

Madsen Wholesale Co. and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 222. Case No. 27-CA-1118. November 9, 1962

DECISION AND ORDER

On April 20, 1962, Trial Examiner William E. Spencer issued his Intermediate Report in the above-entitled proceeding, 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. Thereafter, the Respondent filed exceptions to the Intermediate Report and a supporting brief.

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

The Board has reviewed the rulings 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 the brief, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.

We agree with the Trial Examiner that the Respondent violated Section 8(a) (1), (3), and (5). Like the Trial Examiner, we find that the Union represented a majority of the employees in an appropriate unit. In our opinion, and contrary to our dissenting colleague, the Trial Examiner's principal basis for recommending exclusion of Blanche Burgess, Terry Burgess, and Ruby Pearson from the unit was that they were not working during the critical pay period. As the Trial Examiner observed, unless there is a cutoff date for establishing employee status, it would be virtually impossible for any party to verify majority representation. Thus, for example, a labor organization seeking to prove that it was the majority representative would be required to canvass persons who unknown to it might have had employee status at various times in the past and who might, or might not, depending upon the circumstances, reestablish employee status at some indeterminate time in the future.

In a representation case involving a seasonal industry, the Board directs an election at or near peak season in order to obtain an expression of desires from a representative number of employees. Such a direction provides that those eligible to vote shall be all employees working during the payroll period immediately preceding the date of the notice of election. Of course, employees who are ill or on vacation or temporarily laid off are eligible, but this presupposes that such employees have been working during the current season but were out during the given period. Those who worked during a previous season

but who have not yet been recalled are not considered to be on leave or temporary layoff status for purposes of eligibility to vote. Accordingly, upon the issuance of a notice of election, eligibility is determined by actual prior and continuing employment during the current season.¹

Similarly, in an unfair labor practice case such as the instant situation, where the Respondent has a seasonal operation with a widely fluctuating employee complement, the use of a payroll period which reflects the actual employment of a representative number of employees is appropriate for determining the Union's majority status, and persons who may have worked in prior seasons but who have not yet been recalled are not properly includible.²

Accordingly, utilization of the payroll period of October 28 to November 3, 1961, as would have been done if this were a representation proceeding, seems to us a wholly equitable premise for determining employee status in the circumstances of this case.

ORDER ³

The Board adopts the Recommended Order of the Trial Examiner.

MEMBER RODGERS, dissenting in part:

I agree that the Respondent violated Section 8(a)(3) and (1) of the Act.

I disagree, however, with my colleagues' conclusion that Respondent violated Section 8(a)(5) of the Act. Predicated upon the Trial

¹ Cf. *Tol-Pac, Inc.*, 128 NLRB 1439, which provided that employees who had worked at least the prescribed number of hours during the preceding year were eligible provided they had also worked during the current season.

² See, e.g., *The F. A. Bartlett Tree Expert Co.*, 137 NLRB 501, where temporary employees were then working and were found by a Board majority (Members Brown and Leedom dissenting only as to the factual finding) to have sufficient interest to be included in the unit and the Board directed the election among all employees employed during the payroll period immediately preceding the date of the Board's direction; *Knouse Foods Co-operative, Inc.*, 131 NLRB 801, at 803; *G. L. Webster Company, Incorporated*, 133 NLRB 440; *Norton & McElroy Produce, Inc.*, 133 NLRB 104.

³ As Utah has a right-to-work law, we shall delete from paragraph 1(d) of the Trial Examiner's Recommended Order herein, and from the notice to be posted, the proviso "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 amended], as modified by the Labor-Management Reporting and Disclosure Act of 1959" *Nebraska Bag Company, et al., d/b/a Nebraska Bag Processing Company*, 122 NLRB 654, 656.

Also, interest at the rate of 6 percent per annum shall be added to the backpay to be computed in the manner set forth in *Isis Plumbing & Heating Co.*, 138 NLRB 716. For the reason stated in his dissenting opinion in that case, Member Rodgers would not award interest.

The following is to be inserted as the last paragraph immediately below the signature in the notice to be posted:

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.

The notice to be posted is modified by deleting the words "60 days from the date hereof" in the next to the last sentence of said notice and inserting in its place, the words "60 consecutive days from the date of posting. . . ."

Examiner's exclusion of three employees from the appropriate unit, my colleagues are finding that the Union represented a majority of the employees at the time of its demand for bargaining and, consequently, Respondent's refusal to bargain was violative of the Act. Contrary to my colleagues and the Trial Examiner, I believe that the three employees had "employee status," that they necessarily were part of the unit for which the Union was seeking to bargain, and that the Union in fact did not represent a majority of the employees in such unit.

The Trial Examiner's conclusion that the three employees should be excluded from the unit appears to be based primarily upon a list of employees introduced in evidence by the General Counsel. This list contained the names of employees on Respondent's payroll for the period covering October 28 to November 3, 1961, the alleged organizational period. It did not contain the names of three persons, Terry Burgess, Blanche Burgess, and Ruby Pearson, whose status is here in issue. Relying on the list as constituting Respondent's entire payroll of those having "employee status," the Trial Examiner found that 13 of those named were within the appropriate unit, and of the 13, 8 had signed authorization cards. In this connection, the Trial Examiner rejected Respondent's contention that the list represented only those employees who performed work and received pay for the period covering October 28 through November 3, 1961, and was not an accurate representation of all persons having employee status. Other reasons were cited by the Trial Examiner for excluding the Burgesses and Pearson. Thus, he deemed the precise record of Terry Burgess' employment as "too confusing for definitive findings," and he regarded with scepticism the testimony that Terry Burgess was given leave to go deer hunting at the beginning of Respondent's peak season. And, although the Trial Examiner conceded that both Blanche Burgess and Ruby Pearson worked for substantial periods during past consecutive years, he rejected Respondent's assertion that they had permanent status as seasonal employees, because "it is incredible that Respondent was hiring new employees, . . . to fill in its peak season instead of recalling them to work."

In the first instance, I disagree with the emphasis placed by the Trial Examiner upon the list. When the list was introduced into evidence early in the hearing, the General Counsel proposed a stipulation that the employees named on the list made up "the classifications and employees of the warehouse covering the period between October 28 and November 3, 1961." The General Counsel added that the stipulation would "not attempt to cover the inclusions and the exclusions or whether or not they were part-time or regular employees." The Respondent refused to enter into the stipulation concerning the list, but raised no objection to its admission into evidence. The list,

as admitted, was identified only as a list of employees on Respondent's payroll for the week of October 28 to November 3, 1961. Later, the Respondent, in presenting its defense, introduced the names of the three additional employees. At this point in the hearing, the General Counsel objected to the introduction of the employment records of these three additional employees, claiming Respondent had stipulated at the time the list was introduced that the employees named thereon were the only employees within the unit. However, the record conclusively shows, as set forth above, that the Respondent did not make any stipulation to this effect when the list was introduced in evidence, but specifically refused to assent to the stipulation offered by the General Counsel regarding the list. Accordingly, as the testimony shows that the list, as introduced, only contained the names of employees who rendered service and received pay during the week of October 28 to November 3, 1961, I would not regard it as determinative of the issue of those who may have had or may have "employee status."

Secondly, and contrary to the Trial Examiner, the record of Terry Burgess' past employment, which was stipulated, is not in my opinion, too confusing for definitive findings. Thus, the Respondent and General Counsel stipulated that Terry Burgess worked in May, June, July, and August, 1960; and, during 1961, worked during the months of June, July, August, September, October, November and December. For this period, he worked a total of approximately 667 $\frac{3}{4}$ hours. Moreover, there is no contradiction of the testimony of Madsen, Senior, Respondent's president, that Terry Burgess was given leave during the organizational period to go deer hunting, which accounts for his absence from October 20 through November 17, 1961. Accordingly, his name was obviously not on the list of employees that received pay during October 28 to November 3, 1961, because, at that time, he was on leave.

Likewise, I disagree with the Trial Examiner's conclusion regarding the employment records of Blanche Burgess and Ruby Pearson. Both performed the same type of work in the warehouse, and their employment records are similar. They worked 3 months in 1959 (May, June, July), 7 months in 1960 (March through September), and 9 months in 1961 (in addition to November and December as shown below—January, February, March, and June through September), totaling approximately 917 hours each in 1961. Neither worked between the payroll periods of September 29 to November 10, 1961. Both returned to work on November 10, 1961, after the strike began, and both were still employed by Respondent at the time of the hearing in February 1962. Their work records during November and December 1961 are specifically stipulated. Both worked 33 hours during the week ending November 17, 25 hours during the week ending

November 24, 44 hours during the week ending December 1, and over 40 hours per week throughout December. The fact that their names did not appear on the disputed list furnished General Counsel as employees on the payroll during the week of October 28 to November 3, 1961, does not mean that they did not have "employee status" during that time. Certainly, the fact that they did not render service or receive pay during that period, cannot obscure that fact that their employment records indicate they were regular seasonal employees. Moreover, it appears that their past employment was both consistent and regular—obviously more consistent and regular than the past employment of employee Snow, who was included in the unit by the Trial Examiner.⁴ Nor does it seem "incredible" to me that Respondent was hiring new employees to fill in at its peak season instead of recalling Blanche Burgess and Ruby Pearson to work, as their employment records show that in previous years they did not work during the last 3 months of the year, which was Respondent's peak season.

In support of their position, my colleagues, like the Trial Examiner, emphasize the fact that the Burgesses and Pearson were not working "during the critical pay period." They give virtual finality to the payroll period of October 28 to November 3, 1961, stating that such period would have been determinative "if this were a representation proceeding." Here, my colleagues are in error. First, under a typical Board Direction of Election, Terry Burgess would have been eligible to vote, as employees who are "ill, on vacation, or temporarily laid off," need not have worked during an eligibility period or on the date of the election in order to be eligible.⁵ Second, it appears that Respondent's operation is seasonal in nature; at any rate, there are intermittent busy periods.⁶ As the Respondent draws its seasonal employees from the same labor force, composed primarily of former employees (evidenced by the return in past years of the Burgesses, Ruby Pearson, and Grant Snow), and the seasonal employees work together with, and under the same conditions as, permanent employees, Board precedent warrants the inclusion of Blanche Burgess and Ruby Pearson as

⁴ The Respondent contended that employee Snow was a temporary employee because he had a full-time job elsewhere, and because Snow admitted on cross-examination that he "just picked up his extra job at Madsen's because, for Christmas money or whatever you want to call it" It was stipulated that Snow was first employed by Respondent on December 5, 1958, worked 2 weeks on a full-time basis, and was then laid off. In 1959, Snow worked for Respondent less than 1 month in December as a part-time employee. In 1960, Snow worked outside the Christmas season, on a part-time basis, from January 8 to May 13, and returned for the Christmas rush from October 14 to December 30. He worked a total of 360 hours in 1960. During 1961, Snow worked 72 hours between October 6 and November 6. His entire employment time with Respondent totaled only 763½ hours.

⁵ *Musgrave Manufacturing Company and Mast-Foos Manufacturing Company, Inc.*, 124 NLRB 258; *Wells Aluminum Corporation*, 121 NLRB 1010; *Aroostook Federation of Farmers, Inc.*, 117 NLRB 31.

⁶ Although Respondent operates throughout the year, 50 percent of its business is transacted during the 3 months before Christmas. Other busy periods occur just prior to Valentine's Day, Easter, the Fourth of July, and Halloween.

seasonal employees eligible to vote.⁷ Further, in industries where employment is intermittent or irregular the usual Board policy is to enfranchise all employees with a substantial continuing interest in their employment conditions to insure a representative vote.⁸

In any event, this is not a representation case; this is an unfair labor practice case. In the latter kind of case, where an employer is charged with a refusal to bargain, the Board, in determining unit composition, does not give finality to the payroll list of a specific period.⁹

The exclusion by the Trial Examiner of the Burgesses and Pearson appears to me, in the circumstances, to be arbitrary and capricious. It is the usual policy and practice of the Board to include regular seasonal employees in a unit appropriate for collective bargaining.¹⁰ Accordingly, I would include them in the unit. Including them in the unit, I would find that the Union did not represent a majority as it represented only 8 out of 16 employees. Accordingly, I would dismiss the 8(a)(5) allegations of the complaint.

⁷ *The F. A. Bartlett Tree Expert Co*, supra, see footnote 2, *California Vegetable Concentrates, Inc*, 137 NLRB 1779; *Carol Management Corporation, et al*, 133 NLRB 1126; *G. L. Webster Co, Inc*, 133 NLRB 440.

⁸ See *Tol-Pac, Inc.*, 128 NLRB 1439 (where employees who had worked 50 hours or more at any time during the preceding year were eligible provided their names appeared on at least one daily payroll during the current election year). See also, *Great Western Sugar Co*, 137 NLRB 551, where a Board majority (Rodgers and Leedom dissenting) included seasonal supervisors in a unit of seasonal and year-round production and maintenance employees, and found them eligible to vote "regardless of their employee status at the time of the election."

⁹ See, for example, *Gray, Rogers, Graham & Osborne*, 129 NLRB 450, enforcement denied on jurisdictional grounds 295 F 2d 38 (CA 9), in this case, when the union requested bargaining on May 30, 1959, two of the three employees engaged in field survey work were members of the union. The Board found, however, that the employer did not violate Section 8(a)(5) of the Act, as during the month of May 1959 a total of seven employees performed some surveying work, and therefore, the union did not represent a majority.

¹⁰ *The F. A. Bartlett Tree Expert Co*, supra, see footnotes 2 and 7 (where temporary employees who had worked for the employer one or more previous seasons were included); *Knouse Foods Co-operative, Inc*, supra, see footnote 2; *Imperial Rice Mills, Inc., et al*, 110 NLRB 612.

INTERMEDIATE REPORT AND RECOMMENDED ORDER

STATEMENT OF THE CASE

This proceeding with all parties represented, was heard before Trial Examiner William E. Spencer at Salt Lake City, Utah, on January 31 and February 1, 2, 5, and 6, 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.²

Upon the entire record in the case, my observation of the witnesses, and consideration of the 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

Madsen Wholesale Co., the Respondent herein, a Utah corporation, with its principal office and place of business in Salt Lake City, Utah, is engaged in the whole-

¹ The hearing was reopened and closed by order of the Trial Examiner on March 5 for the receipt in evidence of a stipulation on the testimony of a witness.

² The original charge initiating this proceeding was filed November 2, 1961; a first amended charge filed November 17, and a second amended charge filed December 15. The complaint issued under date of December 21.

sale distribution and sale of toys, sporting goods, fire works, and ceramics. During the past year it made purchases of goods and materials valued at in excess of \$50,000, shipped directly to its Salt Lake City plant from points outside the State of Utah.

II. THE LABOR ORGANIZATION INVOLVED

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 222, called herein the Union, is a labor organization within the meaning of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *General statement of events and issues*

Respondent, engaged in the wholesale distribution and sales of toys, novelties, sporting goods, ceramics, etc., operates throughout the year but according to its president, Kenneth Madsen, Sr., 50 percent of its business is transacted in the months of October, November, and December. It follows that this is also the peak period of its employment. Aside from the Christmas season, its busiest periods coincide with Valentine's Day, Easter, Fourth of July, and Halloween.

Organizational activities among its employees began at the home of employee Kenneth Apedaile about October 30, 1961, and at this meeting nine persons then employed by the Respondent signed union authorization cards and applications for membership. On October 31 and November 1 and 7, the Union requested recognition and collective bargaining. The requests were refused. Respondent's employees then went on strike. The strike, accompanied by picketing, continued to December 14. On that date, and the day following, certain of the striking employees allegedly applied to Madsen, Senior, for reinstatement and reinstatement was denied them on the grounds that they had been replaced, or there was no work available for them.

The complaint alleges an unlawful refusal to bargain; statements and conduct amounting to interference, restraint, and coercion; an unfair labor practice strike; and an unlawful refusal to reinstate striking employees. The Respondent disputes that the Union at any time represented a majority of employees in an appropriate unit, and denies the commission of any of the alleged unfair labor practices.

B. *The appropriate unit*

It is agreed by the parties, and found, that all Respondent's warehousemen and truckdrivers including shipping and receiving clerks, order fillers, packers, working foremen, and leadmen, excluding salesmen, office clerical employees, guards, professional employees, and supervisors as defined in the Act, constitute a unit for purposes of collective bargaining within the meaning of the Act.

C. *The Union's majority*

Prior to the hearing, Madsen, Senior, furnished to the General Counsel a list of employees carried on Respondent's payroll for the period covering October 28 to November 3. This list was identified by Madsen at the hearing and was received in evidence, without objection and without question, as constituting Respondent's payroll for the aforesaid period. Fourteen employees appeared on this list, and of these, 10 admittedly are properly included in the appropriate unit. These 10 are: Robert Pearson, Reed Langford, John Kovacich, Howard Cannegieter, Donald Balfour, Ronald Bair, Ray Nate, Rex Casey, Gordon Sorenson, and Kenneth Apedaile. Of these 10, it is found that the following had signed union authorization cards at the time the Union requested recognition: Balfour, Nate, Casey, Sorenson, and Apedaile. The remaining four, all of whom had authorized the Union to represent them and all of whom the Respondent contends should be excluded from the unit, are Ronald Clark, Stephen Freeman, C. Kent Halvorsen, and Grant LeRoy Snow.

The Respondent employed Clark about September 25, 1961, in its receiving section in which some three other employees also worked. As a receiving clerk he performed miscellaneous duties, such as checking freight as it was received to determine if it corresponded with the bills of lading, storing merchandise as it was received, preparing claims of damages, etc. A substantial portion of his work was manual labor. He was vested with no authority to hire or discharge and while he directed, to some degree, the activities of the other employees in the section, there is no showing that such direction was more than routine. There is also no showing that he was vested with authority effectively to make recommendations affecting the tenure of employment of other employees. He was paid at an hourly rate, as were

other employees. He was told by Madsen on the occasion of his hiring, that if he worked out satisfactorily he would be placed in charge of the receiving department after the first of the year. I find no merit in Respondent's position that he should be excluded from the unit because of supervisory capacity or because he was a probationary employee. He definitely was not a supervisor within the meaning of the Act, and though it may well have been contemplated by the Respondent that if his work was satisfactory he would be promoted to a supervisory position, this would not and did not affect his status as a rank-and-file employee during the crucial period herein. And while it may be said that his employment was, in a sense, on a probationary basis, he nevertheless had employee status as such and is properly included in the unit.

Halvarsen was hired by Madsen on October 25. Madsen on hiring him gave him assurances that if he could handle his job satisfactorily he could continue working for the Respondent indefinitely. Assuming that Respondent had a 30-day probationary period for all his newly hired employees, and that this applied to Halvarsen, as in the case of Clark, his probationary status was sufficient to establish him as an employee eligible for inclusion in an appropriate unit. There is nothing in the record on which I could base a finding that he would not, in the normal course of things, have been continued indefinitely in Respondent's employ. I find that he is properly counted in determining the Union's representative status.

Freeman and Snow are in a somewhat more doubtful category. Freeman was hired for warehouse work on October 9 and according to his testimony nothing was said to him, on the occasion of his hiring, about the duration of his job. He worked in the packing and shipping of toys and locating merchandise for other warehousemen to be used in filling their orders. Sixteen years of age, he was attending school during the time of his employment, reported for work about 4:30 p.m., worked till about 7:30 each evening, and full time on Saturdays and Sundays. Madsen testified that he employed Freeman on a temporary basis and solely for the duration of the Christmas rush. While it may never have been explicitly stated to Freeman that he was hired as a temporary employee, I would resolve the doubt in Respondent's favor and exclude him from the unit.

Snow also worked during the Christmas season, as a warehouseman, during the years of 1958 and 1959. In 1960, he worked from January 8 to May 13, as well as from October 14 to December 30. In 1961, he started on October 6. Admittedly, he had another full-time job, and except for Saturdays during his periods of employment by the Respondent when he worked a full day, he would report about 5:30 p.m. and work until 8 p.m. He admitted on cross-examination that he "just picked up this extra job at Madsen's because, for Christmas money or whatever you want to call it." It appears to me that Snow's seasonal employment was of such regularity over a period of some 4 years, extending at times outside the Christmas season, that he cannot properly be classified as a temporary employee. I would include him in the unit, but his exclusion would not destroy the Union's majority status.

On the basis of the foregoing findings, it is concluded that of the 14 employees furnished by Madsen, Senior, as constituting his entire payroll of employees during the period in question, a list admittedly taken from Respondent's payroll records, 13 are properly included in the appropriate unit, and of these 8 had authorized the Union to represent them at the time of the Union's request for recognition and collective bargaining.

Normally this would conclude the discussion and analysis of the matter, but though assenting to the introduction of the payroll list furnished the General Counsel by Respondent's president, the Respondent in the presentation of its defense took the position that certain other employees should be included in the unit, though their names did not appear on the payroll on the crucial dates. These additional employees are Terry Burgess, Blanche Burgess, and Ruby Pearson, none of whom authorized the Union to represent them and, presumably, since they were not actually employed by the Respondent during the organizational period, none of whom were approached in the matter of union representation.

According to Madsen, Terry Burgess worked for the Respondent as a warehouseman "off and on" for some 3 years, working in the summer between school sessions, and in 1961 worked a total of some 667.75 hours, continuously during June, July, August, September, and for a period in October. He also worked for the week ending November 24 and on through the week ending December 13. According to Madsen, he did not appear on the payroll list furnished the General Counsel because he was during that period on a leave of absence to engage in deer hunting. Burgess did not himself testify, and the precise record of his employment during the crucial period I find too confusing for definitive findings.

Blanche Burgess, also employed in the warehouse, worked during May, June, and July, 1959; March, April, May, June, July, August, and September, 1960;

and in 1961, January, February, March, June, July, August, September, and certain unspecified periods in November and December. Her terms of employment in November and December 1961 are not shown, nor was any explanation offered for her not appearing on the payroll during the crucial payroll period. She worked 900 hours during the year 1961. She did not testify.

Ruby Pearson, also a warehouse employee, had a work record roughly corresponding to that of Blanche Burgess, but, again, no explanation is offered for her not having been carried on the payroll during the crucial period. She, also, did not testify.

For obvious reasons, a union's claim of representation must be related to a certain payroll period, for otherwise there would be no practical way of determining its majority status or lack of it. Of course a payroll list furnished by an employer may contain errors, and every reasonable opportunity should be offered for the correction of such errors. As I understand Respondent's position, there is no claim that error occurred in the list prepared under Madsen's direction and furnished to the General Counsel as a list of all employees under the certain dates. What Respondent apparently wants is that certain persons be regarded as employees for inclusion in the appropriate unit even though they did not have employee status during the period when the Union obtained and asserted its majority, although admittedly this was Respondent's peak season of employment.

I cannot agree that such additional persons be included in the appropriate unit. If, as Madsen testified, Terry Burgess was merely on leave of absence during the period in question, it would seem that his name would have been carried on Respondent's records as one with employee status, but it was not furnished as such and no contention was made that he did have employee status until the litigation in this case was far advanced. Furthermore, it seems questionable whether the Respondent would grant a leave of absence to one of its regular seasonal employees during the peak of its Christmas season when it transacted 50 percent of its business for the entire year. I must regard the testimony on this point with some scepticism. With respect to Blanche Burgess and Ruby Pearson, it is true that they had worked for substantial periods during past consecutive years, and that they worked during the period of the strike, as did Terry Burgess, but if they were regarded by the Respondent as having permanent status as employees, seasonal or otherwise, it is incredible that Respondent was hiring new employees, such as Freeman, Halvarsen, and Clark, to fill in its peak season instead of recalling them to work, or that the Respondent would have recalled them to work only after its employees had struck. On the evidence furnished me, I am unable to agree with the Respondent that Terry and Blanche Burgess and Pearson had employee status during the payroll period of October 28 through November 3, 1961, and accordingly would exclude them from the appropriate unit.

Obviously, if a labor organization could establish its majority representation only by canvassing persons who unknown to it may have had employee status at various times in the past and who may, or may not, depending upon circumstances, re-establish employee status at some indeterminate time in the future, the employees' right to collective bargaining through the representative of their choice would be seriously restricted and to a degree not contemplated by the Act. Where bargaining representation is settled through the election process, there is necessarily a cut-off payroll date for determining voter eligibility. Had the matter gone to an election in this case, I have no doubt that voter eligibility would have rested on the payroll period now considered determinative in the matter, and I have considerable doubt that the Respondent would have urged voter eligibility with respect to the additional persons it would now have me include in the appropriate unit.

I find that as of October 31, 1961, and at all times material herein, the Union represented a majority of Respondent's employees in an appropriate unit for purposes of collective bargaining.

D. Interference, restraint, and coercion

Employees Apedaile, Nate, Clark, Halvarsen, and Casey testified to coercive statements made to them by Respondent's president, Madsen, Senior, following the Union's demand for recognition.

Apedaile testified that on the morning of October 31, the date on which the Union first made known to Madsen its claims for recognition, Madsen approached him in an angry mood and said that if Apedaile had anything to do with the Union coming into his establishment and if he didn't like his job, he could quit, that Madsen's father had been in the business for years, and he, Madsen, did not want the Union coming into his establishment. Nate testified that Madsen approached him on the morning of this same day, asked him if he had anything to do "with these

Union men," and when he replied, "I have talked to some of the Union men about getting the Union in the warehouse," said, "If you don't like your job here, you can quit." Clark testified that on the morning of the same day, about the same time the Union's representatives came up to him, Madsen approached him and said, "If you had anything to do with the Union, you can quit." Halvarsen testified that Madsen told him on the same day, "Now that you have joined the Union, don't you think you ought to know where everything is. You ought to know how to fill these orders in two weeks." Madsen further told Halvarsen on this occasion that he would give him 1 more week to learn how to fill the orders. Halvarsen had only recently been hired on a probationary basis. Casey testified that Madsen approached him on this same morning and said, "Rex, I'll tell you like I told the rest of these guys, if you don't like your job here, you can quit."

Madsen testified, in effect, that following the first demand of the Union's representatives for recognition, the first knowledge he had that his employees were organizing, while he was "a little bit upset," he approached his employees and told them that if they were not satisfied with their jobs they could quit. He denied that he bracketed these statements with any reference to the Union or union activities. I expect that Madsen, Senior, was more than a "little bit upset" over the Union's demands, and while this is understandable enough in one whose business had been operated without organizational activities for many years, particularly when the demand came at the height of seasonal operations, his remarks to employees were not justified because emotionally engendered if, reasonably understood, they were coercive in their impact on the minds of his employees. I think under the circumstances of his emotional stress, the testimony of the employees is more reliable as to what was actually said, and I accept their testimony. His invitation to quit if they did not like their jobs, linked as it was to their union activities, was, in my opinion, coercive, and his remarks to Halvarsen, in his own words "a good worker," were in the nature of a threat, since they implied that because he had joined the Union his probationary period might be shortened.

Clark's further testimony was that on the evening of November 2, Madsen, Senior and Madsen, Junior—the latter in charge of Respondent's warehouse—called him into their office and advised him that if he would stay out of the Union, it would improve his position with the Respondent and after the first of the year he would have a chance to make more money. At noon on November 4, according to Clark, Madsen, Senior, said that if the Union came in, it would mean he would have to cut out all overtime for his employees, and therefore there was nothing to gain by organization. Further according to Clark, on November 6, Madsen, Junior, told him that it would be better for him if he did not have anything to do with the Union, because if he "worked out all right" he would be able to "take over" the warehouse.

Apedaile testified that on the morning of November 6, Madsen, Senior, accused him of being the ringleader for the Union, and told him that he had only two steady employees and could make Apedaile a seasonal employee. Nate and Casey testified, in effect, that on the morning of November 6, Madsen, Senior, told them that they were his only full-time employees and they could not organize the plant; that the other employees were seasonal help; and that if the Union did get in, which he doubted, he would guarantee they would get only 40 hours a week. Nate further testified that on November 1, Madsen, Senior said that he had better take a pencil and paper and figure this thing out, because if the Union did get in, he would need a part-time job to make ends meet; and that Madsen, Senior, further said that after the first of the year he would need only one shipping clerk, that he had been a shipping clerk all of his (Madsen's) life, and could do it again. Casey admitted that on the evening of November 6, Madsen, Senior, told him that he could work all the overtime he wanted to until things were caught up.

Madsen, Junior, did not testify. Madsen, Senior, admitted that he could have told Apedaile that he regarded him as the Union's ringleader, but further testified that he told Apedaile, "Let's forget the whole thing. It is all right with me either way it goes." He denied that he told Clark that if he stayed out of the Union he would have a better position after the first of the year, but admitted that a conversation occurred in which he told him that if he performed his work satisfactorily he could have a supervisory position after the first of the year. This was their understanding from the date of Clark's hiring he testified, and gave no explanation for reviewing this understanding at a later date. He admitted that he may have made statements about cutting out overtime if the Union came in, and explained that this would be required by Union working hours and pay; that in view of increased wages and overtime pay it would be more economical for him to operate two shifts. In general, he either denied the testimony of the General Counsel's witnesses, or gave such explanations of his statements as would negate or lessen their coercive overtones.

Madsen, Senior, did not appear to be deliberately falsifying. He was obviously distressed, distressed by his employees' organizational activities and impact on the economy of his business, and doubtless under the stress of the Union's repeated demands for recognition said more to his employees than now, in retrospect, he would consider wise. It is not unusual for a man's afterthoughts to become his actual conscious recollection of past events. I am convinced, however, that the recollection of his employees as expressed in their testimony outlined above, was much sharper and more exact than his. Their testimony was singularly free from malice toward their employer whom they obviously regarded with affection and respect. I credit them.

I find that by questioning its employees concerning their union affiliation and activities; by threatening them with reprisals because of their affiliation and activities; and by promising Clark advancement if he refrained from union affiliation, the Respondent interfered with, restrained, and coerced its employees in the exercise of rights guaranteed them by the Act.

E. The refusal to bargain

Having received authorizations from a majority of Respondent's employees in an appropriate unit, on October 31, 1961, Alma May and William Fackrell, union representatives, saw Madsen, Senior, on the latter's premises, stated to him that the Union represented a majority of his employees, and requested that he recognize the Union as their bargaining representative. Madsen, Senior, obviously taken by surprise and angry, replied, in effect, that he had been in business for 30 years and did not need a union to tell him how to run his business. The Union's representatives left their cards with him and requested that he get in touch with them.

On November 1, May again approached Madsen and repeated his request for recognition. Madsen, Senior, this time responded that he had no experience in such matters and desired to consult with his attorney. On this same date, November 1, the Union filed a representation petition with the Board, and a copy of it was duly served on the Respondent.

On November 7, May, accompanied by several of Respondent's employees, met with Madsen, Senior, in the latter's office. He again requested recognition, and issued an ultimatum that if the Respondent did not agree to sign a contract by 4 that afternoon, the employees would strike. Madsen arranged for May to talk to Respondent's attorney, Day, on the phone. May repeated his demand for recognition and his strike threat. Respondent's counsel referred to the Union's election petition and stated Respondent's position that the matter of representation should be decided through an election. The strike went into effect that evening, was participated in by a majority of Respondent's employees in the appropriate unit, and continued through December 14.

At no time preceding the strike did the Union offer proof of its majority, and at no time did the Respondent seek such proof other than to insist that the matter be resolved through an election. The strike demonstrated the Union's majority status beyond question.

That the Respondent refused the Union's demand for recognition and collective bargaining is clear beyond question. Its defense is that it had a good-faith doubt of the Union's majority and was entitled to have the matter determined through the Board's election process. The situation is not a novel one; it has been encountered before in many cases. In a very recent decision, *Al Tatti, Incorporated*, 136 NLRB 167, the Board said, in effect, that an employer's reliance on the filing of an election petition as justification for its refusal to grant a union's request for recognition, standing alone, might justify the refusal, but that contemporaneous coercive activities on the part of the employer negated its claim of a good-faith doubt of the Union's majority. That decision controls here. On the occasion of the Union's first demand for recognition and before its representatives had left Respondent's premises, Madsen, Senior, entered on a course of conduct found to have constituted interference, restraint, and coercion, reasonably calculated to undermine the Union's representative status, and continued to address his employees in a coercive manner at various times between the first and the last demand for recognition. Such conduct is inconsistent with Respondent's claim of a good-faith doubt of the Union's majority. If such doubt actually did exist, it was dissipated when a majority of employees in the appropriate unit engaged in a strike. It is immaterial insofar as the duty to bargain is concerned, that coupled with the Union's final demand on November 7 was the demand that the Respondent sign a contract with the Union before a stated deadline. Respondent could have acceded to one, which it was bound to do, without acceding to the other, which it was not bound to do.

It is found that on and after October 31, 1961, the Respondent refused to bargain with the Union as representative of its employees in an appropriate unit, in violation of Section 8(a) (5) and, derivatively, 8(a)(1) of the Act.

F. *The strike*

On the evening of November 6, at the request of employees who had signed union cards, a meeting was held with Union Representative May, and again at the request, or on the suggestion, of the employees a strike vote was taken. Most of the employees who had signed union cards attended this meeting and all of these voted to strike. It does not appear from the testimony of those who testified in the matter that the meeting was characterized by formality further than that some one of them moved that a strike vote be taken, and such a vote was taken under May's direction. The discussion preceding the strike vote centered on wages, job security, and Respondent's refusal to recognize the Union. Employee Freeman, 16 years old, alone of those who testified in the matter, testified on cross-examination that the strike vote was premised on the Respondent's signing a contract with the Union.

On the following morning at Respondent's plant, a group comprising a majority of those employees who had signed union cards, accompanied May in calling on Madsen, Senior. There, as previously stated, May made his third demand for recognition and also threatened a strike if a contract was not executed by 4 p.m. of that day. According to Madsen, Senior, May had a contract in his hand when he made this demand but he did not show it to Madsen, nor do we have evidence as to whether it was merely a contract for recognition or for general coverage of wages and working conditions.³

May's demands having been refused the strike began that evening and, as previously stated, continued through December 14 and was accompanied by picketing. The picket signs read, in substance, that the employees were on strike "in protest of substandard wages."

Under date of November 7, Madsen addressed a letter to his employees in which he referred to the filing of an unfair labor practice charge against the Respondent, denied the charges, cautioned his employees on the preparation and giving of any affidavits in the matter, and asserted his willingness to submit the matter of union representation to an election and to abide by the results, adding . . . "however, we feel that, in view of the difficulty and trouble which has already developed, it is our belief that better results and better things can be worked out with our employees direct in their interest and in a friendly way, rather than being fought out through union procedures"

The issue is whether the strike was caused by Respondent's unfair labor practices, or whether it was economic in character. If it was caused by Respondent's refusal to recognize and bargain with the Union, or because of coercive statements made to employees by Respondent's president, Madsen, Senior, it was an unfair labor practice strike. If it was caused by Respondent's refusal to bow to May's ultimatum on a contract, or solely because of what the employees regarded as substandard wages, it was economic. The matter is one of substance because it defines reinstatement rights of striking employees. The question we have to decide is: would the strike have occurred if the Respondent had recognized the Union and agreed to bargain with it? Despite May's arrogant ultimatum, which I regard as no more than bluster and bluff, and the text of the picket signs—the latter not necessarily inconsistent with this conclusion—I must answer this question in the negative.

Most of Respondent's employees involved herein were young men, in their twenties or younger; this was for most or all of them their first experience with organizational activities; when, following the Union's initial demand for recognition, Madsen, Senior, approached them individually and made the coercive statements reported in detail above, they became fearful that their jobs were in jeopardy, a fear which was necessarily accentuated by Respondent's continued refusal to recognize the Union they had chosen to represent them. Upon the testimony of all the employees, it was this fear of reprisal buttressed by Respondent's refusal to recognize and bargain with the Union, that prompted them to seek the meeting with May on November 6 and to take a strike vote. Doubtless there was discussion at this meeting of wages, job security, and the terms of a union contract, but the testimony considered as a whole shows clearly that the employees' main concern and the

³ The employees attending this meeting of May and Madsen testified only that May repeated his demand for recognition, but that he also issued his contract ultimatum is established beyond doubt. It appears that the employees were not present during the entire time of May's call on Madsen.

principal reason for voting to strike was to obtain job security through recognition and bargaining through the Union. As 19-year-old Halvarsen testified on cross-examination:

Q. Did you make any statements as to why you were voting for the strike?
A. Yes, I did I told them that I was afraid of losing my job.

* * * * *

Q. That was your concern, that you were going to lose your job?

A. Yes.

Q. And you thought that by taking a strike vote, that you could keep your job?

A. Yes I did.

Q. On what did you base that?

A. Job security.

Q. What do you mean by job security?

A. Well, if we got recognition, then we would have job security.

On the entire evidence, I am convinced that had the Respondent agreed to recognize and bargain with the Union on the morning of November 7, when confronted with May's demand and ultimatum, that would have ended the matter at least for the time being and there would have been no strike. Such recognition and consent to bargaining would have reassured the employees with respect to job security, a concern attributable to Madsen's coercive statements, and would have raised hopes for a settlement of the wage issue through collective bargaining. It is clear from the testimony of these employees that with the exception of what they regarded as a substandard wage, they were pleased to be working for the Respondent, and valued their relationship with its management. May obviously did them a disservice in issuing his contract ultimatum, thereby confusing the issue of the strike, but this should not operate to obscure and negative the fact that the immediate precipitating cause of the strike was Respondent's coercive conduct which made its employees fear for their jobs and its unlawful refusal to grant recognition to the Union they had chosen to represent them. Accordingly, I find that the strike was caused by the Respondent's unfair labor practices.

G. Refusal to reinstate striking employees

On the evening of December 14, about 7:30 p. m., after picketing of Respondent's plant had ceased, striking employees Freeman, Snow, Nate, Apedaile, and Casey approached Madsen, Senior, on the stairway outside the front office door. Casey addressed Madsen by saying, "Mr. Madsen, we would like to talk to you for a minute," to which Madsen replied, "No, we don't have anything to talk about." Nate then said, "Mr. Madsen, we just want you to know that we are available to go back to work at our former status." Madsen replied, "Sorry, boys, we are not doing any hiring." The employees thereupon left Respondent's premises.

About noon on December 15, Halvarsen, Clark, and Sorenson spoke with Madsen, Senior, in a restaurant near Respondent's operations. Halvarsen advised Madsen that the three of them were ready and available for work. Madsen replied that he did not need anyone since he had just laid off three men the day before.

Respondent's denial of an unlawful refusal to reinstate its striking employees, with respect to the applications made by certain employees on December 14, rests on Madsen's testimony that the light was poor at the time the group of employees approached him and that Casey was the only one of the employees he recognized. He further testified that he did not hear Nate, or any of the others, offer to return to work. Respondent argues that, assuming Madsen heard Nate's offer, he would not understand that it applied to all employees in the group, and in any event, Snow and Freeman were temporary employees hired only for the Christmas rush. As to Casey, Nate, and Apedaile, Respondent argues that they were economic strikers and had been permanently replaced. It is Respondent's further position that Sorenson and Halvarsen were temporary employees whose normal course of employment had expired at the time they requested reinstatement, and that Clark had quit his employment during the strike.

Obviously, no formality has to attend the application of striking employees for reinstatement for it to be effective. It is enough if the employees make known, either orally or in writing, that they desire to return to work. I think there is no doubt that Nate spoke for the group composed of himself, Casey, Freeman, Snow, and Apedaile, when he stated to Madsen their availability to return to work, and I am not convinced that the light was so poor or that Nate's voice was so weak that Madsen was not sufficiently informed in the matter. His reply to Nate,

"Sorry, boys, we are not doing any hiring," which I find he made, is sufficiently indicative of his position that the strikers had lost their employee status, to make any further effort on their part at individual identification and individual requests for reinstatement futile. As to Clark, while it may well be that during the strike he explored other avenues of employment and made known to the Respondent that he had other employment in mind, I find that he at no time during the strike quit his employment with Respondent to take permanent work elsewhere. As to the strikers the Respondent claims were temporary and whose employment, according to it, had expired at the time they applied for reinstatement, I have found that only one of them, Freeman, was a temporary employee, although it appears that Snow may have been employed principally for the Christmas rush. Whether these latter two be regarded as temporary or not, I can find no showing that convinces me that their employment normally would have been terminated as of the date they applied for reinstatement. With respect to Snow, in 1960 he worked from January 8 to May 13, and from October 15 to December 30, presumably part time. Freeman, a new employee, presumably would have worked throughout the Christmas season. These are, however, matters to be determined with more specificity in compliance.

I find, contrary to Respondent's contentions, that the eight employees named above were unfair labor practice strikers, that on December 14 and 15 they made unconditional requests for reinstatement, and that the Respondent refused the said requests, thereby discriminating against them in the terms and conditions of their employment in violation of Section 8(a)(3) and, derivatively, 8(a)(1) of the Act.⁴

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 Respondent's operations described in section I, above, have a close, intimate, and substantial relationship 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.

V. THE REMEDY

Having found that Respondent refused to bargain with the Union in violation of Section 8(a)(5) and (1) of the Act, I shall recommend that the Respondent, upon request, bargain with the Union as the exclusive representative of all its employees in the appropriate unit concerning wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

It has been found that the Respondent, in violation of Section 8(a)(1) and (3) of the Act, refused reinstatement to employees Freeman, Snow, Nate, Apedaile, Casey, Halvorsen, Clark, and Sorenson. It will be recommended that the Respondent offer to each of them for whom work is available, reinstatement to his former or substantially equivalent position, without prejudice to his seniority and other rights and privileges, discharging if and as necessary persons hired subsequent to November 7, 1961, and make each whole for any loss of pay suffered because of the discrimination against him, by payment to him of a sum of money equal to that which he normally would have been paid in Respondent's employ from the date of his application for reinstatement to the date of Respondent's offer of reinstatement, or to the date on which his period of employment normally would have expired, less his net earnings, if any, during said period. Loss of pay shall be computed upon a quarterly basis in the manner established by the Board in *F. W. Woolworth Company*, 90 NLRB 289. It is further recommended that if no work is presently available for certain of these employees because of the temporary or seasonal character of their employment, the Respondent shall place such of them as come within this

⁴ The Respondent cross-examined the striking employees at length on whether they had engaged in certain conduct during the course of the strike such as would disqualify them for reinstatement. Except for establishing that one or more strikers on occasion used a glass reflector to deflect sunlight into Respondent's plant and Madsen's eyes, and made some obscene gestures toward Madsen and one of the strikebreaking employees, the evidence thus elicited failed to reveal any act of misconduct such as would militate against reinstatement. While one strikebreaking employee testified that his tires were cut while his car was parked outside the plant, the evidence fails to establish that if such was the fact, it was attributable to the strikers. This same employee testified that one of the strikers made threatening gestures but, assuming that this was so, nothing came of it and he continued to work.

category upon a preferential hiring list, and offer them reinstatement at such time or times as work which they normally would be employed to perform becomes available.

The nature and extent of Respondent's unfair labor practices demonstrate the danger of the commission of similar and other unfair labor practices proscribed by the Act. Therefore a broad cease-and-desist order will be recommended.

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. All warehousemen and truckdrivers employed by the Respondent at its Salt Lake City operations, including shipping and receiving clerks, order fillers, packers, working foremen, and leadmen, exclusive of salesmen, office clerical employees, guards, professional employees, and all supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

2. The Union, a labor organization within the meaning of Section 2(5) of the Act, has been at all times on and after October 31, 1961, the exclusive representative of all the employees in the aforesaid appropriate unit for purposes of collective bargaining within the meaning of Section 9(a) of the Act.

3. By refusing at all times on and after October 31, 1961, to bargain in good faith with the Union as the exclusive representative of its employees in the aforesaid appropriate unit, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

4. By discriminating with respect to the hire and tenure of employment of Stephen Freeman, Grant LeRoy Snow, Ray Nate, Kenneth Apedaile, Rex Casey, Charles Kent Halvorsen, Ronald Clark, and Gordon Sorenson, thereby discouraging membership in the above-named labor organization, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(3) of the Act.

5. By the foregoing; by questioning its employees concerning their union affiliation and activities; by threatening them with reprisals because of their said union affiliation and activities; and by promising benefits for refraining from union affiliation and activities, the Respondent has interfered with, restrained, and coerced its employees in the exercise of rights guaranteed in Section 7 of the Act and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

6. The strike which commenced on November 7, 1961, was caused by the Respondent's unfair labor practices, and hence was an unfair labor practice strike.

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

RECOMMENDED ORDER

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record in the case, I recommend that the Respondent, Madsen Wholesale Co., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in the Union, or any other labor organization of its employees, by discriminatorily discharging or refusing to reinstate its employees, or by discriminating in any other manner in regard to their hire and 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 Union as the exclusive representative of its employees in the previously described appropriate unit.

(c) Questioning, in an unlawful manner, its employees concerning their union membership and activities, threatening them with reprisals because of union membership and activities, and promising them rewards or benefits if they refrain from union affiliation and activities.

(d) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist the Union or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in any 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 the Union as the exclusive representative of the employees in the above-described appropriate unit with respect to rates of pay, wages, hours of work, and other terms and conditions of employment, and embody in a signed agreement any understanding reached.

(b) Reinstate Stephen Freeman, Grant LeRoy Snow, Ray Nate, Kenneth Apedaile, Rex Casey, Charles Kent Halvarsen, Ronald Clark, and Gordon Sorenson to their former or equivalent positions, without prejudice to their seniority and other rights and privileges, and make them whole for any loss of pay they may have suffered because of the Respondent's discrimination against them, all in the manner and to the degree set forth in the section above entitled "The Remedy."

(c) Preserve and, upon request, make available to the National Labor Relations Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary for the determination of amounts of pay due under these recommendations.

(d) Post at its plant in Salt Lake City, Utah, copies of the attached notice marked "Appendix."⁵ Copies of said notice, to be furnished by the Regional Director for the Twenty-seventh Region, shall, after being duly signed by the Respondent's authorized representative, be posted by the Respondent immediately upon receipt thereof, and be maintained by it for a period of 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for the Twenty-seventh Region, in writing, within 20 days from the date of the receipt of this Intermediate Report, what steps it has taken to comply herewith.⁶

⁵ 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."

⁶ 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 Respondent has 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 National Labor Relations Act, as amended, we hereby notify you that:

WE WILL NOT discourage membership in International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 222, or any other labor organization of our employees, by discriminatorily 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 question, in an unlawful manner, our employees concerning their union affiliation and activities; threaten them with reprisals if they engage in protected union or concerted activities; or promise them rewards or benefits for refraining from union affiliation and activities.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of their right to self-organization, to bargain collectively through representatives of their own choosing, to engage in 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 amended.

WE WILL, upon request, bargain collectively with the above-named labor organization as the exclusive bargaining representative of all employees in the following unit 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. The bargaining unit is:

All warehousemen and truckdrivers employed at our Salt Lake City operations, including shipping and receiving clerks, order fillers, packers.

working foremen, and leadmen, exclusive of salesmen, office clerical employees, guards, professional employees, and all supervisors as defined in the Act.

WE WILL reinstate Stephen Freeman, Grant LeRoy Snow, Ray Nate, Kenneth Apedaile, Rex Casey, Charles Kent Halvarsen, Ronald Clark, and Gordon Sorenson to their former or equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of pay suffered by them because of the discrimination against them, all in the manner and to the degree recommended by the Trial Examiner in his Intermediate Report and Recommended Order.

All our employees are free to become, remain, or refrain from becoming or remaining members of any labor organization, except to the extent that this right may be affected by a lawful agreement requiring membership in a labor organization as a condition of employment.

MADSEN WHOLESALE Co.,
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, 609 Railway Exchange Building, 17th and Champa Streets, Denver 2, Colorado, Telephone Number, Keystone 4-4151, Extension 513, if they have any question concerning this notice or compliance with its provisions.

Piping Rock Farms, Inc. and Milk Drivers and Dairy Employees Local 584, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and The Greater New York and Northern New Jersey Milk Dealers Labor Committee; Local 602, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America; and Local 607, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Parties in Interest

Gilmartin Farms, Inc. and Milk Drivers and Dairy Employees Local 584, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and The Greater New York and Northern New Jersey Milk Dealers Labor Committee; Local 602, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America; and Local 607, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Parties in Interest.

Cases Nos. 2-CA-8311 and 2-CA-8346. November 9, 1962

DECISION AND ORDER

On July 25, 1962, Trial Examiner William Seagle issued his Intermediate Report in the above-entitled consolidated proceeding, finding that the Respondents had not engaged in the unfair labor practices alleged in the complaint, and recommending that the complaint be dismissed in its entirety, as set forth in the attached Intermediate Re-