STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

TEAMSTERS "GENERAL" LOCAL UNION NO. 200, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, Complainant, vs. MERRILL MOTOR SERVICE, INC., Employer-Respondent.	Case I No. 15392 Ce-1403 Decision No. 10844-A

Appearances:
Goldberg, Previant & Uelmen, Attorneys at Law, by Mr. Alan M. Levy, appearing on behalf of the Complainant.
Mr. John R. Collentine, Attorney at Law, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

A complaint of unfair labor practices having been filed with the Wisconsin Employment Relations Commission in the above entitled matter; and the Commission having appointed George R. Fleischli, a member of the Commission's staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Section 111.07(5) of the Wisconsin Employment Peace Act; and hearing on said complaint having been held at Milwaukee, Wisconsin, on March 21, 1972 before the Examiner, and the Examiner having considered the evidence and arguments and being fully advised in the premises makes and files the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Teamsters "General" Local Union No. 200, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, hereinafter referred to as the Complainant, is a labor organization having its principal office at 6200 West Bluemound Road, Milwaukee, Wisconsin.

2. That Merrill Motor Service, Inc., hereinafter referred to as the Respondent, is a corporation engaged in a cartage operation in the trucking industry and is an employer within the meaning of Section 111.02(2) of the Wisconsin Statutes, having its principal place of business at 172 East Lincoln Avenue, Milwaukee, Wisconsin.

3. That since January 17, 1972 the Complainant has been and is the voluntarily recognized bargaining representative of all drivers and helpers employed by the Respondent at its place of business on 172 East Lincoln Avenue, Milwaukee, Wisconsin.

4. That the Respondent's cartage operation was established in late 1969 when it obtained a permit to engage in cartage operations

from the Wisconsin Public Service Commission; that at the time that said permit was obtained all of the outstanding stock in the Respondent corporation was owned by three individuals namely, Valentine Luljack, Keith Stankiewicz and Thomas R. Biedrich and that shortly thereafter Biedrich purchased the stock owned by Luljack; that on various dates in 1970 and 1971 the Respondent hired four employes, Thomas L. Verney, Thomas Rowe, William Byrnes and Victor Sachen for the purpose of driving trucks and making deliveries; that until sometime in early December 1971 the day-to-day operation of the Respondent's business was handled by its President, Stankiewicz, who also drove a truck and made deliveries; that until December 31, 1971 the Respondent's Secretary-Treasurer, Biedrich, had a full time job with another employer and did not take an active part in the day-to-day operation of the Respondent's business and did not drive a truck or make deliveries; that from its inception the Respondent's business has not been profitable and on several occasions it has become necessary for Biedrich to invest additional sums of money in the business and for Stankiewicz to forego weekly paychecks to enable the Respondent to meet its current obligations.

5. That Biedrich notified his employer in late November 1971 that he was resigning his employment effective December 31, 1971 in order to devote full time to the Respondent's business; that sometime during early December 1971 Biedrich held a meeting with the Respondent's employes for the purpose of explaining that Stankiewicz was being relieved of his position as head of the Respondent's operations and that he, Biedrich, was going to take over control of the Respondent's operations in an effort to make it more profitable; that the employes asked Biedrich if he intended to provide them with certain wage increases and fringe benefits which they desired and a discussion of wages and fringes ensued at the end of which Biedrich advised them that he did not call the meeting to discuss wages and fringe benefits but that he would discuss those subjects if he was presented with a written request for same and it was agreed that a written request would be prepared.

6. That on December 17, 1971 employes Byrnes and Verney signed cards authorizing the Complainant to represent them for purposes of collective bargaining on wages, hours and working conditions and that on December 21 and 29, 1971 employes Rowe and Sachen signed identical cards.

7. That during the period after December 25, 1971 and before January 1, 1972 Biedrich and Stankiewicz discussed two possible courses of action in an effort to make the Respondent's operation more profitable, to wit: (1) seeking to increase the number of customers which then amounted to twelve or (2) eliminating those existing customers whose business was unprofitable if the customer refused to accept a rate increase; that during the next two weeks Biedrich and Stankiewicz made an effort to find new customers which met with little success and they took action to eliminate three customers who refused to accept rate increases.

8. That on or about January 11, 1972 the Respondent received a letter from Fred Hammer, Complainant's Business Representative which read as follows:

> "This is to notify you that a majority of your employees in the collective bargaining unit described below have designated Teamsters 'General' Local Union No. 200 as their exclusive collective bargaining representative.

In view of such designation, we demand recognition, for the purpose of collective bargaining, as the exclusive representative of such employees. The collective bargaining unit in which we demand recognition consists of all drivers and helpers, excluding office, clerical, salesmen, guards and supervisors.

Please be in our office on Monday, January 17, 1972, at 10:00 A.M. for the purpose of negotiating a collective bargaining agreement. If such date is inconvenient for you, please notify us so that another more convenient date can be agreed upon. We are willing to permit a neutral person to check our authorization cards at the time of such meeting for the purpose of verifying our majority status.

In the event of any discrimination against any of your employees because of their union activities, or in the event of your refusal to bargain with us, we will take prompt action to remedy such discrimination or refusal to bargain."

9. That in the afternoon of January 17, 1972 Biedrich and the Respondent's attorney met with Hammer and another Business Representative of the Complainant named Johannes in the Complainant's office; that Johannes did most of the talking on behalf of the Complainant due to the fact that Hammer was called out of the room initially and on one other occasion for short periods of time; that at the outset of the meeting Johannes asserted that the Complainant represented a majority of the Respondent's employes and both Biedrich and the Respondent's attorney accepted that claim and proceeded to discuss the Complainant's demands with regard to wages, hours and working conditions; that Johannes gave Biedrich and the Respondent's attorney a copy of a collective bargaining agreement entitled National Master Freight Agreement, Central States Area Local Cartage, a printed document containing 130 pages; that Biedrich looked at the wage rates and fringe benefits provided for in said agreement and stated that he would probably have to go out of business if he were to sign said agreement; that Biedrich stated that said agreement appeared to be for "large employers" and asked if there was another agreement for "small employers"; that Johannes said that there was only one agreement and that the Respondent would have to accept that agreement; Johannes suggested that Biedrich take a few days to decide what he intended to do and the meeting adjourned; that no one acting on behalf of the Respondent contacted the Complainant thereafter until the filing of the complaint herein on March 1, 1972.

10. That on or after January 17, 1972 and before January 24, 1972 Biedrich initiated a conversation with employe Sachen wherein Biedrich asked Sachen why he had joined the Complainant union; that Sachen advised Biedrich that because of conversations which he had heard "on the dock" it was his understanding that the employes were going to receive insurance coverage and paid holidays and that he joined the Complainant union when a week passed and he did not receive those fringe benefits; that Biedrich advised Sachen that he had intended to grant said benefits in the future but that he could not afford to pay the wages and fringe benefits the Complainant union was asking for since the Respondent had not yet "turned the corner" and that he "couldn't see" why the men "jumped on this thing" as fast as they did.

11. That on or about January 22 or January 23, 1972 Biedrich and Stankiewicz decided that they would discharge Verney, Rowe,

Byrnes and Sachen and eliminate all but three of the Respondent's remaining customers; that the reason Biedrich and Stankiewicz made said decision was because the above named employes had joined the Complainant labor organization and had through the Complainant as their representative, asked for substantial increases in wages and fringe benefits; that no one acting on behalf of the Respondent notified the Complainant of the decision to discharge said employes and eliminate all but three of the remaining customers nor did any one acting on behalf of the Respondent offer to bargain about any aspect of that decision.

12. That at about 8:15 a.m. on the morning of January 24, 1972 Stankiewicz advised Sachen that the Respondent had no more work for him because the Respondent intended to "liquidate" and that Sachen should come back later to get his check; that later that morning when Verney arrived to work Biedrich advised him that the Respondent was going to "let everybody go" because the Company was "liquidating"; that at about 9:15 a.m. that morning when Rowe and Byrnes arrived to work, Biedrich advised them that the Respondent was going to "liquidate" because "we are not making any money" and gave them their checks.

13. That on January 24, 1972 a few minutes after Biedrich told Verney that he was discharged, Verney had a conversation with Stankiewicz wherein Stankiewicz asked him: "Who started this anyhow -- Bill?" [referring to Byrnes]; that Verney stated that all four employes had gotten together and decided that they needed a representative because of "a lot of promises and goofy things going on"; that Stankiewicz stated that the Respondent could not pay the wages and fringe benefits sought by the Complainant union and terminated the conversation by saying, "I started this business and worked hard at it. Now something like this comes along and destroys it."

14. That on January 24, 1972 and continuing for a few days thereafter the Respondent employed an individual, who had never worked for the Respondent before, to drive trucks and make deliveries while the Respondent completed the process of terminating its contracts with all of its remaining customers but three and making arrangements to have another cartage company enter into contracts with the customers so terminated; that prior to the hearing herein the Respondent had not sold any of the three trucks or two tractors which it owns; that since January 24, 1972 Stankiewicz and Biedrich have continued to drive trucks for the Respondent's three remaining customers and that on occasions during that period of time Biedrich's father has driven trucks for the same purpose.

Based on the above and foregoing Findings of Fact, the Examiner makes and files the following

CONCLUSIONS OF LAW

1. That Teamsters "General" Local Union No. 200, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is the voluntarily recognized bargaining representative of a majority of the Respondent's employes in a collective bargaining unit consisting of all drivers and helpers excluding office clerical, salesmen, guards and supervisors, having been recognized as such on January 17, 1972.

2. That Merrill Motor Service, Inc., by the action of its agent, Thomas R. Biedrich, on or after January 17, 1972 wherein he interrogated Victor Sachen concerning his reasons for joining Teamsters "General"

Local Union No. 200, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and implied that he would have received certain desired fringe benefits if he hadn't joined said organization has interferred with Sachen's exercise of the rights guaranteed him under Section 111.04 of the Wisconsin Statutes and has committed an unfair labor practice within the meaning of Section 111.06(1)(a) of the Wisconsin Statutes.

3. That Merrill Motor Service, Inc., by discharging Thomas L. Verney, Thomas Rowe, William Byrnes and Victor Sachen because they joined Teamsters "General" Local Union No. 200, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and through said labor organization asked for substantial increases in wages and fringe benefits, has discriminated and is discriminating against said employes because of their membership in and representation by said labor organization and has committed and is committing unfair labor practices within the meaning of Section 111.06(1)(c) and Section 111.06(1)(a) of the Wisconsin Statutes.

4. That Merrill Motor Service, Inc., by the action of its agent Keith Stankiewicz on January 24, 1972 wherein he interrogated William Byrnes concerning who, among the four employes, first thought of joining Teamsters "General" Local Union No. 200, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America has interferred with Byrnes' exercise of the rights guaranteed him under Section 111.04 of the Wisconsin Statutes and has committed an unfair labor practice within the meaning of Section 111.06(1)(a) of the Wisconsin Statutes.

5. That Merrill Motor Service, Inc., by discharging all of its employes who were represented by Teamsters "General" Local Union No. 200, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and terminating its contracts with all of its remaining customers but three, totally rejected its duty to bargain collectively with said labor organization and has violated and is violating its duty to bargain collectively and has committed and is committing an unfair labor practice within the meaning of Section 111.06(1)(d) and Section 111.06(1)(a) of the Wisconsin Statutes.

Based on the above and foregoing Findings of Fact and Conclusions of Law, the Examiner issues the following

ORDER

IT IS ORDERED that the Respondent, Merrill Motor Service, Inc., its officers and agents shall immediately:

1. Cease and desist from:

a) Interferring with the rights of its employes guaranteed to them by Section 111.04 of the Wisconsin Statutes by interrogating said employes with regard to their membership in or reasons for joining Teamsters "General" Local Union No. 200, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America or by making implied or express threats or promises of any kind with regard to their exercise of those rights.

b) Discouraging its employes from becoming members of or being represented by Teamsters "General" Local Union

No. 200, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America or any other labor organization by discharging or otherwise discriminating against any employe in regard to his hire tenure of employment or terms and conditions of employment.

c) Refusing to bargain collectively with Teamsters "General" Local Union No. 200, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America as the exclusive bargaining representative of all of its employes in the bargaining unit consisting of all drivers and helpers excluding office clerical, salesmen, guards and supervisors with respect to wages, hours and other terms and conditions of employment.

2. Take the following affirmative action which the Examiner finds will effectuate the policies of the Wisconsin Employment Peace Act:

a) Immediately place Thomas L. Verney, Thomas Rowe, William Byrnes and Victor Sachen on a preferential hiring list according to their length of service as employes and offer employment to each of said employes in accordance with their relative length of service (the greatest in length of service to be given the first offer) before it hires any employes within the meaning of Section 111.02(3) or employs any person other than Thomas Biedrich or Keith Stankiewicz to perform the work or substantially equivalent work performed by said employes prior to January 24, 1972. All offers of employment shall be in writing and directed to the Complainant by registered mail, with a copy to the employe's last known address.

b) Pay Thomas L. Verney, Thomas Rowe, William Byrnes and Victor Sachen a sum of money equal to that which they would have earned as employes from the date of their discharge on January 24, 1972 until the date on which their names are placed on the preferential hiring list and the notice requirements of this order have been met, less any money they may have earned or received during said period which they would not have otherwise earned or received had they not been discharged.

c) Maintain written records of all employment offered to any person and all work performed by any person which employment or work would involve work which had been performed in whole or in part by Thomas L. Verney, Thomas Rowe, William Byrnes and Victor Sachen before January 24, 1972 and, upon request, make the contents of those records available to representatives of Teamsters "General" Local Union No. 200, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

d) Notify Teamsters "General" Local Union No. 200, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America that it is willing to bargain collectively and, upon request, bargain collectively with Teamsters "General" Local Union No. 200, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America as the exclusive bargaining representative of all employes employed

in the collective bargaining unit consisting of all drivers and helpers excluding office clerical, salesmen, guards and supervisors with regard to wages, hours and other terms and conditions of employment.

e) Notify all of its employes by posting in conspicuous places on its premises, where notices to all its employes are usually posted, a copy of the notice attached hereto and marked Appendix A. Such copy shall be signed by Thomas Biedrich and Keith Stankiewicz and shall be posted immediately upon receipt of a copy of this order and shall remain posted for one year thereafter. Reasonable steps shall be taken by Merrill Motor Service, Inc. to insure that said notice is not altered, defaced or covered by any other material.

f) Notify the Wisconsin Employment Relations Commission in writing within twenty (20) days of the date of this order as to what steps it has taken to comply herewith.

Dated at Madison, Wisconsin, this 28th day of September, 1972.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By George R. Fleischli
George R. Fleischli, Examiner

APPENDIX A

NOTICE TO ALL EMPLOYES

Pursuant to an order of the Wisconsin Employment Relations Commission we hereby notify our employes that:

1. WE HAVE this day placed Thomas L. Verney, Thomas Rowe, William Byrnes and Victor Sachen on a preferential hiring list according to their length of service as employes and we will offer employment to each of said employes in accordance with their relative length of service (the greatest in length of service to be given the first offer) before we hire any employes or employ any person other than Thomas Biedrich or Keith Stankiewicz to perform the work performed by said employes before they were improperly discharged on January 24, 1972.

2. WE WILL make whole Thomas L. Verney, Thomas Rowe, William Byrnes and Victor Sachen for any income they may have lost by reason of our discriminatory discharge of said employes from January 24, 1972 until the date of this notice.

3. WE WILL NOT discourage membership in Teamsters "General" Local Union No. 200, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America or any other labor organization by discharging or otherwise discriminating against any employe in regard to his hire, tenure of employment or terms or conditions of employment.

4. WE WILL NOT interfere with our employes' exercise of their rights guaranteed under Section 111.04 of the Wisconsin Statutes which consist of the right of self-organization and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection; and the right to refrain from any or all of such activities.

5. WE WILL upon request bargain collectively with Teamsters "General" Local Union No. 200, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America as the exclusive bargaining representative of all employes employed in the collective bargaining unit consisting of all drivers and helpers excluding office clerical, salesmen, guards and supervisors with respect to wages, hours and other terms and conditions of employment.

MERRILL MOTOR SERVICE, INC.

By_____
Keith Stankiewicz, President

_____
Thomas Biedrich, Secy-Treas.

Dated this day of 1972.

THIS NOTICE MUST REMAIN POSTED FOR ONE YEAR FROM THE DATE HEREOF AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY OTHER MATERIAL.

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The Complainant alleges that since on or before January 1, 1972 it has represented a majority of the Respondent's employes in a collective bargaining unit consisting of drivers and helpers and that on January 17, 1972 the Respondent recognized it as the collective bargaining representative of said employes and entered into negotiations on wages, hours and working conditions for said employes. It further alleges that the Respondent thereafter refused to bargain collectively with the Complainant and engaged in several acts of interference and discrimination in violation of Sections 111.06(1)(a), 111.06(1)(c) and 111.06(1)(d) of the Wisconsin Statutes.

The Respondent entered an oral answer at the hearing wherein it admitted that the Complainant has since on or before January 1, 1972 represented a majority of the employes in the collective bargaining unit consisting of drivers and helpers. The Respondent denied that it agreed to recognize the Complainant on January 17, 1972 or that it engaged in any of the unfair labor practices alleged and asked that the complaint be dismissed. At the conclusion of the Complainant's case-in-chief the Respondent made a motion that the complaint be dismissed and the Examiner deferred ruling on that motion. For the reasons discussed below the motion is without merit and is therefore denied.

The evidence presented by the Complainant clearly establishes that the Respondent has engaged in a number of unfair labor practices as alleged. Those violations are discussed herein in the approximate order of their occurrence.

INTERROGATION OF SACHEN

Biedrich's interrogation of Sachen regarding Sachen's reasons for joining the Complainant union which took place shortly after Biedrich and the Respondent's attorney had met with Hammer and Johannes in the Complainant's office, might be overlooked as an isolated and minor violation had it not been followed by the massive discharge of all employes represented by the union. Even though Biedrich prefaced his question by asking Sachen if he minded being asked a "personal question", Sachen did not, by agreeing to allow his employer to ask a "personal question", change the inherently coercive nature of the question and the conversation which accompanied it. 1/ In the context of the situation Biedrich's question constituted an act of interference with Sachen's Section 111.04 rights. Biedrich had recently advised Sachen and the other drivers that he was taking over the day-to-day operation of the business and that he intended to institute "changes"

1/ Interrogation of employes regarding their membership in a labor organization or their reasons for joining have been found to be unfair labor practices in the following cases, inter alia: Edgewater Enterprises Inc. (7079) 4/65; Mt. Nebo Fur Farm (6898) 10/64; Pleasant Valley Coop Creamery (6304) 4/63; Rice Grocery Co. (5632) 11/60; Rainbow Auto Wash Corp. (4788) 6/58.

in an effort to make the business more profitable. These proposed changes were apparently one of the two concerns that caused the employes to join the union. 2/ Asking Sachen why he had joined the union and following up the question with the statement that it was the Respondent's intent to give Sachen the things he mentioned but that he couldn't understand why the men had "jumped on this thing", would have the forseeable effect of discouraging Sachen from adhering to the Union. From this conversation an employe would be led to the conclusion that his employer might be more likely to give him the things that he wanted if he dropped his interest in the union. In fact Biedrich's discussion of the wage and fringe benefit demands made by the Complainant union bordered on a violation of the Respondent's duty to bargain collectively with the majority representative by by-passing the bargaining representative and engaging in bargaining with individual employes.

THE DISCRIMINATORY DISCHARGES

The Respondent contends that it was merely exercising its legitimate prerogative as an employer to curtail unprofitable operations when it discharged the four drivers and proceeded to terminate its contracts with all but three of its remaining customers. 3/ The Examiner does not doubt that the Respondent's business had been unprofitable up to that point in time and accepts, for purposes of this proceeding, Biedrich's claim that he would have to go out of business if he were to agree to the wage rates and fringe benefits sought by the Complainant. 4/ However the Respondent's employes were not on strike and had not threatened to go on strike in support of those demands. The Respondent's termination of their employment was in the nature of a discriminatory lockout 5/ which was precipitated and motivated by the fact that the employes had joined the Complainant labor organization and asked for substantial increases in wages and fringe benefits. By this means the Respondent sought to avoid its duty to bargain collectively with the Complainant.

There is considerable objective evidence of discriminatory motivation in this case. By his own admission Biedrich said that before January 17, 1972 he and Stankiewicz had decided to try to increase the number of customers if possible and to "weed out" those customers who were unprofitable and refused to accept a rate increase.

2/ It was one of the two reasons given to Stankiewicz by Verney. (T. 14)

3/ Apparently as an afterthought, the employer alleged during the course of the hearing that all four employes were discharged for cause as well. This allegation is not supported by credible evidence and is rejected as a mere pretext.

4/ This claim assumes that the Respondent's competition would not allow a sufficient increase in rates and that the Respondent would not be able to increase the efficiency of its operations sufficiently to pay those wages and fringes. It should be noted that those employers who are signators to the cartage agreement are apparently able to pay the wages and fringes provided.

5/ See Neuheisel Lime Works (1230) 2/47; Wisco Hardware Co. (2154) 7/49. It was not a permissable lockout because the Respondent was not attempting to compel the union to accept its last offer in bargaining and return to work but rather sought to avoid its bargaining obligations altogether by getting rid of all of its employes who were represented by the union. The Respondent had never made an offer in bargaining but had merely asked the union if they did not have a less expensive offer.

Action along both those lines had been taken before Biedrich and Stankiewicz became aware of the union's representative status. If the subsequent decision to terminate all but three of the remaining customers was purely economic, why did the Respondent first fire all of its employes before making arrangements to transfer its contracts to another carrier? At that point in time it would be too late to ask the customers if they were willing to accept rate increases. If Biedrich's testimony is believed none of these customers were profitable except for the three who were retained who, coincidently, provided enough work for Biedrich and Stankiewicz but not enough for any of the employes who had recently joined the union.

If the decision was dictated by purely economic considerations it is unlikely that the Respondent would fire all of his drivers and then immediately hire a new driver because he had fired one too many. One of the two reasons given by Biedrich for hiring the new driver was that he was afraid that the one employe who was not discharged might "continue" disrupting his business. This explanation is rejected since it is based on the pretextual claim that all four were discharged for misconduct. If in fact Biedrich was concerned about such a possibility his concern was no doubt based on the fact that the employes were well aware of his motivation in discharging them. Biedrich's other stated reason supports this conclusion. 6/

Although Biedrich claims that he told the employes that he was merely curtailing the Respondent's operations, and advised Stankiewicz to do the same, all three employes who testified stated that they were told that the Respondent was going to terminate its cartage operations. Because of the incredible nature of Biedrich's other testimony the Examiner credits the testimony of the employes on this point. But assuming, for the purpose of analysis, that Biedrich did indicate that the Respondent was merely curtailing its operations, all of the testimony is consistent on the point that Biedrich and Stankiewicz discharged the employes thereby making it clear that there was no prospect that they would be re-employed. Even when there is no collective bargaining agreement in effect an employer who finds it necessary to curtail his operations for economic reasons would not be likely to do so in such a precipitous manner. Also an employer would normally give his employes some indication that the cutback was due to economic necessity by characterizing it as a "lay off" or by using other words to convey a similar meaning. Here the men were told that they were being discharged and no mention was made of any prospect of recall if business improved. The only explanation that Biedrich offered which might explain this fact is his incredible claim that the men were discharged in part because of prior misconduct. The evidence is uncontradicted to the effect that no mention of the alleged misconduct was made at the time of the discharge or at any other time prior to the hearing.

Finally, the statements made by Stankiewicz in his conversation with Verney at the time of his discharge are revealing with regard to his motivation for the action. The compeling inference is that when Stankiewicz stated that something like "this" had come along and destroyed the business which he had built, he was referring to the Complainant union and not the economic condition of the Respondent. The context in which the statement was made leads to the inescapable conclusion that Stankiewicz was referring to the fact that the drivers had joined the Complainant union and asked for substantial increases

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6/ Biedrich stated that one of the reasons for not allowing one of the four drivers to continue to drive was "because he might feel a certain animosity toward us for being let go." (T. 35)

in wages and fringes benefits. The conversation prior to Stankiewicz's statement dealt with the Respondent's inability to pay the wage and fringe benefit demands made by the Complainant union and not the unprofitable nature of some of the Respondent's accounts. Because of the timing of the decision and the manner in which the decision was carried out the Examiner is satisfied that the decision was precipitated and motivated by the fact that the employes had joined the Complainant labor organization and through that organization asked for substantial increases in wages and fringe benefits.

INTERROGATION OF BYRNES

There can be little doubt that under most circumstances an employer commits an act of interference within the meaning of Section 111.06(1)(a) when its principal officer asks one of its employes who initiated the idea of joining the union. Such an inquiry by an employer is inherently coercive since it is pregnant with the implication that the employer may be intending to use the information sought for a discriminatory purpose.

It could be argued that the coercive nature of such an inquiry is not present in a situation where an employe has already become the victim of the ultimate form of discrimination by an employer, i.e. discharge. However, the inquiry took place within a few minutes after the discriminatory firing and for that reason carried an even stronger coercive implication. A reasonable person in Byrnes' situation would be led to the conclusion that the right kind of answer might still somehow save his job.

DUTY TO BARGAIN

Even if the Respondent's motivation in firing all its drivers and thereafter terminating all its remaining customers but three had not been discriminatory it would have violated its duty to bargain with the voluntarily recognized representative of its drivers when it failed to notify the Complainant union regarding its decision or offering to bargain with regard to any aspect of that decision. In view of the finding that the decision was taken for discriminatory reasons it would be somewhat anomalous to find that the Respondent violated its duty to bargain by failing to bargain with regard to its illegal action. Even so, the Respondent's failure to do so in this case is most unfortunate in that such notification might have caused the union to modify its position at the bargaining table. In addition, given timely notice, the union might have persuaded the Respondent to modify its proposed action so as to avoid the legal consequences which necessarily flow from that decision.

When the Respondent chose to discharge all of its employes who were represented by the Complainant union rather than continue to bargain with a union that had taken such a firm stand at the bargaining table, those employes did not cease to be employes within the meaning of Section 111.02(3) of the Wisconsin Statutes and the Respondent remained under a duty to bargain with the Complainant union concerning their wages, hours and working conditions. By discharging all of its employes because they had joined the Complainant union and asked for substantial increases in wages, the Respondent sought to avoid its bargaining obligations altogether. This aspect of the Respondent's conduct constitutes a total rejection of its duty to bargain collectively within the meaning of Section 111.06(1)(d) and requires an appropriate

remedial order. 7/ If the Respondent had discharged less than all of the employes who were represented by the union such conduct would have constituted an act of discrimination and interference but not necessarily a total rejection of its duty to bargain collectively.

REMEDY

The ordinary remedy for a discriminatory discharge of the type present in this case is to attempt to make the victims of that discrimination whole by ordering the Respondent to reinstate them to their former jobs or substantially equivalent jobs and compensate them for lost earnings. 8/ This remedy is based on the premise that the employes should be made whole to the extent possible. In this case immediate reinstatement is not practical because of the nature of the Respondent's action. By terminating its contracts with all but three of its remaining customers the Respondent has created a situation where it does not presently have sufficient work to continue to employ the four employes discharged. If the Respondent were ordered to reinstate the four employes discharged it would have the right, after it had met its duty to bargain in good faith with regard to the question of layoffs, to lay the four employes off for lack of work. 9/ Such a "reinstatement" would hardly make them whole.

A more appropriate remedial order under the circumstances present in this case is to order the Respondent to establish a preferential hiring list and require the Respondent to offer reinstatement to each of said employes at such time that additional work becomes available. 10/ The Respondent should not be allowed to employ any person including Biedrich's father until that obligation has been met. It might be argued that Biedrich should not be allowed to drive a truck and thereby displace one of the drivers on the preferential hiring list. However Biedrich's decision to quit his employment and devote full time to the Respondent's operations, which presumably included driving a truck, was made and implemented before Biedrich had any knowledge of the union activity of his employes and was therefore not motivated by a desire to displace one of the union adherents. The question of the performance of bargaining unit work by supervisors is a working condition, which the Complainant may seek to bargain about in the future.

With regard to backpay, the Respondent has been ordered to make the four drivers whole for all loss of income that they suffered by reason of their discharge. The obligation for backpay should terminate upon compliance with the requirement that the employes be placed on a preferential hiring list since their discriminatory discharge will have been converted to a layoff at that point in time.

7/ This aspect of the Respondent's conduct is similar to but distinguishable from refusal to bargain cases where an employer decides to subcontract or automate and fails to meet its bargaining obligations. See Libby McNeill and Libby (8616) 7/68 and cases cited therein. The difference between the Libby case and this case lies in the discriminatory motivation present herein.

8/ Section 111.07(4) of the Wisconsin Statutes; Valley Sanitation Company Inc. (9475-A) 1/71.

9/ This remedy was employed by the National Labor Relations Board in the recent case of Summit Tooling Co. 195 NLRB 91, 1972 CCH P. 23,923.

10/ The Commission has employed this remedy in Libby, McNeill and Libby (8616) 7/68; Wisco Hardware Co. (2154) 7/49; Neuheisel Lime Works (1230) 2/47.

The appropriate remedy for the two independent acts of interference wherein employes Sachen and Byrnes were interrogated by Biedrich and Stankiewicz is to order the Respondent to cease and desist from such conduct in the future. Since there is no question concerning representation presented by the facts in this case a card-based recognition order is unnecessary; but because of the Respondent's total rejection of the collective bargaining process by discharging all of the employes represented by the Complainant the Respondent has been ordered to bargain with the Complainant.

Dated at Madison, Wisconsin, this 28th day of September, 1972.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By George R. Fleischli
George R. Fleischli, Examiner

60-10-A89027