

WE WILL NOT interfere with the rights of our employees guaranteed them in the National Labor Relations Act by refusing to bargain with the above-named Union or in any related manner.

All our employees are free to become members of Sheet Metal Workers International Association, Local 213, AFL-CIO, or any other union, and they are also free not to become members of any union unless in the future we shall enter into a valid union-shop contract with a union represents our employees.

KIT MANUFACTURING COMPANY, INC.,
Employer.

Dated----- By-----
(Representative) (Title)

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

Employees may communicate directly with the Board's Regional Office, 327 Logan Building, Seattle 4, Washington, Telephone Number, Mutual 2-3300, Extension 553, if they have any question concerning this notice or compliance with its provisions.

Columbine Beverage Company and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 435. Case No. 27-CA-1084. September 28, 1962

DECISION AND ORDER

On March 28, 1962, Trial Examiner William E. Spencer issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Intermediate Report. He also found that the Respondent had not engaged in certain other unfair labor practices alleged in the complaint, and recommended dismissal of such allegations. Thereafter, the General Counsel and the Respondent filed exceptions to the Intermediate Report with supporting briefs. The Respondent's brief, in part, was in support of the Intermediate Report.

The Board¹ 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, conclusions, and recommendations of the Trial Examiner only insofar as they are consistent with this Decision and Order.

1. We agree with the Trial Examiner that between July 21, 1961, when the Respondent learned of Union's organizational activities at the plant, and the end of the strike on September 15, 1961, the Re-

¹ 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 Leedom and Fanning].

spondent engaged in unlawful interrogation of employees concerning their attitudes toward, and interest in, the Union, threatened them with a loss of benefits in the event of a union victory, and with retaliatory action with respect to those who were active in the Union and engaging in the strike, and made promises of benefits for those refraining from strike action. We find that by engaging in this conduct the Respondent interfered with, restrained, and coerced employees within the meaning of Section 8(a) (1) of the Act.

2. The Trial Examiner found that, as the unit of production and maintenance employees, including route salesmen, for which the Union asserted bargaining rights on July 24, 1961, became inappropriate under *Plaza Provision*,² the Respondents' failure to bargain with the Union was not violative of Section 8(a) (5) of the Act. We do not agree.

In *Barlow-Maney Laboratories*,³ the Board held that in order to make out a case of refusal to bargain, it must be shown that the Union in fact represented a majority in the requested unit *at the time the request was made*. The Board there stated:

The employer's obligation arises as of that time, not as of the time that a Trial Examiner, or the Board, finds a different unit appropriate; it should be measured against the unit claimed to be appropriate at that time. [Emphasis supplied.]

On July 24, when the Union made its demand for recognition, and simultaneously filed with the Board and served on the Respondent a copy of its petition for an election, the inclusion of route salesmen with selling functions in a production and maintenance unit under the *Valley of Virginia* rule,⁴ then in effect, was mandatory unless the parties themselves agreed to exclude them from the unit, or some other labor organization sought to represent them separately. As neither condition justifying the exclusion of the route salesmen then existed, the requested unit, including route salesmen, was appropriate at the time of the request when the Respondent's obligation to bargain arose. It is true that subsequent thereto, the Board on December 1, 1961, issued its decision in the *Plaza Provision* case modifying its policy in some respects as to the unit placement of driver-salesmen. However, this modification in the Board's policy did not, nor was it intended to, require the exclusion of driver-salesmen from production and maintenance units under all circumstances; nor is there anything in that decision which can be deemed to relieve the

² *Plaza Provision Company (PR)*, 134 NLRB 910, where the Board changed its policy with respect to unit placement of driver-salesmen

³ *Barlow-Maney Laboratories, Inc.*, 65 NLRB 928, 943, 944; see also *Smith Transfer Company, Inc.*, 100 NLRB 834; *Brewery and Beverage Drivers and Workers, etc v NLRB (Washington Coca-Cola)*, 257 F 2d 194 (C.A.D.C.), remanding 117 NLRB 1163

⁴ *The Valley of Virginia Cooperative Milk Producers Association*, 127 NLRB 785

Respondent from the responsibility for a prior violation of the Act in failing to bargain with the Union. We find, accordingly, that as the unit claimed by the Union was appropriate at the time of the request to bargain and as the Trial Examiner found that the Union represented 11 out of the total of 17 employees in that unit, the Respondent by ignoring since July 25, 1961, the Union's demand for recognition and bargaining violated Section 8(a)(5) and (1) of the Act.

In agreement with the Trial Examiner, we also reject the Respondent's assertion that it had, in good faith, doubted the appropriateness of the claimed unit as well as the Union's majority in that unit. At the time of the bargaining request, the Respondent neither questioned the appropriateness of the unit of production and maintenance employees, including route salesmen, nor did it seek to verify, as invited by the Union, its claim to majority representation in that unit. The Respondent did not raise these issues until it filed its answer to the complaint. Respondent's conduct of interference, restraint, and coercion of employees designed to thwart the employees' organizational efforts is also manifestly inconsistent with its claim that it acted in good faith when it failed to bargain with the Union.⁵

3. We agree with the Trial Examiner that the strike, which began on August 9 and continued until September 15, 1961, was caused by the Respondent's failure to recognize and bargain with the Union. As we have previously found that the refusal to bargain was in violation of Section 8(a)(5), it follows that the strike was an unfair labor practice strike, and that the Respondent was under an obligation to reinstate all strikers who applied unconditionally for reinstatement whether or not they had been permanently replaced during the strike. We find, in agreement with the Trial Examiner, that such valid unconditional application for reinstatement had been made by the following strikers: Jacqueline Wagner, Nola Rogers, Larry Freeman, Adolph Appelhans, Kenneth Keiter, and Keith Llafet. We also find, contrary to the Trial Examiner, that by denying reinstatement to these strikers on the ground that they had been permanently replaced during the strike, the Respondent violated Section 8(a)(3) and (1) of the Act.

THE REMEDY

Having found that the Respondent engaged in certain unfair labor practices as set forth above, we shall order that the Respondent cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

⁵ *Loabs, Inc.*, 128 NLRB 374; *Keystone Universal Carpet Co.*, 130 NLRB 4, 17, enf'd 306 F. 2d 560 (C.A. 3), where the Board held that good-faith belief based upon an erroneous view of the law is not available as defense for a refusal to bargain

We have found that the production and maintenance unit, including route salesmen, for which the Union on July 24, 1961, asserted bargaining rights, was appropriate for purposes of collective bargaining, and that by refusing to bargain with the Union at the time of the request and thereafter the Respondent violated Section 8(a) (5) of the Act. Thereafter, on December 1, 1961, the Board issued its decision in *Plaza Provision Company*,⁶ in which it modified its policy in some respects as to the unit placement of driver-salesmen. The Respondent contends that, under that decision, a production and maintenance unit of Respondent's employees, including route salesmen, is no longer appropriate and, therefore, that affirmative bargaining relief should be denied to the Union. We find no merit in this contention. Even if that decision had as broad a reach as Respondent contends, it did not make existing units which include driver-salesmen with other employees inappropriate. *Plaza Provision* was intended to have prospective and not retroactive effect. Accordingly, as we have found above, it does not excuse refusals to bargain which occurred before its issuance.⁷ We shall therefore order that the Respondent bargain with the Union for the unit for which the Union asserted bargaining rights on July 24, 1961, which we have found to be appropriate at the time the bargaining request was made, and which we find, in the circumstances of this case, remains appropriate.⁸

We have also found that the Respondent on September 15, 1961, discriminatorily denied reinstatement to six striking employees who unconditionally applied for reinstatement on the ground that they had been permanently replaced during the strike. We shall, therefore, order that the Respondent offer these employees reinstatement to their former or substantially equivalent employment without loss of seniority or other rights and privileges, discharging if necessary their replacements hired during the strike. We shall further order that the Respondent make these employees whole for any loss of earnings they may have suffered as a result of discrimination, from September 15, 1961, when they were refused reinstatement, until the date of the Respondent's offer of reinstatement. Backpay including

⁶ *Plaza Provision Company (P R)*, *supra*.

⁷ Cf. *Supervor Steeprite Corporation*, 109 NLRB 322, where the Respondent asserted that no bargaining order should issue because under the standards of unit determination formulated in *American Potash & Chemical Corporation*, 107 NLRB 1418, the unit previously found appropriate would not have been found appropriate at the time of that decision. The Board rejected the argument, stating that the *American Potash* decision was intended to have prospective and not retroactive effect.

⁸ Member Leedom agrees that there is no merit to the contention of the Respondent that, in view of the Board's decision in *Plaza Provision*, affirmative relief should be denied to the Union. However, Member Leedom is of the view that the Board, in framing its Order, should apply current law in determining the appropriate unit. Since Member Leedom believes, for the reasons stated by the Trial Examiner, that under *Plaza Provision*, route salesmen should be excluded from a unit of employees of the Respondent, he would direct the Respondent to bargain in a unit *excluding* route salesmen, in which unit, as the record establishes, the Union also had a majority at the time of its bargaining request.

payment of interest at 6 percent shall be computed in accordance with the Board's usual practices,⁹ and there shall be no tolling of backpay for the period between the issuance of the Intermediate Report and the Order herein.¹⁰ The unfair labor practices found to have been committed by Respondent go to the heart of the Act, and reflect a purpose, likely to be executed in the future, to thwart by unlawful means the employees' exercise of their Section 7 rights. In order that the preventive purpose of our Order may be coextensive with the threat of future violations, we shall order that Respondent cease from in any manner infringing upon employees' rights guaranteed by Section 7.

ADDITIONAL CONCLUSIONS OF LAW

1. All drivers, driver's helpers, route salesmen, and plant production and maintenance employees, at the Respondent's Denver, Colorado, plant, excluding office clerical employees, temporary employees, professional employees, guards, and all supervisors as defined in the Act, constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act.

2. Local Union No. 435, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, has been at all times since July 25, 1961, and now is the exclusive representative of all employees in the aforesaid appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

3. By failing and refusing at all times since July 25, 1961, to bargain with the above-named Union, as the exclusive bargaining representative of employees in the appropriate unit, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

4. By refusing to reinstate the striking employees who unconditionally applied for reinstatement on September 15, 1961, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(3) and 8(a)(1) of the Act.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Upon the entire record in this case, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Columbine Bev-

⁹ *Crossett Lumber Co.*, 8 NLRB 440; *F. W. Woolworth Co.*, 90 NLRB 289. For the computation of interest, see *Isis Plumbing & Heating Co.*, 138 NLRB 716. For the reasons set forth in the dissent in *Isis*, Member Leedom would not award interest.

¹⁰ *A.P.W. Products Co., Inc.*, 137 NLRB 25.

erage Company, Denver, Colorado, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in Local 435, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or in any other labor organization, by discharging or refusing to reinstate their employees, or in any other manner discriminating against them in regard to their hire or tenure of employment or any term or condition of employment.

(b) Refusing to bargain collectively with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, with the above-named union as the exclusive representative of all their employees in the following appropriate unit:

All drivers, driver's helpers, route salesmen, plant production and maintenance employees, excluding office clerical employees, temporary employees, professional employees, guards, and all supervisors as defined in the Act.

(c) Interrogating employees concerning their attitude toward and interest in the Union, promising benefits for those refraining from strike action, and threatening them with reprisals if they engaged in a strike or other protected concerted activities.

(d) In any other manner interfering with, restraining, or coercing employees in the exercise of the right to self-organization, to form labor organizations, to join or assist the above-named or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in collective bargaining or other mutual aid or protection, or to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959.

2. Take the following affirmative action which it is found will effectuate the policies of the Act:

(a) Upon request, bargain collectively with Local 435, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive representative of the employees in the above-described appropriate unit with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, and embody in a signed agreement any understanding reached.

(b) Offer to Jacqueline Wagner, Nola Rogers, Larry Freeman, Adolph Appelhans, Kenneth Keiter, and Keith Llafet immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority and other rights and privileges, and make them whole for any loss of earnings each may have

suffered as a result of the discrimination against him or her, in the manner set forth in the section of this Decision entitled "The Remedy."

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records and reports, and all other records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its plant in Denver, Colorado, copies of the notice attached hereto marked "Appendix."¹¹ Copies of said notice, to be furnished by the Regional Director for the Twenty-seventh Region, shall, after being duly signed by Respondent's authorized representative, be posted by the Respondent immediately upon the receipt thereof and maintained by it for a period of 60 days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other materials.

(e) Notify the Regional Director for the Twenty-seventh Region, in writing, within 10 days from the date of this Order, what steps have been taken to comply herewith.

¹¹ In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "Pursuant to a Decision and Order" the words "Pursuant to a Decree of the United States Court of Appeals, Enforcing an Order"

APPENDIX

NOTICE TO ALL EMPLOYEES

Pursuant to a Decision and Order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify you that:

WE WILL NOT discourage membership in Local 435, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or in any other labor organization, by discharging or refusing to reinstate any of our employees, or by discriminating in any other manner in regard to their hire and tenure of employment or any term or condition of employment.

WE WILL NOT interrogate our employees concerning their attitudes or interest in the Union, nor will we promise benefits for those refraining from strike action or threaten them with any reprisals if they engage in a strike or other protected concerted activities.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of the right to self-organization, to form labor organizations, to bargain collectively through rep-

representatives of their own choosing, and to engage in any other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959.

WE WILL OFFER to the following named employees immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority and other rights and privileges, and make them whole for any loss of pay he or she may have suffered by reason of the discrimination against them:

Jacqueline Wagner
Nola Rogers
Larry Freeman

Adolph Appelhans
Kenneth Keiter
Keith Llafet

WE WILL, upon request, bargain collectively with Local 435, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive representative of all employees in the appropriate bargaining unit described below with respect to rates of pay, wages, hours of employment and other terms and conditions of employment, and embody in a signed agreement any understanding reached. The bargaining unit is:

All drivers, driver's helpers, route salesmen, plant production and maintenance employees, excluding office clerical employees, temporary employees, professional employees, guards, and all supervisors as defined in the Act.

All our employees are free to become, remain, or to refrain from becoming or remaining, members in the above-named or in any other labor organization.

COLUMBINE BEVERAGE COMPANY,
Employer.

Dated----- By-----
(Representative) (Title)

NOTE.—We will notify any of the above-named employees presently serving in the Armed Forces of the United States of their right to full reinstatement upon application in accordance with the Selective Service Act after discharge from the Armed Forces.

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

Employees may communicate directly with the Board's Regional Office, 609 Railway Exchange Building, 17th and Champa Streets, Denver 2, Colorado, Telephone Number, Keyston 4-4151, Extension 513, if they have any question concerning this notice or compliance with its provisions.

INTERMEDIATE REPORT AND RECOMMENDED ORDER

STATEMENT OF THE CASE

This proceeding with all parties represented, was heard before Trial Examiner William E. Spencer, at Denver, Colorado, on November 7, 8, 9, 1961, and February 27, 1962.¹ The issues litigated were the alleged violations by the Respondent of Section 8(a)(1), (3), and (5) of the National Labor Relations Act, as amended, herein called the Act.

Upon the entire record in the case and my observation of the witnesses, and with appreciative consideration of the helpful briefs filed with me by the General Counsel and the Respondent, respectively, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

Columbine Beverage Company, the Respondent herein, is a Colorado corporation, with its principal office, plant, and place of business in Denver, Colorado, where at all times material herein it has been engaged in the production, bottling, and canning of soft drinks. In the course and conduct of its business it annually purchases goods and materials shipped directly to its plant from points and places outside of Colorado, of a value in excess of \$50,000. The Board has and will assert jurisdiction over its operations.

II. THE LABOR ORGANIZATION INVOLVED

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 435, called herein the Union, is a labor organization within the meaning of the Act.

III. THE UNFAIR LABOR PRACTICES

1. General statement of events and issues

The Union began organizing Respondent's employees in early July, 1961, and the first formal organizational meeting was held on Friday, July 21. By letter dated July 24, the Union notified the Respondent that it had been authorized to represent its employees in a stated unit and that it was in a position to prove its majority. The letter further requested a meeting for purposes of collective bargaining on a date prior to July 27. The Respondent received this letter on July 25 and on the same date received a copy of a representation petition filed by the Union with the Board. The Respondent at no time replied to the Union's request for recognition and bargaining.

On August 9, without further efforts to communicate with the Respondent, the Union struck Respondent's plant and a majority of Respondent's employees engaged in a strike. There was peaceful picketing of Respondent's plant from August 9 to September 14. The picket signs carried by the strikers read: "Columbine Beverage Company has refused to bargain as required by law with Teamsters Local 435."

By telegram dated September 14, the Union requested the reinstatement of "all unfair labor practice strikers," and notified the Respondent that the said strikers would report at the plant on the following day "for the purpose of unconditionally seeking to return to work." Some, though not all, of the strikers reported as stated in the telegram, or later, and were told by the Respondent that they had been permanently replaced.

¹ The original charge initiating this proceeding was filed on August 8, 1961; a first amended charge on August 15, 1961; and a second amended charge on September 19, 1961. The complaint was dated September 29, 1961.

The complaint alleges an unlawful refusal to bargain, an unfair labor practice strike; an unlawful refusal to reinstate, on unconditional application, of certain named employees; and statements and conduct constituting interference, restraint, and coercion.

A fundamental problem in the case is the construction and application of the Board's decision in *Plaza Provision Company (P. R.)*, 134 NLRB 910.

2. The Union's majority in the alleged appropriate unit

The complaint alleges an appropriate unit composed of all truckdrivers, driver's helpers, route salesmen, plant production and maintenance employees, excluding office clerical employees, temporary employees, guards, and professional and supervisory employees as defined in the Act.

Admittedly excluded from the aforesaid alleged appropriate unit, are the following persons with employee status as of the week of July 24, when the Union's request for recognition was made:

James Kennedy, Respondent's president; Richard Huter, plant superintendent; William Earle, route supervisor; Earnest Hightower, officer manager, Jeffery Dostal, office clerical; and the following employees whose employment was admittedly temporary in character: Glenn Urban, Gerald Huyman, Ellen Lesnett.

In agreement with the General Counsel I find that the following employees were in the appropriate unit on the crucial date: George Robinson, Jacqueline Wagner, Nola Rogers, Charles Baker, Kenneth Keiter, Adolph Appelhans, Larry Freeman, James Walls, John Derrera, Guy Moody, Frank Falsetta, Keith Llafet, Sammy Montoya, Harry Thompson, David Wheeler, Ray Peters, and Richard Justice, a total of 17. I further agree that of these 17, the following had signed union authorization cards on or before July 25: Wagner, Rogers, Keiter, Appelhans, Freeman, Derrera, Falsetta, Llafet, Montoya, Wheeler, and Justice, or a total of 11. Respondent contends that because certain of these 11 executed authorization cards after the Union mailed its letter demanding recognition, they are not properly counted in determining the Union's majority status. I do not agree. It is sufficient if the cards were executed at any time prior to the Respondent's receipt of the Union's demand, and I find that they were executed on or before that time. A demand for recognition is not something occurring in a vacuum.

In the disputed category are four employees alleged by the Respondent to have had only temporary status, and upon consideration of the entire testimony in the matter, I accept Respondent's contention and find that the following employees are excluded from the alleged appropriate unit because of their temporary status: Marvin Mobley, Dennis Waller, Leonard Gardenas, and Robert Taylor.

Also included in the disputed category are: Samuel Penny, Eugene Gillespie, and Kenneth Walls.

Gillespie since December 1960 has been engaged in part-time work for the Respondent in the preparation and posting of advertising material. He prepares this material in Respondent's plant, obtains the required city licenses for posting, and puts up the signs on walls and various other locations. He has no regular hours of work, averaging a day or two a week, and is paid on a piece-work basis. Occasionally, one or two days a month, he serves as a relief driver, and in that capacity receives the same pay as other drivers. He has other regular employment. I am of the opinion and find that he does not have a sufficient community of interests with other production and maintenance employees, or drivers and driver-salesmen, to justify his inclusion in the alleged appropriate unit.

Penny is Kennedy's father-in-law, works in production and maintenance, and in contradistinction to other production and maintenance employees is paid on a salary basis for a 40-hour week and is not required to punch in and out.

Walls, a route supervisor, in a prehearing statement, taken down by Respondent's attorney, described himself as a supervisor vested with authority to hire and discharge. This statement was passed on to an agent of the Board by the Respondent during the investigation stage of the case, and was sworn to by Walls before the said Board agent. At the hearing, Walls denied that he was vested with such authority, or that he could effectively recommend in matters of hiring and firing. He gave no rational explanation of his prior inconsistent statement, and inasmuch as it was taken down by Respondent's own attorney, it could hardly be doubted that he at that time regarded himself as possessing the authority stated therein. Kennedy testified that Walls had no authority to hire or discharge or to make recommendations in such matters, that all such recommendations would come through his superior, Earle. It was not disclosed whether Kennedy was apprised of Walls' prehearing statement and therefore no showing that he indorsed it. I would not decide the

matter on the basis of an admission by the Respondent because of its having produced the statement in the investigative stage of the case, and such evidence as was taken at the hearing reveals no instance of Walls' ever having hired, discharged, or disciplined an employee, or having made recommendations with respect to such matters. One employee testified that Walls granted him permission to leave his work on account of sickness. In summation, it is my opinion that Walls identified himself with management and that Respondent's employees so identified him, with reason, though not on the basis of his authority to hire and discharge. He undoubtedly exercised a substantial degree of independence of judgment in his supervision of route salesman and was, and was regarded by them, their supervising superior. I think he is not shown to have sufficient community of interests with other employees to be included in the appropriate unit. Penny's case is more doubtful and I do not resolve the issue with respect to him, for were Penny, Gillespie, and Walls all included in the unit, there would be a total of 20 employees in the unit, and of these the Union held authorization cards from 11.

Accordingly, and pursuant to the above findings, it is found that as of the date of the Union's demand for recognition, it represented a majority of Respondent's employees in the alleged appropriate unit.

3. Interference, restraint, coercion

The General Counsel bases his claim of 8(a)(1) violations on the combined testimony of eight employees. The substance of this testimony, and Respondent's refutations, follow.

Lafet testified that on about July 21 Kennedy asked him what he had heard about the Union organizing, and told him that the employees would probably lose a lot of benefits by going Union. Kennedy admitted questioning Llafet on his knowledge of organizing activities. He testified that he had been informed by a person outside his organization that he had overheard a union representative in a local bar bragging that he had Respondent's employees lined up. He denied other portions of Llafet's testimony. He also denied Mattivi's testimony that shortly after the strike began he told the latter that he would get rid of the strikers if they came back to his employment. He testified that Mattivi, who had not yet joined the strike, asked about the strike and he, Kennedy, replied that it was not an unfair labor practice strike as stated on the picket signs. According to Kennedy, on the evening of the day he received the Union's demand for recognition, he instructed his supervisors, Earle and Huter, not to engage in discussion of the Union with employees. No claim is made that employees were advised of these instructions. According to Kennedy, this was the only occasion prior to the strike when he discussed the Union with his plant superintendent, Huter.

Employee Freeman testified that Huter told him he had found out about the Union and that Kennedy was willing to bet that employees Wagner and Montoya were back of it; that Wagner and employee Rogers would be replaced no matter what happened. Wagner testified that Huter told her that Kennedy was willing to bet that Wagner had started the Union and that Wagner and Rogers would be replaced within 6 months and/or lose sick leave and Blue Cross benefits. On another occasion, according to Wagner, Huter told her that all the employees would lose their jobs if the plant went Union. Cardenas testified that Huter told him that no one who went on strike would be working there in 6 months because he, Huter, could find a way to fire them. Freeman testified that on about August 9 Huter questioned him about his going on strike. Huter made a categorical denial of the testimony of each of these witnesses, testified that he and Freeman were friendly and had lunch together but never discussed the Union, and further testified that he never discussed union activities with Kennedy.

Rogers testified that Supervisor Earle asked her if she had attended the union meeting of July 21 and how she would vote in a representation election. Taylor testified that Earle asked him if he went to the meeting, who attended it, and said that the Union could not win. Freeman testified that on about August 10, Earle told him that he would get a wage increase and bonus if he "stuck it out" by not going on strike. Earle denied that he made any of the aforesaid statements or inquiries attributed to him, and testified, with record corroboration, that on a date when Rogers allegedly had the conversation with him, he was not in the plant. His wife, who was present when a conversation occurred between him and Freeman, corroborated him in his denial of Freeman's testimony, and testified, further in corroboration, that on this occasion Freeman asked Earle if he thought that Freeman should go on strike and Earle replied that Freeman would have to make up his own

mind. Earle admitted that he asked employee David Wheeler what he thought of the Union, an admission not prompted by testimony given by Wheeler.

Wagner testified that Route Supervisor Walls asked her if she went to the union meeting and how she would vote in an election. Keiter testified that Walls asked him what he thought of the Union and when Keiter replied, in effect, that he favored it, said, "Well, you'll be sorry for it." Freeman testified that Walls told him that the employees who remained at work during the strike would receive a "big bonus." Walls categorically denied having made any of the statements attributed to him.

If the General Counsel's witnesses are credited the Respondent questioned its employees concerning their union activities and attitudes toward the Union, threatened them with loss of benefits if the Union was successful in organizing the plant, with reprisals if they engaged in a strike, and promised rewards for those who refrained from engaging in the strike. Respondent's counsel would have me discredit all eight of the General Counsel's witnesses, and as a basis therefor, argues that the testimony of certain of them on cross-examination differed materially from their testimony on direct. He also points to some discrepancies in the details of incidents about which they testified. If these employees had been precise and definite in every detail of the conversations they testified to, including dates, places and the exact language used, and their testimony dovetailed in every particular, this would smack more of collusion and rehearsal than veracity. With respect to Wagner and Freeman, however, I had an impression not of downright fabrication but of exaggeration in their direct testimony which was considerably deflated on cross-examination, and except where their testimony is along parallel lines with the testimony of other witness I do not rely on it. The refutations offered by Respondent's witnesses Kennedy, Huter, Earle, and Walls were for the most part categorical denials of all statements and conversations with respect to the Union attributed to them. Had their denials been a little less sweeping, such as denials of all discussions of the Union between Kennedy and his supervisors prior to the strike, with the exception of the one incident in which Kennedy testified he instructed Earle and Huter to refrain from any participation in union discussions, they might have merited more serious consideration, for it is so improbable as to be not credible that during the considerable period between the Union's demand for recognition and the strike, Kennedy would have had no discussions of the organizational activities of his employees with his plant superintendent. With respect to Walls, if he actually regarded himself as a rank-and-file employee, it is hardly credible that he would have refrained from all discussions of the Union with his fellow employees. Too, his repudiation of his sworn prehearing statement given to an agent of the Board, accompanied by no rational explanation, does not enhance his credibility as a witness.

Upon consideration of the entire testimony, I find that from the date the Respondent first learned of organizational activities among its employees, it interrogated them concerning their attitudes toward and interest in the Union, made certain statements reasonably construed as threatening a loss of benefits in event of a union victory, retaliatory action with respect to those active on behalf of the Union and engaging in a strike, and promises of benefits for those refraining from strike action. Such statements and conduct constituted interference, restraint, and coercion within the meaning of Section 8(a)(1) of the Act.

4. The strike

Having received no answer to its request for recognition, dated July 24, the Union on August 9 caused pickets to be established at Respondent's plant, and a majority of Respondent's employees in the alleged appropriate unit engaged in the strike lasting from that date to at least September 14, when the Union notified the Respondent that it was withdrawing its pickets. Picketing actually ceased on that date, though according to Alex Rein, the Union's secretary-treasurer, the strike is still on. The picket signs in evidence throughout the period of the picketing stated that the Respondent had "refused to bargain as required by law" with the Union.

I think there is no doubt, and find, that the strike was caused by the Respondent's refusal to recognize and bargain with the Union, though there may have been other contributory factors.

By letters dated August 9, over Kennedy's signature, the Respondent advised its employees that the Respondent intended to remain in full production despite the work stoppage; that their jobs were still available to the strikers, at the same wages and working conditions currently in effect; that, if necessary, the Respondent would employ replacements for all employees engaging in the work stoppage, and that upon being replaced the striking employee would have lost his employee status.

5. Reinstatement requests

By letter and telegram dated September 14, the Union advised the Respondent that it was removing its picket line and that on September 15 all of the "unfair labor practice strikers" would report to Respondent's plant for the purpose of "unconditionally seeking to return to work." The letter and telegram asked to be considered by the Respondent as "an unconditional offer for all the unfair labor practice strikers to return to work as of September 15, 1961."

The complaint alleges that employees Wagner, Rogers, Freeman, Appelhans, Mobley, Scalise, Taylor, Gochanour, Keiter, Llafet, and Mattivi reported for work pursuant to these communications and were refused reinstatement.

I find that Rogers, Keiter, Freeman, Wagner, Appelhans, Llafet, Gochanour, and Scalise reported at the plant on or about September 15, were interviewed individually by Kennedy, and were informed by the latter that they had been permanently replaced. It is immaterial whether each of these employees made a formal statement to Kennedy that he sought reinstatement: the Union's telegram and letter fully informed the Respondent on the reason for their reporting to the plant, and Kennedy by telling them that they had been replaced showed that he understood that they were applying for reinstatement.

I find that Mobley went to Respondent's plant but not finding Kennedy in, left and did not return to make an individual application for reinstatement. Inasmuch as the Union's communications stated that the employees seeking reinstatement would report to Respondent's plant, the Respondent would reasonably assume that those desiring reinstatement would in fact appear and make known their interest in getting their jobs back. My findings are the same with respect to Taylor. Neither of these employees applied for reinstatement. Mattivi testified that, unable to see Kennedy at the plant, he asked Huter if his job was open and Huter in reply laughed and said, "No." Huter denied that Mattivi asked him for his job back. I do not resolve the conflict because I am convinced that Mattivi was hired on a temporary basis, for summer work only. I further find that Gochanour, who requested reinstatement, was hired on a temporary basis. Mattivi and Gochanour received their employment with the Respondent through the Denver Boys Club, a local organization through which the Respondent recruited employees for temporary work, most of the employees thus recruited being students still in high school who would return to school at the end of the summer season. The summer season admittedly was Respondent's peak season of employment.

I also find that Scalise was hired on a temporary basis. He admitted that he told Earle on being hired that he expected to establish a business of his own, and that he told Kennedy that he "could spend about a month down there, anyhow," and that it might be less. He testified that later he told Earle that he might be available longer than he had previously expected, and that Earle told him his job was open as long as he wanted it. Earle denied that such a conversation occurred. It is clear from Scalise's own testimony that he took employment with the Respondent on a temporary basis until he could start his own business, that Respondent was fully informed of this fact, and assuming that at some later date he did tell Earle that he might extend the period of his availability, he did not thereby remove the contingency of quitting as soon as he started his own enterprise. I think the Respondent was justified in regarding him, at all times, as a temporary employee, and I do not credit his testimony that Earle told him the job was his as long as he wanted it. Scalise was not a persuasive witness.

Pursuant to the foregoing it is found that the Respondent refused reinstatement to Wagner, Rogers, Freeman, Appelhans, Keiter, and Llafet, not because their employment status was temporary, but because their jobs had been filled by the hiring of permanent replacements during the period of the strike. I find that this refusal was not based, and was not justified by the wording of the Union's telegram and letter of September 14 which requested reinstatement "of unfair labor practice" strikers. If the strike was in fact economic in character, the Respondent was not required to admit, by implication, that it had been caused by Respondent's unfair labor practices, in extending reinstatement solely on the basis of the Union's communications; further, if the strike was economic there would be no unfair labor practice strikers and therefore no strikers identifiable under the Union's communications. In its refusal to reinstate the employees named above, the Respondent gave them as the sole ground of its refusal, that they had been permanently replaced. Furthermore, by their individual applications the employees identified themselves as employees who, to Respondent's knowledge had been on strike, and there was no condition attached to their individual applications that Respondent recognize their status as unfair labor practice strikers. If the strike was indeed caused, or

prolonged, by the Respondent's unfair labor practices, no problem of the Union's attempt to characterize them as unfair labor practice strikers is involved, and the Respondent was under a duty to reinstate them, regardless of employees hired during the period of the strike. It was under no such duty if the strike was economic and the strikers had been permanently replaced. I find that they had been permanently replaced.

6. The appropriate unit

The Union in its demand for recognition claimed to represent a majority of employees in a unit composed of drivers, driver's helpers, *route salesmen*, and plant production and maintenance employees.

In its petition for an election, filed simultaneously with its recognition demand and served upon the Respondent, the Union claimed representation in a unit composed of "all drivers, drivers helpers, *route salesmen*, plant production and maintenance employees, excluding office clerical employees, guards, professional and supervisory employees as defined in the Act."

The complaint alleges a unit composed of "all truck drivers, driver's helpers, *route salesmen*, and plant production and maintenance employees, exclusive of office clerical employees, *temporary employees*, professional employees, guards, and all supervisors as defined in the Act."

[Emphasis in all instances is supplied.]

The Respondent argues, firstly, that there are such discrepancies in the above three descriptions of the appropriate unit as to raise an ambiguity with respect to just what classifications of employees the Union claimed to represent, and that the ambiguity is of such proportions as to have freed the Respondent from any duty to recognize and bargain with the Union. As support for this position, the Respondent alludes to the Union's failure in its letter demanding recognition to specify any excluded classifications and because of this failure, it argues that it would reasonably understand that the Union claimed to represent all its employees, clerical, managerial, etc. There is no merit in this contention. The Union's letter stated the classifications of employees it claimed to represent, and by its petition for certification the excluded classifications were set forth with particularity. The Respondent would not reasonably understand that the Union's claim of representation exceeded the classifications of employees set forth in its letter.

A second and more meritorious contention is that neither the Union's recognition request nor its petition for certification, named temporary employees as an excluded classification, whereas they are so specified in the complaint's allegation of the appropriate unit. There can be no doubt that the summer months marked the peak of Respondent's business and that during those months it operated additional delivery routes and hired a substantial number of temporary employees, apparently recruited largely from the ranks of high school students and boys working the interim between high school and college. These were in all respects *temporary employees*, not *seasonal employees* who were hired back year after year and thereby gained permanent status as employees. It further appears that these temporary employees constituted about a fourth of Respondent's total employment of rank-and-file employees during the summer months. It would therefore be a matter of considerable substance to it whether it was asked to bargain with respect to these employees. I also think that the Union's failure to specify them in the exclusions it named in its petition for an election was not mere inadvertance or accident. I think this because it is shown that a majority of Respondent's temporary employees signed the Union's authorization cards and it is a reasonable inference that the Union actually purported to represent them. The General Counsel argues in effect that the Respondent was charged with notice that the Board has a long-established policy of excluding temporary employees from bargaining units, and that the Union could hardly have been expected to name every classification of employees who might be excluded from the unit it claimed to represent.

I should think that where exclusions are specified, as they were in the Union's petition for certification, received by the Respondent at the same time it received the demand for recognition, and employees properly classified as production and maintenance employees are not named in the exclusions, although occupying the status of temporary employees, the Respondent would be justified in assuming that the Union was claiming to represent those employees. Aside from this fact and the fact that I think the Union in its recognition demand intentionally included employees found herein to have only temporary status, I might agree with the General Counsel's position. I do think, however, that had the Respondent responded to the Union's recognition request and met with it, the matter of representation of temporary employees might well have been resolved between the parties. The

fact remains that the Respondent was never asked to bargain for a unit which excluded temporary employees.

Coming now to the most difficult issue with respect to the appropriate unit, we have the matter of driver salesmen or route salesmen, the terms being interchangeable. I shall refer to them as route salesmen. The inclusion of this category of employees in the alleged appropriate unit would have raised no issue prior to the Board's recent decision in the *Plaza Provision Company (P.R.)* case, 134 NLRB 910. In that decision, the Board specifically and contrary to the contentions of the employer in the case, excluded route salesmen from the appropriate unit primarily on the ground that "the interests of the route and special salesmen are diverse from those of the warehousemen and truckdrivers." This decision issued after the initial hearing in the case at bar was closed, and the hearing was subsequently reopened to take additional evidence in the matter, inasmuch as the General Counsel did not move to amend his complaint by removing route salesmen from the alleged bargaining unit, and the Respondent refused to stipulate this disputed classification of employees into the unit.

The uncontroverted evidence in the matter shows:

(a) Route salesmen are paid on a straight salary basis plus a commission on the quantity of Respondent's product handled daily, whereas production and maintenance employees, including truckdrivers, are paid on an hourly basis and receive no commission; a change in the compensation of production employees is not reflected in the compensation of route salesmen, and vice versa.

(b) Route salesmen do not punch a time clock but are expected to have their trucks and loaded and be ready to start on their routes by 8 a.m. They are not required to report in at any stipulated time but return to the plant at such times as they have finished with the day's deliveries. They may work as much as 10 or 11 hours a day. Maintenance and production employees, including truckdrivers, work an 8-hour day and are required to punch in and out. If a route salesman is off duty a portion of a day, he suffers no loss of salary; other employees suffer a decrease in pay for absence from work.

(c) Route salesmen have no time set aside for lunch but eat while on their routes according to their own choice of place and time, whereas other employees have a regular lunch period.

(d) Except that Respondent's president and manager, Kennedy, has general supervision over all employees, route salesmen have separate and distinct supervision of route supervisors Earle and Walls, who supervise no other employees; Huter, plant superintendent, supervises all other employees, including truckdrivers, and has no supervision over route salesmen. Huter hires production employees but no route salesmen, the latter being hired by either Kennedy or Earle. Kennedy also hires some production employees.

(e) Sales experience is a sought after qualification in persons the Respondent hires as route salesmen, and in recruiting route salesmen through advertising mediums the Respondent's advertisements reading "Route salesman driver wanted," are placed under the "SALESMEN AND AGENTS" want-ad heading. Sales experience is neither required nor expected in other employees.

(f) There are certain fringe benefits shared by route salesmen and other employees, though with some differences. They are allowed the same amount of vacation and sick leave with pay, though the route salesman's pay is averaged on what he has made in commissions and salary whereas the production employee's is based on his hourly rate. There is Blue Cross coverage for both route salesmen and other employees. Route salesmen and other employees are allowed holidays with pay, with this difference: if a production employee works an extra day during the week in which a holiday occurs, he is paid time and a half for that extra day, whereas a route salesman is required to work an extra day to make up for a holiday and is not paid time and a half for that extra day. There are no so-called fringe benefits accorded route salesmen that are not accorded other employees, and vice versa.

(g) Route salesmen wear uniforms while on duty, whereas other employees do not.

(h) There is not, and there is no evidence that there ever has been, any interchange of personnel in the classification, of production and maintenance employees including truckdrivers, and the classification of route salesmen.

The only substantial conflict in the evidence is on whether the functions and duties of a route salesman are predominantly the making or promoting of sales of the Respondent's product, or whether they are predominantly driving and the delivery of Respondent's products. The normal procedure is that when a route salesman is hired one of the route supervisors, Earle or Walls, accompanies him on the route assigned to him, for a week or two, acquaints him with his duties of delivering the product to establish customers, presumably introduces him to such customers, and

generally instructs him in his duties, after which he is on his own, except for such instructions as he may receive at regularly held sales meetings, held on company time and attended only by route salesmen and their supervisors, and various pamphlets and manuals on Respondent's products as are made available to him. Respondent conducts approximately six sales contests a year limited to its route salesmen, with points based on sales increase, new accounts and additional placements in old accounts, and offers prizes to the winners.

The night before a route salesman goes on his route, he gives the loading personnel a load list for products to be loaded on his truck to meet the next day's prospective sales. The General Counsel's witnesses, Llafet, Scalise, and Taylor testified that the load list was easily compiled because of the consistency of the business from week to week, and Earle also testified that the order list each night was simply compiled by reference to the sheet from a week before. After checking his load in the morning, the route salesman proceeds to call upon the customers on his route and to make such deliveries and collections as are required. Obviously, it is expected that he will sell each of the customers as much of the products he has in his load as possible, and will attempt to place new products with old customers. The Respondent handles some 30 products and most of its customers handle only a few of these. The route salesman is also expected to call on at least two new accounts each day. Whether these requirements and expectations are met in practice is questionable. After he has completed his route, the route salesman returns to the plant where he unloads his truck with the assistance of plant personnel, checks in moneys collected during the day, and makes out his load list for the next day. He also arranges for and places advertising displays of Respondent's products at the premises of customers, and collects and accounts for money from the sale of products.

The testimony of the General Counsel's witnesses, Montoya, Llafet, Scalise, and Taylor, all route salesmen while in Respondent's employ, minimizes their duties as salesmen to the point where they would seem to be incidental to their duties as deliverymen.

Scalise testified that he called on most of his accounts once a week and on the same day every week, that his sales varied according to the weather, and that his duties involved chiefly the replacing of stock. He testified that he spent no more than an average of about 10 minutes a week soliciting new accounts and a half-hour a day trying to persuade old customers to carry more of Respondent's product. Scalise, I have found elsewhere, was hired on a temporary basis and only until he succeeded in establishing himself in his own business.

Taylor, about 4 months in Respondent's employ, also on a temporary basis, testified in similar vein that there was little variation in the amounts he would sell to any one customer unless there was a holiday or a change in weather. Normally, he testified, he just filled in the usual quota when he called on a customer. He, like Scalise, testified that he spent about 10 minutes a week soliciting new accounts, and about one-half hour a week in attempting to sell additional products to old customers.

Llafet, employed by the Respondent for some 10 months, testified that there was little variation in his deliveries from week to week unless there was a weather change, and that his time was spent in routinely replacing used stock. He acquired five new customers during his employ.

Montoya testified that his sales varied but little from week to week and that his duties consisted principally of restocking old customers in the products they already used. According to him he had only about an hour a week for soliciting new customers and acquired only five during the 8 months of his employ. He further testified that it was only when the weather was bad that he had time for trying to persuade customers to add new products.

In further support of his position that driver salesmen are predominantly drivers and deliverymen, the General Counsel relies on the fact that the Respondent has not added a new product to its sales list since it added Schweppes some 3 years ago; that drivers average some 55 stops a day while working as much as 10 to 11 hours a day, including the hour or more per day spent at the plant. Including travel time between stops, the taking of the order and filling of it from the truck, and removing the empty cases, there would be left only a relatively small amount of time for salesmanship.

There can be no doubt, if the time element is to be considered decisive, that route salesmen spend far more time in delivering Respondent's product than in selling it, and that a considerable portion of their work involves the routine checking and delivery of products already handled by Respondent's customers. Despite the testimony of the route salesmen who testified for the General Counsel, testimony that tended to minimize their sales duties to a degree that I find unacceptable, I am con-

vinced on the entire evidence that the selling of Respondent's product was an essential part of the route salesman's duties and functions, whether or not he conscientiously performed the said duties and functions. It may well be that a route salesman on first being assigned to long-established route might find most of his time taken up with routine deliveries, but nevertheless those routes had to be established and built up; they did not come into existence through parthenogenesis or spontaneous combustion; and if Respondent's business was to continue as a competitive enterprise and to grow, even old-established routes needed to be built up and old customers needed to be persuaded to add to their lists of Respondent's products. Inasmuch as the Respondent employed no special salesmen, engaged in no preselling of its products, and route supervisors Walls and Earle accounted for only some 20 percent of new customers, it seems obvious that the Respondent depended primarily on its route salesmen for its maintenance as a competitive enterprise and expansion through the sales of new and additional products.

All of this is illustrated by the fact that Respondent started its business in 1946 with one route and now has eight regular routes, and that a substantial proportion of this increase in business is attributable to the sales efforts of its route salesmen. As further related in Respondent's brief, when Respondent acquired distribution of the Schweppes beverages, its predecessor distributor was selling some 2,000 cases a year, whereas in the first year of Respondent's distribution 20,000 cases were sold. Most of this increase it attributes, and I think is reasonably attributable, to new accounts obtained by its route salesmen. The same applies to its increase in 1961 of 100 new accounts for Squirt beverages, 40 new accounts for Dad's root beer, 70 new accounts for Handi Can, 50 new accounts for Pick's ginger beer, 20 new accounts for Mission Orange, and 20 new accounts for Mission Grape. Short of some showing by the General Counsel that this increase in accounts came about through the efforts of personnel other than route salesmen—and there is no such showing—it would seem to me that it is incontestable that route salesmen are not merely drivers and deliverymen but play an important and indispensable part in Respondent's sales and sales promotion operation. The commission on sales in addition to their regular salaries is obviously a sales incentive wage and would be meaningless if all the Respondent expected and hoped for from its route salesmen was the delivery and restocking of its products. It would be difficult for me to believe that its route salesmen generally were as insensitive to this commission, which would grow as their sales grew, as one would infer from the testimony of the General Counsel's route salesmen witnesses.

In summation, it is clear from points (a) through (h) above, that Respondent's route salesmen constitute a distinct and homogeneous group of employees and that their interests, in the language of the *Plaza Provision Company* case, are "diverse" from those of production and maintenance employees. In fact, about the only interests they have in common is that they are under a common management, though with distinct and separate supervision, and that they share certain fringe benefits. Their pay, their working conditions, their training and their experience as employees, are all "diverse" from those of other rank-and-file employees. Clearly, driver-salesmen, excluding all other employees, would constitute a unit appropriate for collective bargaining. This does not of itself exclude the possibility of the appropriateness of a unit which would include them along with other production employees, but is indicative of their homogeneity as a group. Nor would I find that their sales functions are merely incidental to their functions as drivers and deliverymen. Their sales functions constitute a required and essential part of their duties as employees. The only question that remains is which predominates, their duties as salesmen or their duties as drivers-deliverymen. The Board in its *Plaza Provision Company* case states inter alia, "There are also instances where the employees perform both functions and a determination as to which predominates will depend upon a close examination of all facts as to their duties and employment conditions." On this question I am somewhat at a loss for an answer, for I am convinced that both their functions as drivers-deliverymen and as salesmen are essential factors in their employment. Without sales there would be no deliveries, and without deliveries there would soon be no sales, but I shall not pursue the chicken-or-the-egg analogy further because it is obvious that in all cases sales preceded and took precedence over deliveries. I would say that neither "predominates" and both are essential and leave it at that, deciding the issue on the diversity of the interests of route salesmen in relation to other production and maintenance employees. There is no question in my mind on this latter point and accordingly I would exclude them from the appropriate unit, and will do so in my recommendations, mindful though I am that the Board, with the full transcript of proceedings before it in the *Plaza*

Provision Company case, may have intended a different application of its reasoning in that case.²

7. Conclusions on the refusal to bargain; the strike; refusal to reinstate

Aside from its contentions with respect to the inappropriateness of the alleged appropriate unit, and discrepancies between the unit in which it was requested to bargain and the unit in which it is alleged to have refused to bargain, the Respondent defends to the allegation of an unlawful refusal to bargain on the grounds that it had a good-faith doubt of the Union's majority, and, in failing to respond to the Union's bargaining demand, reasonably relied on the Union's petition for an election which was served on it simultaneously with the bargaining demand.

I reject the contention that the Respondent had a good-faith doubt of the Union's majority in the unit in which it asserted bargaining rights. The Union in its letter requesting recognition stated that it could prove its majority and requested a meeting with the Respondent. The Respondent never requested the Union to furnish the alleged proof of its majority, as it seems it would have, had it had any real doubts in the matter, and ignored the recognition request. Further, between the time it learned of organizational activities among its employees and the strike of August 9, it questioned its employees on their union interests and attitudes and made statements to them which have been found to constitute interference, restraint, and coercion. Under these circumstances the Respondent may not assert a good-faith doubt of the Union's majority as an acceptable defense to its refusal to bargain, nor may it rely on the filing of an election petition as an acceptable explanation of its refusal. In a recent decision, *Al Tatt, Incorporated*, 136 NLRB 167, in a situation where an employer had relied on the filing of a representation petition as justification for its failure to respond to a union's request for recognition, the Board stated that standing alone, the employer's failure to respond to the recognition request would not persuade it that the employer acted in bad faith, but there, as here, there were instances of interference, restraint, and coercion which belied the employer's claim of a good-faith doubt in the matter of the union's majority.

Further, assuming contrary to the above findings, that the Respondent initially did entertain a good-faith doubt of the Union's majority, such a doubt would hardly have survived the strike of August 9 engaged in by a clear majority of employees in the alleged appropriate unit. It has long been settled law that an employer is not relieved of his duty to recognize and bargain with a union because his employees have gone on strike.

The remaining issue with respect to the refusal to bargain is whether the Respondent was required to bargain in the unit in which the Union asserted bargaining rights, and pursuant to the findings made in subsection 6 above, the answer must be given in the negative. It is elementary that to ground a refusal to bargain, there must be a request or demand, there must be an appropriate unit, and the request or demand must assert and be able to prove majority representation in an appropriate unit. Obviously, there must also be a sufficient identity between the unit on which the demand is based, and the unit in which the Respondent is alleged to have refused to bargain, to enable one to say that the refusal applies to both units. I have found that the only serious discrepancy between the unit in which the Union requested bargaining, and the unit stated in the complaint, is the failure of the Union specifically to exclude temporary workers. I am doubtful that this discrepancy alone would be viewed by the Board as sufficient to justify the refusal to bargain, though I think the matter is one of some substance. But, if I have properly construed and applied the Board's decision in the *Plaza Provision Company* case, the inclusion of driver-salesmen in the same unit with truckdrivers and other maintenance and production employees, in the units asserted both by the Union and the General Counsel, is fatal to the allegation of a refusal to bargain and, accordingly, I must recommend dismissal of the 8(a)(5) allegations of the complaint.

I have found that the strike of August 9 was caused by the Respondent's refusal to recognize and bargain with the Union. There may have been contributing factors but I am convinced that except for the Respondent's refusal there would have occurred no strike. Nor are there any grounds for believing that the strike was prolonged by new or additional unfair labor practices. Inasmuch as the Respondent was under no duty to bargain with the Union in the unit in which the Union asserted bargaining rights, the strike was not caused by an unfair labor practice

² I would hazard the opinion that by "predominates" the Board means that the one function predominates to a degree that the other function is rendered nonessential or merely incidental, and it is on that understanding of the Board's language that I premise my conclusions in the matter

but, on the contrary, was economic in character. The strike being economic, under established law it was permissible for the Respondent to make permanent replacements of its striking employees, and I find that such replacements were made in the cases of all the strikers who applied for reinstatement. Under these circumstances, the Respondent's refusal to reinstate the striking employees found herein to have made unconditional application for reinstatement, was not violative of the Act, and I must recommend dismissal of this allegation of the complaint.³

In conclusion: I have intentionally made my findings herein on a broader base than was required by my ultimate conclusions, to avoid the consumption of additional time and expense which would be incurred in a remand were the Board to disagree with my interpretation and application of its *Plaza Provision Company* decision.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Respondent set forth in section III, above, occurring in connection with its business operations described in section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

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

CONCLUSIONS OF LAW

1. Columbine Beverage Company is an employer within the meaning of Section 2(2) of the Act and is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 435, is a labor organization within the meaning of Section 2(5) of the Act.

3. By interrogating its employees concerning their union activities, attitudes, and intentions with respect to union activities; by threatening them with reprisals if they engaged in a strike or other protected concerted activities; and by promising rewards to those who refrained from strike activities, the Respondent interfered with, restrained, and coerced its employees in the exercise of rights guaranteed by Section 7 of the Act, thereby engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

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

5. The Respondent has not engaged in unfair labor practices violative of Section 8(a)(3) and (5) of the Act, as alleged in the complaint.

[Recommendations omitted from publication.]

³ I do not view the Respondent's letter to its striking employees, informing them that unless they returned to their jobs they would be replaced, as discharges, but as a correct statement of the law with respect to the status of economic strikers.

Bartenders and Hotel and Restaurant Employees Union, Local 58 of the Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO and Fowler Hotel, Inc. Case No. 25-CP-2. September 28, 1962

DECISION AND ORDER

On March 31, 1960, Trial Examiner George A. Downing issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent Union had engaged in the unfair labor practices alleged in the complaint and recommending that it cease and desist therefrom

138 NLRB No. 114.