

6. By promulgating and enforcing broad rules against solicitation and the distribution of literature on company premises during nonworking time, the Respondent has also engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

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

[Recommendations omitted from publication.]

Neuman Transit Co., Inc. and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 307. *Case No. 27-CA-1087. September 18, 1962*

DECISION AND ORDER

On May 3, 1962, Trial Examiner David F. Doyle issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety, as set forth in the attached Intermediate Report. Thereafter, the General Counsel and the Charging Party filed exceptions to the Intermediate Report together with supporting briefs.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to a three-member panel [Members Rodgers, Fanning, and Brown].

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

[The Board dismissed the complaint.]

¹ The Trial Examiner found that the appropriate unit for collective bargaining was one comprising all drivers employed by the Respondent at its Rawlins, Riverton, Rock Springs, Casper, Evanston, and Jeffrey City, Wyoming, terminals. On the other hand, the General Counsel and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 307, the Charging Party herein, contend, in pertinent part, that the drivers assigned to the Jeffrey City terminal should be excluded from the unit. In dismissing the complaint, herein, we find it unnecessary to resolve this issue as to the appropriate unit for collective-bargaining purposes. Here, the record clearly shows, as found by the Trial Examiner, that the Respondent had a good-faith doubt as to the majority status of the Union whether or not the Jeffrey City drivers were included in the unit. Accordingly without passing upon the Trial Examiner's appropriate unit determination, we agree with the Trial Examiner's remaining conclusions that the Respondent had a good-faith doubt as to the majority status of the Union, and did not violate Section 8(a) (5) or (1) by its refusal to bargain.

INTERMEDIATE REPORT AND RECOMMENDED ORDER

STATEMENT OF THE CASE

The charge in this case was filed by the above-named Union on August 22, 1961, and complaint herein was issued by the Regional Director of the Board (Twenty-seventh Region) on December 1, 1961.¹ The Respondent filed a timely answer and thereafter this proceeding came on regularly to be heard by Trial Examiner David F. Doyle at Rawlins, Wyoming, on January 16 through 20, 1962. At the hearing, the parties were represented by counsel who were afforded a full opportunity to present evidence, examine and cross-examine witnesses, and to present oral arguments and briefs on the issues.

Upon the entire record, and from my observation of the witnesses, I hereby make the following:

FINDINGS AND CONCLUSIONS

I. THE BUSINESS OPERATIONS OF THE COMPANY

The pleadings and a stipulation of the parties establish that the Company is a Wyoming corporation with its principal place of business at Rawlins, Wyoming, where it is engaged in the business of a common and contract carrier, hauling general freight, livestock, oil products, chemicals, ores, and other commodities. The Company annually derives gross revenues in excess of \$50,000 from the interstate transportation of general freight, oil products, and other materials and commodities. In the course and conduct of its business the Company maintains terminals and places of business at Rawlins, Riverton, Rock Springs, Evanston, Casper, and Jeffrey City, Wyoming.

It is not disputed, and I find, that all times pertinent hereto the Company was and is an employer engaged in commerce within the meaning of the Act.

II. THE LABOR ORGANIZATION INVOLVED

It is admitted in the pleadings, and I find, that the Union at all times pertinent hereto was, and is, a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The issues*

The complaint herein alleged that between August 19 and 23, 1961, the Company committed unfair labor practices in violation of Section 8(a)(1),(3), and (5) of the Act. The answer of the Company denied the commission of unfair labor practices and asserted certain affirmative defenses. At the hearing the General Counsel introduced the formal documents basic to the proceeding and at that point the Trial Examiner suggested that opening statements by counsel followed by a pretrial conference on the record might be beneficial to ascertain any areas in which the parties agreed and to sharpen the issues requiring litigation. Counsel agreed to the suggestion.

In the ensuing pretrial conference the following issues emerged:

1. The General Counsel contended that on August 19, 1961, the Company had discharged employees Sealock and Stanley for engaging in union activities and had on about the same date laid off employees Jones, Frederick, Saxton, and Stansbury for the same discriminatory reason, all in violation of Section 8(a)(3) and (1) of the Act. The Company contended that Sealock and Stanley were discharged for good and sufficient cause—failure to report for work; and that Jones, Frederick, Saxton, and Stansbury were temporarily laid off because of lack of work.

2. The General Counsel contended that the Union in an organizational campaign achieved majority status of the Company's employees in a unit appropriate for bargaining on or about August 20, 1961, and thereafter properly demanded recognition by the Company and bargaining, which was refused by the Company. He also contended that by the unfair labor practices involving the discharges and layoffs, the Company had refused to bargain with the Union, all in violation of

¹ In this report the Charging Party, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No 307, is referred to as the Union or the Teamsters; Neuman Transit Co., Inc., as the Respondent, the Company, or the Employer; the National Labor Relations Board as the Board; and the Labor Management Relations Act, as amended, as the Act; the General Counsel of the Board and his representatives at the hearing, as the General Counsel.

Section 8(a)(5) of the Act. The Company on this point contended that the discharges and layoffs were lawful, as set forth above, and that it refused to recognize the Teamsters as the representative of its employees because the Company had a good-faith doubt that the Teamsters represented a majority of its employees in any unit which the Board, on the basis of its decisions, could find appropriate.

3. The General Counsel contended that certain of the Company's officers and supervisors had interrogated certain employees concerning their concerted activities and threatened employees with loss of employment or other economic reprisals if they became or remained members of the Union. This contention the Company denied.

4. The General Counsel in his opening statement said that he was going to show a "long history of anti-union conduct" on the part of the Company by the introduction into evidence of certain testimony relative to a meeting of Neuman and his employees at the Ferris Hotel, Rawlins, which would relate to events outside the 6-month period of limitation under Section 10(b) of the Act. He conceded that no finding of an unfair labor practice could be based upon conduct disclosed by such testimony, but he said it would shed light on the events which occurred within the permissible 6-month period, which were claimed to be unfair labor practices in this proceeding. He stated that such evidence was admissible in the light of the United States Supreme Court's decision in *Local Lodge No. 1424, International Association of Machinists, AFL-CIO; et al. (Bryan Manufacturing Co.) v. N.L.R.B.*, 362 U.S. 411. The reaction of the Company to this proposal was prompt and vigorous. Counsel for the Company contended that such evidence was inadmissible and cited as authority the same case, *Bryan Manufacturing Co. (supra)*. The Trial Examiner stated to counsel that when evidence outside the 6-month period was proffered, he would be inclined to rule that it was admissible for the purpose of shedding light on any of the conduct of the Company, now alleged in the complaint to be unfair labor practices. However, the Trial Examiner stated that such evidence became admissible if, fairly considered, it shed light or clarity on the alleged unfair labor practices set forth in the complaint. He also stated that in the event the so-called background evidence, after full disclosure, did *not* meet the requirements for admissibility, he would entertain a proper motion to strike such background evidence from the record. Thereafter in the course of the hearing at each and every point where the General Counsel sought to introduce evidence relating to events prior in time to the 6-month period allowed by Section 10(b) of the Act, counsel for the Respondent made proper objection, was overruled by the Trial Examiner, and a specific exception noted in favor of the Company.

The evidence in this case is contained in 767 pages of transcript and some 40-odd exhibits. However, much of the evidence is undisputed, and this affords a most helpful basis from which the contested issues may be correlated and evaluated. The Trial Examiner has considered all of this evidence in its totality in arriving at his concluding findings as to each of the contested issues. However, the orderly organization of this report requires that the testimony and exhibits pertinent to each contested issue be kept close to the Trial Examiner's concluding findings on that issue. This brings a type of separation of issues into this report, but the Trial Examiner wishes it distinctly understood that all the evidence has been considered in its totality, in making the findings hereinafter expressed.

B. Undisputed facts. The operations of the Company, its terminals, etc.; duties of drivers; the labor management policies; the Rock Springs operation; some seasonal factors; the unit appropriate

At the hearing the principal witness as to the operations of the Neuman Transit Company was its president, H. T. (Ted) Neuman. He was called by the General Counsel as an adverse witness under Rule 43(b). The testimony of Neuman as to the operations of the company is not challenged by the General Counsel. Additional valuable evidence on these points is contained in a series of exhibits prepared by Christie Mayash, accountant for the Company, which were stipulated into evidence, after being thoroughly examined and checked by all counsel. In addition, some of the employees testified to various features of their employment. This mass of testimony affords a clear picture of the operations of the Company and the duties of its drivers. Since this feature is basic to the entire controversy, the evidence on this point will be related first.

It is undisputed that the Company maintains terminals at the following places in the State of Wyoming: Rawlins, Casper, Riverton, Rock Springs, Evanston, and Jeffrey City. The terminal at Rawlins is the heart of the system. It is from this headquarters that Neuman, president of the Company, with the assistance of Don Rogers, dispatcher, directs all operations throughout the system. At each of the other terminals the Company has a dispatcher and such mechanics as are needed

to keep the Neuman fleet of trucks in repair. For its business of hauling the Company operates 35 heavy duty diesel-powered tractors and 57 trailers of various kinds and types. The Company hauls a wide variety of freight for its customers who are engaged in a variety of businesses. The diesel-powered tractors are used to haul all commodities. One day the power unit may be used to haul livestock with a livestock trailer, the next day road oil with a tanker trailer, and the following day, uranium concentrate which is contained in sealed containers and transported in a trailer van. During the calendar year 1961 the percentage of business from the varying types of hauling were:

	<i>Percent</i>
Uranium ore -----	43.80
Petroleum products -----	21.56
Road oil -----	14.94
Acid -----	10.35
Livestock -----	5.08
Yellow cake (uranium concentrate) -----	2.74
Heavy equipment -----	.43
Miscellaneous (chemicals, cement, etc.) -----	1.10

All truckdrivers are hired by Neuman or Don Rogers at Rawlins, Wyoming. The transfer of all employees and equipment between the various terminals is also directed by Neuman or Rogers from the central office in Rawlins. At this office all accident and safety reports are prepared and all personnel records for truckdrivers are maintained. Duplicate records are not kept at any other location. From the central terminal in Rawlins the distance to other terminals in the system is as follows: To Riverton—155 miles; Casper—118 miles; Rock Springs—108 miles; Evanston—214 miles; Shirley Basin—107 miles; Jeffrey City—72 miles.

The testimony and the exhibits also establish that all truckdrivers are hired to drive all equipment and to haul all the various commodities transported in the system. They are transferred between Rawlins, Riverton, Evanston, Casper, and Rock Springs routinely and frequently; drivers stationed at those cities are transferred to Jeffrey City as necessity requires, but less frequently.

The Company's method of pay for all drivers employed by the Company is dependent on the type of commodity hauled. These rates are as follows:

A. Drivers hauling sulfuric acid are compensated on a per-trip basis varying as to length of trip

B. Drivers hauling livestock receive 6 cents per mile, plus loading and unloading time

C. Drivers hauling petroleum receive 6¼ cents per mile, plus unloading time.

D. Drivers hauling road oil receive 6¼ cents per mile, plus unloading time.

E. Drivers hauling freight receive 6¼ cents per mile, plus loading and unloading time.

F. Drivers hauling ore are paid on an hourly rate, and receive overtime at the rate of time and one-half for all hours worked beyond 40 hours in a workweek.

It is also undisputed that the Company has a common policy on labor relations, vacations, holidays, and health and welfare for all drivers at all locations. The Company has a common retirement plan for all truckdrivers at all locations, and all truckdrivers have similar skills and abilities.

In general, the Company has uniformity of wages and working conditions among all employees, dependent upon the type of equipment which the truckdrivers operate.

There is some difference in the operations when the drivers are hauling various types of commodities. When the drivers are hauling road oil, petroleum, and uranium ore, they do not keep Interstate Commerce Commission logs. Drivers on interstate runs, hauling acid, livestock, and yellow cake (uranium concentrate) do keep ICC logs.

The work performed by the drivers located at the Jeffrey City terminal differs in some respects from the duties performed by drivers at other terminals. The Jeffrey City terminal is maintained for the purpose of hauling uranium ore from the uranium mines in the Gas Hills area of Wyoming to the Western Nuclear Mill at Jeffrey City. This is a distance of approximately 225 miles, all within the State of Wyoming. Neuman testified that the Jeffrey City operation was called the ore division for bookkeeping purposes inasmuch as that type of operation did not vary except as to volume. Also at Jeffrey City, the Company maintains some extra-heavy-duty type of Euclid truck which is used to haul raw ore from the mines to the uranium mills. Because of their great size, these heavy vehicles are not allowed on public highways and they travel on special private roads. He also said that the bills of lading for these hauls are different from those used at other terminals in that they refer to the operation as the ore division. He explained that this again was book-

keeping procedure. Since these men do not drive in interstate commerce, they are not required to keep ICC logs. Neuman also said that the Atomic Energy Commission, by its directives, controls the productivity of the uranium mills who in turn control the amount of uranium ore which the Company must haul from the mines to the mills. He said this amount fluctuated very widely and he transferred men and equipment from the other terminals to the Jeffrey City terminal in accordance with the tonnage directives given to him by the nuclear mills. The assignment of drivers and equipment to Jeffrey City is controlled by Neuman and Rogers at Rawlins, the same as all other transfers of men or equipment.

An exhibit established that the average number of drivers employed by the system per month in the year 1960 was 41.25 and in 1961 it was 49.75. As illustrative of the fluctuation of drivers engaged in hauling ore, Neuman testified, from company records, that on January 16, 1962, 27 out of 44 drivers were engaged in hauling uranium ore. On January 15, 1961, 16 drivers were hauling ore. In May and June 1961, 12 drivers were hauling ore, and on August 20, 1961, 8 drivers were hauling ore.

The Company prior to 1959 paid the drivers at Jeffrey City engaged in hauling ore, on a mileage basis. In that year the Federal Wage and Hour Division, Department of Labor, by means of a proceeding entitled *Mitchell v. Metals Transportation Co.*, 137 F. Supp. 887 (Wyo. 1959), required the Company to pay the Jeffrey City drivers thereafter on an hourly basis.

It is undisputed that the Company has six men based at Jeffrey City who are the nucleus for that operation. Rather infrequently they are transferred to other hauls, but it is similarly undisputed that frequently this force of six is greatly expanded by the transfer of drivers from Riverton and elsewhere to take care of expanded needs of the uranium mills. From all the evidence it would appear that the six men at Jeffrey City can take care of the minimum requirements of the mills, but fluctuations of volume upward require the transfer of men and power units and trailers to Jeffrey City. When the demands of the mills return to routine requirements, the expanded force is redistributed back to their bases at Riverton, Rawlins etc. The six drivers at Jeffrey City are Hornbeck, Lynn Kelly, Orville Kelly, Lamb, Luton, and Patton.

Hornbeck was hired January 16, 1960, as a patrol operator, but on or about April 1961 began hauling uranium ore. He has regularly hauled acid in tank trailer from the Susquehanna plant at Riverton to Western Nuclear mills and from the Susquehanna plant into Lucky Mc in the Gas Hills. Hornbeck also testified that other Jeffrey City drivers have also hauled acid regularly on different occasions.

Orville Kelly was hired on February 6, 1961, at Jeffrey City. He has hauled uranium ore at Jeffrey City, been transferred to Rawlins terminal hauling livestock and gas products, and then been transferred temporarily back to Jeffrey City to haul ore. For the month of March 1961 he was transferred back to Rawlins to haul gas, and then on approximately March 28, 1961, he was transferred to Jeffrey City.

Lynn Kelly was hired in January 1960, starting work at the Rawlins terminal. He was transferred to Jeffrey City and, while located there, has hauled ore, fuel oil, and acid. He testified that other drivers at Jeffrey City have hauled acid because that was a "regular" haul.

The parties stipulated that Patton and Lamb were stationed at Jeffrey City, hauled uranium ore, and were not transferred from Jeffrey City to any other terminal. Patton was hired in October 1959 and Lamb in May 1961.

Luton was hired on May 8, 1961. He hauled ore during the period May 8 to 30, 1961. On June 1 and 2, Luton was stationed at Rawlins. From June 3 to 17 he was stationed in Jeffrey City hauling ore and from June 18 to 23, 1961, he was stationed at Rawlins hauling diesel fuel and road oil from Sinclair to Fort Bridger, Wyoming.

Neuman testified that Jeffrey City-based drivers hauled acid from Riverton to the Western Nuclear, Lucky Mc, Gold Mill, Federal Red Rock Mills, and to the Globe Mill on a regular recurring basis. That when Jeffrey City-based drivers haul acid, they were paid by the trip.

Neuman also testified that the livestock hauling was seasonal; it expanded in the spring and summer months and dwindled towards the winter. Gasoline, diesel fuels, and gasoline distillates also varied, composing a higher volume of the Company's business during the summer tourist months, than during the winter, when these hauls were curtailed. Acid hauls and chemical hauls were on a steady basis. Road-oil hauling was limited to the summer months when the highway departments of the State and counties were engaged through contractors in repairing and oiling highways. Heavy equipment hauling was limited by seasonal factors as the heavy equip-

ment was usually transported for general contractors engaged in the building industry, which in Wyoming is seasonal.

Concluding Finding as to Appropriate Unit

As noted hereafter, the demand for recognition made by the Union in its letter delivered to Neuman on the morning of August 21, demanded recognition for the Company's "transport tank drivers" at the Company's Rawlins, Riverton, Rock Springs, Casper, and Evanston, Wyoming, terminals. The complaint of the General Counsel herein alleges the proper unit to be "all *transport drivers* employed by the Respondent at Respondent's Rawlins, Riverton, Rock Springs, Casper and Evanston, Wyoming terminals, exclusive of mechanics, etc." [Emphasis supplied.]

The first point that the evidence establishes is that the Company has no employee who is classified as a "transport tank driver" or as a "transport driver," if either terminology means that drivers are limited to driving either tankers or some other type of "transport" vehicle. The testimony establishes beyond doubt that all Neuman drivers have comparable skills and drive all types of vehicles. The power units they all drive are of the same type, but the trailer which is hauled varies in accordance with the freight transported. The Company has no particular cattle drivers, acid drivers, chemical drivers, etc.; all drivers perform the same type of work and all drive the variety of commodities transported by the Company.

The principal issue between the Company and the General Counsel, who in this instance, takes the Union's position, is relative to whether the six drivers stationed at Jeffrey City should be included in the appropriate unit or not. The mass of undisputed evidence establishes that much of the Company's business at the terminals, exclusive of Jeffrey City, is affected by seasonal factors. In the spring the Company's force of employees is expanded to meet the Company's requirements and in the fall there is a corresponding contraction. The evidence also establishes that the Company's business out of the Jeffrey City terminal is composed mostly of hauling ore for the nuclear mills. This operation is affected by the widely fluctuating requirements of the Atomic Energy Commission. The requirements of ore of the nuclear mills is controlled exclusively by the directives of that Commission, and the Company's business at Jeffrey City expands and contracts in accordance with those directives. However, this is a fluctuation which is not dependent or connected with seasonal considerations. In the course of its operations, the Company has evolved a system whereby it transfers men from Rawlins, Riverton, and Evanston and the other terminals to Jeffrey City to meet the higher requirements for ore, and redistributes the men back to their original stations when these emergency requirements are met. This system evidently is based on practical considerations beneficial to the Company. It has at its other terminals sufficient competent men to fill the requirements at Jeffrey City, even when those requirements are at maximum volume. However, when maximum requirements of ore are not required at Jeffrey City, the Company has sufficient other work at the other terminals to keep the men occupied. Even with this interplay of variable factors, the total operations of the Company are subject to some curtailment by the decrease in both variable fluctuations. But the system evolved by the Company appears to be the best arrangement that can be made to handle a comparatively fluid situation.

In my judgment the same practical considerations dictate that the definition of an appropriate unit of drivers include all drivers of the Company, including those at Jeffrey City. A ruling that the Jeffrey City drivers should not be included in the unit would divide the Company's business into two separate and distinct business operations and divide its employees into two separate and distinct units. If different unions represented each distinct unit, or if one unit was unorganized, there could be no transfer of employees back and forth between the units to handle the variable factors in the Company's business. Also, the employees at Jeffrey City would be dependent for their livelihood almost exclusive upon the fluctuating requirements of the Atomic Energy Commission. Likewise, the employees of the other terminals would be more dependent upon the fluctuating seasonal factors in the Company's business. On the other hand, if all the employees are combined in one unit of all drivers at all terminals, and are represented by one union, there could be unrestricted transfer of employees or an orderly seniority procedure established, which would permit the fluctuating situation at Jeffrey City to offset the seasonal factors at the other terminals, and vice versa. Other evidence related hereafter will show that occasionally the maximum requirements for ore at Jeffrey City is advantageous in affording employment to employees at the other terminals who would have been laid off because of seasonal factors except for transferability to Jeffrey City.

From all the evidence in this case, it appears that employment as a truckdriver is somewhat precarious at best because of seasonal factors alone and it is my considered

judgment that the Board should not create two units of drivers which would leave each unit at the mercy of a different set of variable factors. If all drivers are in one unit and represented by one union, they will have first chance at *all work* of the Company and at least to that extent the Board will have taken a step toward stabilizing their long-term employment. Within the limits of Neuman's operations, the men would have stable employment.

On the basis therefore of all the evidence, I find that the unit of Neuman's drivers appropriate for collective bargaining is as follows:

All drivers employed by Respondent at Respondent's Rawlins, Riverton, Rock Springs, Casper, Evanston, and Jeffrey City, Wyoming, terminals, exclusive of mechanics, office clerical employees, maintenance employees, professional employees, guards, and all supervisors as defined in the Act.²

C. Undisputed facts: Sequence of events; the Union's organizing campaign; its demand for recognition; certain correspondence between the parties; meeting of September 5

Certain features of the Union's organizational campaign and certain features of the Company's reaction to the Union's demand for recognition are not disputed. With these undisputed features in mind, the contested issues may be better understood.

According to the testimony of employee Stansbury, a driver for the Company based at Rawlins, he invited the Union to organize the employees of the Company. On August 15 or 16³ he met Teamster Official Jack Anderson at Riverton, Wyoming. He told Anderson that some of the drivers were interested in the Union and he gave Anderson a list containing the names of some employees. Employee Dick Sealock also testified that he met Anderson in Casper, Wyoming, on or about August 16 or 17 and talked to Anderson about organizing the employees.

On August 18, Anderson, accompanied by another Teamster representative, John Moss, came to Rawlins and checked into a room at the Rawlins Motel. According to the testimony of these union representatives and Sealock, they met at the Venice Cafe in Rawlins around dinnertime that evening. At this meeting they discussed the manner in which they would organize the employees. It was decided that the Union would hold an "open house" and the Sealock and other interested employees would attempt to bring the employees to the Rawlins Motel where the Teamster officials could talk to them and obtain their signatures on applications for membership. The hour at which the "open house" started and Sealock first brought prospective members to the motel, is not clear in the testimony, but it is clear that Sealock was joined in this work by employee Bob Stanley about 10 p.m. that evening. From that time until approximately 2:30 the following morning, Sealock and Stanley were engaged in going to the homes of Neuman drivers and bringing them to the motel room where Anderson and Moss could talk to them and sign them up. Some of the men who came to the motel room stayed and talked with the union officials, while others left. In the course of this meeting, Anderson informed the men that it might be necessary to strike the Company.

It is undisputed that on the morning of August 19, the morning after the first open house, Stanley did not report for work. He was fired by Neuman in the course of a phone call about 6 p.m. that day. On the same morning Sealock encountered difficulty with the Company over an early morning trip he did not make. Neuman in the same phone call as to Stanley told Sealock that he was fired, but that Sealock would be given a chance to explain on the following morning. The discharges of Sealock and Stanley form one of the contested issues in the case and will be treated at length hereinafter.

On the evening of August 19 and the early morning hours of August 20, Sealock and Stanley continued the same system of recruitment by bringing the employees to the motel to be signed up by the union representatives. By a point some time on August 20, a total of 22 drivers had signed union application cards.

² *E. E. McNeal and John Marshall d/b/a Southern Truck Line*, 107 NLRB 615; *Groendyke Transport, Inc.*, 92 NLRB 1332. In my judgment the line of cases which include *K. D. Shaver, d/b/a Shaver Transfer Company*, 119 NLRB 939; *Fredrickson Motor Express Corporation*, 121 NLRB 32; and *Standard Trucking Company*, 122 NLRB 761, are inapposite in the light of all the circumstances here present. Here, the terminals are all in one State with unrestricted transfer of employees between terminals, and an interrelationship and interdependence between terminals, and all conditions of employment of the men are substantially uniform.

³ All dates in this report are in the year 1961.

On Saturday, August 19, Teamster Official Anderson was notified of a death in his family, so he departed on the early morning bus on August 20, leaving in charge Union Representative John Moss who was later joined by another Teamster official named Shenefelt. On the morning of August 20, Neuman interviewed Sealock and Stanley and confirmed his firing of Sealock. Later in the day, Neuman laid off employees Jones, Stansbury, Frederick, and Saxton. He told these employees that they were laid off temporarily for lack of work. The layoff of these employees is a second contested issue in the case and will also be treated at length hereinafter.

When Teamster Official Anderson reached Casper on August 20, he dictated two letters to the Company and sent them by personal messenger to Moss with instructions that they were to be delivered to Neuman, the president of the Company, or some other responsible Neuman official. Moss received these letters at approximately 9 p.m. At approximately 10 p.m. on Sunday, August 20, Moss, Shenefelt, and Stansbury went to Neuman's home. Shenefelt and Moss went up to Neuman's door and Stansbury stayed in the car. Neuman came to the door. Moss told Neuman that he and Shenefelt represented the Union and a majority of Neuman's drivers. Moss said he had a letter for Neuman and that he would like to discuss the matter with him. Neuman did not open the door, but speaking through it, replied, "If you want to see me, come to my office in the morning." The union representatives then went to the home of Don Rogers, dispatcher for the Company at the Rawlins terminal. When the union representatives knocked at Rogers' door he refused to open the door or accept the letters.

Moss then returned to Rawlins Motel and about midnight instructed one of the employees who was a painter to prepare a picket sign. It was stipulated that at 2 a.m., on the morning of August 21, the Union began picketing at the entrance of the Company. The picket sign read, "Neuman Transit Company refused to bargain as preferred by law. Teamsters Local 307."⁴

It is undisputed that the picketing was only partly effective. At the Rawlins terminal approximately half of the drivers reported for work, and approximately half honored the picket line. There was no picketing of any other terminal of the Company. The facts and figures as to the effect of the picketing are involved in the contested issue, "Alleged refusal to bargain," and are developed at length hereinafter.

At 8 a.m., on August 21, Moss and Shenefelt went to the Neuman terminal at Rawlins, passed through the picket line, and went to Neuman's office. Neuman's office and the dispatcher's office are separated from a large public room called the "drivers room" by a partition with a sliding glass window. Moss and Shenefelt talked to Neuman through this window. Moss told Neuman that he represented a majority of his "tanker-drivers" and that they had proof of it. Neuman made no effort to come to greet him but told him that the National Labor Relations Board at Denver settled such matters and that he should take up the matter with his lawyer, Mr. Armsrong, at Rawlins. Moss then laid the letters to Neuman on the dispatcher's desk inside the window and left the company property. These letters on stationery of Teamsters Local Union No. 307 are dated August 20, 1961, in each case, and read as follows:

NEUMAN TRANSIT COMPANY,
Rawlins, Wyoming.

GENTLEMEN: This is to inform you that Teamsters Local Union No 307 has been selected by your *transport drivers* employed at Rawlins, Riverton, Rock Springs, Casper and Evanston, Wyoming as their official authorized bargaining agent for the purpose of representing them on all matters concerning their wages, hours of employment and working conditions, as employees of your Company.

This is also to inform you that we are in a position to prove that we represent a substantial majority of the aforementioned employees.

As the above mentioned employees bargaining agent, we request that you meet with us prior to 10 p m this day, August 20, 1961 at Cabin #16 of the Rawlins Motel, Rawlins, Wyoming for the purpose of discussing terms of an agreement covering the wages, hours of employment and working conditions of said employees.

Sincerely,

TEAMSTERS LOCAL UNION NO 307,
JACK ANDERSON, *Secretary-Treasurer*⁵
[Emphasis supplied]

⁴ A day or two later the signs read "Neuman Transit Company has refused to bargain as required by law Teamsters Local 307"

⁵ This letter is Respondent's Exhibit No 3 in evidence.

Mr. TED NEUMAN, *Owner,*
Neuman Transit Company,
Rawlins, Wyoming.

DEAR SIR: This date, August 20, 1961 we presented our situation at your office for the purpose of proving to you that we have been selected as the official authorized bargaining agent for the purpose of representing your *transport tank drivers* on all matters concerning their wages, hours of employment and working conditions as employees of your company.

Further we also attempted to request that employees,

Dick Sealock	Dick Frederick
Bob Stanley	Ted Saxton
Milo Jones	Dan Stansbury

so employed by your company be immediately reinstated, inasmuch as they were discharged because of exercising union activities which is guaranteed and protected by law.

Therefore, inasmuch as we were unable to gain an audience with you we request that you meet with us prior to 12:00 P.M. this day, *August 20, 1961*, at cabin # 16 of the Rawlins Motel, Rawlins, Wyoming.

In the event that we do not hear from you prior to the deadline outlined herein, please be advised that we will take whatever legal or economic action that we deem appropriate or necessary to protect the right of our members and this local union.

Sincerely,

TEAMSTERS LOCAL UNION No. 307,
 JACK ANDERSON, *Secretary-Treasurer.*⁶
 [Emphasis supplied.]

On August 21, after he had checked the number of employees working and those picketing, and after conferring with Darkey, one of this counsel herein, Neuman wrote the following letter to the Union.

Mr. JACK ANDERSON, *Secretary-Treasurer,*
Teamsters Local Union No. 307,
235 North Wolcott,
Casper, Wyoming.

DEAR MR. ANDERSON: In reply to your letter dated August 20, 1961, delivered to my office August 21, 1961, requesting us to recognize the Union as bargaining representative for our transport and tank drivers in Rawlins, Riverton, Rock Springs, Casper and Evanston, be advised that we do not wish to comply with your request to recognize you as the bargaining agent, *because we doubt that your Union does in fact represent a majority of our employees in the appropriate bargaining unit.*

It is suggested that a *proper legal procedure* is available to dispose of your claims, and that this matter be determined by means of the *election procedure under the supervision of the National Labor Relations Board.*

Very truly yours,

NEUMAN TRANSIT CO., INC.,
 H. T. NEUMAN, *President.*⁷

On August 22, the Union filed the charge which is the basis of the present complaint. Also on this day, the Company filed an RM petition with the Regional Office of the Board (Twenty-seventh Region), requesting the Board to investigate the question concerning representation which had arisen by virtue of the Teamsters claim that it represented a majority of the employees of the Company in an appropriate unit, the procedure outlined in Section 9(a) of the Act.

On August 23, the Company received notice from the Regional Director (Twenty-seventh Region) that the Union's charge had been filed with the Board. Also on that date the Company sent hte following letter to Stansbury, Frederick, Jones, and Saxton The letters to these men were identical and read as follows:

DEAR MR. FREDERICK: Today we received a copy of an unfair labor charge alleging that you were discharged for the purpose of discouraging membership in the Teamster's Union.

As you know, this was not, and is not true You were laid off temporarily only, because of lack of work.

⁶ This letter is Respondent's Exhibit No 2 in evidence

⁷ This letter is Respondent's Exhibit No 6 in evidence

Our situation is now such that work is available for you. You are hereby offered immediate employment. If you desire to return to work, please contact the undersigned at once.

Yours very truly,

NEUMAN TRANSIT CO., INC.,
H. T. NEUMAN, *President*.⁸
[Emphasis supplied.]

On August 30, 1961, Mr. Lowe, counsel for the Union, addressed the following letter to Mr. Armstrong, counsel for the Company:

J. R. ARMSTRONG, *Esquire*,
Attorney at Law,
Ferguson Building,
Rawlins, Wyoming.

DEAR REUEL: In line with your request, here is the proposal I discussed with you in my office Monday.

Subject to our agreement on the following preliminaries, it is my understanding the Teamsters Union would be disposed to withdraw its unfair labor charges with the NLRB and concur in the proposed NLRB conducted elections to resolve the question of recognition of the within as bargaining agent for employees of the Neuman Transit Company. The preliminary conditions, I believe, are as follows:

1. Reinstatement of all laid-off employees, including those fired.
2. Agreement on the employees eligible to vote.
3. A guarantee of no reprisals.

It is, therefore, recommended that we get together and sit down to resolve these points so as to reach some reasonable preliminary solution and thereby permit just and satisfactory solution to the present situation.

Yours very truly,

(S) Robert S. Lowe,
ROBERT S. LOWE.

It is undisputed that Armstrong phoned Lowe on September 1 on receipt of the letter and told Lowe that the Company agreed to a meeting for 4 p.m. on September 5. It is also undisputed that Armstrong told Lowe that he did not think the meeting would be successful if the Teamsters were adamant in regard to the reinstatement of Sealock and Stanley.

On September 5, 1961, representatives of the parties met at the office of Armstrong, company counsel, at Rawlins. Representing the Company were Neuman, Armstrong, and Darkey, the latter also of counsel for the Company. Representatives of the Union were Lowe, its counsel, and a group of union officials. Darkey stated that the Company would discuss the situation, but it believed that the question of Sealock's and Stanley's discharges should be decided by the Board in a proper proceeding. He said the Company would not reinstate these men. The Union then asked for time to discuss the situation in a caucus of union representatives. After the caucus, the union representatives stated that Sealock and Stanley had to be reinstated immediately. The meeting ended on this note.

The issue of refusal to bargain which is vigorously contested by the parties will be discussed hereinafter, as will an issue arising from the admission in evidence of certain testimony relative to the conduct of the Respondent occurring outside the limitation period of Section 10(b) of the Act. As to this latter issue there is pending a motion by the Company to strike the testimony from the record.

D. *The contested issues*

1. The discharge of Stanley; of Sealock

It is undisputed that in operations out of Rawlins and the other terminals, the drivers worked odd hours, because shipping schedules, lengths of hauls, and hours of delivery of freight, all varied, and were subject to normal hazards of the road, such as weather, traffic conditions, mechanical failures, etc. In consequence, drivers schedules for a run were required to keep themselves reasonably available for orders, and the Company tried to give the drivers reasonable advance notice of their runs.

As noted previously, following the meeting of Sealock and union officials at the Venice Cafe, Stanley and Sealock were engaged in bringing employees of the Com-

⁸ General Counsel's Exhibits Nos. 3, 5, 16, and 27

pany to the Union's open house at its room in the Rawlins Motel. They finished this work around 2:30 or 3 a.m. on August 19. When Stanley returned home at that hour, his wife informed him that Don Rogers, the dispatcher at the Rawlins terminal, had been trying to locate Stanley all through the evening and night. This was serious news, for it is undisputed that at the close of business on August 18, Don Rogers, the dispatcher, had left a note for Stanley, which Stanley received, reading as follows: "August 18. Bob: I haven't heard anything as of yet. However I am putting this bill in your box just in case the order comes in. If I hear, I will call you at home and go ahead and load this for you; otherwise be down at 8 a.m. Don."⁹ It is not disputed that both the dispatcher and Stanley understood this note to refer to a possible trip which Stanley was assigned to make if the order for the haul was confirmed for that night.

Nor is there any question concerning the efforts of Rogers to locate Stanley that evening and morning. Stanley testified to the substance of what his wife told him, and his wife gave direct testimony as to what Rogers said to her. Stanley's wife testified that Rogers made *four* phone calls looking for Stanley in the course of the evening of August 18 and the early hours of August 19. She said the first call came from Rogers to her at her place of employment about 10 p.m. Rogers asked her if she knew where her husband was. She replied that he was at home. Rogers said that he had called their home and her sister had informed him that Stanley was not there. The second call came at 11 p.m. when Mrs. Stanley was home. Rogers again asked if she had heard from Stanley and she told him that she had not. That ended the conversation. About midnight Rogers called again. On this occasion Rogers told her that he had orders for her husband, that he was supposed to take a haul out early on the following morning, and Mrs. Stanley agreed to relay that information to her husband. The fourth and final call came approximately an hour later about 1 a.m. on August 19. On this occasion Rogers told her to tell her husband that he was canceled off the trip because he must be "out on the town drinking" and since he wasn't available at home or any place else, that Rogers had been forced to make other arrangements for the haul. Mrs. Stanley told Rogers that she would relay this information to her husband, then she went out looking for her husband. She went to Sealock's home and learned from Mrs. Sealock what the two husbands were doing. When her husband returned about 2:30 a.m. she told him of this series of phone calls from Rogers.

It is undisputed that although the note left in Stanley's box concerning the run he was to make on the 19th concluded with the words "otherwise be down at 8 a.m.," that Stanley did *not* report for work at 8 a.m. or in any other way communicate with Rogers or any official of the Company in the course of the day on August 19.

Sealock's difficulty with the Company was somewhat similar but somewhat different from the experience of Stanley. Don Rogers, the dispatcher, testified that at 5 a.m. on August 19 he received an order for a load of gas from a customer in the western part of the State who said that he was in dire need of the supplies. Rogers testified that at 5 a.m. he called Sealock and told him that he had a rush order for La Grande Johnson's job in the Mountain View area and that he would send the unit down to be loaded for Sealock, which would give Sealock time to get something to eat and be ready to go. According to Rogers, Sealock replied, "All right, fine." Rogers then issued the necessary orders to have the truck loaded. It was loaded and returned to the terminal at approximately 5:45 a.m. However, Sealock did not show up to take the run. About 7:30 a.m. Sealock phoned Rogers and asked Rogers, "If the truck was ready." Rogers told Sealock that the truck had been ready and "was all ready gone an hour." Rogers readily admitted that at the time of Sealock's call the truck had not gone, but explained that he was annoyed with Sealock because Sealock hadn't shown up promptly to take the run and Rogers had been required to obtain and assign another driver to the unit. The other driver took the load to Mountain View.

Other reports both incidents of failure to report for work to Neuman.

H. T. (Ted) Neuman, the president of the Company, was called as the first witness in this proceeding by the General Counsel and examined by leading questions under Rule 43(b) of the U.S. District Court Rules. When Neuman was asked why Sealock was fired he said that he was fired because he was "late for reporting for work." Neuman said that Sealock was supposed to report at 6 a.m. for the Johnson haul and that he had not reported. On the evening of the 19th, Neuman called Sealock and asked him why he didn't report for work. Sealock gave as his excuse "that he had heard from another source that the truck had gone, so he figured there was no use coming down." Neuman told Sealock to report on the morning

⁹ Transcript, page 476.

of the 20th, when Neuman would hear his story and the dispatcher's version and make a decision as to whether or not he would fire Sealock.

Neuman testified that on the morning of the 20th, Sealock came to the office. He heard the dispatcher's report and Sealock's explanation and then he told Sealock he was fired for "failure to show up for work."

Neuman also testified that he discharged Stanley, but this occurred on August 19, in the evening. Neuman said that when he phoned Sealock on this evening, Sealock told him Stanley was with Sealock.

Neuman testified that he fired Stanley forthwith over the phone because Stanley had been habitually late for runs, being late 14 times in the previous 6-month period. When queried about this in his turn on the witness stand, Stanley said that he had not been late 14 times; he estimated the number to be 6 or 7 times. The last instance of tardiness had been about 3 weeks before his discharge and on that occasion, when Neuman asked an explanation, he had no excuse. On that occasion, Neuman warned him that repetition of the offense would bring about his discharge. Stanley admitted also that on a prior occasion he had absented himself from work for a period of 3 days without notice to the Company.

Sealock testified he had been late on only one prior occasion. Neuman in his testimony said that Sealock was not late frequently, and for that reason he gave Sealock an opportunity to explain his failure to report. However, after Neuman heard the report of Rogers, and Sealock's excuse, he decided to discharge Sealock.

Employee Ray Langwell testified that he happened to be in the drivers' room at the Company as the Sealock-Neuman conversation ended. According to Langwell, after Sealock and Stanley left the room, Neuman made the statement, "that he had just fired two men who had joined the Union"¹⁰ However, Langwell's recollection as to all circumstances surrounding this lone statement was extremely hazy. He said he remembered the gist of Neuman's statement but not the exact words that Neuman used. Also, he believed, but was not positive, that Dispatcher Rogers, Harold Boyer, and Dean Mills were present at the time of Neuman's statement. Langwell did not remember how he happened to be in the drivers' room at that time, nor could he say where he was standing in the room in relation to Neuman, when he heard Neuman's statement. Nor could he say what approximate time in the morning this statement was made. He agreed that he was in the room only long enough to hear this statement.

Langwell also testified that in an affidavit which he gave to an agent of the Board, he had said that the form of application for employment which he had signed contained a question requiring him to disclose his union affiliation, if any. On the witness stand, he admitted that he was mistaken on this point, that he had seen his application for employment and it did not contain such a question.

2. The layoffs of Frederick, Stansbury, Saxton, and Jones

Frederick: Neuman, president of the Company, testified that he laid off employee Frederick on August 20 because of lack of work. Frederick and another driver, Nation, by name, were located at Rock Springs. Only one truck was based at that place, and it was Frederick's job to relieve Nation, who was senior to him with the Company, and to alternate with Nation. Neuman and Frederick both testified that on August 17 and 18, Frederick came to the Rawlins terminal and complained to Neuman that his check for the *previous* pay period was too small. Neuman explained that as the hauling from Rock Springs tapered off because of seasonal factors, there were not enough runs at Rock Springs to keep two drivers fully employed. Frederick said that his last check showed that fact. Neuman explained that the continuance of full-time employment for Frederick depended on the Company obtaining more work in the Rock Springs area. When no new work materialized, Neuman phoned Frederick on August 20 and told him he was laid off temporarily for lack of work. Frederick asked if he could have such occasional runs as might turn up in the Rock Springs area. Neuman told him he would be glad to give him this temporary work, as and when a second driver was needed.

Frederick was called as a witness by the General Counsel. From his testimony it is clear that some few hours *after* talking to Neuman about his prospective layoff, Frederick joined the Union. Frederick testified that on the evening of August 18 he was driven to the Rawlins Motel by Saxton, and there met the union representatives and employees Sealock and Everett. He signed an application for membership in the Union about 9 that evening.

¹⁰ Transcript, page 444

According to Frederick, he first talked to Neuman about the smallness of his check on either Thursday or Friday, August 17 or 18. Neuman explained the shortage of work and agreed to give Frederick such extra runs as might arise. On the next night, Frederick talked to Neuman by phone, and Neuman told him two men had been laid off (presumably Sealock and Stanley), and asked Frederick if he could move to Rawlins from Rock Springs, as Neuman thought he could not use Frederick at Rawlins. Neuman told Frederick that another driver, Tolle, would pick Frederick up about 3 p.m., the next day, Sunday. About the time he expected to be picked up, Dispatcher Rogers at Rawlins phoned Frederick and said he was laid off.

At approximately 12:50 a.m. on Monday, approximately 1 hour after picketing began, Neuman called Frederick and said he had some new work he didn't know about earlier, and asked him if he still wanted to go back to work. Frederick asked him if this had anything to do with the Union and Neuman said, "No." Frederick told Neuman he would think about it, and let Neuman know in the morning. At that time, Frederick did not know that the Union had decided to picket and that picketing was scheduled to begin at approximately 2 a.m. At approximately 9 a.m., the next morning, Frederick phoned Union Representative Moss at Rawlins and learned that a picket line had been placed at the company property. Frederick then called Neuman and told him that he understood there was a picket line at the Rawlins terminal, and that as long as there was a picket line he didn't want to cross it. Neuman offered to transfer him to the Riverton or Evanston terminal, where he wouldn't have to cross a picket line. Frederick told him that as long as there was union trouble he didn't want to be involved.

In the course of his examination, Frederick admitted that in his first talk with Neuman about the smallness of his previous paycheck, Neuman explained that the Company had completed two large contracts for road oil, and that was the reason for a reduction in drivers. Frederick also admitted that in the year 1960, he had worked until December, when the work "slacked off like it did this last year," and he was laid off. He testified, "It's slow every year, I understand."¹¹

Saxton: This driver was employed at the Rawlins terminal. Neuman testified that on August 19 he had an interview with Saxton and told him that the Company had completed two large road-oil contracts and that he might have to lay Saxton off. Neuman also explained to Saxton that the Company expected to receive new contracts with Texaco for the shipment of Texaco products from that Company's refinery in Casper to Salt Lake City, and that he might have to transfer Saxton to Evanston. Saxton said he would like to consult with his wife about such a transfer. On the next morning, August 20, Saxton reported to Neuman that he would like the transfer. Neuman told him to go home and pack a suitcase and be ready to go. Saxton returned in about an hour. However, in the meantime, Neuman had called McLean, the Evanston terminal manager, and after a discussion, it was decided by Neuman that there would not be enough work at Evanston for two additional drivers, so Neuman told Saxton he was laid off temporarily. The Company did transfer driver Mills from Rawlins to Evanston. Mills was also a member of the Union, and the son of Don Mills, the Company's terminal manager at Jeffrey City.

In his testimony, Saxton substantially confirmed the testimony of Neuman. He said that for several months he had been engaged in hauling road oil and that these contracts were completed in the week of his layoff. He and his wife agreed to the transfer to Evanston because the job at that terminal seemed steady. When Neuman told Saxton there would not be enough work there for two drivers and that Mills would be transferred and Saxton laid off, Saxton asked Neuman why seniority did not prevail as he had been with the Company longer than Mills. Neuman said the Company did not abide by seniority, the best driver got the job. When Saxton was asked if Neuman ever criticized his work, he replied that Neuman had criticized his performance of work the previous winter.

Saxton said that he signed his union application at the Rawlins Motel at an hour "close to midnight" on August 18, and that he engaged in the work of bringing other drivers to the Rawlins Motel.

Jones: This employee was stationed at the Rawlins terminal. Neuman testified that he temporarily laid off Jones on the morning of August 20, in the course of a personal interview in Neuman's office. Neuman explained to Jones that they had just completed the road-oil jobs at Evanston, and that his truck was due for maintenance. Although Jones had written up a report on the operation of his truck

¹¹ Testimony of Frederick, transcript page 134.

nearly every day for the past 4 weeks, the Company had not wanted to lay up his truck for repairs until the road-oil jobs were completed. Neuman told Jones that the truck repairs would take only 2 or 3 days, and that the Company hoped to get a haul from Riverton, Wyoming, to Grants, New Mexico. Neuman asked Jones if he would be interested in transferring to Riverton if and when this haul would happen and after his truck came out of the shop. Jones said he'd like to consult with his wife on the move. A little later in the morning, Jones returned to Neuman's office and reported that he would be happy to make the move. Neuman said, "Fine. Your truck is in the shop for three days. If and when the haul is consummated, we will move you to Riverton, and you will be off until we hear from that, or your truck gets going again."

In his turn on the witness stand, Jones testified that Neuman laid him off temporarily for a period of 2 weeks due to lack of work and needed repairs to his truck. Jones said that he had reported the condition of his truck to Neuman personally and by written memo on several occasions in previous weeks. He said that on August 19 he talked to Neuman who said he was considering transferring Jones to Riverton, but made "no definite statement on when he (Neuman) was going to transfer me." This discussion ended with Jones going home to consult his wife on the transfer. On the following morning he reported to Neuman that his wife was agreeable to his transfer. Jones said he did not recall exactly what was then said by Neuman or himself, but Neuman said, "He wasn't sure whether I was going to Riverton or not."

Jones' application for membership in the Union is dated August 19. He went on strike and, while on picket duty on August 20, saw driver Dallas Isabell drive his truck through the picket line. Isabell stopped the truck to allow Jones to remove some personal belongings from the truck.

Stansbury: This employee was based at Rawlins, but during the 3-week period prior to his layoff he had been temporarily transferred to Riverton. He returned to Rawlins on August 18 on orders of the Riverton terminal manager.

Neuman testified that he laid off Stansbury on August 20 because of lack of work. Stansbury had always been considered a seasoned worker. During the winter of 1960-61, Stansbury had been kept busy running a pickup truck between Rawlins and Denver. Neuman laid off Stansbury in a personal interview in his office. Neuman told him that he had tried to keep him busy by transferring him temporarily to Riverton, but that now the road-oil jobs were completed and they were short of work. Neuman said he hoped to get a contract for a large haul of sulfuric acid from the Riverton area to Grants, New Mexico, and if the Company received the contract, he might transfer Stansbury to Casper to work out of that terminal with the Company's driver-supervisor. Neuman said that he "thought," but was not sure, that the date on which he talked to Stansbury about a transfer was August 19. On that date, Neuman said he was not sure that they needed another man at Casper.

Stansbury testified that he worked for the Company the first time in June 1959. He quit the Company on December 3, 1959, because he was not making enough money. He returned to the Company in June 1960 and had continued working until his layoff.

Stansbury places the time of his layoff as 9 a.m. on August 19. Stansbury also said that he signed his union application card just after midnight on August 19. According to Stansbury, on August 18 Neuman discussed with him the possibility of a transfer from Rawlins to Casper. Stansbury discussed this with his wife and on the morning of August 19, told Neuman he was willing to go to Casper. Neuman told Stansbury to go home and pack his bag, which Stansbury did. However, when he returned to the terminal, Neuman said that some unforeseen things had come up and that because of these, there was not enough work to keep Stansbury busy, so he was laid off until further notice. Neuman told Stansbury in the course of this conversation that the Company had lost a couple of bids, and, because of that, there was a shortage of work. Neuman did not explain what the bids were or go into details.

Neuman testified that letters were sent to Jones, Frederick, Saxton, and Stansbury on August 23, 1961, offering them employment at the Company. Neuman explained that on August 22, 1961, Bill Joyce, general manager for Western Nuclear, Inc., called Neuman to alert Neuman to a new large uranium haul from Shirley Basin to Jeffrey City, beginning on approximately August 28, 1961. The Company began hiring employees immediately after the phone call from Joyce. It was stipulated by counsel for the parties that the following named employees were hired by the Company as drivers during the period from August 18 to September 1, 1961 and assigned to the Rawlins terminal on the date given opposite each name:

Daugherty and Pittman, August 22; Goodman and Ryan, August 23; Gunnett and Watson, August 26; Phares, August 27; and Mestas and Raey, August 31.

3. Concluding findings on the discharge of Sealock and Stanley, and the layoffs of Frederick, Stansbury, Saxton, and Jones

The entire testimony of the Respondent is comprised of the testimony of three witnesses, Neuman, president of the Company, Don Rogers, dispatcher for the Company, and Christie Mayash, accountant for the Company. Neuman is a man approaching middle age who testified in a serious and thoughtful manner. As a witness he testified fairly, frankly, and candidly. He was the first witness called by the General Counsel in this proceeding, and Neuman was examined as an adverse witness pursuant to the provisions of Section 43(b) of the U.S. District Court Rules. Under 43(b), the General Counsel adduced Neuman's version of the discharges and layoffs by means of leading questions. At one point, Neuman referred to a paper which was on the table near the witness stand and the General Counsel asked the witness to what he was referring. Neuman answered that he was referring to the statement which he had previously made to Mr. Maslanska, an agent of the Board. From that I infer that the General Counsel had some advance knowledge as to the tenor of Neuman's testimony. After Neuman's defenses on these contested issues were thus made a matter of record, the General Counsel presented his own witnesses whose testimony was contrary or at variance with that of Neuman. Later in this proceeding, Neuman was recalled by counsel for the Company and again he was cross-examined by the General Counsel. Through all of these examinations, Neuman was at ease and testified like a witness who was sure of his facts. After an examination of the entire record in the case, I can find no point upon which Neuman should not be given full credence. His testimony bore one notable feature. He testified like a man who had nothing to fear and nothing to hide. All his conduct as a party to this proceeding confirmed that aspect of his testimony. The General Counsel had subpoenaed the production of certain documents and records of the Company. These were produced upon request, and Neuman instructed his accountant, Mayash, to aid and assist counsel for the General Counsel, as well as counsel for the Company, in the examination, compilation, and understanding of the voluminous records which were produced. When the General Counsel wanted a spot check of original documents, arrangements were made so that the General Counsel might make the check. Neuman's bearing and demeanor as a witness and his straightforward answers coupled with his most cooperative attitude toward the General Counsel impressed the Trial Examiner most favorably. I find that Neuman was a most convincing witness, and I accept his entire testimony as it relates to each of the issues in the case.

Rogers, the dispatcher, testified to certain facts in the case. Rogers, too, is a man approaching middle age. He testified with every appearance of frankness and candor on both direct and cross-examination. Rogers comported himself as a dignified, candid, fair witness. He appeared to be without rancor or malice toward any of the employees.

Christie Mayash, accountant for the Company, appeared briefly on the witness stand to explain certain records. However, his efforts in assembling factual data from the records of the Company in cooperation with all counsel was a major contribution to the expeditious handling of this proceeding. The factual data compiled by Mayash, under the supervision and direction of counsel, resulted in a series of *joint exhibits*, which were introduced pursuant to stipulation of counsel for the parties. The testimony which he gave on his brief appearance on the witness stand was likewise unchallenged by counsel for any party herein.

With these findings made, we may turn to a discussion of the testimony, and I will make such findings upon the credibility of witnesses as are required, in the course of that discussion.

It is the contention of the General Counsel that Neuman in all the various events which comprise this proceeding was animated by "an anti-union animus" which motivated the discharges and layoffs. It was upon the General Counsel's plea that the incident at the Ferris Motel would establish this long "history" of "anti-union animus," that the testimony concerning the Ferris Motel was accepted. I must say that this contention of the General Counsel appears to be without any foundation, when the evidence is considered in its totality.

Stanley and Sealock: It is undisputed that the union representatives came to the Rawlins Motel around dinnertime on August 18. They conferred with Sealock and, around 10 o'clock, Stanley joined them. Thereafter the two employees were engaged in bringing other employees to the motel to sign up with the Union. This was necessarily a nocturnal operation because the drivers came in from their runs

at various hours near the close of the day or in the evening. All the union organizational activities were conducted at the motel room, or if any travel was involved it was between the homes of the employees and the Rawlins Motel. Every employee who testified that he signed an application for the Union said that he signed it at the Rawlins Motel. Consequently, it is clear that as far as the Company was concerned this was a secret and clandestine activity. There is not a scintilla of credible evidence in the entire case that either Neuman or Rogers knew of any union organizational campaign prior to 10 p.m., Sunday, August 20, when Union Representatives Moss and Shenefelt went to Neuman's home and told him the Union represented a majority of his employees.

It is undisputed that both Sealock and Stanley were engaged in union organizing activities until approximately 2:30 or 3 a.m. on August 20. It is admitted that at approximately the close of the business on August 19, Stanley had been notified by the dispatcher, Rogers, to stand by for an early morning trip and that Rogers called him four times in the course of that evening to give him orders concerning the trip. At 1 o'clock in the morning, Rogers canceled Stanley off the trip. It is undisputed that although Stanley's orders were to report at 8 o'clock in the morning if he was not given contrary orders during the night, that Stanley failed to report or phone the Company during the whole course of the day on August 20 and that at 6 o'clock Neuman fired him.

Stanley as a witness testified with the air of a mischievous prankster. He appeared to be faintly amused that his discharge was a matter of concern to counsel and others in the proceedings. He blithely denied Neuman's charge that he had been late for 14 runs in prior months, but just as blithely, on cross-examination, estimated that he had been late 6 or 7 times. And with a smile he admitted that he had been absent for 3 days on a prior occasion without notifying the Company. He impressed the Trial Examiner as an irresponsible witness.

Sealock, in his testimony, afforded a different version of his discharge than that afforded by Dispatcher Rogers. In the light of all the undisputed facts, I must reject the testimony of Sealock and accept that of Rogers. In the light of all the evidence, one need not be clairvoyant to understand the conduct of these two employees, which brought about their discharge. Both Sealock and Stanley had been employed in organizational activities at the Union's open house until 3 a.m. on August 20. I'm quite sure that Sealock did not welcome a rush order call 2 hours later, or Stanley anticipate with pleasure a run at 8 a.m.

In the light of all the evidence, I find that both Sealock and Stanley were discharged for cause—failure to report for work. On this issue the testimony of one other witness must be discussed.

Employee Langwell testified that he happened to be in the Neuman terminal a few moments after Sealock and Stanley were discharged and heard Neuman say that he had just fired two men "who had joined the Union." However, upon further examination, Langwell could not explain what he was doing in the office, what time of day it was that the statement was made, or any other of the surrounding circumstances. He finally said that he was there just long enough to hear this statement. In the course of his examination, Langwell was proven to be mistaken in regard to his employment application. Also as will hereafter appear, Langwell tried to be on both sides of this labor dispute. He was an adherent of the Union, yet at approximately midnight, Sunday night, he warned Neuman by means of a telephone call that the terminal was to be picketed at 2 o'clock. Langwell as a witness testified quite boldly on direct examination but when questioned closely he immediately retreated to a point where his memory was insufficient.

Langwell also testified as to what Neuman said at the Ferris Hotel meeting. He testified that at that meeting, Neuman said that there would be no union and that the Company would shut its doors and close its business down before it had a union. No other employee testified to any such statements by Neuman. In my judgment Langwell's partisanship and eagerness to assist the Union have led him into untruthful testimony. Upon the basis of his demeanor and bearing, and the character of his testimony, I reject his entire testimony.

Frederick, Stansbury, Saxton, and Jones: It is undisputed that seasonal factors in regard to the hauling of road-oil affect the Company's operations. The undisputed facts and the testimony of Neuman establish that at approximately the time of the union organizational activities, certain layoffs of employees were contemplated, discussed, and finally effected. The General Counsel contends that the layoffs were animated by "anti-union animus." But the undisputed facts and the testimony of Neuman illustrate that the economic factors which caused the layoffs were already at work some weeks before the advent of the Union's organizational campaign. Frederick admitted that he talked to Neuman about his paycheck for the *previous* pay period on the day he joined the Union. At that time Neuman told him that

the Company did not need two drivers at Rock Springs. Later in the day, Frederick joined the Union. The undisputed facts lead to a conclusion that the men here in question were not laid off because they joined the Union, but that quite the reverse was true, that they joined the Union with some hope of attaining job security because they were aware that the diminishing volume of work would necessitate some layoffs. The General Counsel contends that Frederick was laid off because Neuman knew he was a union adherent. Yet, it is undisputed, that after Neuman received Langwell's telephone call warning Neuman that a picket line was to be established, that Neuman called Frederick and offered Frederick work. Such conduct on the part of Neuman is not consistent with the General Counsel's claim of union animus. In the course of his testimony, Frederick admitted that the work had slacked off like it had the year previous.

Saxton was laid off for lack of work and was not transferred to Evanston although driver Mills was transferred at the same time. In his testimony, Saxton substantially confirmed the testimony of Neuman by conceding that the road-oil jobs on which he had been employed had been finished.

Jones, in his turn, also confirmed the testimony of Neuman that his truck needed maintenance and that he had finished his work on the road-oil job. In the course of his testimony, Stansbury by inference also confirmed Neuman. He said that he worked for the Company in the first year beginning 1959 and that he quit the Company on December 3, 1959, because he was not making enough money. In the winter of 1960-61, the Company had been able to keep him busy running a pickup truck from Rawlins to Denver.

In this entire record, there is *not a scintilla of credible evidence* that Neuman had any knowledge of the union affiliations of the drivers involved or of the Union's organizational campaign, and the drivers themselves agree with Neuman's statement that the completion of the road-oil jobs necessitated some temporary layoffs.

On this issue, there is another significant feature. At no point in the course of the discharges of Sealock and Stanley, or the layoffs of Frederick, Stansbury, Saxton, and Jones, was there a spontaneous complaint or righteous protest from any of the men to any Neuman official that they were being discriminated against *because they had joined the Union*. The first mention in the transcript of testimony of any charge that these discharges or layoffs were discriminatory was made by Union Representative Moss who said that the picket line was established because Neuman "had been laying men off" and he did not say "because of their union activities." From the evidence, which is rather meager as to why the picket line was established, it is apparent that there was no protest from the men involved that their discharges or layoffs were discriminatory; that charge seems to have emanated from the union representatives only.

On the basis of Neuman's credited testimony, and all the undisputed evidence in the case, I find that the layoffs of Frederick, Stansbury, Saxton, and Jones were for cause, lack of work, and not because they had engaged in any union or concerted activities.

4. The alleged refusal to bargain; the good-faith doubt of the Company

Neuman testified that when the union representatives attempted to talk to him at his home at 10 p.m. on August 20, he told them that he would talk to them at 8 a.m. the next morning at his office. The union representatives then attempted to make delivery of their demand letters at the home of Dispatcher Rogers.

After his unsuccessful attempt to deliver the letters to Neuman or Rogers the union representatives returned to Rawlins Motel. According to Union Representative Moss, there was some discussion and he decided that the company would be picketed at 2 a.m. the next morning and he instructed Speyer, one of the union employees, to paint up the picket sign.

Moss testified that he decided to place pickets at the terminal "after some of the members were fired, discharged and several were laid off." And, that a second "reason was that we went to Mr. Neuman's house like gentlemen and tried to talk to him. He even refused to let us in his house."¹²

According to the testimony of Neuman, at approximately midnight, employee Ray Langwell phoned him, saying, "I have just come from a meeting at the Rawlins Motel, and there have been several of your drivers up there. The Teamsters are going to put a picket line on your property at 2 a.m." Neuman thanked Langwell and hung up the phone. He immediately called Dispatcher Rogers and asked the dispatcher to meet him at the Rawlins terminal. They went to the terminal and there canvassed the situation as to continuing the operations of the Company in

¹² Transcript, page 585

the event there was a picket line. At 2 a.m., the picket line appeared at the terminal. Neuman said that he went to the picket line to see which men were engaged in picketing since he wanted to be prepared for the failure of the pickets to report for work. For the remainder of the night, Neuman and Rogers considered ways and means of keeping the Company's operations moving. Neuman testified that he thought it was about 1:20 on this morning that he called Frederick at Rock Springs and told him that there was a job for him because of unforeseen circumstances. Neuman testified that at 8 a.m., the following morning, 35 drivers out of a total of 49 drivers employed by the Company reported for work; the only terminal picketed was at Rawlins. The terminals at Riverton, Casper, Evanston, Rock Springs, and Jeffrey City all reported that all drivers were on the job and that no picketing had occurred at those terminals.

Neuman said that he was busy with operational details until approximately 10 a.m. that morning. At that hour he opened the Union's letters demanding recognition of the Union as representative of a majority of his drivers. He testified that the first thing which caused him to doubt that the Union represented a majority of his employees was the terminology in the Union's letter dated August 20, in which it said it represented a majority of his "transport tanker drivers." He said that since the Company had only "general drivers" he suspected that only a portion of his drivers had been recruited into the Union. He testified that the second fact which made him doubt the majority status of the Union was the fact that 35 of the total force of 49 employees showed up for work at 8 a.m., and of the absentees, 4 of them, Frederick, Jones, Stansbury, and Saxton, had been laid off previously. So he estimated the total strength of the Union at approximately 10 active members and 4 in layoff status.

Later in the morning, Neuman consulted with Darkey, the representative of the Rocky Mountain Employers Council, and acquainted him with the facts of the situation. Darkey advised him that there was another reason for denying the Union immediate recognition and that was that in his opinion a legal question was involved concerning the appropriate unit of Neuman's employees.

With these various factors in mind, Neuman wrote his letter of August 21 to the Union, saying, "We doubt that your union does in fact represent a majority of our employees in the appropriate bargaining unit."

Neuman's discussion with Darkey also led to further action since he instructed Darkey to file an RM petition with the Regional Office of the Board at Denver. This petition was filed on August 22, 1961, the same date on which the Union's charge herein was filed.

When the *good faith* of Neuman's professed doubt of the Union's majority status is examined in the light of the facts existent at 8 a.m., August 21, we are forced to conclude that his doubt was founded on an arithmetical calculation which precluded any chance of error. Neuman, of course, did not know the secret affiliation of some employees in the Union. In his count, he took for granted that men on the picket line or absent from work without excuse were strikers, and that those at work were unaffiliated.

However, at the hearing undisputed evidence established that the Union suffered a serious number of defections, for various reasons prior to or at the time the picket line was established.

Employee Bennett testified that he signed his union application on August 20 and that he tried to retract his application for membership within a matter of 45 minutes after he signed it. He testified that he signed his application for membership in the Union *only* because the union organizers and adherents assured him that his friend, employee Isbell, had previously signed. A few minutes after signing, Bennett checked with Isbell who informed him that he had not signed with the Union and was against the Union. Bennett had been aided in obtaining employment with the Company by Isbell and he felt obligated to Isbell. He immediately went to the picket line at the terminal at approximately 2 a.m. and demanded of those in charge that his card be given to him. He was told that his card was not available. At 8 o'clock the next morning, Bennett crossed the picket line and continued to cross it thereafter. Upon the basis of Bennett's uncontradicted testimony which I credit, I find that the Union obtained his designation card by a fraudulent misrepresentation of a material fact, and that in no event can Bennett's authorization card be counted in favor of the Union.¹³

Employee McAllister testified that he joined the Union with the understanding that they were going to form a union and ask for an increase in wages. On the following morning when he discovered the picket line, he asked what the demands of the Union

¹³ See *NLRB v. H Rohlsten & Co.*, 266 F 2d 407 (CA. 1), cases collated and discussed

were. He then told the pickets that he thought a strike was a last resort weapon. The pickets said they were going to strike first and then talk. He told them that he wouldn't support any such idea and that he was going to cross the picket line. Thereafter he did so.

It is also clear from the testimony of employee Deyo that though he signed a union card, that he crossed the picket line from its very inception. In the course of his testimony, he said he signed the card because the rest of the men wanted him to. In Deyo's opinion the strike was unnecessary, so he crossed the picket line when it was first placed at the terminal, and he continued to cross it until the time of the hearing.

Employee Donald Mills testified that he signed an application for membership in the Union but that he did not "believe in striking for one thing" and that he crossed the picket line as soon as it was placed.

The testimony of these men, which illustrates their conduct in relation to the picket line, is of importance here, not because their crossing of the picket line cancelled their authorization given to the Union, but because of its important bearing upon Neuman's judgment that, in fact, the Union did *not* represent a majority of his drivers. As far as Neuman was concerned, when these men crossed the picket line and appeared for work, he drew the reasonable inference that they were not adherents of the Union. When he took into consideration the fact that Sealock and Stanley who were on the picket line had been previously discharged for cause, and four men had been laid off for lack of work, he came to the conclusion, upon what appears to be very reasonable grounds, that the total union strength was far short of a majority.

From all available evidence I have reconstructed the disposition of the Neuman driver force as of 8 a.m. August 21. It shows the following situation:

Rawlins men at work who had not signed up with the Union	Cantu, Cozart, Dickson, Isbell, Lundbergh, K McBride, R McBride, Poole, R Wales.....	9
Men who had signed with the Union, but who crossed picket line	Bennett, Deyo, Mills, McAllister	4
Union adherents honoring picket line	Everett, Foote, Gonzales, Hanson, Hays, Langwell, O'Connell, Ross, Shurtz, Speyer, W Wales, Urban.....	12
	Jones, Saxton, Stanbury (Employees in status of laid off employees, counted for the union)	3
	Sealock, Stanley—not counted as employees because they had been discharged for cause, prior to the strike	
<i>Rawlins Terminal</i> —		
	On picket line, 12+3	15
	At work, 9+4	13
<i>Riverton</i> —All at work	Allen, Irons, Miller, Phillips, Taylor	5
<i>Casper</i> —At work	Lamar	1
<i>Evanston</i> —All at work	Calder, Crompton, Taylor, Tolle.....	4
<i>Rock Springs</i> —At work.		
	Nation	1
	Employee in status of laid-off employee, counted for Union, Frederick.....	1
<i>Jeffrey City</i> —All at work	Hornbeck, L Kelly, O Kelly, Lamb, Luton, Patton.....	6
TOTALS		

	Working	Picketing	Total
Rawlins.....	13	15	28
Riverton.....	5		5
Casper.....	1		1
Evanston.....	4		4
Rock Springs.....	1	1	2
	24	16	40
	6		6
	30	16	46

¹ No picket

If Neuman on the morning of August 21 saw the disposition of the work force as I see it, as reconstructed from the evidence, he had every reason to believe that the Union did not in fact have a majority in any unit, which the Board might deem appropriate. While there has been much argument in this case as to whether the

appropriate unit should be all drivers at Rawlins, Riverton, Casper, Evanston, and Rock Springs with Jeffrey City *excluded*, or whether the drivers at the last-named terminal should be included, for the purposes of our analysis that decision has no significance, because whether Jeffrey City is counted in, or counted out, the Union did not *appear* to Neuman to have a majority status in either unit.

If Jeffrey City was excluded the count was: at work, 24; on strike, 16; of a total of 40 drivers.

If Jeffrey City was included the count was: at work, 30; on strike, 16; of a total of 46 drivers.

From the above, it is clear and I find that Neuman's expression of a doubt as to the Union's lack of majority status was made in good faith and upon visual evidence and an arithmetical calculation which he could not disregard. In the circumstances of this morning, if he had recognized the Union and signed a contract with it, he and the Union would have run the risk of being prosecuted for a different unfair labor practice, knowingly executing a contract foisting a minority union on all Neuman's employees in derogation of the employees' rights under Section 7 of the Act.¹⁴ When Neuman filed his RM petition with the Regional Office, under the circumstances here present, he fulfilled his duty as required by the Act. At that point he was entitled to have his doubt as to the Union's actual status resolved by the Board's elective processes, to enable him to determine what course of action the Act required him to take.¹⁵

Upon a consideration of all the credible evidence, I find that the Company has not refused to bargain with the Union in violation of Section 8(a)(5) of the Act, for two reasons: (1) Neuman had a good-faith doubt as to the majority status of the Union in an appropriate unit of his drivers, and (2) the Union did not in fact have majority status at any place, except at Rawlins terminal. That terminal is admittedly integrated with those at Riverton, Evanston, Casper, and Rock Springs, and integrated, in my judgment, with Jeffrey City.¹⁶

5. Interference, restraint, and coercion

The General Counsel's complaint alleges that Neuman and Supervisors Stewart, Boyer, and McLean interrogated certain employees and threatened them with loss of employment or other economic reprisal. The complaint also alleges that the Company used an employment application which was unlawful in that it requested the prospective employee to disclose his union affiliation.

The allegation as to the illegal employment application was disproved in the course of the hearing. Employees Sealock and Langwell both testified that they "thought" that their employment application contained such a question, but that each had seen his application and each admitted that it did not contain such a question. That is the only evidence in this record on that point.

The principal statements alleged by the General Counsel to be coercive are contained in the testimony of employee Everett. Everett testified that about 3:30 a.m. on August 21 Neuman phoned him at his home. Neuman told Everett that the Union had put up a picket line at the terminal and Neuman then asked Everett how he felt about it. Everett replied that he wouldn't cross a picket line, then Neuman said, "You stand on your convictions and I'll stand on mine." The General Counsel then asked Everett if Neuman "had said anything else?" Everett replied that Neuman "said again that he wouldn't go union."

Everett also testified that about August 29 he was in Riverton, Wyoming, and he met Boyer, the Company's dispatcher at the terminal. Everett said that on this morning he and Boyer went to a neighboring coffee shop. They sat there and discussed the picket line and in the course of the conversation Boyer said that Neuman had told him "that he would go for broke before he joined the union."

Employee Robert Hays testified that at approximately 8 p.m. on August 20 Rogers, the dispatcher at the Rawlins terminal, asked him if he had been approached by the Union. Hays answered that he had not, but some men had been up at his house

¹⁴ See *International Ladies' Garment Workers' Union, AFL-CIO (Bernhard-Altman Texas Corp.) v. NLRB.*, 366 U.S. 731.

¹⁵ *NLRB v. Hannaford Bros Co (T R Savage Division)*, 261 F.2d 638 (C.A. 1) · *Celanese Corporation of America*, 95 NLRB 664; *Joy Silk Mills, Inc v. NLRB.* 185 F.2d 732 (C.A.D.C.), cert. denied 341 U.S. 914.

¹⁶ In this computation I have credited the Union with 19 union applications in evidence Sealock and Stanley may not be so credited because they were discharged for cause prior to the demand and Bennett may not be so credited because his application was obtained by fraud.

while he was away. Rogers then told Hays that if they came back to tell them to leave him alone, that he didn't want to be bothered. Then Rogers asked Hays what he thought about the Union and Hays replied that he didn't care for the Union, that they had never done much for him. Rogers then said that "the guys was planning on going union" and he would like for Hays to stay with him, but he wasn't trying to tell Hays what to do, that he would have to make up his own decision on the matter. Again, the General Counsel asked, "What else did he say?" And the witness replied, "Well, I am trying to think here. Oh, he said they wouldn't go union no matter what, that if it came to a vote even if they voted union they wouldn't go, if they had to, they would just lock the doors and sell out, they would rather than go union."¹⁷

Employee Gerald Urban testified that on the morning of August 20 Dispatcher Rogers asked him if a couple of the boys had been down to see him. He replied in the affirmative. Rogers then asked Urban if he had signed anything and Urban said, "Yes." Then Rogers, in reference to a trip that Urban was about to make, said, "Well, I guess we're going to have to send you, anyway." Rogers then dispatched Urban on a trip to Casper. When Urban returned on the morning of August 21, the picket line was up at the Rawlins terminal. When he took his truck into the terminal, Urban saw Neuman. Neuman asked Urban whether he was going to stay and work, or whether he was going out there and sit with the boys. Urban replied that he had a withdrawal card from the Teamsters before, and that he had signed up in this campaign, so he guessed he would have to go out there with the boys. Neuman replied, "Okay," and added that when this was all over Urban could come back and get his job back.¹⁸

In his testimony, Dispatcher Rogers denied that he had talked about the Union with Urban. He testified that he could not have had such a conversation because he had no knowledge of any union activities until Neuman called him around midnight, August 20.

Upon a consideration of all the evidence, including the demeanor and bearing of the witnesses, I credit the testimony of Rogers.

Furthermore, in view of the fact that the strike was in progress, with its accompanying picketing, at the time that Boyer said Neuman would not go Union, I understand that statement to mean that Neuman would not capitulate to the Union. Nowhere in these statements attributed to Neuman is there any element of threat of reprisal or force or promise of benefit which is required before a statement can be found to constitute a violation of Section 8(a)(1) of the Act.

There is no evidence in the record that Supervisors Stewart and McLean in any way interfered with, restrained, or coerced any employees. The General Counsel's allegation, as regards those supervisors, are dismissed for insufficient evidence.

6. The so-called background testimony; the Ferris Hotel incident

From the testimony of employees Sealock, Stanley, Langwell, Everett, and Gonzales, it is clear that sometime in the spring of 1960, a meeting of Neuman and his employees was held at the Ferris Hotel, Rawlins. Apparently, a petition circulated among the employees by employee Tom Deyo triggered this meeting. One further fact about this meeting is clearly established. The General Counsel conceded that the petition around which all the testimony revolved was lost or destroyed, and was not available as evidence. The General Counsel also conceded that the petition had nothing to do with the Union, which is a party to this proceeding.

Employee Sealock testified that a few days before the meeting at the Ferris Hotel he had a conversation with Neuman, in which Neuman said that a petition was being circulated among the men and asked Sealock how he felt about it. Sealock said he was fairly new with the Company and he would do what the other men did. Neuman then asked Sealock what his biggest beef was. Sealock said the men were hauling as much gas in 7,000 gallon tankers, as the men in the 8,000 gallon tankers, and he thought they should be paid the same. Neuman said he would look into that and correct it. According to Sealock, in this conversation Neuman then said that he would fire every man who signed the petition or signed an application for a union card. Later in the day, Neuman repeated this statement to a group of employees, but Sealock could not remember which employees were in this group.

Sealock testified that at the meeting at the Ferris Hotel, Neuman said that he had said some things he would have to retract. One of these was in reference to the petition, and his statement that he would fire the men who signed the petition; at

¹⁷ Transcript, page 573

¹⁸ Transcript, page 525.

the meeting Neuman said he would have to retract that because "it just wasn't legal."

Sealock said he had never read the petition and had not signed it, so he did not know what the petition was about.

Employee Everett, like Sealock, testified that he had never read the petition or signed it. He testified to the same effect, as Sealock, in regard to Neuman's statement at the meeting at the Ferris Hotel, that he would have to retract his statement about firing the men who had signed the petition. In the course of his testimony, Everett said that the petition was *not about a union* because he remembered that Tom Deyo, the author of the petition, spoke from the floor and said that the petition was not in regard to a union.

Employee Gonzales next testified that he had signed the petition, but could not recall when or where he signed it, or who presented it to him. He testified he "thought" it concerned a union. As to the meeting at the Ferris Hotel, Gonzales displayed an utterly confused memory, placing the date of the meeting in the winter of 1960, the spring of 1960, and the winter of 1961, which would be a date after this present dispute arose.

Employee Langwell also testified that he attended the meeting at the Ferris Hotel and, like others, he had not seen or signed the petition. Langwell testified that at the meeting, Neuman said "That there would be no union" and that the Company "would shut its doors and close its business down before it had a union." Langwell then testified that prior to this statement by Neuman, no one had raised the question of a union, and the petition had not raised the question of a union.

Employee Stanley testified that when he first went to work for Neuman in March 1960, Neuman interrogated him in regard to his union affiliation. Stanley said he had withdrawn from the Union, and Neuman said, "Good, we don't want a union in here."

Employee Tom Deyo, who apparently was the author of this petition, was called as a witness by the General Counsel. He had signed a membership application for the Union, but had crossed the picket line continuously since it had been set up. The General Counsel did *not* question Deyo about the petition or the meeting at the Ferris Hotel. In the course of Deyo's examination on another point, the General Counsel confronted Deyo with a previous statement Deyo had made to an agent of the General Counsel. The statement concluded with the assertion that Deyo had "never heard anyone from management say anything for or against the Union."

The Motion To Strike the So-Called Background Testimony

The above is a brief summary of the testimony on this subject. At each point at which the General Counsel proffered such testimony, Counsel for the Respondent objected upon the basis of relevancy and upon the ground that the Supreme Court's decision in the *Bryan* case (*supra*) barred the admission of such testimony. In considering this testimony in the light of the *Bryan* decision some remarks of the Court are pertinent to this case. The Court stated that the policy behind Section 10(b) of the Act was "to bar litigation over past events 'after records have been destroyed, witnesses have gone elsewhere, and recollections of the events in question have become dim and confused.'" That description certainly fits this testimony. Here the testimony pivots around a central document or record, a petition, which has been lost or destroyed, and no witness can testify as to what the petition contained. They disagree as to whether it pertained to a union or not, and the General Counsel concedes that it did not pertain to the Union, here a party. Nor does any witness say that *any* union was then involved in an effort to organize the Neuman employees.

At most, all we have is a statement by two highly partisan witnesses, Sealock and Langwell, that Neuman said he would fire any man who signed the petition, and that at the meeting at the Ferris Hotel Neuman said he would retract that statement because he had learned that such an action "just wasn't legal."

The General Counsel proposes that from this testimony I conclude that Neuman was activated *then* by an "anti-union animus" that carried over from 1960 to August 1961, and that this "anti-union animus" motivated Neuman's conduct as to the contested issues herein. That proposal I must reject for a variety of reasons.

The first reason is that the statement attributed to Neuman and his purported retraction of it, are divorced from the context of circumstances in which either the statement or the retraction was made. Here, we have only a *fragment* of the entire transaction.

Secondly, the transaction appears to be most ambiguous. If Neuman made the original statement, it might illustrate his anger about some feature of the petition, but surely his public retraction of the statement can only be construed as an

expressed determination to observe the law, despite his anger in the matter. And no man was discharged! I can attach no significance to this testimony.

Thirdly, this testimony was received only on the representation by the General Counsel that it would shed light on the issues herein. Now, what is the light? Surely, if the light is to illuminate that which lies in darkness, the light should be clearly discernible, and burn with such brightness that it removes shadows from the principal issues. But here the allegedly illuminating testimony has far less clarity than the contested issues which are surrounded by an illuminating mass of undisputed evidence. The Ferris Hotel incident adds more confusion than clarity to this record.

And lastly, this testimony has all the earmarks of something dragged from the shadowland of past, forgotten events, by an exhaustive examination of the memories of partisan witnesses in a desperate effort to make out a case, where none exists. I find this testimony to be of most dubious character, and I believe no prudent person would accept it and, upon it, base any decision of importance. The *Bryan* case is not dispositive of the motion of the Respondent, as I read the case, but I grant the Respondent's motion to strike this testimony on the ground that it is entirely irrelevant, and does not shed any light on the actions of the Respondent occurring within the 6-month period defined by Section 10(b) of the Act. The actions of the Respondent within that period, when viewed in the light of the undisputed evidence, is crystal clear.

CONCLUSION

For the reasons stated above, I find that the General Counsel has failed to prove by a preponderance of the credible evidence that the Respondent has committed any of the unfair labor practices alleged in the complaint. On the contrary I find that a substantial preponderance of the evidence establishes:

1. That Sealock and Stanley were discharged for cause, and that Frederick, Stansbury, Jones, and Saxton were laid off temporarily for lack of work and for no other reason.

2. That the Respondent had a good-faith doubt of the Union's majority status in the appropriate unit, and did not violate Section 8(a)(5) when it refused to recognize or bargain with the Union.

3. That none of the supervisors or officials of the Company violated Section 8(a)(1) of the Act.

Therefore it is recommended that the complaint herein be, and it hereby is dismissed in its entirety.

**American Optical Company and United Optical Workers Union,
Local 853. Case No. 13-CA-4420. September 18, 1962**

DECISION AND ORDER

On June 8, 1962, Trial Examiner Alba B. Martin issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had not engaged in and was not engaging in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety, as set forth in the attached Intermediate Report. Thereafter, the General Counsel and United Optical Workers Union, Local 853 filed exceptions to the Intermediate Report, and supporting briefs. The Respondent filed a brief in support of the Intermediate Report.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to a three-member panel [Chairman McCulloch and Members Rodgers and Fanning].