

Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for the Eighteenth Region, in writing, within 20 days from the receipt of this Decision and Recommended Order, what steps it has taken to comply herewith.²³

²³ In the event that this Recommended Order be adopted by the Board, this provision shall be modified to read: "Notify said Regional Director, in writing, within 10 days from the date of this Order, what steps the Respondent has taken to comply herewith."

APPENDIX

NOTICE TO ALL EMPLOYEES

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

WE WILL NOT discharge, force the termination of, make discriminatory assignments to, or otherwise discriminate against employees for belonging to or assisting or supporting International Molders and Allied Workers Union, AFL-CIO, or any other labor organization.

WE WILL NOT discriminate against or punish employees for giving testimony under the National Labor Relations Act, or for cooperating or meeting with Government officials in anticipation of giving information or testifying in proceedings under the National Labor Relations Act.

WE WILL NOT question any employees about their or other employees' affiliation with or support of any union or about meetings or sessions with Government officials in connection with proceedings under the National Labor Relations Act.

WE WILL respect your guaranteed rights under the National Labor Relations Act to join or assist any union of your choice or bargain collectively through it and will not interfere with, restrain, or coerce you in your freedom of choice to engage or not engage in such activity.

WE WILL offer Robert E. Feltz immediate and full reinstatement to his former or substantially equivalent position, without loss of seniority or other rights and privileges, and WE WILL make him whole for any pay he lost because of the discrimination against him, with interest.

All our employees are free to join or not to join, or to support or not support, International Molders and Allied Workers Union, AFL-CIO, or any other labor organization, without fear of discrimination, discriminatory assignments, or other punishments, direct or indirect, for doing so.

RITCHIE MANUFACTURING COMPANY,
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.

Any employees having a question concerning the above notice or what it requires may inquire by mail, telephone, or in person at the Board's Regional Office, 316 Federal Building, 110 South Fourth Street, Minneapolis, Minnesota, Telephone No. 339-0112, Extension 2601.

Fleming & Sons of Colorado, Inc., a Division of Fleming & Sons, Inc. and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 452. Case No. 27-CA-1397. June 30, 1964

DECISION AND ORDER

On March 4, 1964, Trial Examiner Henry S. Sahn issued his Decision in the above-entitled proceeding, finding that Respondent had 147 NLRB No. 137.

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 Decision. The Trial Examiner also found that Respondent had not engaged in certain other unfair labor practices, and recommended that the allegations of the complaint pertaining thereto be dismissed. Thereafter, the General Counsel filed exceptions¹ to the Decision 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 Jenkins].

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 Decision, the exceptions, the brief, and the entire record in the case, and hereby adopts the findings,² conclusions, and recommendations of the Trial Examiner with the following additions and modifications:

1. The Trial Examiner found that Respondent's refusal to bargain with the Union was not unlawful because (a) the unit for which the Union sought bargaining was "inherently inappropriate," (b) Respondent's insistence upon an election was in good faith and was not motivated either by a rejection of the collective-bargaining principle or by a desire to gain time in which to undermine the Union, and (c) the Union's hasty filing of unfair labor practice charges foreclosed further bargaining.

We disagree with each of these subsidiary findings of the Trial Examiner and therefore with his conclusion that Respondent did not violate Section 8(a)(5) of the Act.

(a) In its letter of May 23, the Union asked recognition as bargaining representative of "all employees" with the customary exclusions. The Trial Examiner found that, because in defining the unit the Union did not specifically exclude salesmen, the unit was inappropriate. At the time of the Union's organizational effort, its demand for recognition, and the May 27 meeting with Respondent, the latter had no salesmen in its employ, although it had vacancies for that position which it did not fill until June and July, subsequent to its refusal to bargain. The Union never demanded that it be recognized as representative of salesmen and in refusing to bargain with the Union, Respondent did not give this as a reason for its conduct. This defense is an afterthought.

¹ As no exception was taken to the Trial Examiner's finding that the "speed up" of machine operation after union activity commenced violated Section 8(a)(1) of the Act, we adopt such finding *pro forma*.

² In section III of his Decision, the Trial Examiner erroneously says that General Counsel's Exhibit No. 3 is an affidavit of Edward R. Toliver. As the exhibit is an affidavit of Donald I. Sutton, we hereby correct this inadvertent error.

We find that the unit of "all employees" was not intended nor was it understood to include salesmen, and that Respondent's refusal to bargain with the Union was not based on any serious doubt as to the appropriateness of the unit for which the Union demanded recognition. As stated by the Board in the *United Butchers* case:³

If the Respondent had doubts as to the scope and composition of the proposed unit, it raised no question with respect to these issues at the time of the Union's demand for recognition The Respondent's objection as to the scope and composition of the unit, raised for the first time at the hearing, comes too late to convince us that its refusal was based on some bona fide doubt as to the appropriateness of the unit.

Moreover, assuming *arguendo*, that the Union considered salesmen to be part of the unit, such inclusion would be at most a minor variance and subject to modification.⁴ Excluding salesmen from the unit would not affect the Union's status as majority representative of the employees in the appropriate unit.

(b) An employer does not have an absolute right to insist upon a Board-directed election.

Where, as here, the Employer entertains no reasonable doubt either with respect to the appropriateness of the proposed unit or the Union's representative status, and seeks a Board-directed election without a valid ground therefor, he has failed to fulfill the bargaining requirements under the Act.⁵

At the May 27 meeting, Respondent's representatives examined the Union's card showing and the personnel manager conceded that the cards appeared to indicate that the Union represented a majority in the unit. Respondent did not challenge the authenticity of the signatures on the cards, nor did it give any other reason for doubting what the cards appeared to establish, that the Union represented a majority of the employees in the appropriate unit.⁶ We find that Respondent did not have a reasonable doubt as to the Union's representative status or the appropriateness of the unit, and therefore was not entitled, under the circumstances, to insist that the Union prove its majority in a Board-directed election.

(c) Although the Union filed its unfair labor practice charges on May 27, the very day on which the first meeting with Respondent was held, we find, contrary to the Trial Examiner, that this action was not

³ *United Butchers Abattoir, Inc.*, 123 NLRB 946, 957.

⁴ *The Hamilton Plastic Molding Company*, 135 NLRB 371, 373.

⁵ *Fred Snow, et al., d/b/a Snow & Sons*, 134 NLRB 709, 710-711, enfd. 308 F. 2d 698 (C.A. 9).

⁶ The record indicates that Respondent is not a newcomer in dealing with unions as it recognizes and has collective agreements at two other plants.

the cause of the breakdown in bargaining. At this meeting, Respondent stated clearly and unequivocally that it would not negotiate with the Union unless the latter established its majority in a Board-directed election. In view of Respondent's position, the Union was not required to go through the futile task of arranging more bargaining meetings which, because of Respondent's firm position, were doomed to be sterile.

Accordingly, we find, contrary to the Trial Examiner, that by refusing to bargain with the Union on and after May 27, 1963, Respondent violated Section 8(a)(5) and (1) of the Act.

2. We disagree with the Trial Examiner's finding that Respondent did not on or about May 24, 1963, threaten employees with economic reprisals for engaging in union activities.

About May 24, employee Saalzar overheard Plant Manager Waller say to two other officials and to Roger Smith, another employee,⁷ that "if they [the employees] got the Union, they [Respondent] were going to close the plant down." Employee Sandoval testified that Smith repeated to him the substance of this threat.

The Trial Examiner found that the statement of Plant Manager Waller was not unlawful because Waller was not aware of employee Salazar's presence, and he did not intend the conversation to be communicated to employees. However, Smith was an employee. The threat of plant closure made to him was unlawful, regardless of whether Waller was aware that Salazar had overheard his conversation, or intended his statement to be repeated by Smith to other employees. Accordingly, we find that by Plant Manager Waller's statement to employee Smith, Respondent violated Section 8(a)(1) of the Act.

3. We agree with the Trial Examiner, for the reasons set forth in his Decision, that Respondent's granting of a general wage increase in August 1963 to all employees in its corporate system was not unlawful.

THE REMEDY

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

As we have found that Respondent unlawfully refused to recognize and bargain with the Union we shall order Respondent, upon request, to bargain collectively with the Union and, if an understanding is reached, to embody such understanding in a signed agreement.

⁷ The Trial Examiner variously refers to Smith as an "official," an "employee," and an "overseer." According to the record, Smith is an hourly-paid press operator. There is no evidence that he is a supervisor. In fact, the Trial Examiner found that he is not. We concur in this finding.

Upon the basis of the foregoing, and upon the entire record in the case, the National Labor Relations Board hereby makes the following:

ADDITIONAL CONCLUSIONS OF LAW ⁸

5. All production and maintenance employees employed at the Employer's Denver, Colorado, plant, excluding salesmen, office clerical employees, guards, 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.

6. At all times since May 27, 1963, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 452, has been, and now is, the exclusive representative of all the employees in the above appropriate unit, for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

7. By refusing to recognize and bargain with the Union on and after May 27, 1963, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a) (1) and (5) of the Act.

8. By threatening employees with economic reprisals for engaging in union activities, Respondent has engaged in unfair labor practices within the meaning of Section 8(a) (1) of the Act.

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

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Fleming & Sons of Colorado, Inc., a division of Fleming & Sons, 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. 452, as the exclusive representative of its employees in the following unit which the Board finds appropriate for the purposes of collective bargaining:

All production and maintenance employees employed at the Employer's Denver, Colorado, plant, excluding salesmen, office clerical employees, guards, watchmen, professional employees, and supervisors as defined in the Act.

(b) Threatening employees with economic reprisals and increasing employees' speeds of production because of their union sympathies and activities.

⁸ Delete the Trial Examiner's Conclusion of Law No. 5.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist the 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 and all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a) (3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain collectively with the above-named Union as the exclusive representative of the employees in the unit described above, with respect to grievances, labor disputes, rates of pay, wages, hours of employment, and other conditions of work, and, if an agreement is reached, embody it in a signed contract.

(b) Post at its Denver, Colorado, plant, copies of the attached notice marked "Appendix."⁹ Copies of said notice, to be furnished by the Regional Director for the Twenty-seventh Region, shall, after being duly signed by the Respondent's representative, be posted by it immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the said Regional Director for the Twenty-seventh Region, in writing, within 10 days of the date of this Order, what steps it has taken to comply therewith.

(d) It is further ordered that the complaint be, and it hereby is, dismissed insofar as it alleges that Respondent violated Section 8(a) (5) and (1) of the Act by granting a general increase in wages to the employees in question.

⁹ In the event that this Order is enforced by a decree of a 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."

APPENDIX

NOTICE TO ALL EMPLOYEES

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

WE WILL, upon request, bargain collectively in good faith with International Brotherhood of Teamsters, Chauffeurs, Warehouse-

men and Helpers of America, Local No. 452, as the exclusive representative of all employees in the bargaining unit described below with respect to rates of pay, hours of employment, and other conditions of employment, and, if an understanding is reached, we will embody such understanding in a signed contract. The bargaining unit is:

All production and maintenance employees employed at our Denver, Colorado, plant, excluding salesmen, office clerical employees, professional employees, guards, watchmen, and supervisors as defined in the Act.

WE WILL NOT threaten our employees with economic reprisals or increase our employees' speeds of production because of their union sympathies and activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form labor organizations, to join or assist International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 452, 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.

All our employees are free to become, remain, or refrain from becoming or remaining members of the above-named labor organization or any other labor organization, except to the extent that this right may be affected by a lawful agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a) (3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959.

FLEMING & SONS OF COLORADO, INC., A
DIVISION OF FLEMING & SONS, INC.,
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 Twenty-seventh Region, 609 Railway Exchange Building, 17th and Champa Streets, Denver, Colorado, Telephone No. 534-4151, Extension 513, if they have any question concerning this notice or compliance with its provisions.

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

Upon a charge filed on May 27, 1963, by the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 452, herein called the Union, against Fleming & Sons of Colorado, Inc., a division of Fleming & Sons, Inc., the Respondent herein, the General Counsel of the National Labor Relations Board, by the Regional Director for the Twenty-seventh Region, issued a complaint dated July 30, 1963. The complaint alleges that the Respondent Company has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the National Labor Relations Act, as amended (61 Stat. 136), herein called the Act. Copies of the charge, complaint, and notice of hearing were duly served upon the Respondent and the Union.

The complaint alleges, in substance, that the Respondent violated Section 8(a)(1) of the Act in that it threatened employees with economic reprisal if employees did not refrain from becoming or remaining members of the Union or giving any assistance or support to it; unilaterally changed existing wage rates and hours of employment, increased the rates and speeds of production, decreased its working hours, and changed work assignments to make them more arduous. The complaint also alleges that the Respondent engaged in unfair labor practices within the meaning of Section 8(a)(5) of the Act in that it refused to bargain collectively with the Union.

The Respondent in its answer admitted the jurisdictional allegations of the complaint and that the Union is a labor organization within the meaning of Section 2(5) of the Act but denies the commission of any unfair labor practices.

Pursuant to proper notice given, a hearing was held on the issues framed by the pleadings in Denver, Colorado, on September 3 and 4, 1963, before Trial Examiner Henry S. Sahn. All parties were represented by counsel and were afforded full opportunity to participate in the hearing, to introduce relevant evidence, and to argue orally. Excellent briefs were filed by counsel for the General Counsel and the Respondent on October 9, 1963, which have been fully considered.

Upon the entire record in this case, including the briefs filed by the parties and citations of cases alleged to be dispositive of the issues in this case, and from observation of the demeanor of the witnesses while testifying, the Trial Examiner makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The Respondent, Fleming & Sons of Colorado, Inc., is, and has been at all times material herein, a Texas corporation and an operating division of Fleming & Sons, Inc., which exists by virtue of the laws of the State of Texas, and maintains its principal office at Dallas, Texas. At all times material herein, the Respondent has been, and is now, engaged in the manufacture of corrugated boxes at its plant at Denver, Colorado.

The Respondent, in the course and conduct of its business operations at Denver, Colorado, annually sells and causes to be shipped directly from its Colorado plant goods and materials valued in excess of \$50,000 to Adolph Coors, Canogren, and Tasty Foods, Inc., located within the State of Colorado, which enterprises annually sell and cause to be shipped directly from points and places located within the State of Colorado to points and places located without the State of Colorado goods and materials valued in excess of \$50,000. It is conceded and found, therefore, that the Respondent Company is engaged in commerce within the meaning of the Act, and it is subject to the jurisdiction of the Board.

II. THE LABOR ORGANIZATION INVOLVED

It is admitted and found that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

In May 1963, Respondent's production department employees, comprising its machine operators, became interested in organizing a union.¹ On May 20, 1963,

¹ As of September 1963, the Respondent's personnel comprised nine hourly paid machine operators, two salaried salesmen, an office manager, one office clerical employee, plant superintendent, and plant manager.

Victor Roybal, who is employed by the Respondent Company as a lift-truck and machine operator, telephoned the union offices, evidently at the request of and acting for his coworkers, and spoke to Edward R. Toliver, a union official, with respect to the possibility of organizing a union at Respondent's production department. Toliver arranged to meet Roybal at the plant the following day. Toliver gave Roybal union membership application cards, which authorized the Union to act as bargaining agent, and told Roybal to solicit the employees to sign these cards for the eventual purpose of having the Union represent the said employees in collective-bargaining negotiations with the Respondent.

The same day, May 21, Roybal obtained the signatures of seven of the production employees² and returned the signed cards to Toliver, the union official.

On May 23, 1963, the Company received a letter dated May 22 from the Union's president, Donald I. Sutton, which reads as follows:

This is to advise your Company that the undersigned Local Union has been authorized by all employees employed by your Company at 1100 W. 45th Ave., Denver, Colorado, excluding office clerical employees, guards, watchmen, professional employees and supervisors as defined in the National Labor Relations Act, 1947, as amended "to represent them on all matters concerning their wages, hours of work and other conditions of employment with your company.

This is also to inform your company that we are in a position to prove that we represent the above-described employees as their collective bargaining agent.

As the above-described employees' authorized Collective Bargaining Agent, we request that your company meet with us on Friday, May 24, 1963 at 10 A.M. in our office at 3245 Eliot Street, Denver, Colorado, for the purpose of negotiating terms of a labor agreement covering the wages, hours of work or other conditions of employment for said employees.

A meeting was arranged for May 27 at the Union's office. Representing the Company were Oather Waller, plant manager, and Earl Johnson, personnel director, and for the Union, Donald I. Sutton and Edward R. Toliver. The meeting began by Toliver stating that the Union represented a majority of the Company's employees and requested that it be recognized as the collective-bargaining agent for the employees. Johnson requested proof of the Union's majority whereupon Toliver handed Johnson seven signed cards which Johnson inspected and asked Waller, the plant manager, if the names that appeared on the union cards were employees of the Company. Waller replied in the affirmative but the authenticity of the signatures could not be verified at that time as the company records were at the plant. Sutton, the Union's business representative, testified that Toliver offered to have photocopies of the cards made but Johnson declined the offer stating, "because when the Teamsters petition the National Labor Relations Board for an election, that all of this would be confirmed."

Johnson then stated that the cards appeared to indicate a majority of the employees had signed whereupon Toliver asked Johnson to enter into negotiations for a contract. Johnson replied that he would "rather" not enter into any negotiations until the Board had conducted an election among the employees to determine if they wish to be represented by the Union. Toliver replied this was unnecessary as the seven signed cards showed the Union represented a majority of the employees, whereupon Johnson again advised Toliver that he would "rather" have the Board conduct an election to determine if the Union had majority status. Toliver then suggested that the Company file a representation petition but Johnson said this was up to the Union. No agreement could be reached when the Company continued to state it preferred a Board-conducted election and the Union insisted that it was not necessary as it had shown by the cardcheck that the Union represented a majority of the employees in the unit. Toliver then accused Johnson of refusing to bargain which the latter denied, stating that he would recognize and bargain with the Union if they should win a Board-conducted election. The meeting came to an abrupt end about 3 p.m., approximately 45 minutes from the time it began, when Toliver informed the company officials he would file an unfair labor practice charge against the Company and call a strike of the employees. A charge was filed with the Board that same day.

Contentions

The General Counsel alleges that the Respondent by refusing to recognize the employees' signed authorization cards and insisting it would not bargain with the Union until the Union proved its representative status by a Board-conducted election violated Section 8(a)(5). The Respondent answers this contention by arguing that the

² Between May 21 and September, an additional machine operator was hired.

Company may refuse to rely upon the authorization cards and can insist that the Union establish its majority by means of a Board-conducted election, especially where, as in this case, there is an absence of any *mala fides* on the part of the Company.

The Respondent also contends that the unit requested by the Union does not constitute an appropriate collective-bargaining unit as it includes both machine operators and salesmen thereby justifying its refusal to bargain until the Union agreed to a Board election. The General Counsel attempts to rebut this argument by urging that assuming salesmen have no substantial community of interest with machine operators, nevertheless, no salesmen were employed by the Company on the date of the demand to bargain which is controlling in determining the appropriateness of the unit. Moreover, contends the General Counsel, the Respondent is precluded from asserting inappropriateness of the unit as a defense as it was not asserted until the hearing. The General Counsel has cited no authority for this proposition nor has research disclosed any cases which support this argument. Moreover, Toliver, the union official, in his affidavit (General Counsel's Exhibit No. 3) states that Johnson, the Company's personnel director, told the union officials at the May 27 meeting that "the Board would have to consider the appropriateness of the unit . . ."

Conclusions

The Respondent contends that the contract unit described in the Union's bargaining request was inappropriate for collective bargaining as it combined in a single grouping both machine operators and salesmen.³ The machine operators produce corrugated boxes whereas the salesmen who are white-collar employees call upon customers to solicit orders for the Company's products. The salesmen are salaried employees whereas the machine operators are paid by the hour. There is no contact with the production employees and the supervision and the control of the machine operators is separate and distinct from that governing the salesmen. Thus, the machine operators have their own production supervisor whereas the salesmen are under the direct control of the plant manager. There is neither common supervision nor homogeneity or community of interests or functions between the machine operators and salesmen as the duties and working conditions of the machine operators are different from those of the salesmen and there is, as well, a lack of similarity of skills or interchangeability of jobs between them. The salesmen category, therefore, does not warrant their inclusion nor are they properly included in a bargaining unit comprising machine operators as the determinative elements of an appropriate bargaining unit is to group together only employees who have substantial mutual interests in wages, hours, and other conditions of employment.⁴ The divergence in the Union's description of the unit in its demand for recognition is substantial as the nature of the salesmen's employment, as well as their conditions of employment, gives rise to a sufficiently separate and distinct community of interest so as to preclude their inclusion in the unit sought. Accordingly, it is found that the unit sought is inherently inappropriate for purposes of collective bargaining as there is not only a lack of operational integration but there is also a substantial variation between the proposed unit and the appropriate unit because it affects the essential composition of the unit.⁵

However, the General Counsel contends the Respondent is precluded from asserting that the salesmen were improperly included in the unit because on the date the Union requested the Company to bargain there were no salesmen employed by the Respondent Company. It is true there were no salesmen on the payroll as of May 23, 1963, the date the Union made its request of the Company to bargain, but that was due to there being temporary vacancies in this job category on that particular date. The Company had employed a salesman from approximately October 1961 until May 18, 1963, and for a period of about 2 weeks, namely, May 18 to June 6, 1963, the salesman's job was vacant while the Company was in the process of seeking to hire a replacement. On June 6, 1963, a replacement salesman was hired and on July 16, 1963, a second salesman was hired.

Moreover, the classification of salesman was a continuing job category which had been established by the Company as early as February 1961 and on the date

³ "All employees employed by [the] Company excluding office clerical employees, guards, watchmen, professional employees and supervisors . . ."

⁴ Fifteenth Annual Report of the National Labor Relations Board, pp. 38-39. See also *Kalamazoo Paper Box Corporation*, 136 NLRB 134, 137.

⁵ *Joslin Dry Goods Company*, 118 NLRB 555; cf. *The Lord Baltimore Press, Inc.*, 144 NLRB 1376.

the request to bargain was made these salesman positions were then in existence and the vacancies in the process of being filled. Inasmuch as the job category of salesman had been established for some time at the Respondent's plant, the intervening happenstance of temporary vacancies in that job category cannot be utilized to force salesmen then in the process of being hired (and without consulting them) into an inappropriate unit unilaterally selected by the Union. The wishes of the salesmen and their relative independence as a distinct working force cannot be ignored in designating an appropriate unit.⁶ For it is inimical to the Act's statutory scheme that the Union and not the Board, under the circumstance here disclosed, should not be entrusted with the authority to determine by the fair election contemplated by the statute, which unit will assure the salesmen of the fullest freedom in exercising the rights guaranteed them by the Act. To hold otherwise, under such circumstances, would be tantamount to disregarding the paramount legal rights and vested primary interests of the salesmen.⁷

Then, too, there is insufficient evidence which reveals antiunion sentiment or any clearly evinced determination by the Company not to bargain with the Union within the meaning of Section 8(a)(5) of the Act. In fact, the evidence is to the contrary. The most that can be said is that possibly the Company may have been reluctant to accepting the signed cards—a not uncommon phenomenon and hardly enough to indicate union animus, much less enough on which to base a conclusion of a violation within the meaning of Section 8(a)(5), when it is considered the company representatives explicitly informed the union officials that if the Union were to win a Board-conducted election, it would both recognize and bargain with the Union. Thus, the Company invited the Union to petition the Board for an election but instead the Union affirmatively refused to cooperate. Rather, the Union peremptorily and summarily broke off negotiations, thereby depriving the Company of an opportunity to negotiate further, made no effort to schedule additional meetings, threatened the Company with a strike, and within a matter of a few hours after the first and only meeting of 45 minutes concluded, precipitately filed an unfair labor practice charge against the Company. In these circumstances, it is not believed the Union comported itself reasonably by refusing the Company's suggestion of a secret Board election to determine the appropriate unit and its majority status or did it sufficiently press its claim for recognition so as to charge the Company with an unlawful refusal to bargain.

Then also, the company representatives emphasized they would "rather" have the Union's majority status determined by a secret election conducted by the Board explaining that not only was this method more dignified and orderly but it would leave the determination of the appropriate unit up to the Board⁸ and better ascertain the wishes of the employees as they sometimes changed their minds after signing union cards. And equally important, testified the company witnesses, in previous negotiations with other unions which had organized Respondent's employees at its Dallas and Houston, Texas, plants, it was established company policy to request that these organizing unions prove their majority status by a Board-conducted election.

. . . ordinarily an employer faced with the demand for recognition by a labor organization which claims to represent a majority of his employees may refuse to rely upon evidence of the union's representation and insist that the union establish its majority by means of a Board-conducted secret election. But when, as stated in the *Joy Silk Mills* case, "such refusal is due to a desire to gain time and to take action to dissipate the union's majority, the refusal is no longer justifiable and constitutes a violation of the duty to bargain set forth in Section 8(a)(5) of the Act." Whether an employer's refusal to bargain is impelled by a good- or bad-faith doubt as to the union's majority status can only be tested by reference to the total picture of the employer's conduct revealed by the record as a whole.⁹

⁶ See *Pittsburgh Plate Glass Company v. N.L.R.B.*, 313 U.S. 146, 152, 157; *May Department Stores d/b/a Famous-Barr Company v. N.L.R.B.*, 326 U.S. 376, 380.

⁷ Cf. *N.L.R.B. v. Superior Fireproof Door & Sash Company, Inc.*, 289 F. 2d 713 (C.A. 2).

⁸ Sutton, the Union's president, in an affidavit (General Counsel's Exhibit No. 3) given to a Board investigator, stated that Johnson, the plant manager, at the meeting "said that the Board would have to consider the appropriateness of the unit" if the Union acceded to the Company's request that it petition the Board for a representation election.

⁹ *Sunset Lumber Products*, 113 NLRB 1172, 1175. Accord: *Chamberlain Corporation*, 75 NLRB 1188, 1189-1190.

Again, in *Charles A. Blinne, d/b/a C. A. Blinne Construction Company*, the Board stated that it "is consonant with the underlying statutory scheme . . . to resolve disputed issues of majority status, whenever possible, by the machinery of a Board election."¹⁰

It is found, therefore, under the circumstances peculiar to this case, that the Respondent was not only legally justified in refusing to rely upon evidence of majority representation in the form of authorization cards signed by the employees, but also insisting that the Union prove its majority in a secret election under Board auspices provided that its motive was not a desire to gain time and to take action to dissipate the Union's majority. Moreover, the Company's professed preference for a Board election should not be distorted into an unfair labor practice where it is plain that there is no probative evidence of an unwillingness on its part to meet with the Union. Furthermore, the General Counsel has not proved by a preponderance of the substantial evidence that the Respondent had such a motive. On the contrary, the evidence reveals that the Respondent had a general policy of requesting certification of unions under the aegis of the Board at its two other plants. This evidence indicates the Respondent's good faith in dealing with the Union herein.¹¹

Moreover, the record does not sustain the General Counsel's position of a refusal to bargain within the meaning of Section 8(a)(5) of the Act not only because of the Union's failure to request bargaining in a proper unit but also the General Counsel has failed to prove that the Respondent's insistence on a Board election was motivated by bad faith or by either an adamant determination not to negotiate with the Union or a complete rejection of the bargaining principle envisaged by the Act. Furthermore, there is no evidence disclosing that Respondent Company had a disposition to evade its obligation to bargain or a policy or practice of denying employees the rights guaranteed them by the Act. In fact, the record suggests the contrary as the Company recognizes and evidently enjoys amicable relations with other unions at its Dallas and Houston, Texas, plants. Nor does the record contain evidence of union animus as would require that the Company's preference for a Board election be looked upon with suspicion. If importance is attached to a hostile union attitude on the part of an employer in characterizing his acts, conversely, it would seem, as a matter of equity, that an employer with a friendly union attitude is entitled to credit in characterizing its acts.¹²

An employer may in good faith insist on a Board determination of a disputed unit issue and a Board election if such insistence is *neither* motivated, as found herein, by a rejection of the collective-bargaining principle nor by a desire to gain time within which to undermine the union. As far as the record shows, the Company took its position honestly, in good faith, and without a hostile or arbitrary attitude. Nor should it be assumed that doctrines evolved in other contexts will be equally well adapted to the facts peculiar to the instant proceeding because the overall bargaining conduct of the Respondent here did not amount to a refusal to bargain in good faith. It is found, therefore, that the Company in good faith sought a Board election as there is nothing inconsistent in Respondent's conduct to indicate otherwise.

Finally and equally important, the Union's hastily filing a charge on the same day that the one and only 45-minute negotiation meeting was held precluded any additional meetings being held, thereby foreclosing any further bargaining. Under these facts, it would not be reasonable to hold that the Respondent's conduct constitutes substantial evidence upon which to base a finding of a *refusal* to bargain. An employer is entitled to a reasonable time, varying according to the circumstances of the case, in which to consider the validity of a union's request to bargain.¹³ Under the circumstances in this case, it would not be an unreasonable limitation to hold that before the Union swore out its charge, after only one meeting, the Respondent should have been offered a reasonable opportunity to determine the validity of the Union's representation claim,¹⁴ additional negotiation meetings scheduled, and not be placed in the position of being accused of refusing to bargain with respect to *unstated* demands.

¹⁰ 135 NLRB 1153 at 1162.

¹¹ *B. F. Goodrich Company*, 106 NLRB 757 at 761. *A. L. Gilbert Company*, 110 NLRB 2067, 2069-2070.

¹² See *N.L.R.B. v. Chronicle Publishing Company, Inc.*, 230 F. 2d 543, 547-548 (C.A. 7).

¹³ See *Louis Natt, d/b/a Mrs. Natt's Bakery*, 44 NLRB 1099, 1108.

¹⁴ *N.L.R.B. v. Jones & Laughlin Steel Corporation*, 301 U.S. 1, 44, holds that Section 9(a) of the Act imposes upon an employer only the duty of negotiating with the authorized representative of a majority of his employees. At the time the charge was filed in this case, the Respondent was exercising this privilege, namely, the right to ascertain whether the Union did represent a majority of its employees in an appropriate unit.

The obligation to bargain collectively encompasses a correlative and affirmative duty of equitable dealing. Collective bargaining is stifled at the source if the party upon whom the demand is being made is not accorded a reasonable opportunity to investigate and determine the validity of the representation claim. Even assuming, *arguendo*, that the unit for which bargaining was requested is appropriate and that the Union represented a majority of the employees, nevertheless, if the Respondent had not been accorded sufficient time to resolve its doubt with respect to the unit and majority *when the charge was filed on the same and only day a meeting was held*, it follows that there could be no refusal to bargain if there was no obligation to bargain *at that time*.¹⁵ The filing of an unfair labor practice charge on the same day the only meeting was held and at the same time delivering a strike ultimatum does not appear to foster the good-faith indicia defined in Section 8(d) of the Act which provides that: ". . . to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder . . ." The underlying theme of collective bargaining is negotiation as there is a mandate to continue good-faith discussions. The filing of an unfair labor practice charge along with the threat of a strike on the same day of the first and only 45-minute meeting, however, precluded any further negotiations. Moreover, the bona fides of the Respondent, under the circumstances presented here, could best have been tested at that juncture by further affirmative steps by the Union looking toward an additional definite meeting date and collective bargaining before the charge was filed. It is concluded, therefore, that the evidence presented by the General Counsel in this case falls short of establishing such bad faith on the part of the Respondent in its dealings with the Union as constituted a refusal to bargain within the meaning of the Act.¹⁶

All these actions on the part of the Union removed the possibility of the beginning of any effective negotiations and thus precluded the existence of a situation in which the Respondent's own good faith could be tested. If it cannot be tested, its absence can hardly be found.¹⁷

Consequently, on the record as a whole, there is insufficient evidence to show that Respondent violated Section 8(a)(5) of the Act by refusing to bargain with the Union. Accordingly, it is recommended that the 8(a)(5) allegations of the complaint be dismissed.¹⁸

The Alleged Violations of Section 8(a)(1)

The complaint avers that Waller, plant manager, on or about May 24, 1963, threatened an employee with economic reprisals if employees supported and joined the Union. To substantiate this allegation, the General Counsel's witness, Salazar, an employee, testified that while returning to his machine at the end of his lunch period, he stopped at a water fountain to get a drink. Unknown to a group of men, including Waller, the plant manager, who did not see Salazar and who were engaged in conversation, Salazar overheard Waller, who was about 10 feet away from him, say to three company officials: " . . . if they got the union, they were going to close the plant down." Sandoval, an employee, testified that Smith, an employee, said to him: ". . . they says if we get the Union, they were going to close down the plant."

The General Counsel cited as authority for his contention that the above-described incident was a violation of Section 8(a)(1), the case of *General Seat and Back Manufacturing Corporation*.²⁰ In that case, the plant superintendent, during an organizational campaign, came over to an employee described as a "forelady" and in the course of the conversation interrogated her as to who belonged to the union and what she had seen and heard (of the organizing campaign). When the "fore-

¹⁵ *C. L. Bailey Grocery Company*, 100 NLRB 576, 577-580. See *N.L.R.B. v. Jackson Press, Inc.*, 201 F. 2d 541, 544-545 (C.A. 7); *Tearkana Bus Company, Inc. v. N.L.R.B.*, 119 F. 2d 480, 484 (C.A. 8).

¹⁶ See *Green Colonial Furnace Company*, 52 NLRB 161, 163.

¹⁷ *Times Publishing Company, et al.*, 72 NLRB 676, 683.

¹⁸ *Cf. South Texas Coaches, Inc., et al.*, 22 NLRB 502 at 514.

¹⁹ Lucinskas, office manager, Phipps, plant foreman, and Smith, an overseer but not alleged by the General Counsel to be a supervisor.

²⁰ 117 NLRB 1223, 1235.

lady" said she knew nothing, the superintendent "shook his finger" and said "he was going to let everyone go who had anything to do with the union" An employee who was working at her machine some 8 to 10 feet away heard the conversation and the Trial Examiner held that by the superintendent making this threat within the hearing of the machine operator, he violated Section 8(a)(1). The Board affirmed the Trial Examiner without comment.

The above-cited case is believed to be inapposite to the facts in the instant case as there the superintendent spoke to a "forelady" but the intermediate report fails to disclose whether or not she was a supervisor. More over, the superintendent came to where the "forelady" was working in the plant and it was reasonable for him to expect that anything he told her would be overheard by fellow employees working in close proximity to where the conversation occurred. When compared with the facts in the instant case, the two incidents are clearly distinguishable particularly when it is considered that Salazar's presence was unknown to Waller, Respondent's plant manager, nor did Waller intend the conversation to be communicated to the employees, and Smith, who is alleged to have repeated this purported conversation to employee Sandoval, is not claimed by the General Counsel to be a supervisor within the meaning of the Act. Therefore, Smith's statement to Sandoval cannot be imputed to Respondent so as to hold it liable. Nor can Salazar's overhearing this conversation, unknown to the participants, be considered interference, restraint, or coercion of Salazar within the meaning of Section 8(a)(1) of the Act, because there is no basis upon which it can *reasonably* be inferred that this conversation was intended to have such consequent impact upon Salazar nor when it was allegedly relayed to Sandoval did Smith have inherent capacity to so coerce him. Accordingly, it will be recommended that this allegation of the complaint be dismissed.

The complaint also alleges that Phipps, production manager, unilaterally changed existing wage rates and hours of employment, increased the rates and speeds of production, decreased working hours and changed work assignments. There was no evidence introduced by the General Counsel to substantiate these allegations except with respect to Respondent increasing the speed of the machines which the employees operated and granting a 2-percent increase on or about August 1, 1963, to all its employees.

With respect to the wage increase, it is uncontroverted that this was given at the same time to all employees in all Respondent's plants throughout the country. As this August pay raise was a general corporate increase applicable not only to Respondent's Denver plant but to its two other plants, this wage increase has not been established as having any causal connection with the organizing campaign of the Union at the Denver plant which began 2 months before nor with the charge filed on May 27. It would seem, moreover, that pending an organizational campaign, the employer need not stand still and maintain the *status quo* (not granting a pay raise) without regard to legitimate business considerations which are economically motivated. The decisive factor is the timing and motivation. Here the timing and object of the Company in granting the wage increase has not been shown to have been motivated by an intention to interfere with, restrain, or coerce the employees' rights guaranteed to them by Section 7 of the Act. Nor does the record support an inference that the timing of this increase was more than a mere temporal coincidence constituting an award of economic benefits which violated Section 8(a)(1). The Board has said that a unilateral increase would be permissible in keeping with an established company policy, "where the raise . . . was one which was regularly or periodically granted or one which the employees normally expected to receive."²¹ It will be recommended, therefore, that this allegation of the complaint be dismissed.²²

Five of the seven employees who testified stated that shortly after union activity was initiated at the plant the production output of the machines they operated was increased. The Respondent contends its speedup was for business reasons denying that this speedup was intended to coerce the employees because of their adherence to the Union but that changes in machine speed were made, as in the past, as a part of Respondent's practice in a plant which recently opened of gradually increasing production rates as new employees gained skill in operating their machines.

²¹ *Standard Coil Products, Inc.*, 99 NLRB 899, 903.

²² *Burns Brick Company*, 80 NLRB 389, 391; *W. C. Nabors, d/b/a W. C. Nabors Company*, 89 NLRB 538, 539; *Wilma M. Moran, et al., d/b/a Gillcraft Furniture Company*, 103 NLRB 81, 93-94; *Campbell & McLean, Inc.*, 106 NLRB 1049, 1051.

Production commenced in October 1961. As of approximately June 1963,²³ when it is alleged this "speedup" began, the following employees who testified had worked at the plant for the following periods of time:

Salazar.....	16 months
Roybal.....	15 months
Virgil.....	10 months
Sandoval.....	1½ months
Salmerson.....	19 months
Sanchez.....	16 months
Valdez.....	13 months

It is true, as Respondent contends, that in a new plant, such as the one here, the speed of the various machines is increased as the employees, all of whom have had no prior experience, gain skill in their jobs but there comes a time when with increasing experience, a machine operator reaches the peak of his proficiency. Waller, the plant manager, testified that after 6 months on the job, a machine operator would become "competent enough to do a creditable job" and "very competent within a year's time."

In applying Waller's formula to the length of time the various employees had worked for Respondent, as detailed above, it would appear that all of them with the exception of one or possibly two, would have reached their maximum proficiency and production when Respondent increased the speed of the machines in June after union organizational activities had begun on May 23. It is believed and found that this "speedup" after union activity commenced was not a mere temporal coincidence but was a change in working conditions intended to convey Respondent's displeasure with its employees for their signing union cards and therefore, was a violation within the meaning of Section 8(a)(1) of the Act.

The General Counsel in his brief argues that if it is found that Respondent committed an act in violation of Section 8(a)(1), it necessarily follows that Section 8(a)(5) also was violated which is sometimes referred to as a *per se* violation.²⁴ However, this concept was discredited in *The Walmac Company* case²⁵ where the Board stated:

Apparently, it is the theory of the Trial Examiner that in any situation where a union claims, but is denied, recognition as majority representative and the employer commits any form of unfair labor practice, *ipso facto*, the employer also thereby violates Section 8(a)(5). We cannot agree with this principle, and past Board decisions do not support it.

In *Harcourt and Company, Inc.*,²⁶ the Board stated:

Our colleague apparently assumes that every interference by an employer with the right of its employees to bargain collectively through representatives of their own choosing is *per se* an unlawful refusal to bargain with their statutory representative. We do not understand this to be the law.

It is well established that violations of Section 8(a)(2), (3), (4), and (5) are species of the generic unfair labor practices defined in Section 8(a)(1), and hence conduct violative of those sections is also violative of Section 8(a)(1). The converse, however, is not true. For example, interference with the right of the employees to bargain collectively is a much broader concept than a refusal to bargain with their statutory representative. Indeed, the commission of any of the unfair labor practices defined in the Act constitutes at least an indirect interference with that right, for the Act was designed to encourage collective bargaining and to assure to employees the right to bargain collectively through

²³ The witnesses testified the "speedup" began shortly after the Union began to organize; the Union's request for recognition was received by Respondent on May 25, 1963; the meeting with the Union took place on May 27, and the charge was filed the same day.

²⁴ In *N.L.R.B. v. Miranda Fuel Co.*, 326 F. 2d 172 (C.A. 2), the court in commenting "upon the *per se* approach" stated: "Like all cliches and short cuts in the law, designed to make life easy for the judicial officer who has to make the decision, this merely eliminates the thinking process necessary to get at the root of the matter."

²⁵ 106 NLRB 1355 at 1356. Accord: *Caldwell Packaging Company*, 125 NLRB 495, 496, footnotes 4 and 5; *KTRH Broadcasting Company*, 113 NLRB 125.

²⁶ 98 NLRB 892 at 900-901.

representatives of their own choosing. Thus, coercive statements by an employer, as well as any other conduct engaged in by an employer that is calculated to prevent its employees from organizing for the purpose of collective bargaining . . . constitute acts of interference with the right of the employees to bargain collectively, just as does a direct refusal to bargain with their bargaining agent. Under our dissenting colleague's theory, all such conduct would constitute an independent violation of Section 8(a)(5). We cannot agree with this legal conclusion.

It is found, therefore, under the facts peculiar to this case, and the applicable law, that Respondent's insistence on a Board election and its doubt about including salesmen in the production unit can neither be equated with a refusal to bargain nor has the "speedup" any causative relationship to an 8(a)(5) violation as it was not motivated by Respondent's seeking to avoid its duty to bargain. On the contrary, Respondent repeatedly assured the Union that if it won the election, it would begin bargaining immediately.²⁷ Moreover, the lone unfair labor practice does not evidence a plan to destroy the Union's majority by unlawful means.²⁸

IV. THE REMEDY

Having found that the Respondent has increased the speeds of production of the various machines operated by its employees in violation of Section 8(a)(1), it shall be recommended that the Respondent cease and desist therefrom.

Inasmuch as Respondent's antiunion activities are not so extensive in manner and scope and are not of such an aggravated character as to indicate an attitude of general opposition to employees' rights, it will be recommended that Respondent only be required to cease and desist from in any like manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them in Section 7 of the Act.

Because of the Union's precipitous action in filing an unfair labor practice charge which resulted in negotiations being aborted, it is not believed that it would prejudice the employees unduly in aiming for remedial restoration of the *status quo ante* to ask that they demonstrate, in an atmosphere free of any possible trace of constraint, their desires in a secret election conducted under Board auspices. Equally important, also, is the belief that under the circumstances here revealed, the Board should determine the proper unit and who is eligible to vote.²⁹

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

CONCLUSIONS OF LAW

1. The Union herein is a labor organization within the meaning of Section 2(5) of the Act.
2. Fleming & Sons of Colorado, Inc., a division of Fleming & Sons, Inc., is an employer who at all times material hereto was engaged in commerce within the meaning of the Act.
3. By interfering with, restraining, and coercing employees in the exercise of rights guaranteed in Section 7 of the Act, Respondent Company has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.
4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.
5. The Respondent Company has not committed a violation of Section 8(a)(5) of the Act, as alleged in the complaint. It is recommended that the allegations of the complaint setting forth said violation be dismissed.

[Recommended Order omitted from publication.]

²⁷ See *Delight Bakery, Inc.*, 145 NLRB 893, Trial Examiner's Decision; *Emma Gilbert, d/b/a A. L. Gilbert Company*, 110 NLRB 2067, 2069-2076.

²⁸ *KTRH Broadcasting Company*, 113 NLRB 125, 130-131.

²⁹ See *N.L.R.B. v. The Joclin Manufacturing Company*, 314 F. 2d 627 (C.A. 2), and *The Halsey W. Taylor Company*, 145 NLRB 425, where the Board treated a representation petition as a motion for clarification, and determined the status of the disputed employees in the unit.