

In the Matter of THE OHIO OIL COMPANY and OIL WORKERS
INTERNATIONAL UNION, CIO, LOCAL 19

Case No. 21-CA-300.—Decided October 10, 1950

DECISION AND ORDER REMANDING CASE

On April 7, 1950, Trial Examiner Irving Rogosin issued an Order Dismissing Complaint in the above-entitled proceeding, a copy of which is attached hereto. Without otherwise considering the merits of the case, the Trial Examiner granted the Respondent's motion to dismiss the complaint,¹ finding that the Union went on strike in violation of the 60-day notice requirement of Section 8 (d) of the Act and its contract with the Respondent, and that thereby the Union forfeited its status as the majority representative of the Respondent's employees, and the strikers lost their status as employees. Accordingly, he concluded that the Respondent was relieved of the statutory duty to bargain with the Union and to reinstate the strikers, as alleged in the complaint.² Thereafter, the General Counsel and the Union each filed requests to review pursuant to Section 203.27 of Board Rules and Regulations. The Respondent filed briefs in support of the Trial Examiner's Order.

On September 18, 1950, the Board heard oral argument at Washington, D. C., in which all the parties participated.

To the extent here material, the Board has reviewed the rulings of the Trial Examiner made at the hearing, and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Order Dismissing Complaint, the requests for review, the briefs, and the applicable portions of the record in the case and finds, contrary to the Trial Examiner, that the Union complied with the 60-day statutory and contractual notice requirements before striking and that therefore the dismissal of the complaint because of the alleged premature strike was erroneous.

The relevant facts on this issue are not in dispute and are briefly these: Before the events involved in this case, the Respondent and

¹ Contrary to the General Counsel's contention, we find that it is not beyond a Trial Examiner's authority to grant a motion to dismiss a complaint before filing an Intermediate Report. Sec. 203.35, subsec. (h) and Sec. 203.27 of Board Rules and Regulations.

² The complaint alleges violations of Section 8 (a) (1), (3), and (5) of the Act.

the Union had maintained contractual relations since 1946 pursuant to a written agreement which was amended and extended from time to time. This contract contained a no-strike clause. As last amended, it also provided that "On and after July 3, 1948, either party may by written notice delivered to the other party request a change or changes in the general wage rates and if . . . an agreement is not reached between the parties within sixty days after receipt of written notice of such request," the agreement would terminate.

On July 2, 1948, the Union sent by registered mail a letter to the Respondent notifying it that, in accordance with the terms of their contract and the Act,³ it desired a conference to review wage rates.⁴ As the Respondent's office was apparently not open on July 3, a Saturday,⁵ and Independence Day, which fell on a Sunday, was celebrated on the following Monday, the Respondent did not receive the letter until July 6.

Although the Union pressed for an early conference, no negotiations were held until September 2 and 3, because of the Respondent's insistence on awaiting the establishment of a wage pattern between the Union and the major oil companies. The September 2 and 3 meetings, however, produced no agreement. Thereupon, pursuant to a previously taken strike vote and notification to the Respondent, the Union called a strike at 12:01 a. m., September 4.⁶ Apparently, both parties presumed that 60 days had elapsed since the Union notified

³ Section 8 (d), which defines the bargaining obligation of employers and labor organizations, provides, *inter alia*, that:

. . . where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

* * * * *

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

. . . Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.

⁴ Copies of this letter were sent to the Federal Mediation and State Conciliation Services. There is no question that the Union complied with Section 8 (d) requirements in this respect.

⁵ In his request to review, the General Counsel offers to prove that the post office unsuccessfully attempted to deliver the letter to the Respondent on July 3 but that the Respondent's office was not open "for the reception of registered mail." In view of our disposition of this case, we find it unnecessary to pass on this offer.

⁶ The strike was simultaneously called against seven other oil companies in the area.

the Respondent of its desire to modify their contract. Indeed, it was not until closing arguments before the Trial Examiner after a month-long hearing that the Respondent raised for the first time the contention that the strike was premature.

The question squarely presented to the Board is one of computation; that is, whether the Union gave the Respondent the 60 days' notice required by Section 8 (d) and their contract before striking.

The Trial Examiner found that the strike was prematurely called on the "threshold of the 60th day," or only 59 days after notice was served on the Respondent. He reached this conclusion by using July 6, the date of the Respondent's receipt of the notice, as the starting point for the computation of time; then by excluding both July 6 and September 4, the day the strike began, he found that only 59 days had elapsed between the giving of notice and the inception of the strike.

The General Counsel urges, among other contentions, that, as there is no inflexible rule for computing time, a given day should be included or excluded where it would avoid a forfeiture and best serve to carry out the legislative intent or the intent of the parties to the contract, as the case might be. He therefore argues that July 6 should be included, thus establishing that the requisite 60 days' statutory and contractual notice was given.

Insofar as the Trial Examiner believed that the computation of time should commence with the receipt of the notice on July 6, we concur in his view. The language of the contract and Section 8 (d) of the Act so indicates. Moreover, it is a familiar legal principle that where a statute or contract requires notice to be given or served without prescribing the manner in which it should be done, actual notice is required and the notice is ineffective until received by the person to be served.⁷

However, we are unable to agree with the Trial Examiner that July 6 should be excluded from the computation. We perceive no compelling reason either in the contract or the statute requiring this result. As shown above, the contract provided for its termination if the parties did not reach agreement "within sixty days after receipt of written notice" of a request to change general wage rates. Section 8 (d) requires that a party desiring to terminate or modify a contract serve a written notice upon the other party "sixty days prior to the time it is proposed to make such termination or modification," and that the contract be continued in full force and effect "for a period of sixty days after such notice is given." Significantly, neither the

⁷ *In re Leterman*, 260 F. 543 (C. A. 2), cert. denied sub nom *Coleman v. Tawas Co., Inc.*, 250 U. S. 688; *Conway v. First National Bank*, 256 F. 277 (C. A. 5); *Haldane v. U. S.*, 69 F. 819; 39 Am. Jur. Sec. 9; 46 C. J. pp. 557-559; 1 Williston, Contracts Sec. 87, n. 4.

contract nor the statute prescribes with any degree of mathematical certainty the manner of computing the 60 days.

Like other problems of construction, the question of including or excluding the initial day in determining whether a designated number of days had expired before an act may be done cannot be decided by any rule-of-thumb. It is for this reason that the question has been a vexatious and controversial subject of litigation. Although the authorities recognize the existence of general rules of computation, which in many jurisdictions have been embodied into statute, it is clear that the rules are not regarded as absolute but rather as guides to a just and intended result.⁸ An examination of the cases indicates that the courts prefer the construction which prevents a forfeiture of rights, if this can be done without doing violence to the clear intention and policy of the statute or the intention of the parties to a contract.⁹ As Judge Learned Hand candidly observed, "In matters of time the canon is especially persuasive that we are to look at the result."¹⁰ In the final analysis, the interpretation to be given to a statutory or contractual time provision depends substantially upon the particular facts of each case.

Guided by the foregoing considerations, we are persuaded that July 6 should be included in the computation, and consequently that the Union fully satisfied the 60-day notice provisions of Section 8 (d) and the contract before striking. It is plain that the object of the notice was to afford the parties an opportunity to negotiate a modification of the contract, during which time the status quo would be maintained. Manifestly, the day the notice was received could be used as effectively for this purpose as any other.¹¹ In addition, the Union was in fact restrained that entire day from exercising its right to strike, which absent the contract and Section 8 (d), it otherwise could have done.¹²

By thus including the day of receipt of the notice, a forfeiture of the Union's representative status and the strikers' employee status would be avoided. It can hardly be argued that such an interpretation would frustrate the congressional intent and policies of the Act to prevent "quickie" strikes,¹³ particularly as the statute itself is

⁸ *Taylor v. Brown*, 147 U. S. 640; *Griffith v. Bogert*, 18 How. 158; 62 C. J. pp. 983-984, 993-994; 52 Am. Jur. Sec. 17.

⁹ See footnote 8, *supra*.

¹⁰ *In re East*, 17 F. 2d 585, 586.

¹¹ Cf. *Griffith v. Bogert*, *supra*. It is noted that the Trial Examiner found that, notwithstanding the Union's demands for an early conference, the Respondent sought to defer negotiations pending the establishment of a wage pattern in the industry by the Union and the major oil companies and, in fact, did not meet with the Union until approximately 2 months after the Union's initial request.

¹² Cf. *Taylor v. Brown*, *supra*.

¹³ 93 Cong. Rec. 5146, May 12, 1947 (Sen. Ball).

not explicit with respect to the exact time when the notice period should start running. Nor can it be fairly said that the foregoing computation would do violence to the intent or purpose of the notice provision of the contract, as the parties themselves presumed that the Union had complied with it before striking. It is settled doctrine that the interpretation parties give to their contract is persuasive evidence of its meaning.¹⁴

Having found, contrary to the Trial Examiner, that the Union gave the Respondent proper statutory and contractual notice before striking, we shall set aside the order dismissing the complaint herein and remand the case to the Trial Examiner for consideration of the merits of the allegations of the complaint.¹⁵ In view of our determination herein, we find it unnecessary at this time to pass upon the other substantive contentions of the General Counsel and the Union.

ORDER

IT IS HEREBY ORDERED that the above-entitled case be, and it hereby is, remanded to the Trial Examiner for the preparation and issuance of an Intermediate Report, setting forth his findings of fact, conclusions of law, and recommendations with respect to the unfair labor practices alleged in the complaint.

ORDER DISMISSING COMPLAINT

Messrs. Charles K. Hackler and Ralph H. Nutter, for the General Counsel.

Mr. William K. Tell, of Findlay, Ohio, and Mr. Howard T. Sutherland, of Los Angeles, Calif., for the Respondent.

Messrs. J. Elbro Brown and Verlin L. McKendree, of Bakersfield, Calif., for the Union.

This complaint, amended at the hearing, is based upon a charge duly filed on December 9, 1948, by Oil Workers International Union, CIO, Local 19, herein called the Union. The complaint, issued on April 8, 1949, by the Regional Director for the Twenty-first Region (Los Angeles, California), on behalf of the General Counsel of the National Labor Relations Board,¹ against The Ohio Oil Company, herein called the Respondent, alleged that the Respondent had engaged in and was engaging in unfair labor practices affecting commerce, within the meaning of Section 8 (a) (1), (3), and (5) and Section 2 (6) and (7) of the National Labor Relations Act, 49 Stat. 449, as amended by the Labor Management Relations Act, 1947, 61 Stat. 136, herein called the Act. Copies of the charge and the complaint, accompanying the notice of hearing, were duly served on the parties.

¹⁴ 3 Williston, Contracts Sec. 623; cf. *The Fafnir Bearing Company*, 73 NLRB 1008.

¹⁵ In its letter of April 28, 1950, requesting review of the Trial Examiner's Order, the Union made unsubstantiated charges of prejudice against the Trial Examiner and asked the Board to replace him. In its subsequent formal request to review, however, the Union omitted these charges. As we find no basis for the charges, we hereby deny the request to replace the Trial Examiner.

¹ Unless otherwise stated, or indicated by the context, references to the General Counsel are to his representatives at the hearing; references to the Board are to the National Labor Relations Board.

Specifically, the complaint alleged, in substance, that (1) since July 2, 1948, the Respondent had refused to bargain with the Union as the exclusive representative of its employees in an appropriate unit, in violation of Section 8 (a) (5) of the Act; (2) on or about September 4, 1948, because of said refusal to bargain, the Respondent's employees in said unit went on strike; (3) during October 1948, the Respondent interfered with, restrained, and coerced its striking employees by continuing to refuse to bargain, and by addressing personal appeals to said employees to abandon their strike and return to work; (4) on or about November 1, 1948, all the striking employees who had remained on strike unconditionally offered to abandon the strike and return to work, but the Respondent, in violation of Section 8 (a) (3), then and thereafter refused to reinstate said employees because they had engaged in the strike and other concerted activities; and (5) by all the foregoing, the Respondent had interfered with, restrained, and coerced its employees in violation of Section 8 (a)-(1) of the Act.

In its answer, the Respondent denied generally and specifically the allegations of the complaint, including the appropriateness of the unit, the majority status of the Union, the effect of its operations upon commerce, and the commission of any unfair labor practices.

Pursuant to notice, a hearing was held at Bakersfield, California, from April 26, 1949, to May 25, 1949, inclusive, before Irving Rogosin, the undersigned Trial Examiner, duly designated by the Chief Trial Examiner. The General Counsel and the Respondent were represented by counsel; the Union, by its official representatives. All parties participated in the hearing and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues. At the close of the General Counsel's case, the Respondent's motion to dismiss the complaint on the ground that the activities involved in this proceeding do not affect commerce within the meaning of the Act, was denied. Ruling on the motion to dismiss, renewed at the close of the General Counsel's case, and again, upon additional grounds, at the close of all the evidence, was reserved. It is this motion which is the subject of this order.

Motion of the General Counsel to conform the pleadings to the proof with respect to formal matters not affecting the substantive issues, was granted without objection. Counsel for the General Counsel and for the Respondent then availed themselves of the opportunity afforded all parties to argue orally upon the record. All were advised of the right to file proposed findings of fact and conclusions of law, as well as briefs. On August 5, 1949, a brief was received from the General Counsel; consolidated "proposed findings, conclusions and brief in support thereof" were received from the Respondent the same day.

The Motion to Dismiss

The motion to dismiss at the close of the evidence asserted, for the first time, as grounds therefor that, by striking in violation of the no-strike provision in the existing collective bargaining contract, and by failing to comply with the requirements of Section 8 (d) of the Act before engaging in the strike, the Union had forfeited its status as exclusive bargaining representative of the employees in the appropriate unit, thereby relieving the Respondent of the statutory duty to bargain, and depriving the striking employees of their status as employees under the Act.

The principle that employees who strike in violation of a no-strike provision of a contract may lose their status as employees, and that a union representing such employees may thereby be deprived of its status as bargaining representa-

tive, has been recognized by the Board and the courts.² Section 8 (d) of the Act now imposes similar sanctions for failure to comply with prescribed procedural requirements.

It is, therefore, necessary to determine whether the Union did in fact violate the no-strike provision in the contract, and whether it failed to comply with the provisions of Section 8 (d). The salient facts so far as they relate to these issues are not in conflict.

The Union³ achieved its status as exclusive representative of the employees in the unit, on January 2, 1946, as a result of a consent determination by the Regional Director. On October 1, 1946, the parties executed their first basic collective bargaining agreement for a term of 1 year, subject to automatic renewal in the absence of 30 days' written notice before any anniversary date. The agreement contained a prohibition against strikes and lockouts for its duration. Amendments, in respects not here material, were made on November 18, December 10, and December 15, 1946. On March 17, 1947, a further amendment was executed, providing for a wage increase, and extending the agreement to October 1, 1947, subject to wage reopening 30 days before the terminal date. On December 22, 1947, the parties further amended the contract by providing for succeeding wage increases, effective October 1, December 16, 1947, and January 16, 1948. This amendment further provided:

5. Neither party shall request or have the right to request, prior to July 3, 1948, any change in general wage rates. On and after July 3, 1948, either party may by written notice *delivered* to the other party request a change or changes in the general wage rates and if any such request is so made and an agreement is not reached between the parties within sixty days after *receipt* of written notice of such request, then, and in that event, this agreement and any other agreement then in effect between the parties relating to the employees shall thereupon cease to be of any further force or effect whatever. [Emphasis supplied.]

On July 2, 1948, District Director J. Elro Brown, on behalf of the Union, wrote the Respondent at its Los Angeles division office⁴ requesting a review of the existing wage rates. The text of the letter stated:

Proceeding in accordance with the provisions of our collective bargaining Agreement, we herewith request a conference for the purpose of reviewing the wage rates of the employees of your Company who are represented for purposes of collective bargaining by the Oil Workers International Union, CIO, and their Local Unions.

For your information, we are requesting that you grant an increase in wages to all of the employees above mentioned in the amount of 30¢ per hour, effective March 1, 1948.

We herewith offer to meet with you at your very earliest opportunity for the purpose of collectively bargaining concerning the wage increase herein mentioned.

Copies of this notice are being served upon the Federal Mediation and Conciliation Service and the State Department of Industrial Relations, for

² *N. L. R. B. v. Sands Mfg. Co.*, 306 U. S. 332; *National Electric Products Corp.*, 80 NLRB 995; *Fafnir Bearing Co.*, 73 NLRB 1008; *Joseph Dyson & Sons, Inc.*, 72 NLRB 445; *Scullin Steel Company*, 65 NLRB 1294.

³ Kern River Local 19, Oil Workers International Union, C. I. O.

⁴ The Respondent also maintained an office at Bakersfield, California, in connection with its operations in Kern County.

the purpose of advising them of this dispute solely because of the alleged requirements of the Labor-Management Relations Act of 1947, and subject to the validity of all provisions of such Act.

As shown by the official post office return receipt, offered by the General Counsel, with a copy of the letter and received in evidence, the notice of proposed modification was delivered to the Respondent at its Los Angeles office on July 6, 1948.

An exchange of correspondence followed, in which the Respondent sought to defer negotiations pending the establishment of a "wage pattern" in the industry between the Union and "major oil companies." The Union, however, pressed for an early bargaining conference with the Respondent.

On July 29, 1948, District Director Brown wrote the Federal Mediation and Conciliation Service at Washington, and the State Department of Industrial Relations at Sacramento, California, by registered mail, referring to the Union's letter of July 2, 1948, concerning its "sixty (60) day notice for proposed contract modifications" with 10 named oil companies, including the Respondent. The letter continued:

Those letters sent to you were for the purposes of notifying you within thirty (30) days that a dispute existed with the above Companies.

In order to avoid any misunderstanding, we are herewith serving upon the Federal Mediation and Conciliation Service and the State Department of Industrial Relations, this additional notice for the purpose of advising you again of a dispute with the above Companies, solely because of the alleged requirements of the Labor-Management Relations Act of 1947, Section 8, (d) (3), and subject to the validity of all provisions of such Act.

For your information, there have been no meetings for purposes of collective bargaining with the above Companies, nor will there be any meetings prior to August 3, 1948, because of the fact that such Companies are unready or unwilling to meet with the Union on the matter of wages until that time.

According to a notation on the letter received in evidence, copies were forwarded to the companies involved, including the Respondent.

Although the Respondent continued to urge postponement of negotiations until a wage pattern had been established, a conference between the parties was finally scheduled for September 2, 1948, at the Respondent's Bakersfield office.

On September 1, 1948, at a meeting of Kern River Local 19, a "constitutional majority" of the membership voted to strike for "an adequate wage increase."

Conferences between representatives of the Respondent and the Union, held on September 2 and 3, failed to produce agreement, and, at 12:01 a. m., September 4, 1948, members of the Union, employed by the Respondent, and seven other oil companies in the area, went on strike.⁵

Contention ; conclusions

The Respondent's contention that the Union had engaged in an illegal strike is based on the alleged insufficiency of the notice of intention to modify or terminate the contract, both under its provisions and under the requirements of the Act.

The notice dated July 2, was mailed by the Union from Bakersfield to the Respondent's divisional office at Los Angeles. July 2, 1948, fell on a Friday. The

⁵ It was stipulated at the hearing that of approximately 15,000 members of the International in California, 2,000 were employed in Kern County.

record does not disclose whether Saturday, July 3, was a regular working day at the Respondent's Los Angeles office. The fourth of July occurred on a Sunday and was celebrated on the following Monday, July 5. The notice was not actually delivered until Tuesday, July 6. The strike began at 12:01, September 4, 1948. Thus, it appears that, although the notice had been seasonally mailed, less than 60 days elapsed between delivery of the notice and the inception of the strike.

The contract then in force provided that no request for revision of wage rates could be made prior to July 3. Thereafter, either party could "by written notice *delivered* to the other party request a change or changes in the general wage rates and if any such request is so made and an agreement is not reached between the parties within sixty days after *receipt* of written notice of such request, then, and in that event, this agreement and any other agreement then in effect" should terminate. It is clear from this provision that the parties contemplated that the 60-day period should commence to run only after receipt of the written notice, which, here, occurred on July 6.

Where it is provided by contract or statute that a certain result shall not accrue until after the expiration of a given number of days from a stated date, both the first and last days must be excluded in computing the elapsed time so that the full number of days required will be allowed.⁶ If, therefore, July 6 and September 4 be excluded from the computation, it is evident that the Respondent received only 59 days' notice. Even under the more familiar principle that, in computing elapsed time, the first day is excluded, and the last day, included, or vice versa, the notice was still inadequate, for, where an act is to be done by the person to whom the notice is given, the person is permitted the whole of the last day to act.⁷ Here, the Union went on strike at the threshold of the 60th day instead of allowing the Respondent the whole of that day in which to act. It is, therefore, apparent that the Union struck prematurely, and, hence, in violation of the no-strike provision of the contract.

Turning to the question of the Union's obligation under the Act, apart from the provisions of the contract, it is equally apparent that the Union has failed to satisfy the statutory requirements. The relevant provisions of Section 8 (d) provide:

... where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) *serves* a written notice upon the other party to the contract of the proposed termination or modification *sixty days prior* to the expiration date thereof, or in the event such contract contains no expiration date, *sixty days prior* to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract, containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where

⁶ 52 Am. Jur. 343; 62 C. J. 984, 988, 989.

⁷ 62 C. J. 994. "Where a statute requires something to be done by a designated day, it is construed to mean the entire day to midnight." Williston on Contracts, Section 857, n. cases cited.

the dispute occurred, provided no agreement has been reached by that time; and

(4) *continues in full force and effect, without resorting to strike or lock-out*, all the terms and conditions of the existing contract for a period of *sixty days after such notice is given or until the expiration date of such contract, whichever occurs later* :

The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of Section 9 (a), and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. *Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of section 8, 9, and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer. (Emphasis added.)*

Section 8 (d) (1), requiring the service of written notice of termination or modification, does not prescribe the mode of service. It is a familiar principle of law that where a statute requires notice to be given or served without prescribing the manner in which it shall be done, actual notice is required, and the notice is ineffective until it is received by the person to be served.⁸ Moreover viewed in the light of the statutory policy, the intent of Section 8 (d) that the 60-day period should not begin to run until actual receipt of the required notice, is reasonably clear. The use of the word "serves" in connection with the notice must be taken as further evidence of the legislative intent that actual personal notice is required. Since the manifest purpose of this section is to encourage peaceful settlement of disputes without resort to strikes or lockouts, the interpretation that the 60-day period is to be computed from the date of receipt of the notice accords with the underlying purpose to afford the party to be served the full period of 60 days. That the Union, by mailing the notice seasonably, and apparently observing the remaining provisions of Section 8 (d), may have intended to comply with the statute, does not satisfy its requirements or excuse strict compliance. Nor, does the fact, as the General Counsel seems to imply, that the Respondent may have suffered no prejudice by the lack of adequate notice, assist the Union.

The General Counsel concedes in his brief that, "following the usual common law interpretation, the strike began on the 59th day." Inferentially, he concedes

⁸ See 39 Am. Jur. 237; 46 C. J. 558. Thus, in the absence of a statute authorizing the service of a notice by mail, the notice is ineffective until it is received. 39 Am. Jur. 249. Where a statute requires the giving of notice or filing of a paper without specifying the means, the person required to perform the act may choose the means of service, but he does so at his own risk that the notice will be received. See *Hotel Hay Corp. v. Milner Hotels*, 39 NW 2d 363, 255 Wis. 482; *James V. Hutchinson*, 211 SW 2d 507; *Calkin v. Roberts Park Fire Prot. Dist.*, 76 NE 2d 43, 398 Ill. 374; *Ferreira v. Gross*, 80 NE 2d 481, 323 Mass. 175. "In general, where a notice, as distinguished from an acceptance, is required by contract or statute, it is a question of interpretation, but usually it must reach the person to be notified within the period stipulated." Williston on Contracts, Section 87 n., and cases cited.

that the strike was in violation of the no-strike clause, as well as Section 8 (d) of the Act, but argues, in substance, that the Respondent waived the breach or, at least, is estopped to assert it; that the Respondent raised the defense belatedly; and that to apply strictly the provisions of Section 8 (d) would defeat the broad objectives of the statutory policy.

With respect to the first of these contentions, it is not maintained, nor does the evidence establish, that the Respondent expressly waived the breach of the no-strike provision in the contract or the statutory requirement. The contention is based on the fact that at conferences held between the parties on September 2 and 3, 1948, prior to the strike, the union representatives referred to the impending expiration of the contract as midnight of September 3, and that the Respondent's representatives did nothing to disabuse the Union of its erroneous impression. The General Counsel apparently contends that the Respondent was under a duty to apprise the Union that it had incorrectly computed the 60-day period, and to warn it that a strike at midnight, September 3, would violate the contract as well as the statute. He, therefore, argues for one or two inferences, either that the Respondent concurred in the Union's opinion as to when the contract would terminate or, knowing that the Union was in error in its conclusion, remained silent in order to entrap the Union in an illegal strike. To adopt this contention would shift to the Respondent responsibility for the performance of an obligation imposed on the Union both by the contract and the statute. There is no evidence that the Respondent by its silence misled the Union. In any event, the duty of complying with the contract and the statute by serving the required notice devolves solely upon the party seeking to modify or terminate the contract.

The General Counsel further contends, and the record discloses that the Respondent acknowledged receipt of the notice, corresponded with the Union, and ultimately met with its representatives on two successive days prior to the strike without then, or in conferences held thereafter, and while the strike was in progress, raising the issue of the insufficiency of the notice. From these facts, the General Counsel argues that by its failure to assert or rely on the insufficiency of the notice, the Respondent "condoned any alleged breach of the Union's contractual obligation and waived its rights to discharge or refuse to reinstate such persons because of the character of the strike."

Whether an employer could, under appropriate circumstances, prior to the enactment of the amended Act, waive the breach of the no-strike provisions, is irrelevant to present considerations. The statutory requirement now imposed by Section 8 (d) of the amended Act renders such a waiver ineffective. Where a statute is enacted for the protection of the public generally rather than for the protection of the rights of individuals, a party may not by agreement waive the protection of the statute.⁹ Thus, the Supreme Court has held, in a case involving an attempted waiver of the benefits of the Fair Labor Standards Act, that "a statutory right conferred on a private party, but affecting the public interest, may not be waived or released if such waiver or release contravenes the statutory policy."¹⁰

⁹ 12 Am. Jur. 661 ". . . the right of the sovereign power to direct that which is for the welfare of the general public cannot be abridged by agreements between individuals . . . Rights conferred as a matter of public policy cannot be waived." Williston on Contracts, Section 166, and cases cited.

¹⁰ *Brooklyn Savs. Bk. v. O'Neil*, 324 U. S. 697. To a similar effect, see *Medo Photo Corp. v. N. L. R. B.*, 135 F. 2d 279, 282 (C. A. 2), *aff'd*, 321 U. S. 678, 687; *N. L. R. B. v. Newport News Co.*, 308 U. S. 241, 251; *J. I. Case v. N. L. R. B.*, 321 U. S. 332, 337, 338; *McQuay-Norris Mfg. Co. v. N. L. R. B.*, 116 F. 2d 748.

It is clear from a reading of Section 8 (d), and the legislative history, that Congress enacted these provisions, not alone for the benefit of the immediate parties, but for the protection of the public interest. Thus, Senator Ball's statement:

The provision in the National Labor Relations Act defining collective bargaining, and providing that where a contract between a union and an employer is in existence, fulfilling the obligation on both sides to protect collectively means giving at least 60 days' notice of the termination of the contract, or of the desire for any change in it, is another provision *aimed primarily at protecting the public*, as well as the employee, who have been the victims of "quickie" strikes. . . .¹¹ [Emphasis supplied.]

Reference to the provisions of Section 8 (d), particularly subsection (4), providing for maintenance of the status quo during the 60-day period, further indicates the purpose to protect the public interest by attempting to prevent or at least delay strikes in industry affecting commerce. The sanctions imposed for violation of this section further emphasize the importance of the public interest which Congress sought to protect.

The undersigned, therefore, concludes that the statutory requirement of notice under Section 8 (d) was designed to effectuate a public policy, and as such, under the principles stated, could not be waived. No contention is made here, and no evidence was offered of any express waiver by the Respondent. At most, the General Counsel contends that the Respondent by its silence tacitly waived the benefit of that section. Since the statutory requirements cannot be waived by express agreement, it must follow that such waiver cannot be inferred from the Respondent's course of conduct. Nor does the fact that the defense was raised at the close of the hearing for the first time deprive the Respondent of its right to rely on the protection of the statute.

This leaves for consideration the General Counsel's contention that to apply strictly the provisions of Section 8 (d) would defeat the broad objectives of the Act. The general principle that "a limitation fixed by statute is arbitrary and peremptory, admitting of no excuse or delay beyond the period fixed, unless such excuse be recognized by the statute itself,"¹² is clearly controlling here. Moreover, if it were to be held that 59 days' notice constitutes sufficient compliance with a statute requiring 60 days, what of 58 days, or 56? Manifestly, such an approach would substitute for the judgment of the legislative branch, which has determined what shall constitute adequate notice, the opinion of the administrative agency appointed to administer the statute.

Congress, in enacting this section, imposed certain limitations upon its applicability. Thus, it provided that paragraphs (2), (3), and (4) should not apply under stated circumstances. In addition, it qualified the provision dealing with loss of status by employees engaging in strikes within the proscribed period, to the extent of terminating such loss of status upon reemployment by the employer involved. The absence of further qualification or exception in Section 8 (d) is persuasive of the congressional intent that in all other respects the provisions are to be strictly observed.

The General Counsel argues in his brief that "if the Respondent's contention is accepted it would run counter to the statutory scheme, for it would frustrate the accomplishment of the very purpose for which the 60-day period was instituted; namely, to encourage settlements of disputed issues through orderly process of

¹¹ 93 Cong. Rec. 5146, May 12, 1947.

¹² *Creasy v. U. S.*, 45 F. Supp. 175.

negotiations and conciliation and to guarantee to both parties through a collective bargaining agreement a reasonable period in which to explore their differences before the contractual relationship is broken off." Apart from the fact that it does not take into sufficient account the public interest in the maintenance of the status quo for the full period required by the statute, the argument proves too much. For adopting the General Counsel's argument, it is apparent that the Union, here, by its precipitate action in striking before the expiration of the full 60-day period, rejected the very policy which the General Counsel now seeks to invoke in aid of the Union.

If these conclusions appear to be based upon a strict, narrow, or technical interpretation of the statutory requirements, and lead to a harsh or arbitrary result, it can only be said that the result is inherent in the provisions themselves and in the statutory policy. Substantial compliance cannot be substituted for the express requirements of the statute.¹³

On the basis of the foregoing, the undersigned finds that, by engaging in the strike at 12:01, September 4, 1948, without having served the Respondent with adequate notice of intention to modify or terminate the contract, either under its terms or under the provisions of Section 8 (d), the Union forfeited its status as exclusive bargaining representative of the employees in the appropriate unit, deprived the strikers of their status as employees under the Act, and relieved the Respondent of its statutory duty to bargain.

The complaint alleges that during the strike, the Respondent interfered with, restrained, and coerced its employees in violation of Section 8 (a) (1) of the Act, by addressing personal appeals to the striking employees to abandon the strike, and by continuing to refuse to bargain collectively with the Union. In view of the Union's loss of status as majority representative, the Respondent's conduct did not violate the Act.

Upon the basis of the foregoing, and for the reasons considered above, the Respondent's motion to dismiss the complaint on the grounds stated, is hereby granted, and it is hereby

ORDERED that the complaint be dismissed in its entirety.

Any party may obtain a review of the foregoing order, pursuant to Section 203.27 of the Rules and Regulations of the Board, by filing a request therefor with the Board, stating the grounds for review, and immediately upon such filing, serving a copy thereof on the Regional Director for the Twenty-first Region and the other parties. Unless such request for review is filed within ten (10) days from the date of this order for dismissal, the case shall be closed.

¹³ Cf. *Boeing Airplane Co. v. N. L. R. B.*, 174 F. 2d 988 (C. A. D. C.), setting aside *Boeing Airplane Co.*, 80 NLRB 447.