

object thereof is to force or require such persons to cease doing business with Ada Transit Mix.

GENERAL DRIVERS, CHAUFFEURS AND HELPERS,
LOCAL UNION No. 886, AFFILIATED WITH
INTERNATIONAL BROTHERHOOD OF TEAM-
STERS, CHAUFFEURS, WAREHOUSEMEN AND
HELPERS OF AMERICA,

Labor Organization.

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

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

Rural Electric Company, Inc. and Local Union 415, International Brotherhood of Electrical Workers, AFL-CIO. Case No. 27-CA-816. February 28, 1961

DECISION AND ORDER

On August 23, 1960, Trial Examiner John F. Funke issued his Intermediate Report in the above-entitled proceeding, finding that 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 copy of the Intermediate Report attached hereto. The Trial Examiner also found that the Respondent had not engaged in certain other alleged unfair labor practices. Thereafter, the Respondent and the General Counsel filed exceptions to the Intermediate Report and supporting briefs.

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

The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and briefs, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, only insofar as they are consistent with the findings, conclusions, and Order hereinafter set forth.¹

1. The Trial Examiner found that the construction and maintenance employees of the Respondent constituted a unit appropriate for

¹ We do not approve or adopt the gratuitous and wholly inappropriate comments of the Trial Examiner in footnote 20 of the Intermediate Report with regard to matters beyond his concern or province as a Trial Examiner.

purposes of collective bargaining and that on March 21, 1960, Local 415 had been designated as collective-bargaining representative by a majority of the employees in that unit. Nevertheless, he recommended dismissal of the 8(a)(5) allegation of the complaint because in his view the demand made by the Union's business manager, Dean, in his telephone call to Respondent's manager, Lyons, on that date and the latter's response thereto were inadequate to support this allegation of the complaint. The General Counsel excepts to the failure of the Trial Examiner to find an 8(a)(5) violation. In our opinion, the General Counsel's exception is a meritorious one.

It is well settled that a request for recognition need not follow a prescribed form so long as it is clear from the entire situation that all essential elements of a demand are present.² When Dean's and Lyon's versions of the contents of their telephone conversations are considered together—as they must, since the Trial Examiner discredits neither and each is consistent with and supplements the other—it is patently clear that they contain all the elements necessary for finding a proper demand and a refusal to recognize and/or bargain. Thus, a concise summary of the pertinent details is as follows: (1) Dean telephoned Respondent's manager, Lyons; (2) he identified himself as business manager of Local 415, International Brotherhood of Electrical Workers; (3) he advised Lyons that a majority of the construction and maintenance employees had asked the Union to represent them; (4) he requested recognition as bargaining representative of these employees and asked to meet and negotiate with respect to them; and (5) Lyons refused to recognize and/or bargain with the Union.

The Trial Examiner advances three principal reasons for not finding an 8(a)(5) violation under these circumstances. First, he concludes that the demand was inadequate because certain testimony of Dean indicates that the telephone call was made primarily in order to enable him to complete paragraph 7(a) of the Board's representation petition form as a preliminary step to filing it with the appropriate Regional Office for the purpose of requesting a Board election. Assuming, *arguendo*, that this indeed was Dean's principal motive, it was never communicated to Lyons during the course of their conversation as even one of the reasons for the call and was mentioned by Dean for the first time at the hearing, long after the event. Unlike the Trial Examiner, we cannot attach any significance or weight to Dean's unexpressed intent in light of his explicitly and unequivocally stated request to Lyons for recognition and bargaining without the slightest reference to filing a petition.

Obviously, the situation here is completely distinguishable from those cases where a union representative merely outlines to a company

² *Barney's Supercenter, Inc.*, 128 NLRB 1325; *Cottage Bakers*, 120 NLRB 843; *Joy Silk Mills, Inc. v. N.L.R.B.*, 185 F. 2d 732, 741 (C.A.D.C.), cert. denied 341 U.S. 914.

representative alternative methods, such as a card check or filing a petition, for determining the union's majority status and where it therefore can be said that the union is not making an unconditional demand for recognition, but is simply endeavoring to expedite the determination of its status.³ For, the only articulated request in the Dean-Lyons' conversation was for recognition and bargaining and the sole reference to the Union's status was that it represented a majority of the employees involved. Accordingly, we reject the Trial Examiner's first premise for failing to find an 8(a)(5) violation and hold that the demand itself was clearly an adequate one.

The Trial Examiner's second predicate is that the request was improper because it was made "by a stranger labor organization to a subordinate supervisor" without authority to accept or reject it and hence no finding of an unlawful refusal to bargain can be made. The fact that the Union may have been unknown to Lyons prior to his telephone conversation with Dean is immaterial, since it is clear that at the outset of the conversation Dean specifically identified himself as well as his labor organization. However, the question posed as to whether Lyons was a proper person to whom to direct the bargaining request raises a matter requiring more detailed consideration.

The record discloses that the Respondent corporation is administered by a board of directors, all of whom are ranchers and farmers; that each director is in charge of a geographic district and operates at distances 55 to 65 miles from one another; that Respondent's manager, Lyons, is in charge of Respondent's only office and facility, which is located at Pine Bluffs, is alone responsible for the actual operation of the business from that location, and is directly responsible only to the board of directors; that Lyons does not formulate company policies, but sees that they are carried out in day-to-day operations; and that Lyons, who has general supervision over Respondent's employees, headquartered at Pine Bluffs, including all the employees in the unit, is the sole company representative regularly present and available at the Pine Bluffs premises. In view of the foregoing circumstances, we conclude that, contrary to the Trial Examiner's description of his status as that of a "subordinate supervisor," Lyons, by virtue of his position, is in fact a responsible official who had at least ostensible authority to receive a bargaining request, and thus was a proper person to whom to address the Union's bargaining

³ See *Barney's Supercenter, Inc.*, *supra*, footnote 2; *Graff Motor Supply Company*, 107 NLRB 175; *Mildred F. Kellow d/b/a Kellow-Brown Printing Company*, 105 NLRB 28, *Joseph Solomon, an individual, d/b/a The Solomon Company, et al.*, 84 NLRB 226. Although Chairman Leedom dissented in *Barney's Supercenter, Inc.*, on the ground that the demand there was not unconditional, the evidence here establishes in his opinion that the articulated demand was unconditional and he therefore agrees with his colleagues that the demand was adequate for purposes of Section 8(a)(5).

request.⁴ It is significant in this respect that Lyons did not assert any lack of authority on his part or refer Dean to some other official of Respondent who was in charge of labor relations matters. Accordingly, we find that Lyons was a proper company representative to whom to direct the Union's bargaining request and under the circumstances his rejection constituted a refusal to bargain on the part of the Respondent.

The Trial Examiner's third basis for recommending dismissal of this allegation of the complaint is that the Union failed to write the board of directors setting forth the scope of the unit, offering to prove its majority status, and requesting a date to bargain. However, the Union in the Dean-Lyons' telephone conversation clearly defined the appropriate unit, claimed majority status, and asked for a bargaining meeting and Respondent did not question the unit, raise a doubt as to the Union's majority, or express a willingness to meet and negotiate. In these circumstances, we cannot agree with the Trial Examiner that the Union was required to test further the Respondent's position. This is not a situation where a company entertains a good-faith doubt as to the union's majority status, in which event the union would be under a duty to offer to prove its majority.⁵ On the contrary, there is no evidence that the Respondent at any time questioned or harbored any doubt as to the Union's status. Indeed, it is clear that Respondent had knowledge through its supervisor, Fitzgerald, who signed an authorization card and attended the employee meetings that the Union represented a majority of the employees in the unit claimed to be appropriate.⁶ It is, of course, true that the Union filed a petition shortly after the above refusal to bargain. In these circumstances, it was incumbent on the Respondent either to recognize the Union or, in view of the Union's petition, to await the outcome of the election. As to the latter, however, the Respondent made a free and fair election impossible by engaging in conduct which the Trial Examiner found and we agree constituted interference, restraint, and coercion in violation of Section 8(a) (1) of the Act, including making promises of benefit and threats of reprisals to discourage union activity. In view of this conduct of Respondent, by which it sought to undermine the Union's majority status, we find that the Respondent's refusal to recognize and bargain with the Union violated Section 8(a) (5) and (1) of the Act.⁷

2. Having found that Respondent was not under an obligation to bargain with the Union, the Trial Examiner did not find any violation of Section 8(a) (5) in Respondent's unilateral action in granting a

⁴ *Squirrel Brand Co., Inc.*, 104 NLRB 289, 299; *James Thompson & Co., Inc.*, 100 NLRB 456, 462.

⁵ *Cutter Boats, Inc.*, 127 NLRB 1576; *Automotive Supply Co., Inc.*, 119 NLRB 1074.

⁶ See *Montgomery Ward & Company, Incorporated*, 115 NLRB 645.

⁷ *Joy Silk Mills, Inc.*, *supra*.

substantial wage increase on or about May 13. However, he did find such conduct violative of Section 8(a) (1). Since we have found that Respondent was under a duty to bargain with the Union, it was also incumbent upon the Respondent to do so with respect to changes in the rates of pay of the employees in the unit and by its unilateral action Respondent violated Section 8(a) (5) as well as 8(a) (1) of the Act.

THE REMEDY

Having found that the Respondent has engaged in unfair labor practices, it will be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent on March 21, 1960, and thereafter, violated Section 8(a) (5) and (1) of the Act by refusing to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, we shall order the Respondent, upon request, to bargain collectively with the Union as such representative, and, in the event an understanding is reached, embody such understanding in a signed agreement. We shall also order the Respondent to cease and desist from unilaterally instituting any changes affecting wages or other terms or conditions of employment of its employees without first consulting with and bargaining with the Union concerning these matters.

Having found that the Respondent independently violated Section 8(a) (1) of the Act by promising and granting benefits to its employees for refraining from union activity, by threatening its employees with the abolition of jobs for engaging in union activity, and by encouraging them to withdraw from union activity, we shall further order the Respondent to cease and desist from this and any other like or related conduct.

CONCLUSIONS OF LAW

1. Respondent is an employer within the meaning of Section 2(2) of the Act and is engaged in commerce within the meaning of the Act.
2. Local Union 415, International Brotherhood of Electrical Workers, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.
3. Since March 21, 1960, said labor organization has been the exclusive representative of all employees in the following appropriate unit for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All construction and maintenance employees of Rural Electric Company, Inc., excluding electrification advisers, meter repairmen, office clerical employees, professional employees, guards, and supervisors as defined in the Act.

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

5. By unilaterally instituting changes in the terms and conditions of employment of employees in the above-described appropriate unit, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a) (5) and (1) of the Act.

6. By the commission of other independent acts of interference, restraint, and coercion of its employees in the exercise of the rights guaranteed in Section 7 of the Act, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a) (1) of the Act.

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

ORDER

Upon the entire record in this case, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Rural Electric Company, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with Local Union 415, International Brotherhood of Electrical Workers, AFL-CIO, as the exclusive representative of the Respondent's construction and maintenance employees, excluding electrification advisers, meter repairmen, office clerical employees, professional employees, guards, and supervisors as defined in the Act, with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

(b) Instituting changes in the terms and conditions of employment of employees in the appropriate unit without first consulting with and bargaining with the above-named labor organization concerning these matters.

(c) Promising and granting benefits to its employees for refraining from union activity; threatening its employees with the abolition of jobs for engaging in union activity; and encouraging its employees to withdraw from union activity.

(d) In any like or related manner, interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist Local Union 415, International Brotherhood of Electrical Workers, AFL-CIO, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the

purposes of collective bargaining or other mutual aid or protection, and to refrain from any or all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959.

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

(a) Upon request, bargain collectively with Local Union 415, International Brotherhood of Electrical Workers, AFL-CIO, as the exclusive representatives of all its employees in the above-described appropriate unit with respect to rates of pay, wages, hours of employment, and other conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its place of business in Pine Bluffs, Wyoming, copies of the notice attached hereto marked "Appendix A."⁸ Copies of said notice, to be furnished by the Regional Director for the Twenty-seventh Region, shall, after being duly signed by Respondent's representatives, be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by other material.

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

⁸In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "Pursuant to a Decision and Order" the words "Pursuant to a Decree of the United States Court of Appeals, Enforcing an Order."

APPENDIX A

NOTICE TO ALL EMPLOYEES

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

WE WILL NOT refuse to bargain collectively with Local Union 415, International Brotherhood of Electrical Workers, AFL-CIO, as the exclusive representative of the employees comprising the appropriate unit described below.

WE WILL NOT unilaterally institute changes affecting the terms and conditions of employment of employees in the bargaining unit described below without first consulting and bargaining with Local Union 415, International Brotherhood of Electrical Workers, AFL-CIO, as exclusive bargaining representative.

WE WILL NOT promise and grant benefits to our employees for refraining from membership in and activity on behalf of Local Union 415, International Brotherhood of Electrical Workers, AFL-CIO, or any other labor organization; threaten our employees with the abolition of jobs because of membership in or activity on behalf of said Local 415, or any other labor organization; or encourage our employees to withdraw from membership in or activity on behalf of said Local Union 415, or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed by Section 7 of the National Labor Relations Act.

WE WILL bargain collectively, upon request, with Local Union 415, International Brotherhood of Electrical Workers, AFL-CIO, as the exclusive bargaining representative of all our employees in the appropriate unit described below with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, and, if an agreement is reached, embody such understanding in a signed contract. The appropriate unit is:

All construction and maintenance employees of Rural Electric Company, Inc., excluding electrification advisers, meter repairmen, office clerical employees, professional employees, guards, and supervisors as defined in the Act.

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

RURAL ELECTRIC COMPANY, INC.,
Employer.

Dated _____ By _____
(Representative) (Title)

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

INTERMEDIATE REPORT
STATEMENT OF THE CASE

This proceeding, with the General Counsel and Rural Electric Company, Inc., herein called the Company or the Respondent, represented, was heard before the duly designated Trial Examiner on June 16, 1960, at Cheyenne, Wyoming. The complaint, as amended, alleged that Local Union 415, International Brotherhood of Electrical Workers, AFL-CIO, herein called Local 415 or the Union, was

duly designated by a majority of the employees of Respondent as its bargaining representative in a unit appropriate for the purposes of collective bargaining and that on or about March 21, 1960, Respondent failed and refused and has since failed and refused, upon request, to recognize and bargain collectively with said Local 415. The amended complaint further alleged that Respondent offered its employees rewards and benefits to refrain from union activity, bargained directly with its employees, threatened its employees with loss of employment and other reprisals if they became or remained members of the Union, kept under surveillance the meetings of the Union, and granted unilateral wage increases to its employees on or about May 1, 1960.

The amended complaint alleged that by the above conduct Respondent violated Section 8(a)(1) and (5) of the Act. Respondent's answer and amended answer denied the commission of unfair labor practices.

Oral argument was waived but briefs were received from the General Counsel and Respondent on August 4.

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

FINDINGS AND CONCLUSIONS

I. THE BUSINESS OF THE COMPANY

Respondent is a Wyoming corporation with its office and principal place of business at Pine Bluffs, Wyoming. It is a public utility engaged in distributing electricity in the States of Wyoming, Nebraska, and Colorado. Its annual gross revenue from the sale of electricity in said States is in excess of \$250,000.

Respondent admits and I find that it is engaged in commerce within the meaning of the Act.

II. LABOR ORGANIZATION INVOLVED

Local Union 415, International Brotherhood of Electrical Workers, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The facts*

According to the testimony of B. E. Lyons, Respondent's manager, the board of directors of Respondent¹ held a meeting on March 7, 1960, at which it was decided that wage rates required both study and adjustment. A special meeting was scheduled for March 17 and during the interim Lyons was designated to get comparable wage scales from other REA's. On March 17, Director Forstrom was prevented from attending by a snowstorm and action was postponed until the next regular meeting in April.

By a coincidence which is entirely unexplained in the record, sometime shortly prior to March 18, a group of Respondent's employees visited the offices of Local 415 in Cheyenne and inquired about the procedure for organizing a union.² The procedures were explained to the men and they were given authorization cards to be signed by the other employees. The record establishes that the leader and instigator of the organizational efforts was John Couch, not employed by the Respondent at the time of the hearing and not called as a witness by either party, presumably because he was unavailable. Unfortunately only the testimony of Couch could fill important gaps in the record, which is far from complete.³ On March 21, a group of employees returned to Local 415 and submitted 13 authorization cards to Business Manager Dean. Dean prepared a petition for a representation election under Section 9(c) of the Act, and, in keeping with the Union's practice, called

¹ Respondent was administered by a board of seven directors, all of whom were ranchers and farmers. These directors were Harold McWilliams, president, Peter Boullor, vice president, Kenneth Forstrom, treasurer, Floyd Mason, Jr., secretary, Herbert Lynn, Edward Wickhorst and W. T. Young (later replaced by William K. Lossi). Each director was in charge of a geographical district and they operated at distances of 55 and 65 miles from each other. Forstrom was in charge of the Burns district in which Pine Bluffs is located.

² This is the testimony of Norman Dean, business manager of Local 415 at the time and a credible witness. Dean could not identify the employees nor fix an exact date.

³ The record does not disclose what efforts, if any, were made by the General Counsel to subpoena Couch.

Company Manager Lyons to request recognition.⁴ According to both Dean and Lyons the conversation was brief since Lyons, inexperienced in labor relations, was startled and confused by the call. I credit Dean's testimony that he requested recognition as the bargaining representative for the Company's outside construction employees and stated that a majority had asked the Union to represent them. But both Dean and Lyons agree that Lyons was upset and that no direct answer was given to the request. (Dean stated that he finally asked Lyons if he would object to the Union representing his employees and Lyons said he would object.) I also find that Lyons, as company manager, had no authority to either grant or refuse this request for recognition.⁵ It is Lyons' uncontradicted testimony that he mentioned this telephone conversation with Dean to no member of the board of directors until he received notice from the National Labor Relations Board on March 24 that a petition had been filed. Incredible as it may seem that Lyons would not mention a telephone conversation which admittedly startled him to any director of the Company there is no testimony nor any facts in the record which impeach this statement.

Now back to the employees. Before the letter of notification was received by Lyons the employees held a meeting at the home of Dick Shandera, at that time a groundman and the signer of an authorization card. This meeting was held on Wednesday, March 23, and was attended by Theodore Edmonds, Thomas Kelley, Red Smith, John Couch, Shandera, and Earnest Fitzgerald, the Company's line superintendent and the immediate supervisor of the construction crew. Fitzgerald, like the others who attended, had signed an authorization card for Local 415 and was considered by the others, at least at this time, as a participant in their efforts.⁶ No representative of Local 415 attended the meeting nor did Local 415 have any knowledge of it. The testimony of employees Edmonds, Kelley, and Shandera, the only employees called by the General Counsel, as to what took place at this meeting and the meeting held the next night at Shandera's was given sparingly and reluctantly. On Wednesday they did determine to investigate comparable wage rates, *not* by inquiry through Local 415, but through Fitzgerald. The next day Fitzgerald called some men he knew who were members of the Union in Cheyenne and obtained from them a scale of wages paid by Cheyenne Light, Fuel and Power and by an employer identified only as the "Bureau." On Thursday, March 24, the day Lyons received the notice from the Labor Board, the men held a second meeting. This meeting was attended by James K. Thompson, the Company's electrification adviser and likewise the signer of an authorization card.⁷ Prior to the meeting Thompson had a telephone conversation with Kenneth Forstrom, director and treasurer of the Company. Thompson's testimony as to the substance of this conversation is:

And he mentioned trying to find out what the men wanted and give the Board the first chance and I told him I was going to the meeting, the men were going to have a meeting and they would discuss it [wages] at the meeting. And I was to call him back after the meeting and let him know what they had decided.

Forstrom testified, credibly, that prior to this telephone conversation Thompson had approached him and told him the men needed more money but that they did not

⁴ Paragraph 7a of the Board's petition requires the petitioner to state the date on which request for recognition was made and the date on which the Employer declined recognition. Local 415 therefore made a practice of calling the employer before filing. Dean stated that he was occasionally surprised by an employer who agreed to recognize the Union.

⁵ Lyons was in charge of the Company's operation at Pine Bluffs and was directly responsible to the Board. He did not, however, formulate company policy but saw that it was carried out in day-to-day operations. As he put it, "I am in charge of the whole works to see that the Board's policies are carried out."

⁶ Fitzgerald was admittedly a supervisor within the meaning of the Act. He signed a card at the request of John Couch; he had been a member of the IBEW in the past; and he was the only person involved in this proceeding, apart from Dean, with any previous experience with labor organizations, either as a representative of management or as an employee. Fitzgerald testified, "I felt like I was one of the boys." Kelley testified, "We just considered him one of us."

⁷ As electrification adviser Thompson advised farmers and ranchers in the uses of electricity, compiled electrical data and published it in a newspaper, obtained rights-of-way for the Company, promoted the sale of electricity, negotiated contracts, etc. I find that Thompson was a managerial employee (he supervised no one) and not within the bargaining unit. *Temco Aircraft Corporation*, 121 NLRB 1085, at 1089.

believe they could talk to the board. Forstrom had replied that he did not see why the men could not talk to the board and give it an idea of what was wanted. It does not appear that Forstrom told Thompson that the board had under advisement its own study of wage rates. Forstrom further testified that, although he had no knowledge that the men had designated Local 415 as their bargaining agent, he did know, on March 24, that a meeting of the employees had been held the preceding night and that one was to be held that night.⁸ Forstrom also told Thompson that he would arrange a meeting between the men and McWilliams, president of the directors, to discuss wages.

At the meeting of the men on March 24, Thompson told them of his conversation with Forstrom and specifically of Forstrom's request that the Company be given the "first chance." The men had in their possession such comparable wage rates as Fitzgerald had been able to obtain and they then unanimously agreed to present their own proposal (General Counsel's Exhibit No. 11) to the board without the intervention of the Union. It was their decision that, should the board accept their proposal, they would abandon the Union; should the board reject it, they would resort to the Union. Thompson was selected as their ambassador to carry this message to Forstrom.

Unknown to the employees or to Forstrom, other events were taking place on March 24. Upon receipt of the Labor Board's letter, Lyons went to McWilliams at Hillsdale and McWilliams decided to see Mr. Wilson, the Company's attorney in Cheyenne. Wilson referred them to Mr. Tomlinson in Denver, an attorney experienced in labor law. The only advice received by McWilliams, so far as the record reveals, was that the Company could no longer negotiate on wages directly with the employees. McWilliams did testify that the directors had at this time settled on a wage increase and that formal adoption was scheduled to take place at the regular April meeting. McWilliams did not know, on March 24, of Forstrom's request that the board be given the first chance or of the men's decision to accede to the request.

On Friday, Thompson advised Forstrom of the men's decision to submit their own proposal directly to the board and Forstrom, still unaware that Lyons had received the letter from the Labor Board, agreed to go with Thompson to see McWilliams.

On Saturday, Directors Forstrom and Boulior drove with Thompson to McWilliams' home, and Ed Wickhorst, another director, arrived shortly after the discussion started. McWilliams terminated any discussion as to wages at the very beginning by telling Thompson and his fellow directors that he could not discuss the matter with them and could not negotiate until the Labor Board held the election requested by the Union. When Thompson asked McWilliams what he should tell the men, McWilliams repeated that the Company could not raise wages, could not do anything, until after the election. Although it is clear on the record herein that McWilliams neither told Thompson nor suggested to him that the men repudiate the Union and then seek to meet with the Board, Thompson testified that Boulior stated that he did not see why the demands could not be met and Wickhorst told him that he (Wickhorst) was sure the men would not get the wages requested if they joined the Union. Thompson relayed McWilliams' refusal to discuss wages to the men at Fitzgerald's house on Saturday afternoon. Thompson's testimony is that no decision was reached,⁹ while Fitzgerald testified that the men decided they would still give the board the first chance and that the Union was not mentioned at this meeting.

On Saturday night, Forstrom received a call from Director Lynn who stated that Fitzgerald wanted to talk to some of the directors and arranged to drive with Fitzgerald to Forstrom's house on Sunday. Forstrom was the only witness who testified to the meeting on Sunday with Fitzgerald. According to Forstrom, Fitzgerald stated that the men were no longer interested in the Union, and that he (Fitzgerald) was not interested in a raise or anything else. Forstrom's testimony is brief but he took the position, indoctrinated in neutrality by McWilliams, that he could not influence the men one way or the other.

Fitzgerald now assumed the leadership among the men and on Monday there was a meeting of the construction employees at the warehouse. According to Shandera, Fitzgerald told the men he wanted to go directly to the board of directors who, he

⁸ The record does not clearly indicate whether Forstrom had knowledge of the meetings when he talked to Thompson or learned of them when he talked to him. Since, however, there would be no reason for him to call Thompson unless he had heard of the Wednesday meeting and there would be no meaning to the words "first chance," I conclude that Forstrom knew that a meeting had been held and strongly suspected that the men might seek the aid of the Union if they had not already done so.

⁹ "A. (By THOMPSON) · I don't know what they decided. It was such a mixed up affair I don't think anything was definitely decided."

believed, would give them "a fair shake," but that it would be necessary that they first "be clear of the Union." Acting on Fitzgerald's suggestion, Couch, Shandera, Kelley, and Smith drove to Cheyenne in a company car for the purpose of withdrawing from the Union and having the Union withdraw its petition for an election. Fitzgerald was aware of the trip and of the fact that the men would take time off in Cheyenne to go to the union office. (The men were going to Cheyenne in the car on company business in any event and, while the testimony is not entirely free from contradiction, it is not established that it was unusual for the men to take advantage of trips to Cheyenne to engage in personal business.) The trip was unsuccessful to the extent that Local 415 did not agree to withdraw its representation petition and the employees made similar visits on the next 2 days. These trips convinced Dean that the Company was engaging in unfair labor practices and led to the filing of charges, following which the petition was withdrawn in accordance with the Labor Board's suggested procedure.¹⁰

Following receipt of notice of withdrawal of the petition from the Labor Board and on or about May 13, 1960, the board of directors granted the employees substantial wage increases without notice to or consultation with the Union.¹¹ This action concluded the case as presented by the General Counsel.

B. Conclusions

1. The refusal to bargain

I find that the construction and maintenance employees of Respondent constituted a unit appropriate for the purposes of collective bargaining and that on March 21, 1960, Local 415 had been designated collective-bargaining representative by a majority of the employees in that unit.¹² The immediate issue which I find presented

¹⁰ Dean could not identify the men who came in on these visits but he testified that they spoke to Watts, president of Local 415, on four different occasions. He summarizes these discussions as follows:

. . . After several conversations with several groups on—they came over two or three, four or five men at a time on, I would say, at least four different occasions and came in and talked to myself and Mr. Watts, president, asking for a letter that the Union was withdrawing from the case and we questioned them each time to establish why they felt like this and the only reason that was brought out on it that I can recall was that the Board of Directors prior to our filing the petition would not meet with the employees as a group, that they were told they had to go through a manager, and after the petition was filed the—someone told them that the Board of Directors would meet with them and consider whatever problem they had . . . but the Board didn't feel they should meet with them unless the Union should withdraw their interest in the case. At the last meeting I told this group of fellows I would not withdraw the petition or give them a letter of withdrawal because I felt they were being coerced and we weren't in a position to let the Union be used in this manner, as a threat, that the Union was being used merely as a threat to get some monetary gain for the employees.

¹¹ Thompson was raised from \$1.90 to \$2.15 per hour; Shandera from \$1.45 to \$2.10 when he was promoted from groundman to apprentice hneaman; Kelley from \$1.45 to \$1.90. No evidence was received as to other increases although McWilliams' testimony indicates that all the construction men received increases. According to McWilliams the increases conformed to the Company's proposal which had been decided upon after agreement among the directors and which had been held in abeyance while the representation petition was pending. They did not conform to the men's own suggestions. Cf. General Counsel's Exhibit No. 11.

¹² On March 21 the following employees concededly were members of the unit: Edmonds, Bailey, Kelley, Couch, Smith, Gossett, and Shandera. Of these Edmonds, Bailey, Kelley, Smith, and Shandera had signed authorization cards for Local 415 on March 18. Two other employees, Johnson and Soule, had also signed cards but the record does not disclose whether Johnson was an employee on March 21 nor does it disclose whether Soule was a groundman or a meterman on March 21. Since I have found that Fitzgerald is a supervisor and Thompson is a managerial employee they have not been computed in totaling the unit. Clearly the Union represented a minimum of five employees of the seven concededly in the unit and represented a majority of any expansion of the unit which would result from the inclusion of Johnson and Soule. (Druri and Anderson were temporary employees hired after March 21.) Counsel for the General Counsel stated at the opening of the case that the unit consisted of 10 employees. This would presumably include Thompson, Soule, and Gibson but, again, the Union would have a majority in such a unit.

by the 8(a)(5) allegation is whether or not the telephone call made by Dean to Lyons on March 21 and the latter's response constituted a demand and a refusal sufficient to support the allegation. I find they did not for the following reasons.

The telephone call made by Dean to Lyons was admittedly the usual perfunctory call made as a matter of practice prior to the filing of a Section 9(c) petition. As Dean testified when he was asked if the reason for making the call was to establish a demand and refusal in the petition:

This was one of the points, but we have—I have, as agent for the IBEW, filed, I would imagine, close to 40 of these petitions over a period of my employment with them and on numerous occasions I was quite surprised to find that they would recognize us without going through an election.

From this testimony it is clear that Dean himself, while obviously willing to accept recognition and bargaining status, made the call as a preliminary step to the direction of an election by the Labor Board. Since Dean, on this record, does not appear to have known who Lyons was or what authority he had with respect to Respondent's labor policy, the inference that he was seeking merely a reply which would satisfy the requirements of paragraph 7a of the Labor Board's petition is strengthened. On the other hand it is equally clear that Lyons did not have the authority to either grant or deny recognition to Local 415. According to his own testimony Lyons did not formulate either the labor policy or any other policy of the Company.¹³ Very specifically it is established that Lyons had no voice in labor policy. He participated in none of the decisions of the board at which the wage increases were discussed and determined¹⁴ nor, although he accompanied McWilliams to see the Company's attorneys on March 24, does it appear that he took part in these meetings. The telephone call was the only request made by Local 415—it was not followed by any letter to the board of directors setting forth the scope of the unit, offering to prove majority status, or requesting a date to begin bargaining. Both Dean and Lyons agree that Lyons was confused and upset by the call and Lyons' testimony supports this conclusion.¹⁵ At the time this call was made neither Lyons nor any director of the Company had any knowledge that any employee had signed an authorization card nor that they were contemplating joining a union. No union had represented any of the Company's employees in the past. Such a telephonic request by a stranger labor organization to a subordinate supervisor not responsible for the Company's labor policy and without the authority to accept or refuse the request will not, in my opinion, support a refusal-to-bargain charge. I am well aware that the demand need not be made *in haec verba*, and that an oral request is sufficient. But the Board has not yet adopted a rule that any request made by a labor organization primarily for the purpose of completing paragraph 7a of the Board's petition, even though it includes a claim of majority status and a description of a proposed and appropriate unit, is enough to impose a risk of violation of Section 8(a)(5) upon the employer who does not accede to it. Common sense, a factor too often neglected in the law of labor relations, rejects such a proposition. I have read the cases cited by both counsel for the General Counsel and for the Respondent and I find that none of them fit the precise and narrow ground on which I reject the General Counsel's views. I shall recommend that the complaint insofar as it alleges a violation of Section 8(a)(5) be dismissed.

2. Interference, restraint, and coercion

There is uncontradicted testimony that on Saturday, March 26, Director Boulior told Thompson that he did not see why the men's wage demands could not be met and

¹³ See footnote 5, *supra*.

¹⁴ Lyons testified that he was "in and out" of the board's March 17 meeting and that he was hopeful he would be included in any wage revision.

¹⁵ Lyons testified:

I was sitting at my desk, I don't recall just what I was working on, and the cashier buzzed my buzzer and said, "On line one," and I picked up the telephone and, as I recall the conversation, a man said, "I would like to meet with you to bargain for some of your employees."

I said, "What?" or, "This is out of the blue sky," or something like that.

And then he said, "I am Norman Dean of the IBEW and I would like to meet with you and negotiate for some of your employees."

And I suppose I stammered and stammered and I said, "I don't think so."

And he said, "Your answer is no, then?"

To the best of my recollection I said, "Well, under the circumstances I presume it would have to be considered that way."

that Director Wickhorst told Thompson that he was sure the men would not get their demands if they joined the Union. Although I have found Thompson to be a managerial employee I find that this statement was made to him as the representative of the employees designated by them to approach management with their wage demands. The remarks can only have been intended by Boulior and Wickhorst to have been transmitted by Thompson to the employees and they clearly implied a promise of benefit to the employees in return for not joining the Union. The statements cannot be separated the one from the other—made at the same time and under the same circumstances they jointly constituted a promise of reward for abstention from union activity. This was not an isolated statement involving a single employee—it was a promise of benefit directed to the entire construction crew by men who had the authority to fulfill their promise. I find these statements constituted a violation of Section 8(a) (1) of the Act.

Two allegedly coercive statements are attributed to Lyons and Fitzgerald. Thompson testified that Lyons told him that his job would be abolished if the men “went union.” Whether or not the statement would be coercive if made to Thompson alone in view of the finding that Thompson was a managerial employee need not be resolved.¹⁶ It was made in the presence of employee Smith (as well as Fitzgerald) and was a threat that the Company would exercise reprisals for engaging in union activity. I find this threat a violation of Section 8(a) (1).

As to the alleged statement by Fitzgerald that the Company would get a line crew out of Nebraska if the men went union, the evidence is insufficient to establish that Fitzgerald ever made the statement. Kelley, the only witness who testified that such a threat was made, testified that he “heard” the Company would get a line crew out of Nebraska and that he “thought” Fitzgerald made the statement. Such testimony is too vague, in my opinion, to support the General Counsel’s burden of proof.

Shandera testified, however, that it was at the suggestion of Fitzgerald that the men went to the union hall on Monday, March 28, to withdraw from the Union and Kelley testified that after their visit to the hall they reported back to Fitzgerald to advise him of the results. The suggestion was made by Fitzgerald so that the Respondent could deal directly with the men and encouraged the men to bypass their designated representative. This is so even though there is evidence that the men themselves may have reached the decision to deal directly with the Company.¹⁷ The impetus provided by the suggestion of Fitzgerald, including the permission to use the Company’s car and the Company’s time, I find unlawful.

The allegation that Respondent engaged in unlawful surveillance of union meetings and activities rests on the attendance of Fitzgerald and Thompson at the meetings at Shandera’s house on March 24. At this time both Fitzgerald and Thompson had signed authorization cards at the request of other employees and were regarded by the other employees as part of the bargaining unit. In fact, it was Fitzgerald who was selected by the other employees to obtain the wage information which they needed and it was Thompson who was their chosen emissary to submit their wage demands. Absent a direction to attend and to report back to management I do not find that the invited attendance of a minor supervisory employee and a minor managerial employee constituted an act of surveillance as the Board uses the term. While it is true that Director Forstrom asked Thompson to report the wage demands of the employees to him, Forstrom did not know (although he may have suspected) that the men had designated any union to represent them. All that the record establishes is that Forstrom knew the men had had a meeting and that they had wage demands to which they believed the Company was unwilling to listen. Forstrom’s objective was to bring the parties together *before* the men selected a union. Forstrom did not ask Thompson to report the names of the employees who attended or the leaders of the activity, the common objective of surveillance. The vice in surveillance lies in the intrusion by management into the organizational activity of employees, the breaching of their freedom to engage in concerted activity, and the necessarily coercive effect of espionage upon the employees. The factors which make surveillance iniquitous were not embraced in Forstrom’s simple request that he be advised of the wage demands. I shall recommend that paragraph XII of the complaint be dismissed.

¹⁶ The record herein establishes that both the directors and the employees regarded Thompson, who was paid an hourly rate lower than the linemen, as a rank-and-file employee.

¹⁷ The testimony of the employees on this point is characterized by an impenetrable obfuscation. The witnesses were still employed by the Respondent and were the beneficiaries of substantial wage increases and, understandably, they were not eager to testify adversely to Respondent’s interests. It is regrettable that Couch, the one witness who might have shed light on the vitally important aspects of the case, was not available.

There remains the allegation that Respondent, by granting substantial wage increases on or about May 13, further violated the Act. Since I have already found that the obligation to bargain with the Union was not incurred by the Respondent I do not find any violation of Section 8(a)(5) in this unilateral action. As to whether or not the action violated Section 8(a)(1), the issue is not free from some perplexity. Respondent did initiate a study of the employee's wages prior to any knowledge of union activity and I credit the testimony that a wage increase had been agreed upon on March 17 and was to be made effective in April. There intervened however, the filing of the representation petition by Local 415 and the directors formally refused to negotiate on wages while the petition was pending. Had this formal refusal been strictly adhered to and had a "hands off" policy been maintained the subsequent grant of a wage increase would have presented a different question. But at the time McWilliams officially proclaimed a policy of neutrality and refused to engage in negotiations two other directors indicated to Thompson that the chances of a wage increase were favorable except for the pending question of representation. The men then abandoned the Union, but not without encouragement from Fitzgerald, in the hope, sponsored by the directors, that they would do better dealing with the board directly. It was this combination of factors, including Forstrom's request to Thompson that the board be given first chance, which taints the subsequent increase. The testimony in this case does not reveal to what extent the men were influenced in their decision to withdraw from the Union by the implied promise that they would do better but I cannot believe the influence was insignificant. I therefore find that the subsequent grant of substantial increases in hourly rates was but the redemption of the prior promise and as such was "inextricably interrelated" with Respondent's unlawful conduct.¹⁸ I therefore find it unnecessary to reach the question of a good-faith doubt of majority status on the part of Respondent or the question of a voluntary bypassing of the Union by the employees themselves. The effect of either condition upon the Respondent's right to engage in freedom of action is not brought to issue. I do not separate the implied promise to grant an increase upon an unlawful condition with the grant of the increase when the unlawful condition has been met.¹⁹

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

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

V. THE REMEDY

Having found that the Respondent has engaged in and is engaging in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action which I find will effectuate the policies of the Act.

Because the unfair labor practices do not warrant a broad order,²⁰ the recommended order will be appropriately confined to the violations found.

¹⁸ *Umon Furniture Company, Inc.*, 118 NLRB 1148, Member Rodgers dissenting

¹⁹ In reaching this conclusion I do not rely on the Board's recent decision in *Chauffeurs, Teamsters and Helpers Local Union No. 175, etc. (McJunkin Corporation)*, 128 NLRB 522. The cases are entirely inapposite.

²⁰ The legal assistants who prepare the Board's orders might do well to read the recent decisions of the courts on the issue of scope. See, e.g., *Communications Workers of America, AFL, et al. v. N.L.R.B.*, 362 U.S. 479; *Highway Truck Drivers and Helpers, Local 107, etc. v. N.L.R.B.*, 273 F. 2d 815 (C.A.D.C.); *N.L.R.B. v. United Brotherhood of Carpenters and Joiners of America, AFL-CIO, et al. (Midwest Homes, Inc.)*, 276 F. 2d 694 (C.A. 7); *Local 636 of the United Association of Journeymen, etc. (Detroit Edison Co.) v. N.L.R.B.*, 278 F. 2d 858 (C.A.D.C.); *N.L.R.B. v. Bangor Building Trades Council*, 278 F. 2d 287 (C.A. 1); *International Typographical Union, AFL-CIO (Haverhill Gazette) v. N.L.R.B.*, 278 F. 2d 6 (C.A. 1); *Morrison-Knudsen Company, Inc. v. N.L.R.B.*, 276 F. 2d 63 (C.A. 9); *N.L.R.B. v. Local 111, United Brotherhood of Carpenters & Joiners of America (Clemenzi Construction Co.)*, 278 F. 2d 823 (C.A. 1); *Puerto Rico Drydock & Marine Terminals, Inc. v. N.L.R.B.*, 284 F. 2d 212 (C.A.D.C.); *N.L.R.B. v. International Association of Machinists, etc. (Menasco Mfg. Co.)*, 279 F. 2d 761 (C.A. 9); *N.L.R.B. v. Local 476, United Assoc. of Journeymen & Appren. of Plumbing & Pipefitting Ind., etc. et al. (E Turgeon Constr. Co., Inc.)*, 280 F. 2d 441 (C.A. 1); *N.L.R.B. v. Lamar Creamery Company*, 246 F. 2d 8 (C.A. 5). The restraint which should govern

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

CONCLUSIONS OF LAW

1. Respondent is an employer within the meaning of Section 2(2) of the Act.
2. Local Union 415, International Brotherhood of Electrical Workers, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.
3. By interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed by Section 7 of the Act, as above found, the Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act.
4. Respondent has not engaged in unfair labor practices in violation of Section 8(a)(5) of the Act.
5. The aforesaid unfair labor practices are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

[Recommendations omitted from publication.]

Board orders was made clear by the United States Supreme Court in *N.L.R.B. v. Express Publishing Company*, 312 U.S. 426, at 433:

It would seem equally clear that the authority conferred on the Board to restrain the practice which it has found the employer to have committed is not an authority to restrain generally all the other unlawful practices which it has neither found to have been pursued nor persuasively to be related to the proven unlawful conduct We hold only that the National Labor Relations Act does not give the Board authority, which the courts cannot rightly exercise, to enjoin violations of all the provisions of the statute merely because the violation of one has been found.

In a case decided as recently as July 25, 1960, and in the face of the above decisions, the scope of the Board's order was increased beyond the recommended order despite the fact that no previous unfair labor practices had been committed by the employer and there was no reasonable grounds for anticipating, on the facts of the case, that future violations would be committed. The caseload of the Board is sufficient without provoking needless appeals and the issuance of orders which no court will enforce serves no purpose at all.

Union Taxi Corporation and Wayne B. Lewis

Teamsters Automotive & Chauffeurs Local Union No. 165 and Wayne B. Lewis. *Cases Nos. 20-CA-1586 and 20-CB-668. February 28, 1961*

DECISION AND ORDER

On February 12, 1960, Trial Examiner Maurice M. Miller issued Intermediate Report in the above-entitled proceeding, finding that the Respondents had engaged in and were engaging in certain unfair labor practices within the meaning of Section 8(a)(1) and (3) and 8(b)(1)(A) and (2) of the Act, and recommending that they cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the Respondent Union and the General Counsel filed exceptions to the Intermediate Report and supporting briefs.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial errors were committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and briefs, and the entire record in these cases, and hereby adopts the findings, conclusions, and recommenda-