

cause (1) at the time of the aforementioned lockout, Standard was not a member of said employer association, and (2) it only acts in the capacity of a collective-bargaining agent for and on behalf of its members.

As to (1) the record clearly discloses, and I find, that at the time of the 1959 lockout, Standard was in arrears in its dues to Respondent Association. Nonetheless, Respondent Association neither suspended Standard's membership therein, nor did it expel Standard from membership. Furthermore, Standard participated in the March 31, 1959, Respondent Association meeting where the members of that organization were advised to lock out their employees if the union involved did not accept Respondent Association's contract terms. In addition, (1) in June 1960 Respondent Association billed Standard for dues covering the second quarter of 1959 through the third quarter of 1960; (2) under date of July 31, 1959, Respondent Association wrote Standard that the Board was seeking certain data concerning the complaint case and asked Standard to submit such data; (3) under date of November 12, 1959, Respondent Association sent Standard a letter addressed, "Attention All Members," advising Standard of a forthcoming association dinner meeting, and (4) under date of August 31, 1959, Respondent Association wrote Standard advising it what had transpired at a meeting of plumbing contractors held on August 27, 1959. In addition, the parties stipulated in the original proceedings that Standard was a member of Respondent Association on March 31 and April 1, 1959. Under the circumstances, I find no merit to Respondent Association's contention that Standard was not one of its members at the time of the lockout in question.

As to (2) the Board and court each found that Respondent Association and those of its members who had locked out their respective employees had violated Section 8(a)(3) and (1) of the Act. The Board ordered Respondent Association as well as those of its members who had discriminated against their employees to make said employees whole for any loss of wages they may have suffered as a result of the discrimination against them. The Tenth Circuit enforced said order. It thus follows that Respondent Association is financially responsible for making the 13 Standard discriminatees whole or any loss of pay they may have suffered.⁷

The credited evidence discloses that Standard has long since gone out of business and that Larry Roberts filed a voluntary petition in bankruptcy on November 13, 1962, listing his liabilities about \$150,000, and his assets, consisting mainly of "hand tools and various small items," about \$3,000.

3. Conclusions and recommendations

Upon the foregoing findings and computations, I conclude that Respondent Association is obligated to make whole the employees here involved the backpay set forth in the Supplemental Intermediate Report.

It is recommended that the Board adopt the foregoing findings and conclusions.

⁷ See *E. F. Shuck Construction Co., Inc., et al.*, 114 NLRB 727, *enfd.* 243 F. 2d 519 (C.A. 9).

Air Filter Sales & Service of Denver, Inc. and International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, Local No. 435. Case No. 27-CA-1250. April 30, 1963

DECISION AND ORDER

On January 31, 1963, Trial Examiner Herman Marx 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. 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 [Chairman McCulloch and Members Leedom 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 brief, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.

ORDER

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

INTERMEDIATE REPORT AND RECOMMENDED ORDER

STATEMENT OF THE CASE

The complaint in this proceeding alleges that the Respondent, Air Filter Sales & Service of Denver, Inc. (herein also called the Company), has refused to bargain with a labor organization named International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, Local No. 435 (also referred to herein as the Union), as the duly designated representative of an appropriate bargaining unit of employees, thereby violating Section 8(a)(5) and (1) of the National Labor Relations Act, as amended (29 U.S.C. 151 *et seq.*; also called the Act herein).¹ The Respondent has filed an answer which, in material substance, denies the commission of the unfair labor practices imputed to it in the complaint.

Pursuant to notice duly served upon each of the other parties by the General Counsel, a hearing upon the issues in this proceeding has been held before Trial Examiner Herman Marx, at Denver, Colorado. The General Counsel and the Respondent appeared through, and were represented by, counsel at the hearing; and all parties were afforded a full opportunity to be heard, examine and cross-examine witnesses, adduce evidence, file briefs, and submit oral argument. The respective briefs of the General Counsel and Respondent filed with me since the close of the hearing have been read and considered.²

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

FINDINGS OF FACT

I. NATURE OF THE COMPANY'S BUSINESS; JURISDICTION OF THE BOARD

The Company is a Colorado corporation; maintains its principal office and place of business in Denver, Colorado; is there engaged in the business of assembling, installing, and servicing air filters, refrigeration, and air-conditioning units; and is, and has been at all material times, an employer within the meaning of Section 2(2) of the Act.

Its gross income during the year preceding October 3, 1962 (the date of a relevant stipulation in evidence) exceeded \$50,000, of which more than \$25,000 was derived from the sale of air-conditioning facilities to, and servicing of, such equipment for

¹ The complaint was issued on August 24, 1962, and is based upon a charge filed by the Union with the Board on July 2, 1962, and an amendment thereof filed on August 22, 1962. Copies of the complaint, charge, and amendment have been duly served upon the Respondent.

² The hearing transcript contains misspelled or otherwise garbled words, obviously the result of inaccurate transcription. For example, the word "authenticity" is transcribed as "ethicacy" (a nonexistent word) at page 106 of the transcript, and "cantankerous" (a meaningless term in the context) is used at various places on page 152 in place of "conclusional." However, as the record presents the material facts and issues, I see no need, at least in the absence of a motion by any of the parties, to undertake correction of the transcript.

a concern named Martin Marietta Company, which performs contracts relating to the national defense, and uses the air-conditioning facilities for employees engaged in such contractual performance. The Respondent and Martin Marietta Company also have an agreement providing for the sale by the former to the latter "during the next year" (from the date of the stipulation) of similar air-conditioning facilities and related services for which it is anticipated that the Respondent will receive more than \$30,000. As the parties have stipulated, the furnishing of air-conditioning equipment and related services to Martin Marietta Company, as described above, "has an impact on national defense."

In the course of its business during the year ending October 3, 1962, the Company purchased from supply sources located outside Colorado goods valued in excess of \$20,000, and such products were shipped from such locations into the said State.

By reason of such interstate transactions and shipments, and of the sale of goods and services to Martin Marietta Company, described above, the Respondent is, and has been at all material times, engaged in interstate commerce, and in operations affecting such commerce, within the meaning of the Act. Accordingly, the Board has jurisdiction of the subject matter of this proceeding. The assertion of such jurisdiction will effectuate the policies of the Act.³

II. THE LABOR ORGANIZATION INVOLVED

The Union admits to membership individuals employed by the Company; exists for the purpose, in whole or in part, of dealing, on behalf of employees, with employers concerning terms and conditions of employment; and is, and has been at all material times, a labor organization within the meaning of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Prefatory statement

The Respondent's business affairs are managed by its president, Donald S. Marmaduke, who owned and operated the enterprise as an individual prior to the Company's incorporation about a year ago. Although the Respondent has a board of directors, which consists of Marmaduke, his wife, and the enterprise's bookkeeper, in actual practice at least, Marmaduke exercises ultimate control over the Company's personnel policies. He testified to as much, stating, in effect, that it is he who establishes the terms and conditions of employment of the Respondent's employees.

As the complaint alleges, and the answer admits, "(a)ll employees employed by the Respondent at its Denver, Colorado, operations, excluding office clerical employees, guards, salesmen other than truck drivers and servicemen, watchmen, professional employees 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." The unit has been thus appropriate at all times material to the issues in this proceeding.

The employees in the unit perform "shop and service" functions, and vary in number from time to time. The record contains much evidence as to the number on various dates. This relates, presumably, to the issue of the Union's right to represent the unit. As regards that aspect of the case, the controlling fact, for reasons that will appear, is that the Union represented a majority of the unit on June 13, 1962, when the Company received a bargaining request from the Union. However, some description of the numerical size of the unit at times other than June 13, 1962, is appropriate to bring the evidence in question into accurate focus.

In connection with the unit composition, Marmaduke testified that the "usual number" of shop and service employees "is seven to nine . . . depending upon the season," but a document (General Counsel's Exhibit No. 5) prepared by Marmaduke himself from the Company's records runs counter to any claim that the employment of more than seven such employees is "usual." The exhibit deals with a 2-month period (May 14 to July 13, 1962). During that time, the unit numbered nine on only 4 days (May 14 to 17); eight for the next 4 working days; and a variable number from five to seven employees (seven most of the time) for the balance of the period. It is evident that for the 2-month period, the average number of employees in the unit did not exceed seven; and thus, apart from any question of efficacy of evidence of the unit size at other times than the date of the bargaining request, and, particularly bearing in mind that the 2-month period is the only one for which concrete employment figures are furnished in the record, I am unable

³ *Ready Mixed Concrete & Materials, Inc.*, 122 NLRB 318.

to accord any operative weight to Marmaduke's generalization that the "usual number" of shop and service employees "is seven to nine."⁴

The bargaining request mentioned above is contained in a letter dated June 12, 1962, written by the Union, through one of its representatives, an organizer named Edward Toliver, to the Company, and received by the latter on June 13, 1962. In material substance, the communication set forth a claim that the Union was then the collective-bargaining representative of a unit of the Company's employees (which is the same, for all practical purposes, as the unit found above to be appropriate for bargaining purposes);⁵ stated that the Union was in a position to prove "we represent a substantial majority of such employees"; requested that the Company meet with the Union "for the purpose of discussing terms of a labor agreement covering the wages, hours of work, and other conditions of employment"; and suggested that the meeting be held at a specified place and time.

At the time of receipt of the letter, there were five employees in the unit. Four of these had designated the Union as their bargaining representative, each doing so by signing a card that had the effect of authorizing the Union to represent the signatory as "collective bargaining agent."⁶

The letter resulted in a meeting on June 19, 1962, between the Union and the Respondent. The labor organization was represented at the meeting by Toliver and another organizer, M. Edward Dunn; and the Company by Marmaduke and an attorney, F. Nelson Pabst.

The business of the meeting opened with an inquiry by Pabst as to its purpose, and Toliver replied that the Union wished to prove its majority status, secure recognition from the Company for itself as the employees' bargaining representative, and bargain with the Company. This was followed by some discussion about the unit composition, the talk centering about the status of "an outside salesman" in the Company's employ, and the upshot of the matter was that the parties agreed that this employee would be excluded from the unit.

During the early part of the meeting (probably after the unit discussion, at least according to the sequence of events reflected in Toliver's testimony), Marmaduke or Pabst expressed doubt that the Union represented a majority of the unit, stating that there had been some recent personnel changes. Toliver replied that he be-

⁴ Similarly, I find no weight in testimony by Marmaduke that the Company "occasionally" uses "temporary help" supplied by a firm named Manpower, Incorporated (evidently an employment agency). He stated that they are paid by Manpower and are "actually" its employees, and not the Company's, although later agreeing with a suggestion in a leading question that what he means by his statement that "they are not your employees [is] that they are not on your payroll." The evidence in question is insufficient to support a conclusion that the "temporary help" were in fact employees of the Company, or that their relationship to it or to its regular shop and service personnel was such as to warrant their inclusion in the unit. One may note, in that connection, that the record does not even establish the identity of any of such "temporary help" or the length of time any of them did any work connected with the Company's business. Moreover, it is far from certain that any such individual did such work at any material time. At first, Marmaduke testified that he "believe[s]" the Company secured such help "during all of the summer months of 1962," but later he stated that "it is possible that we hired some part-time help" during the week of June 11 (the week in which the bargaining request was made). He also said, subsequently, that in that week "I cannot be sure of this, but we were hiring Manpower temporary help." In short, the testimony concerning the "temporary help" appears to me to be a digression from the material issues.

⁵ The unit definition in the letter, unlike the one found to be appropriate above, does not exclude "salesmen other than truck drivers and servicemen" or, in other words, does not except the one salesman employed as such by the Company. Representatives of the Union and the Company agreed at a meeting held on June 19, 1962, following the Company's receipt of the bargaining request, that employees in the category of the salesman be excluded from the bargaining unit; and at the hearing in this proceeding, the Respondent's counsel stated that "it has never been our understanding . . . the Union expected to have the salesmen" as members of the unit. In short, the variance between the unit definition found to be appropriate above and the one spelled out in the Union's letter does not prejudice any of the parties, nor materially affect any of the issues.

⁶ In addition to the four signatories in the unit at the time of the bargaining request, two other individuals (Joe Sandoval and Robert Casteel) had signed authorizations, but their employment had terminated before the request. Needless to say, I exclude the Sandoval and Casteel cards in making findings herein as to the Union's representative status.

lieved that the Union nevertheless represented a majority and proposed that the Company provide a list of the employees, and that the Union then would submit its authorization cards to the Company. Marmaduke said that he did not have such a list with him, but that he would use his recollection to state the names of the employees then in the unit, and he proceeded to do so, whereupon Toliver produced the executed authorizations, read off the names of the signatories, and then placed the cards in front of Marmaduke on a conference table at which the parties were seated. Marmaduke picked up the cards and looked through them.⁷

Toliver thereupon reiterated the Union's claim of representation, and then asked the Company's representatives to sign an instrument providing for the Respondent's recognition of the Union as the unit's bargaining representative, and for a meeting to negotiate "a complete labor agreement covering wages, hours and working conditions" of the employees in the unit. Following this, there was some discussion as to the Company's financial capacity to enter into such a contract, and whether the Union could be of assistance to the Company, but apart from a provision for union security, which Toliver said the Union would seek in contract negotiations, and to which the Company's representatives said they would not agree, no terms for the "complete labor agreement" were either advanced or discussed.⁸ After some discussion of union security, the Company's representatives stated, in substance, that the Union's request for execution of the instrument providing for recognition and contract negotiations would be taken under advisement and submitted to the Company's board of directors, and Pabst said that he would inform Toliver of the Company's decision within a few days.⁹

On June 25, 1962, Toliver, not having heard from Pabst or any other representative of the Company, sought to reach Pabst by telephone at the latter's office, but was unsuccessful, and left a message with the latter's secretary, requesting that the attorney call him. Pabst did not do so, and, therefore, later that day, Toliver spoke to Marmaduke on the telephone and inquired whether the Company had reached a decision. Marmaduke replied that the matter was in Pabst's hands. Toliver stated that he had tried unsuccessfully to reach Pabst, and requested that Marmaduke communicate with Pabst and give the Union a reply to its June 19 recognition and bargaining request. Pabst has never returned Toliver's telephone call, nor has the attorney or any other representative of the Company ever given the Union an answer to the request, nor, for that matter, communicated with the Union since the telephone conversation between Toliver and Marmaduke.

⁷ There is no dispute that Toliver made the cards available for inspection by the Company's representatives, all four participants in the meeting giving testimony to that effect. The fact that the cards were thus produced contributes weight to testimony by Toliver and Dunn to the effect that Marmaduke undertook to recite the names of the employees from memory in response to an offer to produce the cards if the Company would submit a list of employees to the Union. I find that testimony credible and have based findings on it.

⁸ Contrary to Toliver and Dunn, Pabst denies that there was any discussion of union security. Whether there was is of no great moment, but, in any case, I think it likely that there was such a discussion. Provisions for union security are a conventional feature of collective bargaining, and thus there is nothing implausible about the relevant testimony of Toliver and Dunn. And its plausibility is heightened by the fact that Pabst himself testified that there was discussion "in great detail" of the question whether unionization would preclude the Company from hiring an employee with "specific ability." The fact that this subject arose tends to support a conclusion that there was some talk of a requirement of union membership as a condition of employment. I find the relevant testimony of Toliver and Dunn credible, and have based findings as to the union security subject on it.

⁹ According to Pabst, the commitment made by the Company was that "when they [the directors] were in a position to decide what they should or should not do, or what was best for all parties, they [the directors] were to notify me and I was to notify Mr. Toliver." I do not believe that the matter was left in so indefinite a state as "when [the directors] were in a position to decide." Marmaduke's version, in addition to the accounts of Toliver and Dunn, supports a conclusion that the commitment was more specific, for the Company's president testified that its representatives informed those of the Union that "*we would contact them after we had discussed it with our directors*" [emphasis supplied]. Moreover, the fact, as the evidence establishes, that Toliver sought to ascertain the Company's decision from both Marmaduke and Pabst on June 25, 1962 (unsuccessfully, as will appear) tends to support testimony by Toliver, substantially corroborated by Dunn, to the effect that the Company made a commitment on June 19 to give the Union an answer within a few days, and I have made corresponding findings.

B. Discussion of the issues; concluding findings

There can be no doubt that the Company has failed and refused to bargain with the Union since June 19, 1962. If the Company had a bargaining obligation it was not met by meeting with the Union on June 19, for the Respondent promised on that occasion to inform the Union of its decision regarding the recognition and bargaining request, and has failed to do so. Significantly, in their testimony, neither Marmaduke nor Pabst gave any explanation of the Company's failure to keep its promise; nor, indeed, did Pabst explain why he failed to return Toliver's call of June 25, although it is evident that he received the message that Toliver had called on that date.¹⁰ Particularly taking into account the Respondent's continuing failure to keep its promise even after Toliver's efforts to ascertain the Company's bargaining attitude on June 25, the breach of the promise is as much a refusal to bargain as though the Company had refused to do so in so many words.

The question, then, is whether the refusal has been lawful. On that issue, the Respondent basically makes three contentions: (1) That the Union has never made a sufficient bargaining demand (or a "clear demand," as the Respondent's brief puts it); (2) that the labor organization lacks the requisite majority status to serve as the representative of the unit; and (3) that the Company's failure to bargain was lawful because it has had a good-faith doubt of the Union's majority status.

The first of these claims requires little comment. To accept it one would have to ignore the letter of June 12, 1962, as well as the Union's request at the meeting on June 19 that the Company sign the proposed agreement for recognition and bargaining negotiations. Clearly, the Union made a sufficient bargaining demand both in the letter and at the meeting, and the Respondent's claim to the contrary is without substance.

Nor am I able to accept the Respondent's contention that the evidence establishes that the Union lacks the representative status to require the Respondent to bargain. There can be no question that the Union represented a majority of the unit (four out of five employees) at the time of its initial bargaining request, nor, indeed, that it continued to do so on June 19, the date of the meeting, by which time the unit had increased to six, according to Marmaduke, by the hiring of one employee (Watts).¹¹ The Respondent argues, however, that by June 25, the date of Toliver's telephone calls to Marmaduke and Pabst, the Union had lost its majority status by force of the fact that one of the card signatories (Messinger) had quit, and three others (Martinez, Morrison, and Watts) had been hired. Thus, the argument runs, granting the Union's majority status prior to these personnel changes, the organization lost its right to represent the unit as a result of the changes, and therefore the Company has since had no obligation to bargain with the Union.

This thesis has at least one basic flaw, and that is that there is a presumption, in the words of the Court of Appeals for the Fourth Circuit, "that the authority of the bargaining agent continues until the contrary be shown" (*N.L.R.B. v. Highland Park*

¹⁰ Pabst testified at one point: "I received three or four calls from Mr. Toliver, I believe the calls, now, I believe now, because I didn't pinpoint it at the time, I believe the calls were from Mr. Toliver prior to the meeting and subsequent to the meeting, but I don't recall specifically what it was about" [emphasis supplied]. So far as appears from Toliver's testimony, he called Pabst's office once after the meeting, and that was on June 25 when he left a message for Pabst. Especially in the light of Pabst's testimony, quoted above, I am satisfied that he received the message that Toliver had called him.

¹¹ Whether or not Watts began working for the Company on June 19, as Marmaduke testified, is of no controlling effect, but I think it appropriate to note some factors in the record that tend to raise a doubt as to the accuracy of Marmaduke's testimony. An affidavit Marmaduke gave a representative of the General Counsel in the course of the latter's investigation of the charge names five employees in the unit as "definitely . . . on my payroll" on June 19, 1962, and makes no reference to Watts. Moreover, the mechanical clock punches in Watts' timecard for his first week of employment do not begin until some point after the reporting hour on June 20. The starting and quitting times on June 19, and the reporting entry on June 20 are handwritten. In explanation of the difference, Marmaduke testified that Watts "was a new employee," and that handwritten entries are "sometimes due to the fact the employee forgets to clock in." Whether Marmaduke's relevant generalizations are credible and sufficient to explain the omission of Watts' name from the affidavit and the difference in the timecard entries need not be decided.

Mfg Co., 110 F. 2d 632, 640).¹² It is a fact that the Union represented the unit at the material times of the bargaining requests made of the Company by the letter of June 12 and at the meeting of June 19. Thus, applying the cited presumption here, it is evident that the burden of proving that the right of representation has been lost is upon him who asserts the loss, and that the right continues to exist unless the burden has been met. The mere evidence of the turnover does not meet it, and the nub of the matter is that the record is silent as to whether any of the employees hired after June 19 have designated the Union as their bargaining representative at any material time. It is by no means inconceivable that one or more of the newly hired employees held membership in the Union, perhaps dating back to another employment, or that the Union had otherwise been designated as bargaining agent by one or another of such employees. It would be speculative and quite improper, in my judgment, to hold that no such authorization exists, whether by membership or otherwise, simply because the General Counsel has presented no evidence on the subject, for he is under no duty to continue advancing with evidence of the posture of authorizations in the unit after he has established the right of representation at the time of a proper bargaining demand. That burden, clearly, is upon the Respondent if it relies, as it does here, upon a claim that its failure to bargain is justified by a loss of majority status after the bargaining requests. In the light of the presumption described above, the record does not establish such a loss.¹³

The sum of the matter, regarding the representation issue, is that the Union was, at the time of the bargaining request contained in its letter of June 12, 1962, has been at all material times since, and is now, the bargaining representative of the employees in the unit described above, within the meaning of Section 9(a) of the Act.

With respect to the Respondent's remaining contention, it portrays itself as having a doubt of the Union's majority at the June 19 meeting notwithstanding the production of the cards as evidence of the Union's representative status; and, in its brief, in effect depicts its doubt as reasonable because the majority was a "bare minimum number" with no "allowance for inaccuracy, change of view, quits or new employees." But this view of the matter strays off at a tangent from the material facts. One of them is that the Union produced hard evidence, in the form of the authorization cards, that it represented four of a unit of no more than six employees at the time.¹⁴ The possibility of "inaccuracy" in the authorization appears to me to be a strawman. There was no inaccuracy in the fact of representation set forth in the cards, and it is clear beyond doubt that at the meeting the Company accepted the cards to be what they purported to be, for no question was raised by the Company as to the authenticity of the cards, although Marmaduke looked through the cards, nor did either he or Pabst, the Company's lawyer, ask the Union for an opportunity to look into the authenticity of the cards or the authorization each contained.¹⁵ In fact, Pabst testified

¹² See, also, *N.L.R.B. v. Harris-Woodson Co., Inc.*, 162 F. 2d 97, 99 (C.A. 4). The presumption is but an application of what the Court of Appeals for the Ninth Circuit has called "the familiar rule that a state of affairs once shown to exist is presumed to continue to exist until the contrary is shown." *N.L.R.B. v. National Motor Bearing Co.*, 105 F. 2d 652, 660.

¹³ I do not decide what would be the effect upon the Union's claim of representation if there were affirmative evidence that the Union has not been designated as bargaining representative by employees hired after June 19. It is enough that there is no such evidence. Thus there is no need to consider whether adoption of the Respondent's representation position would tend to encourage an employer to ignore, or stall a reply to, a proper bargaining demand in the hope, or with the anticipation, that resignations or the hiring of new employees will relieve him of a bargaining obligation raised by the demand.

¹⁴ As indicated previously, it is possible that Watts was not on the Respondent's payroll on June 19. If he was not yet employed, the unit on June 19 consisted of five employees.

¹⁵ I have some doubt that, as Toliver and Dunn testified, either Marmaduke or Pabst expressly stated at the meeting that the cards proved the Union's majority. Toliver seemed uncertain about the matter, at points testifying to such a statement, but at others indicating that he is inferring the Company's acquiescence from the conduct of its representatives rather than from any express statement by either; and Dunn expressed uncertainty whether it was Marmaduke or Pabst who made such a statement. It is not unlikely that in quoting one or the other of the Company's representatives as expressly acknowledging the Union's majority status, Toliver and Dunn are voicing an inference they draw from the fact that no question was raised about the cards, and that the meeting turned to other matters. Except as a factor in evaluating the credibility of Toliver and Dunn, in general, it is of no significant moment whether the Company expressly agreed at the meeting that the cards proved the Union's majority status, for the evidence regarding the meeting warrants an

that he "wasn't interested in the cards," stating that he "did not know the names and addresses of the employees" and "couldn't identify the signatures" (an explanation which does not negate the fact that Marmaduke raised no question about the cards, and that neither he nor Pabst requested an opportunity to look into the authenticity and reach of the cards). Clearly, too, the prospect of "quits and new employees" is wholly ungermane to the question whether the Company had a good-faith doubt of the Union's majority status on June 19. In sum, taking into account the production of the cards, the Company's omission to raise any question about them, and the course of events that followed at the meeting, I am unable to accept the claim that the Company doubted the Union's majority status on June 19 irrespective of the production of the cards.

Moreover, there are compelling indications in the record that the failure to bargain did not stem from a good-faith doubt of the Union's majority status, whether on June 19 or subsequently, but was rooted, instead, in a disposition to dodge bargaining irrespective of the Union's representative status.

This is evidenced by Pabst's own testimony that he did not examine the authorization cards at the June 19 meeting "because it was my feeling the Union should be willing to hold an election. I wasn't interested in the cards." Bearing in mind that there was no evidence of any infirmity in the cards at the meeting, that no question was raised regarding them, and that election and related representation procedures necessarily take time, and sometimes involve protracted delay, one is justified in believing that the claimed disinterest in the cards and the "feeling that the Union should be willing to hold an election" stemmed not from a desire to ascertain the representation wishes of the employees, but from a purpose to avoid bargaining or to delay it in the hope or anticipation that the Union's majority would vanish with the passage of time.¹⁶

This view of the Respondent's bargaining attitude becomes inescapable, it seems to me, when one adds to Pabst's admitted disregard of the cards the important fact that the Company has never kept the promise it made at the June 19 meeting to inform the labor organization of its decision regarding the Union's request for execution of the proposed agreement for recognition and negotiations; and that Pabst has never returned Toliver's call of June 25, even after Toliver's request of Marmaduke on that date that the latter communicate with Pabst with a view to securing an answer to the Union's request. One would think that measured by the standard of ordinary business courtesy if nothing else, if the reason for the failure to bargain was a doubt of the Union's representative status, Marmaduke or Pabst would have so informed Toliver in reply to his efforts on June 25 to have the Company fulfill the promise it had made at the meeting. The failure of Marmaduke and Pabst to do so, not to speak of the broken promise, is a persuasive indication

inference, and I am persuaded, that the Company, whether or not it expressly acknowledged the Union's representative status, manifested tacit acquiescence in the Union's claim of a majority, doing so by not raising any question about the cards, and, following their production, proceeding to a discussion of other subjects such as the proposed recognition and negotiating agreement, union security, and the Company's financial capacity to contract with the Union.

¹⁶ Marmaduke and Pabst testified, and Toliver and Dunn denied, that the Company made a proposal at the meeting for a representation election. There are factors in the record that tend to support Toliver and Dunn. One is that Marmaduke, who was called as a witness first by the General Counsel and then by the Respondent, made no reference to it during his first appearance, although on that occasion, after some testimony regarding the meeting under interrogation by the General Counsel, he described it at some length under examination by the Respondent's counsel. He advanced the claim for the first time when called by the Respondent, doing so after Pabst testified. It is noteworthy, too, that the Company, as previously described, manifested tacit acquiescence, by conduct, following the production of the authorization cards, in the Union's claim of majority status. In any case, whether the election proposal was made is of no great importance and need not be decided, for, assuming that the suggestion was put forward, the question still remains whether the failure to bargain stemmed from a good-faith doubt of the Union's majority status. It may be borne in mind, in that connection, that Board representation proceedings may be quite protracted, and that election proposals as a means of avoiding or delaying bargaining obligations are not uncommon, as the existence of many Board and judicial decisions on the subject attest. The nub of the matter is that for the reasons set forth in this report, whether or not the alleged election proposal was made, the record, taken as a whole, impels a holding that the refusal to bargain was lodged in a disposition to avoid bargaining without regard to the Union's representative status.

that a doubt of the Union's status that the Company now professes to have had was not a factor in the Company's failure to bargain.

In fact, some testimony Marmaduke himself gave leads one to that conclusion. It may be recalled that at the June 19 meeting the Company's representatives took the position that it would be necessary to submit the Union's request for recognition and negotiations to the Company's board of directors. According to Marmaduke, following the meeting, he discussed the Union's request with his wife and the Company's bookkeeper, who are the other two directors; and his testimony contains three versions of the directors' bargaining attitudes.

In his first account, Marmaduke described the directors as deciding "that conditions as they were, it would be best not to do anything about it"; and then, asked what "conditions" he was referring to, he replied: "Our financial conditions and the fact that we could not come to any understanding on just what they [the Union] did offer or wanted to do with us." If this testimony is to be believed, the directors' decision was not grounded upon a doubt of the Union's representative status.

But the course of the examination of Marmaduke that followed, and the subsequent two versions of the directors' attitudes, are no less revealing. After his initial account of the decision, he was asked leading questions as to "what the opinion of the directors was concerning the representation claim by the Union," and what was "their opinion as to whether or not the Union did represent a majority of your employees." An objection to the questions was sustained, and in the course of the ruling it was pointed out to the Respondent's counsel that he was "leading the witness . . . and testimony of that sort elicited from this witness in a leading vein would not be particularly fruitful in the final analysis."¹⁷

Following this, in response to interrogation as to what the directors had said, Marmaduke testified: "I talked to the directors about our meeting with the Union, what they had asked us to do, showed them the agreement paper, and their conclusion was the same as mine that at that time or at this time . . ." There was an objection at this point to the "conclusion," and continuing after disposition of the matter, Marmaduke stated: "I talked to my wife, the office manager, told her what was asked of us and she said she didn't feel the Union could help us at that time and we should not bargain. I talked to Mr. Ballou [the bookkeeper], he was very emphatic he thought it would be the worst time in the world to enter into any further discussion." This, according to Marmaduke, concluded the discussion among the directors. Again, significantly, in describing the directors' bargaining attitudes, Marmaduke does not quote them as refusing to bargain because of any doubt of the Union's representative status.

The third version and pertinent portions of its context appear in the following excerpts from the record:

Mr. HAINES (for the Respondent): I should like to offer for the record, and I understand there will be an objection, but I think it is perfectly fair under the circumstances that the witness's attention be directed to the question of representation by the Union of the employees and I would like to ask if he had any conversation concerning whether or not in the opinion of the directors the Union represented the employees, and I will direct that question to Mr. Marmaduke.

Mr. GILLIS (for the General Counsel): He properly anticipated General Counsel's objection, and then stated the question. There has been no showing the witness's recollection has been exhausted. He is giving a brief cursory statement. I think the leading is not justified in the absence of the showing of his recollection being exhausted.

TRIAL EXAMINER: I don't understand this at all. I think the question is leading. I am not suggesting that in a given situation you cannot jog the witness's memory but there would have to be a basis for it.

* * * * *
Mr. HAINES. I would like to make a statement, Mr. Examiner.

TRIAL EXAMINER: All right, sir.

¹⁷Although the questions were put to Marmaduke while technically under cross-examination by the Respondent's counsel, it may be noted that he had been called by the General Counsel as an officer of an adverse party under Rule 43(b) of the Federal Rules of Civil Procedure, and the leading questions put to him by the Respondent's counsel were objectionable because they went beyond the scope of Marmaduke's "examination in chief" by the General Counsel. Also, the interrogation sought the "opinion of the directors," and hence was objectionable as calling for a conclusion.

Mr. HAINES: I am asking if there was a subject discussed. That is not leading. I am asking what was said. That is not leading. He can say there was no discussion. He can state what the discussion was, but it is not leading to ask him if there was a subject discussed

TRIAL EXAMINER: The point is this. I think it is a suggestive question in the light of what was developed here and I have to take the question within the contents of the entire record. I think the question is highly suggestive, absent of [sic] showing the witness's memory has been exhausted

He stated that completes the conversation. He has had an opportunity a couple times to testify about the subject you are asking, and he didn't. However, what I am going to do is this. I think I have expressed myself sufficiently about the value of answers to leading questions and suggestive questions, and I will permit it.

You may answer.

* * * * *

The WITNESS: Well, Mr. Nelson Pabst is the director, he very briefly said he did not feel on the basis of what had been shown us that there was a majority of our employees who wanted the Union¹⁸ Mr. Ballou, the other director, said that he felt the same thing, and he was more familiar with the financial aspects of the business, and strongly advised against doing anything.

TRIAL EXAMINER: What did he say about representation?

The WITNESS: He also felt—

TRIAL EXAMINER: Tell us what he said, not what he felt, sir.

The WITNESS: He said "I don't believe the majority of your employees want the Union."

* * * * *

The WITNESS: And my wife who is still another Director said, "Well, half the people on the cards aren't even here, so how can they call it a majority?" To the best of my knowledge, sir, those were their direct answers. But it didn't come that fast.

The conflict in Marmaduke's testimony regarding the bargaining attitudes of the directors is evident. In his first two versions, he not only does not quote them as having any doubt about the Union's claim of representation, but he portrays them, in essence, as refusing to bargain because of economic considerations. The third version, which, in effect, depicts Marmaduke's wife and the bookkeeper as being opposed to bargaining because of disbelief in the Union's claim of representation, is not, in my judgment, worthy of credence because it is not only a wide departure from the two previous versions, but came almost on the heels of a statement by counsel, in the presence of Marmaduke, that he would like to ask the witness "whether or not in the opinion of the directors the Union represented the employees"; and was the product of a leading and suggestive interrogation as to the directors' "opinion." To accord any value to such testimony one would have to ignore the first two versions and the leading and suggestive context that drew forth the third.

Although Marmaduke himself determines "the working conditions, wages, rates of pay, hours of employment [and] benefits" (the conventional and customary subjects of collective bargaining), I think it likely that, as he testified, he did discuss the Union's recognition and bargaining request with his wife and the bookkeeper, and there is no reason to doubt that, in effect, they did tell him, as his first two versions indicate, that the Company should not bargain because it would not be economically desirable for it to do so. I am persuaded, in short, that a doubt of the Union's representative status was not a factor in the directors' decision not to bargain.

In summary, taking into account the Company's disregard of the Union's proof of representation at the June 19 meeting, its failure to keep its promise to notify the Union of its decision regarding the Union's recognition and bargaining requests, Pabst's omission to return Toliver's call of June 25, Marmaduke's failure to procure for Toliver, as requested by the latter on that date, an answer whether the Company would bargain, and Marmaduke's testimony to the effect that the Company's directors were opposed to bargaining for economic reasons, I find that the Company's refusal to bargain was not based upon any good-faith doubt of the Union's representative

¹⁸ Pabst is not a director, and Marmaduke subsequently corrected his testimony that Pabst is one.

status, but was rooted in a purpose not to bargain irrespective of the Union's right to represent the employees in the unit.¹⁹

That being the case, I find that by its refusal to bargain since June 19, 1962, the Respondent has violated Section 8(a)(5) of the Act, and has thereby interfered with, restrained, and coerced employees in the exercise of rights guaranteed them by Section 7 of the Act, thus violating Section 8(a)(1) of the statute.²⁰

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Company set forth in section III, above, occurring in connection with the operations of the Company 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

Having found that the Respondent has engaged in unfair labor practices violative of Section 8(a)(5) and (1) of the Act, I shall recommend below that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

CONCLUSIONS OF LAW

Upon the basis of the foregoing findings of fact, and upon the entire record in this proceeding, I make the following conclusions of law:

1. Air Filter Sales & Service of Denver, Inc., is, and has been at all material times, an employer within the meaning of Section 2(2) of the Act.
2. International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, Local No. 435 is, and has been at all material times, a labor organization within the meaning of Section 2(5) of the Act.
3. All employees employed by the said Company at its Denver, Colorado, operations, excluding office clerical employees, guards, salesmen other than truckdrivers and servicemen, watchmen, professional employees, and supervisors, as defined in the Act, constitute, and have at all material times constituted, a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.
4. The said Union was, on June 12, 1962, has been at all times since, and is now, 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.
5. By failing and refusing to bargain collectively with the Union, as the exclusive representative of the employees in the aforesaid appropriate unit, as found above, the said Company has engaged, and is engaging, in unfair labor practices within the meaning of Section 8(a)(5) of the Act.
6. By interfering with, restraining, and coercing employees in the exercise of rights guaranteed them by Section 7 of the Act, as found above, the Company has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.
7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Sections 2(6) and 2(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 this proceeding, I recommend that Air Filter Sales & Service of Denver, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:
 - (a) Refusing to bargain collectively with International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, Local No. 435, as the exclusive representative of its employees in a bargaining unit consisting of all employees employed by the Company at its Denver, Colorado, operations, excluding office clerical

¹⁹ I do not agree with a position taken by the Respondent to the effect that a finding that an employer's refusal to bargain was not based upon a doubt of a union's majority status hinges upon proof that the purpose of the refusal was to gain time in which to undermine the union's representative status. See *Snow v NLRB*, 308 F 2d 687 (C.A. 9). Furthermore, it seems evident that a bargaining refusal such as that involved here would of itself tend to undermine a union's bargaining authority.

²⁰ The Respondent has incorporated proposed findings in its brief. Each such proposed finding is rejected upon the basis of the findings and conclusions made herein.

employees, guards, salesmen other than truckdrivers and servicemen, watchmen, professional employees, and supervisors, as defined in the Act.

(b) In any other like manner interfering with, restraining, or coercing employees in the right to self-organization, to form, join, or assist any labor 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.

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

(a) Upon request, bargain collectively with International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, Local No. 435, as the exclusive representative of the employees in the appropriate bargaining unit, described above, with respect to their rates of pay, wages, hours of employment, and other conditions of employment, and if an agreement is reached, embody it in a signed contract.

(b) Post in conspicuous places at its plant and place of business, including all places where notices to employees are customarily posted, copies of the attached notice marked "Appendix A." Copies of said notice, to be furnished by the Regional Director of the Twenty-seventh Region of the National Labor Relations Board, shall, after being signed by a duly authorized representative of the Company, be posted by it immediately upon receipt thereof, and maintained by it for 60 consecutive days thereafter in such conspicuous places. Reasonable steps shall be taken by the said Company to insure that said notices are not altered, defaced, or covered by any other material.²¹

(c) Notify the said Regional Director, in writing, within 20 days from the receipt of this Intermediate Report and Recommended Order, what steps the said Company has taken to comply therewith.²²

It is further recommended that, unless on or before 20 days from the date of its receipt of this Intermediate Report and Recommended Order the Respondent notify the said Regional Director that it will comply with the foregoing recommendations, the National Labor Relations Board issue an order requiring the Respondent to take the action aforesaid.

²¹ 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 additional event that the Board's Order is enforced by a decree of the United States Court of Appeals, the words "A Decree of the United States Court of Appeals, Enforcing an Order" shall be substituted for the words "A Decision and Order."

²² In the event that this Recommended Order is adopted by the Board, paragraph 2(d) thereof shall be modified to read: "Notify the 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

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, as amended, we hereby notify our employees that:

WE WILL, upon request, bargain collectively with International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, Local No. 435, as the exclusive representative of a bargaining unit consisting of all employees of the Company employed at our Denver, Colorado, plant, excluding office clerical employees, guards, salesmen other than truckdrivers and servicemen, watchmen, professional employees, and supervisors, as defined in the said Act, with respect to rates of pay, wages, hours of employment, or other conditions of employment, and if an agreement is reached, embody it in a signed contract.

WE WILL NOT by refusing to bargain collectively, as required above, or in any other like manner, interfere with, restrain, or coerce employees in the exercise of their right to self-organization, to form, join, or assist any labor 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 said Act.

AIR FILTER SALES & SERVICE OF DENVER, INC.,
Employer.

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

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

Information regarding the provisions of this notice and compliance with its terms may be secured from the Regional Office of the National Labor Relations Board, 609 Railway Exchange Building, 17th and Champa Streets, Denver, Colorado, 80202, Telephone No. Keystone 4-4151, Extension 513.

Maxam Dayton, Inc. and Eva May Secrist, Edna Spitzer, Callie Pearl Mills, Lois J. Horne, Edith Norris, Betty J. Freeman, Winifred Ann Bailey

Central States Joint Board, Retail and Department Store Employees, Amalgamated Clothing Workers of America, AFL-CIO; Local 802, Amalgamated Clothing Workers of America, AFL-CIO; and Their Agent, Agnes Smith and Eva May Secrist, Edna Spitzer, Callie Pearl Mills, Lois J. Horne, Edith Norris, Betty J. Freeman, Winifred Ann Bailey. Cases Nos. 9-CA-2510-1, 9-CA-2510-2, 9-CA-2510-4, 9-CA-2510-6, 9-CA-2510-7, 9-CA-2510-8, 9-CA-2510-9, 9-CB-1022-1, 9-CB-1022-2, 9-CB-1022-4, 9-CB-1022-6, 9-CB-1022-7, 9-CB-1022-8, and 9-CB-1022-9. April 30, 1963

DECISION AND ORDER

On February 7, 1963, Trial Examiner Stanley Gilbert issued his Intermediate Report in the above-entitled proceeding, finding that the Respondents had engaged in and were engaging in certain unfair labor practices and recommending that they cease and desist therefrom and take certain affirmative action, as set forth in the attached Intermediate Report. The Trial Examiner also found that the Respondents had not engaged in certain other unfair labor practices alleged in the complaint and recommended dismissal of those allegations. Thereafter, the General Counsel 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 Leedom, Fanning, and Brown].

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