

Region 24, shall, after being duly signed by the Respondent, be posted by Respondent immediately upon receipt thereof and maintained by it for 60 consecutive days thereafter in conspicuous places where notices are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notice is not altered, defaced, or covered by any other material.

(g) Notify the Regional Director for Region 24, in writing, within 20 days from the date of the receipt of this Decision and Recommend Order, what steps Respondent has taken to comply herewith.⁵¹

⁵¹ In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify said Regional Director, in writing, within 10 days from the date of this Order, what steps the Respondent has taken to comply herewith."

APPENDIX

NOTICE TO ALL EMPLOYEES

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

WE WILL NOT contract out work of the nature performed by employees in the bargaining unit without first giving Sindicato de Trabajadores, Packinghouse, United Packinghouse Food & Allied Workers, District 9 of Puerto Rico, AFL-CIO, and its affiliate Union de Empleados de la Industria del Telefono de Puerto Rico, Local 963, notice of our intention to contract out such work and an opportunity to bargain over it.

WE WILL, upon request, hereafter bargain with the above-named unions before contracting out such work.

WE WILL, upon request, bargain with the above-named unions about the effects of the unit work we heretofore contracted out.

WE WILL offer those employees laid off as a result of contracting unit work during the period November 9, 1962, to March 31, 1963, reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and we will make them whole for any loss of pay suffered as a result of their layoff.

WE WILL, upon request, furnish the above-named unions with such information and data as will, or as may tend to, substantiate our position respecting the cause of a layoff.

PUERTO RICO TELEPHONE COMPANY,
Employer.

Dated _____ By _____
(Representative) (Title)

NOTE.—We will notify the employees, entitled to reinstatement, if presently serving in the Armed Forces of the United States of their right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act of 1948, as amended, after discharge from the Armed Forces.

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

Employees may communicate directly with the Board's Regional Office, P.O. Box 11007, Fernandez Juncos Station, Santurce, Puerto Rico, Telephone No. 724-7171, if they have any questions concerning this notice or compliance with its provisions.

International Union of Operating Engineers, Local No. 9, AFL-CIO [Morrison-Knudsen] and Fred Wisecup. Case No. 27-CB-251. November 20, 1964

DECISION AND ORDER

On July 30, 1964, Trial Examiner Henry S. Sahm issued his Decision in the above-entitled proceeding, finding that Respondent had 149 NLRB No. 90.

engaged in and was engaging in the unfair labor practices alleged in the complaint, and recommending that it cease and desist therefrom, and take certain affirmative action as set forth in the attached Trial Examiner's Decision. Thereafter the Respondent filed exceptions to the Trial Examiner's Decision and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations 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.¹ The Board has considered the Trial Examiner's Decision, the exceptions and brief, and the entire record in this case, and hereby adopts the findings,² conclusions,³ and recommendations⁴ of the Trial Examiner as modified below.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the Board hereby adopts as its Order, the Order recommended by the Trial Examiner, and orders that Respondent, International Union of Operating Engineers, Local No. 9, AFL-CIO, its officers, agents, representatives, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order as modified below:

¹ Respondent excepts to the Trial Examiner's conduct of the proceedings, alleging bias and prejudice and a denial of due process. Contrary to Respondent's contention, we are satisfied and find that the Trial Examiner conducted the hearing fairly; that he questioned witnesses without partiality and solely for purposes of clarifying ambiguous testimony; that his evidentiary rulings were not prejudicial, and that his factual findings, with the exception noted below, and ultimate conclusions are supported by the record. See *Standard Dry Wall Products, Inc.*, 91 NLRB 544, enfd. 188 F. 2d 362 (C.A. 3); *A. O. Smith Corporation, Granite City Plant*, 132 NLRB 339; *Baker Hotel of Dallas, Inc.*, 134 NLRB 524, enfd. 311 F. 2d 528 (C.A. 5).

² As the record shows that Wisecup's replacement reported for work on Thursday, October 10, 1963, rather than Friday, October 11, 1963, as found by the Trial Examiner, we hereby correct the Trial Examiner's Decision to reflect the proper date.

³ The General Counsel alleged that Respondent unlawfully caused the Employer to assign Wisecup to a less agreeable job, thereby causing his resignation. On the facts found by the Trial Examiner, and as shown by the record, the Respondent, by protest and threat of work stoppages, caused Morrison-Knudsen to remove Wisecup from the position of tractor operator because he was nonunion. When Wisecup was discriminatorily removed from the job of tractor operator, the Employer offered him work as a chuck tender, a position with which Wisecup was unfamiliar and which involved a reduction in pay of \$0.83 per hour. Rather than accept this job, Wisecup elected not to return to work. In the circumstances, we agree with the General Counsel that Wisecup's rejection of the chuck tender job did not amount to a voluntary resignation, but that Respondent caused Morrison-Knudsen to constructively discharge him in violation of Section 8(a)(3), and thereby violated Section 8(b)(2) and (1)(A) of the Act.

⁴ The Trial Examiner awarded Wisecup backpay commencing on October 11, 1963. However, as the record shows that Wisecup's employment ceased on the previous day, we hereby correct the recommended remedy to reflect the correct date in order that Respondent's backpay obligation commence on October 10, 1963.

1. Delete subparagraphs (a), (b), (c), and (d) of paragraph 1 of the Order recommended by the Trial Examiner, substituting the following:

“(a) Causing, or attempting to cause, Morrison-Knudsen Company, Inc., or any other employer, to constructively discharge, refuse to hire, or otherwise discriminate against Fred Wisecup, or any other worker, in violation of Section 8(a)(3) of the Act, or otherwise to discriminate against employees or applicants in violation thereof.

“(b) In any other manner causing, or attempting to cause, Morrison-Knudsen Company, Inc., or any other employer, to discriminate against its employees in violation of Section 8(a)(3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959, or restraining or coercing said employees or applicants in the exercise of rights guaranteed in Section 7 of the Act, except insofar as 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. Modify the provisions of the notice attached to the Trial Examiner's Decision marked “Appendix A” to conform to the above deletions and additions.

3. Add as a separate paragraph under paragraph 2(a) of the Recommended Order, the following: “Notify the above-named employee if presently serving in the Armed Forces of the United States of his right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act of 1948, as amended, after discharge from the Armed Forces.”

4. Add the following immediately below the signature line of the notice attached to the Trial Examiner's Decision marked “Appendix A”: “We will notify the above-named employee if presently serving in the Armed Forces of the United States of his right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act of 1948, as amended, after discharge from the Armed Forces.”

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

This case, heard before Trial Examiner Henry S. Sahn at Breckenridge, Colorado, on January 23, 1964, pursuant to a charge filed on October 24, 1963, and a complaint issued December 2, 1963, raises issues with respect to Section 8(b)(2) and (1)(A) of the Act concerning the alleged discriminatory termination of Wisecup, charging party employee, because he was not a member of the Respondent Union. The Union denies it caused the employer, Morrison-Knudsen Co., Inc., to discharge Wisecup.

The conflicting contentions of the parties are set forth in their respective briefs, which have been fully considered. Upon such consideration, and upon the entire record in the case from observation of the demeanor of the witnesses, the Trial Examiner makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE COMPANY AND THE LABOR ORGANIZATION INVOLVED

Morrison-Knudsen, a Delaware corporation, herein called both the Company and M-K, maintains its office and principal place of business at Boise, Idaho. The Company is a general contractor in the building and construction industry. In the course of its business operations, the Company annually purchases and ships in interstate commerce, goods and materials directly to States other than the State of purchase in an amount exceeding \$50,000. The Company is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

The Respondent Union is a labor organization within the meaning of Section 2(5) of the Act.

Resolutions of credibility

The witnesses of the General Counsel and Respondent are in sharp conflict in their respective versions as to the circumstances under which the alleged discriminatee, Wisecup, left the employ of the Company. Nevertheless, after observing the witnesses, analyzing the record, and the inferences to be drawn therefrom, it is concluded that the versions of the witnesses for the General Counsel as to what occurred in this case merit belief, as they appeared to be sincere and truthful witnesses, as detailed below¹. Moreover, the events narrated by the General Counsel's witnesses follow a logical sequence, which are consistent with the attendant circumstances in this case. This credibility conclusion is based also on observation of the witnesses with respect to the accuracy of their memories, their comprehension, and their general demeanor on the stand in answering questions put to them.

The testimony

The Company, Morrison-Knudsen, and Respondent, Local 9 of the Operating Engineers, are signatories to a collective-bargaining agreement, the pertinent provisions of which are set out in the attached Appendix B.

The Respondent Union maintains offices at Denver and Frisco, Colorado. The Frisco office is approximately 90 miles from Denver and 7 miles from Silverthorne, Colorado, where the Company's project site, which is involved in this proceeding, is located.

On Friday, October 4, 1963, about 8 a.m., Eliopulos, the Company's office manager, telephoned Webber, the Union's Denver office dispatcher, to request the referral of a tractor operator to report the same day to its Silverthorne road construction project for the 1:30 p.m. shift.² Webber told Eliopulos that he doubted the order could be filled for the Friday afternoon shift but that he would attempt to have a tractor operator at the project site the following Monday, the next working day.³

Two hours later, the same day, about 11 a.m., Eliopulos again telephoned Webber and requested two additional tractor operators to report for work on Monday, October 7. Webber, the Union's dispatcher, testified that he gave referrals the same day (Friday) for these three tractor jobs to Kirkwood, Schneidman, and Wingert and told them to report at the project site the following Monday morning.

When none of these three tractor operators reported at the project site on Monday morning, October 7, for the 3 a.m. shift, Eliopulos testified he telephoned Webber the morning of the same day and so advised him.⁴ Webber denied he received such notification on Monday from Eliopulos, testifying that it was not until the following

¹ *Universal Camera Corporation v. N.L.R.B.*, 340 U.S. 474, 494-497; *Deepfreeze Appliance Division, Motor Products Corp. v. N.L.R.B.*, 221 F. 2d 458, 462 (C.A. 7).

² Eliopulos first telephoned the Union's Frisco office but when no one answered he called their Denver office.

³ This finding is based on the credited testimony of Eliopulos, the Company's office manager.

⁴ Wingert, who was referred by the Union, reported at 1:30 p.m., on Monday, October 7.

Wednesday when he first learned this in a telephone conversation from Fox, the Union's Frisco business representative. This conflict in testimony is resolved in favor of Eliopulos' version.⁵

That same Monday afternoon, after Eliopulos had notified Webber that the three tractor operators had not reported for work, Wisecup, the alleged discriminatee, applied at the construction site to Amick, the M-K Company's project manager, for a job as a tractor operator. Amick told Wisecup there was a vacancy for a tractor operator but under the Company's contract with the Union, they did their hiring through the Union and he would have to register first with Irving Fox, the manager of the Union's Frisco office.

Wisecup went to the Union's Frisco office the same day, about 3 p.m. on Monday, October 7, and registered with Fox on the Union's out-of-work list. After Wisecup registered, he told Fox he would like to join the Union and tendered the initiation fee but Fox refused to accept it, telling him he would first have to be actually working on a job.

Wisecup then returned to the Company's office and told project manager Amick that he had registered for work with Fox. Amick then asked Wisecup to see him at 8 o'clock the following morning at the project site and if the tractor operators whom they had requested from the Union did not report, he would consider hiring him.

When two of the three tractor operators allegedly referred by the Union the previous Friday did not report at the project site on Tuesday, Eliopulos, the Company's office manager, again telephoned the Union's Denver office and advised Webber, the dispatcher, he was unable to contact Business Agent Fox at their Frisco office but that Wisecup was registered on the Frisco out-of-work list and requested union clearance for him by name.⁶ Webber stated he did not have the authority to clear Wisecup but that this clearance must come from Fox, the Union's Frisco business agent. The Company, as it was in critical need of tractor operators,⁷ hired Wisecup as a tractor operator on Tuesday morning, October 8, about 9 o'clock. When Wisecup's shift ended that afternoon, he went to the Union's Frisco office and told Fox he was working for the M-K Company as a tractor operator and again tendered the initiation fee to join the Union which Fox refused to accept but gave Wisecup no reason therefor.

The following morning, Wednesday, October 9, Fox came to the project site and protested the Company's hiring of Wisecup as a tractor operator because he was not a union member. The company officials replied that Wisecup told them he had registered with the Union and as they were "desperately" in need of tractor operators, they had hired him. Fox acknowledged Wisecup was registered on the Union's out-of-work list but stated that he had refused to accept Wisecup's tender of the initiation fee as it was within the Union's discretion to accept or reject Wisecup's application to join the Union.

When the company officials asked Fox what would happen if they continued to employ Wisecup as a tractor operator, he replied that the other tractor operators (all of whom were union members) might refuse to work with Wisecup. In order to avoid this happening, it was agreed between Fox and the company officials to meet the following day.⁸

At this meeting on Thursday, October 10, 1963, the Company was represented by Eliopulos, its office manager, Amick, project manager, and Denham, area manager;

⁵ General Counsel's Exhibit No. 5, a telephone bill, shows the Company called the Union's Denver office on Monday and Tuesday and Webber admits that he spoke to Eliopulos on Tuesday about clearance for Wisecup, the alleged discriminatee, which would necessarily require discussion with respect to the three men not reporting. Moreover, Fox, when testifying as to the Wednesday telephone conversation, did not mention that he told Webber the three men allegedly referred by the latter had failed to report. Furthermore, it is incredible that the Company would fail to so notify the Union from Friday to Wednesday. In fact Webber himself testified this would have been "unusual."

⁶ Article V(e) of the Company's contract with the Union provides that "the Employer shall have the right to request by name any job applicant who previously has been employed in work covered by the jurisdiction of this Agreement and who shall have registered with the Union, whether he be a member of the Union or not, and if said applicant is available the Union shall refer said applicant to the Employer, regardless of said applicant's position or priority on the Union's eligibility lists."

⁷ The Company was constructing a highway for the State of Colorado which "was ready to shut down a portion" of the project because of lack of tractor operators.

⁸ Denham, the Company's area manager, testified that at this meeting the union officials stated: ". . . that Wisecup couldn't work because all the rest of the people on the job, the operating engineers, were Union . . . the men wouldn't work with a non-Union worker."

the Union by Ziegler, business representative of the Denver office and Fox, who is in charge of the Frisco office. When the union officials insisted that Wisecup be removed from his job as a tractor operator, the company officials feared they would be guilty of violating the Act if they acceded to the Union's demands, so in order to protect themselves against such an eventuality, requested the Union to make its demand for Wisecup's discharge as a tractor operator in writing.⁹ The union officials refused to do this but did agree to furnish a replacement for Wisecup. When this replacement reported for work on the 3 a.m. shift the following morning, Friday, October 11, the Company terminated Wisecup's employment as a tractor operator and assigned him to a job as a laborer. When the shift ended at 1:30 p.m. that day, Wisecup quit his laborer's job.¹⁰

Concluding Findings

Against this fact pattern, Respondent's contentions in its efforts to exonerate itself from a finding of unfair labor practices are singularly unimpressive. Certain undisputed and demonstrable facts in this case, which have been referred to heretofore, and additional indicia, mentioned below, strengthen and fortify this conclusion. The testimony of the General Counsel's witnesses are credited as the events narrated by them follow a logical sequence, which are consistent with certain undisputed and demonstrable facts as well as the attendant circumstances and entire background of evidence adduced in this case. On the other hand, the record shows that Respondent's witnesses, Webber and Fox, frequently contradicted themselves and one another and that their testimony was not only improbable but in some respects incredible. They did not impress the trier of these facts as forthright witnesses but appeared as not only seeking to color their testimony, but also to be concealing facts in an effort to hide an unlawful motive, in order to have Wisecup discharged as a tractor operator because he was not a member of their Union. Moreover, the demeanor of both Webber and Fox, while on the witness stand, and their disposition to fence with the General Counsel's representative, together with their unresponsive, equivocal, vague, unconvincing, and, in some instances, evasive and incredible testimony which contradicted themselves and one other, compels the Trial Examiner to discredit their testimony, insofar as inconsistent with findings of fact made above. Thus, they were so reluctant to state frankly any matter adverse to the Union's interest that at times this characteristic approached not only evasion but incoherence. Webber did, however, admit on cross examination that only union men would be referred by the Respondent.

Finally, the three union members whom Webber, the Respondent's dispatcher, testified he referred on Friday, October 4, to the Company's project site, which is a critical aspect of this case and Respondent's defense, were not called as witnesses by the Respondent. The unexplained failure to produce these three men warrants drawing an inference that, if produced, their testimony would not have supported Webber's testimony.¹¹ Their absence not only weakens the Respondent's contentions "but of itself is clothed with a certain probative force."¹²

It has been established by a preponderance of the probative evidence that Wisecup was discharged solely because of his nonmembership in the Union, pursuant to a demand upon the M-K Company by Fox, the business representative of the Respondent Union, and its admitted agent within the meaning of Section 2(13) of the Act. Respondent's conduct in causing the discharge of Wisecup constituted an act of causing the employer company to discriminate against an employee in violation of Section 8(a)(3) because it is not open to a union, under an exclusive hiring arrangement as here, to deny employment opportunities to job applicants for such reasons and accordingly was a violation of Section 8(b)(2) and (1)(A) of the Act.¹³ It is

⁹ See attached Appendix B, second paragraph of article IV.

¹⁰ A tractor operator receives \$3.45 an hour; a laborer \$2.62.

¹¹ *Halliday v. U.S.*, 315 U.S. 94, 99; *Interstate Circuit v. U.S.*, 306 U.S. 208, 225, 226; *Wallock & Schwalm v. N.L.R.B.*, 198 F. 2d 477, 483 (C.A. 3); *N.L.R.B. v. Reed & Prince Manufacturing Company*, 130 F. 2d 765, 768 (C.A. 3); *Concord Supplies & Equipment Corp.*, 110 NLRB 1873, 1879.

¹² *Paudler v. Paudler*, 185 F. 2d 901, 903 (C.A. 5), cert. denied 341 U.S. 920.

¹³ *N.L.R.B. v. International Brotherhood of Electrical Workers, Local 340 (Walsh Constr. Co.)*, 301 F. 2d 824 (C.A. 9); *N.L.R.B. v. Alaska Steamship Co., et al.*, 211 F. 2d 357, 360 (C.A. 9); *Radio Officers' Union, etc. (A. H. Bull Steamship Company) v. N.L.R.B.*, 347 U.S. 17, 31-33, 40-42, 55; *Local 18, International Union of Operating Engineers (Earl D. Creager, Inc.)*, 141 NLRB 512; *Local Union No. 369 of the International Brotherhood of Electrical Workers (Charles H. Bentley, d/b/a Bentley Electric Company)*, 143 NLRB 1297; *Local #841, International Union of Operating Engineers, AFL-CIO (Avco Construction, Inc.)*, 135 NLRB 657, 664.

further found that the discrimination stemmed from Wisecup's lack of membership in the Respondent Union and was against an employee with respect to whom membership in the Respondent Union had been denied on a ground other than his failure to tender periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership. By thus causing the Company to discharge Wisecup, Respondent has restrained and coerced the said Company's employees in the exercise of rights guaranteed by Section 7 of the Act and has thereby violated Section 8(b)(1)(A). Accordingly, it is found that Respondent has engaged in unfair labor practices in violation of the provisions of Section 8(b)(2) and (1)(A) of the Act.¹⁴

II. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth above, occurring in connection with the business operations of Morrison-Knudsen Company, Inc., set forth in section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and such of them as have been found to be unfair labor practices tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

III. THE REMEDY

Having found that the Respondent has engaged in unfair labor practices, it shall be recommended that it cease and desist therefrom and that it take certain affirmative action designed to effectuate the policies of the Act. It shall be recommended (1) that Respondent notify Morrison-Knudsen Company, Inc., in writing, with a copy to Wisecup, that the Respondent has no objection to the employment of Wisecup in the capacity of an operating engineer, or any other employer, within the Respondent Union's territorial area, and (2) that the Respondent make Wisecup whole for any loss of pay he may have suffered as a result of Respondent having caused Morrison-Knudsen Company, Inc., to discharge Wisecup on or about October 11, 1963, by payment to him of a sum of money equal to that which he normally would have earned as an employee of Morrison-Knudsen Company, Inc., and Wisecup that it has no objection to the employment of Wisecup as an operating engineer, as provided above,¹⁵ less his net earnings during said period, whichever is the greater, the payment to be computed on a quarterly basis in the manner established in *N.L.R.B. v. Seven-Up Bottling Company of Miami Inc.*, 344 U.S. 344. Interest on backpay shall be computed in the manner set forth in *Isis Plumbing & Heating Co.*, 138 NLRB 716.¹⁶

As the Respondent's unfair labor practices found herein go to the heart of the Act, it will be recommended that the Order contain a broad injunction against any form of restraint or coercion by the Respondent. Moreover, in view of the nature of the unfair labor practices committed in this case and other proceedings in the past,¹⁷ the commission of similar and other unfair labor practices reasonably may be anticipated. It shall therefore be recommended that the Respondent be ordered to cease and desist from causing or attempting to cause Morrison-Knudsen Company, Inc., or any other employer, as defined in the Act, within their jurisdictional area, to discharge, lay off, decline to hire, or otherwise discriminate against employees or applicants for employment by reason of lack of union membership or union clearance, except in accordance with the provisions of Section 8(a)(3) of the Act.

¹⁴ Cf. *N.L.R.B. v. Animated Displays Company and Carpenters' District Council of Detroit, Wayne and Oakland Counties and Vicinity*, etc., 327 F. 2d 230 (C.A. 6), enf. 137 NLRB 999; *Shear's Pharmacy, Inc.*, 137 NLRB 451, 452-453, *Excel Merchandise Co., Inc.*, 116 NLRB 1581; *International Association of Bridge, Structural and Ornamental Iron Workers, Local No. 494, AFL-CIO (Spiegelberg Lumber and Building Company)*, 128 NLRB 1379; *Local 610, United Brotherhood of Carpenters and Joiners of America, AFL-CIO (V. G. Cameron, d/b/a Cameron Store Fixtures)*, 122 NLRB 476; *Brotherhood of Painters, Decorators & Paperhangers of America, etc. (Spoon Tile Company)*, 114 NLRB 1171; *St. Joe Paper Company*, 135 NLRB 1340; *Brunswick Corporation*, 135 NLRB 574, 576-588.

¹⁵ *Crossett Lumber Company*, 8 NLRB 440, 497-498.

¹⁶ *Local No. 4, United Slate, Tile and Composition Roofers, Damp and Waterproof Workers Association, AFL-CIO (Avon Sheet Metal Co.)*, 140 NLRB 384.

¹⁷ See *International Union of Operating Engineers, Local Union No. 9, AFL-CIO*, 147 NLRB 393; *Denver Building and Construction Trades Council International Union of Operating Engineers, Local 9 (Henry Shore)*, 90 NLRB 1768, enf. 192 F. 2d 577 (C.A. 10).

Upon the foregoing findings of fact and upon the entire record in the case, there are hereby made the following:

CONCLUSIONS OF LAW

1. Morrison-Knudsen Company, Inc., is an employer within the meaning of Section 2(2) of the Act.

2. International Union of Operating Engineers, Local No. 9, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By maintaining and enforcing and attempting to maintain and enforce a discriminatory arrangement requiring union membership or other clearance as a condition of employment; by causing Morrison-Knudsen Company, Inc., to terminate the employment of Fred Wisecup because he was not a member of the Respondent or alternatively, had not received clearance for work from Respondent; Respondent Union violated the provisions of Section 8(b)(2) and (1)(A) of the Act.

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

RECOMMENDED ORDER

Upon the basis of the foregoing findings of fact and conclusions of law, and pursuant to Section 10(c) of the Act, it is hereby recommended that International Union of Operating Engineers, Local No. 9, AFL-CIO, its officers, agents, representatives, successors, and assigns, shall:

1. Cease and desist from:

(a) Causing or attempting to cause Morrison-Knudsen Company, Inc., to discharge, refuse to hire, or otherwise discriminate against Fred Wisecup or any other worker in violation of Section 8(a)(3) of the Act, as otherwise to discriminate against employees or applicants for employment in violation thereof.

(b) Causing or attempting to cause Morrison-Knudsen Company, Inc., to terminate the employment of an employee in violation of Section 8(a)(3) of the Act, or otherwise to discriminate against employees or applicants for employment in violation thereof.

(c) Otherwise causing or attempting to cause Morrison-Knudsen Company, Inc., or any other employer, as defined in the Act, within their jurisdictional area, to discharge, layoff, decline to hire, or otherwise discriminate against employees or applicants for employment for lack of union membership or union clearance, except in accordance with the provisions of Section 8(a)(3) of the Act.

(d) In any other manner restraining or coercing employees or applicants for employment in the exercise of rights guaranteed in Section 7 of the Act.

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

(a) Notify Morrison-Knudsen Company, Inc., that the Respondent has no objection to, and will not interfere with, the employment by Morrison-Knudsen Company, Inc., of Wisecup, in the manner set forth in "The Remedy."

(b) Make Fred Wisecup whole for any loss of pay, as set forth in the section of this decision entitled "The Remedy."

(c) Post in conspicuous places in all of its offices, meeting halls, hiring halls, and union halls, including all places where notices to its members are customarily posted, copies of the attached notice marked "Appendix A."¹⁸ Copies of said notice, to be furnished by the Regional Director for Region 27, shall, after being duly signed by the Respondent's authorized representative, be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter. Reasonable steps shall be taken to insure that such notices are not altered, defaced, or covered by any other material.

(d) Sign by its authorized representative and mail sufficient copies of said notice to the Regional Director for Region 27 for posting by Morrison-Knudsen Company, Inc., at its business offices, construction projects, and at all locations where notices to its employees are customarily posted, if said company is willing to do so.

¹⁸ In the event this Recommended Order be adopted by the Board, the words "a Decision and Order" shall be substituted for the words "the Recommended Order of a Trial Examiner" in the notice. In the further event that the Board's Order be 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."

(e) Notify the said Regional Director, in writing, within 20 days from the date of the receipt of this Trial Examiner's Decision, what steps the Respondent has taken to comply herewith.¹⁹

It is further recommended that, unless on or before 20 days from the date of receipt of this Trial Examiner's Decision, the Respondent notify the said Regional Director, in writing, that it will comply with the Recommended Order, the National Labor Relations Board issue an order requiring the Respondent to take the action aforesaid.

¹⁹ 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 A

NOTICE TO ALL MEMBERS OF LOCAL 9, OPERATING ENGINEERS, AFL-CIO; TO ALL EMPLOYEES OF MORRISON-KNUDSEN COMPANY, INC.; AND TO ALL APPLICANTS FOR EMPLOYMENT

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, you are notified that:

WE WILL NOT cause or attempt to cause Morrison-Knudsen Company, Inc., or any other employer, to discharge, demote, or deny employment to or otherwise discriminate against Fred Wisecup, or any other employee or applicant for employment because he is not a member of this Union.

WE WILL NOT in any other manner restrain or coerce employees or applicants for employment in the exercise of their rights guaranteed in Section 7 of the National Labor Relations Act.

WE WILL notify, in writing, Morrison-Knudsen Company, Inc., that we have no objection to and will not interfere with the hiring or employment of Fred Wisecup as an operating engineer whether he is a member of this Union or not.

WE WILL notify, in writing, Fred Wisecup that we have no objection to his employment by the Morrison-Knudsen Company, Inc., as an operating engineer, or any other employer, whether he is a member of this Union or not; hereafter, we will not coerce or restrain him by unlawfully infringing upon the rights guaranteed him by Section 7 of the Act.

WE WILL make Fred Wisecup whole for any loss of pay he may have suffered as a result of our having caused Morrison-Knudsen Company, Inc., to discharge him.

INTERNATIONAL UNION OF OPERATING ENGINEERS,
LOCAL No. 9, AFL-CIO,

Union.

Dated _____ By _____
(Representative) (Title)

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

Employees may communicate directly with the Board's Regional Office, 609 Railway Exchange Building, 17th and Champa Streets, Denver, Colorado, Telephone No. Keystone 297-3551, if they have any question concerning this notice or compliance with its provisions.

APPENDIX B

ARTICLE IV

Union Membership

All present employees covered by this Agreement and coming under the jurisdiction of the Union, as set forth in the Recognition Clause, Article III, shall, as a condition of employment, become members of the Union within eight (8) days following the date of this Agreement, and shall remain members in good standing during the term of this Agreement. All new employees covered by this Agreement and coming under the jurisdiction of the Union, as set forth in the Recognition Clause, Article III, shall, as a condition of employment, become members of the Union within eight (8) days following the date of their employment, and shall remain members in good standing during the term of this Agreement. "Good standing" for the purpose of this Agreement is interpreted to mean the payment or tender of initiation fees and periodic Union dues uniformly required as a condition of acquiring or retaining membership.

When an employee fails to tender to an authorized agent of the Union such initiation fees or periodic Union dues as are required for good standing membership, the Employer will, upon written request from the Union, dismiss the employee at the close of the shift during which said written request is furnished by the Union to the Employer. Such written request from the Union shall itemize and certify the delinquent employee's account with the Union and shall be furnished by the Union in triplicate, one (1) copy to be mailed or delivered to the superintendent or foreman of the Employer in charge of the particular project upon which said delinquent employee is employed, one (1) copy to be mailed or delivered to the Employer at its principal place of business in Colorado, and one (1) copy to be mailed or delivered to the delinquent employee.

The Union represents that it will not invoke the provisions of this Article unless and until such time as it will have available for the Employer an adequate replacement for the delinquent employee for whom the Union is making written request for dismissal.

Upon request by the Union, the Employer will notify the Union of the names, addresses and date of hire of any newly employed employees covered by this Agreement who were not referred by the Union

ARTICLE V

Hiring Procedure

(a) The Employer agrees that he will give the Union the first opportunity to furnish all classes of employment that are provided for in this Agreement. The Employer further agrees that all requests for workmen will be placed with the Union dispatching office within a reasonable time prior to the contemplated date of employment of such workmen

(b) Each Union dispatching office shall maintain appropriate registration lists or cards kept current from day to day in five classifications, namely, (1) Shovel Operators, (2) Mechanics and Welders, (3) Hoist and Portable Operators, (4) Tractor Operators, and (5) Oilers and Helpers. Applicants will be placed on these lists and referrals will be made from these lists in accordance with the time and date of application. All applicants must be registered and must re-register at least once every ten (10) days. During such period of registration and re-registration, all applicants must be ready, able and willing to go to the jobsite and perform the work for which he is dispatched.

The practice of each Union dispatching office shall be uniform as to all applicants with respect to physical presence in the office at given hours, to telephoning in, being available at a telephone, as the Union may determine, and all applicants shall be informed of such practice.

No applicant for employment shall be registered in more than one Union dispatching office at any one time.

(c) Selection of applicants for referral to jobs shall be on a nondiscriminatory basis and shall not be based on, or in any way affected by, Union Membership, bylaws, rules, regulations, constitutional provisions, or any other obligation or aspect of Union membership, policies or requirements

(d) Each Union dispatching office shall furnish to each workman dispatched to a job a written referral. Such referral shall not be Union "clearance", but shall be merely written evidence in the workman's possession that he has been dispatched by the Union dispatching office in accordance with this Agreement.

(e) Notwithstanding the foregoing subparagraphs, the Employer shall have the right to request by name any job applicant who previously has been employed in work covered by the jurisdiction of this Agreement and who shall have registered with the Union, whether he be a member of the Union or not, and if said applicant is available the Union shall refer said applicant to the Employer, regardless of said applicant's position or priority on the Union's eligibility lists.

(f) The Employer retains the right to refuse to accept and to reject any job applicant referred by the Union if said applicant is unsatisfactory to the Employer.

(g) The Union agrees to comply with all laws and regulations, state and federal, with regard to the acceptance, selection and referral of job applicants without discrimination and hereby agrees to indemnify and hold harmless the Employer from any losses or damages resulting from any act or omission of the Union in breaching or failing to comply with all such laws and regulations, not, however, including court costs and attorney's fees not authorized by the Union.