Byrne Dairy, Inc. *and* Dairy & Bakery Salesmen & Dairy Employees Union Local 316, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America. Cases 3-CA-3450, 3-CA-3505, and 3-RC-4368

June 2, 1969

DECISION AND ORDER

MEMBERS FANNING, JENKINS, AND ZAGORIA

On November 22, 1968, Trial Examiner Lloyd S. Greenidge issued his Decision 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 attached Trial Examiner's Decision. He further found that Respondent had not engaged in certain other unfair labor practices alleged in the complaint, and recommended that such allegations be dismissed. He also found, in Case 3-RC-4368, that Respondent interfered with a Board election held on May 9, 1968, and recommended that the election be set aside. Thereafter, Respondent filed exceptions to the Trial Examiner's Decision and a supporting brief.[1]

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 these cases to a three-member panel.

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 entire record in these cases, including the Trial Examiner's Decision, the exceptions and brief, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, as modified herein.[2]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order of the Trial Examiner, as modified below, and hereby orders that Respondent, Byrne Dairy, Inc., Syracuse, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order, as herein modified:

1. Substitute the following for paragraph 1(a) of the Trial Examiner's Recommended Order:

"(a) Interfering with, restraining, or coercing its employees in the exercise of their statutory rights within the meaning of Section 8(a)(1) of the Act, by interrogating them about union matters, soliciting information from them as to how the Union may be defeated, threatening them with discharge, plant closure, loss of paid lunch period, scholarship fund, or retirement benefit in the event they became or remained members of the Union, and making implied promises of general benefit if they refrained from becoming or remaining members of the Union."

2. Substitute the following for the first indented paragraph of the Notice to the Trial Examiner's Decision:

> WE WILL NOT question you about your union activities; solicit information from you as to how Dairy & Bakery Salesmen & Dairy Employees Union Local 316, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, herein at times called the Union, may be defeated; threaten you with discharge, plant closure, loss of paid lunch period, scholarship fund, or retirement benefit in the event you become or remain members of the Union, and make implied promises of general benefit if you refrain from becoming or remaining members of the Union.

IT IS HEREBY FURTHER ORDERED that the complaint be, and it hereby is, dismissed, insofar as it alleges unfair labor practices other than those found herein by the Board.

IT IS ALSO FURTHER ORDERED that the petition for certification of representative filed in Case 3-RC-4368 be, and it hereby is, dismissed, and that all prior proceedings held thereunder be, and they hereby are, vacated.

MEMBER ZAGORIA, dissenting in part:

I join my colleagues in finding that Respondent interrogated employee Haas, in violation of Section 8(a)(1). The only other unfair labor practices found by the Trial Examiner, to support his conclusion of a Section 8(a)(5) violation, concern the Employer's February 20 speech. In that speech, according to testimony credited by the Trial Examiner, Respondent:

(a) Asked the employees whether they had ever worked under union conditions, and told them if they signed up for something "your signature is forever."

(b) Reminded the men that they then received a half hour paid lunch period each day, stating "if the union got in, we would have to work 2 1/2 hours more per week." As another employee, who was credited, recalled, Respondent said "in a union company, you get a half hour and it's not paid for, where they gave us the lunch hour and paid us for it."

[1] The Respondent has requested oral argument The request is denied The record, the exceptions and brief adequately present the issues and the positions of the parties.

[2] We do not adopt the Trial Examiner's conclusion that Respondent secretary C. Vincent Byrne's remark that the Union was "remancing" employees in a saloon and his later statement that employee Dowling had been in "union processions" before created an impression of surveillance of employees' union activities. In our judgment, the statements are ambiguous in nature, and in the context in which these remarks were made, it is not reasonable to infer that they created the impression of surveillance in the minds of the employees. Accordingly, we find no Section 8(a)(1) violations with respect to these statements

(c) Reviewed the Company's current educational plan, stating "that under a union contract only high scorers receive scholarship payments."

(d) Stated that Byrne Dairy employees may stay on at age 65 but when a man reaches that age, under a union contract, "out the door you would go."

(e) Remarked that others "promise a land of love," but "we . . . keep the place running." Respondent then said "you know what happened to Fairbanks," and handed employees an article showing that Fairbanks Dairy was held by a Trial Examiner of the Board to have terminated one aspect of its operations unilaterally, in violation of Section 8(a)(5). Respondent stated "the Union was representing these people and . . . they were no longer in business."

(f) Finally, Byrne said "you can move ahead faster here, stay on our team, it will pay in the long run."

I do not agree that the above-quoted remarks constitute violations of the Act. They were rather, in my opinion, legitimate efforts by Respondent to compare current employee benefits with what it said were the benefits under union contracts, and there is no allegation or showing that these representations were inaccurate. Under the circumstances, I would hold them to have constituted legitimate campaign propaganda.[3] Respondent's statement about the permanence of the employees' commitment to the Union was similar to another recently found nonobjectionable by the Board.[4] The reference to Fairbanks I would not find coercive either, since there was no indication it was the selection of the Union which caused Fairbanks to close. Indeed, the article shown to employees specifically indicated the only malfeasance by Fairbanks was, as found by the Trial Examiner there, its refusal to bargain about a conversion to lease arrangements with its drivers. Lastly, Respondent's remarks urging employees to "stay on our team, it will pay in the long run" seem to me ambiguous. Thus, I cannot find that Respondent engaged in conduct sufficiently serious to warrant setting aside the election, or to justify a bargaining order. I would, therefore, certify the results of the election, and issue a cease-and-desist order covering only the Respondent's conduct with respect to Haas.

[3]See, e.g., *The Orchard Corporation of America*, 170 NLRB No 141.
[4]*Northlake Convalescent Hospital*, 173 NLRB No. 149.

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

LLOYD S. GREENIDGE, Trial Examiner: This consolidated proceeding stems from the efforts of Dairy & Bakery Salesmen & Dairy Employees Union Local 316, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, herein called the Union, to organize the employees of Byrne Dairy, Inc., herein called the Respondent and at times the Company. On March 6, 1968,[1] the Union filed an unfair labor practice charge in Case 3-CA-3450 and, on May 20, a complaint issued in that proceeding alleging the commission of unfair labor practices by the Respondent in violation of Section 8(a)(1) and (3) of the National Labor Relations Act, as amended (61 Stat. 136), herein called the Act. On May 15, the Union filed an unfair labor practice charge in Case 3-CA-3505 and, on June 21, a complaint issued in that proceeding alleging the commission of unfair labor practices by the Respondent in violation of Section 8(a)(1) and (5)[2] of the Act. In Case 3-RC-4368, the Union filed a petition for certification on February 19. A hearing was held on the petition on March 14 and 20 followed by the Regional Director's Decision and Direction of Election dated April 22. An election was held on May 9 and the Union lost.[3] Thereafter, the Union filed objections to conduct affecting the results of the election. On June 20, the Regional Director found that the objections raised issues which could best be resolved by a hearing and directed such a hearing. By order dated June 21, the Regional Director consolidated Cases 3-CA-3450, 3-CA-3505, and 3-RC-4368, for the purposes of hearing, rulings, and decision by a Trial Examiner.

Pursuant to due notice, a consolidated hearing was held before me at Syracuse, New York, on August 27, 28, and 29. All parties were represented and participated fully in the hearing. During the hearing, the complaint and answer in Case 3-CA-3450 were amended. At the conclusion of the hearing, the parties were granted leave to file briefs and briefs were received from the Respondent and the General Counsel.

The issues presented are (1) whether the Respondent interfered with, restrained, and coerced its employees in the exercise of rights guaranteed them in Section 7 of the Act in violation of Section 8(a)(1) of the Act; (2) whether Respondent discriminatorily laid off an employee in violation of Section 8(a)(3) of the Act; (3) whether the Union represented a majority of Respondent's employees in an appropriate unit at the time it requested bargaining; (4) whether the Respondent's refusal to bargain with the Union violated Section 8(a)(5) of the Act; and (5) whether Respondent engaged in conduct which warrants setting aside the election.

Upon the entire record in these consolidated cases, and from my observation of the witnesses, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT AND THE LABOR ORGANIZATION INVOLVED

Respondent, a New York corporation, is engaged at Syracuse, New York, in the bottling, sale, and distribution of milk and related products. During the past year,

[1]Unless otherwise noted, all dates herein refer to the year 1968
[2]At the opening of the hearing, the Union moved to correct the charge in Case 3-CA-3505 by striking the numerical designation (3) appearing in paragraph (h) thereof for the reason that the designation was surplusage as the body of the charge in that case speaks only of the alleged 8(a)(5) violation and the alleged discrimination is adequately covered by the earlier charge in Case 3-CA-3450. The motion was granted without objection from the General Counsel.
[3]The tally of ballots showed that of 19 valid votes counted, 6 votes were cast for the Union, 13 votes were cast against the Union, and 1 was challenged.

Respondent, in the course and conduct of its business, sold and distributed products valued in excess of $500,000. During the same period, it received shipments of goods valued in excess of $50,000 directly from sources outside the State.

The complaint alleges, the answer admits, and I find that the Respondent is, and has been at all times material, engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that it will effectuate the policies of the statute to assert jurisdiction herein. I also find, on the basis of the record in this proceeding, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE UNFAIR LABOR PRACTICES

A. *Introduction*

For many years, the Union has made several abortive attempts to organize Respondent's employees. In 1960, it filed a representation petition but withdrew the same in July of that year. (Case 3-RC-2384.) The Union's most recent effort in this regard began on February 7 and became known to Respondent at least by February 15. Under the direction and guidance of James Parry, vice president and assistant business agent, the Union met with the employees and endeavored to obtain employee signatures on membership applications.

As particularized in more detail below, the Union signed up the first employee on February 7. Most of the events with which we are here concerned occurred between that date and the date of the election, which, as noted, took place on May 9. During this period, Respondent employed about 20 to 23 rank-and-file employees. The treasurer and plant manager of Respondent is William Byrne, the secretary and sales manager is Vincent Byrne, and the plant foreman is Thomas Reilly. Respondent concedes and I find that, at all times material herein, William Byrne, Vincent Byrne, and Thomas Reilly have been and are agents of the Respondent acting in its behalf within the meaning of Section 2(13) of the Act and supervisors within the meaning of Section 2(11) of the Act.

B. *Interference, Restraint, and Coercion*

The complaint alleges, in substance, that on February 20, Respondent, by Vincent Byrne, threatened its employees with discharge, plant closure, and loss of paid lunch hour and scholarship fund if they became or remained members of the Union, and made implied promises of general benefit to them if they refrained from becoming or remaining members of the Union. It is also alleged that on the said date and on February 21, Respondent, by William Byrne and Vincent Byrne, kept under surveillance, and/or gave the impression that it was keeping under surveillance, the union activities of its employees, interrogated the employees as to their union membership, activities, and desires, and those of their fellow employees, and solicited information from them as to how the Union could be defeated. The answer denies these allegations.

1. The speech of February 20

On Monday, February 19, Vincent Byrne heard a rumor that certain employees were going to lose their jobs because they had joined the Union the previous Saturday and that others were concerned that, in such an event, there would be no one available to load their trucks. On the basis of this rumor, Byrne concluded there was unrest in the plant and that affirmative action was required to allay the fears and anxieties of employees thus aroused. The following day, Byrne decided to call a meeting of all plant employees to assure them their jobs were secure and to inform them of the Company's benefits. The meeting was held in the afternoon of February 20 on company time and property and lasted from 30 to 45 minutes during which free coffee and doughnuts were served. In the recent past, business conditions had been mentioned at gatherings of plant and sales employees during the Christmas season and on social occasions, but it appears that the meeting of February 20 was the first time in several years that job security and employee benefits were discussed at a meeting of plant employees. Vincent Byrne testified that he had not attempted to "educate" the employees about the "facts" until after the Union became active but attributes the delay to a critical labor shortage in the Syracuse area in the fall of 1967.

William Byrne opened the meeting by stating, among things, that there was a "trouble maker" in the crowd.[4] This said, William Byrne turned the meeting over to Vincent Byrne.

Vincent Byrne's speech was delivered from handwritten notes, in evidence, prepared by him in advance of the meeting. Byrne acknowledged that the notes are not a verbatim record of the speech and that several of his remarks and statements do not appear therein. With the limitations of the notes in mind, I move to a consideration of the speech to the extent pertinent to this inquiry.

At the outset, Byrne told the employees that he had been misquoted in the past, and that any employee who felt he could not hold in strict confidence what was said during the meeting was free to leave without fear of reprisal. Byrne then declared that there was unrest in the plant because the employees did not have the "facts" and proceeded to give them the facts as he saw them.

Byrne asked the men if they ever worked for a union. He told them that to get a job in a union they would have to rent a truck and procure their own license; that a union in the area owns the jobs and a man stands in the street and issues work assignments as jobs come in. He reminded the employees that they had acquired their training and skills at the Company's expense. Byrne asked the employees if they wanted to work for a company that deals with facts or for a stranger[5] who makes promises but deviates from the truth; cautioned them to beware of a stranger; and told them if they signed up for something, "your signature is forever." At this point, Byrne held up a union authorization form. Byrne went on to say that some men were being romanced in a saloon and accused the Union of forcing its will upon them. According to the credited and uncontroverted testimony of Walker, Byrne told the group that the Union would buy them beer to get them to sign up.

[4]This finding is based on the mutually corroborative testimony of employees Walker, Dowling, and Rogers which I credit over the denials of Vincent Byrne and employee Pistello that the term troublemaker was used. Pistello's version of William Byrne's statement did not differ materially from that of the credited testimony. According to Pistello, Byrne said,". . . there was somebody trying to arouse everybody, get everybody wound up about something."

[5]As used here, the word meant union and employees without facts.

With regard to company benefits, Byrne first reminded the men that the lunch period was free time to be used as they saw fit, then displayed five signs with the number and word "1/2 hour" written on each. Employee Walker credibly testified Byrne told the men that they were "paid for a full half hour at Byrne's but if the union got in, we would have to work 2-1/2 hours more per week." Dowling [6] and Haas corroborated Walker.[7] Haas recalled Byrne told the employees that "in a union company, you get a half hour and it's not paid for, where they gave us the lunch hour and paid us for it."

Byrne also discussed the educational plan stating that, under the company's program, children of all employees receive $500 per year for 4 years on a noncompetitive basis. However, Dowling credibly testified Byrne also said that under a union contract only high scorers receive scholarship payments.

At some point during the meeting, Byrne discussed automation and the older employees. He stated that even though the Byrne plant was more automated than those of its competitors, it was the Company's policy to retain experienced employees after they reached retirement age and, on application, to transfer them to more suitable work. Walker, whose testimony was corroborated by Dowling, recalled Byrne also declared that Byrne Dairy employees may stay on at age 65 but when a man reaches that age, under a union contract, "out the door you would go."

After reviewing the benefits and retirement programs, Byrne remarked that others "promise a land of love" but "we — keep the place running." He then said, "you know what happened to Fairbanks,"[8] handed an employee a newspaper item about Fairbanks Dairy, a copy is in evidence, and told him to read it. The item referred to the Board's Decision in *Fairbanks Dairy, Division of Cooperdale Dairy Company,* 146 NLRB 893. After the item was read, Byrne said, according to the credited testimony of Bart, "the union was representing these people and that they were no longer in business, they were no longer a plant." Walter J. Nellis, general manager at Fairbanks Dairy, testified that, at the time of the Board's Decision in April 1964, Fairbanks had an inside bottling and an outside sales operation but that, in May 1965, it discontinued the bottling phase of its business and laid off the men who had been engaged in that work.

Finally, Byrne told the employees that many men were against unions, asked what was the will of the employees, and said "you can move ahead faster here, stay on our team, it will pay in the long run."

2. The interview on February 21

On Wednesday, February 21, Vincent and William Byrne sent for Haas to come to the conference room. As Haas was off that day, the message was delivered, during the lunch period, by Haas' wife who was employed as a receptionist and confidential secretary to Jack Byrne, president of Respondent.

During the interview, according to the credited testimony of Mr. Haas, Vincent Byrne inquired about James Parry, the assistant business agent for Local 316, asking whether Parry was alone when he visited Haas in the latter's home about 1 week earlier or was accompanied by Dowling as Dowling had been in "union processions" before, why Dowling favored the Union, and whether Parry had criticized the Company's insurance policies. Questioned about the morale of the men, Haas said they wanted a union. Vincent Byrne then asked, again according to the credited testimony of Haas, how the men stood with the Union, whether the Union could be stopped, whether the Company would win, and whether Haas had signed a union application. Further, Byrne asked Haas who favored the Union and who was in between. To the last inquiry, Haas responded by giving the names of nine employees who he believed supported the Union, including the name of Victor Rogers, and by stating that the others were against the Union or in between. Finally, Haas averred that, while he was indicating the employees' preference, Byrne "wrote things" on a list of names Byrne had before him.

Vincent Byrne testified about still another rumor current in February. This one to the effect that certain payroll information entrusted to Mrs. Haas had passed to plant employees. The interview with Mr. Haas was arranged, said Byrne, to discuss the leak of confidential information and plant morale. Byrne told Haas that his wife had access to confidential data, asked if she had disclosed payroll information to him, and if he had taken such information into the plant and discussed it with the employees. Haas acknowledged receiving and passing on confidential information. Byrne then told Haas to keep what was said to himself because he (Byrne) did not want to upset Mrs. Haas who was pregnant at the time. According to Byrne, Haas' statement about having signed a union application followed Byrne's expression of concern for Mrs. Haas' physical condition and his desire not to upset her by disclosing that information entrusted to her care was passed by Haas to plant employees.[9] It was at this juncture, Byrne continued to say, that Haas stated his wife was already upset by the fact that he had signed an application for the Union and, in a moment of blind impulse or possibly out of a sense of guilt, volunteered the names of six other employees, who had also signed union applications, before Byrne could stop him. In addition, Haas offered to intercede with the employees on Byrne's behalf but Byrne rejected the offer and told Haas to stay neutral. The Byrnes denied that Vincent asked Haas if he thought the Union would win and how the Company could get rid of the Union, denied any interrogation of Haas concerning his union membership and that of his coworkers and, denied that Vincent had a list of names on which he made notations.

[6]At the hearing, the General Counsel refused a timely request by Respondent's counsel for the production of a second statement given by General Counsel's witness Patrick Joseph Dowling, for use in the cross-examination of Dowling. (The first statement was produced.) Relying on the amendment to Section 102.118 of the National Labor Relations Board Rules and Regulations, Series 8, effective July 8, 1968, the General Counsel contended that the contents of the second statement did not relate to the subject matter of the witness' direct testimony. I examined the statement *in camera* and found that it dealt with matters other than those about which the witness testified on direct. Accordingly, I denied Respondent's motion to compel the General Counsel to produce the statement and, at the same time, instructed the reporter to forward the statement to the Board in a sealed envelope.

[7]In view of the weight of the credible evidence and considering demeanor, I do not accept Byrne's general denial of any threats by him to withdraw employee benefits.

[8]Byrne's recollection of this remark was ambivalent as he testified, at one point, that he asked, "Do you know what happened to Fairbanks?" The question, however is comfortably cushioned between testimony where Byrne twice acknowledged the accuracy of the statement quoted above. Accordingly, I find that a statement and not a question was presented to the employees.

[9]Byrne's solicitude was illusory or transitory since it appears that he and his brother Jack did, in fact, discuss the matter with Mrs. Haas.

Certainly, Respondent had a legitimate and valid interest in the security of its files and, in fact, was required to take whatever steps appeared reasonable and appropriate to uncover and discipline violators of its trust and their accomplices. It is doubtless true that the unauthorized disclosure of confidential information was discussed during the interview, but I do not believe that the subject of union activities was injected into the discussion by Haas as an act of self-reproach for wrongdoing. It strains credulity that Haas could have given seven names of union supporters, out of a total of nine that he said he mentioned, before interruption by Byrne if the employees' organizational activities were not a matter of deep interest to Byrne. As shown above, the interview was arranged, according to Byrne, to consider another matter as well and that was plant morale. Byrne readily admitted that the Union was involved in the morale problem, that he was concerned about union activity in the plant, and that he did not want the Union to get in. Moreover, the asserted expression of regard for Mrs. Haas' health did not deter the Byrnes from discussing the matter with her, a fact which casts doubt upon the validity of the assertion and the claim that the expression propelled disclosure by Haas of unwanted information. Finally, when asked on direct examination whether he had inquired about Haas' union membership, Vincent Byrne evaded and testified that the meeting was about confidential information. In view of the inherent implausibility of Vincent Byrne's explanation, his evasion, vacillation, and demeanor, I do not consider the Byrnes' denials (William testified in corroboration of Vincent) of Haas' credited testimony as reliable and I do not credit them.

3. Conclusions as to inference, restraint, and coercion

The Act proscribes interference by an employer with his employees' right to select a union to represent them. However, in the 1947 amendment, Congress expressly recognized that an employer's statements of views, argument, or opinion would not constitute or be evidence of an unlawful interference if such statements contained no reprisal or force or promise of benefit. The question here is whether the Byrnes' statements stayed within the limits of "views, argument, or opinion" uncontaminated by threats or promises.

Surely, Vincent Byrne's remarks to the employees in his speech of February 20 that their lunch period was free time but, if the Union was successful in its campaign, they would have to work 2-1/2 hours longer — which statement was reinforced by the display of signs graphically illustrating what was at stake — constitued a threat of the loss of a benefit not protected by Section 8(c) and condemned as interference by Section 8(a)(1). Similarly, I construe Byrne's statement that only high scorers are awarded scholarship payments under a union contract to mean that children of employees who do not receive high scores stand to lose a benefit they are now entitled to under the Respondent's noncompetitive program. The statement was, therefore, violative of Section 8(a)(1).

I reached the same conclusion with respect to Byrne's mention of Fairbanks Dairy prefaced by the statement "You know what happened to Fairbanks." The reference was a reminder of the known fact that Fairbanks had closed down its bottling operations and laid off the plant employees. The use of the newspaper item concerning Fairbanks was an obvious attempt to link the plant closing with the Board's Decision in that case.[10] That the import of his remark and reference would not be lost on the employees, Bryne told them, according to the credited testimony of Bart, that "the union was representing these people and that they were no longer in business, they were no longer a plant." The statements, in context, were threats of the loss of jobs and plant closing should the employees select the Union as their bargaining agent and were, therefore, coercive and violative of Section 8(a)(1).

Further, Byrne's statement that employees are not permitted to work after age 65 under a union contract conveyed a message that the selection of the Union would result in the loss of a benefit available to older employees. The statement was also violative of Section 8(a)(1).[11]

In concluding his speech, Byrne told the employees "you can move ahead faster here" and urged them to "stay on our team, it will pay in the long run." I find these remarks to constitute an implied promise of benefit if the employees remain loyal to the Respondent and reject the Union. As a consequence, they were violative of Section 8(a)(1).

The February 20 speech was plainly calculated to convey the thought that advent of the Union was linked in some way with the loss of benefits and job security. And, although Byrne testified that the purpose of the meeting was to bring certain "facts" about the Respondent's various programs to the employees' attention, the need to do so did not become urgent until after Respondent heard of the union campaign.

Byrne's professed concern that the employees receive untarnished facts did not keep him from misstating a fact. Thus, Byrne's warning to beware of a stranger (meaning union and employees without facts) followed by the statement "if you sign up for something your signature is forever" and the display of a union authorization form conveyed a meaning to the employees that was clear and unmistakable. The meaning was simply that by signing the Union's authorization form, the employees authorized deductions from their pay for all time which, of course, is contrary to fact[12] and law.[13] By erroneously representing to the employees that if they signed the Union's membership

[10] In the *Fairbanks* Decision (146 NLRB 893), the Board found that the employer violated Section 8(a)(5) and (1) by, among other reasons, negotiating directly with individual employees with respect to the leasing of routes serviced by them and by splitting and dividing up routes, all without notice to the exclusive bargaining representative of its employees.

[11] The complaint does not specifically allege a violation based upon this statement. However, in view of the similarity of this issue to those alleged and found and, as it was fully litigated, I am not precluded from passing upon it by the failure of the General Counsel to allege the statement as a violation. *Associated Home Builders of Greater East Bay, Inc.* v. *N.L.R.B.*, 352 F.2d 745 (C A 9); *Frito Company, Western Division* v. *N L R.B.*, 330 F.2d 458 (C.A. 9); *N.L R B* v. *Pecheur Lozenge Co . Inc.*, 209 F.2d 393 (C.A. 2), cert. denied 347 U.S. 953; *American Newspaper Publishers Association* v *N L R.B.*, 193 F.2d 782 (C.A. 7), cert. denied 344 U.S. 812; *Granada Mills, Inc.*, 143 NLRB 957, 958; *Monroe Feed Store*, 112 NLRB 1336, see also Rule 15(b), Federal Rules of Civil Procedure

[12] The Union's checkoff authorization provision reads, in pertinent part, as follows

> This authorization and assignment shall be irrevocable for the term of the applicable contract between the Union and the Company, or for one year, whichever is the lesser, and shall automatically renew itself for successive yearly or applicable contract periods thereafter, whichever is the lesser, unless I give written notice to the Company and the Union at least 60 days and not more than 75 days before any periodic renewal date of this authorization and assignment of my desire to revoke the same

[13] See the proviso to Section 8(a)(3) of the Act, also Section 302(c)(4) therein.

and authorization form their signatures would be forever, Respondent restrained and coerced its employees in violation of Section 8(a)(1).[14] Cf. *McCormick Longmeadow Stone Co., Inc.*, 158 NLRB 1237; *Armco Drainage & Metal Products, Inc.*, 106 NLRB 725, 742-746.

In brief, I conclude and find that Byrne's speech was intended to, and did, interfere with, restain, and coerce employees in the exercise of their Section 7 rights in violation of Section 8(a)(1) and that, in the context of the entire record, it exceeded the limits permitted an employer by Section 8(c).

Likewise violative of Section 8(a)(1) was the interview with Haas on February 21, the day following Vincent Byrne's antiunion speech. On his day off, Haas was summoned to the office by the Byrnes to discuss a leak of confidential information and plant morale.

Manifestly, Haas was not censured, reprimanded, or otherwise disciplined for his complicity in a breach of trust although admittedly guilty of the offense. Rather, on February 22, Vincent Byrne told Haas that his transgression would have no bearing on his tenure or work record. It is evident, therefore, that the wrongdoing was not the real reason for the call to the office.

During the interview, Haas was questioned repeatedly by the Byrnes as to whether Union Agent Parry was alone when he visited Haas or was accompanied by employee Dowling, whether Parry criticized the Respondent's insurance program, why Dowling favored the Union, and where he was asked about the morale of the men, whether the Union could be stopped, whether Haas had signed a union application, and who favored the Union. This then was the true and motivating reason why Haas was summoned to the office on his day off, his wrongdoing merely a bridge to the desired end.

It is by now well settled and no longer a matter for serious debate that the interrogation of an employee as to his own and his fellow employees' union sympathies and activities and as to the organizational efforts of union agents where, as here, such interrogation is unaccompanied by assurances against reprisals and serves no legitimate purpose is not permitted by Section 8(c) and violative of Section 8(a)(1).[15] I so find. Respondent argues that the interrogation was not coercive because Haas and the Byrnes were on friendly terms and Haas did not claim that he was intimidated. There is no merit in the argument. Assuming the interrogation was conducted in a friendly atmosphere, as suggested, that fact in itself would not lessen the unlawful effect of the interrogation as it sought "to place [Haas] in the position of an informer regarding the union activities of his [coworkers]." It was, therefore, coercive.[16]

As will appear hereinafter, employee Streeter signed an application for the Union in a local bar. Accordingly, Vincent Byrne's statement, in the February 20 speech, that the Union was "romancing" employees in a saloon and forcing its will upon them and his remarks to Haas, during the February 21 interview, that Dowling had been in "union processions" before created the impression of surveillance of employees' union activities and constituted interference, restraint, and coercion within the intendment of Section 8 (a)(1). I so find and conclude.

[14]Not alleged as a violation but fully litigated and, accordingly, a finding is not foreclosed. See cases cited in fn 11, *supra*

[15]*Blue Flash Express, Inc.*, 109 NLRB 591.

[16]See *Abex Corporation*, 162 NLRB No. 34.

C. *The Refusal to Bargain*

1. The appropriate unit

The complaint alleges and the Regional Director has found in Case 3-RC-4368 that the following constitutes a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All production and maintenance employees, including bulk tank drivers, cash and carry drivers, and regular part-time employees, employed by the Respondent at its plant on Oneida Street in Syracuse, New York, but excluding all office clerical employees, all retail and wholesale routemen, route pullers, garage employees, and all guards, professional employees and supervisors as defined in the Act.

The answer denies that the unit set forth above is appropriate.

As indicated above, on March 14 and 20, a hearing was held on the RC petition at which the Respondent was afforded the right to offer evidence and argument on the issues, including the issue of the appropriate unit. While the Regional Director's unit finding was contrary to the Respondent's contentions, then and now, that only an overall plantwide unit is appropriate, it did not avail itself of the appeal and review procedures provided by the Board's Rules, Sec. 102.67 (b), and therefore no relitigation of the unit issue was permitted in this proceeding.[17] Such relitigation is expressly prohibited by paragraph (f) of the cited section which provides, in pertinent part, as follows:

> The parties may, at any time, waive their right to request review. Failure to request review shall preclude such parties from relitigating, in any related subsequent unfair labor practice proceeding, any issue which was, or could have been, raised in the representation proceeding.

Accordingly, I adopt the Regional Director's finding of an appropriate unit as controlling herein.[18]

2. The Union's majority status

The complaint alleges and the answer denies that, on or about February 14, 15, and 20, a majority of Respondent's employees in the unit found appropriate herein designated the Union as their exclusive collective-bargaining representative.

The General Counsel introduced into evidence two payroll lists of the Respondent. One covering the period February 12 through 17 and containing the names of 22 plant employees, the other the period February 19 through 24 with the same number of such employees. The parties agreed to exclude Reilly, the plant superintendent, as a supervisor. They also agreed that the name Bruce Richmond which appears in two places on the lists, but

[17]An offer of proof in support of the Respondent's unit contention was made and rejected.

[18]Distinguish *Stanley Air Tools, Division of the Stanley Works*, 171 NLRB No. 48, where relitigation of the issue of supervisory status was permitted on the theory that the issue in the unfair labor proceeding was unrelated to the earlier resolution in the representation case. Here, however, the alleged refusal to bargain in the unit found appropriate is clearly related to, and inextricably a part of, the prior determination. See also *Amalgamated Clothing Workers of America, AFL-CIO (Sagamore Shirt Company)* v. *N.L.R.B.*, 365 F.2d 898 (C.A.D.C.), and *Heights Funeral Home, Inc.* v *N.L.R.B.*, 385 F. 2d 879 (C.A. 5)

counted only once in the figure given above, is the name of the same individual and that he should be included in the unit. It is, therefore, concluded that, during the periods February 12 through 17 and February 19 through 24, there were 21 nonsupervisory employees in the unit found appropriate. The Union, therefore, needed 11 valid designations in those periods in order to have achieved a majority.

In support of the claim of majority representation, the General Counsel introduced 14 signed applications for union membership. The applications, with a perforated line across the center of each, were in the following form:

DAIRY AND BAKERY SALESMEN AND DAIRY EMPLOYEES UNION LOCAL 316
International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America
Syracuse, N.Y.

APPLICATION FOR MEMBERSHIP

Date Employed _____
Last Name _____ First Name _____ Init _____
Date of Birth _____
Address _____
Phone No _____
Amount Paid on Application $ _____
Soc. Sec. No. _____
Date Initiated _____ Beneficiary _____

I hereby designate the Dairy and Bakery Salesmen and Dairy Employees Union Local 316, through its authorized agents, as my representative for collective bargaining.

Plant _____ Dept. _____
Voucher
_____ Signed _____

CHECK-OFF AUTHORIZATION AND ASSIGNMENT

I, the undersigned member of Local No. 316 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herewith, authorize my employer to deduct from my wages each and every month my union dues, consisting of initiation fees, fines, and uniform assessments owing to such Local Union as a result of membership therein, and direct that such amounts so deducted be sent to the Secretary-Treasurer of such Local Union for and on my behalf.

This authorization and assignment shall be irrevocable for the term of the applicable contract between the Union and the Company, or for one year, whichever is the lesser, and shall automatically renew itself for successive yearly or applicable contract periods thereafter, whichever is he lesser, unless I give written notice to the Company and the Union at least 60 days and not more than 75 days before any periodic renewal date of this authorization and assignment of my desire to revoke the same.

I have read the above authorization and application and understand it and have signed it of my own free will. This is not to be applicable until 30 days after the date hereof.

Employee _____
Date _____ 19 ____
Witness: _____

Each application consisted of an original and duplicate copy. The Union retained the duplicates and sent the originals to the Board's Regional Office in Buffalo in support of its representation petition. Twelve were received there and time-stamped by a Board employee on February 19. The application signed on February 7 by Leonard A. Alsheimer, the cash and carry driver, was not forwarded to the Regional Office because the Union had been advised by its attorney to exclude all drivers from the requested unit. And, for reasons not disclosed, the application signed on February 15 by Victor James Rogers, the alleged discriminatee, does not bear a stamp.

The Respondent contends that, by the clear wording of the application, the designations were not effective until 30 days after execution and, therefore, that the Union did not represent a majority at any time material. In support thereof, Respondent points to the last paragraph in the bottom section of the application which reads as follows:

> I have read the above authorization and application and understand it and have signed it of my own free will. *This* is not to be applicable until 30 days after the date hereof. [Emphasis supplied.]

I find no merit in this contention. As noted above, the application is in two sections. The last sentence in the top section denominated: "APPLICATION FOR MEMBERSHIP," states:

> I *hereby* designate the Dairy and Bakery Salesmen and Dairy Employees Union Local 316, through its authorized agents, as my representative for collective bargaining. [Emphasis supplied.]

The term "hereby" obviously means that the applicant designates the Union as his bargaining representative as of the date he signs the application. The word "this," in the paragraph cited by the Respondent, refers to the authorization for checkoff and not to the application for membership.[19]

I turn now to a consideration of the validity of the applications. Each application bears the signature of the applicant in the top section and it appears again in the bottom section together with the signature of a witness. Assistant Business Agent Parry credibly testified that he observed each of the following named employees execute an application on the date which appears next to the employee's signature and that he signed each as a witness:

Patrick J. Dowling	2/7/68
Leonard A. Alsheimer	2/7/68
Richard C. Walker	2/9/68
Albert V. Bart	2/13/68
Joseph F. Pistello	2/13/68
Harry E. Wells	2/13/68
Donald E. Wells	2/13/68
Robert J. Doupe	2/13/68
Bruce C. Doupe	2/14/68
Donald E. Haas	2/14/68
James B. Streeter	2/14/68
Erie J. Crump	2/14/68
Andy J. Clendenning	2/14/68
Victor James Rogers	2/15/68

Except in the cases of Dowling, who signed his application in the presence of his sister and Parry, and Alsheimer, who signed in Parry's presence alone, all applications were executed in the presence of other employees and Parry. Streeter signed his application in Flanigan's bar before Parry, Dowling, and Walker. After execution, Parry immediately assumed control of all applications.

The 14 applications were received in evidence. No irregularities in signature or date appear on any of them and, after their receipt, Respondent presented no detailed proof to rebut the presumption arising from the unambiguous language on the applications. In view of the

[19] An application identical in form to the one here in question was found to be a valid present designation in *Marsellus Vault & Sales, Inc.*, 170 NLRB No. 99

foregoing and considering the credited testimony concerning the signing of the applications on February 7, 9, 13, 14, and 15, Parry's immediate assumption of custody and his identification of the applications at the hearing, I conclude and find that the 14 applications constitute valid designations[20] and that, accordingly, on February 14 and thereafter, the Union represented a majority of the 21 employees in the unit herein above found to be an appropriate bargaining unit. In reaching this conclusion, I am not unmindful of Respondent's contention that any presumption of validity that might attach to the applications is destroyed by Parry's alleged statement to Haas that the signing of the application was not for the purpose of collective bargaining and by Parry's statement to Clendenning that the Union "had plenty of signatures without mine but they wanted me to be a part of them." There is no evidence the employees were told that the only purpose of the applications was to secure a Board election. On the contrary, it was affirmatively established that they were informed, in unmistakable language, that the applications would have the effect of designating the Union as their bargaining agent and that purpose is clearly stated on the face of the application. Haas testified Parry read the portion of the application to him which states that the applicant designates the Union his representative for collective bargaining. Accordingly, I credit this later statement of Haas and find that the earlier remark, cited by the Respondent, ensued from a misunderstanding of the question propounded. With regard to Clendenning, it does not appear that the statement attributed to Parry was contrary to the fact as Clendenning signed on February 14, the day the Union received a total of 13 signed applications, 2 in excess of the required majority. Accordingly, I reject the contention.

3. The Union's bargaining demands and the Respondent's refusals

The complaint alleges and Respondent denies that "commencing on or about February 14, 1968, and continuing to date, more particularly on February 14, 15, and 20, 1968, the Union has requested, and is requesting, Respondent to bargain collectively" with it as the exclusive collective-bargaining representative of the employees in the unit found appropriate herein, and that "commencing on or about February 14, 1968, and at all times thereafter, Respondent did refuse, and continues to refuse, to bargain collectively with the Union" but instead engaged in a course of conduct designed "to undermine the Union and destroy and dissipate its majority status. . ."

The Union first demanded recognition and bargaining rights by telegram dated February 14 addressed to John M. Byrne, president of Respondent. After stating that the Union has been designated bargaining representative by a majority of employees in a unit of all inside production and general help employees employed at the Respondent's Oneida Street location excluding drivers and all other employees and all other locations of Respondent's operation, the telegram adds: "If you have any questions concerning our majority standing, we would be willing to submit to a card-check by an impartial person to satisfy you in this regard. Please contact me immediately to arrange a bargaining meeting." The name Patrick F. Shanahan, president of the Union, appears at the bottom of the telegram.

M. Harold Dwyer, attorney for Respondent, replied on February 15 by letter which reads, in part, as follows:

> Please be advised that Byrne Dairy, Inc. has a good faith doubt that you do, in fact, represent a majority of those of its employees who would constitute an appropriate collective bargaining unit and, therefore, your demand for recognition is denied.
>
> Should you be in disagreement with the position of our client as stated herein, we suggest that you establish your claim in accordance with the National Labor Relations Act.

On February 15, Shanahan sent a letter to John Byrne repeating the Union's earlier demand for recognition and bargaining and again offering to prove its majority by a card check. In addition, the unit in which the Union claimed a majority interest was set forth as follows:

> All inside production, maintenance and general help employees employed [by Respondent] at [its] 240 Oneida Street, Syracuse, N.Y. plant and excluding all drivers, mechanics, office clerical, store clerks, sales personnel, supervisors, guards, solicitors, and excluding all employees employed at locations other than the Oneida Street, Syracuse, N.Y. plant.

By letter dated February 19, Shanahan acknowledged receipt of Dwyer's communication of February 15, and again repeated the Union's demand for bargaining rights and its offer to submit to a card check. In reply, Dwyer, by letter dated February 20, advised the Union, in part, as follows.

> We do not accept your offer to determine the matter of representation by a card check.
>
> We are ready to meet and bargain as soon as a representative has been certified by the National Labor Relations Board. In view of your petition to that end which is now pending before the Board, such a meeting would be premature at this time.

From the above, I find that on February 14 the Union demanded recognition, that this was refused by the Respondent on February 15, that the Union renewed its demand on February 15 and 19 and that on February 20 Respondent again refused recognition. Furthermore, I find that the Union's demands and the Respondent's refusals have both persisted until the present.

It has been found above that the Union attained a majority status on February 14, therefore, the Respondent's failure to recognize or bargain with the Union on and after February 15 — when the demand was renewed — constituted a violation of the Act unless the Respondent's refusal was excused by a variance in the unit or was based upon a good-faith doubt of the Union's majority status.

Initially, a question is presented whether the inclusion of two bulk tank drivers[21] and one cash and carry driver[22] in the unit found appropriate above constitutes a substantial variance between the appropriate unit and that which the Union proposed as to relieve Respondent of its statutory obligation to bargain. The inclusion of these employees in the appropriate unit does not alter the Union's majority status or change the basic character of the unit. I find, therefore, the variance between the

[20] See *Hunter Engineering Company*, 104 NLRB 1016, 1020, enfd. 215 F.2d 916 (C.A. 8).

[21] Mortimer Reed, Jr., and Bruce Richmond.

[22] Leonard A. Alsheimer.

requested unit and the appropriate unit to be insubstantial.[23]

Respondent contends that it had a serious doubt with regard to the appropriateness of the unit requested by the Union and this doubt was reinforced by the filing of the petition for certification in which the Union itself raised a question of representation. The contention lacks merit. In electing to rely on its belief that a plantwide unit was the only appropriate unit, a position rejected by the Regional Director, Respondent acted at its peril and in violation of the Act.[24] Moreover, the filing of a representation petition by a union does not *per se* suspend an employer's bargaining obligation where, as in this case, the Respondent engages in unfair labor practices during the preelection period.[25] Respondent also contends that its doubts about the Union's majority stemmed from a long history of attempts by the Union to organize its employees and prior claims of majority interest which were never substantiated. It is evident enough, however, that Respondent refused the Union's suggestions, contained in its requests of February 14, 15, and 19, that a card check be made by a disinterested third party to establish its claim and, instead, embarked upon a series of activities violative of Section 8(a)(1) detailed above. The February 20 speech to all plant employees was one such instance, the interview the following day with Haas was another. Clearly, these occasions of interference, restraint, and coercion were sufficiently pervasive and serious to destroy any possibility of conducting a free election.[26] Viewed in the light of these events, I am persuaded and find that the Respondent's refusal to recognize and bargain with the Union, on and after February 15, was not based, as it contends, on a good-faith doubt of the Union's majority but instead was motivated by a desire to gain time within which to dissipate the Union's majority. By such conduct, Respondent violated Section 8(a)(5) and (1) of the Act.[27]

D. *The Separation of Victor James Rogers*

1. Facts

On February 3, Rogers applied for work at Respondent in response to a newspaper advertisement for truckdrivers or route men. Ronald Kelly, an employee, informed Rogers that there were no openings in those classifications and suggested that he talk to William Byrne with regard to a position in the plant. In the interview with Byrne, conducted in the presence of Plant Superintendent Tom Reilly, Byrne told Rogers that he was overstaffed but could give him temporary work in the plant and asked Rogers why he wanted to work for the Respondent. Rogers replied that he intended to move from the village of Palymra and sought permanent work in Syracuse. Byrne then said that the job would be full-time but temporary, that he could not guarantee permanent employment and would not want Rogers to move to Syracuse thinking he had a permanent assignment. Rogers did not flatly deny these assertions stating only that he did not recall Byrne telling him the work would be temporary. In any event, Byrne offered Rogers employment at once and Rogers accepted. However, since Rogers was employed elsewhere at the time, Byrne deferred to Rogers' request for 2 weeks' delay. Rogers commenced his employment at Byrne on February 6,[28] and worked on the paper operating machine until he was laid off on February 27.

Rogers signed a union application on February 15, as found above, and attended the February 20 meeting of all plant employees. In the interview with Haas on February 21, Haas told Vincent and William Byrne that Rogers and eight other employees were union supporters.

Sometime between 5:30 p.m. and 6 p.m. on February 26, while Rogers was completing his work for the day, William Byrne saw Rogers with empty boxes and asked why he needed them. Rogers replied that he intended to use them to pack his belongings for the move to Syracuse. Byrne said he could not stop Rogers from moving and reminded Rogers that he was advised, at the time of the initial interview, not move to Syracuse because of the job. Byrne then told Rogers that two employees who he thought were leaving when he hired Rogers had decided to remain and, as a result, he would have to let Rogers go because he had too much help. Byrne asked Rogers if he would report for work the next day and Rogers said that he would report as usual.

At the close of the workday on February 27, Rogers went to William Byrne's office where Byrne handed Rogers his pay envelope and told him he was through Rogers asked why he was being terminated. Byrne replied that he had no complaints about Rogers' work, that it was satisfactory in every way, and that it was simply a matter of the Company having more help than it needed. Rogers testified that Byrne then asked what he (Rogers) would do if he were in Byrne's shoes and he (Rogers) replied that he would dismiss one of the two employees Byrne thought was leaving as both had military obligations. Rogers recalled that Byrne named Pistello but said that Haas was not mentioned. Finally, Byrne told Rogers that he would recall him when there was an opening.

Byrne's version of the exit interview was in accord with Rogers' in all essential particulars except Byrne testified he told Rogers that he had talked to Haas and Pistello the previous Thursday or February 22, that both stated, contrary to earlier expressions, they were not leaving[29] and that, since Rogers was the last man hired, he would be the first laid off. Both Haas and Pistello testified that Byrne told them, before Rogers was laid off, he had too much help.

[23] *Delight Bakery, Inc*, 145 NLRB 893, enfd. 353 F.2d 344 (C.A. 6), *United Butchers Abattoir, Inc.*, 123 NLRB 946; *American Rubber Products, Corp.*, 106 NLRB 73.

[24] *Tom Thumb Stores, Inc.*, 123 NLRB 833.

[25] See *United Butchers Abattoir, Inc., supra.*

[26] See *N.L.R.B.* v. *River Togs, Inc*, 382 F 2d 198 (C A 2), enfg. in part and denying in part 160 NLRB 58.

[27] *Joy Silk Mills, Inc.*, 85 NLRB 1263, enfd as modified 185 F.2d 732 (C A.D.C.) cert denied 341 U.S 914; *Irving Air Chute Company, Inc.* v. *N.L R.B.*, 149 NLRB 627, enfd 350 F.2d 176 (C.A. 2); see also *International Metal Specialties, Inc.*, 172 NLRB No 39.

[28] Rogers was allegedly summarily discharged by his former employer upon presentation of 2 weeks' notice of his intention to quit.

[29] The underlying facts with regard to the alleged change in positions of Haas and Pistello are as follows. Haas disliked the milk business and was unhappy in his work. Although Haas testified he was uncertain whether he had discussed the subject of his leaving with Byrne in January, I think it is highly probable that the subject was discussed in that month. Accordingly, I do not credit Haas' statement that he first told Byrne he was leaving on February 27 or his denial of a conversation with Byrne on February 22. A composite reading of Haas' testimony leads me to the conclusion that Haas announced he was leaving in January and reaffirmed his intention on February 22, the day after the interview, with a caveat that left open for the indefinite future the actual date of his departure

Pistello told Byrne, in January, that he was going to enlist in the Air Force. Later, in the same month or early in February, he announced that he could not enlist and, therefore, had decided to take his chances in the draft. The net result of all this was an expression by Haas on February 22 and an earlier indication from Pistello of their intentions to remain with the Respondent for indefinite periods. Accordingly, Byrne's statements to

On March 5, William Byrne wrote Rogers, at his last known address in Palmyra, advising him that there was no vacancy in his classification and requesting his telephone number for future use. In April, Rogers stopped in to see William Byrne, told Byrne that he had moved to Syracuse, and inquired about an opening. As there was no vacancy at the time, Byrne again promised to contact Rogers when one occurred. Sometime in May, but before the Board election on May 9, Byrne visited Rogers in his home and offered him employment in the classification he held at the time of the layoff. Rogers agreed to return on May 13 but did not report as he had promised. Notice of Respondent's offer to Rogers was posted on the Company's bulletin board. On May 15, one Burt Brown, a former employee and an experienced paper machine operator, was given the job offered Rogers on May 13. No new employee was hired between February 27 and May 15. Rogers voted in the Board election.

2. Contentions of the parties

The complaint alleges and the answer denies that, on or about February 27, Respondent laid off Rogers and thereafter failed and refused to reinstate him "because [he] joined or assisted the Union or engaged in other union or concerted activities for the purpose of collective bargaining or mutual aid or protection." The Respondent attributes the layoff solely to economic factors.

3. Conclusions

Rogers' union activities were limited to signing a union membership application. Vincent and William Byrne knew this because Haas told them during the February 21 interview. However, apart from signing an application, Rogers played no role in the organizational campaign. In fact, Rogers was probably the least active of all union supporters. He was not in any of the groups of employees that accompanied Parry in soliciting signatures from fellow employees and was the last employee to sign a membership application.

According to the Byrnes, as shown above, Respondent decided in February to reduce the size of its staff because of an over supply of help and Rogers was selected for layoff on February 27 because he had less seniority than any other employee. It was affirmatively established that by letter dated March 5 Byrne asked Rogers to forward his telephone number for use in the event of a vacancy and that, in early May, Respondent recalled Rogers in the classification he held at the time of the layoff but Rogers failed to report for work although he had agreed to do so.

The General Counsel asserts that, even assuming Haas and Pistello had changed their minds before the layoff and decided to remain, there was no economic justification for the layoff of Rogers because employee Wallace left Respondent's employ the day Rogers was hired and employee Don Wells quit the day Rogers was laid off. From this premise he argues that, since the assigned reason can not be sustained, the real reason for the layoff must be found in Rogers' prounion sympathies and Respondent's opposition to the Union. I find no merit in the argument. Whether the layoff was economically justifiable is not a matter ofconcern to the Trial Examiner. It is elementary that an employer may discharge, or as in this case, layoff an employee for cause or even no cause at all provided it is not for union membership or activity. The crucial question, in the first instance, is the motivating reason for the layoff.

Surely, Respondent knew Rogers had signed a union application. It was also well aware that at least six other employees had signed applications, including Dowling, who Vincent Byrne observed had been in union processions before. Yet, Dowling continued in Respondent's employ and was employed on the date he appeared and testified at the hearing. It is not disputed that Rogers was junior in seniority to all plant employees; that, consistent with an earlier promise, Respondent, in early May, recalled Rogers in the classification he held at the time of the layoff; and that, when Rogers failed to report for work as he had agreed, Respondent hired another person. It is abundantly clear, therefore, that Respondent's actions and conduct effectively refute the claim that the layoff was motivated by an antiunion purpose. Further, the allegation that Respondent failed and refused to recall Rogers is contrary to the facts. Accordingly, as the General Counsel has failed to sustain his burden of proving, by a preponderance of the evidence, that the selection of Rogers for layoff was discriminatorily motivated, I shall recommend that the allegations of discrimination set forth in the complaint in Case 3-CA-3450 be dismissed.

III. THE UNION S OBJECTIONS TO THE ELECTION

In the objections to the election in Case 3-RC-4368, the Union alleges, in relevant parts, that, since on or about February 14, the Respondent ". . . unilaterally made substantial offers of improvement in benefits and conditions with the purpose and effect of substantially affecting the outcome of the election. The Employer discharged one employee, threatened other employees, conducted interrogation and surveillance and harassment of employees concerning their membership and activity on behalf of the Union."

In the Order Consolidating Cases and Notice of Hearing dated June 21, the Regional Director ordered that a Trial Examiner shall prepare a Decision and, upon issuance of the said Decision, Case 3-RC-4368 shall be transferred to and continued before the Board.

The critical period here runs from February 19, 1968, when the Union's representation petition was filed, to May 9, 1968, the date of the election. *Ideal Electric and Manufacturing Company,* 134 NLRB 1275, 1278.

The evidence upon which the General Counsel and the Union rely to sustain the objections is the same as that offered in support of the 8(a)(1) and (3) allegations. To the extent that I have already found the 8(a)(1) allegations to constitute unlawful conduct and, as such conduct occurred during the critical preelection period, it is unnessary to restate those findings in a parellel context. It is sufficient to say that the instances of interference, restraint, and coercion found above more than adequately support the objections filed here.[30] Accordingly, I conclude and find that by such conduct Respondent interfered with its employees' freedom of choice in the election held on May 9. I shall, therefore, recommend that the objections be sustained, the election held on May 9 in Case 3-RC-4368 be set aside, and that the petition filed therein be dismissed.[31]

Rogers on February 26 and 27 that two employees had decided to remain was consistent with the basic facts.

[30]See *Playskool Manufacturing Company,* 140 NLRB 1417, 1419; *Overnite Transportation Company,* 158 NLRB 879, 884

[31]*Irving Air Chute Company, Inc., Marathon Division,* 149 NLRB 627,

IV. THE EFFECTS OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section II, above, occurring in connection with Respondent's operations described in section I, above, have a close, intimate, and substantial relationship 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.

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

CONCLUSIONS OF LAW

1. Byrne Dairy, Inc., is, and has been at all times material, an employer within the meaning of Section 2(2) of the Act, and is, and has been at all times material, engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Dairy & Bakery Salesmen & Dairy Employees Union Local 316, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America is, and has been at all times material, 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 rights guaranteed in Section 7 ofthe Act, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. All production and maintenance employees, including bulk tank drivers, cash and carry drivers, and regular part-time employees employed by Respondent at its plant on Oneida Street in Syracuse, New York, but excluding all office clerical employees, all retail and wholesale routemen, route pullers, garage employees, and all guards, professional employees and supervisors as defined in the Act, constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

5. The above-named labor organization was, on February 14, 1968, and at all times since has been, the exclusive representative of all employees in the unit described above for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment, or other terms and conditions of employment.

6. By refusing, on and after February 15, 1968, to bargain collectively with the above-named labor organization as the exclusive representative of all employees in the unit described above, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (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.

8. The General Counsel has failed to establish that Respondent discriminated against Victor James Rogers, or committed any other violation alleged in the complaints but not herein found.

9. Respondent's conduct as found hereinabove improperly affected the results of the election held on May 9.

629-630, enfd. 350 F 2d 176 (C.A. 2, 1965)

The Remedy

Having found that Respondent violated Section 8(a)(1) and (5) of the Act, I shall recommend that it cease and desist therefrom and take certain affirmative action, including the posting of appropriate notices, designed to effectuate the policies of the Act.

Having found that Respondent's conduct improperly affected the results of the election held herein, I shall recommend that the election held on May 9, in Case 3-RC-4368, be set aside and the petition filed therein be dismissed.

Having found that the Union had a valid card majority and that Respondent did not have a good-faith doubt in refusing to bargain with the Union, and that it committed unfair labor practices to erode the Union's majority, I shall recommend that Respondent recognize and, upon request, bargain collectively with the Union as the exclusive representative of the employees in the unit found appropriate herein.

It will further be recommended that the complaint in Case 3-CA-3450 be dismissed, insofar as it alleges that Respondent discriminatorily laid off and failed and refused to reinstate Victor James Rogers, or committed any other violation alleged in the complaint but not herein found.

Upon the basis of the foregoing findings of fact and conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following:

RECOMMENDED ORDER

Byrne Dairy, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interfering with, restraining, or coercing its employees in the exercise of their statutory rights within the meaning of Section 8(a)(1) of the Act, by interrogati ng them about union matters, soliciting information from them as to how the Union may be defeated, threatening them with discharge, plant closure, loss of paid lunch period, scholarship fund, or retirement benefit in the event they became or remained members of the Union, making implied promises of general benefit if they refrained from becoming or remaining mem bers of the Union, and keeping under surveillance, and/or giving the impression that it is keeping under surveillance the union activities of its employees.

(b) Advising employees that if they sign the Union's authorization form their signatures are forever.

(c) Refusing to bargain collectively concerning rates of pay, wages, hours of employment, or other terms and conditions of employment with Dairy & Bakery Salesmen & Dairy Employees Union Local 316, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, as the exclusive representative of its employees, in the following appropriate unit:

> All production and maintenance employees, including bulk tank drivers, cash and carry drivers, and regular part-time employees employed by Respondent at its plant on Oneida Street in Syracuse, New York, but excluding all office clerical employees, all retail and wholesale routemen, route pullers, garage employees, and all guards, professional employees and supervisors as defined in the Act.

(d) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights guaranteed in Section 7 of the Act.

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

(a) Upon request, bargain collectively with Dairy & Bakery Salesmen & Dairy Employees Union Local 316, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, as the exclusive representative of all its employees in the above-described appropriate unit with respect to rates of pay, wages, hours of employment, or other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed contract.

(b) Post at its plant in Syracuse, New York, copies of the attached notice marked "Appendix."[32] Copies of said notice, on forms provided by the Regional Director for Region 3, after being duly signed by Respondent's representative, shall be posted by 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 by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 3, in writing, within 20 days from the receipt of this Decision, what steps have been taken to comply herewith.[33]

IT IS ALSO RECOMMENDED that the complaint in Case 3-CA-3450 be dismissed insofar as it alleges that the Respondent discriminated against Victor James Rogers or committed any other violation alleged in the complaint but not herein found.

IT IS FURTHER RECOMMENDED that the Union's objections to the conduct of the election held on May 9, in Case 3-RC-4368, be sustained, that the said election be set aside, and that the petition for certification of representatives filed therein be dismissed.

[32]In the event that this Recommended Order is adopted by the Board, the words "a Decision and Order" shall be substituted for the words "the Recommended Order of a Trial Examiner" in the notice. In the further event that the Board's Order is enforced by a decree of a United States Court of Appeals, the words "a Decree of the United States Court of Appeals Enforcing an Order" shall be substituted for the words "a Decision and Order."

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

APPENDIX

NOTICE TO ALL EMPLOYEES

Pursuant to the Recommended Order of a Trial Examiner of the National Labor Relations Board

After a trial in which all parties had an opportunity to present evidence, a Trial Examiner of the National Labor Relations Board found that we, Byrne Dairy, Inc., violated the National Labor Relations Act and ordered us to post this notice to inform our employees of their rights.

The Trial Examiner's Recommended Order has directed us to assure our employees that:

WE WILL NOT question you about your union activities; solicit information from you as to how Dairy & Bakery Salesmen & Dairy Employees Union Local 316, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, herein at times called the Union, may be defeated; threaten you with discharge, plant closure, loss of paid lunch period, scholarship fund, or retirement benefit in the event you become or remain members of the Union; make implied promises of general benefit if you refrain from becoming or remaining members of the Union; and, we will not keep under surveillance your union activities and/or give the impression that we are doing this.

WE WILL NOT tell you that if you sign the Union's authorization form your signature is forever.

WE WILL NOT refuse to bargain collectively with Dairy & Bakery Salesmen & Dairy Employees Union Local 316, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, as the exclusive representative of all the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your right to self-organization, to form, join, or assist any labor organization, to bargain collectively with us concerning terms or conditions of employment through representative you select, or to refrain from any of these activities if you so choose, except as these rights may be affected by a contract validly made under the National Labor Relations Act, whereby membership in a labor organization is a condition of employment after the 30th day following the date of the contract or the beginning of a person's employment, whichever is later.

WE WILL, upon request, bargain collectively with Dairy & Bakery Salesmen & Dairy Employees Union Local 316, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, as the exclusive bargaining representative of all employees in the bargaining unit described below concerning rates of pay, wages, hours of employment, and other terms and conditions of employment, and, if an agreement is reached, embody it in a signed contract. The bargaining unit is:

> All production and maintenance employees, including bulk tank drivers, cash and carry drivers, and regular part-time employees employed at our Oneida Street plant in Syracuse, New York, but excluding all office clerical employees, all retail and wholesale routemen, route pullers, garage employees, and all guards, professional employees and supervisors as defined in the Act.

All our employees are free to become or remain members of Dairy & Bakery Salesmen & Dairy Employees Union Local 316, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, and we won't punish you in any way if you do.

BYRNE DAIRY, INC.
(Employer)

Dated By
(Representative) (Title)

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

Any questions concerning this notice may be directed to the Board's Regional Office, Fourth Floor, The 120 Building, 120 Delaware Avenue, Buffalo, New York 14202, Telephone 842-3100.