It will also be recommended that Respondent cease and desist from any like or related manner infringing upon the rights of employees guaranteed in Section 7 of 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 & Helpers of America, Local Union No. 492, is a labor organization within the meaning of Section 2(5) of the Act.
2. Colony Materials, Inc., is an employer within the meaning of Section 2(2) of the Act.
3. All Respondent's truckdrivers and laborers employed at its Santa Fe, New Mexico, operation, excluding office clerical, plant clerical, technical, and professional employees, and all other employees, guards, and supervisors, as defined by the Act, constitute, and during all times material constituted, a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.
4. The above-named labor organization at all times since August 20, 1959, has been the exclusive collective-bargaining representative of all the employees in the aforesaid appropriate unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.
5. By refusing on and after April 1, 1960, to bargain collectively with the aforesaid labor organization as the exclusive collective-bargaining representative of all employees in the appropriate unit, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.
6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed by Section 7 of the Act and has thereby engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.
7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

[Recommendations omitted from publication.]

Leonard Niederriter Company, Inc. ***and*** **Retail Clerks International Association, Local Union 1538, AFL–CIO.** *Case No. 6–CA–1855. February 10, 1961*

DECISION AND ORDER

On August 11, 1960, Trial Examiner Henry S. Sahm issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in a copy of the Intermediate Report attached hereto. Thereafter, the Respondent filed exceptions to the Intermediate Report with a supporting brief.

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

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 brief, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, insofar as they are consistent with our decision herein.

1. We agree with the Trial Examiner that the Respondent by discharging Arthur A. Wells on September 18, 1959, violated Section 8(a)(3) and (1) of the Act.

2. In disagreement with the Trial Examiner, however, we find that the record fails to sustain the allegation of the complaint that by discharging Stanley M. Schwartz on September 18, 1959, the Respondent violated Section 8(a)(3) and (1) of the Act.

The Trial Examiner found, and we agree, that on July 16, 1959, when Schwartz was interrogated by Respondent's president, Leonard Niederriter, with respect to his membership in the Union, Schwartz was sales manager of the furniture department and a supervisor. The record, however, is not clear that Schwartz had been thereafter relieved by the Respondent of his supervisory authority and duties, and that at the time of his discharge 2 months later he was no longer supervisor, but simply a rank-and-file salesman. While his override commission was taken away from Schwartz shortly after the interrogation, no explanation was tendered to him for the withholding thereof.[1] Nor is there any evidence that Schwartz had been informed by the Respondent that he was no longer sales manager, or that he had been relieved of his supervisory authority. On the other hand, there is the affirmative testimony of the head of the service department, Yunker, that nobody told him that Schwartz' authority to approve the delivery of merchandise, a supervisory function originally conferred on him by the president of the Respondent, had been withdrawn, although there did come a time when Schwartz stopped exercising the same. James Niederriter, son of the Respondent's president, similarly testified that nobdy told him that Schwartz' responsibilities were withdrawn, but that it became apparent to him that in July and August 1959 Schwartz had dropped all supervision over the salesmen and was shifting his responsibilities to him, and that on one occasion Schwartz told him that he was no longer adjusting furniture claims and meeting manufacturers' salesmen visiting the store. The record thus indicates that while Schwartz had not been demoted to a rank-and-file salesman, he on his own accord stopped exercising his supervisory authority during the last 2 months of employment with the Respondent. The mere fact, however, that a supervisor fails to exercise his supervisory authority does not change his employment status

[1] Cf. *Continental Oil Company*, 95 NLRB 358, 373, where we have held that the change in the method of compensation of a supervisor does not necessarily indicate a change in the employment status

from that of supervisory to the status of a rank-and-file employee; he is still in the possession of the power regardless of its nonexercise.[2]

Assuming, however, that at the time of his discharge Schwartz was performing only the duties of a rank-and-file salesman rather than those of a supervisor, we are not persuaded that Schwartz was discharged for union activities in which he might have engaged in subsequent to the change in his employment status rather than for joining the Union and engaging in unprotected union activities while he was a supervisor.[3] The Trial Examiner made no specific finding that Schwartz was discharged for his union activities subsequent to July 16, 1959. He simply found that the "real and underlying reason motivating the discharge of Schwartz and Wells was their adherence and support of the Union." However, the record indicates that it was Schwartz' activities in organizing the plant and joining the Union while he was a supervisor that produced a particularly strong resentment on Respondent president's part which was the underlying cause for Schwartz' discharge. President Niederriter, during the July 16 interrogation of Schwartz, strongly objected to his union activities and pointed out to him that as a supervisor he had no right to engage in such activities. Indeed, explaining why he thereafter stopped speaking to Schwartz, he said: "When you do a favor for a man and he bites you, that's time to stay away from him."

In view of the above, we find, that by discharging Stanley Schwartz the Respondent did not violate Section 8(a)(3) of the Act.

THE REMEDY

As we have found that the Respondent has discriminated with respect to the hire and tenure of employment of Wells, we will order that the Respondent make him whole for any loss of earnings which he may have suffered because of the discrimination against him by payment of a sum of money equal to the amount he normally would have earned as wages from the date of discrimination until he was reemployed, less his net earnings during such period, in accordance with the Board policy set forth in *F. W. Woolworth Company*, 90 NLRB 289, and *Crossett Lumber Company*, 8 NLRB 440.

As we have found that Schwartz was lawfully discharged and as Wells was reemployed by the Respondent around October and continued in its employ until November 20, 1959, when it permanently discontinued its business, and as there is no evidence or finding by

[2] *N L R B.* v *Beaver Meadow Creamery, Inc.*, 215 F 2d 247, 251 (C A 3), enfg 103 NLRB 1504; see also *Capital Transit Company*, 114 NLRB 617. Contrary to the Trial Examiner, the finding in the earlier representation case (Case No. 6–RC–2390, not published in NLRB volumes) that Schwartz was not a supervisor did not finally and conclusively resolve that issue for the purposes of this case involving alleged violation of Section 8(a)(3) and (1) of the Act. See *Southern Airways Company*, 124 NLRB 749, footnote 2

[3] *Gibbs Automatic Division, Pierce Industries, Inc.*, 129 NLRB 196.

the Trial Examiner that such discontinuance was for discriminatory reasons, we shall not direct that a preferential hiring list be created.

ORDER

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

1. Cease and desist from:

(a) Discouraging membership in or activity in behalf of Retail Clerks International Association, Local Union 1538, AFL–CIO, or any other labor organization of its employees, by discriminating against them in their hire or tenure of employment or any term or condition of their employment.

(b) Engaging in like or related acts or conduct which interferes with, restrains, or coerces employees in the exercise of their right to self-organization, to form labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959.

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

(a) Make Arthur Wells whole for lost earnings suffered as a result of the discrimination against him, as provided in the section of this Decision and Order entitled "The Remedy."

(b) Preserve and, 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 in its possession necessary to an analysis of the lost earnings due under the terms of this Order.

(c) Inasmuch as the posting of a notice as customarily required would result in a notice posted at a store no longer in business and therefore be inadequate to inform affected parties, the Respondent shall mail an exact copy of the notice attached hereto marked "Appendix" [4] to the Union and to Wells. Copies of said notice, to be furnished by the Regional Director for the Sixth Region, shall, after

[4] 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"

being duly signed by an authorized representative of the Respondent, be mailed immediately after receipt thereof.

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

IT IS FURTHER ORDERED that, except as otherwise found herein, the allegations of the complaint be, and they hereby are, dismissed.

APPENDIX

NOTICE TO ALL EMPLOYEES

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

> WE WILL NOT discourage membership in, or activity in behalf of, Retail Clerks International Association, Local Union 1538, AFL–CIO, or in any other labor organization of our employees, by discriminating against them in their hire or tenure of employment or any term or condition of their employment.
>
> WE WILL make whole Arthur Wells for lost earnings suffered as a result of the discrimination against him.

LEONARD NIEDERRITER COMPANY, INC.,
Employer.

Dated_____ By_____
(Representative) (Title)

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

INTERMEDIATE REPORT

STATEMENT OF THE CASE

Upon a charge filed by the Retail Clerks International Association, Local Union 1538, AFL–CIO, herein called the Union, the General Counsel of the National Labor Relations Board, by the Regional Director for the Sixth Region, issued a complaint dated November 17, 1959, and amended on February 23, 1960, against Leonard Niederriter Company, Inc., herein called both the Company and the Respondent, alleging that the Respondent Company had engaged in and was engaging in unfair labor practices within the meaning of Section 8(a)(1), (3), and (4) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge, complaint, and notice were served upon the parties.

With respect to the unfair labor practices, the complaint alleges, in substance, that Respondent on various dates in July and August 1959 interrogated employees in order to determine their membership in, leadership of, and activity and sympathy toward the Union, and threatened them with economic reprisals, including a threat to discontinue its business operations, if the Union was successful in a representation election. The complaint alleges further that on September 18, 1959, Respondent discharged Stanley M. Schwartz and Arthur A. Wells because they engaged in concerted activities with other employees for the purpose of collective bargaining on behalf of the Union.

Respondent's answer, filed on November 30, 1959, admits the jurisdictional allegations of the complaint, but denies the commission of any unfair labor practices. More specifically, the answer avers that:

(a) Stanley M. Schwartz, the alleged discriminatee, engaged in organizationa. activities on behalf of the Union in the summer of 1959 on company time and premises.

(b) Schwartz refused to perform his duties as supervisor and neglected to discharge the same as they were assigned to him.

(c) Schwartz conducted his own private business affairs on company time and premises.

(d) Schwartz, as supervisor, who was hired as an expert buyer for furniture, through inefficiency and overbuying, caused to Company to lose large sums of money which ultimately led to the Company's going out of business on November 15, 1959.

(e) Arthur A. Wells, the other alleged discriminatee, was discharged on or about September 18, 1959, but the reason therefor was the lack of business at the Respondent retail store, and he had the least seniority among the salesmen of the Respondent's organization. As a result of the inefficiency and overbuying by Stanley M. Schwartz, the answer alleges, the Respondent's retail store was forced out of business on November 20, 1959, for financial reasons and a selling-out sale brought large numbers of customers to the store, resulting in Wells being rehired on October 8, 1959.

A hearing was held before the duly designated Trial Examiner, Henry S. Sahm, at Erie, Pennsylvania, on February 23 and 24, 1960. All parties were represented at the hearing and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence pertinent to the issues. At the conclusion of the hearing oral argument was waived by the parties. Briefs were received from the Respondent and the General Counsel on April 1, 1960.

Upon the entire record in the case, including the briefs filed by the parties, and from my observation of the demeanor and deportment of the witnesses while they were testifying in this proceeding, there are hereby made the following:

FINDINGS OF FACT

I THE BUSINESS OF THE RESPONDENT

The Respondent, a Pennsylvania corporation, was formerly engaged in the retail sale of furniture and electrical appliances in Erie, Pennsylvania, but has since gone out of business. Respondent, during the 12-month period immediately preceding September 23, 1959, had a gross business exceeding $600,000. On the foregoing admitted facts, it is found that Respondent was engaged in commerce within the meaning of the Act during the periods of time pertinent in this proceeding.

II. THE LABOR ORGANIZATION INVOLVED

Retail Clerks International Association, Local Union 1538, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The discharge of Schwartz and Wells*

Stanley M. Schwartz, an alleged discriminatee, was employed by Respondent at $75 per week in March 1958 to prepare the store for its opening. When the store formally opened on July 8, 1958, Schwartz assumed the duties of one, Burton Jones, who had been sales manager but whose employment was terminated at about the same time the store opened for business.[1] After the store opened Schwartz was compensated for his services on a commission basis as follows: a commission on sales made by himself and a 2-percent commission on the net furniture sales (as distinguished from appliance sales) made by all of Respondent's salesmen. This 2-percent commission is referred to as an "override."

The Union began an organizational campaign in July 1959, among the salesmen in Respondent's furniture and appliance departments. Stanley Schwartz, who was in the forefront of these union activities, and Arthur A. Wells, both of whom were subsequently discharged, signed union authorization cards, joined the Union, and attended union meetings, the first of which was held about July 9, 1959. By letter dated July 16, 1959, the Union requested Respondent to recognize it as the collective-bargaining representative of the store's salesmen.

[1] This is based on the credited testimony of Arleen Solibay, Respondent's bookkeeper, who testified that when Jones left she posted a notice in the store advising the employees that Schwartz was to replace Jones as "Sales Manager."

A few days after Schwartz attended the July 9 union meeting, Leonard Niederriter, president of the Respondent Company, called him into his office and asked Schwartz if he had joined the Union. Schwartz replied he had. Thereafter, Niederriter no longer spoke to Schwartz and on or about July 18, 1959, the 2-percent "override" commission he had heretofore received was discontinued; he no longer did any of the purchasing; his advice and recommendations were no longer solicited by Niederriter; and he no longer approved sales and adjusted customer complaints, functions which he had heretofore discharged.

On September 18, 1959, Schwartz was discharged. No reason was given him for his discharge other than Leonard Niederriter's statement to Schwartz at the time of his discharge that "now you can go to the Union and get your wages."

The following day, Schwartz and Wells, who was also discharged at the same time as Schwartz, began to picket the store which continued until the first week in October.

Wells returned to work for the Respondent sometime around October 8 and continued in its employ until November 20, 1959, when the store went out of business.

Contentions

In answer to the General Counsel's contention that Schwartz was discharged because of his union activities, Respondent claims that Schwartz was a supervisor within the meaning of Section 2(11) of the Act,[2] and therefore not protected from discharge for union activities.[3] Moreover, argues Respondent, even if Schwartz were not considered to be a supervisor, the motivating cause for his discharge was inefficiency and dereliction of his duties.

Wells, a salesman, claims Respondent, was terminated on September 18, 1959, for economic reasons, namely, business was curtailed to such an extent that his services were no longer required so that it was necessary to terminate him. However, business improved during Respondent's "going-out-of-business sale," states Respondent, whereupon Wells was again hired as a salesman working from approximately October 8 to November 20, 1959, when Respondent closed the store.

B. *Alleged violation of Section 8(a)(1)*

The uncontradicted testimony shows that when Leonard Niederriter, president of Respondent, received a letter from the Union on or about July 16, 1959, he called Schwartz into his office and asked him whether he had joined the Union. Whether this was a violation depends on whether Schwartz was a supervisor at the time, as it is not an unfair labor practice for an employer to question his supervisor concerning union activities with certain exceptions not here pertinent. It is necessary, therefore, to inquire into whether Schwartz was a supervisor at the time Niederriter questioned him on July 16 about his union activities.

Schwartz was represented in the Respondent's furniture store's newspaper advertisements as "Furniture Sales Manager." He also signed store correspondence with the same title. During the year that Schwartz was furniture sales manager, he took three trips for the purpose of buying furniture. He signed the orders for the purchase of furniture. In addition to his salary of approximately $10,000 annually, Schwartz received $1,800 in "override" commissions for the year July 1958 to July 1959.[4] He instructed the salesmen and to that end called periodic meetings for that purpose.[5] On one occasion, when it was found there were too many salesmen,

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[2] "The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

[3] Section 14(a) of the Act states in part: "Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization. . . ."

[4] This was based on a 2-percent commission of all the sales of the Respondent's entire furniture department. It is found that this override commission was paid Schwartz for buying furniture; advising and making recommendations to Respondent; and having authority, along with Leonard Niederriter, to approve sales, adjust customer complaints, including the exchange of furniture, and also to approve the extension of credit.

[5] This is based on the credited testimony of employee Bernard Jendruczak who, after repeated questioning, reluctantly acknowledged that Schwartz was furniture sales manager and that he instructed the new salesmen.

Schwartz recommended the termination of two of them which recommendation was followed by Respondent. No furniture could be removed from the store or warehouse unless upon order from Schwartz and all sales by the salesmen had to be approved by Schwartz. Also deliveries and returned merchandise required the approval of Schwartz.[6] Such approval could also be given by Leonard Niederriter, president of Respondent, but he was only in the store a few hours each day.

It is found, therefore, that questioning of Schwartz on July 16, 1959, by Neiderriter, as to whether Schwartz was a member of the Union, was not a violation of the Act because Schwartz was a supervisor at that time.[7] It was not until July 18 that Schwartz was relieved of his supervisory duties and demoted to a rank-and-file salesman. Questioning a supervisor regarding union activities is not a violation of the Act.[8] It is recommended, therefore, that the allegation of the complaint charging Respondent with interrogating Schwartz be dismissed.

As found above, Schwartz was a supervisor for the first year of his employment. However, he was no longer a supervisor within the meaning of the Act *after July 18, 1959,* when his "override" commission was discontinued and his other supervisory duties taken from him. Therefore, at the time of his discharge on September 18, 1959, he was a rank-and-file salesman.[9]

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[6] This is based on the credited testimony of Arleen Solibay, Respondent's bookkeeper, and Neville A. Yunker, service manager for Respondent.

[7] *The Great Atlantic & Pacific Tea Company,* 119 NLRB 603, 606; *Buitoni Foods Corp.,* 111 NLRB 638, 639; *Montgomery Ward & Company, Incorporated,* 115 NLRB 645, 646, 661–663; *Plankinton Packing Company (Division of Swift & Co.),* 116 NLRB 1225, 1228; *Sears, Roebuck & Company,* 112 NLRB 559, 562; *The Great Atlantic & Pacific Tea Company,* 121 NLRB 1193, 1194

[8] *N.L.R.B.* v. *Talladega Cotton Factory, Inc,* 213 F. 2d 208, 217 (C.A. 5); *Special Wire Goods, Inc.,* 115 NLRB 67, 79. See *The Great Atlantic & Pacific Tea Company,* 123 NLRB 747; *Pacific American Shipowners Association, et al,* 98 NLRB 582, 596–597; *New York Telephone Company,* 89 NLRB 383; *Salant & Salant, Inc.,* 88 NLRB 816, 819, *Carnegie-Illinois Steel Corporation (Gary Steel Works),* 84 NLRB 851. The reasons for making an exception in the case of supervisors are stated in the Intermediate Report of Trial Examiner John Fischer, in *Massey-Harris-Ferguson, Inc.,* 114 NLRB 328, at page 337 Section 2(3) of the Act excludes supervisors from the definition of "employee" as the legislative history of this amendment is premised on the view that the employer is entitled to the undivided loyalty of his supervisors 68 Harvard Law Review 374. See also 103 University of Pennsylvania Law Review 271.

[9] The Board in a Decision and Direction of Election dated October 7, 1959 (Case No 6–RC–2390), not published in NLRB volumes, held Schwartz not to be a supervisor *at the time* of the representation hearing which was held on August 19, 1959 It is the trier of these facts' understanding, based upon a study of the following cited cases, that the Board's findings and conclusions in a prior representation case *existing at the time of such decision* are binding on the Trial Examiner in a subsequent unfair labor practice proceeding absent evidence which was newly discovered or unavailable to the respondent at the time of the representation hearing. See *Pittsburgh Plate Glass Company* v. *N L R B.,* 313 U S. 146; *N L R B* v *American Steel Buck Corp,* 227 F. 2d 927 (C A. 2), *Pacific Greyhound Lines,* 22 NLRB 111; *Swift & Company,* 63 NLRB 718, *The Midland Steel Products Company,* 71 NLRB 1379; *Worcester Woolen Mills Corporation,* 74 NLRB 1071, enfd 170 F 2d 13 (C A 1), cert denied 336 U.S 903; *Grede Foundries, Inc, Iron Mountain Division,* 83 NLRB 201; *Clark Shoe Company,* 88 NLRB 989; *American Finishing Company,* 90 NLRB 1786; *Kearney & Trecker Corporation,* 101 NLRB 1577; *The Baker and Taylor Co,* 109 NLRB 245, 246; *National Carbon Company, a Division of Union Carbide and Carbon Corporation (Edgewater Works),* 110 NLRB 2184, 2185; *Jackson Daily News,* 103 NLRB 207, *United Insurance Company,* 122 NLRB 911, 916 However, when the *United Insurance Company* case came before the Court of Appeals for the Seventh Circuit in 1960 (272 F. 2d 446) that court said in setting aside the Board's decision · "a prior Board determination of employee status in a representation proceeding would not be binding in a future unfair labor practice proceedings." However, the same court of appeals in a case decided 12 years earlier (*Allis-Chalmers Manufacturing Company* v *N L R B*, 162 F 2d 435, 439) held that where the Board reasonably exercises its discretion in determining the appropriate unit for collective bargaining, its determination is binding upon the court. See also *Southern Airways Company,* 124 NLRB 749, footnote 2 In *Montgomery Ward & Company, Incorporated,* 115 NLRB 645, where the charging union filed a representation petition, the parties agreed to a consent election in a unit of all employees excluding supervisors An employee, whom the Respondent contended in the subsequent unfair labor practice proceeding, to be a supervisor but who voted in the representation election, was held by the Board "not [to be] the equivalent

There is no question, and it is acknowledged by Respondent that Leonard Niederriter knew of Schwartz' union activities as early as June 1959.[10] Moreover, in the middle of July, Leonard Niederriter called Schwartz into his office and questioned him about whether he had joined the Union and Schwartz stated he had. That this knowledge was the motivating cause for both Schwartz' and Wells' discharge, is evidenced by Leonard Niederriter's statement on September 18 when he fired them that—"Now you can go to the union and get your wages." Also corroborative of this conclusion is Leonard and James Niederriter's testimony that one of the reasons for firing Schwartz was his engaging in union organizational activities on company time and premises. This clearly establishes the Respondent's animus. This evidence, therefore, is conclusive in determining that Respondent's motivation in discharging both Schwartz and Wells was their union activities.

Leonard Niederriter's testimony that Schwartz was fired because he refused to perform his various duties as sales manager; that he "overbought" furniture and that he transacted his private affairs on company time and premises is not credited for the reasons hereinafter explicated. After observing the witnesses and analyzing the record and inferences to be drawn therefrom, it is concluded that these grounds asserted by Respondent do not follow a logical sequence and are not consistent with the attendant circumstances in this proceeding nor with the union animus displayed by Niederriter, particularly his questioning Schwartz about his union activities as well as his statement when he discharged him that Schwartz should now look to the Union for his wages.[11] Moreover, James Niederriter told Schwartz in July that his father would close the store before he would deal with the Union which prediction eventually occurred.

Corroborative of the conclusion that Schwartz' discharge was discriminatorily motivated is James Niederriter's testimony on direct examination that he instructed the bookkeeper to discontinue paying Schwartz the 2-percent "override" commission when he learned that Schwartz had joined the Union.

Nor is Leonard Niederriter's testimony credited, for the reasons stated above, that Wells was laid off from September 18 to October 8, 1959,[12] because of economic reasons, namely, that business was so bad there was no further need for his services. Moreover, although Niederriter testified that economic reasons forced him to terminate Wells on September 18, Arleen Solibay, Respondent's bookkeeper, testified that the reason Respondent gave on Wells' unemployment compensation form for his discharge was "incompetent." These contradictory versions indicate a discriminatory motive for Wells' discharge. It is believed and found, therefore, based upon the entire record in this case, and from observation of Leonard Niederriter's demeanor and deportment while testifying, that the motivating reason for Wells' discharge was his activities on behalf of the Charging Union. This conclusion, in addition to the reasons stated above, is based on Wells having signed the union authorization card, attended union meetings, and his being told by Niederriter at the time of his discharge, and this is uncontradicted, that he could now look to the Union for his wages.

On the entire record, therefore, it is found that the real and underlying reason motivating the discharge of Schwartz and Wells was their adherence to and support

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of a determination of his status by the Board" The Board stated at pages 646 and 647 "The representation case was never before the Board itself The Board was never asked to determine whether [the employee] was or was not a supervisor Nor is there evidence that the Union was in possession of all the evidence as to the status of [the employee] and deliberately refrained from making the claim that he was a supervisor. We hold, therefore, that the mere fact that [the employee] was permitted to vote in the election by the agreement of the parties is not the equivalent of a determination of his status by the Board"

[10] Furthermore, a salesman named Wagner told Niederriter in June that he was approached in the store by a union organizer

[11] Judge Learned Hand in *Dyer* v. *MacDougall,* 201 F 2d 265, 269 (C A. 2), stated.

> [demeanor] evidence may satisfy the tribunal, not only that the witness' testimony is not true, but that the truth is the opposite of his story, for the denial of one, who has a motive to deny, may be uttered with such hesitation, discomfort, arrogance, or defiance, as to give assurance that he is fabricating, and that if he is, there is no alternative but to assume the truth of what he denies.

Accord *N L R B.* v. *Howell Chevrolet Company,* 204 F 2d 79, 86 (C A. 9), affd 346 U.S 482

[12] This recall date is based on Wells' testimony that he received from Respondent on October 8, a letter dated October 5, requesting him "to report back to work immediately"

of the Union. Accordingly, it is found that by discharging Schwartz and Wells for this reason, Respondent violated Section 8(a)(1) and (3) of the Act.

Inasmuch as Respondent is found to have violated Section 8(a)(3) by discharging Schwartz and Wells because of their engagement in activities protected by Section 7 of the Act, it is not necessary to discuss the averments of the complaint alleging a violation of Section 8(a)(4) with respect to Respondent discharging the same two discriminatees because they testified at a representation hearing, as the remedy is substantially the same in either situation.[13]

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its business operations 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 thereof.

V. THE REMEDY

It is well settled that a discriminatorily discharged employee is entitled to backpay from the date of the unlawful discharge to the date upon which he is offered immediate reinstatement to his former or substantially equivalent position. The right to backpay during the foregoing period is based on the theory that, but for the unlawful discharge, the discriminatee would have earned his normal wages during this period.

However, where it is shown that a discriminatee would not have earned wages during the backpay period, or a portion thereof, the Board will modify its backpay order accordingly. Thus, the Board has not ordered payment of wages for that portion of the backpay period during which the business was shut down.[14] Similarly the Board has cut off backpay on the date upon which a discriminatee refused reinstatement [15] or was laid off, either because of a reduction in force [16] or because of participation in an unprotected strike.[17] Finally, the Board has declined to order backpay beyond the date of a permanent cessation of business operations.[18]

In the present case there was a permanent closing of Respondent's retail store on November 20, 1959. Under all the circumstances, it is concluded that, although the discriminatees are entitled to backpay for the period from September 19 to November 20, 1959, in the case of Schwartz and for Wells from September 19 to approximately October 8, 1959, when he was rehired, they are not entitled to any monetary compensation for the period subsequent to the permanent cessation of business operations on November 20, 1959.

The Board has stated that it is not unmindful of the hardships imposed upon employees by a Respondent's decision to go out of business but at the same time, an employer, who permanently closes his business and discontinues business operations, should not be ordered to continue paying wages to its employees thereafter.[19]

As the Respondent has permanently discontinued its business operations, immediate reinstatement shall not be recommended for the two discriminatees. Instead, it shall be recommended that the Respondent create a preferential hiring list, notify the two discriminatees, Schwartz and Wells, of said list, and, in the event it resumes operation of its furniture and appliance business, to offer the discriminatees immediate reinstatement to their former or substantially equivalent positions without prejudice to their seniority and other rights and privileges previously enjoyed.[20]

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[13] *Lakeland Bus Lines, Incorporated*, 124 NLRB 123 See also *Brookville Glove Company*, 116 NLRB 1282, 1283, and cases there cited; *Crosby Chemicals, Inc.*, 121 NLRB 412, 414.

[14] *Acme Equipment Company*, 102 NLRB 153

[15] *Alexander Manufacturing Company*, 110 NLRB 1457, 1459

[16] *E V. Prentice Machine Works, Inc.*, 120 NLRB 417, 418; *J. C Boespflug Construction Co.*, 113 NLRB 330, 336; *Westinghouse Electric Corporation, Ansonia Plant*, 77 NLRB 1058, 1061.

[17] *Mid-West Metallic Products, Inc.*, 121 NLRB 1317, 1320

[18] *A. M. Andrews Company of Oregon and A M Andrews of Illinois, Inc.*, 112 NLRB 626, 630; *Colonial Fashions, Incorporated*, 110 NLRB 1197, 1204; *Reynolds Corporation*, 74 NLRB 1622; *Randolph Corporation*, 89 NLRB 1490, 1495; *Cleveland-Cliffs Iron Company*, 30 NLRB 1093, 1115, enfd. 133 F. 2d 295, 302 (C.A. 6); *Yoseph Bag Co.*, 128 NLRB 211.

[19] *Rudy Barbers, et al., d/b/a Barbers Iron Foundry*, 126 NLRB 30.

[20] *Id.*

It will also be recommended that Respondent make whole Schwartz and Wells for any loss of pay they may have suffered by reason of the discrimination against them by payment to them of a sum of money equal to that which they would normally have earned as wages from the date of discrimination to the date Respondent discontinued its business (less the time Wells was reemployed) less their net earnings during such period, in accordance with the Board policy set forth in *F. W. Woolworth Company*, 90 NLRB 289, and *Crossett Lumber Company*, 8 NLRB 440.

The right is expressly reserved to modify the backpay and reinstatement provisions of these recommendations if made necessary by a change of conditions in the future, and to make such supplements thereto as may hereafter become necessary in order to define or clarify their application to a specific set of circumstances not now apparent.[21]

CONCLUSIONS OF LAW

1. Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By interfering with, restraining, and coercing its employees in the exercise of rights guaranteed them in Section 7 of the Act, as found above, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.
4. By discriminatorily discharging Stanley Schwartz and Arthur Wells because of their adherence to and support of the Union, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.
5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

[Recommendations omitted from publication.]

[21] *Bermuda Knitwear Corporation*, 120 NLRB 332, 333.

Southeastern Galvanizing Corporation and Florida Wholesale Fence, Incorporated *and* United Steelworkers of America, AFL–CIO. *Case No. 12–CA–1332. February 10, 1961*

DECISION AND ORDER

On July 19, 1960, Trial Examiner Arthur E. Reyman issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report, attached hereto. Thereafter the General Counsel and the Respondent filed exceptions to the Intermediate Report.[1]

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

The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed.[2] The Board has considered the Inter-

[1] The Respondent filed with the Board a motion to reopen the record. This motion is denied as the issues raised therein are disposed of by our subsequent findings

[2] We affirm the Trial Examiner's denial of Respondent's motions to strike and to dismiss because Reeves Fences, Inc., was not named as a Respondent Reeves Fences, Inc., is a