That's all." When asked what he meant, he answered, "Well, we just notified the four employees that were operating company equipment. That's the only reason I—." (As previously indicated, he did not impress me as a candid witness.)

## 3. Asserted reasons for layoffs

There is no contention about the Company's right not to send out company trucks into the danger areas. The principal question is why President Doran sent out the formal layoff notices to the company drivers who, like the lease drivers, were not paid anything unless they were dispatched.

The evidence clearly shows that the Company had no intention of recalling any of the company drivers to perform their regular assignments as the work arose. The telegrams (reading "Due to business conditions and the general conditions of the trucking industry in the Midwest we are forced to lay you off until conditions improve") were a formal way of telling them that they were laid off indefinitely. Supporting this interpretation, the Company asserts in its brief: "Lackey was sent his telegram along with the other three company drivers on April 10, 1970. Therefore, he was not available to

haul the Philadelphia load when it finally moved seven or eight days later." This contention indicates that Lackey was ordered home at least in part because of the Company's earlier decision to lay off all four of the company drivers immediately, despite the undelivered Philadelphia load. The contention also shows that the Company considered Lackey "unavailable" after the telegrams were sent—notwithstanding the undisputed evidence that Lackey advised the Company on the following Monday that he thought he was entitled to haul that particular load, and the undisputed evidence that he and other laid-off company drivers made frequent inquiries about returning to work. Clearly Lackey was not "unavailable" when, as the undisputed evidence further shows, he later told Dispatcher Winterman, "My family is getting hungry. I've got a family to keep up here" (in a conversation in which Winterman complained about being "covered up with freight," having "nine loads sitting over there in the lot that they haven't got a tractor to pull them with"), or when Lackey told Dispatcher Bacon that if the Union got in, maybe Lackey would get some backpay for being laid off while the Company was "hiring other brokers and working the ones that was up there and not working us," as mentioned heretofore.

The Company also argues in its brief that when the Company "decided to bring Lackey back from Philadelphia to Cincinnati," the Company "had already decided that the four company drivers had to be laid off in order to cut costs." I find that this is merely an afterthought. Of course, by laying up the company trucks and not using them for 4 1/2 months (until the time of trial), the Company saved on some licensing and insurance expense. But such savings were not mentioned when Doran was repeatedly asked, when testifying as an adverse witness, why he sent the layoff telegrams. Obviously the continued storage of these "fairly new" trucks after the strike was no way to pay for, and make a profit on them. (Two of them were 1969 trucks, delivered only 4 months earlier. The other two were 1968 trucks.) Moreover, the Company evidently had paid for the necessary licenses, and for the insurance, on one of the 1968 trucks when it was driven out the back gate, and sent (with a lease driver) to California.

I find that the Company's next contentions are also afterthoughts. It argues in its brief that the four company trucks "are only used for the hauling of heavy machinery . . . and are specially equipped with seven axles. Therefore, this equipment was idle due to the lack of heavy machinery shipments . . . . Finally, the operation of these four specially equipped" trucks "is approximately 10 percent more expensive than the operating costs of normal units . . . due primarily to the . . . 'axle mile' tax." President Doran said nothing about these matters when repeatedly asked, upon being called as an adverse witness, why the company drivers were laid off. The Company's equipment had been in regular use until the strike; and the Company suggested no way for it to know how much business it would have after the strike. Factually, the Company is in error in stating that all the trucks driven by the company drivers were equipped with seven axles. Only one of the two 1969 trucks was equipped with a seventh axle, and for 5 or 6 weeks before April 10, one of the 1968 trucks had been in the shop for repairs, and a truck without a seventh axle was being driven. Thus at the time of the strike, only two of the four trucks being driven by company drivers had seven axles. Therefore the extra cost of operating seven-axle trucks could not have been a factor in deciding to give indefinite layoff notices to at least two of the company drivers (including Lackey, who was denied the hauling of the Philadelphia gun-mount load).

When President Dorn was recalled to testify as the Company's sole defense witness, the General Counsel and the Union had already produced evidence, discussed above, that after the FASH strike terminated, the Company was utilizing not only all of the lease drivers being used at the home terminal at the beginning of the strike, but also at least four new lease drivers, taking the place of the four laid-off company drivers. Also, the evidence was undisputed that before the laid-off company drivers Lackey and Clyde Brigner were hired to drive lease trucks, Dispatcher Winterman was complaining to Lackey that Winterman was "covered up with freight" and that he did not have any tractors available to pull "about nine loads sitting over there in the lot." (The Company's trucks were in storage.) Without explanation, the Company failed to produce any written records to show the actual volume of traffic before and after the strike.

President Doran testified that the Blue Rock terminal primarily handles machinery and large items (such as Navy gun mounts) which require special hauling permits. (Doran testified that the Schneider terminal in Cincinnati primarily handles steel, that "Sometimes we help them out if we're slow and there's a piece of equipment available and he needs something," and that "Occasionally we would pick up loads of steel on return loads back, return movements into this area.") He testified that the hauling of machine tools, manufactured in Cincinnati, constituted about 80 percent of the Blue Rock hauling, and asserted:

Well, the machine tool industry has been *down practically to nothing* this year due to the cancelling primarily of this . . . investment tax credit . . . . And the thing has been *down since the first of the year* . . . . Our biggest machine tool customer was Cincinnati Milling Machine. They were operating, *up until about February* they operated three shifts. They are cut back to forty hours a week, one shift now.

Concerning the gun mounts, which the Company began hauling for the Navy in 1966, Doran testified:

Well, it continued up until the first part of the year . . . . That is, on a day-to-day basis up to about the first of the year. And then the retrenching of the various government agencies caused a let-off on this business and it has slowly deteriorated. We are not handling too much right now for the Navy. That is business that's just been disbanded.

The decline in business in the early part of 1970 is reflected by the decline in the number of lease drivers working at the Blue Rock terminal: from 17 or 18 in February (at the time of the union meeting) to 10 in April (at the beginning of the strike, when the 4 company drivers were laid off). I therefore credit President Doran's testimony that there had been a decline in business in 1970 (but not his apparent exaggeration that "the machine tool business has been down practically to nothing this year"). I do *not* credit his testimony about the volume of business at the time of trial. When asked why he had not recalled the company drivers when conditions improved following the layoffs, he claimed, "Conditions haven't improved that much. We are *still off about fifty percent*." (Emphasis supplied.) Later he testified that the average number of loads being hauled from the terminal had dropped from around 75 to 80 a month in early April to "possibly" 40 to 50 a month at the time of trial—that the average loads were "about three or four" at the time of the layoffs, "one or two loads a day we were averaging possibly" in June, and the "same . . . . Between one and a half and two loads per day" in July and August. Undoubtedly, if the traffic had remained that slow 3 months after the end of the strike, the four or more new lease drivers would not have been added. (Doran

appeared to be giving answers which he felt would help the Company's cause, rather than relating actual figures.)

#### 4. Concluding findings

As suggested by the General Counsel and the Union in their briefs, I find that the Company's sending of the layoff telegrams, 4 days before the April 14 representation hearing, was for the purpose of having the admitted employees on an indefinite laid-off status—off the active payroll. Then if the Regional Director agreed that the brokers were independent contractors, there would be no employees on the active payroll to be covered in contract negotiations (even assuming the laid-off employees were permitted to vote and they voted for union representation). On the other hand, if the Regional Director disagreed and directed an election in a unit of company and lease drivers (as the Regional Director did), and the Union won the election (as the Company had good reason for believing that it would), all negotiations could still be avoided (to deter union organization at its remaining terminals)—provided the Company challenged the Regional Director's ruling on the independent contractor issue and succeeded in setting aside the certification in a refusal-to-bargain proceeding. (Company drivers Lackey and Clyde Brigner being hired in the meantime as lease drivers would still keep them off the Company's direct payroll.) President Doran made it clear at the trial that the Company's position on the status of the brokers had not changed, testifying, "We hold those people out as independent contractors." (Doran claimed that he always sent a man a telegram when he lays him off, however there is no evidence of any earlier layoffs. The Company continued to operate its own trucks during the 1967 FASH strike.)

All four of the laid-off company drivers had signed union authorization cards. President Doran testified that he had heard about the union meeting in February (attended by Lackey and Koehler), and that Lackey's truck had been stopped by the Union, but denied hearing that the four company drivers were for the Union. He later admitted, however, that union organizer Travis Dezard was in his office two or three times, and told him that *all* his employees had been "signed up." Also, Doran admitted seeing Lackey and Koehler at the April 14 representation hearing.

The Company argues in its brief that President Doran "has stated without reservation that he will reinstate these employees as soon as business conditions warrant." But significantly, Doran also testified that the Bowman Company (the Company's Louisville agent) may decide to buy one of the two 1968 trucks; that the older truck driven by Lackey at the time of the layoffs is now being equipped with a seventh axle, and "We don't know" if a laid-off company driver is going to be called to operate it; and that *if* business conditions warrant, he would put back into operation the two 1969 trucks and one 1968 truck now stored at Vice President Richard Doran's farm. President Robert Doran *denied* that a decision had been made to sell the vehicles. However, as laid-off driver Koehler credibly testified (referring to Vice-President Richard Doran's testimony at the preceding *Radco* trial), "I heard Mr. Rich Doran say yesterday they were for sale." This declaration by the Company's vice president—contradicting the president's testimony—further impeaches Robert Doran's credibility, and indicates that the Company did not plan to recall these four laid-off employees to work again as company drivers.

Accordingly I find, as alleged in the complaint, that the Company discriminatorily laid off and refused to recall the four company drivers because of their union support and in order to discourage membership in the Union. I also find that the employment of Lackey and Clyde Brigner as lease drivers

was not reinstatement to a substantially equivalent position.

#### CONCLUSIONS OF LAW

1. By discriminatorily laying off William Lackey, Frank Koehler, Harold Brigner, and Clyde Brigner on April 10 and thereafter refusing to reinstate them, the Company engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act.

2. The General Counsel has failed to prove by a preponderance of the evidence that the Company unlawfully interrogated an employee.

3. The General Counsel has also failed to prove that President Robert Doran caused the discriminatory discharge of a *Radco* employee.

#### THE REMEDY

In order to effectuate the policies of the Act, I find it necessary that the Respondent be ordered to cease and desist from the unfair labor practices found and from like or related invasions of the employees' Section 7 rights; to take certain affirmative action, including the offering of reinstatement to William Lackey, Frank Koehler, Harold Brigner, and Clyde Brigner, with backpay (for the earnings lost as a result of the discriminatory layoffs), computed on a quarterly basis, plus interest at 6 percent per annum, as prescribed in *F. W. Woolworth Company*, 90 NLRB 289, and *Isis Plumbing & Heating Co.*, 138 NLRB 716; and to post appropriate notices.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:<sup>2</sup>

#### ORDER

Respondent, Ace Doran Hauling & Rigging Company, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging, laying off, refusing to recall, or otherwise discriminating against any employee for joining or supporting Truck Drivers, Chauffeurs, and Helpers Local Union No. 100, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other union.

(b) In any like or related 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 William Lackey, Frank Koehler, Harold Brigner and Clyde Brigner immediate and full reinstatement to their former jobs as employee drivers of company-owned equipment, without prejudice to their seniority or other rights and privileges, and make them whole in the manner set forth in the section of the Trial Examiner's Decision entitled "The Remedy."

(b) Notify immediately the above-named individuals, if presently serving in the Armed Forces of the United States, of the right to full reinstatement, upon application after discharge from the Armed Forces, in accordance with the Selective Service Act and the Universal Military Training and Service Act.

<sup>2</sup> In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(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 records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its terminals in Cincinnati, Ohio, copies of the attached notice marked "Appendix."<sup>3</sup> Copies of the notice, on forms provided by the Regional Director for Region 9, after being duly signed by an authorized representative of the Respondent, shall be posted by the Respondent immediately upon receipt thereof, and be maintained 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 ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 9, in writing, within 20 days from the date of the receipt of this Decision, what steps the Respondent has taken to comply herewith.<sup>4</sup>

IT IS ALSO ORDERED that the complaint be dismissed insofar as it alleges violations of the Act not specifically found.

<sup>3</sup> In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall be changed to read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board"

<sup>4</sup> In the event that this recommended Order is adopted by the Board after exceptions have been filed, this provision shall be modified to read "Notify the Regional Director for Region 9, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith"

APPENDIX

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

The National Labor Relations Board having found, after

trial, that we violated Federal Law by laying off and refusing to recall four employee drivers because of their union support:

WE WILL Offer William Lackey, Frank Koehler, Harold Brigner, and Clyde Brigner full reinstatement as company drivers, and pay them for the earnings they lost as a result of their April 10, 1970, layoffs, plus 6 percent interest.

WE WILL NOT lay off or discriminate against any employee for supporting or joining Teamsters Local 100, or any other union.

WE WILL NOT unlawfully interfere with our employees' union activities.

ACE DORAN HAULING  
& RIGGING COMPANY  
(Employer)

Dated \_\_\_\_\_ By \_\_\_\_\_ (Representative) \_\_\_\_\_ (Title)

WE WILL NOTIFY immediately the above-named individuals, if presently serving in the Armed Forces of the United States, of the right to full reinstatement, upon application after discharge from the Armed Forces, in accordance with the Selective Service Act and the Universal Military Training and Service Act.

This is an official notice and must not be defaced by anyone.

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

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Room 2407, Federal Office Building, 550 Main Street, Cincinnati, Ohio 45202, Telephone 513-684-3686.