

force or require Aetna to recognize or bargain collectively with us, or its employees to accept or select us as their collective-bargaining representative, and will abstain thereafter from picketing for such objects for a period of 12 months.

WE WILL NOT picket, or cause to be picketed, or threaten to picket, Aetna, where an object thereof is to force or require Aetna to recognize or bargain collectively with us, or its employees to accept or select us as their collective-bargaining representative, where a valid election which we did not win has been conducted by the National Labor Relations Board among the employees of Aetna, within the preceding 12 months.

WAREHOUSE AND MAIL ORDER EMPLOYEES, LOCAL 743,
INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUF-
FEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Labor Organization.

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

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

Employees may communicate directly with the Board's Regional Office, Midland Building, 176 West Adams Street, Chicago, Illinois, Telephone No. Central 6-9660, if they have any question concerning this notice or compliance with its provisions.

General Medical Supply Corp. and Local 135, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. *Case No. 25-CA-1547. January 22, 1963*

DECISION AND ORDER

On August 24, 1962, Trial Examiner Sidney Sherman issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Intermediate Report. The Trial Examiner also found that the Respondent had not engaged in certain other unfair labor practices alleged in the complaint. Thereafter, the Respondent and the General Counsel filed exceptions to the Intermediate Report, together with supporting briefs.

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

The Board has reviewed the Trial Examiner's rulings and finds no prejudicial error. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions, the briefs, and the entire record in this case, and adopts the findings, conclusions, and the recommendations of the Trial Examiner as amplified herein.

1. We agree with the Trial Examiner that Respondent violated Section 8(a) (3) and (1) of the Act by refusing to recall the employees who had been laid off on January 25, 1962, because it knew that many

of them were union adherents.¹ As the Trial Examiner pointed out in another connection (see footnote 32 of the Intermediate Report) Sperling, Respondent's president, deliberately understated the impact of the orders it had already received from its principal customer, the Veterans' Administration, in his testimony at the hearing, March 8, 1962, on the Union's petition for an election. Delivery dates on these orders could only be met if additional employees were hired. As a matter of fact, Respondent had already begun hiring and continued to do so after the representation hearing despite its claim at the hearing that no increase in employment could reasonably be contemplated. Sperling testified at that hearing that the company had a policy of recalling laid-off employees and had done so in the past. However, he sought to create the impression at the representation hearing, where the issue was the voting eligibility of these employees, that the orders he then had or could expect to obtain would not require additional hiring. The contrary, of course, was true.

It is clear from Sperling's questions of witnesses, his testimony and that of the laid-off employees at the representation hearing, and from the testimony of Roessner, Respondent's general manager, at the hearing in this case, that the laid-off employees had good reason to believe that they would be recalled and that Roessner would, in fact, have recalled them except for Sperling's specific instructions not to do so.

2. We also agree with the Trial Examiner that Respondent's receipt of the Union's petition for an election the same day that it received the Union's request for recognition did not, under the circumstances of this case, excuse its refusal to recognize and bargain with the Union as the majority representative of its employees in an appropriate unit. The Trial Examiner properly regarded the Union's alleged loss of majority through the nondiscriminatory layoff of January 25, 1962, a few days after the first request for recognition was made, as immaterial. We note, moreover, in accordance with the facts found by the Trial Examiner, as explained in paragraph 1, above, that the employees who were laid off on January 25 had a reasonable expectancy of reemployment. They remained employees of the Respondent and, as a consequence, the Union did not lose its majority even after the nondiscriminatory layoff.²

ORDER

The Board adopts as its Order the Recommended Order of the Trial Examiner, as modified below:

(a) Insert the following at the end of Section 2(c): "Interest at the rate of 6 percent per annum shall be added to the backpay to be

¹ In adopting the Trial Examiner's finding that the Respondent knew the identity of the prounion employees, Member Rodgers does not rely on the small size of the plant

² *Scobell Chemical Company, Inc.*, 121 NLRB 1130, enf'd 267 F. 2d 922 (C.A. 2)

computed in the manner set forth in *Isis Plumbing & Heating Co.*, 138 NLRB 716.”³

(b) Immediately below the signature line at the bottom of Appendix B, insert:

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.

³ For the reasons stated in their dissenting opinion in the *Isis* case, Members Rodgers and Leedom are convinced that the award of interest in this case exceeds the Board's remedial authority. While adhering to such view, for the purpose of this decision they are acceding to the majority Board policy of granting interest on moneys due

INTERMEDIATE REPORT

The charge in this case was served upon the Respondent on March 22, 1962, and the complaint issued on May 2. Hearing was held before Trial Examiner Sidney Sherman on June 5, 6, and 7, 1962, in Indianapolis, Indiana. The issues litigated were whether the Respondent had violated Section 8(a)(5) and (1) of the Act by refusing to recognize the Union, Section 8(a)(3) and (1) of the Act by discharging or laying off 17 union adherents and thereafter refusing to rehire 14 of them, and Section 8(a)(1) of the Act by threats of reprisal and other coercive statements. After the hearing, the Respondent and the General Counsel filed briefs.¹

Upon the entire record in the case and from my observation of the witnesses, I adopt the following:

FINDINGS OF FACT

I THE BUSINESS OF THE RESPONDENT

General Medical Supply Corp., hereinafter called the Respondent, is an Indiana corporation, and at its only plant in Indianapolis, Indiana, it is engaged in the manufacture and sale of hypodermic syringes. Respondent annually ships to out-of-State points products valued in excess of \$50,000.

I find that the Respondent is engaged in commerce within the meaning of the Act and that it will effectuate the policies of the Act to assert jurisdiction herein.

II THE LABOR ORGANIZATION INVOLVED

Local 135, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

¹ At the hearing the General Counsel introduced various business records of Respondent, which were designated as General Counsel's Exhibits Nos 14, 16, and 17. After the hearing, General Counsel submitted a compilation based on these three exhibits, and moved to withdraw the exhibits and to substitute therefor said compilation. The Respondent consented to the granting of said motion and it is hereby granted. I have marked this compilation as "Trial Examiner's Exhibit No 1." The Respondent also submitted after the hearing a document entitled "Respondent's Exhibit No 5, as Expanded," which consists of an elaboration of data contained in Respondent's Exhibit No 5, received at the hearing. As the accuracy of this expanded exhibit has been verified by the General Counsel, I have determined to receive it in evidence, and have marked it as "Trial Examiner's Exhibit No 2." Respondent also submitted two documents entitled, respectively, "Summary of Private Orders Received," and "Summary of Private Customers," which had been verified by General Counsel, and Respondent moved to withdraw Respondent's Exhibit No 7, which had been received at the hearing, and the contents of which were digested in the foregoing summaries. This motion is hereby granted, in the absence of objection thereto. I have determined moreover to receive the foregoing summaries in evidence and have marked them as "Trial Examiner's Exhibit No 3(a) and No 3(b)," respectively.

Counsel for the Respondent and the General Counsel are to be commended for their diligence and thoroughness, particularly their careful documentation and analysis of the contents of voluminous business records.

III. THE UNFAIR LABOR PRACTICES

A. *The issues*

The complaint, as amended at the hearing, alleges that Respondent violated Section 8(a)(1) of the Act by interrogation of employees concerning union activities, by threats of reprisal for such activities, by forbidding discussion of such activities in Respondent's plant, and by threats of surveillance of such activities; that Respondent violated Section 8(a)(3) and (1) of the Act by discharging or laying off 18 named employees because of their union activities and by failing to recall 15 of these employees; and that Respondent violated Section 8(a)(5) and (1) of the Act by refusing to recognize or bargain with the Union as the representative of Respondent's employees in the appropriate unit. The answer controverts all the foregoing allegations.

B. *Sequence of events*

The Respondent early in January² had in its employ about 40 female production workers. On January 14, about 12 of them, after a discussion in the plant initiated by employee Thomas, decided to seek the aid of a union in organizing the employees, and on the same day Thomas contacted Lammert, a representative of the Union. The next day Lammert addressed a meeting of employees at the home of employee Monday, and 18 on that date signed cards authorizing the Union to represent them. The next day five more employees signed union cards. On January 24, a meeting was held at the Union's hall in Indianapolis, which was attended by 25 of the Respondent's employees, and 3 additional cards were signed there. Thus, altogether, 23 employees had signed union cards by January 16, and 26 by January 24.

On January 19, Berns, a union agent, wrote a letter to Sperling, Respondent's president, stating that the Union represented a majority of the Respondent's employees and requesting a bargaining meeting. On January 22, the Union filed a representation petition with the Board.³ On January 25, Respondent terminated 20 of its employees. Whether this was a discharge or a layoff will be discussed later. On January 29, Berns wrote another letter to Sperling referring to the foregoing "layoff," and renewing his request for recognition. Two days later Berns called Sperling to protest the action of January 25. During their conversation, Berns expressed a desire to meet Sperling, to which Sperling assented. However, there was no further contact between them.

On February 9, Sperling called the employees together in the plant and delivered a speech about the union campaign. Whether he made any coercive remarks in this speech is the subject of conflicting testimony, which will be treated below.

On March 8, at a hearing held upon the Union's representation petition, a number of Respondent's employees testified on behalf of the Union, and others, while not testifying, were present in the hearing room. Sperling and his general manager, Roessner, were also present at the hearing and gave testimony. The sole issue in the representation case was whether the 20 former employees were eligible to vote in the election, the Union contending that they were, and the Respondent contending that they were not because they had no reasonable expectancy of reemployment. After the hearing, the Union withdrew its representation petition and subsequently, on March 21, filed the instant charge, alleging, *inter alia*, that the action of January 25 was discriminatory. Although the Respondent has hired 22 employees since January 25, only 3 of the union adherents involved in the January 25 action have been rehired by the Respondent.

C. *Discussion*1. *The interrogation*

The amended complaint alleges unlawful interrogation by Roessner on January 24 and February 9, and by Sperling on February 9. While the record shows that Sperling on February 9 made a speech to the employees regarding the Union, there is no evidence of any interrogation of employees by Sperling on that date or at any other time, nor is there any evidence of any interrogation by Roessner on February 9. Accordingly, at the close of the General Counsel's case, I granted Respondent's motion to strike the foregoing allegation as to Sperling and Roessner.

However, with regard to interrogation by Roessner on January 24, employee Bray testified that on that date Roessner referred to a notice of a union meeting which had been posted in the employees' restroom, and asked her if she had posted it or

² All events hereinafter related occurred in 1962, unless otherwise stated

³ Case No. 25-RC-2160

knew who had done so. Roessner admitted that he was aware that the foregoing notice had been posted in the restroom, but denied the foregoing interrogation.

Bray had signed a union card on January 14, but was not one of the alleged discriminatees. She was no longer in Respondent's employ at the time of the hearing. Accordingly at that time, while she may have been favorably disposed to the Union, she had no apparent personal interest in the organization of Respondent's plant by the Union or in the outcome of this proceeding. Roessner on the other hand was still employed as Respondent's general manager at the time of the hearing and it was therefore to his interest to deny any involvement in unfair labor practices.

In view of the foregoing, I credit Bray and find that Roessner interrogated Bray as testified by her. I find, further, in the context of the Respondent's other unfair labor practices discussed below, particularly a threat of reprisal delivered by Roessner in the same conversation with Bray, that such interrogation was coercive and violated Section 8(a)(1) of the Act.

2. Threats of reprisal

Section 5(b) of the amended complaint alleged that General Manager Roessner, on January 24, and President Sperling on February 9, warned the employees that Respondent "would quit business" if they did not refrain from joining or assisting the Union. As no evidence of such threat by Sperling on that date was adduced, I granted Respondent's motion to strike the foregoing allegation with respect to him. As to Roessner, Bray testified that, in the same conversation in which he interrogated her about the posting of the union notice (see above), Roessner stated that Sperling would "close the doors before he would let a union get in." Although Roessner denied this threat, I credit Bray for reasons already discussed, and find that by such threat the Respondent violated Section 8(a)(1) of the Act.

Paragraph 5(f) of the amended complaint alleges that threats similar to the foregoing were uttered by Roessner on February 2 and May 2, Thomas testified to such threats by Roessner on those dates. While Roessner contradicted her, I credit Thomas, as I was favorably impressed by her demeanor and as I have already rejected Roessner's denial of a like threat addressed to Bray.

Paragraph 5(c) of the complaint, as amended at the hearing, alleges that on February 9, Sperling threatened employees with reprisals if they discussed union activities on Respondent's property. This allegation has reference to certain remarks allegedly made by Sperling in the speech delivered by him on February 9 to the assembled employees. It is undisputed that in this speech Sperling assured the employees that they were free to designate the Union as their representative, while at the same time reminding them that under the Indiana right-to-work law they could not be required to join a union as a condition of employment. There is conflict, however, as to what Sperling told them about their right to discuss the Union in the plant. The General Counsel's witnesses testified that Sperling forbade discussion at any time in the plant, and not merely during working hours. Sperling's version was that he told the employees he had the right to discharge the employees for discussing, or soliciting for, the Union in the plant *during working hours*, and that he had some employees who would inform him of any such activities by other employees which might escape detection by the general manager (Roessner).

Of the three employee witnesses called by the Respondent, one (Bacher) professed no recollection of the matter, another (Bennett)⁴ testified incredibly, *contrary to Sperling's own admission*, that he did not even discuss the question of union activity in the plant, and a third (Hickman) asserted, in agreement with the General Counsel's witnesses, that Sperling forbade any discussion of the Union "in the plant." Hickman was still in Respondent's employ at the time of the hearing and was not shown to be a union adherent.

On the other hand the five witnesses for the General Counsel on this point testified uniformly that Sperling forbade discussion of the Union in the plant, and not merely during working hours. While all five were union adherents, none of them was involved in the alleged discriminatory layoff, and three (Deeter, Nispel,⁵ and Mason) were still in Respondent's employ at the time of the hearing. I was favorably impressed by the demeanor of these five witnesses, particularly Deeter and Prosser. Accordingly, I find that in his speech on February 9, Sperling in effect forbade any discussion of the Union in the plant at any time, *including nonworking time*, and that Respondent thereby violated Section 8(a)(1) of the Act.

Section 5(g) of the complaint, as amended at the hearing, alleges that on March 12, Sperling threatened employees with discharge if they adhered to the Union. In sup-

⁴ Also referred to in the record as Burnett.

⁵ Also referred to in the record as Green (her maiden name)

port of this allegation, the General Counsel adduced testimony by several employees about a conversation sometime in March between Sperling and employee Bolinger.⁶

Preston, who gave the most complete version of the incident, testified:

Well, he [Sperling] looked over at one of the girls and he said something about her being divorced and having three kids, "where else could she get a job," and he said he wasn't going to let anybody tell him what to do and he said something about that they had got him out of his sick bed to come down here to the . . . hearing⁷ . . . and that he had made fools out of them and he said he could get rid of all of them; he took his hand and went like that,⁸ . . . said something about his daughter and friends could run the place.

Deeter testified that she overheard Sperling say to Bolinger, "I could get rid of all this⁹ and I could have my daughter and her friends come in and do this work."

Evelena Alderson testified that on the same occasion Sperling pointed at her and said to Bolinger, "This one I would take a chance on"; that he then pointed to Mason and said, "That one there, she is divorced and has three kids. Where else could she get a job?" Thereafter, according to the witness, Sperling said of Eva Monday, "This Eva, who does she think she is anyway? And then . . . he told Margaret [Bolinger] . . . they won't outsmart Mike¹⁰ . . . then he said before he got through there wouldn't be anybody left that was with Jim Hoffa's boys . . ." According to the witness, Sperling added, "You know before there is a union I will close the doors on the place and take a vacation."

Eva Monday, who also observed the conversation between Sperling and Bolinger, testified that she overheard only a remark by Sperling that "they were not going to tell him what to do."

Bolinger, herself, although called by the Respondent, corroborated some of the foregoing testimony. Thus, while denying that Sperling had threatened to get rid of Hoffa's adherents or to close the plant, she acknowledged that Sperling said something to the effect that he could bring his daughter and her friends in to do the work in the plant. Also, in agreement with Evelena Alderson, Bolinger testified that Sperling told her he would take a chance on Evelena, that she (Bolinger) took it to mean that Sperling thought Evelena, having been rehired, would defect from the Union. Bolinger also substantiated Evelena's testimony about Sperling's allusion to the fact that one of the employees had three children and would have difficulty in obtaining other employment.

Sperling, on the other hand, categorically denied all the remarks attributed to him, except for the "take-a-chance" reference to Evelena. He explained, moreover, that this remark was addressed to Roessner, not Bolinger, that it was made after learning that Roessner had rehired Evelena, and that the statement was prompted by his favorable reaction to Evelena's "clean cut" appearance.

Sperling did, however, admit that he had a conversation with Bolinger in the plant, but insisted, contrary to the testimony of other witnesses, including Bolinger, that this conversation occurred near the plant office and not in proximity to the other employees, that he merely asked Bolinger whether the other employees were still "agitating and killing time" during working hours, and that, when she answered in the affirmative, he instructed her to tell the others to refrain from such conduct during working hours.

In evaluating the foregoing conflicting testimony, I am constrained to give special weight to the testimony of Bolinger. She was not a union adherent and was in fact called as a witness by the Respondent. While she was no longer in the Respondent's employ at the time of the hearing,¹¹ her husband was still employed as a foreman in one of Sperling's other companies. She seemed a sincere and candid witness. Sper-

⁶ The General Counsel's witnesses placed this conversation about the middle of March. Bolinger placed it toward the end of March. Sperling did not recall the exact date, but according to his testimony it could not have occurred in the middle of March, as he was bedridden between March 8 and the end of March. I do not deem it necessary to resolve this conflict. It is clear, in any event, that the conversation occurred after the hearing of March 8 on the Union's representation petition.

⁷ Sperling attended the hearing of March 8 on the Union's representation petition while recovering from the effects of an automobile accident.

⁸ At this point, as noted by me in the record, the witness made a sweeping gesture.

⁹ Deeter testified that this remark was accompanied by a gesture in the direction of a table at which the employees were working.

¹⁰ Evidently referring to himself. Sperling's first name was "Miklos."

¹¹ She left voluntarily in May.

ling on the other hand here, as elsewhere, tended to avoid direct answers to questions.¹² Relying on a synthesis of Bolinger's testimony and that of the General Counsel's witnesses, I find that, on a date in March, after the hearing on the Union's petition, Sperling engaged Bolinger in a conversation in the presence of other employees, including Deeter, Preston, Evelena Alderson, and Monday; that he told Bolinger he would take a chance on Evelena; that he pointed to Mason and indicated that she would have difficulty in obtaining other employment; and that he stated that he could dispense with the services of the employees and bring his daughter and her friends in to do their work. I find also that these remarks were delivered in the context of derogatory comments about the Union,¹³ and were therefore calculated to convey the impression that such remarks, including the threat to dispense with the employees' services, were related to the union activity.¹⁴ I find further that by such threat the Respondent violated Section 8(a)(1) of the Act.

3. Surveillance

Sections 5(d) and 5(e) of the amended complaint allege, in effect, that Sperling on various dates in February threatened to maintain surveillance of (1) union meetings and (2) of the union activity of the employees in the plant.

As to (1), Nispel testified that on February 28 Sperling told her and employee Bacher that there was going to be a union meeting that night and "he was going to watch the cars." Although called as witness by the Respondent, Bacher's testimony was even more damaging than Nispel's. Bacher, who was still in Respondent's employ and not shown to be a union adherent, testified that she recalled a statement in February by Sperling to her to the effect that there had been a union meeting the night before and that "he had seen the girls go in." In view of Sperling's unreliability as a witness, and as Bacher's testimony tends to corroborate Nispel, I do not credit Sperling's denial of Nispel's charge, and find that in February he told Nispel that he was going to observe which employees attended a union meeting.

As to (2), above, a number of the employees testified that in his February 9 speech Sperling not only forbade all union activities in the plant but warned that he would have someone report to him on any such activities. As already noted, Sperling admitted that he warned the employees on February 9 that any violation of his interdiction of in-plant union activity that escaped detection by the general manager would be reported to him by certain of the employees. He denied merely that the interdiction applied to nonworking time. However, as it has been found above that Sperling's edict did apply to nonworking time, his warning that any breach thereof would be so reported to him was unlawful, as it tended to enforce compliance therewith.

I find therefore that by Sperling's foregoing threats of surveillance on February 9 and 28 the Respondent violated Section 8(a)(1) of the Act.¹⁵

4. The January 25 "layoffs"

The amended complaint alleges that on January 25 the Respondent discharged or laid off 18 named employees because of their union activity and has since refused

¹² It should be noted, moreover, that Sperling's version of his conversation with Bolinger seems contrived. It is difficult to believe that Sperling would entrust to Bolinger, a non-supervisory employee, the responsibility for admonishing the other employees to refrain from "agitation" during working hours. Sperling had already forbidden such conduct himself in his February 9 speech, according to his own testimony, and it is not understandable why he should hesitate to repeat this instruction directly to the employees.

¹³ Bolinger testified credibly that in the course of his aforementioned conversation with her Sperling referred to the fact that Teamsters Union officials were living in hotels in Miami, and that she had heard Sperling declare that the Union could not use his money for that purpose. Moreover, I credit Preston's testimony despite Sperling's denial, that in the foregoing conversation with Bolinger he complained of the fact that he had been forced to leave a sickbed to attend the hearing on the Union's petition.

¹⁴ However, I do not find that Sperling threatened, as Evelena Alderson testified, to close the plant and take a vacation to avoid a union, or that he threatened to dismiss those who were with "Hoffa's boys." This testimony is specifically contradicted by Bolinger and not corroborated by other witnesses. As certain circumstances relating to her pretrial statements and an incident that occurred at the hearing tended to reflect on Evelena's credibility, I have determined not to credit her uncorroborated testimony there, as here, it is contradicted.

¹⁵ However, I find no violation in Sperling's statement to Bacher that he had in fact engaged in surveillance of a union meeting, as this was not alleged in the complaint.

for the same reason to reinstate 15 of these employees, and that the Respondent thereby violated Section 8(a)(3) and (1) of the Act. The record shows, and the parties stipulated, that 1 of these 18 employees (Prosser) was not in fact laid off on January 25, but remained in Respondent's employ until May 3. I will therefore recommend that her name be stricken from the complaint.

The remaining 17 of these employees were among the 20 employees who were notified on January 25 that their services were no longer required. They were also among the 26 employees who had signed cards in the plant or at meetings, authorizing the Union to represent them.

These 17 employees represented virtually the exact number (16) that had to be eliminated in order to destroy the Union's majority status.¹⁶ The January 25 action occurred only 2 days after Respondent had received the Union's request for recognition and a copy of the Union's representation petition. It occurred a day after Roessner, as found above, warned Bray that Sperling would close the plant to forestall unionization, and also a day after a union meeting of which Respondent had advance notice. The other threats of reprisal for union activity and other coercive conduct found above amply attest Respondent's union animus.¹⁷ There is, moreover, evidence in the record from which it may be inferred that the Respondent was aware on January 25 of the identity of the union adherents. Thus, on January 31, Sperling told Berns that he knew which employees were for the Union.¹⁸ Further the small size of the plant affords a basis for inferring Respondent's knowledge of the identity of the prounion employees,¹⁹ particularly in view of the fact that the first meeting to discuss unionization was held in the plant, the Union was thereafter openly discussed in the plant,²⁰ and, on January 24, the union adherents adopted the practice of eating their lunch in the plant in a separate group, a matter of which Roessner was aware.²¹

The foregoing considerations would seem to establish *prima facie* that the action of January 25 was for discriminatory reasons.

In rebuttal, the Respondent cites the following:

1. Oral and documentary evidence that the decision to effect a reduction in force on January 25 was related to a decline in the volume of unfilled orders.

2. The denials of Sperling and Roessner that the selection of any employee for separation on January 25 was related to their union activity, coupled with the fact that, with two exceptions, the Respondent followed seniority in making such selections.

The Reason for the Reduction in Force

While disagreeing in other respects, Roessner and Sperling agreed at the hearing before me (and in the representation case) that at the time of the January 25 action there was an economic need for a reduction in force. The Respondent's business records confirm this.

On January 25, the Respondent had recently completed work for its principal customer, the Veterans' Administration, on all orders which were due to be shipped by that date, and Respondent received no new orders from that source until

¹⁶ Of the 20 employees remaining after January 25, only 9 were union adherents.

¹⁷ Further evidence thereof appears in the credible testimony of Berns (which Sperling only inferentially denied) that in their conversation of January 31, Sperling stated that it was foolish of Berns to think that Respondent would ever be organized, and that Sperling was not going to have any Hoffa men running his plant. This was in keeping with Sperling's later remarks to the employees, as found above, that nobody was going to outsmart him or tell him what to do.

¹⁸ Berns so testified. Although denying that he knew on January 25 who the union adherents were among the employees released on that date, Sperling did not directly contradict Berns' foregoing testimony, and I credit it. As Sperling's admission to Berns was made 6 days after the January 25 action, it would not in itself constitute sufficient proof of Respondent's knowledge of the identity of the union adherents on January 25, but would be entitled to consideration in conjunction with the other matters cited in the text.

¹⁹ *Holland Manufacturing Company*, 129 NLRB 776; *Wiese Plow Welding Co., Inc.*, 123 NLRB 616.

²⁰ The Respondent points to testimony that the foregoing activities occurred outside the presence of management. However, such evidence does not preclude the inference that employees not sympathetic to the Union may have reported such activities to management. Note in this connection Sperling's assertion in his February 9 speech, as found above, that there were some among the employees who would keep him informed of any in-plant union activities which were not observed by management.

²¹ The last finding is based on the uncontradicted testimony of Bennett, a witness for Respondent.

February 23. Its outstanding unfilled orders from the Veterans' Administration on January 25 represented only about 1 week's work,²² and delivery of most of this amount was not due until April 20. As for its other customers, shipments to them during the preceding 8 months had averaged less than 200,000 units a month. Only 110,000 units were ordered by such other customers in January and shipments in February to all customers, including the Veterans' Administration, totaled only 218,000 units. It is thus evident that on January 25 Respondent could at the most have been assured of less than 2 weeks' work for its existing force of 40 employees and that, in fact, total shipments for the entire month of February represented work that could have been completed by the full complement of 40 employees in less than 2 weeks. It follows that, absent the reduction in force on January 25, it would have been necessary to lay off most, or all, of Respondent's employees by the middle of February. That Respondent chose instead to retain half its force throughout the slack period seems consistent with sound business practice.

The General Counsel does not contend that between January 25 and February 23 the state of Respondent's backlog was such as to warrant retaining all 40 employees. He points merely to evidence in Respondent's own records showing that during January it increased its inventory of raw materials as to certain items, and that two new employees were hired on January 15, only 10 days before the reduction in force. However, this evidence is not inconsistent with Roessner's testimony, which I credit, for reasons discussed below, that the decision to retrench was not reached until January 19 or 20, because no new Government orders had materialized by that time and work on the old orders was virtually completed. The General Counsel points also to statements by Roessner to employees during the early part of January to the effect that he expected to maintain full production indefinitely, and to Sperring's admission at the representation hearing that when delivery of the Veterans' Administration order was made (on January 24), the Respondent was promised further orders. However, whatever the reason for Roessner's statements²³ and whatever expectations Respondent may have had of new business, the fact remains that such new business had not materialized on January 20 or on January 25 and did not in fact materialize until about a month later.

General Counsel contends further that Respondent could have retained its existing work force intact to produce for inventory. He points to the fact that Respondent's inventory of finished products had in the past been 10 to 15 percent higher than it was on January 25.²⁴ However, there were also times in the recent past when such inventory was 15 to 20 percent lower than in January. Moreover, considerations other than discouragement of union activity might well have influenced Respondent's decision not to retain employees solely to build up inventory in anticipation of future orders. In reaching such a decision, Respondent would have had to weigh (1) the disadvantages of tying up capital in additional finished inventory without any assurance as to when such excess inventory might be liquidated²⁵ as against (2) the disadvantages of having to rebuild its work force if business improved and of having to replace with inexperienced help any former employees who were not then available for rehire. Moreover, Respondent's personnel records show that a 50 percent decline in its work force, such as occurred on January 25, was not unprecedented. Thus in the first week of November 1960, Respondent's complement declined from 28 to 15 employees.²⁶ And, in explaining the size of the reduction in force, Roessner testified that he was influenced by the fact that Respondent's record showed that Respondent had only 18 or 19 employees before the upsurge of Government work in August 1961. Those records corroborate Roessner on this point.

Finally, for reasons discussed below, I deem Roessner to be a credible witness in this area and credit his testimony that he was responsible for the layoff and that it was motivated by economic considerations. Accordingly, I do not find that the decision to effect a reduction in the force on January 25, or the size of such reduction was dictated by discriminatory considerations.²⁷

²² I.e., 121,400 units. During January, Respondent shipped about 500,000 units.

²³ Roessner attributed them to his misunderstanding of information that he had received from Respondent's bookkeeper concerning the nature of the backlog.

²⁴ See Respondent's Exhibit No. 6. It was stipulated by counsel after the hearing that this exhibit, although not so described at the hearing, related to raw materials as well as finished goods. General Counsel's argument assumes, nevertheless, that it is an accurate index of the quantity of finished products on hand, and I have accepted this assumption.

²⁵ Roessner testified that a factor in his decision to retrench was Respondent's apparent financial stringency.

²⁶ "Stipulation Exhibit No. 6" attached to General Counsel's Exhibit No. 2.

²⁷ General Counsel suggests that Respondent might have "created" a decline in its backlog by refusing orders or by causing customers to cancel orders. However, there was

Mode of Selection

The question remains whether the employees were selected for dismissal on January 25 on a discriminatory basis. At first glance, it would seem difficult to conceive of a less discriminatory basis than the method adopted by the Respondent—*viz*, seniority. However, the Board has held that even the adoption of seniority as a basis for layoff does not negate discrimination, where it sufficiently appears that seniority was used merely as a cloak for discrimination.²⁸ The question here is therefore whether seniority was used as a device to conceal a discriminatory basis for selection.

Respondent called Sperling and Roessner to explain the basis for selection. However, there was sharp conflict between their testimony before me. Moreover, Sperling's testimony is difficult to reconcile with that given by him in the hearing in the representation case.

According to Sperling, the decision to effect a reduction in force was made in December 1961, he alone was responsible therefor, and the selection of employees was based on Sperling's disenchantment with those employees who had been hired in the fall of 1961 by his then general manager, Everett. Sperling testified that he deemed these employees responsible for the unusual number of customer complaints, allegedly received by Respondent toward the end of 1961, about the quality of its products. It was for this reason, according to Sperling, that late in December 1961 he directed Everett's replacement, Roessner, to "clean house" by discharging, as soon as the current backlog of work was liquidated, all the employees hired in the fall of 1961. Thus, according to Sperling, the sole basis for selection of the employees to be released was their supposed incompetence. Moreover, according to Sperling, it was his low opinion of the caliber of these employees that prompted him to instruct Roessner, after a new order was received from the Veterans' Administration on February 23, not to recall any of those employees but to hire new employees to handle that order. However, it is curious that Sperling's testimony in the representation case hearing on March 8, referred to above, does not mention the supposed inefficiency of the affected employees as the reason for the January 25 action, notwithstanding that proof that they had been discharged for that reason would have rendered them ineligible to vote. Instead, Respondent in the representation case contested their eligibility to vote solely on the ground that, while it intended to recall at least some of the girls if business improved,²⁹ Respondent could foresee no improvement in business conditions that would warrant their reemployment.

The foregoing conflict in Sperling's own testimony suggests that his explanation before me of the basis for selection on January 25 and of the reason for not recalling the old employees was an afterthought, designed to meet the exigencies of this proceeding. The representation hearing was held several days before the Respondent, on March 12, began to hire employees to handle the new Government order. Accordingly, it was not until the instant hearing that there was any need for the Re-

no evidence of this at the hearing, and the General Counsel failed to explain why such rejected or canceled orders would not be reflected in Respondent's business records, which were made available to the General Counsel.

It may be contended that even if a reduction in force was necessary, the timing of such reduction should be found to have been at least accelerated by the union activity of the employees, specifically the January 24 meeting, of which the Respondent admittedly had advance notice. In this connection the General Counsel points to Roessner's admission that the completion of the Government order, which Respondent alleges was the occasion for the January 25 action, had been effected at least 3 days before, on January 22, whereas the union meeting occurred only a day before. The General Counsel seeks, moreover, to enhance the significance in this respect of that meeting by urging that, from Sperling's admission, cited above, that he observed a union meeting in February, an inference be drawn that either Sperling or Roessner also spied on the union meeting of January 24.

As to this matter of surveillance, it was stipulated at the hearing (General Counsel's Exhibit No. 2, paragraph 10) that Sperling was not even in Indianapolis on January 24. As for Roessner, I deem the foregoing admission by Sperling of surveillance by himself of one union meeting insufficient basis for inferring surveillance by someone else of an entirely different meeting. With regard to the timing of the January 25 action, it cannot be denied that it was a suspicious circumstance, particularly in view of Respondent's union animus, and that it militates against the credibility of Roessner's denial that the layoff was influenced in any way by the union campaign. However, I do not deem such evidence sufficient to overcome the reasons set forth below in the text for crediting Roessner's testimony in this area.

²⁸ *Borg-Warner Controls, Borg-Warner Corporation*, 128 NLRB 1035, 1043-1044.

²⁹ See General Counsel's Exhibit No. 3, p. 171, lines 12-24.

spondent to explain its refusal to rehire the old employees as well as their original separations. The old contention at the representation hearing—lack of business—would explain the latter action but not the former. The new contention—inefficiency—adequately explained both actions.

That this new contention was an afterthought is confirmed by Roessner's testimony before me, which is consistent in the main with that given by him and Sperling in the representation case, but conflicts sharply with Sperling's testimony before me. Roessner and Sperling agree on only one point in this area—that on January 25 there was an economic need for reduction of the work force. Roessner asserted, however, that he alone, and not Sperling, was responsible for formulating the decision to reduce the work force, that he made this decision on January 19 or 20, and that he based his selections for layoff solely on seniority, except for two instances where he deemed special considerations of efficiency to be of overriding importance.

Moreover, Roessner contradicts Sperling as to the circumstances relating to the failure to rehire the old girls. Sperling testified that after receipt of the new Government order he unequivocally instructed Roessner not to rehire any of the old girls because they were "no good" and to hire new girls instead. Roessner, on the other hand, testified that at that time he asked Sperling whether he should call back the old girls, and that Sperling merely told him not to "call" them. Uncertain as to Sperling's meaning, Roessner, beginning on March 12, nevertheless did take back all three of the "old" girls who thereafter applied for reinstatement.³⁰ (Roessner indicated, in effect, that he chose to construe Sperling's instructions not to "call" the girls as merely precluding him from seeking them out but not as preventing their rehire should they apply to him.) Sperling's testimony at this point tends to shore up his contention which, as already pointed out, was raised for the first time before me, that the original basis for selection on January 25 was efficiency. Roessner's testimony, however, if believed, undercuts this contention, since the fact that Sperling forbade recall of the old girls without any explanation would permit an inference of discriminatory motivation. Moreover, the fact that Sperling sought at the hearing to transform his cryptic order to Roessner not to call the old girls to an order not to hire them because they were no good would underscore the contrived nature of Sperling's new defense of a discharge for cause.

There is also a discrepancy between Sperling's testimony and Roessner's action on January 25. The burden of Sperling's testimony is that he told Roessner to clean house by dismissing all the employees hired by *Everett* in the fall of 1961. Roessner, however, also released four girls whom he had hired himself in December and January. This was consistent with his version of the January 25 action as a layoff based on seniority but not with Sperling's version of a discharge for cause of *Everett's* most recent hires.

While Roessner had his shortcomings as a witness,³¹ I consider him more candid and reliable than Sperling, who demonstrated a tendency to be evasive, and to slant his testimony³² and shift his position to suit his immediate purpose. Roessner, moreover, was not so deeply involved financially or otherwise in the issues in the case.

³⁰ E Alderson, Schwartz, and Summit. Harvey had already been rehired, on February 6. All but Schwartz were union adherents.

³¹ As already noted, I have refused to credit his denial of coercive remarks attributed to him by employees. Moreover, it is difficult to reconcile his testimony before me that he had not on January 25 formed any opinion as to the ability of the employees with contrary testimony before me and in the RC case in which he expressed opinions as to the competence of the laid-off employees.

³² A striking illustration of this is Sperling's testimony on March 8 at the representation hearing that the \$85,000 VA order of February 23 was a "small" order, which would not require any additions to the work force. That order in fact represented 25 percent of Respondent's production for the entire preceding calendar year, and within 3 months after receiving that order Respondent had doubled its work force. Sperling testified before me that this increase in the work force was due to the combined effect of the VA order and the volume of private orders and Respondent's brief points to a sharp rise in private orders in April. However, there was a sharp drop in private orders in March, when nine employees were added, and there is no evidence or contention that the April increase was anticipated when those employees were hired. Moreover, since the aggregate value of the private orders in April was only about 20 percent of the value of the VA order, such private orders could hardly have accounted for any substantial number of the new hires, particularly as Respondent had been able to ship in February, *without adding to its work force*, more units than were encompassed in all the April private orders. Thus, it is evident that Sperling's foregoing testimony at the representation hearing and before me was a deliberate understatement of the impact of the VA order.

Finally, I deem it significant that Roessner's testimony, while tending to justify the January 25 action as an economic layoff, conflicted with Sperling's grand strategy, which was to put forth a defense of discharge for cause on January 25 and a refusal to rehire for the same cause. Moreover, as shown above, Roessner contradicted Sperling in material points as to the circumstances relating to the Respondent's failure to recall most of the old employees. The fact that Roessner, while still Respondent's general manager and subject to discharge by Sperling, should refuse in these important respects to accommodate his testimony to Sperling's is a compelling reason for crediting Roessner as to the circumstances of the layoff (and the failure to recall).

Accordingly, I credit Roessner here as against Sperling and find that on January 19 or 20 he formulated the plan to effect a reduction in force and that he based his selections for layoff mainly on seniority rather than efficiency.

The question remains whether Roessner followed seniority because he knew that he would thereby reach the bulk of the union adherents. Even if it be assumed, in view of the evidence cited above, that Roessner, contrary to his testimony, knew who the union adherents were, there are circumstances which to my mind militate against a finding that he would have been influenced by this consideration. Roessner appears to have been relatively free of any union animus, as is attested by the fact that late in February or early in March, he proposed to Sperling the rehire of the former employees and, despite Sperling's adverse reaction, proceeded to rehire all who applied, regardless of union affiliation. While I have found above that Roessner engaged in coercive conduct, this consisted principally in warning the employees that Sperling would close the plant rather than permit it to be organized. I do not regard this as necessarily reflecting any union animus on Roessner's part. Such warnings were consistent with a desire to dissuade the employees from engaging in any conduct that would invite reprisals by Sperling, whose animus toward the Union must have become known to Roessner at an early date.³³ Accordingly, I am not persuaded that Roessner resorted to seniority on January 25 as a means of reaching the union adherents.

However, the Respondent's failure to recall the old employees stands on an entirely different footing. There, as already noted, Roessner and Sperling are in agreement that the decision not to recall was made by Sperling. Moreover, for reasons already stated, I reject Sperling's testimony that he made it clear to Roessner that he was not to hire any of the old girls because they were inefficient, and I credit Roessner that Sperling merely told him not to call them, without specifying any reason, leaving Roessner free to construe this as precluding him merely from seeking them out. Had Sperling made it clear that he did not want any of the old girls taken back because of their incompetence, I do not believe that Roessner, however well disposed he may have been to the former employees, would have openly defied Sperling. While I do not doubt that when Sperling instructed Roessner not to "call" the old girls he meant that he did not want them rehired under any circumstances, and that Roessner (deliberately or otherwise) misconstrued his meaning, I find that Sperling's reason for opposing their rehire was not, as he contends, their supposed inefficiency but rather their union activities. It is clear that by the second week in March, when the Respondent began to augment its work force to handle the new Government order, Sperling either knew, or had reason to believe, that the bulk of the old employees were union adherents, and that their reinstatement was essential to the Union's achievement of majority status. Apart from the circumstantial evidence cited above indicating such knowledge by Sperling as early as January 25, there is Sperling's admission to Berns 6 days later that he knew which employees were for the Union. Moreover, at the hearing Sperling admitted that, when he forbade Roessner to hire old employees, he knew that "some" of them were union adherents. Sperling could hardly testify otherwise, as it was obvious that the Union would not have sought to establish the eligibility of the old employees to vote unless it expected the majority of them to vote for it, and Sperling must at least have suspected the prouinion sentiments of the seven³⁴ of the old employees who testified in Sperling's presence at the representation hearing on March 8 in

³³ Sperling made no effort to conceal this animus from Berns in their January 31 conversation. It is hardly likely that Sperling would not have made it known to Roessner from the inception of the union campaign. This protective purpose of Roessner's would be consistent with the fact that, as already noted, in the matter of recalling the old employees he attempted to act as a buffer between Sperling and the union adherents.

³⁴ Loooper, Purvis, Roberts, Earline White, Burkhardt, Bornstein, and Duncan (whose testimony was stipulated).

support of the Union's petition and of the two³⁵ others who attended as spectators on that date. None of those nine were recalled. For reasons already indicated, I find that Sperling was also aware as early as January 31 of the sentiments of the five remaining union adherents³⁶ who were not recalled. Moreover, it would be no defense as to those five in any event, that Sperling did not believe them to be union adherents, if in fact he did not recall them in order to avoid recalling others whom he believed to be union adherents.³⁷

That he did in fact oppose the recall of all the 14 old employees involved herein because of the known union activities of some or all of them is sufficiently established by Sperling's union animus, including his threats of reprisal for union activities, and by the speciousness of his explanation for not recalling them (that all of the old employees were deemed incompetent), which explanation conflicts not only with Roessner's credited testimony before me but with Respondent's position in the representation case that the action of January 25 was due solely to lack of work and that Respondent would recall at least some of the employees affected by that action should business ever improve.

In conclusion, I find that, while it has not been proven that the reduction in force of January 25 was discriminatory, the refusal to recall 14 of the union adherents affected by that action was discriminatory, and that by such refusal the Respondent violated Section 8(a)(3) and (1) of the Act.³⁸

5. The refusal to bargain

The complaint alleges that the Respondent refused on and after January 19 to bargain with the Union as the representative of its employees, thereby violating Section 8(a)(5) and (1) of the Act. The answer denies this allegation.

a. *The appropriate unit*

The parties stipulated, and I find, that the following unit is appropriate for purposes of collective bargaining within the meaning of the Act:

All production and maintenance employees of the Respondent, employed at its Indianapolis, Indiana, plant, excluding all office clerical employees, salesmen, guards, professional employees, and supervisors as defined in the Act.

b. *The Union's majority status*

The record shows, and I find, that during the week ending January 20 there were 40 employees in the foregoing unit, that on January 15, 18 of them signed authorization cards for the Union, that 5 more signed cards the next day, and that the total number of employees signing such cards (23)³⁹ represented a majority of the employees in the unit. Accordingly, I find that on January 16, and at least until

³⁵ Day and D. Alderson.

³⁶ Charles, Riley, Stevens, Ella White, and Willis

³⁷ *Arnoldware, Inc.*, 129 NLRB 228.

³⁸ While there is no showing that any of these 14 applied for reinstatement, it is clear from Sperling's testimony at the representation hearing that it had been Respondent's practice in the past to recall satisfactory laid-off employees when business improved and Roessner's credited testimony before me indicates that he was disposed to recall the old employees in the spring of 1962, but did not because of Sperling's objection. It is true that at the representation hearing Roessner, in response to leading questions by Sperling, testified that "some" of the laid-off employees were good workers while others were poor, and that he intended to recall the former. However, nothing in his testimony before me indicates that his proposal to Sperling contemplated a selective recall procedure.

Moreover, Roessner's treatment of Summit negates the likelihood that, if left to his own devices, he would have recalled the laid-off employees on a selective basis. He admitted that Summit was the only employee laid off on January 25 out of seniority, and that this was because of her obvious limitations. Yet he rehired her upon application despite her admitted inadequacy.

In any case, even if it be assumed that, absent discrimination, the old employees would have been recalled on a selective basis, as the burden is on the Respondent to disentangle the consequences of its own wrong, and there is no basis in the record for determining which employees would, or would not, have been recalled under such selective procedure, I still would have no alternative but to find a discriminatory refusal to recall as to all 14 employees here involved.

³⁹ This number was increased to 26 on January 24.

January 25, the Union represented a majority of the employees in the appropriate unit.

As already noted, on January 25 Respondent laid off 20 employees, including 17 union adherents, leaving only 9 union adherents among the 20 employees retained. However, for reasons set forth below, I find that this circumstance did not affect the Union's bargaining rights.

c. *The demand and refusal*

On January 19, Union Representative Berns wrote Sperling that the Union represented a majority of the Respondent's production and maintenance employees, requested a bargaining meeting, and offered to furnish at such meeting proof of the Union's majority status. Although Sperling was out of town at the time, he was advised on January 23 of the receipt of this letter and of its contents. At his direction, the letter was referred on that date to his attorney. In the meantime, on January 22, the Union filed with the Board a petition for certification as the representative of Respondent's employees. A copy of this petition was also received by Respondent on January 23, and was referred to Respondent's attorney. On January 25, as already related, the Respondent laid off 20 employees, including 17 union adherents. On January 29, Berns wrote Sperling again, referring to the layoff, and renewing his request for recognition. This letter was seen by Sperling on January 31, upon his return to Indianapolis. On the same date, an agent of the Board notified a member of the law firm representing Respondent of the receipt of advice from Berns that the Union desired a consent election upon its petition, provided Respondent agreed that the employees laid off on January 25 were eligible to vote. On January 31, Berns called Sperling and protested the layoff of January 25. In the course of this conversation, Sperling stated, as found above, that it was foolish of Berns to think that Respondent would ever be organized and that Sperling "wasn't going to have any Hoffa men running his plant." Berns did not on this occasion specifically renew his request for recognition, nor did he attempt to contact Sperling again, although Sperling indicated he was not averse to meeting with Berns.⁴⁰

Respondent at no time replied to the Union's requests of January 19 and 29 for recognition. Respondent contends that (1) there was no unequivocal request for recognition by the Union, and (2) the Union lost its majority on January 25 by reason of the layoff, which Respondent contends, and I have found, was non-discriminatory.

In support of its first contention, Respondent cites the circumstances that on the same day that the Respondent received the Union's initial bargaining request, it also received a copy of the Union's representation petition; and that on the same day that the Union's second request came to Sperling's attention, Respondent's counsel was advised of the Union's conditional agreement to a consent election, and Sperling himself received a call from Berns in which he admittedly made no reference to his written request for recognition. Respondent contends that under these circumstances it was reasonable for Respondent to believe that the Union was proposing an election as an alternative to voluntary recognition.

However, it is well settled that the mere filing of a representation petition by a union does not justify a refusal to recognize the union absent a good-faith doubt of its majority status.⁴¹ Respondent does not contend that it had any such doubt prior to January 25.

Accordingly, I find no merit in Respondent's contention that the Union's bargaining request of January 19 was ineffective because of the filing of the representation petition.⁴²

Turning to the Respondent's defense that the Union lost its majority by reason of the nondiscriminatory layoff on January 25, the short answer thereto is that if there was a refusal to bargain before January 25, the Union's subsequent loss of

⁴⁰ The foregoing findings are based on Berns' version of the January 31 conversation. Sperling's version was that it consisted of some banter about the political affiliation of the Union's leaders and some disparaging remarks by Sperling about the Union, but in a milder vein than those related by Berns. Sperling did not, however, directly deny the statements imputed to him by Berns, as related in the text, above. In view of this and in view of Sperling's general unreliability as a witness, I credit Berns.

⁴¹ *Southern Illinois Sand Co., Inc.*, 137 NLRB 1490; *Laabs, Inc.*, 128 NLRB 374

⁴² *Joseph Solomon d/b/a The Solomon Company*, 84 NLRB 226, cited in Respondent's brief, seems distinguishable from the instant case on the ground that there the union expressly offered the Respondent the alternative of a Board election or a card check. See *Cactus Petroleum, Inc.*, 134 NLRB 1254.

majority was immaterial.⁴³ I find that there was such a refusal. Although the Respondent received the Union's bargaining request on January 23, it did not see fit to reply thereto. As already noted, Respondent does not contend that it had any doubt of the Union's majority on January 23 and the only reason advanced for not replying to the Union's request on that date is the receipt on the same date of a copy of the Union's petition for certification, a reason which I have already found insufficient. Moreover, I am satisfied that the true reason for Respondent's failure to honor the Union's request for recognition was its determination not to enter into bargaining relations with the Union under any circumstances.⁴⁴

This determination was reflected in (1) Sperling's statement on January 31 to Berns that it was foolish to think that Respondent would ever be organized and that no "Hoffa men" could run his plant; (2) Roessner's warnings to the employees that Sperling would close the plant to prevent organization thereof; (3) Sperling's prohibition of union activities within the plant even during nonworking time, and his threats of surveillance of union activities; (4) Sperling's threat in May to discharge all the employees in the context of remarks disparaging the Union; and (5) last but not least, Sperling's refusal to rehire the bulk of the laid-off employees because of their union activities. Accordingly, I find that there was a refusal to bargain on January 23, that the Respondent thereby violated Section 8(a)(5) and (1), and that it is immaterial whether the Union thereafter lost its majority status.⁴⁵

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 the operations of the Respondent described in section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

It having been found that the Respondent violated Section 8(a)(1), (3), and (5) of the Act, it will be recommended that the Respondent cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

It has been found that the Respondent refused to bargain with the Union, which represented a majority of the employees in an appropriate unit. Accordingly, I shall recommend that the Respondent be ordered to bargain, upon request, with the Union as the exclusive representative of the employees in the appropriate unit.

It has also been found that Respondent early in March determined not to recall any of its laid-off employees because of their union activity, and 14 of such employees were not recalled for that reason.⁴⁶ Accordingly, the Respondent should be required

⁴³ *Franks Bros. Company v NLRB*, 321 US 702 (1944)

⁴⁴ Cf. *S. Frederick Sansone Co*, 127 NLRB 1301, where the Board found no unlawful refusal to bargain in the case of a Respondent who had received simultaneously, as here, a bargaining demand and copy of a representation petition filed by the union. There, however, the Board found, contrary to the situation here, that the refusal to bargain was motivated by a good-faith doubt of the union's majority status and not by rejection of the principle of collective bargaining.

⁴⁵ In view of this finding, it is unnecessary to consider Respondent's contentions regarding the adequacy of the Union's second bargaining request on January 29. I would attach no significance, in any event, to the fact that in their January 31 conversation Sperling acquiesced in Berns' suggestion that they meet. It is undisputed that Berns did not indicate that the purpose of such a meeting would be to discuss recognition, and that Berns was given no reason to believe that at such a meeting Sperling would consider granting recognition. In fact the tenor of Sperling's comments on the Union and its leadership could not fail to convince Berns that any discussion of recognition with Sperling would be futile; and it is apparent from Berns' testimony, which I credit, that the only reason for Berns' proposal of a meeting was that he was intrigued by Sperling's rather vigorous and provocative exposition of his individualistic personal philosophy. As Berns put it, ". . . at one point I burst out laughing and told him that he sounded very funny and I would like to meet him in person to discuss the principles of freedom which we had been talking about . . ." It was at this point that Sperling professed a willingness to meet.

⁴⁶ Day and Willis did not appear at the hearing. The General Counsel explained that Day's absence was due to reasons of health, and that he had excused Willis from appearing pursuant to a subpoena, upon receipt of a letter stating that she was unable to attend the hearing because she had moved to Kansas. The issues pertaining to the discrimination

to offer them immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges. The Respondent should also be directed to reimburse them for any loss of pay they may have suffered by reason of the Respondent's discrimination against them, by paying to them a sum of money equal to the amount they would normally have earned as wages from the date that they would have been recalled absent discrimination,⁴⁷ to the date of Respondent's offer of reinstatement, less their net earnings during that period. Backpay shall be computed on the basis of calendar quarters, in accordance with the method prescribed in *F. W. Woolworth Co.*, 90 NLRB 289.

In view of the nature of the violations found herein, particularly the Respondent's discriminatory refusal to rehire its laid-off employees, a threat of future violations exists which warrants a broad cease-and-desist provision.

CONCLUSIONS OF LAW

1. All Respondent's production and maintenance employees, excluding office clericals, salesmen, professional employees, guards, and 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. At all times material the Union has been and still is the exclusive representative of all the employees in the aforesaid unit for the purposes of collective bargaining, within the meaning of Section 9(a) of the Act.

3. By refusing to bargain collectively with the aforesaid labor organization as the exclusive representative of its employees in an appropriate unit, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

4. By interrogation, by forbidding union activities during nonworking time, and by threats of reprisal for, and surveillance of, union activities, Respondent has interfered with, restrained, and coerced its employees in the exercise of rights guaranteed in Section 7 of the Act, and has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

5. By refusing to recall 14 of the union adherents laid off on January 25, the Respondent has violated Section 8(a)(3) and (1) of the Act.

RECOMMENDED ORDER

Upon the entire record in the case, and the foregoing findings of fact and conclusions of law, it is recommended that Respondent, General Medical Supply Corp., of Indianapolis, Indiana, its officers, agents, successors, and assigns, shall be required to:

1 Cease and desist from:

(a) Refusing to bargain concerning rates of pay, wages, hours of employment, or other conditions of employment, with Local 135, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive representative of all its production and maintenance employees, but excluding office clericals, professional employees, guards, and supervisors as defined in the Act.

(b) Discouraging membership in Local 135, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or in any other labor organization, by discriminating against employees in regard to their hire or tenure of employment or any term or condition of employment.

(c) Threatening employees that it will close its plant or discharge them because of their union activities or that it will engage in surveillance of such activities.

against these employees were fully litigated. Under these circumstances, their absence from the hearing does not preclude a finding of discrimination against them or the award to them of backpay with reinstatement nor does Respondent so contend. See *Atlanta Flour and Grain Company, Inc.*, 41 NLRB 409, footnote 11; *Acme Waste Paper Company*, 121 NLRB 18, 19.

The General Counsel urges that interest computed at 6 percent per annum be added to the backpay award. While the arguments advanced in support of such a remedy appear to have merit, I deem myself bound by existing Board precedents, which are adverse to the General Counsel's proposal. See *Indianapolis Wire-Bound Box Company, d/b/a Cleveland Veneer Company*, 89 NLRB 617, footnote 26; *Earl I Sifers, d/b/a Sifers Candy Co.*, 92 NLRB 1220, 1222.

⁴⁷ That date in each case is to be determined on the assumption that, absent discrimination, the Respondent would have followed seniority in determining the order of recall, as it did in determining the order of layoff. For the basis of this assumption, see footnote 38, above.

(d) Coercively interrogating employees concerning their union activities or prohibiting union activity in the Respondent's plant during nonworking time.

(e) In any other manner, interfering with, restraining, or coercing its employees in the exercise of their right to self-organization, to form, join, or assist the above-named Union, 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, or to refrain from any or all such activities, except to the extent that such right is affected by the provisos in Section 8(a)(3) of the Act, as amended.

2. Take the following affirmative action, which is deemed 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 employees of the Respondent, excluding office clericals, salesmen, professional employees, guards, and supervisors as defined in the Act, with respect to rates of pay, wages, hours of employment, or other conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Offer to the employees listed in attached Appendix A immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges.

(c) Make whole the said employees, in the manner set forth in the section of the Intermediate Report entitled "The Remedy," for any loss of pay they may have suffered by reason of the Respondent's discrimination against them.

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

(e) Post at its plant in Indianapolis, Indiana, copies of the attached notice marked "Appendix B."⁴⁸ Copies of said notice, to be furnished by the Regional Director for the Twenty-fifth Region, shall, after being duly signed by the Respondent's representative, be posted by the Respondent immediately upon receipt thereof, and maintained by it for a period of at least 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that such 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 receipt of this Intermediate Report, what steps the Respondent has taken to comply herewith.⁴⁹

⁴⁸ In the event that this Recommended Order is adopted by the Board, the words "A Decision and Order" shall be substituted for the words "The Recommended Order of a Trial Examiner" in the notice. In the further event that the Board's Order is 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."

⁴⁹ In the event that this Recommended Order is 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 A

Alderson, Dimple
Bornstein, Rose M.
Burkhardt, Bertha
Charles, Mary
Day, Charlotte

Duncan, Emma
Looper, Sandra
Purvis, Janet
Riley, Ethel Marie
Roberts, Margaret

Stevens, Carol A.
White, Earline
White, Ella Virginia
Willis, Betty

APPENDIX B

NOTICE TO ALL EMPLOYEES

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

WE WILL bargain, upon request, with Local 135, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive representative of all employees in the bargaining unit described below in respect to rates of pay, wages, hours of employment, or other conditions of employment,

and, if an understanding is reached, embody it in a signed agreement. The bargaining unit is:

All our production and maintenance employees, excluding office clericals, professional employees, salesmen, guards, and supervisors as defined in the Act.

WE WILL NOT threaten that we will close our plant rather than deal with a union, or coercively interrogate our employees about their union activities, threaten employees with reprisals for union activities, threaten surveillance of union activities, or forbid any union activities in our plant during nonworking hours.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form, 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, or to refrain from any or all such activities, except to the extent that such right may be affected by the provisos in Section 8(a) (3) of the Act, as amended.

WE WILL offer the following employees immediate and full reinstatement to their former or substantially equivalent positions, and make them whole for any loss of pay suffered by reason of the discrimination against them:

Alderson, Dimple	Duncan, Emma	Stevens, Carol A.
Bornstein, Rose M.	Looper, Sandra	White, Earline
Burkhardt, Bertha	Purvis, Janet	White, Ella Virginia
Charles, Mary	Riley, Ethel Marie	Willis, Betty
Day, Charlotte	Roberts, Margaret	

All of our employees are free to become, remain, or refrain from becoming or remaining, members of Local 135, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization.

GENERAL MEDICAL SUPPLY CORP.,
Employer.

Dated..... By.....
(Representative) (Title)

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

Employees may communicate directly with the Board's Regional Office, 614 ISTA Center, 150 West Market Street, Indianapolis, Indiana, Telephone No. Melrose 3-8921, if they have any question concerning this notice or compliance with its provisions.

Local 3, International Brotherhood of Electrical Workers, AFL-CIO and New York Telephone Company. Case No. 2-CC-668.
January 22, 1963

DECISION AND ORDER

On July 5, 1962, Trial Examiner Eugene F. Frey issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Intermediate Report. He also found that the Respondent had not engaged in certain other unfair labor practices and recommended dismissal as to them. Thereafter, the General Counsel and the Respondent filed exceptions to the Intermediate Report with supporting briefs.