

Harold W. Koehler, Harold C. Koehler and Jerry Koehler, a partnership d/b/a Koehler's Wholesale Restaurant Supply and Local 135, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and Koehler's Employees Union, Party to the Contract. *Case No. 25-CA-1489. November 15, 1962*

DECISION AND ORDER

On May 11, 1962, Trial Examiner Frederick U. Reel issued his Intermediate Report in the above-entitled proceeding, finding that the Respondents had engaged in and are engaging in certain unfair labor practices and recommending that they cease and desist therefrom and take certain affirmative action, as set forth in the attached Intermediate Report. Thereafter, the Respondents filed exceptions to the Intermediate Report and a supporting brief.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 Rodgers and Fanning].

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

For the reasons fully set forth in the Intermediate Report, we agree with the Trial Examiner that Respondents violated Section 8(a) (1), (2), (3), and (5) of the Act.

Our dissenting colleague would not find a violation of Section 8(a) (5), for he asserts that the authorization cards upon which the Union based its claim to majority status were not reliable for this purpose. For the reasons stated by the Trial Examiner, and for the reasons stated herein, we are unable to find record support for this assertion.

For sometime prior to the employees' attempt to obtain representation by the Union, Respondents had unlawfully dominated, interfered with, and contributed financial and other assistance to the Koehler Employees Union, herein called KEU. By the end of September 1961, the activities of KEU lay dormant. About this time, Respondents' truckdrivers and warehousemen became dissatisfied with their wages and other conditions of employment. This prompted some of the drivers, led by Simons and Williams, to seek outside help.

¹ Respondents' request for oral argument is denied as the record, including the brief and exceptions, adequately presents the issues and positions of the parties.

This was not the first occasion on which Simons had sought to enlist the aid of a bona fide labor organization to improve the employees' lot. In July 1961, he led an unsuccessful attempt to obtain representation by another union. At that time, he was warned by Respondents' president that "I hear you're trying to start some trouble If you're not satisfied with your job, I'll see that you get another." This warning was related by Simons to other employees.

It is against this backdrop that Simons and Williams obtained authorization cards from the Union. These cards bore the caption "Application For Membership and Authorization For Representation" by the Union, and went on to recite that

Of my own free will, I hereby request membership in the above named union, and authorize said union, its agents or representatives to act for me as a collective bargaining agent in all matters pertaining to rates of pay, wages, hours of employment, and other conditions and terms of employment. . . .

Simons and Williams then set out to obtain signed cards. Twenty-two of the thirty-eight drivers and warehousemen executed the cards.

Simons testified that, because of Respondents' threats concerning his abortive attempt to organize the employees in July, he telephoned several of the men and invited them to his home. He handed them the cards and explained that "it was for a Teamsters Union for us, we were going to get together and try to form a pact where we could all be together in one unit." Sensing that some of the men were "afraid of losing their jobs" because of Respondents' opposition to the earlier organizational attempt, Simons assured them that "if nobody opens their mouth we'll get all the cards signed and we hand them over to the Union then we're done with them, and if everybody sticks together we have nothing to worry about we can get just about what we want," having reference to "pay raises and other things of that kind." Simons further told them that they could get a secret election before the Board without Respondents knowing who had signed the cards or who had voted for the Union.

At the hearing, Williams was queried as to what he told the employees when he solicited their signatures. He testified that he "wanted to have so many names to get the Union in there, and then after that there would be a vote sometime later to see if the Teamsters would get in there." When asked if this was the only purpose held out in obtaining signatures, Williams replied in the negative and testified further that "I told them (the employees) Koehlers wouldn't do any bargaining with us, so we haven't got any Blue-Cross and no insurance or no retirement plan. So if they can't do that for us we'll just vote and get the Teamsters in here where they got some benefits," and that he gave the employees to understand "that by signing these cards they indicated they wanted a Union in there"

other than the KEU. Finally, Williams specifically testified that he obtained the signatures with the understanding that the employees wanted the Union to bargain for them.

This is not the type of case, as our dissenting colleague apparently believes, where employees have been beguiled by a union into signing authorization cards with the assurance that the only purpose in doing so was to obtain an election.² Respondents had insisted that labor relations at its plant be conducted under Respondents' thumb, without regard to its employees' rights under the Act. When the dominated KEU failed to obtain the desired changes in wages and working conditions and became moribund, the employees decided to turn elsewhere for help. Employees Simons and Williams led the movement. Simons and Williams expressed their belief that selection of the Union as their bargaining agent would enable the employees to strike a better bargain with Respondents. Knowing that the employees feared Respondents' reprisals for moving away from the dominated KEU, Simons and Williams assured them that they would be used to obtain a secret election in which the Respondents would be unaware who had signed the cards or who had voted for the Union.

On the record before us, we fail to see how it can be said that the cards which the Union obtained lacked reliability in establishing the Union's claim to representative status. Contrary to our dissenting colleague, we find that Respondents violated Section 8(a) (5) when it refused to recognize and bargain with the Union.

ORDER

The Board adopts as its Order the Recommended Order of the Trial Examiner.³

MEMBER RODGERS, dissenting in part:

I disagree with my colleagues' holding that Respondents violated Section 8(a) (5) of the Act.

To establish that the Respondents had unlawfully refused to bargain with the Teamsters, it was essential that the General Counsel prove that the Teamsters represented a majority of Respondents' em-

² Cf. *Morris & Associates, Inc.*, 138 NLRB 1160; *Englewood Lumber Company*, 130 NLRB 394.

³ The notice appended to the Intermediate Report is hereby amended by deleting the phrase "This notice must remain posted for 60 days from the date hereof," and substituting therefor the phrase "This notice must remain posted for 60 consecutive days from the date of posting."

The notice is further amended by substituting the telephone number of the Twenty-fifth Regional Office to read "Melrose 3-8921."

The Recommended Order and notice is also amended by adding: "Interest at the rate of 6 percent per annum shall be added to the reimbursed dues and Blue Cross-Blue Shield premiums, to be computed in the manner set forth in *Isis Plumbing and Heating Co.*, 138 NLRB 716. For the reasons set forth in the dissent in that case, Member Rodgers would not award interest on dues and premiums and does not approve the award here."

ployees. I do not believe that the cards offered by the General Counsel to show such majority status are reliable for this purpose.

The two leaders in the Teamsters' organizational drive were employees Robert Simons and Jerry Williams, Simons being the more active of the two in obtaining employee signatures on the Teamsters' cards.⁴ The testimony of both Simons and Williams makes it clear that in inducing employees to sign Teamsters cards, they led them to believe that the purpose of the cards was to obtain an election—not to authorize the Teamsters to bargain for them.⁵ This Simons testified he told the employees that by signing the cards they were not selecting the Teamsters as their bargaining agent, that they would have a chance to vote at a secret election, and that they could vote for the Teamsters Union or against it. It was explained to the employees that the cards were needed in order to get the opportunity to vote. Williams similarly testified that all of the employees knew that the cards were "not to get a Union in there, it was just so there would be a vote to see if a Union would get in there." The testimony of Simons and Williams was corroborated by that of employees DuBecky and Garrett, both of whom signed after being told the cards were just for the purpose of obtaining an election. It may be noted here that Garrett testified that he did not read his card before signing it.

In addition to the representations made by those soliciting for the Teamsters as to the purpose of the cards, there is other objective evidence in the record indicating that the wording on the cards did not necessarily reflect the real desire of the signers. While some employees undoubtedly wished to be represented by the Teamsters, others preferred the Koehler's Employees Union. As Williams testified, some "would rather be Teamsters than a company union, and the other half would rather be Koehler's Union than the Teamsters. One is as bad as the other." Concededly, the KEU had been an ineffective representative because the Koehlers would not bargain with it, but the openly expressed hope of employees was that the Respondents would be frightened by the possibility of having to bargain with the Teamsters into bargaining with the KEU and agreeing to certain em-

⁴ While, as the majority notes, the Respondents may have been opposed to the Teamsters and on an earlier occasion had warned employee Simons about union activities, I do not consider these facts material to the issue of whether the instant cards can be relied upon to show majority status.

⁵ In their recitation of events, I think my colleagues have attached too much weight to certain statements made by Simons and Williams and have failed to properly consider those statements in the context of their whole testimony. To properly judge the reliability of the cards, we should consider everything these card solicitors told the employees to induce them to sign, and not just excerpts from what they said. As indicated above, the testimony of Simons and Williams taken in its entirety, convinces me that they induced employees to sign on the representation that the purpose of the cards was to obtain an election. Moreover, even if I were to agree that the statements relied upon by the majority have some significance, in the light of other testimony of Simons and Williams there is, at the very best, serious doubt as to what induced the employees to sign, and this doubt destroys the reliability of the cards. In the face of this doubt, I cannot find that the General Counsel has sustained the burden of proof imposed on him.

ployee demands. Simons admitted that some of the employees told him that "they didn't wish the Teamsters, they just wanted to get the KEU going again and get a strong contract."

Under all the circumstances, I do not think it can reasonably be said that the employees, merely by signing the Teamsters cards, clearly manifested an intention to designate the Teamsters as their bargaining representative. Accordingly, lacking adequate proof of this Union's majority status, I would not find that Respondents violated Section 8(a) (5) in refusing to bargain with this Union.⁶

⁶ See *Englewood Lumber Company*, 130 NLRB 394.

INTERMEDIATE REPORT AND RECOMMENDED ORDER

STATEMENT OF THE CASE

This matter was heard before Trial Examiner Frederick U. Reel in Indianapolis, Indiana, on March 13 through 16, 1962, pursuant to a complaint issued by the General Counsel on January 19, 1962, based on a charge filed November 24, 1961, by Local 135, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called the Teamsters. At issue is whether Respondents (hereinafter sometimes called Koehler) interfered with, restrained, and coerced their employes in the exercise of rights guaranteed by the Act, dominated or interfered with or contributed financial or other support to Koehler's Employees Union (hereinafter called KEU), discriminated in favor of KEU members, and unlawfully refused to bargain with the Teamsters. At the conclusion of the hearing the Teamsters presented oral argument, and thereafter briefs were received from General Counsel and Respondents, which have been duly considered. Upon the entire record,¹ and upon my observation of the demeanor of the witnesses, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENTS; THE LABOR ORGANIZATIONS INVOLVED

The pleadings establish and I find that Respondents are engaged in Indianapolis in the wholesale sale and distribution of food and other groceries, that in the year preceding the issuance of the complaint Respondents handled at their warehouse goods and materials valued in excess of \$100,000 of which goods and materials valued in excess of \$50,000 were transported to the warehouse directly from points outside the State of Indiana, and that Respondents are engaged in commerce within the meaning of the Act. The pleadings further establish and I find that the Teamsters and the KEU are labor organizations within the meaning of the Act.

II. THE UNFAIR LABOR PRACTICES

A. *The state of employee organization at the end of September 1961*

For some time prior to the events in this case (which centers around the months of October and November 1961) Koehler's employees had been represented, at least nominally, by KEU. This organization came into existence early in 1960, at which time it executed a 3-year contract with Respondents. The circumstances surrounding the formation of KEU, the drafting of its constitution, and the execution of the contract are of interest only as background to this proceeding, and cannot be found as unfair labor practices under Section 10(b) of the Act as construed in *Local Lodge 1424 International Association of Machinists, et al. (Bryan Manufacturing Co.) v. N.L.R.B.*, 362 U.S. 411. By the end of September 1961 the KEU had become moribund, but in October and November it enjoyed a revival under circumstances detailed later in this report.

Membership in KEU was available to all Koehler's employees, including supervisory officials such as Office Manager Henry Rust, who was in full charge of

¹ Including a stipulation, which is herewith accepted and made a part of the record, and which supplies deficiencies in the transcript occasioned by the failure of the recording machine.

Respondents' office personnel and handled payroll, personnel records, and the like, and who was a "non-voting member" of KEU. From January 1961 until September 1961 the president of KEU was Harold W. Koehler's son-in-law, Charles Shearer, an assistant superintendent in the meat department, who had authority to hire and fire and was a supervisor within the meaning of the Act.² Shearer was succeeded as KEU president by Jerry Williams (sometimes known as Pete), a rank-and-file employee, who played a leading role in the events of October-November 1961 described below. The KEU officers were elected by a committee composed of one elected representative from each of the several divisions or departments of Respondents' business (i.e., over-the-road drivers, in-town drivers, meat department, produce department, warehouse department, and office). At the end of September 1961 two of these committee posts were vacant by virtue of resignation or transfer.

KEU dues may be fairly characterized as nominal, amounting to 10 cents per month. Dues were deducted annually in advance; that is, the Company early in the calendar year deducted \$1.20 from the wages of each KEU member. These checkoffs were made on the basis of a statement by the KEU president to the Respondents' office manager; no written checkoff authorizations existed. Employees hired after the pay period in which the deductions were made enjoyed a "free ride" (worth 10 cents per month) for the balance of the year. The last dues deductions for KEU prior to the hearing were made in March 1961. Apparently because of an oversight, the money then withheld from wages was not turned over to KEU until November 1, 1961, in the course of the events described below.

In addition to the nominal dues, KEU enjoyed other sources of income. Most of the Koehler employees were participants in a mutual benefit fund to which each employee member contributed \$1 per week and to which the Company contributed \$2.50 per member per week. Of the latter sum, 25 cents was turned over to the KEU.³ Roughly speaking, therefore, KEU received something over \$1 per month per employee directly from Respondents. KEU also received the proceeds from the "coke" machine located in the warehouse. In addition, KEU enjoyed the free use of Respondents' office facilities, and also utilized the legal services of Respondents' counsel who apparently furnished his services to KEU as part of his duties under a retainer from Respondents.

With further reference to the benefit fund, this was created in 1957 and administered by "Koehler's Employees' Committee," but its operations were assumed by KEU when that organization was created in 1960. The agreement creating the fund, and the bylaws adopted at that time, provided in effect that an employee would forfeit his right to share in the employer's contribution for various reasons, including walking out or quitting or failing to report for work on account of any grievance without giving his department head or the Respondents a week's time in which to correct the grievance. The 1960 contract with KEU contained a no-strike clause and machinery for arbitrating grievances.

B. *The employees commence organizational efforts, and Respondents thereupon revive KEU*

In late September and early October 1961, Respondents' truckdrivers and warehousemen became dissatisfied with their working conditions, primarily with their wages, with the drivers' supervisor, one Maurice Hey, and with their employer's failure to pay their Blue Cross health insurance premiums. Led primarily by one Robert Simons,⁴ 22 employees (a majority of those in the bargaining unit eventually found appropriate; see *infra*) signed cards on October 2 and 3, which recited that the signer applied for membership in the Teamsters and designated that organization as his bargaining representative.⁵ Simons advised the employees that after

² Shearer left Koehler's employ in September 1961.

³ The contract between Respondents and KEU provided that participation in the benefit plan was limited to members of KEU. I credit the testimony of Respondents' Office Manager Henry Rust, an officer of the benefit plan, that the practice was to the contrary.

⁴ Simons had also led an abortive attempt to organize in July 1961. On that occasion when Harold Koehler found out about it, he told Simons, "I hear you're trying to start some trouble . . . If you're not satisfied with your job, I'll see that you get another one."

⁵ Actually only 21 signed but the 22d, Jon Williams, authorized his brother Jerry to sign Jon's name to a card. One or two of the cards were misdated, but the correct dates were established by competent testimony.

one-third of the men had signed, the cards would be handed to the Teamsters, who in turn would file them with the Regional Office of the National Labor Relations Board in support of a petition for an election.

As over half the drivers and warehousemen had signed Teamster cards, Harry Berns, local Teamster representative, telephoned Respondents on October 5 to announce that Teamsters represented a majority and requested recognition. Respondents referred Berns to their attorney, John Raikos. When Berns called Raikos on October 5 and repeated the Teamsters' claim and request, Raikos expressed disbelief that Teamsters had a majority, averring that he believed the majority supported KEU. The Teamsters that same day mailed a formal request for recognition to Respondents, and filed a representation petition with the Regional Office of the Board.

Respondents called a meeting of the KEU committee for the following Monday, October 9. As two vacancies existed on the committee they were filled by appointment, KEU President Williams appointing Paul Tom Fisher and Robert Simons when their names were suggested by Respondents' officials. At this meeting Harold W. Koehler (who with his two sons, Jerry and Harold C. or Charley, constitute the Respondent partnership) told the KEU committeemen that someone was "putting a knife in his back," that he wanted to find out who was on his team and who was not, that he did not want anyone around who was not on his team, that he would try to find such people other employment, and he did not think he would ever sign a contract with the Teamsters.

As Attorney Raikos had suggested that Respondents obtain proof that the men supported KEU rather than Teamsters, Charley Koehler prepared six copies of a statement stating that the "undersigned" authorized their KEU committeeman to be their exclusive bargaining representative, and gave one to each committeeman, instructing each to ask the men in his department to sign the sheet. Simons and Williams ascertained from Berns that the Teamsters had no objection to the men's signing the KEU sheet and that Berns advised the men to sign to avoid being "put on the spot." Thereupon, the KEU committeemen circulated their sheets, assuring the employees that it "didn't mean anything." All the employees signed.

During working hours the next day, Respondents sent KEU President Williams to Attorney Raikos' office. While there, Williams learned from Raikos that the sheets Charley Koehler had prepared would not do, and that individual cards should be used. Raikos drafted a sample card, which Williams took back with him to Respondents' office. There Williams told Charles Koehler that Raikos wanted individual cards rather than the long sheets, and the cards Raikos desired were thereupon run off on the Company's mimeograph machine and handed to Williams. He thereupon gave a supply of cards to each of the KEU committeemen to obtain the signatures of the employees. The card, roughly comparable to the Teamsters cards, recited that the signer wanted the KEU to represent him. On October 12 and 13, 46 employees, including almost all who had signed Teamsters cards, signed the KEU cards. The KEU committeemen returned the signed cards to Williams who in turn delivered them to Respondents' counsel. Also on October 12, the Koehlers, meeting with the KEU committeemen, decided to give the truckdrivers a bonus for being punctual and neat.

C. The election is scheduled for November 28

On October 24, the Board's Regional Office conducted a hearing on the Teamsters' petition, primarily to determine the composition of the bargaining unit. At this hearing KEU intervened in the proceeding, and was represented by its president, Jerry Williams. Attorney Raikos represented Respondent at that hearing, and it was pointed out on the record that, at least early in the hearing, "at each point when a question is asked of Mr. Williams, Mr. Raikos consults and advises him as to his answers."⁶ The Regional Director thereafter set November 28, 1961, as the date for the election in which the drivers, warehousemen, and dockmen were to decide whether they wished to be represented by the Teamsters or by KEU or by no union.

⁶ The quotation is from page 7 of the transcript of the hearing in Case No 25-RC-2097. The formal papers concerning that case are in evidence as General Counsel's Exhibit No. 2. As I advised the parties at the hearing in the instant case, I take official notice of the entire record in the representation case *Paramount Cap Manufacturing Company v. N.L.R.B.*, 260 F. 2d 109, 113-114 (CA 8).

D. Respondents' campaign against the Teamsters; the "secret" contract of November 21

During the month preceding the day set for the election, Harold W. Koehler frequently stated to employees that he would sell the business rather than deal with the Teamsters. On one occasion he told Jerry Williams that Respondents were having a "For Sale" sign made, that Williams and Simons were "to put that sign up out in front" and "to think of Jesus Christ and the Last Supper when you put 70 people out of work by putting up that sign." On several occasions in mid-November Charley Koehler asked individual employees whether they had signed Teamster cards, which employees were leading the Teamster drive, whether they supported KEU, and what complaints they had. During the week commencing Monday, November 20, Charley Koehler visited the homes of 20 to 30 employees and told them that his father and brother were preparing to close the business if the Teamsters won the election.

On Monday night, November 20, Charley Koehler asked Jerry Williams, president of KEU but a leader in the Teamsters drive, to come to the office to discuss what concessions would satisfy the men. After Williams had indicated the wage increases each man should receive, Koehler asked him if granting these would swing the employees back to supporting KEU. Williams thereupon telephoned from the office to Simons' house, where he knew Simons, Fisher, and another employee named Tuttle, were gathered. He arranged to discuss the matter with them that evening, and then told Charley Koehler that he and the others would come to Koehler's house later that night.

Williams proceeded to Simons' house, laid Charley Koehler's proposals before his three associates,⁷ and then went with them to Koehler's house for further discussions. Koehler told them that he knew he was breaking the law by making them promises, but he was anxious to save the business which would be sold if the Teamsters came in. He agreed to sign a new contract with KEU which would meet the grievances of the men by granting substantial wage increases, removing Hey as supervisor over the drivers, providing that; Respondents would assume Blue Cross payments for KEU members, and that KEU would receive the proceeds of the "coke," cigarette, and candy machines. The employee leaders, for their part, agreed to accept these terms, and further agreed among themselves and after discussion with Charley Koehler, that in the forthcoming election two would vote for the KEU and two for the Teamsters. At the request of Fisher and Williams, Respondents dispatched them on an out-of-State assignment so they would have a valid excuse for not accompanying Teamster representatives on last-minute campaign visits to the employees' homes.

The next day, November 21, the new contract was formally drafted by Respondents' counsel, Raikos, and was executed by the Respondents and by the members of the KEU committee. It was agreed that the matter would be kept secret, and that if the Teamsters won the election the new contract would be destroyed. Notwithstanding this agreement, the employees and the Teamsters quickly learned that such a contract had been signed although they were not aware of its precise terms.

The Teamsters, upon learning of the contract, filed on November 24, the day after Thanksgiving, the unfair labor practice charge which initiated this case; and the Board's Regional Director thereupon postponed the election indefinitely, pending disposition of the charge.⁸ On November 25, Harold W. Koehler at a meeting of the employees announced that the new contract with KEU would become effective at once, and that anyone who could not go "all the way" with Koehler's and KEU should leave the Respondents' employ.

E. Concluding findings

The acts of interference, restraint, and coercion violative of Section 8(a)(1) established by the foregoing findings which rest on admitted or substantially un-denied testimony, are too blatant to require extended discussion. To name only the most egregious, we have Respondents' threatening to close the plant if the Teamsters became the bargaining representative, preparing statements of loyalty to KEU which they circulated among the employees for the express purpose of ferreting out Teamster supporters, granting benefits to the employees for the express purpose of influencing their votes in the election, and concluding a contract with

⁷ Tuttle was not a member of the KEU committee, Simons and Fisher were committee-men, and Williams was president.

⁸ Upon issuing the complaint in this case the Regional Director formally dismissed the representation petition.

KEU on the eve of an election which was to determine whether KEU was the bargaining representative. Compounding these violations is Respondents' knowledge at the time they committed these acts that they were violating the law in so doing. This element of willfulness, coupled with the extent and nature of the violations, leads me to believe that a broad cease-and-desist order is necessary as "danger of [further violations] in the future is to be anticipated from the course of [Respondent's] conduct in the past." *N.L.R.B. v. Express Publishing Company*, 312 U.S. 426, 437.

Equally plain is Respondents' violation of Section 8(a)(2) which forbids employer domination of a labor organization or employer interference with its administration or employer contribution of financial or other support to it. The sole issue of substance on this aspect of the case is whether Respondents *dominated* the KEU (thus requiring me to recommend an order that Respondents *disestablish* that union) or merely unlawfully *assisted* KEU (thus requiring me to recommend basically a "withhold recognition until certified" order). Upon consideration of the entire record insofar as it concerns events occurring after May 24, 1961 (6 months before the filing and service of the charge), I find and conclude that Respondents dominated the KEU and that a disestablishment order should issue. In so finding I rely primarily on the following considerations:

Respondents' financial support to KEU amounted to over 90 percent of KEU's income. Dues checkoffs were made without any employee authorization therefor. A supervisory employee was president of KEU during a substantial part of this period. KEU had become moribund, and Respondents were instrumental in reviving it when they learned of union activity among their employees. Respondents suggested the names of the two employees to be selected for the filling of vacancies on the KEU steering committee. Respondents permitted KEU officers and committeemen to transact KEU business on company time. Respondents could effectively remove any member from the KEU committee by simply transferring him to a department other than the one of which he was the representative. Respondents made it plain that being on their "team" and "going all the way" meant supporting the KEU. Respondents' counsel rendered legal services to KEU under his retainer from Respondents. Respondents also executed a contract with KEU at a time when that union's status as bargaining representative was under challenge in an imminent election.⁹

The difference between "domination" and mere "support" is one of degree. While anyone of the factors enumerated in the foregoing paragraph might not of itself establish "domination," the entire pattern in my view surpasses mere support and rises to the level of domination.

General Counsel argues in his brief that the original contract between Respondents and KEU unlawfully required employees to "pay support money to the KEU without providing for the statutory 30-day grace period." I reject this contention, for as I construe the contract, membership in KEU was not a condition of employment, and the record shows that dues were deducted only for members, and only once each year. However, the agreement signed in November 1961 provided that the Company pay the Blue Cross-Blue Shield premiums for hospital and medical insurance for KEU members. Such payments on behalf of KEU members constituted unlawful discrimination encouraging membership in KEU in violation of Section 8(a)(3) and (1) of the Act. *The Radio Officers' Union et al. (A. H. Bull Steamship Company) v. N.L.R.B.*, 347 U.S. 17, 34-38, 46-52.

With respect to the alleged refusal to bargain, the evidence establishes that on October 5, 1961, when the Teamsters requested recognition and Respondents refused, the Teamsters held designation cards signed or authorized within the past 72 hours by 22 of the 38 employees in the bargaining unit.¹⁰ Even though at that time the

⁹ The record also indicates that, well over 6 months before the filing and service of the charge, Respondents had in effect formed KEU, for its constitution and bylaws were drafted by Respondents' counsel, leading supervisory officials constituted its original organizing committee, and Harold W. Koehler occasionally participated in its deliberations as "committee counselor" or "committee advisor." I do not find it necessary to rely on these facts to support the finding of domination. Cf. *Lundy Manufacturing Corporation*, 136 NLRB 1230.

¹⁰ The bargaining unit, consisting of all Respondents' employees, exclusive of office clericals, the janitor, salesmen, and regular statutory exclusions, was found by the Regional Director in Case No 25-RC-2097, and is admittedly an appropriate unit under the pleadings before me. The number of employees in the unit is determined by General Counsel's Exhibit No 13, as explained by the testimony of Respondents' office manager. The exhibit lists 13 warehouse employees, 7 in the produce department, 6 in meat, and 18 drivers, or a total of 44. Subtracted therefrom for purposes of determining the size

Teamsters represented a majority of the employees, Respondents could have lawfully declined to recognize them and could have lawfully insisted on the Teamsters establishing their majority in a Board election, *providing* Respondents were motivated by a good-faith doubt as to the Teamsters' majority status. But settled law establishes that where, as here, an employer after refusing a demand for recognition and insisting on an election commits unfair labor practices which prevent the holding of a fair election, he cannot be heard to assert that he was acting in good faith when he withheld recognition. In such a case, having frustrated the statutory means for determining majority status, the employer must abide by other methods of proof, such as a showing of authorization cards. A number of the cases attesting this settled proposition are cited in *N.L.R.B. v. J. C. Hamilton, et al., d/b/a The J. C. Hamilton Company*, 220 F. 2d 492, 494 (C.A. 10). It is equally well settled that the question of a union's majority under these circumstances must be determined as of the date of its bargaining request, for any subsequent loss of majority would be attributable to the employer's unfair labor practices. See, e.g., *Franks Bros. Company v. N.L.R.B.*, 321 U.S. 702, 704, 705; *N.L.R.B. v. Stow Manufacturing Co.*, 217 F. 2d 900, 905 (C.A. 2), cert. denied 348 U.S. 964. Compare the testimony of Fisher that he "was swayed" from supporting the Teamsters by the benefits in the November 21 contract, and that in his view Teamsters commanded a majority of the employees until Respondents "sway[ed] them over" by threatening to shut the plant down if the Teamsters won the election. See also the testimony of Simons that the employee leaders "double-crossed" the Teamsters after the granting of the benefits in question.

The ultimate question on this aspect of the case is whether the record establishes that the Teamsters in fact represented a majority of the employees at the time of the request to bargain on October 5. As stated, Teamsters held 22 cards out of a unit of 38. Under the circumstances, as shown above, a card showing of majority is sufficient; Respondents prevented better methods of proof. Two employees, Garrett and DuBecky, testified that in signing cards they intended only to pave the way to an election, and did not intend to make a binding choice. Simons, when he solicited employee signatures on the Teamster cards, told the employees that although they signed these cards they would have an opportunity to cast a secret ballot for or against the Teamsters (a prediction which failed of realization solely because of Respondents' unfair labor practices). Williams, when he solicited employee signatures on the Teamster cards, indicated that the obtaining of an election was only one of the purposes of the card. The cards on their face recite that the signer of his own free will applies for membership in the Teamsters and designates that union as his bargaining representative. Moreover, the Board's rule is that "an employee's thoughts (or afterthoughts) as to why he signed a union card and what he thought that card meant, cannot negative the overt action of having signed a card designating the union as bargaining agent." *Joy Silk Mills, Inc. v. N.L.R.B.*, 185 F. 2d 732, 743 (C.A.D.C.), cert. denied 341 U.S. 914, quoted in *Dan River Mills, Incorporated, Alabama Division*, 121 NLRB 645, 648, 665, footnote 10.¹¹ See also *N.L.R.B. v. Gorbea, Perez & Morell, S. en C.*, 300 F. 2d 886 (C.A. 1); *N.L.R.B. v. Sunshine Mining Co.*, 110 F. 2d 780, 790 (C.A. 9); *N.L.R.B. v. Geigy Company, Inc.*, 211 F. 2d 553, 556 (C.A. 9); cf. *N.L.R.B. v. Stow Manufacturing Co.*, 217 F. 2d 900, 902 (C.A. 2), cert. denied 348 U.S. 964.

Respondent relies on *Englewood Lumber Company*, 130 NLRB 394, where a Board panel by divided vote declined to find a majority based on cards obtained by a representation that they would be used solely to obtain an election. The extent to which that 2 to 1 decision represents present law may be questioned in the light of the later 4 to 0 decision in *Gorbea, Perez & Morell, S. en C.*, 133 NLRB 362, which (unlike *Englewood*) has received express judicial approval. In any event, I find *Englewood* inapposite here (cf. footnote 2 of the *Englewood* decision, and see the cases cited by the dissent at footnote 6 in that case). In the instant case the record admits of little doubt that the employees were following the leadership of Simons, Williams, and Fisher, and that these leaders were supporting the Teamsters and would have swung the election to the Teamsters but for the unlawful conduct of Respondents in executing a new contract with KEU meeting all the employees' demands

of the unit on October 5 are three supervisors (Hey, Mindack, and Shinkle), two employees (Hasty and Murphy) who were not employed until after the bargaining request on October 5, and one (James Henderson) who had left Respondents' employ on September 30. None of the six named individuals signed Teamsters' cards

¹¹ The bargaining order in *Dan River* was set aside on grounds not applicable here (274 F. 2d 381 (C.A. 5)).

It should also be noted that Simons, while circulating Teamsters cards, told some of the men that "all the drivers had signed" although at the time he so stated he had spoken to approximately one-half to two-thirds of the drivers, and had obtained cards from all to whom he had spoken. There is no suggestion in the record that Simons' overstatement was a critical factor in his obtaining any cards, with the possible exception of John Garrett's. Garrett testified that he intended to follow the leadership of Simons and the other KEU committeemen and also that he intended to "go along with the majority" on seeking an election. At the time Garrett signed, he was the seventh truckdriver to do so; Simons, Fisher, Tuttle, Robertson, Hockersmith, and Whitsit had preceded him. Even if his card be rejected, Teamsters held 21 out of 38, a clear majority, and even if DuBecky's card is also rejected the majority would be unaffected. Moreover, under Board decisions, Simons' overstatement is not a basis for rejecting the cards. See *E. H. Sargent and Co., a Corporation*, 99 NLRB 1318; *Harry Epstein, et al., d/b/a Top Mode Manufacturing Co.*, 97 NLRB 1273, 1276, enfd. 203 F. 2d 482 (C.A. 3), cert. denied 347 U.S. 912.

In short, under the authorities cited above, I find that the Teamsters held valid authorizations from a majority of the employees in the unit on October 5, that subsequent defections were attributable to Respondents' unfair labor practices, and that a bargaining order should issue in favor of the Teamsters. In this connection it is perhaps fair to comment that from the testimony and from my observation of the witnesses I would agree with the analysis of Respondents' counsel, who steadfastly maintained that the majority of the men would follow their leaders in supporting either the Teamsters or KEU, and that their leaders included Williams, Simons, and Fisher—the KEU president and two of the KEU committeemen. But the record leaves no room for doubt that but for Respondents' unfair labor practices (particularly, the threat to close the plants and the granting of concessions in a KEU contract), the leaders in question would have continued to spearhead the Teamsters' drive, and hence—under Respondents' counsel's own analysis—but for the unfair labor practices, the Teamsters would have demonstrated their majority in the election.

General Counsel urges that the provisions of the benefit fund are invalid insofar as they condition participation in the fund on an employee's surrendering for 1 week his right to strike over a grievance. In essence, the "fund" provided for a wage increase; i.e., the employer paid a sum into the fund for each employee each week, and the employee received the proceeds semiannually. Manifestly an employer cannot lawfully condition a wage increase on an individual's surrendering any of his Section 7 rights. However, the benefit fund in general, and that provision in particular, were merged into the KEU contract in 1960. If that contract were valid, the violation with respect to the benefit fund would have been cured at that point, for the contract contained a no-strike clause. Inasmuch as KEU was dominated (or, at the very least, unlawfully supported) by Respondents, however, the contract must be set aside. Assuming that the benefit fund continues (and, as a condition of employment, it must continue until changed after bargaining with the Teamsters), the provision limiting the right to strike must be viewed as invalid unless and until it is incorporated in a valid collective-bargaining agreement.

IV. THE REMEDY

Respondents' violations of the Act were not only widespread and far reaching but, at least in some instances, were committed in open and admitted defiance of the law. Under these circumstances the commission of future violations may reasonably be anticipated, and I shall therefore recommend a broad cease-and-desist order. Affirmatively, I shall order Respondents to bargain with the Teamsters upon request, and to withdraw recognition from and disestablish KEU. Nothing in the order, however, should be construed as requiring Respondents to vary lawful existing terms and conditions of employment unless and until new terms and conditions are agreed upon in future lawful bargaining negotiations.

In view of my finding of domination, and, indeed, even if Respondents had merely unlawfully supported KEU, an order of dues reimbursement would be appropriate. *Virginia Electric and Power Company v. N.L.R.B.*, 319 U.S. 533, 540; *N.L.R.B. v. Local 294, International Brotherhood of Teamsters, et al. (Grand Union Co.)*, 279 F. 2d 83, 87-88 (C.A. 2), and cases there cited; cf. *Local 60, United Brotherhood of Carpenters, et al. (Mechanical Handling Systems) v. N.L.R.B.*, 365 U.S. 651. The last annual dues deductions, however, were made in March 1961, over 6 months before the filing and service of the charge. I shall therefore

recommend reimbursement of any dues deducted or otherwise paid to KEU within the limitations period, a provision which will have application only in the event that Respondents make future deductions in favor of KEU, or the employees continue to pay dues to KEU, during the pendency of this litigation.

CONCLUSIONS OF LAW

1. Respondents are employers engaged in activities affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Teamsters and KEU are labor organizations within the meaning of Section 2(5) of the Act.

3. By interfering with, restraining, and coercing employees in the exercise of rights guaranteed in Section 7 of the Act, as found above, Respondents engaged in unfair labor practices violative of Section 8(a) (1) of the Act.

4. By dominating and interfering with the administration of KEU and by contributing financial and other support to it, as found above, Respondents have engaged in and are engaging in unfair labor practices violative of Section 8(a)(2) and (1) of the Act.

5. By discriminating in terms of employment in favor of KEU members, Respondents have unlawfully encouraged membership in that organization in violation of Section 8(a)(3) and (1) of the Act.

6. By refusing to bargain collectively with the Teamsters, Respondents have engaged in and are engaging in an unfair labor practice violative of Section 8(a)(5) and (1) of the Act.

RECOMMENDED ORDER

Upon the foregoing findings of fact and conclusions of law, and upon the entire record in the case, I recommend that Respondents Harold W. Koehler, Harold C. Koehler and Jerry Koehler, a Partnership d/b/a Koehler's Wholesale Restaurant Supply, their officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain with Local 135, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive representative of Respondents' employees in the appropriate unit. The appropriate unit is:

All employees including regular part-time employees employed by Respondents, but excluding all office clerical employees, the janitor, salesmen, all guards, professional employees, and supervisors as defined in the Act.

(b) Dominating, interfering with, and contributing assistance and support to Koehler's Employees Union, or any successor thereto, or any other labor organization of their employees.

(c) Recognizing or negotiating with Koehler's Employees Union or any successor thereto as the bargaining representative of any of their employees.

(d) Giving effect to any contract with Koehler's Employees Union, provided that nothing herein shall require Respondents to alter existing terms and conditions of employment unless and until new terms and conditions are agreed upon in lawful bargaining negotiations.

(e) Conditioning participation in the employees' benefit fund on an employee's surrendering the right to strike, unless and until such right is surrendered in a valid collective-bargaining agreement.

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

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

(a) Upon request, bargain collectively with Local 135, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive representative of all their employees in the above-described unit, and embody any understanding reached in a signed agreement.

(b) Withdraw and withhold recognition from, and completely disestablish, Koehler's Employees Union as the representative of any of their employees for the purpose of dealing with the Respondents concerning any terms or conditions of employment.

(c) Reimburse employees for any dues payable to Koehler's Employees Union which were withheld from their pay or otherwise paid to that union after May 24, 1961.

(d) Reimburse any nonmembers of KEU who are within the bargaining unit for any Blue Cross-Blue Shield premiums paid by such employees while in Respondents' employ after November 29, 1961.

(e) Post at their plant at Indianapolis, Indiana, copies of the attached notice marked "Appendix."¹² Copies of said notice, to be furnished by the Regional Director for the Twenty-fifth Region, shall, after being duly signed by an authorized representative of the Respondents, be posted by the Respondents immediately upon receipt thereof, and be maintained by it for a period of 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to insure that said notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director for the Twenty-fifth Region, in writing, within 20 days from the date of the receipt of this Intermediate Report and Recommended Order, what steps they have taken to comply herewith.¹³

¹² In the event that this Recommended Order be adopted by the Board, the words "A Decision and Order" shall be substituted for the words "The Recommendations of a Trial Examiner" in the notice. In the further event that the Board's Order be enforced by a decree of a United States Court of Appeals, the words "Pursuant to a Decree of the United States Court of Appeals, Enforcing an Order" shall be substituted for the words "Pursuant to a Decision and Order."

¹³ In the event that this Recommended Order be adopted by the Board, this provision shall be modified to read: "Notify said Regional Director, in writing, within 10 days from the date of this Order, what steps the Respondents have taken to comply herewith"

APPENDIX

NOTICE TO ALL EMPLOYEES

Pursuant to the Recommendations of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the Labor Management Relations Act, we hereby notify our employees that:

WE WILL NOT refuse to bargain with Local 135, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive representative of our employees in the appropriate unit. The appropriate unit is:

All employees including regular part-time employees in our employ, but excluding all office clerical employees, the janitor, salesmen, all guards, professional employees, and supervisors as defined in the Act.

WE WILL NOT dominate or interfere with, or contribute assistance or support to, Koehler's Employees Union or any other labor organization.

WE WILL NOT recognize Koehler's Employees Union or any successor thereto as the bargaining representative of any of our employees.

WE WILL NOT give effect to any contract we have with Koehler's Employees Union.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of the right of self-organization, to form labor organizations, to join or assist Local 135, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the National Labor Relations Act, or to refrain from any and all such activities.

WE WILL NOT condition any employee's participation in the employees' benefit fund on his surrendering the right to strike, unless and until we negotiate a valid no-strike agreement with a labor organization representing a majority of the employees in the bargaining unit in which such employee is employed.

WE WILL reimburse our employees for any dues paid to Koehler's Employees Union after May 24, 1961.

WE WILL reimburse any nonmembers of KEU who are within the above-described bargaining unit for any Blue Cross-Blue Shield payments made by them while in our employ after November 29, 1961.

WE WILL, upon request, bargain collectively with Local 135, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive representative of all our employees in the appropriate unit described above with respect to rates of pay, wages, hours of employment, and other conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

WE HAVE disestablished Koehler's Employees Union as the representative of any of our employees for the purpose of dealing with us concerning terms or conditions of employment.

KOEHLER'S WHOLESALE RESTAURANT SUPPLY,
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, 614 ISTA Center, 150 West Market Street, Indianapolis, Indiana, Telephone Number, Melrose 2-1551, if they have any question concerning this notice or compliance with its provisions.

**O. N. Jonas Co., Inc. and Textile Workers Union of America,
AFL-CIO-CLC.** Cases Nos. 10-CA-4912, 10-CA-4950, and 10-
CA-4953. November 15, 1962

DECISION AND ORDER

On August 14, 1962, Trial Examiner Eugene E. Dixon issued his Intermediate Report in the above-entitled proceedings, finding that the Respondent had engaged in and is 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 alleged unfair labor practices and recommended dismissal of the complaint as to them. Thereafter, the General Counsel and the Charging Party filed exceptions to the Intermediate Report and supporting briefs.

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

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

ORDER

The Board adopts as its Order the Recommended Order of the Trial Examiner, except that the last clause of paragraph 1(d) of the Order and the last clause of the last indented paragraph of the Appendix, both beginning with the words "except to the extent," are hereby deleted.