conflict with the previous decisions rather than distinguishable from them. The mere fact that the Petitioner is seeking a unit of guards rather than a production and maintenance unit does not touch the essential problem as stated in American Dyewood of whether or not the Board is to disrupt the numerous collective-bargaining contracts voluntarily established by unions and management in an effort "to determine whether they have covered the working conditions of individual employees whom the Board, if called upon to make a decision, would exclude." The Act does not call upon this agency to do so, as the majority admits, and I find no congressional intent in Section 9 (b) (3) or elsewhere for the policing and disruption of such voluntary arrangements as arrived at herein.

For these reasons, I would overrule the Nash Kelvinator decision as inconsistent and in conflict with the precedent set forth in American Dyewood and Sonotone Corporation. In accord with the ruling of the latter named decisions, I would further dismiss the petition filed herein on the ground that it is barred by the current contract between the Employer and the Intervenor.

Member Beeson took no part in the consideration of the above Decision and Direction of Election.

ROADWAY EXPRESS, INC. *and* JESS E. CAWTHORN *and* WALTER C. BUXTON

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL 823, AFL *and* JESS E. CAWTHORN *and* WALTER C. BUXTON *and* RALPH E. HAYES. Cases Nos. 16-CA-662, 16-CA-663, 16-CB-49, 16-CB-50, and 16-CB-51. May 18, 1954.

DECISION AND ORDER

On January 11, 1954, Trial Examiner C. W. Wittemore issued his Intermediate Report in these consolidated cases, finding that the Respondents had both engaged in and were engaging in certain unfair labor practices 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 Company and the Respondent Union filed exceptions to the Intermediate Report and supporting briefs.

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,[1] and the entire record in the cases,[2] and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner with the following additions and explanations:

1. We are in full agreement with the Trial Examiner's findings that the Respondent Union restrained and coerced employees in the exercise of their privilege to question the wisdom of their Union as their representative,[3] violating Section 8 (b) (1) (A) of the Act by the various threats of reprisal and reprisals, set forth in the Intermediate Report,[4] which it made to employees who had protested the Local's bargaining practices to its International and requested an investigation by the International.

In so finding, we adopt the credibility findings of the Trial Examiner. The Respondent Union excepts to the Trial Examiner's refusal to credit Union Steward Kaylor's denials of the statements attributed to him, primarily because the Examiner did not describe what aspects of Kaylor's demeanor as a witness made him incredible. To the contrary, we recognize that credibility findings may rest entirely upon evidence through observation which words do not, and could not, either preserve or describe. Considering the possible cogency of such evidence, we find no warrant here for refusing to accept the Trial Examiner's credibility findings.[5] For these reasons, we also adopt his findings in relation to the Hayes' book episode and to the assault on Buxton. Contrary to the Respondent Union's con-

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[1] Both Respondents except to the Trial Examiner's action in denying their several motions to sever the cases herein. The Respondent Union excepts to his reliance upon evidence introduced in the cases against the Respondent Company, particularly to the use made of the intracompany memorandum from Terminal Manager K. E. McLinn to Southwest Division Manager G. W. Gore, dated July 25, 1953. Consolidation is a matter for administrative discretion. The propriety of the consolidation here is in part established by the fact that witnesses such as McLinn testified as to the subject matter of both the CA and CB cases. See Seamprufe, Inc., 82 NLRB 892, enforced 186 F. 2d 671 (C. A. 10), cert. denied 342 U. S. 813; The North Electric Manufacturing Company, 84 NLRB 136. Accordingly, we find no merit to the contentions against consolidation and hereby deny the renewed motions to deconsolidate the cases.

[2] As the record, exceptions, and briefs, in our opinion, adequately present the positions of the parties, we hereby deny the Respondents' separate requests for oral argument.

[3] The privilege to protest and to question the wisdom of their bargaining representative and to persuade others or take such steps as they deem necessary to align their union with their position is inherent in the employee's right to self-organization as guaranteed by Section 7 of the Act. Nu-Car Carriers, Inc., 88 NLRB 75, at 76-77, enforced 189 F. 2d 756 (C. A. 3), cert. denied 342 U. S. 919.

[4] For comparable types of restraint and coercion see Salt River Valley Water Users Association, 99 NLRB 849, enforced as modified (on other grounds) 206 F. 2d 325 (C. A. 9); Progressive Mine Workers v. N. L. R. B., 187 F 2d 298 (C. A. 7), enforcing as modified (on other grounds) 89 NLRB 1490.

[5] N. L. R. B. v. James Thompson & Co., Inc., 208 F. 2d 743 (C. A. 2), enforcing as modified (on this ground) 100 NLRB 456; Standard Dry Wall Products, Inc. v. N. L. R. B., 188 F. 2d 362 (C. A. 3).

tentions, such findings, in our opinion, follow the logic of the events concerned. [6]

We also find without merit the Respondent Union's contention that it cannot be held liable for Powell's assault upon Buxton because Powell's agency is not established. Assistant Business Agent Kennison (Kinnison) made it clear that he would have assaulted Buxton had he been able to do so, thereby participating in the assault made by Powell. Under these circumstances, it is immaterial whether Powell was actually authorized to assault Buxton. [7]

2. The Trial Examiner found, and we agree, that the Respondent Union violated Section 8 (b) (1) (A) (2) by causing the Respondent Company to discharge Walter C. Buxton and Jess E. Cawthorn in violation of Section 8 (a) (3) of the Act.

Buxton was discharged by McLinn on July 30, 1953, for the stated reason that he had been carrying firearms on company equipment while on duty; Cawthorn was discharged by McLinn on July 27, 1953, for the stated reason that he had not reported for his run on the night of July 25 (in fact, July 24), had not obtained permission from McLinn to be absent, and had allegedly been previously warned in the matter. Buxton had carried firearms and Cawthorn had failed to report his intended absence to McLinn. Accordingly, the Respondent Company asserts that they were discharged for cause and that its knowledge that the Respondent Union desired their termination was coincidental, not causative. The Respondent Union argues in its exceptions and brief that it cannot be held responsible for the discharge of either Buxton or Cawthorn as they were both discharged by the Respondent Company for the Company's reasons. It concedes that it requested the Respondent Company to promulgate a rule against the carrying of firearms and informed McLinn that Buxton had been armed, but contends that it did not "cause" his discharge in that it did not "prescribe in any way what punishment should be given to Buxton as long as he ceased carrying the gun." The Respondent Union argues that it is even more clearly absolved from any responsibility for Cawthorn's discharge because it neither informed the Respondent Company of any dereliction on his part nor knew until after his discharge that he was subject to discharge, for reasons it did not supply. The Respondent Union also questions the theory of any violation in the discharge of employees who remain members in good standing with the Union and who failed to process their grievance against their discharge through their Union, as provided both in the contract between the Union and their Employer and in the Union's bylaws.

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[6] The Respondent Union contends that the fact that Webb got Hayes' book returned and that the strike was soon settled thereby establishes that it was retained for the reasons he asserted. We find it as reasonable to assume that had the facts been as he asserted, he would have ended the walkout by a simple explanation to the strikers and to Hayes, rather than having to make the trip of more than 20 miles to Joplin to recover the book.

[7] See Section 2(13) of the Act; United Electrical Workers, etc., Local 914, 106 NLRB 1372.

On the record considered as a whole, these contentions lack merit. On July 23, Assistant Business Agent Kennison gave Terminal Manager McLinn a statement "signed by every driver attending the meeting" (which the Union held to discuss the strike emergency on July 23, 1953), asserting that "they refused to work as long as Roadway kept these 3 men Buxton, Hayes and Cawthorn, or assured them they were safe out on the road." During the all-night session which followed, both Kennison and Business Agent Webb repeatedly threatened McLinn with "trouble with the City contract until these 3 Road drivers were layed off [sic]." Immediately thereafter, the Respondent Company discharged Buxton and Cawthorn for reasons which under the circumstances surrounding each discharge afforded it the pretext for honoring the Union's request by eliminating them. The contract between the Respondents provided that at least one warning notice in writing be sent before an employee may be discharged. The patent purpose of such provisions is to afford an employee a grace period for reform. This purpose was ignored with respect to both Buxton and Cawthorn. After his assault by Powell, in May, Buxton had carried firearms in the unconcealed manner which police authorities told him was legal without being criticized by the two supervisors who knew he was so armed. The company rule against carrying firearms was first promulgated on July 24, 1953, when Buxton was on vacation. He was discharged before he returned from vacation, without being given a chance to discontinue the conduct which had, since he engaged in it, been declared against company policy. On May 8, Cawthorn received a routine warning, which he was told to disregard, because he had delayed his run on May 1, refusing as the Respondents knew, to report until Hayes' union book was returned. Contrary to the assertion in his discharge notice, he had not earlier been warned against reporting absences to dispatchers. Although there was a company rule requiring employees to obtain time off from McLinn, the record establishes that dispatchers frequently authorized absences. Cawthorn had obtained permission through a dispatcher to miss his run on July 24, 1953, as he had done several times in the past without difficulty or reprimand. Reviewing these facts in the light of the Respondent Union's threats, we think the pretension in the asserted reasons for discharge patent.[8] Therefrom, we can only conclude with the Trial Examiner that the true reason for the discharges of both Buxton and Cawthorn was the pressure for their discharge which the Respondent Union applied to the Respondent Company.[9] Moreover, the fact that Business Agent and Local

[8] Accordingly, we need not, and do not, pass upon the validity of the legal argument of the parties that neither an employer nor a union violates the Act when the union requests a discharge for reasons which are unrelated to even supposed obligations of membership and the employer adopts that reason for a discharge which is for cause, within the meaning of Section 10 (c) of the Act.

[9] Although the record does not permit us to hazard an explanation for the Respondent Company's failure similarly to discharge Hayes, we can attach no significance here to such inaction.

President Webb on July 23, 1953, "repeatedly talked" to McLinn and his companion, who were investigating the causes for the strike, about the "attitudes of Buxton and Hayes, showing them "copies of the letters they had written to the International Union," establishes that the Respondent Union by requesting their discharge sought to rid its ranks of dissidents and that the Respondent Company knew the Respondent Union's purposes. Under these circumstances the Respondent Union caused the Employer to discriminate against Buxton and Cawthorn in violation of Section 8 (a) (3) because they had engaged in protected concerted activities which were objectionable to the Union, thereby encouraging membership in and unquestioning loyalty to the policies of the local Union.[10]

3. Like the Trial Examiner, we find that the Respondent Company violated Section 8 (a) (3) and (1) by yielding to the Respondent Union's demand that Buxton and Cawthorn be discharged because they had engaged in protected concerted activity which was objectionable to the Union.

For the reasons stated above in paragraph 2, we reject the Respondent Company's contention that the discharges were for cause within the meaning of Section 10 (c). We also reject the contention of the Company that it should be absolved of liability for the discriminations because two different groups of its employees, for reasons beyond its control, were unable to continue to work together in reasonable satisfaction and the discharges were the means it took to correct the situation. It is well settled that the statute permits no such action.[11]

ORDER

Upon the entire record in these cases, and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that:

A. The Respondent Company, Roadway Express, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Encouraging membership in International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 823, AFL, or in any other labor organization of its employees, or discouraging membership in any labor organization of its employees, by discriminating in regard to their hire or tenure of employment or any term or condition of their employment, except to the extent permitted by the proviso to Section 8 (a) (3) of the Act.

(b) In any manner interfering with, restraining, or coercing its employees in the exercise of the rights to self-organization, to form labor organizations, to join or assist any labor organi-

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[10] Radio Officers' Union of the Commercial Telegraphers, etc. v. N. L. R. B., 347 U. S. 17. Under this rationale, it is obviously immaterial whether or not the discriminatees remained members of Respondent Union.

[11] See, e.g., Oertel Brewing Co. et al. v. N. L. R B., 197 F. 2d 59, 62 (C. A. 6); Lloyd A. Fry Roofing Co. v. N. L. R. B., 193 F. 2d 324, 327 (C. A. 9).

zation, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or 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.

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

(a) Offer to Jess E. Cawthorn and Walter C. Buxton immediate and full reinstatement to their former or substantially equivalent positions without prejudice to their seniority or other rights and privileges.

(b) Upon request make available to the Board or its agents, for examination and copying, all payroll records, social-security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amounts of back pay due.

(c) Post at its terminal in Miami, Oklahoma, copies of the notice attached to the Intermediate Report and marked "Appendix A."[2] Copies of said notice, to be furnished by the Regional Director for the Sixteenth Region, shall, after being duly signed by the Respondent Company's representative, be posted by it immediately upon receipt thereof and be maintained by it for a period of at least sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent Company to insure that such notices are not altered, defaced, or covered by any other material.

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

B. The Respondent Union, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 823, AFL, its officers, representatives, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Causing or attempting to cause, in any manner, Roadway Express, Inc., its officers, agents, successors, and assigns, to discriminate against its employees in violation of Section 8 (a) (3) of the Act.

(b) In any manner restraining or coercing employees of Roadway Express, Inc., its successors or assigns, in the exercise of their rights to self-organization, to form labor organizations, to join or assist any labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective

[2] This notice shall be amended by substituting for the words "The Recommendations of a Trial Examiner" in the caption thereof, the words "A Decision and Order." In 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.

bargaining or other mutual aid or protection, or 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.

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

(a) Post at its offices and meeting halls at Joplin, Missouri, and in Miami, Oklahoma, if any, copies of the notice attached to the Intermediate Report as Appendix B.[13] Copies of said notice, to be furnished by the Regional Director for the Sixteenth Region, shall, after being duly signed by an official representative of the Respondent Union, be posted by it immediately upon receipt thereof and maintained by it for a period of at least sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by any other material.

(b) Mail to the Regional Director for the Sixteenth Region, signed copies of said notice, for posting, the Respondent Company willing, at the Respondent's terminal in Miami, Oklahoma, in places where notices to employees are customarily posted.

(c) Notify the Respondent Company, in writing, that it has no objection to the reinstatement and that it formally requests the reinstatement of Jess E. Cawthorn and Walter C. Buxton.

(d) Notify the Regional Director for the Sixteenth Region, in writing, within ten (10) days from the date of this Order, as to what steps the Respondent Union has taken to comply herewith.

C. The Respondents, Roadway Express, Inc., its officers, agents, successors, and assigns, and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 823, AFL, its officers, representatives, agents, and trustees, shall jointly and severally make whole Jess E. Cawthorn and Walter C. Buxton for any loss of pay they may have suffered because of the discrimination against them, in the manner set forth in the section of the Intermediate Report entitled "The Remedy."[14]

Member Beeson took no part in the consideration of the above Decision and Order.

[13] See footnote 12.

[14] For the reasons stated by the Trial Examiner, we find no merit in the Respondent Union's contention that its back-pay liability should be tolled from the date of the conference with the Board agent during which it stated that it had no objection to the reinstatement of Buxton and Cawthorn or from the date of the filing of its answer making a similar allegation or from the date of the filing of its brief before this Board repeating the withdrawal of any objection and, in the language of the recommended order, formally requesting their reinstatement. To toll its back-pay liability, the Union must notify the Respondent Company directly and in writing that it has no objection to the reinstatements and formally requests them. In our opinion, such actions are reasonably designed to remove the impediment of the Union's objection to the reinstatements. Until that be done in an unequivocal manner, we find no warrant for exonerating the Union from liability for back pay.

Intermediate Report

STATEMENT OF THE CASE

Charges having been duly filed and served, complaints, an order consolidating the above-entitled cases and notice of hearing thereon having been issued and served by the General Counsel of the National Labor Relations Board, and answers having been filed by the above-named Respondents, a hearing involving allegations of unfair labor practices in violation of Section 8 (a) (1) and (3) and Section 8 (b) (1) (A) and (2) of the National Labor Relations Act, as amended (61 Stat. 136), herein called the Act, was held in Miami, Oklahoma, on November 3, 4, and 5, 1953, before the undersigned Trial Examiner.

As to the unfair labor practices, in substance the complaints allege and the answers deny that: (1) The Respondent Company discriminatorily discharged employee Jess E. Cawthorn on July 27, 1953, and employee Walter C. Buxton on July 30, 1953, for reasons other than their failure to pay periodic dues to the Respondent Union; (2) the Respondent Union; caused the Respondent Company to discharge the aforesaid two individuals, for reasons other than their failure to pay periodic dues; (3) the Respondent Union, through certain of its agents, threatened employees with bodily harm and discharge, and did assault one employee; and (4) by such conduct the Respondents have restrained and coerced employees in the exercise of rights guaranteed by Section 7 of the Act.

At the hearing all parties were represented, were afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence pertinent to the issues, to argue orally upon the record, and to file briefs and proposed findings of fact and conclusions of law. Briefs were filed by General Counsel and both Respondents.

At the conclusion of the hearing the Respondent Union renewed certain motions to sever the cases and to dismiss the complaint as to it. Ruling was then reserved. The motion to sever is hereby denied. Disposition of the motion to dismiss is made by the following findings, conclusions, and recommendations.

Upon the entire record in the case, and from his observation of the witnesses, the Trial Examiner makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT COMPANY

Roadway Express, Inc., is an Ohio corporation, having its principal office and place of business in Akron, Ohio. It operates and maintains about 55 trucking terminals located in about 20 States and the District of Columbia, including a terminal at Miami, Oklahoma, the only one with which this case is concerned. It is engaged in the business of trucking and the transportation of general freight among about 20 States and the District of Columbia, through its 55 terminals. It is engaged in commerce within the meaning of the Act.

II. THE LABOR ORGANIZATION INVOLVED

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 823, AFL, is a labor organization admitting to membership employees of the Respondent at its Miami, Oklahoma, terminal.

III. THE UNFAIR LABOR PRACTICES

A. Setting and issues

During the period material to the issues the two Respondents have been parties to a union-shop contract. By its terms drivers are required to be members in good standing of Local 823.

All issues raised by the complaint stem from a dispute between officials of Local 823 and certain individual members who worked out of the Miami terminal. The dispute arose in April 1953, when a group of Miami members (the Local's headquarters are in Joplin, Missouri) wrote directly to James Hoffa, an official of the International, requesting an investigation of the Local and certain of its dealings with the Respondent Company. Action by responsible

agents of the Local against individual members who precipitated the April letter, both direct and through the Respondent Company, is the basis for the major issues raised by the complaint.

B. Threats of reprisal by Local 823

Credible evidence establishes and the Trial Examiner finds that: (1) About 2 weeks after he, with others, had signed the April 13 letter to Hoffa, employee Carl Rundell was asked by Union Steward Ray Kaylor, whom the Trial Examiner finds to be an agent of the Respondent Local, to take his name off the letter, and warned that he and others would be fired if they did not withdraw their names; (2) at about the same time employee R. E. Simmons, who also had signed the Hoffa letter, was told both by Kaylor and Pat Kennison, an official and agent of the Local, that if he did not get his name "off the list" he would lose his job with the Company; and (3) in June 1953, Mrs. Ralph Hayes, wife of one of the driver-complainants in this case who also had signed the April letter, was told by Steward Kaylor that if her husband did not "shut up and quit agitating" he would lose his job.[1]

The above-described threats of economic reprisal plainly infringe upon rights of employees guaranteed by Section 7 of the Act. As noted in sections below, such threats were not idle and in the cases of Cawthorn and Buxton were actually carried out. Whatever reprisals the Local cared to make, short of actual discrimination or threats of discrimination as to employment, may have been privileged, but the amended Act plainly prohibits such conduct by a union as was here engaged in.

C. Union reprisals against employees

1. Against R. E. Hayes

Hayes is another driver who signed the Hoffa letter. Upon returning to the Miami terminal on May 1, having completed a run, he found Kennison and Floyd Webb, another representative of the Local, awaiting him. They asked him if he had signed the letter in question. He admitted it. Webb asked him if he did not think he had done wrong. He said he did not think so. They then asked the employee for his union book, retained it, and said that if he wanted it back he must let them know in writing that he was withdrawing his name from the Hoffa letter. The Union's bylaws, under which Hayes was operating, state:

> It is compulsory for all members to carry their books with them at all times while working.

The summary action by union officials in depriving Hayes of his book apparently became known to other drivers at the Miami terminal, and several of them refused to take out their runs unless and until the book was returned to Hayes. It was returned late that night, after Webb was informed that other drivers would not leave the terminal.

The action of Webb and Kennison in depriving Hayes of his book on this occasion was plainly a form of coercion, designed to affect his employment, and thus prohibited by the Act.[2]

2. Against Buxton

Walter C. (Clyde) Buxton headed the list of 13 Miami drivers who had written to Hoffa on April 13. Upon his returning to the terminal the evening of May 8, he was met by Kennison

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[1] Having observed his demeanor as a witness, the Trial Examiner does not credit the denials of Kaylor. And Kennison was not called as a witness by the Respondent Union although, as the record shows, he attended the hearing.

[2] As noted heretofore, Kennison was not called as a witness. Webb's explanation of taking the book away from Hayes limps feebly in the light of reason. He claimed that although he himself did not look at the book, Kennison took it from the driver to "check," to make sure all the stamps were in it. Since it is undisputed that for years Hayes' union dues had been deducted by the Respondent Company and turned over to the Union each month, and that receipt stamps were up to date at the time, it is reasonable to infer that the real reason for the officials' action was in retaliation for Hayes' failure to admit that he had done "wrong" in sending the Hoffa letter.

and an individual named Powell. Kennison asked whether or not he had signed the Hoffa "petition." Buxton admitted that he had. Kennison said he didn't give a damn what Hoffa said and that from then on Buxton "didn't belong to no local union." Kennison continued, "You yellow son of a bitch, I was sent down here to do a job. I would do it myself, but I have been in the hospital and had part of my stomach removed." Whereupon Powell invited him to come out. Buxton told Powell he had no business there, and asked Kennison to take him away. They did not leave, and Buxton went into a room nearby. Powell and an unidentified man came to the door and said, "You yellow son of a bitch, you decided you weren't coming out, so we will come in and get you." Buxton picked up a ball peen-hammer nearby and warned Powell not to come in. Kennison meanwhile had gone around to another door entering the room and demanded to be let in. As Buxton turned, Powell came through the door, from behind Buxton, yanked the hammer from his hand, and proceeded to beat the driver over the head with it.

Buxton's testimony as to this incident is not only corroborated by another witness but is undisputed. It is clear, and the Trial Examiner concludes and finds, that Buxton was physically assaulted in reprisal for his action in appealing to the International, and that the Local must be held responsible, under the Act, for the action of Kennison and Powell. Powell, whatever his connection with the Local, if any, as a paid official or agent, was plainly acting as its agent on this occasion, since he was with Kennison and since Kennison participated in the actual assault.[3]

Assaulting an employee with a ball peen-hammer may reasonably be inferred as action quite likely to affect that employee's term of employment, and as such comes within the scope of prohibited conduct. It is found that by the conduct of Kennison and Powell on May 8, above described, the Respondent Union restrained and coerced employees in the exercise of rights guaranteed by the Act.

D. The discriminatory discharges

1. Walter C. Buxton

Following the assault of May 8 Buxton consulted both the city attorney of Miami and the county sheriff, seeking a permit to carry a gun for his self-protection. He was informed that Oklahoma law provided for no such permit being formally issued, but that it was permissible to carry one if not concealed. From then on Buxton carried a gun, unconcealed, at the terminal and on his trips. It is undisputed that he was seen with the gun by both the dispatcher at Miami and the chief dispatcher at Dallas. Both dispatchers were clearly supervisors. He was never warned by any company official not to carry this gun.

Uncontradicted testimony establishes and the Trial Examiner finds that about July 20 Kennison came to the Miami terminal, and after he left Terminal Manager K. E. McLinn told Safety Supervisor W. C. Turner that Kennison had said that as long as it continued to keep Buxton and Cawthorn on the payroll the Company could expect "hell from the union." It is likewise undisputed and is found, on the basis of McLinn's testimony, that on July 23 Kennison told him that "we were going to have trouble with the City contract until these 3 (Buxton, Hayes and Cawthorn) Road drivers were layed off." McLinn's testimony also makes clear the fact that he well knew that the Union's dispute with these 3 members was not delinquency in dues, but other matters. According to a memorandum written to his superior a few days after the events which, as a witness, he said described the truth at the time it was written, on the morning of July 23 he went to the union office at Joplin, and was there shown by Webb copies of letters written by Hayes and Buxton to the International. At the same time, according to McLinn, Webb repeatedly talked about the 2 men and "their attitudes."

Later in the day McLinn returned to Joplin and again talked with Kennison and Webb. Kennison then brought up, for the first time, the matter of "these men carrying guns." McLinn said he knew nothing about it and was unable to do anything. Kennison said he would get statements from drivers who had seen Buxton and the others carrying guns.

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[3] Of further bearing upon this point of agency is the undisputed testimony of City Attorney Robert H. Reynolds, who said that Kennison, after the event of May 8, informed him that he had picked up Powell at a labor meeting in Joplin and had brought him to the Roadway Express terminal at Miami on the occasion in question. See United Electrical Workers, etc., Local 914, 106 NLRB 1372.

Still later in the day the Local held a special meeting. Buxton and Hayes attended, but were told to leave. At this meeting the local officials obtained statements from drivers who had seen Buxton carrying a gun. Late that evening Kennison and Kaylor came to the Miami terminal and presented McLinn with 3 statements regarding Buxton, and a statement which Kennison said was signed by every driver attending the union meeting to the effect that they would refuse to "work as long as Roadway kept these 3 men Buxton, Hayes and Cawthorn."

After completing his run on July 22, Buxton went on a week's vacation. On July 30 he was summarily discharged by McLinn, with the written explanation:

> For carrying Fire Arms on Company equipment and while on duty, you are hereby released from the service of Roadway Express effective this date.

The circumstances depicted by the credible and uncontradicted testimony permit only one reasonable conclusion: in an effort to evade the Act the Respondents conspired to rid themselves of a dissident union member and seized upon the carrying of the gun as a convenient pretext. Buxton had openly carried the gun for weeks, with permission of local law enforcement officials, to protect himself against further attack by the union officials. In carrying the gun Buxton had violated no law and no item of company policy or practice. While the Respondent Company was no doubt forced, by threat of strike, to take the action against Buxton, it nevertheless must share responsibility for the illegal discharge.

In summary, it is concluded and found that the Union caused the Company to discharge, and that the Company did discharge, employee Buxton discriminatorily and for reasons other than his failure to pay dues and initiation fees. By such conduct the Respondents restrained and coerced employees in the exercise of rights guaranteed by the Act.

2. Jess E. Cawthorn

Cawthorn has previously been identified as 1 of the 3 drivers who, McLinn was warned on July 23, he must get rid of or face a strike.

On the night of July 22 Cawthorn reported for work as usual, but was told by Safety Supervisor Turner that no trucks were running. (As McLinn's testimony and memorandum reveal, there was a strike that night over a matter irrelevant to the issues here.) Turner gave him permission to go home. On July 24 Cawthorn, who lives outside Miami, called Buxton and inquired if the strike was ended. When Buxton replied that it was not, he asked him to get in touch with Dispatcher Lewis to see if it would be all right to remain at home. It is undisputed that Buxton communicated with Lewis, and that Lewis informed him that Cawthorn would not be needed and could remain at home over the weekend. It is likewise undisputed that on Saturday morning, July 25, Cawthorn came into Miami for his paycheck and was told by McLinn to report for his run as usual on Monday morning.

Despite these undisputed facts, on Monday, July 27, McLinn discharged Cawthorn with the written explanation:

> On the night of July 25th you did not report for your run at your usual bid time. I received no word from you that you would not be here.
>
> You have previously been warned on this matter, therefore, your services with Roadway Express Inc. are discontinued, effective this date.

Here, as in the case of Buxton, it is plainly apparent that the real reason for the dismissal of Cawthorn was the pressure by union officials Webb and Kennison, and not the employee's failure to report for a run. McLinn's reference to a previous warning has as little foundation in fact as the reason he gives in the letter for the dismissal on July 27. The earlier incident, uncontradicted testimony establishes, was when, in May, other drivers refused to go out until Webb and Kennison had returned Hayes' union book. By union rules Hayes could not leave until the book was in his possession. Cawthorn was scheduled to go out last and could not leave until others scheduled before him had left. Through no fault of his own he was 1 hour late in leaving.

The Trial Examiner concludes and finds that the Union caused the Company to discharge, and that the Company did discharge, employee Cawthorn, discriminatorily and for reasons other

than his failure to pay dues and initiation fees.[4] By such conduct the Respondents restrained and coerced employees in the exercise of rights guaranteed by the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Respondents, set forth in section III, above, occurring in connection with the operations of the Respondent Company 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 Respondents have engaged in unfair labor practices, the Trial Examiner will recommend that they cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

It has been found that the Respondent Company has discriminated in regard to the hire and tenure of employment of employees Buxton and Cawthorn. It will be recommended that this Respondent offer them immediate and full reinstatement to their former or substantially equivalent positions without prejudice to their seniority and other rights and privileges.

It has also been found that the Respondent Union caused the Respondent Company to discriminate against Buxton and Cawthorn. Accordingly, it will be recommended that the Respondent Union notify the Respondent Company in writing--not only that it has no objection to the employment of the two employees--but also that it requests the Company to offer them immediate and full reinstatement. [5]

Since it has been found that both Respondents are responsible for the discrimination suffered by Cawthorn and Buxton, it will be recommended that the Respondents jointly and severally make whole the two employees for the loss of pay they may have suffered by reason of the discrimination against them, and that the method of computing back pay shall be in accordance with the policy set out in F. W. Woolworth Company, 90 NLRB 289, and Crossett Lumber Company, 8 NLRB 440.[6]

The unlawful conduct of both Respondents, found herein, indicates a purpose to limit the lawful rights of employees. Such purpose is related to other unfair labor practices, and it is found that the danger of their commission is reasonably to be apprehended. It will therefore by recommended that the Respondents cease and desist from in any manner restraining and coercing employees in the exercise of rights guaranteed by the Act.

Upon the basis of the foregoing findings of fact, and upon the entire record in the case, the Trial Examiner makes the following:

CONCLUSIONS OF LAW

1. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 823, AFL, is a labor organization within the meaning of Section 2 (5) of the Act.

2. By discriminating in regard to the hire and tenure of employment of Jess E. Cawthorn and Walter C. Buxton, thereby encouraging membership in the above-named labor organization,

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[4] See Air Products Incorporated, 91 NLRB 1381.

[5] The Trial Examiner does not consider that the fact that sometime in August 1953, union officials told Board agents that they had no objection to reemployment of Cawthorn and Buxton in any way mitigates the Union's plain responsibility to purge itself by informing the Company, directly and in writing. Furthermore, in view of the nature of the Union's pressure upon the Company, the Trial Examiner believes that an appropriate remedy may only be effectuated by the making of a formal request, in writing, that the two individuals be reinstated.

[6] The Union's liability for back pay, of course, (Brotherhood of Painters, etc., 107 NLRB 323) will run from the date of the respective discriminations to the date of the Company's offer to employ them or to a date 5 days after the Respondent Union notifies the Respondent Company, in writing, that it requests the reinstatement of the 2 individuals, whichever shall first occur.

the Respondent Company has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (3) of the Act.

3. By interfering with, restraining, and coercing employees in the exercise of rights guaranteed in Section 7 of the Act, the Respondent Company has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (1) of the Act.

4. By causing the Respondent Company to discriminate against the above-named employees in violation of Section 8 (a) (3) of the Act, the Respondent Union has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (b) (2) of the Act.

5. By restraining and coercing employees in the exercise of rights guaranteed by Section 7 of the Act the Respondent Union has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (b) (1) (A) of the Act.

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

[Recommendations omitted from publication.]

APPENDIX A

NOTICE TO ALL EMPLOYEES

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

WE WILL NOT encourage membership in International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 823, AFL, or in any other labor organization of our employees, or discourage membership in any labor organization of our employees, by discriminating in regard to their hire or tenure of employment or any term or condition of employment.

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

WE WILL offer Jess E. Cawthorn and Walter C. Buxton immediate and full reinstatement to their former or substantially equivalent positions, and will make them whole for any loss of pay suffered as a result of the discrimination against them.

All our employees are free to become, remain, or refrain from becoming or remaining, members of the above-named Union, or any other labor organization, except to the extent that this right may be affected by an agreement in conformity with Section 8 (a) (3) of the Act.

ROADWAY EXPRESS, 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.

APPENDIX B

NOTICE TO ALL MEMBERS OF INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL 823, AFL

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

WE WILL NOT cause or attempt to cause Roadway Express, Inc., its officers, agents, successors, or assigns, to discriminate against its employees in violation of Section 8 (a) (3) of the Act.

WE WILL NOT in any manner restrain or coerce employees of Roadway Express, Inc., its successors or assigns, in the exercise of their right to self-organization, to form labor organizations, to join or assist any labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or 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.

WE WILL make Jess E. Cawthorn and Walter C. Buxton whole for any loss of pay suffered because of the discrimination against them.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL 823, AFL,
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.

LEWIS COAL COMPANY, INC. *and* CHARLEY MAYS, FRANK HARRIS, AND ROY HIX, Case No. 9-CA-500. May 18, 1954

DECISION AND ORDER

On July 21, 1953, Trial Examiner Alba B. Martin issued his Intermediate Report in the above-mentioned proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the Respondent filed exceptions to the Intermediate Report and a supporting brief.

The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. Except as noted below,[1] the rulings are hereby affirmed. The Board has considered the Intermediate Report, the Respondent's exceptions and brief, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, with the following modifications:[2]

[1] As we herein adopt the Trial Examiner's finding that the Respondent discriminatorily discharged Charley Mays on two occasions, we find it unnecessary to pass on the propriety of the Trial Examiner's ruling that Mays was incompetent to testify as a witness because of a prior conviction for false swearing.

[2] The Trial Examiner inadvertently stated in the Intermediate Report that Foreman Whitehead testified that he had heard some talk about the union meeting on Friday mornings, whereas the testimony refers only to holding meetings on Friday. We hereby correct this error, which does not affect the Trial Examiner's ultimate findings or our concurrence therein.