Admiral Merchants Motor Freight, Inc. *and* Local Lodge No. 31, International Association of Machinists and Aerospace Workers, AFL-CIO. Case 17-CA-10039

September 23, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On April 28, 1982, Administrative Law Judge James M. Kennedy issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

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

The Board has considered the record and the attached Decision in light of the exceptions and brief[1] and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified herein.[2]

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 Administrative Law Judge, as modified herein, and hereby orders that the Respondent, Admiral Merchants Motor Freight, Inc., Omaha, Nebraska, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Insert the following as paragraph 2(b) and reletter the following paragraphs accordingly:

"(b) Expunge from its records and files any and all references to the unlawful layoffs of employees Tilley and Nixon, and notify said employees in writing that this has been done and that evidence of the unlawful layoffs will not be used as a basis for future personnel action against them."

2. Substitute the attached notice for that of the Administrative Law Judge.

[1] Respondent has requested oral argument. This request is hereby denied, as the record, exceptions, and brief adequately present the issues and the positions of the parties.

[2] I shall modify the Administrative Law Judge's recommended Order by incorporating therein a provision requiring Respondent to expunge from all its records and files any references to the unlawful layoff of Ron Tilley and Roger Nixon and to notify said employees, in writing, that Respondent has taken such action and that evidence of the unlawful layoffs will not be used as a basis for future personnel action against them.

In accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

APPENDIX

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

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To engage in activities together for the purpose of collective bargaining or other mutual aid or protection
To refrain from the exercise of any or all such activities.

WE WILL NOT impose as a condition of continued employment that employees repudiate portions of the collective-bargaining agreement which regulate the wages, hours, and terms and conditions of their employment; WE WILL NOT threaten loss of employment nor will we lay off employees to obtain such repudiation.

WE WILL NOT refuse to bargain in good faith with Local Lodge No. 31, International Association of Machinists and Aerospace Workers, by bypassing it and dealing directly with employees which it represents nor will we without notice to that Union unilaterally change the wages, hours, or other terms and conditions of employment which it has obtained through collective bargaining on behalf of employees in the appropriate unit.

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

WE WILL make whole employees Ron Tilley and Roger Nixon for lost wages and other benefits to which they were entitled as a result of their layoffs in September 1980 and as a result of our denying them the benefits of their collective-bargaining agreement, together with interest thereon.

WE WILL expunge from our records and files any and all references to the unlawful layoffs of employees Tilley and Nixon and WE WILL notify these employees in writing that this has been done and that evidence of the un-

lawful layoffs will not be used as a basis for future personnel action against them.

ADMIRAL MERCHANTS MOTOR FREIGHT, INC.

DECISION

STATEMENT OF THE CASE

JAMES M. KENNEDY, Administrative Law Judge: This case was heard before me at Omaha, Nebraska, on January 26, 1982, pursuant to a complaint issued by the Regional Director for the National Labor Relations Board for Region 17 on June 2, 1981, and which is based on a charge filed by Local Lodge No. 31, International Association of Machinists and Aerospace Workers, AFL-CIO (herein called either the Union or the IAM), on November 17, 1980.[1] The complaint alleges that Admiral Merchants Motor Freight, Inc. (herein called Respondent), has engaged in certain violations of Section 8(a)(1) and (5) of the National Labor Relations Act, as amended (herein called the Act or the NLRA).

Issues

Whether or not Respondent violated Section 8(a)(5) of the Act when it bypassed the Union, the statutory bargaining representative of certain employees at its Omaha, Nebraska, terminal, and dealt directly with those employees regarding changing their wages, hours, and terms and conditions of employment as set forth in a collective-bargaining contract, and whether the changes which followed violated its bargaining obligation because they were implemented unilaterally, without notice to the Union. A secondary issue is whether the means used to obtain the employees' agreement constituted interference, restraint, and coercion within the meaning of Section 7 and Section 8(a)(1) of the Act. Respondent does not deny the conduct but asserts several defenses, principally contending that a Federal district court injunction required/permitted such conduct and thereby insulated it from liability under the NLRA.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Briefs, which have been carefully considered, were filed on behalf of the General Counsel and Respondent.

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

FINDINGS OF FACT

I. RESPONDENT'S BUSINESS

Respondent admits it is a Minnesota corporation engaged in the interstate transportation of freight, headquartered in St. Paul and having a terminal in Omaha, the facility involved herein. It further admits that in the course and conduct of its business it annually derives at least $50,000 in gross revenues, and is an essential link in the interstate transport of freight. Accordingly, it admits, and I find, that it is an employer engaged in commerce and in an industry affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Respondent admits, and I find, that the Union and its parent International association are labor organizations within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

The facts regarding Respondent's conduct are not in dispute. Furthermore, although Respondent raises some factual defenses, those matters are not in significant dispute either, simply being subject to differing interpretations.

Respondent operates numerous terminals throughout the Midwest. Most of its employees appear to be represented by different locals of the Teamsters Union. For reasons not pertinent here, during late 1979 and early 1980, Respondent found itself unable to meet certain financial obligations under its Teamsters collective-bargaining agreements. As a result it fell into significant arrearages to the Teamsters health and welfare plan and the Teamsters pension plan which are operated by trust funds established under Section 302 of the Act and regulated by the Employee Retirement Income Security Act of 1974 (29 U.S.C. Sec. 1001, *et seq.*) (ERISA). Pursuant to the requirements of ERISA, the trust funds filed suit against Respondent in the United States District Court for Minnesota sometime in 1980.[2]

On August 14, 1980, pursuant to the Funds' motion for summary judgment that court issued its findings of fact, conclusions of law, and order, together with a preliminary injunction. The court found that the arrearages then owed those funds totaled $957,173 and ordered Respondent to pay that amount. To enforce its order it issued a preliminary injunction containing the following language:

> 2. Pending further order of this court, defendant Admiral Merchants Motor Freight, Inc., acting through its directors, officers, agents, servants, *employees*, shareholders, and all persons acting in privity or in concert with defendant, is ENJOINED from failing to pay all monies due the plaintiffs Central States, Southeast and Southwest Areas Health & Welfare Fund on behalf of all of defendant's employees participating in said Funds, pursuant to the relevant collective bargaining agreements, trust agreements, and pension plans. [Emphasis supplied.]

It will be noted that the language used by the court nearly tracks the not unfamiliar language of Federal Rules of Civil Procedure 65(d).[3]

[1] All dates herein refer to 1980 unless otherwise indicated.

[2] *Central States, Southeast and Southwest Areas Pension Fund and Central States, Southeast and Southwest Areas Health and Welfare Fund, et al. v. Admiral Merchants Motor Freight, Inc.*, Docket No. 3-80 Civ. 189.

[3] Rule 65(d), with the pertinent portion italicized reads:

Continued

Neither the Union herein, Machinists Local 31, nor its International were parties to that proceeding.[4] They were not notified of it by Respondent and it does not appear from the record made before me that the district court was aware that Respondent employed employees represented by labor unions other than the Teamsters.

Although the District Court's order was later appealed to the United States Court of Appeals for the Eighth Circuit[5] Respondent's officials began taking steps to comply with the injunction immediately upon its issuance.

One of the steps it took was to ask its employees to give up a certain portion of their earnings so that such moneys could be used to satisfy the arrearages. Respondent contends that its employees, including the Omaha mechanics involved herein, voluntarily agreed to a "Judicial Compliance and Debt Reduction Plan" which was devised in August and submitted to the court sometime in early September. Whether or not employees elsewhere voluntarily agreed to the plan, there is substantial doubt regarding the voluntary nature of the Omaha IAM-represented employees' participation.

On Sunday, August 31, during the Labor Day weekend, Respondent's president, Robert E. Short, held an emergency meeting of the Omaha staff. Normally the Omaha facility would have been closed over that 3-day weekend. Most of the employees who attended were Teamsters drivers although some office personnel as well as the two IAM mechanics were present. According to the testimony of the mechanics, Short explained that the Company was in financial difficulty and was subject to an injunction, the terms of which were not clearly explained nor was a copy delivered either to them or to the IAM. Short told them the injunction had created an emergency, that he was about to be held in contempt and would probably go to jail unless the employees signed a letter,[6] drafted by the Company, authorizing the relinquishment of certain remuneration.

Short urged each of the assembled employees to take a copy of the authorization letter, of which he had numerous copies, sign it, and give it to the terminal manager. During Short's talk, mechanic Roger Tilley proposed that a smaller amount be deducted which the Company would promise to repay later. Short rejected the proposal saying that, if the employees did not sign, the operation would be closed. He did not explain whether he meant to close the Omaha terminal, its repair shop, or the entire system. Short then left the meeting saying each employee could make up his own mind. The two IAM mechanics, Tilley and Roger Nixon, declined to sign the letter and left.

The next day, Monday, September 1, was Labor Day, when the office normally would have been closed. Nonetheless, Terminal Manager Harry Polacek telephoned the two mechanics telling each that the garage was closed and they were laid off because they had refused to sign the letter. Simultaneously, he mailed letters to them advising them of the layoff.

On the following day, Tuesday, September 2, Polacek called to work Mike Erwin, a part-time mechanic. Nixon observed Erwin's truck at the terminal and stopped to inquire. He learned from Polacek that Respondent intended to continue to operate the garage if it could get employees who would sign the letter.

Nixon informed Tilley and together they obtained the assistance of a union steward from another company to file a grievance. It appears that the Union's business agent, Jack Tilley (employee Tilley's uncle), had left Omaha for a union meeting in Cincinnati the preceding Friday. He was not to return until September 11. Their grievance asserted that they had been laid off without the 5-day notice required by the IAM collective-bargaining agreement. When Polacek rejected their grievance Tilley and Nixon began picketing the terminal.

The picketing apparently had a salutary effect for Polacek immediately offered to discuss the grievance. On September 3 IAM Grand Lodge Representative George Breitenstein, who happened to be visiting Omaha on an unrelated matter, spoke with Polacek on their behalf. He negotiated their return to work together with a make-whole remedy for the lost days. However, Polacek immediately gave both Tilley and Nixon the proper 5-day notice of layoff.

Breitenstein testified that, during the course of his meeting with Polacek, Polacek told him he was under orders to lay off the men if they did not sign the letter which Short had presented them. Polacek did not give

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Form and Scope of Injunction or Restraining Order

> Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail and not by reference to the complaint or other document, the act or acts sought to be restrained; and is *binding only upon the parties to the action*, their officers, agents, servants, *employees*, and attorneys, upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

[4] The IAM contract referred to herein actually consists of two agreements, a companywide agreement with the International and a local supplement with Local 31.

[5] That court affirmed the district court in a *per curiam* decision filed March 5, 1981, Docket Nos. 80-1863 and 80-1864.

[6] The letter, undated and on Respondent's letterhead, is set forth in full:

> Mr. R. E. Short
> President
> Admiral Merchants Motor Freight, Inc.
>
> Dear Mr. Short:
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> As a concerned Omaha employee of Admiral Merchants Motor Freight, Inc. who is interested in the continued operation of this trucking company, I hereby offer that you make the following changes in my terms of compensation during the twelve month period beginning September 1, 1980 and ending Aug. 31, 1981.
>
> 1. No paid Holidays during the period involved.
> 2. No paid sick days during the period involved.
> 3. Reduction of paid vacation pay to two weeks.
> 4. Reduction in the gross weekly wages by the combined amount of weekly Health & Welfare and Pension contributions to the labor funds.
> 5. Road drivers to be paid mileage or hourly pay only, whichever is applicable.
> 6. No wage contract increases during the period involved.
> 7. No overtime pay during the period involved.
>
> It is understood that the continued operation of Admiral Merchants Motor Freight, Inc. will be reviewed from time to time to make certain that management is successfully reorganizing the carrier.
>
> Very truly yours,
> [Employee's signature]

Breitenstein a copy of the letter and he never learned exactly what was in it. Nevertheless, Breitenstein told Polacek that Local 31 would not agree to it. Moreover, he asserted to Polacek that in dealing directly with its employees Respondent was engaging in improper unilateral bargaining. He agrees that Polacek referred in some fashion to an injunction but says Polacek neither told him its terms nor gave him a copy. Breitenstein said his principal purpose was to negotiate a settlement of the employees' grievance; he had been authorized to do that by business agent Tilley and in that sense was simply Local 31's "messenger boy."

Business agent Tilley had, by then of course, learned from the employees via long distance telephone that a problem had arisen between Respondent and its mechanics. He had told both mechanics not to sign the letter and had advised them that it was "illegal" insofar as the IAM contract was concerned. Following his instructions neither Nixon nor Tilley signed the letter and, pursuant to the terms of the 5-day notice, were laid off on September 10. On September 12 they applied for unemployment compensation insurance and were told by the state unemployment agency that Respondent was seeking to hire mechanics. Immediately they checked with Polacek who told them he was simply attempting to protect himself by requesting employees. At approximately that time business agent Tilley returned from Cincinnati and told both men that the Union could not approve the letter but, as they had been laid off and were not working, and as they had debts and families to feed, they would have to use their own best judgment regarding whether or not they should sign the letter to remain employed.

Ronald Tilley signed the letter on September 17 telling Polacek he was signing it "under protest." Nixon also signed it, but the record is not clear regarding when he did so.

Immediately thereafter the wage deductions described in the letter were taken from each of them. (It appears that at least some money was withheld from Tilley's paycheck for a period of time preceding the actual authorization.)

In the meantime business representative Tilley began to pursue the matter. On September 12, after his return from Cincinnati, he called Polacek to find out what Respondent was doing. He told Polacek he did not understand why the Machinists were being required to pay for a Teamsters problem and said Respondent was violating the IAM collective-bargaining agreement. He told Polacek the IAM would be required to file charges with the NLRB. Polacek simply replied that he was "under orders." Tilley testified that neither Polacek nor Short ever gave him or any IAM official a copy of the injunction. He said that he caused NLRB charges to be filed on either September 17 or 18.

On September 26 business agent Tilley again had occasion to speak to Polacek and later to Short by telephone. Tilley testified he was attempting to settle a grievance which had been filed regarding denied overtime pay and succeeded in settling it on the basis that Respondent would give the employees time-and-a-half "comp time" to recompense overtime work in lieu of pay at one-and-a-half times the straight time scale. During the course of these discussions Short asked Tilley to withdraw the NLRB charge. At first Tilley refused. However, Tilley was aware that his nephew Ron had been hospitalized and, because of Respondent's arrearages with the IAM-negotiated health plan, that fund was withholding reimbursement for Ron's medical expenses. After discussing it for a time, Short agreed to make the appropriate payments and Tilley agreed to withdraw the charge when they were paid. Even so, Tilley told Short he would nonetheless grieve the contract breaches which the letter had caused. Both promises were kept and the original NLRB charges were withdrawn.

Subsequently, Tilley filed the appropriate grievances, but says that when he asked for an area committee meeting, as called for by the agreement, Respondent failed to reply. Accordingly, he had the Board charges refiled.[7]

IV. ANALYSIS AND CONCLUSIONS

The foregoing facts are essentially undisputed and, absent the issuance of the ERISA injunction by the district court, there would be no question that Respondent violated Section 8(a)(5) and (1) of the Act as alleged. Respondent never notified the IAM of the pending ERISA action and never told it that the lawsuit might require a modification of the IAM-negotiated terms and conditions of employment. Furthermore, despite the fact that Section 8(d) and Section 8(a)(5) of the Act obligate an employer to deal with the employees' statutory bargaining agent regarding wages, hours, and terms and conditions of employment, Respondent failed to carry out that duty. Instead, it went directly to the mechanics and negotiated, nay, coerced an agreement to reduce their remuneration. Unless Respondent's conduct is in some way insulated by the district court's injunction, the NLRA has been violated as alleged. See *Medo Photo Supply Corporation* v. *N.L.R.B.*, 321 U.S. 678 at 683 (1944) (direct dealing unlawful), and *N.L.R.B.* v. *Benne Katz, etc., d/b/a Williamsburg Steel Products Co.*, 369 U.S. 736, 743 (1962) (unilateral changes of mandatory bargaining subjects without notice to the union unlawful). Furthermore, financial hardship is no justification for unilateral changes of this sort. *Airport Limousine Service, Inc.*, 231 NLRB 932 (1977), and *Oak Cliff-Golman Baking Company*, 207 NLRB 1063 (1973).

Respondent advances several arguments asserting that each insulates it from a Board finding that Section 8(a)(5) and (1) have been violated. First, it contends that in the circumstances of this case an NLRA order will infringe upon ERISA and that the ERISA policies are somehow superior to those of the Act. Second, it asserts that an

[7] Respondent argues that the Union abused NLRB procedures by taking the above course of action and the complaint should therefore be dismissed. I disagree. This was no more an abuse of Board process than it was for Respondent to ask for the charge's withdrawal. Respondent further asks that the complaint be deferred to the grievance procedure. However, I see no warrant for deferral. Respondent, by not answering Tilley's request, has demonstrated that the grievance procedure is not available. In that circumstance deferral is inappropriate. *Medical Manors, Inc. d/b/a Community Convalescent Hospital and Community Convalescent East*, 206 NLRB 962 (1973). See also *Struthers Wells Corp.*, 248 NLRB 1170 (1979), where the Board refused to defer a clear contract violation to arbitration. Respondent's conduct here, as in that case, is a clear contract violation not involving a dispute over its meaning.

unfair labor practice finding would interfere with the ERISA injunction on principles of comity and orderly administration of justice. Third, it argues that, even if an unfair labor practice was committed, a "make whole remedy" is inappropriate because the order would be punitive.

I am unpersuaded. First, there is no reason to find, as Respondent urges, that the NLRA and ERISA are in conflict or, if they are, that the policies of ERISA are superior to those of the NLRA. The NLRA, as administered by the Board, sets forth procedures by which collective-bargaining relationships are established and maintained. Once established the parties are mandated to bargain over wages, hours, and terms and conditions of employment. See Section 8(d) and Section 8(a)(5). Among the many topics over which Section 8(d) requires bargaining are pensions (*Pacific Coast Association of Pulp and Paper Manufacturers* v. *N.L.R.B.*, 304 F.2d 760 (9th Cir. 1962)) and health plans (*W.W. Cross & Company, Inc.* v. *N.L.R.B.*, 174 F.2d 875 (1st Cir. 1949)).

If the parties choose to create trust funds for the implementation of such plans they are obligated to meet the criteria of Section 302 of the Labor Management Relations Act of 1947 (LMRA), an amendment to the NLRA, as well as to assure the financial integrity of the fund as mandated by ERISA. Philosophically, therefore, there simply is no conflict between the two acts; instead, they complement one another. Indeed, one section of ERISA (29 U.S.C. Sec. 1144(d)) specifically states that ERISA shall not "be construed to alter, amend, modify, invalidate, impair or supersede any law of the United States" (with two exceptions not pertinent here) "or any rule or regulation issued under any such law." Two circuit courts of appeal, noting that section, have held that ERISA does not in any way displace the Railway Labor Act (45 U.S.C. § 151, *et seq.*), and, considering that that law seeks to accomplish the same objective in the railway and airline industries, labor peace, as the NLRA does elsewhere in the private sector, there is no reason to assume that the result would be different here. See *Air Line Pilots Association International* v. *Northwest Airlines, Inc.*, 627 F.2d 272, 276 (D.C. Cir. 1980), and *Bonin* v. *American Airlines, Inc.*, 621 F.2d 635, 638 (5th Cir. 1980). See also *National Stabilization Agreement of the Sheet Metal Industry Trust Fund* v. *Commercial Roofing & Sheet Metal*, 655 F.2d 1218 (D.C. Cir. 1981), finding no conflict between ERISA and Section 302 of the LMRA.

Thus, while it may be true that the Teamsters trusts to which Respondent was bound were obligated to enforce whatever rights they may have had against Respondent, their entitlements cannot be construed to infringe upon the Section 7 rights of employees in bargaining units represented by other labor organizations which have like contractual arrangements with the same employer.

Moreover, it is by no means clear that the district court's order here was intended to run against employees in the fashion Respondent asserts, indeed, acted upon. It is true that the injunction language refers to employees, as does nearly every injunction following Federal Rules of Civil Procedures 65(d) or similar wording. But, as one district court has said, succinctly stating the obvious, in only a slightly different context:[8]

> The provision relating to "officers, agents, servants, employees, etc. was inserted merely to make the decree effective *as against the named defendants*, adopting to a great extent, the language of Rule 65(d) . . . . Such clauses are a standard provision in injunction decrees and *do not impose any liability which would not exist without them*. [Emphasis supplied.]

Keeping the purpose of the ERISA action in mind, to force Respondent to pay its debts to the plaintiff funds, it should be apparent to anyone that the injunction was designed to accomplish only that purpose. It was not intended, as Respondent infers, to impose liability on nondebtors, such as the employees. It only barred employees, among others, from assisting Respondent in any effort to evade the order to pay those debts.[9] I reject, therefore, Respondent's contention that the employees were bound by the order to assist Respondent to pay its debts to the Teamsters funds.

Even if it could be said that Respondent's Teamsters employees were so bound, it does not follow that the IAM-represented employees in Omaha were. The IAM was not a party to the ERISA action and had no notice of it. Indeed, it does not appear that the court was even aware that the IAM was the statutory bargaining agent of some of Respondent's employees. Quite simply, therefore, the injunction cannot be construed to have been in any way aimed at the IAM-represented employees in Omaha.

It may be that Respondent's president, Short, so construed that order and that his construction of the order was an error. Assuming that to be the case, his mistake does not insulate Respondent from carrying out its obligations under Sections 8(d) and 8(a)(5) of the Act.[10]

Under the circumstances, therefore, I do not find that the order of the district court or any proposed order by the Board will be in conflict either through the asserted clashing of the NLRA and ERISA or through principles of comity or judicial administration.

Finally, although I have alluded to it previously, Respondent's conduct in obtaining the signed letters from employees Ron Tilley and Roger Nixon was unlawful. Those two employees were the beneficiaries of an enforceable collective-bargaining contract and they had

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[8] *United States* v. *Wilhelm Reich Foundation*, 17 F.R.D. 96 at 101 (S.D. Me. 1954), affd. *per curiam sub nom. Baker* v. *United States*, 221 F.2d 957 (1st Cir. 1955), cert. denied 350 U.S. 842.

[9] See *Hodgson* v. *Humphries*, 454 F.2d 1279 (10th Cir. 1972), and *Interstate Commerce Commission* v. *Rio Grande Growers Cooperative*, 564 F.2d 848 (9th Cir. 1977).

[10] It should be noted in passing that ERISA, unlike the Bankruptcy Act, does not give the district court authority to set aside collective-bargaining contracts or otherwise to interfere with their administration. In construing the court's order to permit such interference, Respondent misapprehended the scope of the order and also misinterpreted the thrust of ERISA itself. Even if ERISA could be so interpreted the contracting unions would have to be parties to the action both to satisfy the *in personam* jurisdiction requirement and procedural due process. The contracting union here, the IAM, was never joined in, much less notified of, this litigation.

certain Section 7 expectancies deriving from it—i.e., the regulations of their wages, hours, and terms and conditions of employment. When Respondent's president, Short, and its terminal manager, Polacek, threatened them with loss of their employment unless they agreed to a modification of their wages, hours, and working conditions, Respondent coerced them to forgo their Section 7 right to collective-bargaining representation.[11] What purpose would Section 7 serve if, after requiring the parties to sign a contract, it could not thereafter protect the employees from coercive conduct designed to vitiate the agreement? Clearly Respondent's threats of lost employment if the mechanics did not sign the letter constituted activity barred by Section 8(a)(1).

Although the complaint breaks Respondent's conduct into six subparts (threats of closure, layoffs, reinstatement, a second layoff, a second reinstatement, and, finally, imposing an unlawful condition for reinstatement), there are really only three violations: conditioning continued employment on the employees' partial repudiation of the wage section of their collective-bargaining contract, the threat, and laying them off when they refused to comply with that condition. Neither their first reinstatement upon settlement of their grievance nor their second appears to be a violation, although both layoffs were. With regard to the first layoff, I note that the employees were supposedly made whole for that period of time (although that is not altogether clear, for full contract remuneration appears to have been denied Tilley on an *ex post facto* basis).

The appropriate analysis, therefore, is to find that Respondent imposed on the IAM mechanics, as a condition of continued employment, their repudiation of certain contract wage benefits. To enforce that condition it first threatened employment loss (through closure)[12] and, when that did not succeed, actually laid them off. All three efforts violated Section 8(a)(1) of the Act.

Accordingly, I find that Respondent's conduct in dealing with its IAM-represented employees in Omaha violated Section 8(a)(1) of the Act as detailed above and violated Section 8(a)(5) and (1) first by bypassing the IAM and dealing directly with the employees regarding those matters and second by unilaterally and without notice to the IAM reducing the wages (in the process contravening the collective-bargaining contract) without notifying the IAM of the proposed changes and without giving that Union an opportunity to bargain about them.

V. THE REMEDY

Having found that Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, I shall recommend that it be required to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act, including reimbursing affected employees to the extent that they were wrongfully laid off and money withheld from their pay and to make them whole for that misconduct.[13] Interest thereon shall be computed in accordance with the Board's Decision in *Florida Steel Corporation*, 231 NLRB 651 (1977); see, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962). As both Tilley and Nixon were returned to work, a reinstatement order is unnecessary.

Upon the foregoing findings of fact and upon the entire record in this case, I make the following:

CONCLUSIONS OF LAW

1. Respondent, Admiral Merchants Motor Freight, Inc., is an employer engaged in commerce and in an industry affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local Lodge No. 31, International Association of Machinists and Aerospace Workers, AFL-CIO, and its parent International association are labor organizations within the meaning of Section 2(5) of the Act.

3. The following employees of Respondent constitute an appropriate unit for collective bargaining within the meaning of Section 9(b) of the Act:

> All journeyman mechanics, journeyman trailer mechanics, apprentices, leadmen mechanics, and assistant leadmen mechanics employed by Respondent, but excluding all office clerical employees, professional employees, sales employees, guards, supervisors as defined in the Act, and all other employees.[14]

4. On August 31 and September 17, 1980, by conditioning continued employment on the employees' agreement to repudiate wage benefits as set forth in the collective-bargaining agreement between it and the IAM, by threatening to close the business, and by laying off employees Tilley and Nixon to obtain that repudiation, Respondent interfered with, restrained, and coerced employees in the exercise of rights guaranteed them by Section 7 of the Act and thereby violated Section 8(a)(1) of the Act.

5. By bargaining directly with its IAM-represented employees, by bypassing their statutory bargaining representative and dealing directly with its employees and by unilaterally, without notice to the IAM, reducing wages and changing the terms and conditions of employment of the IAM-represented employees without giving that Union the opportunity to bargain about such changes, Respondent failed to meet its obligation to bargain in good faith as required by Section 8(d) and thereby violated Section 8(a)(5) and (1) of the Act.

Upon the foregoing findings of fact, conclusions of law, and upon the entire record in this case, and pursu-

[11] Compare *Fimbel Door Co., Inc.*, 224 NLRB 703, 707 (1976); *Burwise Sheet Metal Co., Inc., et al.*, 199 NLRB 372 (1972); *Blue Cab Company, etc.*, 156 NLRB 489 (1965), enfd. *sub nom. General Teamsters Local 782 v. N.L.R.B.*, 373 F.2d 661 (D.C. Cir. 1967), cert. denied 389 U.S. 837; *Ra-Rich Manufacturing Corporation*, 120 NLRB 503 (1958), enfd. 276 F.2d 451 (2d Cir. 1960). Each of these cases involved violations of Sec. 8(a)(3), not charged here. The analysis is nonetheless the same.

[12] Contrary to the complaint, I find that the facility was never closed, unless the layoff constituted a *de facto* closure; yet Respondent's recall of a part-time employee and its request for employees through the state unemployment office shows that it never actually closed the repair shop.

[13] Respondent's last contention, that the Board's standard make-whole remedy is punitive, is without merit.

[14] At the hearing Respondent admitted the appropriateness of the above-described unit.

ant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[15]

The Respondent, Admiral Merchants Motor Freight, Inc., Omaha, Nebraska, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interfering with, restraining, and coercing its employees in the exercise of rights guaranteed them by Section 7 of the Act by: conditioning continued employment on their repudiation of certain contractual wage benefits, threatening to close the business, and laying off employees to obtain that repudiation.

(b) Refusing to bargain in good faith by bypassing its employees' statutory bargaining representative and dealing directly with employees represented by a statutory bargaining agent and by unilaterally and without notice to the Union changing the wages, hours, and terms and conditions of employment of employees represented by it.

(c) In any like or related manner threatening, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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

(a) Make employees Ron Tilley and Roger Nixon whole for loss of wages and other benefits to which they were entitled under the collective-bargaining agreement between Respondent and the IAM in the manner set forth in that portion of this Decision entitled "The Remedy."

(b) 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 the amount of backpay due under the terms of this Order.

(c) Post at its Omaha, Nebraska, terminal copies of the attached notice marked "Appendix."[16] In the event that Respondent is no longer in business at that location, copies of such notice shall be mailed to all employees employed in the IAM bargaining unit in Omaha between August 31, 1980, and the date of the Board's Order. Copies of said notice, on forms provided by the Regional Director for Region 17, after being duly signed by its authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for a period of 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 17, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

[15] 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.

[16] In the event that this 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 read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."