

Al Schertzer and Philip Gorenstein, Co-Partners, d/b/a A & P Import Company and John Pemberton and Rubin Gatson.
Cases Nos. 29-CA-56-1 and 29-CA-56-2 (formerly 2-CA-10106-1 and 10106-2). September 2, 1965

DECISION AND ORDER

On May 27, 1965, Trial Examiner Harold X. Summers, issued his Decision in the above-entitled proceeding, finding that the Respondents had engaged in certain unfair labor practices alleged in the complaint and recommending that they cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. The Respondents have filed exceptions to the Trial Examiner's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel [Members Fanning, Brown, 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 Trial Examiner's Decision, the exceptions, and the entire record in this case, and hereby adopts the Trial Examiner's findings, conclusions, and recommendations.¹

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby adopts as its Order the Recommended Order of the Trial Examiner as modified herein, and orders that the Respondents, Al Schertzer and Philip Gorenstein, co-partners, d/b/a A & P Import Company, New York, New York, their agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order, as so modified:

1. The word "Unlawfully" is inserted before the word "Interrogating," in paragraphs 1(b) and 1(c).

2. Add to the end of paragraphs 2(a) and 2(b) the following: "and make him whole for any loss of pay he may have suffered by reason of the discrimination against him by payment of a sum of money equal to the amount he normally would have earned as wages from the date of his termination to the date of Respondent's offer of reinstatement in the manner set forth in the section entitled "The Remedy."

¹ We correct the following inadvertent typographical errors in the Trial Examiner's Decision. On line one, page 9, the date "January 8" should read "January 28." In the third line of the first indented paragraph of Appendix B, the word "labor" is substituted for the word "local."

TRIAL EXAMINER'S DECISION

This case was heard upon the consolidated complaint¹ of the General Counsel of the National Labor Relations Board, herein called the Board, alleging that Al Schertzer and Philip Gorenstein, co-partners, d/b/a A & P Import Company, had engaged in and were engaging in unfair labor practices within the meaning of Section 8(a) (1) and (3) of the National Labor Relations Act, herein called the Act. Respondents' answer to the complaint failed to treat with some of its allegations and denied others; in effect, it denied the commission of any unfair labor practices. Pursuant to notice, a hearing was held before Trial Examiner Harold X. Summers at New York, New York, on December 14, 1964. At the hearing, an amendment to the complaint and an answer denying the new allegations were filed. All parties were afforded full opportunity to examine and cross-examine witnesses, to argue orally, and to submit briefs. A brief filed by the General Counsel and a letter from counsel for Respondents deemed to be in the nature of a brief (although it did not purport to be a formal brief) have been fully considered.

Upon the entire record of the case,² including my evaluation of the witnesses based upon the evidence, and my observation of their demeanor, I make the following:

FINDINGS OF FACT

I. COMMERCE

Al Schertzer and Philip Gorenstein, herein called Respondents, are the sole partners in this copartnership doing business under the trade name and style of A & P Import Company, which entity will be referred to herein as A & P or, simply, the Company. At all times material, maintaining an office and place of business at 1123 Broadway in the city and State of New York and another office and a warehouse at 934 Hancock Street, Brooklyn, in the county of Kings, city and State of New York, A & P has engaged in the importation and wholesale sale and distribution of home furnishings. During the year preceding the issuance of the instant complaint, which period is representative of its annual operations, it purchased and caused to be delivered to its place of business, directly from Japan and various European countries, merchandise valued in excess of \$50,000.³

I find that Respondents are an employer within the meaning of the Act.

II. THE UNIONS

Local 807, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called Local 807, and Warehouse, Production and Sales Employees Union, Local 11, National Organization of Industrial Trade Unions, herein called Local 11, are labor organizations within the meaning of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background and setting*

A & P has been in business since 1950. At all times with which we are concerned, Al Schertzer has been the firm's "outside man," and Philip Gorenstein has been its "inside man." Schertzer, except for business trips, performs his work at the office in Manhattan, where sales are consummated and where the Company's books and records, including those related to personnel, are kept. Gorenstein devotes his time to supervising the operation at the Brooklyn warehouse; he gives orders and, in consultation with his partner, formulates and executes all warehouse personnel decisions. I find both Schertzer and Gorenstein, in addition to their status as joint proprietors, to be supervisors for and agents of the partnership.

Second in command at the warehouse is Joseph Schertzer, brother of Al and brother-in-law of Gorenstein. Not a partner, his title is manager. He takes care of orders at the warehouse, sees that merchandise goes out to customers, and, in general, makes sure that all warehouse merchandise is in its proper place. In Gorenstein's absence—10 to 15 percent of the time—he takes full charge. In addition, he spends

¹ The complaint was issued September 28, 1964. The charges initiating the proceeding were filed on June 29, 1964.

² The transcript stands corrected.

³ The findings in this paragraph are based upon allegations in the complaint which, undenied by the answer, are deemed to be admitted, as supported by credited testimony at the hearing.

time at the Manhattan office and, at that location, replaces his brother in the latter's absence, about 10 percent of the time. Respondents concede that Joseph Schertzer is a supervisor for A & P, and I find him to be a supervisor and agent.⁴

The Company engages in no manufacturing, processing or fabrication. Basically—outside of its sales and clerical functions—it picks up purchased merchandise at ocean piers, transports it to the Brooklyn warehouse, stores it, and delivers it to customers,⁵ in which operations it employs truckdrivers⁶ and/or warehousemen. Since the uneven necessity for the transport of merchandise, either from the piers or to the customers, does not lend itself to 100 percent utilization of truckdrivers as such, they are expected and required to perform warehousing duties, including cleanup, at various times. Indeed, with one exception, noted *infra*, A & P has never hired warehousemen who are not also qualified and licensed to drive a truck.

For at least 8 years prior to the date of the instant hearing, the Company has dealt with Local 11 as bargaining representative of its truckdrivers and warehousemen. The current collective-bargaining contract covering their working conditions is effective, by its terms, from January 13, 1964, to January 12, 1967. For purpose of this case, the only pertinent provisions of this contract are its union-security clause⁷ and the prescribed probationary period for new employees.⁸

A & P's need for truckdriver-warehousemen is a fluctuating one, depending, at any given time, upon the amount of merchandise arriving for pickup and that requiring delivery. At an appropriate place hereinbelow, this subject is discussed in some detail; suffice it to say at this point that, in mid-January of 1964, a date which marks the beginning of the events relevant herein, the Company had in its employ but one truckdriver-warehouseman, William Ford.

B. Chronology of events⁹

1. During or about January 1964,¹⁰ Philip Gorenstein became acquainted with Rubin Gatson, one of the two charging parties herein, who was then doing odd jobs at a garage adjoining the Brooklyn warehouse. Gorenstein suggested that he might have work for Gatson. Among other things, he asked Gatson if he belonged to a union. On January 28, Gatson was employed by A & P as a warehouseman-laborer at \$75 per week.

2. Pursuant to Gorenstein's request, the New York State Employment Service referred Perry Kinard to Respondent. He was hired as a truckdriver on March 16, to be paid \$75 per week.

3. Between the end of January and mid-May, A & P hired four or five new employees. However, except for Kinard, none of these worked more than a day or two. I find that they were hired on a casual, temporary basis, and that the Company's only regular truckdrivers or warehousemen during this period were Ford, Gatson, and, from March 16, Kinard.

4. On May 18, a fourth "regular" was added. He was John Pemberton, the second charging party herein, who was employed as a truckdriver at \$75 weekly.¹¹ At the time, Gorenstein asked him if he belonged to a union.

⁴ For convenience's sake, Al Schertzer will hereafter be referred to as Schertzer; references to Joseph Schertzer will include his given name.

⁵ Typical customers are Sears Roebuck Co., Montgomery Ward, Macy's of New York, Bloomingdale, W. T. Grant, Bamberger's and other major department stores

⁶ At all relevant times, A & P owned three small trucks.

⁷ This record does not reveal the length of the period beyond which an employee of Respondent must join Local 11.

⁸ Sixty days.

⁹ Unless otherwise indicated, these findings are based upon uncontradicted, credited testimony. They will not be repeated elsewhere in this Decision; later references to them will take the form of the abbreviation "*Chron*", followed by the item number or numbers being alluded to.

¹⁰ Unless the contrary is noted, all dates referred to herein fall within 1964

¹¹ There was conflicting testimony as to whether Pemberton had worked for A & P a day or two some weeks earlier. The difference is irrelevant except as its resolution may bear on the credibility of Pemberton, who testified that he had been so employed, had earned \$22 at such employment, and, for unemployment compensation purposes, had been charged with a week of partial employment. As a witness, Pemberton displayed a certain obtuseness in comprehending questions and some difficulty in conveying answers; but this, I was convinced, arose out of a problem of communication rather than one of fabrication. This aspect of his testimony—by dint of which, incidentally, Pemberton stood to gain nothing—rang true, and I credit it.

5. At some point between the end of April and May 8—before Pemberton was hired—Gatson and Kinard had discussed between themselves the fact that they were working unpaid overtime. They had considered the possibility that a union might be of assistance in solving this problem, but they took no action in this respect at that time.¹²

A few days after Pemberton was hired—specifically, between May 18 and May 25—there was a second discussion of the possible unionization of the warehouse. Participating were Gatson, Kinard, and Pemberton. The latter suggested that an approach be made to Local 807,¹³ and the other two agreed. Thereupon, during the same period of time, Pemberton procured four bargaining authorization cards from Local 807. He, Gatson, and Kinard each signed a card. Ford, approached by Gatson, declined to sign one, instead showing his Local 11 membership card.¹⁴ Pemberton turned the signed cards in to Local 807.

6. On May 26, Kinard was discharged by Gorenstein. No reason for the action was then given, but, in a subsequent conversation between Kinard and Schertzer—for other aspects of that conversation, see *Chron.* 8, *infra.*, third paragraph—the latter explained that Kinard had been laid off because “we figured you were the one who brought 807 in.”¹⁵

7. May 27 was a day of swift-moving events.

The morning, a new employee, Paul Robinson, appeared in place of Kinard. Pemberton telephoned the office of Local 807 and informed “Whitey,” a Local 807 representative (who, in this proceeding, was known only by this nickname), of the development; Whitey said he would come over. When he arrived at the warehouse, accompanied by another (unidentified) individual, he instructed Pemberton, who was loading a truck, to summon Kinard from his home. Pemberton telephoned Kinard, then resumed his work.

(At or about this time, Gorenstein asked Pemberton who the two strangers were with whom he had spoken. Pemberton said that they were “insurance agents.”)

Shortly afterward, Whitey and his companion went into the warehouse office and spoke to Gorenstein. Whitey identified himself and said that he was “pulling the shop” because it was operating without a union contract. Gorenstein protested that Respondent was a “union house” and had been for 7 or 8 years. His protests were unavailing at this time and, at the close of the meeting, Whitey gave a picket sign to Kinard, who had now arrived, and picketing began. Warehouse operations stopped completely as Gatson and Pemberton joined Kinard in picketing.

Whitey having left the premises to keep an appointment, Gorenstein called Pemberton from the picket line into his office. Joseph Schertzer was also present. Gorenstein asked what this was all about, and Pemberton explained that the employees had agreed to join Local 807 and had signed membership applications which he (Pemberton) had then turned in. When Gorenstein asked who had “brought in” Local 807, Pemberton said they had “all” agreed on the move and repeated that he had turned

¹² This finding is based on the credited testimony of Gatson and Kinard. Implicit is my rejection of proffered testimony that, when Gatson and Kinard were hired, they were told of Local 11’s status as bargaining agent for the Company’s employees. Also implicit is my rejection of proffered testimony that, at the end of April or early in May, representatives of Local 11 apprised Gatson of Local 11’s status as bargaining agent and sought to persuade him to join Local 11. If, indeed, such approaches were made at that time, why did Gatson and Kinard feel the need of “a union” to assist them? And why was not Kinard, as well as Gatson, approached? And why was Gatson not told—and there is no claim he was told—that he *must* join Local 11 to keep his job? In context, I find that approaches on behalf of Local 11, such as there were, were made at a later date, as found hereinbelow.

¹³ In his search for employment prior to May 18, Pemberton had been met, on a number of occasions, with a request to see his “union book.” Not a member of any union, he had gone to Local 807’s hall with the idea of “buying a book”, there, he had been told that this could not be done—to join Local 807 he had first to find employment covered by the organization.

¹⁴ This finding is based upon the credited testimony of Ford. The showing of the card was the first indication to Gatson, or to any of the others, that Local 11 represented any of the Company’s employees; and—I find—it did not convey to any of them that Local 11 was their bargaining agent, let alone that they were subject to a union security clause calling for Local 11 membership. (Ford did *not* mention these aspects to Gatson.)

¹⁵ Found in accordance with Kinard’s credited testimony. The nearest Schertzer, in his testimony, came to touching upon such a conversation was his testifying that, each time Kinard came to the Manhattan office, he (Schertzer) would ask him if he was happy and if he had any complaints.

the cards in. At this, Gorenstein said that Gatson had been with the Company 6 months and Kinard 3 months without any trouble; now, he said, Pemberton was fired for "starting trouble." Before Pemberton left, Gorenstein said he would take Gatson and Kinard back but not Pemberton, to which Pemberton retorted that the others would not return without him.¹⁶

At or about this time, Joseph Schertzer left the office and asked Gatson if he had "signed up." Upon receiving an affirmative answer, he said, "You're fired, too!"¹⁷

Gorenstein called Pemberton to the office 15 minutes later. He noted that Kinard was "stubborn" and suggested a willingness to take back Pemberton and Gatson but not Kinard. Pemberton's answer: "we" would not come back without Kinard.

(Gorenstein, at or about this time, reported on developments to his partner. He said he had discharged Pemberton and Gatson because "he thought a conspiracy was taking place against him and, 'in quick judgment,' he discharged them for not telling him first of what activities were going on." Also, either Gorenstein or Schertzer called the Local 11 delegate to tell him of the picketing and to ask what was going on. The delegate's reaction, as given at this hearing—he couldn't care less; the picketing meant nothing to Local 11, because that organization had a contract.)

The picketing had gone on for 1½ to 3 hours when the two partners decided that the course of action on which they had embarked was not a proper solution to any problem, and they decided to reinstate Kinard, Gatson, and Pemberton. Whether this decision was arrived at prior to or during a second meeting with Whitey is not apparent from this record. At any rate, there was a second meeting, at the end of which Whitey told the picketers that they should return to work and that he would check into whether, in fact A & P had a bargaining relationship and contract with Local 11.¹⁸ They did return to work, and full operations were resumed at the warehouse.

No one lost any wages as a result of the interruption of work. All involved, including Kinard, received full pay for the week.

8. It was *after* May 27 that, for the first time insofar as Gatson, Kinard, and Pemberton were concerned, a campaign by and on behalf of Local 11 was launched among them.

Within a day or two of the picketing incident, Stanley Goodman and Cruz Colon, Local 11 delegates, visited the warehouse and spoke to Gatson.¹⁹ They displayed what apparently was the contract with A & P, they—Goodman was the spokesman—explained the benefits of membership in their organization, and they proffered a membership application. When Gatson pointed out that the employees had signed up with Local 807, Goodman said that he "would not fight with" Local 807 but that Local 11 was the recognized bargaining representative for the Company's employees. Gatson expressed for himself a reluctance to sign up but suggested that Kinard might be more amenable. He did not sign an application on this occasion.

At or about the same time, Gorenstein called Kinard to his office and asked, "Who is the cause of all this mess? . . . Who brought 807 in?" Kinard said he did not know. "Well, who signed?" Gorenstein asked; to which Kinard answered that they all had. Veering slightly, Gorenstein said that the Company *had* a union and asked why Kinard didn't join.²⁰ This tack was further pursued next day when, Kinard having made a delivery to the Manhattan office, he was asked by Schertzer to wait a minute. Schertzer then commented that something was wrong on the job, alluding to

¹⁶ Based upon Pemberton's credible testimony as to the conversation. Neither Gorenstein nor Joseph Schertzer mentioned it in his testimony.

¹⁷ Based upon Gatson's credible testimony. Joseph Schertzer testified that he *might* have said this but, if so, it was "without authority." I find not only that he said it, but that, at the very least, he was acting on the authority of Gorenstein, who conceded that he discharged Gatson as well as Pemberton.

¹⁸ At this point, Whitey disappeared into the obscurity from which, at this hearing, he never clearly emerged. On June 1, Local 807 filed a representation petition covering employees of the Company; on June 8, following an informal conference of parties to that proceeding, the petition was withdrawn.

¹⁹ Details as to this incident, as here found, are based on the credited testimony of Gatson. I omit, however, the fact—as testified to by him—that Kinard was also present, in view of Kinard's failure to mention the incident in his testimony.

²⁰ Based on Kinard's credited testimony, despite Gorenstein's general denial that he asked any employee about union activities. Gorenstein as a witness was unimpressive, and I would not credit him except on uncontradicted material. (In arriving at this conclusion, however, I do not rely upon any inconsistent statements allegedly made to a Board agent in the course of the investigation of this case; in view of Gorenstein's uncontradicted testimony at this hearing that the pretrial statements attributed to him were not in fact made by him, I would not place any significance in the alleged statements.)

"this mess about the union." Kinard asked what he was referring to, and Schertzer asked if (sic: why?) the employees had signed for another union when the Company already had a union. Kinard said they had been unaware of this fact when they signed up with 807. Thereupon, Schertzer gave him the full name of Local 11 and, handing him an application for membership, said that he could sign up then and there and that there would be no initiation fee. Kinard declined to sign at that time.²¹

Kinard did join Local 11 on June 2.

On what I find to be the same day, Local 11's delegates again spoke to Gatson, who still declined to sign up. (This information was passed on to Schertzer with the demand that, under the currently effective union security provision, Gatson be discharged. Schertzer equivocated; saying that Gatson was a good worker, he sought an extension of time. Although the request was not granted, it does not appear that Local 11 subsequently followed up on its demand.) On the same day, the delegates spoke to Pemberton, in Gorenstein's presence.²² Goodman recited to Pemberton the benefits provided by Local 11 and said that, if he joined then (giving him a membership application blank) initiation fees would be waived. Pemberton was told also that Kinard and Gatson (sic) had already signed up. He took the application but said he would think about signing it until Friday (June 5).

Between June 2 and June 5, Gorenstein met Gatson and Kinard in the warehouse elevator. Speaking to Gatson, he asked whether Gatson had signed up with Local 11; receiving an answer to the effect that Gatson was still thinking it over, he said Gatson was a fool for not signing; and he added that before he would let Local 807 come in, he would close the doors.²³

In connection with the "campaign" which is the subject of this subsection, it should be noted, and I find, that neither Gatson, Kinard, nor Pemberton was told by anyone that he *must* join Local 11 or that membership in that organization was a contractual condition of continued employment with A & P.

9. On June 5, Pemberton was discharged. The circumstances are discussed *infra*, but it should be noted at this point that his final check was for \$100 instead of \$75. On the same day, which was payday, Gatson's check was for \$10 and Kinard's check was for \$25 more than their past weekly checks.

10. The solicitation for Gatson's membership in Local 11 was renewed during the following week. On June 8 or 9, Gorenstein again called him a fool for not joining Local 11, and, on the 9th, Gorenstein, in Joseph Schertzer's presence, again asked Gatson about joining Local 11, to which Gatson replied that he would if and when its delegates returned; and Joseph Schertzer asked him (1) who had brought in Local 807 and (2) why he (Gatson) had signed a Local 807 card.²⁴

11. On June 19, Gatson was laid off. The circumstances of the layoff are discussed *infra*.

12. The charges initiating the instant proceeding were filed on June 29, notice thereof being received by A & P the next day. On October 14, an agent of the Board interviewed a number of the Company's employees at the warehouse in the course of the investigation of the charges.

13. Gatson was recalled by Respondent as a warehouseman, on November 30, at a weekly salary of \$75.

14. The instant hearing was conducted on December 14.

C. Independent interference, restraint, or coercion

The complaint alleged, as independent interference with or restraint or coercion of employees in their self-organizational rights, certain conduct on the part of Respondents or their agents:

(1) On or about January 28 and May 18, 1964, the interrogation of prospective employees by Philip Gorenstein concerning their membership in or affiliation with any labor organization.

²¹ This finding is based upon Kinard's credited testimony, despite Schertzer's denial that he had ever asked Kinard to join Local 11.

²² The findings as to the incident which follows are based, substantially, on Pemberton's testimony, uncontradicted in relevant detail. However, he testified that there were two meetings: first, one with Gorenstein alone and, then, one with Local 11 delegates in Gorenstein's presence. The discussions at the two alleged meetings were substantially identical, and, since the difference is one without material distinction, I treat the incident as confined to one meeting.

²³ The findings in this paragraph are based on the credited testimony of Gatson and Kinard. Gorenstein denied that there was any such incident, but see my appraisal in footnote 20.

²⁴ Schertzer testified neither as to the conversation at which he was placed as a witness nor to the one in which he is said to have questioned Gatson.

(2) On or about May 27 and various other dates during the months of May and June, the interrogation of employees by Gorenstein, Al Schertzer, and Agent Joseph Schertzer, concerning their membership in, activities on behalf of, and sympathies with Local 807.

(3) On or about June 3, the warning of employees by Gorenstein that the Company would close its warehouse and terminate its business operations rather than recognize and bargain with Local 807 as representative of its employees.

(4) On or about June 2 and 3, and various other dates during the month of June, by Gorenstein and the two Schertzers, the urging and solicitation of employees to designate Local 11 as their bargaining representative and to become members of that organization.

(5) On or about October 13, by Gorenstein, instructing an employee to give false information to a Board agent investigating the instant case.

(1) I have found²⁵ that Gorenstein, on January 8 and May 18, respectively, did ask Gatson and Pemberton, upon their being hired, if they belonged to labor organizations. Even absent proof that the answers to such question were or might have been used in a discriminatory manner, the asking of the question is in itself coercive, if no justification or explanation is advanced and if the question is asked in the context of other unfair labor practices committed.²⁶

(2) The allegation as to interrogation of employees with respect to their membership in, activities on behalf of, and sympathies with Local 807, is amply supported by the evidence. I have found that on May 27, when, in explanation of the picketing Pemberton said that the employees had signed up with Local 807, Gorenstein asked him who had brought in that Local 27; on the same day, Joseph Schertzer asked Gatson if he had signed a Local 807 card²⁸; within 1 or 2 days thereafter, Gorenstein asked Kinard who was "the cause of all this mess? . . . Who brought 807 in?" and asked him who had signed²⁹; the next day, Al Schertzer asked Kinard why the employees had signed up with a union other than Local 11³⁰; and, on June 9, Joseph Schertzer asked Gatson who had brought in Local 807 and why Gatson himself had signed a Local 807 card.³¹

(3) I have found that, between June 2 and June 5, Gorenstein did indeed warn employees—speaking to Gatson in Kinard's hearing—that, before he would let Local 807 come into A & P, he would close the doors.³²

(4) Respondents did solicit employees to sign up with and join Local 11: a day or two after the picketing of May 27, Gorenstein told Kinard that the Company had a union and asked why Kinard didn't join, following which conversation Schertzer handed Kinard a Local 11 membership blank and, saying there would be no initiation fee, said he could sign up then and there;³³ on the same day, Gorenstein stood by as Local 11 delegates sought to persuade Pemberton to join Local 11 and, several days later, told Gatson he was a fool for not signing up with Local 11;³⁴ on June 8 or 9, Gorenstein once again called Gatson a fool for not joining Local 11 and, on the 9th, again asked Gatson about joining.³⁵

(5) The allegation that Gorenstein instructed an employee to give false information to an investigating Board agent is based upon certain testimony of General Counsel's witness Kinard. According to him, on October 13, Gorenstein told him that a man from the Labor Board would be asking him some questions;³⁶ and that,

²⁵ See *Chron.* 1 and 4.

²⁶ *D'Armigene, Inc.*, 148 NLRB 2. Also, see *Efco Corporation*, 150 NLRB 1505, *Clark Printing Company, Inc.*, 146 NLRB 121, *Schott Metal Products Company*, 128 NLRB 415, 430, *Transamerican Freight Lines, Inc.*, 122 NLRB 1033 (approved as to this but remanded on other grounds), 275 F. 2d 311 (C.A. 7); and *cf. Wayside Press, Inc. v. N.L.R.B.*, 206 F. 2d 862, 864 (C.A. 9), and cases cited therein. Apparently *contra* is *Parkhurst Manufacturing Company, Inc.*, 136 NLRB 872, *enfd.* 317 F. 2d 513 (C.A. 8), but see the Board's explanation thereof in *Efco Corporation, supra*, at footnote 1.

²⁷ See *Chron.* 7.

²⁸ See *Chron.* 7.

²⁹ See *Chron.* 8.

³⁰ See *Chron.* 8.

³¹ See *Chron.* 10.

³² See *Chron.* 8.

³³ Both incidents are found at *Chron.* 8.

³⁴ Also in *Chron.* 8.

³⁵ See *Chron.* 10.

³⁶ As found in *Chron.* 12, a Board agent interviewed certain of the Company's employees, including Kinard, on October 14.

if Kinard were asked what he did, he should say that he had been hired as and had worked as a truckdriver.³⁷

Gorenstein first testified that he had not told Kinard or anyone that a man was coming to ask them questions; then, his attention called to telephone instructions given him by his partner on October 13 or 14, he testified that he did tell the men that someone from the Board was coming in to question them, but he denied telling anyone "what kind of a statement to give or to make"; specifically, he denied telling either Kinard or Ford, A & P's only employees at the time, what to say to the Board agent. For his part, Ford testified that he had been telephonically told by *Scheritzer* that a Board agent wanted to talk to him (testimony which does not rule out the possibility that Gorenstein also summoned employees to the office at which the Board agent was conducting his interviews) and that he did not see Gorenstein talking to Kinard when, at the Board agent's request, he himself sent Kinard in to the office for his interview (testimony which is responsive to nothing to which Kinard had testified).

Crediting Kinard's testimony, I find that Gorenstein did tell him to say to a Board agent that he had been hired as and had worked exclusively as a truckdriver; and I conclude that such an instruction, a serious impediment to the Board's processes, has a natural tendency to inhibit an employee in resorting to or cooperating with the Board in the protection or clarification of his self-organizational rights.³⁸

I have carefully considered each of the items of conduct above found to have occurred in the light of the existing bargaining relationship between Respondent and Local 11.³⁹ I am aware that an employer may lawfully accord what might be considered a disparity of treatment as between incumbent and outside unions. Thus, he may—and must—deal with and enter into a collective-bargaining contract with the representative of his employees to the exclusion of all other labor organizations; and he may, by agreement, confer such benefits as payment for time spent by the incumbent's representatives on grievances, use of bulletin boards, and the right of access.⁴⁰ But to say this is not to say that he may ride rough-shod over the exercise of employees' rights in the direction, let us say, of a change of bargaining agents. It is well settled that employees have the right to engage in concerted activities, even if—and this is an assumption, not a finding, in the instant case—they constitute less than a majority of the employees in the involved bargaining unit, unless the activities themselves must be subordinated to other activities more consonant with the purposes of the Act.⁴¹ Viewing the acts of the employer here found to have been committed, I do not believe that its substantial inhibition of employees' self-organizational rights is justified by its privilege of conferring certain benefits upon a recognized bargaining agent—which privilege, after all, is but another projection of employees' self-

³⁷ Kinard also testified that next day, in his hearing, Gorenstein summoned employee Ford to be interviewed by the Board agent, with the statement that he should answer any questions asked but not to sign anything. The General Counsel, in his brief, argues that, although not specifically pleaded, this issue—an employer's instruction to an employee not to sign a statement for the Board—was fully litigated, and he seeks a finding of an 8(a)(1) violation. I do not regard the issue as having been fully litigated; the witnesses Gorenstein's and Ford's testimony was directed basically toward the alleged instruction to give false information rather than the alleged instruction not to sign a statement. Moreover, where, as here, a complaint is amended at the hearing to cover a newly discovered matter in specific terms, a respondent may reasonably assume that it is not called upon to defend against related but unspecified matters.

³⁸ As the Board said in *Local 138, International Union of Operating Engineers, AFL-CIO (Skura)*, 148 NLRB 679, "Not only does the Board have the authority to protect employees who participate in Board processes, but it has been held that the Board has an affirmative duty to exercise that authority to its outermost limits to protect such employees [Citation omitted, emphasis supplied]." See *W. T. Grant Company*, 144 NLRB 1179, 1180-1182; *Winn-Dixie Stores, Inc.*, 143 NLRB 848, 849-850; *Texas Industries, Inc., et al.*, 139 NLRB 365, 367-368; and *Hilton Credit Corporation*, 137 NLRB 56, footnote 1. Also, see *American International Aluminum Corp.*, 149 NLRB 1205, finding an 8(a)(1) violation in a company rule against an employee's giving "false" or "exaggerated" information to a Government agency in connection with a proceeding involving the employer.

³⁹ This relationship is not here under attack by the General Counsel

⁴⁰ *Laub Baking Company*, 131 NLRB 869, *Seaboard Terminal and Refrigeration Company*, 114 NLRB 754; cf. *Sterling Cabinet Corp.*, 109 NLRB 6.

⁴¹ See *N.L.R.B. v. Draper Corporation*, 145 F. 2d 199 (C.A. 4) ("Wildcat" strike in derogation of rights of bargaining representative selected by majority).

organizational rights.⁴² I find the Respondents' conduct to constitute interference with, and restraint and coercion of, employees in the exercise of their self-organizational rights.

D. *The May 26 discharge of Perry Kinard*

It would be belaboring the obvious to devote extended discussion to the validity of Kinard's discharge on May 26. (See *Chron.* 6.) No reason was given him at the time of the discharge,⁴³ and no explanation was offered at this hearing. Kinard had signed a bargaining authorization running to Local 807,⁴⁴ and I find—as Gorenstein subsequently explained to him—he was discharged because Respondents believed him to be responsible for bringing in Local 807.⁴⁵

E. *The May 27 discharges of Pemberton and Gatson*

While the picketing described in *Chron.* 7, was going on, Gorenstein, "in quick judgment," and because "he thought a conspiracy was taking place against him" and because "they" did not tell "him first of what activities were going on," discharged Pemberton and Gatson. (The actual executor of the decision in Gatson's case was Joseph Schertzer, who first asked Gatson if he had "signed up.") Although, at this hearing, Gorenstein said that he had not told Pemberton or Gatson why they were being discharged—a bit of testimony which does not exactly accord with my findings (See *Chron.* 7)—he did testify that the reason was self-evident: they were discharged because they were picketing. I agree, and find, that this was at least one reason for the discharges, the other—as evinced by the contemporaneous conversations here found—being that Pemberton had brought in Local 807 and Gatson had signed up with Local 807.

F. *Pemberton's June 5 discharge, Gatson's June 19 layoff*

The complaint alleges that Respondents discharged John Pemberton and Rubin Gatson on June 5, 1964, and June 19, 1964, respectively, and thereafter failed and refused to reinstate them, because they joined and assisted Local 807 and engaged in other concerted activities for the purpose of collective bargaining and mutual aid and protection, and because they refused to join or assist Local 11 or to designate Local 11 as their bargaining representative.

1. The case of Pemberton

At the hearing, counsel for Respondents took the position that Pemberton's discharge was for cause, unconnected with factors of unionism.

Pemberton was hired by Gorenstein as a regular employee on May 18, 1964. From that date until June 5, he worked as a truckdriver or, when not driving a truck, as a general employee in the warehouse.

As earlier found, Pemberton was asked, at the time of his being hired, whether he belonged to a union;⁴⁶ having discussed unionization of Respondents' employees with Gatson and Kinard, it was he who suggested that they communicate with Local 807, he who established contact, and he who procured, distributed, collected and turned over to that organization signed authorization cards, including his own;⁴⁷ and on May 27, the day of the picketing, it was he who was noted by Gorenstein in the company of the man who later was identified as Local 807's representative, he who was singled out by Company representatives as the spokesman among the employees for the Local 807 "movement," he who was accused of having "started trouble," and who (with Gatson) was discharged that day for his activities.⁴⁸ On or about June 2 (Pemberton meanwhile having been reinstated), in the presence of

⁴² Respondents' conduct here "reasonably created the impression of employer concern about . . . disaffection [from the incumbent union] and a desire that this organization continue its incumbency . . ." Quoted from Trial Examiner's Decision, as approved by the Board in *Armco Steel Corporation*, 148 NLRB 1179. Although the Court of Appeals for the Sixth Circuit subsequently (on April 27, 1965), set aside the Board's order, commenting that the conduct to which the quotation applied was isolated and, thus, non-coercive, the principle remained undisturbed.

⁴³ Gorenstein could not remember what he told Kinard.

⁴⁴ See *Chron.* 5.

⁴⁵ He was replaced next morning by Paul Robinson, who, in the course of his job interview, volunteered to Gorenstein that he did not belong to a union.

⁴⁶ See *Chron.* 4.

⁴⁷ *Chron.* 5.

⁴⁸ *Chron.* 7, and see subsection E of this Decision.

Respondent Gorenstein, Local 11 delegates sought to persuade him to join Local 11, a decision as to which he said he would not make until Friday, June 5.⁴⁹

On Friday, June 5, at 5.30 p.m., Pemberton went to the warehouse office to pick up his paycheck. At that time, he was discharged and given his final pay. There is sharp dispute as to the reason he was then given for the action, and I here temporarily reserve resolution of the issue to discuss the reason for the discharge assigned by Respondent at this hearing.

Respondents contend that Pemberton was discharged for his unsatisfactory work-performance.⁵⁰ In support of this defense, Gorenstein testified that Pemberton was a satisfactory employee for no more than 1 or 2 days; that, thereafter, he became "lackadaisical," was slow on deliveries—taking 2 or 3 hours for a 20-minute trip—kicked cartons, and used profanity; that he (Gorenstein) recommended to Schertzer (on a date unspecified) that Pemberton be dismissed and that he "couldn't wait" until he could dismiss him, but was advised by Schertzer to keep him another week. Schertzer testified that, after the first 2 or 3 days of Pemberton's employment, Gorenstein complained about his work, reporting that he did not cooperate, kicked cartons, continually used profanity, and (in response to a leading question) took too long for deliveries, that they discussed letting him go because of his poor work; and that he would have been separated earlier than he was if it were not for the union activity going on and for a telephoned "threat" by a "union man" that a petition would be filed with the Board, circumstances which persuaded the Company to maintain the status quo.

In arriving at the actual reason for Pemberton's discharge—other than what was told him at the time—we have the benefit of the light shed by one factor: the existence or absence of warnings or reprimands. Pemberton, in testifying, denied that he was ever told that anything was wrong with his work. Gorenstein testified that he told Pemberton at least half a dozen times that he was not satisfied with his work but that he did not ask Pemberton if he could or would improve. Above and beyond the respective impressions of reliability which the two conveyed—discussed earlier—I find it hard to believe that, if Pemberton's work performance on and after the third day of his 3 weeks of employment were as described here by Respondents, Gorenstein would have communicated his dissatisfaction without demanding, let alone mentioning, improvement. I credit Pemberton's testimony and find that he was neither warned nor reprimanded and that, in fact, he was not told that his work was unsatisfactory.⁵¹ This fact lends credence to the General Counsel's contentions.

I am now prepared to make findings as to the conversation taking place at the time of Pemberton's discharge. According to Pemberton, Gorenstein asked if he had the (Local 11) papers and whether he had signed them; receiving a negative answer ("No, sir, [and] I am not going to sign them."), Gorenstein told him he was fired. Gorenstein, on the other hand, said that, on the occasion in question, he told Pemberton that his work was unsatisfactory and that A & P could not use him. On the basis of my evaluation of the relative reliability of the two men as witnesses and based upon the factor of inherent plausibility in the light of Pemberton's "commitment," made a few days earlier, to decide by June 5 whether to join Local 11, and in the light of the absence of any prior indication to Pemberton of dissatisfaction with his work-performance, I find the discharge conversation to have been as testified to by Pemberton.⁵²

⁴⁹ Chron. 8.

⁵⁰ There is no contention that the action was taken because of any lack of work; in point of fact, Pemberton's place was filled on June 8 by Paul Robinson, who had worked for a few hours on May 27. Moreover, Respondents specifically disclaim that Local 11's union-security clause had anything to do with the discharge.

⁵¹ Schertzer's testimony that, at the end of Pemberton's first week of employment, "I think" he was told that, absent improvement in his work during the next week, the Company could not use him, has no probative value with respect to the issue.

⁵² In further support for this conclusion, the General Counsel points to the fact that Pemberton, at the time of his discharge, was given a paycheck containing an extra amount, described by Respondent at this hearing as "severance pay" (The check was for \$100, whereas Pemberton's weekly salary has been \$75.) The General Counsel notes that there is a total absence of evidence that severance pay was given to any other employee, and he argues, by implication—unless I overread him—that it strains one's credulity to be asked to believe that an employer would voluntarily give severance pay to one who, after a 3-week tenure of employment, is being discharged for unsatisfactory work performance. While I agree that an explanation is difficult to find, I perceive no less difficulty in understanding why an employer would give severance pay to an employee who (as alleged by the General Counsel) is being discharged for union activity. I draw no inference, favorable, or unfavorable, to Respondents, from the giving of the extra pay.

I conclude, therefore, that Pemberton was *not* discharged because of unsatisfactory work performance.

2. The case of Gatson

The one exception to the Company's past practice of hiring only warehouse employees who were qualified and licensed to drive a truck had been made in the hiring of Rubin Gatson on January 28, 1964.⁵³ Gorenstein's judgment in hiring him was vindicated, since, throughout his employment with A & P, he was considered to be an excellent worker.

As earlier found, Gatson was one of the two warehouse employees (of a total, then, of three) who discussed unionization of the warehouse; he was also, in the second discussion—which now included the recently-hired Pemberton—and one of the three (of a total, now, of four) who signed cards designating Local 807 as their bargaining agent; and he was the one who (unsuccessfully) solicited the signature of the fourth employee to a Local 807 authorization card.⁵⁴ Also, it has been found, he participated in the picketing of May 27 and, because of the picketing and because he had signed up with Local 807, was discharged at that time.⁵⁵ Prior to this discharge, he had been a target of A & P's coercive interrogation;⁵⁶ and, subsequent to the discharge (having been reinstated), he was the recipient of a coercive warning issued by Gorenstein,⁵⁷ once again the target of coercive interrogation,⁵⁸ and the object of coercive solicitation to join Local 11.⁵⁹ At the time of the last such solicitation, on June 9, he had apparently capitulated, he said he would join Local 11 if and when its delegates returned to the warehouse. However, he never did join.⁶⁰

At the close of the pay period ending June 19, Gatson was handed his pay check (the amount to be discussed hereinbelow under the section entitled "The Remedy") and told by Gorenstein that he was no longer needed, at least for the time being. When Gatson asked why he was being laid off instead of someone with less seniority, for example, Robinson or Kinard, he was told that it was because he did not drive a truck; he was assured at that time that there was nothing wrong with his work and that he would be recalled if and when the available work warranted it.

As earlier indicated, the complaint alleged that Gatson was *discharged* on June 19. Early in the hearing, it became apparent, and I find, that Gatson was indefinitely *laid off* on that date. Undaunted, the General Counsel took the position that the action, whatever it was, was motivated by Gatson's sympathies with and activities on behalf of Local 807 and of his failure and refusal to join or to designate as his bargaining agent Local 11. A & P, on the other hand, attributes the necessity for a layoff at that time to a lack of available work and the selection of Gatson as the person to be laid off to the fact that he, could not double as a warehouseman *and* truckdriver.

Specifically, no claim is made by Respondents that Gatson's work performance was lacking in any respect; he was, I find, considered by Respondents to be an excellent worker. Nor is any failure to comply with the union-security provision in the contract between the Company and Local 11 assigned as a reason for the action; although Gatson never did join Local 11 despite solicitation both by Local 11 delegates and by Respondent Gorenstein, and although (I find, on the credible testimony herein) Local 11 delegates, having been unsuccessful in their solicitations, did request and demand of Respondents that they discharge Gatson under the union-security provision, Respondents never complied with the request or demand.⁶¹

On the available evidence, the discussion of Gatson's layoff lends itself to division into two parts: (a) Whether, absent union considerations, *any* layoff would have been effectuated on June 19, and (b) if the answer is in the affirmative, whether, absent union considerations, *Gatson* would have been selected for layoff.

⁵³ Gatson had a physical disability; he wore an artificial leg.

⁵⁴ See *Chron.* 5.

⁵⁵ See *Chron.* 7, and subsection E hereof.

⁵⁶ On January 8—see *Chron.* 1—and May 27—see *Chron.* 7.

⁵⁷ Between June 2 and June 5—see *Chron.* 8.

⁵⁸ On June 9—see *Chron.* 10.

⁵⁹ A day or two after May 27, several days later, on June 8 or 9, and again on June 9. See *Chron.* 8 and 10.

⁶⁰ So far as this record reveals, Local 11 delegates did not return during Gatson's subsequent short tenure of employment.

⁶¹ Indeed, as will be seen, Gatson—still not having joined Local 11—was eventually called back to work by Respondents. On this record, it appears that the union-security clause has been more honored in its breach than in its observance.

(a) A & P's warehouse operation is a fluctuating activity, dependent, at any given time, on the current extent of the receipt of merchandise from abroad and of the required deliveries to customers. Since receipt-in and delivery-out of merchandise are not necessarily tied together temporally, there are actually two activity-curves superimposed upon each other—one representing activities required in picking up merchandise at the piers for transport to the warehouse, the other representing activities required in delivering merchandise to customers—and the peaks of one do not necessarily coincide with the peaks of the other. And all the while, to the degree called for by the current pickup and delivery demands, there is the warehousing itself: unloading trucks, placement of merchandise in the warehouse, order-picking, loading of trucks, and cleanup and general maintenance.

Perhaps it was because of this interplay of elements that the testimony with respect to the Company's business cycle was somewhat more confused than in the average case.⁶² To the extent, however, that seasonality can be discerned from such testimony as there was, I find that, prior to 1964, A & P's peak activity began late in January; persisted through June; beginning in July, tapered off until the bottom was reached in mid-December; from which point it rose to the late-January peak.

This record contains no detailed evidence with respect to the Company's activities during the first 5 months of 1964. In the absence of such evidence, particularly in view of the absence of evidence that this period differed from similar periods in the past, and taking into consideration the hirings during the period,⁶³ I find that, as in past years, from late January at least through June was a busy period at the warehouse. As for June—normally, the last of the busy months—I find that sales reached an all-time high and that deliveries were at the year's peak. I do not credit Gorenstein's testimony, in the face of his own as well as other contradicting testimony, that "[I]t was slow for a few weeks prior to June 19," "[T]here was absolutely nothing doing those few weeks," and "I think we had a week, a lull there [in May or in June], a lull for a week." I find Respondents' assigned reason for effectuating a layoff on June 19 to lack plausibility and, in fact, to have been used as a pretext for something else.⁶⁴

(b) But assuming, without finding, that economic circumstances dictated the layoff of one employee, would Gatson have been selected (absent union considerations)? On the one hand, he was second in seniority at the time and was considered a valuable employee; on the other, he could not drive a truck.

On June 19, three men were driving trucks (Ford, Kinard, and Robinson) and one (Gatson) was working exclusively in and around the warehouse. Beginning Monday, June 22 (I find, on the basis of the credible testimony) Robinson performed warehouse work for about a week; beginning on or about June 29 (I further find), Robinson having been put back onto a truck, Kinard devoted the next 3½ months (except for seven or eight truck-trips, amounting to approximately 5 percent of his time) to warehouse work. Thus, in effect, Gatson's job, the performance of warehouse work, was filled by someone else⁶⁵ from June 19 to at least October 14.⁶⁶

In view of the fact that, on and for some time after June 19, warehouse work occupying the full time of at least one man was available, the fact that Gatson, who had performed and was performing this work, was considered to be an excellent employee, and the fact that, overall, he had been with the Company longer than two employees who were kept on,⁶⁷ I conclude that, even if the layoff of one man was

⁶² Sample testimony: "A & P has a 3-month slow season starting in July The busy season starts toward the end of January June is the 'selling period' The slowest month is December Deliveries taper off from July to December, the low point By July, less deliveries are being made than at any time in the preceding 6 months The Company starts receiving in January Small amounts are delivered in June [then, by the same witness] Deliveries are at a peak in June extremely high." No company records were introduced into evidence.

⁶³ In early January, there was but one rank-and-file employee at the warehouse; late in January, a second was hired, and a third and a fourth were added in March and in May, respectively.

⁶⁴ This is not to say that the point may not subsequently have been reached at which the layoff of one employee was called for. There is insufficient evidence in this record upon which to base a finding as to when, if ever, that point was reached; I leave the issue for resolution at subsequent levels of this proceeding.

⁶⁵ Gorenstein's instruction to Kinard to tell a Board agent that he had done truck-driving work only—see subsection C(5) hereof—now assumes significance.

⁶⁶ At or about October 14, Robinson left the employ of the Company.

⁶⁷ One of these, Robinson, was in his probationary period.

called for as of June 19, Gatson would not have been the man selected under non-discriminatory circumstances. Since he was selected, we must look elsewhere for reasons.⁶⁸

3. Final conclusions on Pemberton's discharge and Gatson's layoff

I have found that neither Pemberton's discharge nor Gatson's layoff was motivated by the reasons assigned by Respondents. To say this, however, is not to say that the Act has been violated. The burden is the General Counsel's to prove that the actual bases for the actions were unlawful.

As earlier found in some detail, Pemberton was active on behalf of Local 807, a fact of which Respondents displayed an awareness; he was coercively interrogated more than once, accused of "starting trouble," and, on one occasion, unlawfully discharged. In the presence of one of the Respondents, he resisted efforts to persuade him to join Local 11, agreeing instead to consider the matter for 3 days. At the end of that period Respondent Gorenstein discharged him upon ascertaining that he had decided not to join Local 11; and the reason assigned by Respondents, I have found, is without foundation.

As related hereinabove, Gatson took active steps displaying his interest in and sympathy with Local 807, and he consistently refused to join or to designate Local 11 as his bargaining agent. Of this, Respondents clearly had knowledge: they coercively interrogated him, warned him of dire consequences should Local 807's campaign be successful, and coercively solicited his affiliation with Local 11. As in Pemberton's case, they unlawfully discharged him on one occasion. And finally, under circumstances indicating the pretextuous nature of the reasons assigned by them therefor, they laid him off.

And, finally, an overall view is helpful. At the time of Pemberton's discharge, the Company's employees were Ford, Gatson, Kinard, and Pemberton. From the inception of the 1964 union movement, interest in and activities on behalf of Local 807 were confined to Gatson, Kinard, and Pemberton. Ford had refused to join them. Subsequently, Kinard (having been the object of unlawful discharge, interrogation, and solicitation) left their ranks to join Local 11. After Pemberton was discharged, he was replaced by Robinson who, Respondents knew, belonged to no union. Thereupon, Gatson's layoff completed a cycle. All the "die-hards," and only the "die-hards," were gone.

Upon the entire record and on what I am convinced is a fair preponderance of the credible evidence (giving full consideration to the facts summarized in the three immediately preceding paragraphs, the other unfair labor practices here found and Respondents' anti-807 animus inherent therein, and the timing of the relevant events⁶⁹) I conclude and find that Respondents discharged John Pemberton and thereafter failed and refused to reinstate him,⁷⁰ and laid off Rubin Gatson because

⁶⁸ In concluding, as I do, that Gatson was not laid off due to lack of work, I have carefully considered the fact that he was recalled to employment with Respondents on November 30, 1964 (under conditions further discussed in the section entitled "The Remedy," *infra*). I do not regard the recall as having any probative weight with respect to the merits of the layoff. I do not rely on it as support for Respondents' contentions (the recall occurred subsequent to the filing of the charges which initiated this proceeding and subsequent to the issuance of the instant complaint) nor as indicative that there had been no real necessity for a layoff in the first place (December 1964, unlike previous Decembers, was marked by extremely high business activity at the warehouse); the factor plays no part in my conclusions herein.

⁶⁹ Among other things, it should be noted that a petition for certification was filed with the Board by Local 807 4 days before Pemberton was discharged.

⁷⁰ Under the circumstances, it was not incumbent upon Pemberton to apply for reinstatement. Nevertheless, principally because he was overwhelmed by the size of the last paycheck given him, he did apply at least five times in the 5 weeks following his discharge. (I credit him on this despite Gorenstein's denial.) He testified that, on the last such occasion, he was told by Gorenstein that he would be taken back only if he withdrew his unfair labor practice charge, testimony which counsel for Respondents attacks as inherently incredible since, by Pemberton's reckoning, the date of this conversation preceded the filing of Pemberton's charge. Although I find that Pemberton's testimony lends itself to the interpretation that his last visit *postdated* the filing of the charge, I do not rely, in reaching the conclusions herein, on this statement attributed to Gorenstein.

of their interest in and activities on behalf of Local 807 and because of their failure or refusal to join in or to designate as their bargaining agent Local 11, thereby discouraging membership in one union, encouraging it in another, and interfering with, restraining, and coercing employees in the exercise of their self-organizational rights, in violation of Section 8(a) (3) and (1) of the Act.

II. THE REMEDY

Having found that Respondents have engaged in certain unfair labor practices, I shall recommend that they be ordered to cease and desist therefrom and to take certain affirmative action in order to effectuate the policies of the Act.

Having found that Respondents discriminated with respect to the hire and tenure of employment of John Pemberton and Rubin Gatson, I shall recommend appropriate action.

Rubin Gatson, this record reveals, was recalled by Respondents on or about November 28, 1964, and reported for work on November 30, thereafter, at least until the date of this hearing, he performed the same type of work he was performing at the time of his layoff on June 19. The General Counsel contends, however, that the recall fell short of proper reinstatement because his current salary is \$75 per week whereas, prior to his layoff, he was receiving \$80; and, as part of the remedy herein, the General Counsel asks for the reinstatement of Gatson to an \$80 job.⁷¹ Although this might well have been considered a matter to be disposed of in a supplemental proceeding on compliance rather than a proceeding on the merits, the facts were fully known at the time of this hearing and the matter was fully litigated. Gatson was hired in January, 1964, at \$75 per week. On June 5, payday for the week ending that day, his paycheck was for \$85; on June 12 and on June 19 (the day of his layoff), his paychecks were for \$80 each. The General Counsel argues that, beginning June 5, Gatson received a \$5 wage increase, a contention in support of which he offered testimony, through Gatson, that Gostenstein had so informed Gatson on June 5. The Respondents take the position that the three overwages constituted *bonuses* in return for extra effort expended by Gatson during the 3 weeks involved.⁷² In view of Gatson's obvious confusion as to the amount of the "raise" given him on June 5, he thought he received \$80 whereas, I find, he received \$85, and in view of the fact that other employees were given "bonuses" without discernable pattern, I find that the General Counsel has failed to prove, by a preponderance of the evidence, that the position from which Gatson had been laid off was paying \$80 per week at the time.

I shall recommend that Respondents offer John Pemberton full and immediate reinstatement to his former or substantially equivalent position, without prejudice to his seniority or other rights and privileges. Since no reinstatement order appears necessary with respect to Rubin Gatson, I shall recommend that the reinstatement previously effected be without prejudice to his seniority or other rights and privileges.

I shall recommend further that Respondents make Pemberton and Gatson each whole for any loss of earnings suffered by him because of the discrimination by payment to him of a sum of money equal to the amount he would have earned from the date of his discharge of layoff to the date of Respondent's offer of reinstatement, less his net earnings during said period. Backpay shall be computed on a quarterly basis in the manner prescribed by the Board in *F. W. Woolworth Company*, 90 NLRB 289, with interest at the rate of 6 percent per annum computed quarterly.

As the unfair labor practices committed by Respondents are of a character striking at the roots of employee rights safeguarded by the Act, it will also be recommended that Respondents cease and desist from infringing in any manner upon the rights guaranteed in Section 7 of the Act.

Upon the foregoing factual findings and conclusions, I come to the following:

CONCLUSIONS OF LAW

1. Respondents are an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

⁷¹ Implicit in the request is the contention that Gatson's backpay throughout the entire period from June 19 be computed on the basis of an \$80 weekly gross wage.

⁷² The Company's payroll records were not introduced. However, since such records were displayed to counsel for the General Counsel during an off-the-record discussion, I draw no inference unfavorable to any party by reason of the failure to introduce such records.

2. Local 807 and Local 11 are labor organizations within the meaning of Section 2(5) of the Act.

3. By discriminating in regard to the hire and tenure of John Pemberton and Rubin Gatson by terminating their employment on June 5, 1964 and June 19, 1964, respectively, because of their interest in and activities on behalf of Local 807 and because of their failure or refusal to join or designate as their bargaining agent Local 11, Respondents have engaged in and are engaging in unfair labor practices within the meaning of Section 8(a)(3) of the Act.

4. By the foregoing conduct, by interrogating prospective employees concerning their membership in a labor organization, by interrogating employees as to their union activities, sympathies, and membership, by warning employees of a termination of operations if a particular union should become the employees' bargaining agent, by soliciting employees to join or to designate a particular union as their bargaining agent, and by instructing an employee to give false information to a Board agent in connection with the investigation of an unfair labor practice charge, Respondents have interfered with, restrained, and coerced employees in violation of Section 8(a)(1) thereof.

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

RECOMMENDED ORDER

Upon the basis of the foregoing findings of fact and conclusions of law and upon the entire record in the case, and pursuant to Section 10(c) of the Act, it is hereby ordered that the Respondent, Al Schertzer and Philip Gorenstein, co-partners, d/b/a A & P Import Company, their agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in any labor organization by discriminating in regard to hire, tenure, or other conditions of employment.

(b) Interrogating prospective employees concerning their membership in a labor organization.

(c) Interrogating employees as to their union activities, sympathies, and membership.

(d) Warning employees of a termination of operations if a labor organization should become their bargaining agent.

(e) Unlawfully soliciting employees to join a labor organization or to designate it as their bargaining representative.

(f) Instructing employees to give false information in connection with the investigation of a charge of unfair labor practices.

(g) In any other manner, interfering with, restraining or coercing their employees in the exercise of their right to self-organization, to form labor organizations, to join or assist any labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, and to refrain from any and all such activities except to the extent that any such right may be effected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act.

2. Take the following affirmative action which I find will effectuate the policies of the Act:

(a) Offer John Pemberton reinstatement to his former position even though this may necessitate displacement of a present incumbent (or, if his former position no longer exists, to a substantially equivalent position), without prejudice to his seniority or other rights and privileges.

(b) Accord, to the extent they have not done so, to Rubin Gatson his seniority or other rights and privileges as if he had suffered no layoff period.

(c) Notify John Pemberton 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.

(d) Preserve and, upon request, make available to the Board, or its agents for examination and copying, all payroll records, social security records, timecards, and personnel records and reports necessary to analyze the amount of backpay due and the right of reinstatement.

(e) Post at its place of business at Brooklyn, New York, copies of the attached notice marked "Appendix." ⁷³ Copies of such notice, to be furnished by the Regional Director for Region 29, shall be duly signed by an authorized representative of Respondents, be posted immediately upon receipt thereof, and be maintained by them for a period of 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondents to insure that such notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director for Region 29, in writing, within 20 days from the date of the receipt of this Decision, what steps the Respondents have taken to comply herewith.⁷⁴

⁷³ If this Recommended Order is adopted by the Board, the words, "a Decision and Order" shall be substituted for the words "the Recommended Order of a Trial Examiner" in the notice. If the Board's Order is enforced by a decree of a United States Court of Appeals, the notice will be further amended by the substitution of the words "a Decree of the United States Court of Appeals, Enforcing an Order" for the words "a Decision and Order".

⁷⁴ If this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify the Regional Director for Region 29, in writing, within 10 days from the date of this Order, what steps Respondents have taken to comply herewith"

APPENDIX A

NOTICE TO ALL EMPLOYEES

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

WE WILL NOT discourage membership in Local 807, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other local organization, by discriminating as to the hire, tenure, or any other term or condition of employment of any of our employees.

WE WILL NOT ask job applicants if they belong to a union; ask employees about their union sympathies, activities, or membership; threaten employees with closing down if they select any union as their bargaining agent; unlawfully solicit employees to join any union or designate it as their bargaining representative; or instruct employees to give false information in connection with the investigation of an unfair labor practice charge.

WE WILL NOT, in any other manner, interfere with, restrain, or coerce our employees in the exercise of their right to self-organization; to form, join or assist a labor organization, to bargain collectively through a bargaining agent chosen by themselves; to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; or to refrain from any such activities (except to the extent that the right to refrain is limited by the lawful enforcement of a lawful union-security requirement)

WE WILL offer John Pemberton his former or substantially equivalent job (without prejudice to seniority or other employment rights and privileges) and WE WILL pay him and Rubin Gatson for any loss suffered because of our discrimination against them.

All our employees are free to become or remain members of any labor organization.

AL SCHERTZER AND PHILIP GORENSTEIN, CO-PARTNERS, D/B/A
A & P IMPORT COMPANY,

Employer.

Dated _____ By _____
(Representative) (Title)

NOTE.—We will notify the above-named employees if 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.

If employees have any question concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 16 Court Street, Brooklyn, New York, Telephone No. 596-5386.

Bauer Welding & Metal Fabricators, Inc. and Sheet Metal Workers Local Union 547, affiliated with Sheet Metal Workers International Association, AFL-CIO and Operations Communications Committee, Party in Interest. Case No. 18-CA-1883.
September 3, 1965

DECISION AND ORDER

On April 21, 1965, Trial Examiner A. Norman Somers issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent filed exceptions to the Trial Examiner's Decision and a supporting brief.

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 Trial Examiner's Decision and the entire record in this case,¹ including the exceptions and brief, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby adopts as its Order the Recommended Order of the Trial Examiner, and orders that the Respondent, Bauer Welding & Metal Fabricators, Inc., its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.²

¹ We adopt the Trial Examiner's finding that the authorization cards presented by the Union in support of its demand for recognition did clearly and unambiguously authorize the Union to represent the signers for the purpose of collective bargaining. We further agree that the letters that accompanied the cards, although they refer to an election, unequivocally state that it is the signer's authorization of the Union to represent him that is sought. We therefore see no misrepresentation or ambiguity in the letter. Thus, subjective evidence as to the intent of the signers is irrelevant, and we do not rely on such testimony. However, the Trial Examiner's receipt of such evidence, although error, was not prejudicial.

We expressly disavow the Trial Examiner's speculations and assumptions as to how particular employees might have voted in the election, and what conclusions may be drawn therefrom, as forth in the latter part of section E, 2, of his Decision.

² The telephone number for Region 18, appearing at the bottom of the notice attached to the Trial Examiner's Decision, is amended to read: 334-2618.