**Ace Foods, Inc. *and* Local 73, Amalgamated Meatcutters and Butcher Workmen of North America, AFL–CIO.** Case 30–CA–1436

August 27, 1971

## DECISION AND ORDER

BY MEMBERS BROWN, JENKINS, AND KENNEDY

On May 20, 1971, Trial Examiner John F. Funke issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter the Respondent filed exceptions to the Trial Examiner's Decision and a brief in support thereof, and the General Counsel filed cross-exceptions and a supplemental brief in support of said cross-exceptions and of the Trial Examiner's Decision.

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

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and briefs, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.[1]

## ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Trial Examiner and hereby orders that Respondent, Ace Foods, Inc., Milwaukee, Wisconsin, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's recommended Order.

[1] The Trial Examiner noted that the Respondent sought advice from its labor counsel before investigating Jones' absence, and concluded that this step indicated it was contemplating disciplinary action without verifying any rumors. In agreeing with the Trial Examiner that the Respondent violated the Act by discharging Jones, we draw no inferences whatsoever from the fact that it sought advice from its counsel.

## TRIAL EXAMINER'S DECISION

### STATEMENT OF THE CASE

JOHN F. FUNKE, Trial Examiner: Upon a charge filed November 19, 1970, by Local 73, Amalgamated Meatcutters and Butcher Workmen of North America, AFL–CIO, herein the Union, against Ace Foods, Inc., herein Ace, the General Counsel issued complaint January 29, 1971, alleging Ace violated Section 8(a)(1), (3) and (5) of the Act. The answer of Ace denied the commission of any unfair labor practices.

This proceeding, with the General Counsel and Ace represented, was heard by me at Milwaukee, Wisconsin, on March 25, 26, and 31, 1971. Briefs were received on May 7.

Upon the entire record in this case and from my observation of the witnesses while testifying, I make the following:

### FINDINGS AND CONCLUSIONS

#### I. THE BUSINESS OF ACE

Ace is a Wisconsin corporation engaged in food management service in Wisconsin, Minnesota, and Illinois. The Milwaukee plant is the only plant involved in this proceeding. During a representative year Ace sells and ships products valued in excess of $50,000 to points outside the State of Wisconsin. During the same period Ace purchases materials valued in excess $50,000 from points outside the State of Wisconsin.

Ace is engaged in commerce within the meaning of the Act.

#### II. LABOR ORGANIZATION INVOLVED

The Union is a labor organization within the meaning of the Act.

#### III. THE UNFAIR LABOR PRACTICES

##### A. *Violations of Section 8(a)(1)*

The complaint alleges: (1) Unlawful interrogation of employees; (2) threatening employees with layoffs and subcontracting of work; (3) promising no layoffs if the employees rejected the Union; (4) creating the impression of the futility of organization; and (5) creating the impression of surveillance of a union meeting.

David Jones testified that he was employed in the meat department of Respondent at 4500 West Wisconsin Avenue and signed a union card on October 29, 1970.[1] On November 5 he had a conversation with Omar Larson, head of the meat department,[2] who told him he would not get anywhere with the Union as far as money was concerned and the only benefit would come through the insurance plan. Larson added that Ace had contacted other meat cutting companies and that if the Union got in there would be layoffs but that the company could afford to work the men 40 hours per week without a union.

[1] Unless otherwise noted all dates refer to 1970.

[2] It was stipulated that Larson was a supervisor within the meaning of the Act.

Larson repeated that one wrapper and five men could be laid off during the December slack season. Larson then told him there would be a pay raise coming in December of 15 cents per hour, and then asked him if he had signed a union card and how he was going to vote.

Jerry Morrison worked in the meat department from September 19 until January 3, 1971. He signed a card for the Union given him by David Jones. On November 5[3] he went into Larson's office to check his timesheets and Larson asked him if he had signed a union card. When he said he had Larson told him a union meant slack work and that he would be laid off. On cross-examination Morrison testified that it was an ordinary conversation and he did not regard it as any threat to his job, since it was his understanding that as a junior employee he would be among the first to be laid off.

Michael Hertel worked in the meat department for 46 weeks and signed a union card on November 3. On November 6 Larson stopped him in the shop and asked him if he had ever signed a union card. When he said he had Larson told him he would probably be laid off if the Union came in due to his seniority status.

Thomas Krimmer, also employed in the meat department during November, had a conversation with Larson in his office in which Larson told him that if the Union came in his hours would be reduced. He fixed the time as about a week or two after Jones was terminated. At the time Krimmer was working part time.

Janice Krueger testified that she had a conversation with Larson on or about November 4 and that Larson told her he had heard about the Union and that when the schools closed down in December there would probably be a layoff if the Union "was in."

Ruby Rife testified to a conversation with Larson in his office on November 6 in which he told her there would be some layoffs about Christmas time and that if the Union got in he could not help them by letting them work in some other part of the commissary. On November 11 a union meeting was held at her house. On November 14 Larson asked her how the union meeting was and she asked him "how come he asked me." Larson said it was just for conversation.

On cross-examination Rife testified that in her first conversation with Larson he told her the junior employees would be laid off during the slack season but that she would not be laid off and it would not make any difference whether there was a union or not.

Edward Thorton testified to a conversation with Larson on November 5 in his office. Larson told him he had heard the fellows in the meat department wanted to start a union and that there could be possibility of a layoff at Thanksgiving and Christmas. Eugene Gillingham testified to a similar conversation with Larson about the same period of time.

Larson was an evasive witness and much of his testimony was ambiguous. He did admit having conversations with some of the employees concerning the Union, but denied that he threatened any employee with layoff if the employees designated the Union as their representative. He also admitted that he learned of the meeting in Rife's house from Thorton and was told Jones passed out union cards at the meeting. He did testify that he was told by Hans Liepscher, director of commissary operations, that he should not discuss the Union with the employees,[4] an admonition to which he apparently paid little heed. Without belaboring the point I think a fair reading of the transcript will support the conclusion that the testimony of the General Counsel's witnesses was entitled to credence where it is contradicted by Larson and a comparison of their respective demeanors on the stand fortifies such conclusion. I so find.

### B. *Conclusions*

I find that Respondent violated the Act by Larson's interrogation of the employees in his department; by threatening the employees there might be layoffs during the slack season if they accepted the Union while at the same time implying that other work might be found for them if they rejected the Union and by creating the impression of the futility of organization by telling them benefits would be confined to the insurance plan. I also find that he created the impression of surveillance by asking Rife how the meeting at her house went but only because he had previously told her that he was going to find out what was going on when she had her conversation with him on November 4. Otherwise the statement would appear to be no more than a casual remark made as he passed her machine.

While it is true that Larson was a minor supervisor working on an informal basis with his men it is also true that he was head of the meat department and could be expected to know what was taking place there, what changes were contemplated and would participate in making the changes, including layoffs and relocation of employees. Accordingly, his words carried some weight.

### C. *Violation of Section 8(a)(3)*

Only one violation is alleged, David Jones, terminated November 17. The facts relating to his discharge are relatively clear despite the efforts of counsel on both sides to obscure them with irrelevancies.

Jones was employed as a meatcutter from February to November and his supervisor was Omar Larson. His regular shift was from 5 a.m. to 1:30 p.m. He also held another job at Barrel Plating Service from June until November 4 and as a meatcutter with Target Foods from November 5 until November 21, where he worked from 2 p.m. to 6 p.m.

On October 29 he signed a card with the Union given to him by Paul Fricke, union representative, at a meeting at the home of Ruby Rife. At this meeting he was given five blank cards for the purpose of obtaining signatures of other employees and handed these cards to Sowinski,

[3] Morrison subsequently changed his testimony to indicate that the conversation took place after the discharge of Jones on November 17, but after being shown his pretrial affidavit decided it was about November 5.

[4] This conversation took place a day or two after the union representatives made their demand for recognition upon Arnold Leaman. (See *infra.*) Larson also testified that he had seen and probably read through a seven-page document of instructions from Respondent's counsel. (Resp. Exh. 2.)

Dankhart, Cowdy, Morrison, and Thorton (to give to Mike Hertal). All of these returned signed cards to him and he returned them to Fricke. On November 5 he had the conversation with Larson referred to above. On November 11 he attended the meeting at Rife's house concerning which Larson acquired knowledge from Thorton.

On Monday, November 16, Jones did not report to work because he had car trouble and could not get the car started. He called Ace and talked to Liepscher, told him the car was not running and that he would not be in that day. He then took his car to a filling station and from there to Williamson Ford, an agency, and asked them to fix his car so he could report to work the next day. He then returned home about 4 p.m. called the company and spoke to Larson. He told Larson his car would not be ready until the next morning, Tuesday, and that he would be in for work on Wednesday, November 18. Larson told him he would see him on Wednesday. On Monday he called Target and asked if he could come in early to work on Tuesday since he would not get his car in time to work his full-time job at Ace.[5] He said he could report to Target about 1 p.m. The next morning, Tuesday, he called Williamson and was told his car was ready and he reported to Target about 1 p.m. About 3 or 4 p.m. he received a telephone call from his wife who told him she had received a telephone call from Western Union stating he was fired and that a telegram would follow. The telegram (G.C. Exh. 5) read:

> Because of your unauthorized absence from work while gainfully employed by another employer and the untruthful reason given us therefore your employment by Ace Foods, Inc., is hereby terminated immediately.

It was signed by Arnold E. Leaman, vice president.[6]

Jones then talked to Pat Creighton, supervisor of the meat department at Target, who said he would call Ace. Later Creighton reported to Jones that Ace would not rehire him.

On November 18 Jones called Ace and tried to talk to Larson or Liepscher, but they were not available and he then talked to Sowinski who said he did not have time to talk and hung up. On November 20 Jones again called Ace and talked to Liepscher and asked for permission to come and get his check. Liepscher called him back and said it was all right. When he went to pick up his check he saw Liepscher and asked to speak to him but Liepscher told him he was too busy. This summarizes the General Counsel's relevant testimony respecting the discharge of Jones.

Omar Larson testified that sometime in November he heard that Jones might quit his job and also learned that he was working for Target on a "moonlight" job.[7] On Monday, November 16, the first day of Jones' absence Liepscher told him Jones would not be in. On the evening of that day he called Jones at his home to find out if he would be in on Tuesday but received no answer. He then called Target and was told Jones had left. He did talk to Jones on Tuesday when Jones told him his car was being repaired and that he could not be in until noon and he told Jones to come in any time he could make it.[8] Larsen also testified that he called Target on Tuesday (the same day he talked to Jones) and was told there was no one by the name of Jones working there.

About 11 a.m. on Tuesday Larsen, Liepscher, and Leaman went to the hospital to visit an employee and Larsen suggested the need of a replacement for Jones if he was not going to report back. Leaman suggested that he and Liepscher go to Target and find out whether Jones was working there. When they entered the store they saw Jones cutting meat. The time was fixed as about 12:30 p.m. They did not approach Jones nor make any inquiry of him concerning his intentions but instead Larsen went to a telephone booth, called Target, and was again informed that no such person as Jones was working there. When he told Liepscher this they decided to talk to the store manager who checked the timecards and stated Jones was working, thus confirming the evidence of their own senses. Liepscher and Larsen then returned to Ace without seeing Jones again. That same afternoon Jones received his discharge telegram.

Hans Liepscher, director of the commissary operations, testified that he had posted a copy of "Common Sense," Ace's booklet on instructions to its employees (Resp. Exh. 3) on the bulletin board and that he had read Respondent's Exhibit 2, the document relating to an employer's rights and obligations, and gave a copy to Larsen. He also told Larsen not to discuss the Union with the employees.

On Monday, November 16, Liepscher received a telephone call from Jones about sometime before 12 a.m. who told him he would be unable to work that day but would be in the following day. Shortly after he received the call he was asked to keep a record of events (presumably related to Jones), but the record does not disclose who made the request. (Resp. Exh. 4.) This record indicates the telephone call from Jones was received at 8:15 a.m. on the 16th. He amended his testimony accordingly. Jones told him he would not be in on that day but would be in about 11 a.m. Tuesday. Later on Monday Liepscher had a conversation with Larsen who told him Jones had called and said he would not be in on Tuesday. On the next day, Tuesday, he and Larsen were instructed by Mr. Leaman to "verify the absence of David Jones." Liepscher and Larsen then went to the Target store and saw Jones in a uniform and from this point his testimony coincides with that of Larsen. Later he received a call from Jones asking if he could pick up his paycheck and Liepscher told him he could. Liepscher denied having any knowledge of Jones' union affiliation or activity at this time, which was time of termination.

Arnold Leaman testified that when he received the Union's petition for an election on November 7 he called Ace's counsel, Jack Bernheim, and that he then told Liepscher to have no discussion with the employees regarding the Union. He also told Liepscher to relay these instructions to Larsen in the meat department, the only

[5] According to Jones he lived 33 miles from Ace and 17 miles from Target.

[6] The telegram was followed by a confirming letter. (G.C. Exh. 6.)

[7] According to Leaman, Ace had no rule against moonlighting and several of the employees worked at other jobs.

[8] Jones fixed this conversation as taking place on Monday, November 16.

department affected. He also gave Liepscher and Larsen copies of Respondent's Exhibit 2, Bernheim's instructions.

On November 17 Leaman was informed by Liepscher that Jones had been absent for 2 days due to car trouble but that he had reason to believe that Jones was working at another food store. He then called Bernheim who told him this information should be checked. He then told Liepscher and Larsen to go to Target and see if Jones was working there. He fixes this time as between 12:30 and 12:45 p.m. Either Liepscher or Larsen reported to him that Jones was working there and that the store manager at Target told them Jones intended to report to work on Wednesday, November 18, at Ace. Leaman then called Bernheim and upon Bernheim's advice Jones was terminated by telegram and letter. (G.C. Exh. 5 and 6.) Leaman was then asked if he had considered that part of the booklet "Common Sense" entitled "Absence" in reaching his decision and said that he had.[9]

With respect to the termination of Jones, Jacob L. Bernheim testified that he received a call from Leaman on November 17 stating that an employee named Jones had not been to work on the 16th and had not reported in that day and that the explanation he gave was that his car was not running. Leaman also told him that he believed Jones was working for Target. Bernheim advised them to check and be sure he was working for Target and later received a call from Leaman telling him that Jones was in fact working there. Bernheim then stated it was his opinion that the man should be discharged and dictated the language of the telegram and letter, *supra.*

### D. *Conclusions*

I find the discharge of Jones to be in violation of Section 8(a)(3) of the Act.

No question was raised at any time concerning Jones' ability or of his conduct on the job. The reason for discharge was specifically limited to his working for Target on Tuesday, November 17. At this time his union activity had been made known to Larsen through Thorton, who not only told Larsen that Jones had been present at Ruby Rife's home on November 11 but had also passed out union cards at that meeting. Whatever else the record discloses it does not disclose that Jones broke any company rule by working at Target. It is not disputed that he had car trouble on Monday, November 16, and that he called Ace as early as 8:45 a.m. after earlier calls went unanswered. He truthfully gave them the reason for his failure to report and later that afternoon he called Larsen and told him he could not be in on Tuesday since the car would not be ready until sometime Tuesday morning. He did state he would be in on Wednesday which, considering the hours he worked at Ace, seemed the earliest feasible time. According to Jones, and this is not contradicted, no objection was voiced by Larsen who simply told him to come in when he could.[10]

Based on rumors which he had heard Larsen called Target on late Monday afternoon and was told Jones had left and called again on Tuesday and was told that no employee by the name of Jones was employed there. At this time it would appear that there was no reason for further investigation since no information had been received which would contradict anything either Liepscher or Larsen had been told by Jones. Jones had no record of unauthorized or unexplained absences and was having, apparently, no personal or other difficulties with Larsen. He stood as an employee with a transportation problem through no fault of his own. Yet on the second day of his absence Leaman saw fit to call Ace's labor counsel, Bernheim, and reveal the situation to him. Without blaming any respondent for seeking constant guidance from counsel before any action is taken during the course of a union campaign, this step indicates that Ace was contemplating disciplinary action without verifying any rumors. The trip to Target by Liepscher and Larsen was taken in response to Bernheim's suggestion that they obtain proof against Jones. When this proof that Jones was working at Target was obtained Jones was forthwith fired by telegram without the opportunity to explain his situation, including the fact that he could report to Target for his afternoon work on Tuesday but could not report to Ace until a time approximating the end of his shift there. Ace could not wait until Wednesday to see if Jones would report and interrogate him then as to his reasons for working at Target while not reporting to Ace; it discharged him forthwith. This anxiety to get rid of him arouses more than suspicion, it creates a strong inference that the motive was other than that stated. Since the only other motive must have been his union activity I would find the case, unusual in discriminatory discharge cases, rather free from doubt.[11]

### E. *Violation of Section 8(a)(5)*

Certain material facts were stipulated at the hearing. The parties agreed that the unit appropriate for collective bargaining was:

> All meat-processing and meat-handling employees of the employer in its meat department (Department 102) located at its Milwaukee, Wisconsin, location, excluding office and clerical employees, professional employees, guards and supervisors as defined in the Act and all other employees.

[9] That instruction read: "In case you are unable to come to work notify the Manager as soon as you can."

[10] There are two discrepancies respecting this telephone conversation. One, as to whether Jones called Larsen as he testified, or Larsen called Jones as he testified, I find immaterial. In any event a conversation did take place between the two. Larsen believed the conversation took place on Tuesday morning and that Jones told him he would get his car and be in about noon on Tuesday. Jones testified that it took place on Monday afternoon and that since he would not get his car until Tuesday morning he would not, in view of his working schedule, be in until Wednesday. Apart from the fact that Jones appeared to have a much clearer recollection of events than did Larsen, his testimony is more consistent with the facts, particularly his work schedule. I therefore find that he informed Larsen he would not be in until Wednesday. Larsen knew, then, when he and Liepscher went to Target on Tuesday that Jones was not reporting to Ace until Wednesday.

[11] I have considered the fact that, apart from the unlawful conduct of Larsen, Ace did not engage in any antiunion campaign or express hostility toward union organization. On the contrary, as will be shown, *infra,* it appeared willing to cooperate in the holding of an election. This fact, however, does not serve to countervail the only plausible motive I can find in its dealing with Jones.

It was also stipulated that the following 12 employees were employed in the appropriate unit in November:

| | |
|---|---|
| Thomas J. Cowdy | Janice L. Kreuger |
| Harry C. Dankert | Jerry E. Morrison |
| Eugene Gillingham | Ruby A. Rife |
| Michael J. Hertel | Chester H. Rutzen |
| David R. Jones | Alois M. Sowinski |
| Thomas L. Krimmer | Edward P. Thorton |

Paul Fricke, business representative of the Union, testified that he contacted some of the employees in the meat department at Ace and that a meeting was held at the home of Ruby Rife on October 25. He named David Jones, Eugene Gillingham, Ed Thorton, Ruby Rife, and Janice Krueger as attending among "several other employees." Three cards were signed and he gave five cards to David Jones for distribution. Several days later another meeting was held and Jones returned "at least" five more signed cards to him.[12]

On November 4 he and Bill Danielson went to Ace and saw Leaman who invited them to his office where he told Leaman the Union represented a majority of the employees in the bargaining unit and requested recognition. Leaman told them he could not recognize them on the basis of a card check so they returned to the union office and filed a petition for an election with the Board. (G.C. Exh. 2.)

On November 17 Jones was discharged. On November 19 the Union filed the charge herein which prevents the processing of the representative case. (Case 30–RC–1379.)

Arnold Leaman testified that to the best of his knowledge Fricke and Danielson appeared at his office and demanded recognition on October 29. (This discrepancy in dates I find immaterial since the Union represented a clear majority of the employees on November 4 when the petition was filed and majority status was never raised as an issue.) They informed him they represented a majority of the employees in the meat department and requested recognition. Leaman told them he would not recognize a card check and was then told by Fricke that the Union would have to file a petition. Leaman agreed that that was "the best route to go." Leaman stated that no offer to show the cards was made. On November 7 he received a letter from the Board indicating the Union had filed a petition. Leaman then called Bernheim who told him to fill out the commerce data form and send the rest of the information requested to him. Later Leaman and Bernheim discussed the unit issue and agreed the unit was appropriate and that they would proceed to an election.[13] Later Leaman was advised by the Regional Director that the election could not be held due to the pending unfair labor practice charges.

This is where the representation proceeding reposed at the time of hearing.

F. *Conclusions*

The Union had authorization cards from 9 of the 12 employees in the bargaining unit when it made its demand for recognition upon Ace and filed its petition for an election on November 4. The demand was refused with the understanding, implied at last, that the parties would resort to the Board's election procedures. These failed when, following the discharge of Jones, the Union filed the unfair labor practice charges in the instant case, including refusal-to-bargain charge. We therefore turn now to the gospel of card check law, *Gissel.*[14]

In *Gissel* the Court pointed out the pivotal issue in cases such as the instant one to be:

> . . . the propriety of a bargaining order as a remedy for an 8(a)(5) refusal to bargain where an employer has committed independent unfair labor practices which have made the holding of a fair election unlikely or which in fact undermined a union's majority and caused an election to be set aside.

The Court then referred to those cases in which the employer's conduct embraced "outrageous" and "pervasive" unfair labor practices and the coercive effects could not be eliminated by the application of traditional remedies. The second class includes the "less extraordinary cases marked by less pervasive practices which nonetheless have a tendency to undermine union strength and impede the election processes." Lastly are those cases which "because of their minimal impact on the election machinery, will not sustain a bargaining order."

I would find that the instant case embraced by the description applied to the second class. In this class there must be first a showing that the Union did at one point have a majority. That has been found here. The Court then states:

> . . . in such a case, of course, effectuating ascertainable free choice becomes as important a goal as determining employer misbehavior. In fashioning a remedy in the exercise of its discretion, then, the Board can properly take into consideration the extensiveness of the employer's unfair labor practices in terms of their past effect on election conditions and the likelihood of their recurrence in the future. If the Board finds that the possibility of erasing the effects of past practices and ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards, would, on balance, be better protected by a bargaining order, then such an order should issue.

In this case Ace has been found guilty of several violations of Section 8(a)(1) of the Act including unlawful interrogation of many of the employees in the meat department,[15] threats of layoffs if the union came, stating that the only benefit the employees could gain would be in insurance, and giving the impression of surveillance of a

[12] A total of nine cards was submitted by the General Counsel. These, with the dates of signing were from: Thomas Cowdy, 11/3; David A. Jones, 10/29; Ruby Rife, 10/29; Janice Krueger, 10/29, Alois Sominski, 11/3; Tom Krimmer, 11/3; Michael Hertel, 11/3; Eugene Gillingham, 11/2; and Edward Thorton, 11/2. The cards were unambiguous designations of authority to represent the employees and the testimony of the employees establish they were solicited without misrepresentation. I find all nine cards valid.

[13] Resp. Exh. 13, a letter from Bernheim to Field Examiner Warmoth of the Regional Office, offering to consent to an election.

[14] *N.L.R.B.* v. *Gissel Packing Co.*, 395 U.S. 575.

[15] The interrogation does not meet the standards of coercive interrogation required by the Second Circuit as set forth in *Bourne* v. *N.L.R.B.*, 332 F.2d 47, 48.

union meeting. These were rather extensive in nature and while Larsen was only a minor supervisor they were communicated directly to the employees subject to his authority and the only employees in the bargaining unit. On the other hand none of them seem to have regarded the interviews with Larsen as coercive. The junior employees who were interrogated by counsel regarding the layoff threats testified that they knew they were subject to layoff and the senior employees knew they were not. This was no massive or systematic campaign, it was conducted by one minor echelon supervisor and conducted in violation of the instructions given him. I have grave doubt that the misconduct of Larsen standing alone would sustain a bargaining order, particularly in view of the Court's statement, which can hardly be contradicted on the basis of experience, that cards are admittedly inferior to the election process in determining the true wish of the employees.[16]

But Larsen's coercive statements do not stand alone. It has been found that the discharge of Jones was in violation of Section 3 of the Act and a discriminatory discharge must be accorded the status of mortal sin in the catechism of labor law. The effect of discharge from employment as a reprisal for union activity is devastating, not only upon the dischargee but upon all other employees similarly engaged in their guaranteed right to organize. That right cannot exist under threat of loss of livelihood. While it is impossible to measure the impact, either as to depth or duration, of discriminatory discharge upon the other employees a factor of significance is the number of employees in the affected group. Here there were only 12 employees in the bargaining unit all of whom worked together and lunched together. Jones was not simply an anonymous employee in large division identified by a badge number. This factor, in my opinion, magnifies the consequences of the 8(a)(3) violation. Further analysis would lead only deeper into the realm of subjective speculation.

Inevitably there is created a twilight zone between the classes defined by the Court where reasonable men will differ as to the appropriate remedy. Giving, as I do, substantial weight to the lasting "chill" imposed on organizational efforts by discriminatory discharges and giving consideration to the circumstances of the instant case, an affirmative bargaining order will be recommended as the only effective means of redressing the unfair labor practices found.

Upon the foregoing findings and conclusions I make the following:

## Conclusions of Law

1. By interrogating its employees regarding their union activity; threatening its employees with layoffs during the slack season if they accepted the Union while at the same time implying that other work might be found for them if they rejected the Union; by creating the impression of surveillance of union meetings; and by creating the impression that union organization would be futile, Respondent Ace violated Section 8(a)(1) of the Act.

2. By terminating the employment of David Jones on November 17, 1970, in order to discourage union activity, Respondent Ace violated Section 8(a)(3) and (1) of the Act.

3. By refusing to recognize and bargain with the Union on and after November 4, 1970, Respondent Ace violated Section 8(a)(5) and (1) of the Act. The unit appropriate for collective bargaining is:

> All meat-processing and meat-handling employees of the employer in its meat department (Department 102) located at its Milwaukee, Wisconsin, location, excluding office and clerical employees, professional employees, guards and supervisors as defined in the Act and all other employees.

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

## The Remedy

Having found the Respondent Ace engaged in and is engaging in unfair labor practices it will be recommended that it cease and desist therefrom and take certain affirmative action necessary to effectuate the policies of the Act.

Having found Respondent Ace discharged David Jones in violation of Section 8(a)(3) of the Act it will be recommended that it offer him full and immediate reinstatement to his former position without prejudice to his seniority or other rights and privileges and make him whole for any loss of earnings he may have suffered. Such losses shall be computed on a quarterly basis with interest at the rate of 6 percent per annum.

Because the obligation to bargain with the Union is being imposed upon Ace and the Union is being imposed upon the employees as their bargaining agent without the benefit of a secret ballot election it is recommended that the notice herein contain language advising the employees of their right to a decertification election. See *N.L.R.B.* v. *Price-Less Discount Foods, Inc.*, 405 F.2d 1125 (C.A. 6).

Upon the foregoing findings of fact and conclusions of law and upon the entire record, I recommend, pursuant to Section 10(c) of the Act, issuance of the following:[17]

## ORDER

Respondent, Ace Foods, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interrogating its employees regarding their union activity; threatening its employees with layoffs during the slack season if they accepted the Union while at the same time implying that other work might be found for them if they rejected the Union; creating the impression of

[16] Cf. *New Alaska Development Corp., Alaska Housing Corporation* v. *N.L.R.B.*, 441 F.2d 491 (C.A. 7); *N.L.R.B.* v. *General Stencils*, 438 F.2d 894 (C.A. 2).

[17] 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, recommendations and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, automatically become the findings, conclusions, decision and order of the Board, and all objections thereto shall be deemed waived for all purposes.

surveillance of union meetings; and creating the impression that union organization would be futile.

(b) Discharging or otherwise affecting the hire, tenure or condition of employment of any employee to discourage union activity or membership.

(c) Refusing to recognize and bargain in good faith with Local 73, Amalgamated Meatcutters and Butcher Workmen of North America, AFL–CIO, as the exclusive bargaining representative of its employees in the unit found appropriate herein.

(d) In any other manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed by Section 7.

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

(a) Offer David Jones immediate and full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges.

(b) Make David Jones whole for any loss of earnings or other monetary loss he may have suffered by reason of the discrimination practiced against him, in the manner set forth in that part of this decision entitled "The Remedy."

(c) Notify David Jones, 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.

(d) Upon request bargain collectively and in good faith with Local 73, Amalgamated Meatcutters and Butcher Workmen of North America, AFL–CIO, as the exclusive representative of its employees in the unit found appropriate herein with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment and, if understanding is reached, embody same in a written, signed agreement.

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

(f) Post at its plant at Milwaukee, Wisconsin, copies of the attached notice marked "Appendix."[18] Copies of said notice, on forms to be provided by the Regional Director for Region 30, after being duly signed by the Respondent, shall be posted by him 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.

(g) Notify the Regional Director for Region 30, in writing, within 20 days from the recipt of this Decision, what steps Respondent has taken to comply herewith.[19]

[18] 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."

[19] 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 said Regional Director for Region 30, 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

WE WILL NOT interrogate our employees concerning their union activity. Their union activity is their own business.

WE WILL NOT threaten our employees with layoffs during the slack season if they accept the Union while at the same time implying that work will be found for them if they reject the Union.

WE WILL NOT give our employees the impression that we have spied upon union meetings.

WE WILL NOT tell our employees that the only benefit they could obtain from union organization would be insurance benefits.

WE WILL NOT discharge any employee because of his union activity.

WE WILL offer reemployment to David Jones in his former job with all his former rights and privileges.

WE WILL pay David Jones for any loss of earnings he may have suffered as a result of his discharge together with interest at 6 percent per annum.

WE WILL notify David Jones, if he is serving in the Armed Forces, of his right to employment, upon application, after discharge from the Armed Forces.

WE WILL, upon request, bargain with Local 73, Amalgamated Meatcutters and Butcher Workmen of North America, AFL–CIO, as the exclusive bargaining representative of our employees in the unit found appropriate concerning rates of pay, wages, hours of employment, and other terms and conditions of employment. If we reach agreement we will sign a contract with the above-named Union covering the terms of such agreement. The appropriate unit is: All meat-processing and meat-handling employees of the employer in its meat department (Department 102) located at its Milwaukee, Wisconsin, location, excluding office and clerical employees, professional employees, guards and supervisors as defined in the Act and all other employees.

Employees, pursuant to Section 9(c)(1) of the National Labor Relations Act, may, *at an appropriate time,* petition the National Labor Relations Board at the office set forth below, for an election to decertify and get rid of the Union as their collective-bargaining representative. The filing of such a petition can only be done as the voluntary act and choice of the employees and on their own initiative, without encouragement or assistance from any representative of management.

ACE FOODS, INC.
(Employer)

Dated By
(Representative) (Title)

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

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.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Commerce Building, Second Floor, 744 North Fourth Street, Milwaukee, Wisconsin 53203, Telephone 414–224-3861.