In the Matter of STANDARD OIL COMPANY OF CALIFORNIA (EL SEGUNDO REFINERY) *and* JOHN W. WAITE, AN INDIVIDUAL *and* LILBOURNE L. RICE, AN INDIVIDUAL *and* STANLEY N. LYMAN, AN INDIVIDUAL *and* WAYNE A. CALHOUN, AN INDIVIDUAL *and* JOHN W. BELL, AN INDIVIDUAL *and* THOMAS A. BEMENT, AN INDIVIDUAL

Case No. 21-CA-357.—Decided November 8, 1950

DECISION AND ORDER

On November 30, 1949, Trial Examiner Wallace E. Royster 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. The Trial Examiner also found that the Respondent had not engaged in certain other alleged unfair labor practices and recommended that the complaint be dismissed with respect to such allegations. Thereafter, the Respondent filed exceptions to the Intermediate Report and a supporting brief.[1]

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.[2] 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 and Order herein.

The Trial Examiner found that the Respondent, in violation of Section 8 (a) (3) of the Act, discharged Bell, Waite, and Rice because of their protected strike activity.[3] It was his opinion that their

[1] As the record, exceptions, and brief adequately present the issues and positions of the parties, the Respondent's request for oral argument is denied.

[2] At the hearing, The Trial Examiner properly denied the Respondent's motions to dismiss and strike certain portions of the amended complaint on the ground that the amended complaint varied from the charges and more than 6 months had elapsed since the occurrence of the unfair labor practices alleged in the amended complaint. *Cathey Lumber Company*, 86 NLRB 157.

[3] The Trial Examiner also found that the Respondent was privileged to discharge two other strikers, *Lyman and Calhoun*, because of their wilful assaults on nonstrikers, and accordingly recommended the dismissal of the complaint with respect to them. No exceptions to these findings and recommendations were filed and we therefore adopt them without comment.

misconduct amounted to minor brushes in the heat of excitement normally encountered during a strike, which did not render them vulnerable to discharge. We do not agree. The record discloses that Bell deliberately and without provocation assaulted Just, a nonstriking employee, and participated in the dangerous harassment on the highway of nonstriker Cox, who was driving home with his family from the refinery; that Waite forcibly attempted to prevent nonstriking employees Durkos and O'Haver from entering the plant; and that Rice "bumped or jostled" nonstriker Leslie and then struck him when Leslie tried to cross the picket line to enter the refinery. By deliberately bumping or jostling Leslie and then striking him, Rice, in our opinion, sought to bar ingress to the plant through resort to force. We cannot agree with the theory apparently suggested by our dissenting colleagues that Leslie was under some obligation to walk *around* the picket line and not *through* it; that because he exercised his right to pass through it he "invited" whatever "bumping and jostling" he received. It must also be noted that Leslie's alleged provocative remark came *after* Rice's initial use of force. Such conduct, we find, exceeded the proper bounds of concerted activity and deprived Bell, Waite, and Rice of the protection of the Act.

Accordingly, we shall dismiss the complaint in its entirety.[4]

ORDER

Upon the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the complaint against the Respondent, Standard Oil Company of California (El Segundo Refinery), El Segundo, California, be, and it hereby is, dismissed.

MEMBERS HOUSTON and STYLES, dissenting in part:

We concur in the majority opinion except insofar as it finds that Rice and Waite did not engage in protected strike activity, and that therefore the Respondent did not violate Section 8 (a) (3) and (1) of the Act in discharging them.

We, like the Trial Examiner, find that Leslie, with whom Rice was involved in an incident, was not the innocent victim of picket line violence, as the majority opinion pictures him to be. As shown in the Intermediate Report, Leslie invited whatever "bumping or jostling" he received when, instead of walking around the picket line, he delib-

[4] In view of our dismissal of the complaint herein, we find it unnecessary to pass upon the Respondent's motion to reopen and supplement the record with evidence that the Union went on strike before the expiration of the 60 days' notice required by Section 8 (d) of the Act, and that the strikers thereby forfeited their employee status.

erately went through it and provoked Rice to strike him by his obscene remark to him.

As for Waite, we find that the record does not establish that he deliberately attempted to bar Durkos and O'Haver from the plant. Rather, the evidence indicates that he merely sought to enlist their support of the strike.

Accordingly, we would find that the Respondent, by discharging Rice and Waite for their strike activity, violated Section 8 (a) (3) and (1) of the Act.[5]

INTERMEDIATE REPORT AND RECOMMENDED ORDER

Messrs. Jerome Smith and *Ralph H. Nutter*, of Los Angeles, Calif., for the General Counsel.

Lawler, Felix & Hall, by *Messrs. William T. Coffin* and *Reed A. Stout*, of Los Angeles, Calif., for the Respondent.

STATEMENT OF THE CASE

Upon separate charges duly filed on January 28, 1949, by John W. Waite, Lilbourne L. Rice, Stanley N. Lyman, Wayne A. Calhoun, and Thomas A. Bement, and on February 8, 1949, by John W. Bell, the National Labor Relations Board, by its Regional Director for the Twenty-first Region (Los Angeles, California), issued an amended complaint, dated August 18, 1949, against Standard Oil Company of California, alleging that the latter had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8 (a) (1) and (3) and Section 2 (6) and (7) of the National Labor Relations Act, 61 Stat. 136.[1] Copies of the amended complaint, the charges, and a notice of hearing were served upon Respondent and the charging parties.

With respect to unfair labor practices the complaint alleged, in substance, that Respondent on or about November 4, 1948, failed and refused upon request to reinstate each of the charging parties because each engaged in a strike and other concerted activities as members and in support of Oil Workers International Union, Local 547, herein called the Union.[2]

In its answer, filed August 30, 1949, Respondent admitted the principal jurisdictional allegations of the complaint, denied the commission of unfair labor practices, denied that the charging parties or any of them were denied reinstatement because they engaged in a strike or otherwise acted in concert in support of the Union, asserted that each of the charging parties was denied reinstatement because he had engaged in certain specific misconduct, because each of them had committed, aided, abetted, and participated in violent and unlawful acts against Respondent and Respondent's employees, because each had violated a temporary restraining order of the Superior Court of the State of

[5] For the reasons set forth in *Standard Oil Company of California*, 91 NLRB 783, we find no merit in the various contentions raised by the Respondent and we would also deny its motion to reopen and supplement the record.

[1] For convenience, Standard Oil Company of California will sometimes hereinafter be referred to as Respondent; the National Labor Relations Board, as the Board; the National Labor Relations Act, as the Act; and the individuals named in the caption, collectively, as the charging parties.

[2] The complaint alleges, the answer admits, and I find that the Union is a labor organization within the meaning of the Act.

California, and that the amended complaint was illegally issued in that it was and is barred by the limitations contained in Section 10 (b) of the Act.[3]

Pursuant to notice, a hearing was held in Los Angeles, California, from October 18 through 28, 1949, before the undersigned Trial Examiner duly designated by the Chief Trial Examiner. The General Counsel of the Board was represented by the staff attorneys named in the appearances, *supra*, and Respondent by counsel. Both parties participated in the hearing, were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence pertinent to the issues. At the opening of the hearing I granted over objection a motion by the General Counsel to strike from Respondent's answer the allegation that the charging parties had violated a temporary restraining order as not constituting a defense to the amended complaint. After considerable evidence concerning him had been adduced, a motion by the General Counsel to dismiss the amended complaint as to Bement was granted without objection. Respondent's motion to dismiss the complaint in its entirety was denied. Both parties argued on the record and both have filed briefs which I have considered.

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

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent, a Delaware corporation with its principal offices in San Francisco, California, is engaged in the production, refining, transportation, sale, and distribution of petroleum and petroleum products. It owns and operates refineries at Richmond, Bakersfield, and El Segundo, California, and through subsidiaries or affiliated companies operates refineries in the States of New Jersey, Texas, and Utah, and in the province of British Columbia, Canada. Respondent and its subsidiary or affiliated companies own, lease, or hold under contract extensive oil properties located in the United States and in certain foreign countries.

During 1948, Respondent produced in the State of California more than 70,000,000 barrels of refined petroleum products, of which more than 38 percent was shipped to points located outside the State of California.

II. THE UNFAIR LABOR PRACTICES

On September 3, 1948, Respondent had in the refinery at El Segundo, California, which alone of Respondent's enterprises is involved here, about 2,100 nonsupervisory employees. Using round figures, 1,600 of them were represented by the Union, 180 by a Boilermaker's union affiliated with the American Federation of Labor, and 80 by Independent Union of Petroleum Workers. The remaining 240, principally clerks and storeroom personnel, were unorganized.

Dissatisfied with the offer of Respondent respecting a wage increase, the Union, on September 3, called its members on a strike which persisted until it was settled by agreement on November 3, 2 months later. At an increased tempo, during the strike period, employees represented by the Union abandoned the strike and returned to work. Of the 1,600 workers in the unit, more than 900 had returned to their jobs before the strike settlement. At no time during the strike did Respondent hire anyone who was not in its employ at the time the strike began.

[3] Other allegations made by way of affirmative defense are not here set forth as they have no relevancy to the issues.

At the end of the strike, 452 strikers applied for reinstatement. All but 17 who, Respondent asserted, had been guilty of violent and otherwise unlawful conduct during the strike period, were accepted.

Machinery was provided in the settlement agreement for review of refusals to reinstate and, upon such review, 4 of the 17 were reemployed; the charging parties were not.

The question here is whether, by denying reinstatement to the charging parties, or any of them, Respondent failed to accord to them rights secured by the Act, thereby discriminating against them within the meaning of Section 8 (a) (3) of the Act.

Before detailing the evidence as to each of the charging parties, Board and court decisions bearing upon the right of a striker to reinstatement to his job must be considered. I believe it to be established, once the existence of a lawful strike is postulated, the settlement or unconditional offer to abandon the strike is established, the existence of unfilled jobs suitable for the strikers is proved or admitted, that the strikers, having remained employees during the strike period, are entitled to reinstatement.[4]

This is so not because strikers have greater security of tenure than nonstrikers. They have not. On the contrary, in addition to the normal hazards which threaten the continuing status of any worker, the economic striker may be permanently replaced and his opportunity to return to work at the conclusion of the strike thereby be foreclosed. In the case assumed, however, the striker not having performed duty for the employer because of the existence of a lawful strike, his employment relation has continued and he may not be denied his right to return to the payroll because he has exercised his privilege under the Act to join with his fellows in concerted action.

In the cases presented by the amended complaint, the charging parties had been, so far as the record shows, satisfactory employees; they had engaged in a lawful strike; they had not been replaced; and they did offer unconditionally to return to work. Without more being shown, Respondent violated the Act by its refusal to accept them, and the amended complaint so alleges.

Respondent, without challenging this principle, alleges, however, that each of them was discharged because of his conduct during the course of the strike; and that such conduct did not constitute protected activity.

First, I will consider the evidence in support of this allegation which, it is asserted, has application to the cases of all those named in the complaint. The record shows without substantial contradiction and I find that on the morning of September 7, perhaps as many as 250 strikers gathered before the 4 main employee-entrances to the refinery and that at least 150 of them formed compact picket lines so disposed as to cover these entrances and to make entrance to the plant without interference by the pickets difficult. Two nonstrikers, Harry Baumgartner and Sanford Mullins, managed to break through one of the picket lines but were pursued, caught, and forcibly restrained from entering the refinery. Later in the same day, Mullins entered without hindrance. Baumgartner did not go to work until September 19. Of course, Baumgartner and Mullins had a right to enter the refinery without molestation and those who prevented them from doing so find no protection for their conduct in the Act.[5] There is evidence that Rice, Calhoun, and Waite were in one of the picket lines that morning and it is asserted that all of the charging

[4] *N. L. R. B.* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333, 347, 348.
[5] *N. L. R. B.* v. *Indiana Desk Co.*, 149 F. 2d 987.

parties were. There is no evidence, however, that any of them was among the group of pickets which prevented Baumgartner and Mullins from going to work. Furthermore, there is evidence that such picketing tactics were employed by strikers on other occasions during the strike and Respondent offered to prove that during the strike period, property of Respondent and of nonstrikers was extensively damaged, that nonstrikers were brutally assaulted and seriously injured, and that threats of further damage and personal injury were made. Except in connection with incidents still to be discussed, however, there is no evidence that any of the charging parties was guilty of such conduct. Therefore, I do not consider that any of the charging parties were thus deprived of the Act's protection.[6]

Respondent further asserts that each of the charging parties was denied reinstatement because of his participation in certain specific misconduct. The facts as to each such incident follow.

Lilbourne L. Rice was employed by Respondent in June 1946, in the unit represented by the Union. Rice joined the Union a few days after the strike began and for its duration was on one or more of the picket lines almost daily.

Fred Powell, general manager of the refinery, testified that Rice was denied reinstatement because he assaulted a nonstriker, John W. Leslie, as the latter was approaching a refinery entrance, and because Rice's manner on the picket line was "belligerent and threatening."

According to Rice, he was on a picket line, with five to seven others, before one of the entrances on September 26. The picket line was in motion and formed an oval extending between the curb lines bounding the driveway-entrance. When Leslie reached the picket line, Rice asked him to stay out of the refinery in aid of the strikers.[7] Leslie's reply was, "Do you want me to kick the shit out of you?" Whereupon according to Rice, Leslie charged him with head lowered and drove him several feet toward the entrance. In order to regain his balance, Rice explained, he grasped Leslie about the waist—that Leslie quickly broke free and proceeded into the refinery pausing only to utter a few curses en route.

Leslie testified that as he approached the entrance, the pickets maneuvered to interpose the line between him and the entrance and that he attempted to skirt the line at its east end—that Rice followed behind shoving and jostling and causing Leslie to drop one of the packages with which his arms were burdened. As he stooped to retrieve it, according to Leslie, Rice struck him on the head. Leslie denied making any provocative remark to Rice.

Leslie suffered an abrasion on the back of his head. Rice denied that a blow was struck.

I find that the truth lies at a point in between the testimony of the participants. Although Respondent points out in its brief the unlikelihood that Leslie would have sought trouble at a time when his arms were immobilized with parcels, I find that he did not evidence any concern in that connection. Had he really wanted to avoid contact with the pickets, he could have done so by gaining the sidewalk which led to the entrance at a point east or west of the picket line. Of course he had a right to go through the pickets but by doing so, I am persuaded, he did not evidence that desire to avoid difficulty which Respondent would attribute to him. Having chosen to go through the picket lines, I find that he was bumped or jostled by Rice as he testified, that he offered then to "kick the shit"

[6] *Deena Artware, Inc.*, 24 LRRM 1675, 1677–8, 86 NLRB 732.

[7] Leslie is a clerical worker not in the unit represented by the Union.

out of Rice, and that Rice then struck Leslie causing a minor abrasion on Leslie's head.

Other than the incident found, no other conduct of Rice was the subject of testimony which would lead to a conclusion that his manner on the picket line was "belligerent and threatening."

John W. Bell was employed by Respondent in January 1947, joined in the strike, and performed picket duty regularly for its duration. At the conclusion of the strike, he was denied reinstatement.

Manager Powell testified that Bell was not put back to work because of his involvement in an incident with John Just and another with Raymond and Betty Cox.

Bell testified that he was at or near the picket line at one of the refinery entrances on October 5, when he heard shouts of "Stop him! Stop him!" and an instant later was struck on the shoulder by a man whom he later learned to be John Just. According to Bell, the impact of the blow or collision staggered him but that he saw Just and another, pursued by four men, racing for the door of a refinery building. Bell joined in the pursuit, took at least one step through the door, and engaged in a name-calling contest with one of the men inside. A deputy sheriff told Bell to leave and he did so.

Just testified that he and another had been in a parking lot near the refinery and, believing that they were about to be attacked by four men, both bolted for the refinery. As he passed near the picket line, according to Just, Bell struck him on the shoulder with clenched fist knocking Just against a corner of a building, and that Bell then pursued Just to the door. Respondent's witness, Gleasner, testified that Bell aimed a blow at Just as the latter turned in the entrance door.

By contact with the building, Just suffered a skinned forearm and a bruised hip.

I find that the contact between Bell and Just was not accidental and that Bell struck or bumped Just as the latter fled past the picket line. I find that Bell reacting quickly to the cry of "Stop him!", did attempt to intercept Just.

Betty Jane Cox, the wife of Raymond H. Cox, an employee in the inspection laboratory of the refinery, testified that at about 1 p. m. of October 5, she drove to the refinery to meet her husband. As Raymond Cox approached her car, she testified, an unidentified picket pointed out her car to the occupants of a grey Ford coupe.

With Raymond at the wheel, the Coxes proceeded toward their home about 9 miles away. When they had proceeded a few miles, they noticed that the Ford was in a traffic lane beside them and that its occupants appeared to be staring in their direction. Then, for a few miles, the Coxes testified, the Ford clung to them—on one side, then the other—to the front and to the rear. As the Ford maneuvered, it appeared to the Coxes, they testified, to be attempting either to force their car to stop or to leave the road. In turning from the outside to the inside lane, the left front fender of the Cox car came into brief and harmless contact with the right rear fender or bumper of the Ford. At the next traffic light, the Ford was so placed as to block the Cox car and Bell and another got out of the Ford and came to the Cox car. There Bell said something about the collision and attempted to keep Raymond Cox from closing a car window. The traffic light changed to green, the Ford pulled away and so did the Cox car. For a distance of 3 or 4 blocks, the Ford[8] zigzagged across the road before the Cox car until the latter was driven to a police station.

[8] Bell and his companion had been left on the highway at the traffic light and were not in the Ford at this time. Bell was not the driver of the Ford at any time during the drive.

Bell testified that he and two companions were on this occasion driving to Venice, California, in search of work and that he did not notice the Cox car until it brushed the Ford. Then, he explained, he attempted to remonstrate with Cox about the collision but was unable to do so when Cox closed the windows of the car. He denied that any attempt was made to run the Cox car from the road or that he was aware that it was driven by an employee of Respondent.

Respondent contends that Bell and his companions followed the Cox car from the refinery and that they menaced the Coxes on the highway by attempting to force that car from the road.

I have no doubt that Mrs. Cox sincerely believed that the Ford was maneuvered with that purpose. The fact that her small child was in the car with her of course heightened her fear. Cox also testified that the Ford attempted to drive him from the road but was less certain in that connection than his wife.

I do not believe that Bell and his companions followed the Cox car with any unlawful intent. I find that they were en route to Venice on a legitimate errand and that meeting the Cox car on the highway was fortuitous. I do find, however, that Bell or one of his colleagues while on the highway recognized Cox as an employee[9] of Respondent and that thereafter the Ford was driven in a manner so as to harass and annoy Cox without any attempt to do more. I find that Bell approached the Cox car at the traffic light stop to argue, discuss, or dispute with him about the collision. I regard it as highly improbable, considering the trivial character of the contact between the cars, that he would have done so had he not been otherwise motivated to harass Cox than by the bump given the Ford. However, I do not believe that Bell and his associates would voluntarily have driven to the police station behind Cox, as they did, had they been guilty of an attempt to wreck the Cox car.

John W. Waite was employed by Respondent in January 1945, and was one of the pickets during the strike. His application for reinstatement was rejected.

On September 19, while on a picket line, Waite saw George Durkos, a welder, not in the bargaining unit represented by the Union, approach a refinery entrance. Waite stepped in front of Durkos and said, "Just a minute. I want to talk to you." Durkos threw out his arm in an attempt to brush Waite aside and as he did so, Waite seized the extended arm and both fell to the sidewalk. Durkos then said, "Get up and let me alone. I won't go in." Waite did so.[10] Durkos went on to the refinery having sustained a bump on his forehead.

On September 23, Lester O'Haver, also a welder not in the unit represented by the Union, was seized by the wrist as he passed a picket line by a man he identified as Waite.[11] A police officer standing nearby pulled Waite away. O'Haver proceeded in to the refinery.

Manager Powell testified that he refused reinstatement to Waite because of those two incidents, explaining that they assumed importance because Durkos and O'Haver were members of an A. F. of L. union and that Waite's actions might cause friction between the Union and the A. F. of L.[12]

[9] Cox did not work in the unit represented by the Union.

[10] There was no substantial variance between the testimony of Waite and Durkos concerning the incident.

[11] Waite testified that he recalled no such incident. I credit the testimony of O'Haver as to what occurred.

[12] Powell also testified that Waite knew of the terms of a temporary restraining order of a California court restricting picket line activity and violated it. I rejected Respondent's offer to prove the existence of such an order.

The Leslie, Just, Durkos, and O'Haver incidents occurred near the refinery and on the picket line. Minor brushes of such character are not uncommon during strikes when tempers are short and days are long. It should be recognized that in the heat of industrial conflict, strict adherence to a standard of conduct prevailing in the drawing-room is not to be expected.

The Cox incident, I have found, was not of a serious nature. No attempt was made by Bell to visit injury upon any of the occupants of that car.

The case of Waite has an added flavor—the belief of Respondent that his reinstatement would be resented by members of the A. F. of L. union. This consideration, it is asserted, is one which Respondent was not entitled to weigh.

Stanley N. Lyman was first employed by Respondent in May 1946. Lyman was one of the strikers, performed picket-line duty during the strike, and was refused reinstatement because, it is alleged, he participated in an assault upon a returning striker, Loran Hopkins.

Between 7 and 7:15[13] on the morning of October 14, Lyman and another striker, Wayne A. Calhoun, left the picket line and walked toward a parking lot 2 or 3 blocks away. On a sidewalk bordering the lot they saw Hopkins approaching. Both walked to him, inquired where he was going and asked if he thought he "was smart crossing the picket line." Hopkins replied that he did not think he "was smart at all" whereupon Lyman caught him by the coat sleeve and Calhoun struck him in the mouth. Hopkins struggled loose and started away but was again stopped by Lyman and struck by Calhoun. Hopkins' injuries were slight but his lip was cut and bleeding.[14]

Wayne A. Calhoun began work for Respondent in January 1946, performed picket duty during the strike, and, at its termination, was refused reinstatement, allegedly because of violent conduct. His participation in the Hopkins incident has been related. Calhoun was most active in support of the strike and permitted his personal car to be used on union business during the strike period.

On September 17, 1948, at about 7:10 p. m., Albert Burket, a supervisory employee who worked throughout the period of the strike, was attacked by two men and painfully beaten about the face. Burket testified that one assailant held his arms behind him while the other, whom he identified as Calhoun, punched him repeatedly in the face. A police officer who interviewed Burket minutes after the beating had been administered, testified that Burket stated his inability to identify those guilty in any way but asserted that as to the man who struck the blows, "he would never forget the man's face." Within a few minutes of this incident, Calhoun and two others were at the police station where Burket was given opportunity to identify them. He failed to do so.

Burket explained that his opportunity to see Calhoun at the police station was limited in that he was posted across the street from Calhoun, that it was dusk, and that he did not have the aid of his glasses which were broken in the assault. Burket testified that he identified Calhoun as his assailant from a photograph of the latter which was exhibited to him about 10 days later.

[13] Calhoun placed the time as about 9 a. m. The preponderance of the evidence supports the finding that the earlier hour is correct.

[14] These findings are based upon the credited testimony of Hopkins and of Myra Martin, who witnessed the incident. Lyman and Calhoun testified that the former stopped Hopkins in order to gain information concerning happenings in the refinery, that Hopkins called him a son-of-a-bitch and offered to strike him, that Calhoun intervened as a peacemaker, and that no blows were struck. The evidence that Hopkins was struck by one of them is overwhelming, hence their denials are not credited. The evidence that Lyman and Calhoun deliberately followed Hopkins in order to attack him is insufficient to make such a finding.

Calhoun denied any participation in the attack upon Burket and testified that at the time it happened he was in the company of two other strikers. His companions of the evening corroborated his alibi. Stanley Newton Lyman (not one of the charging parties) testified that he saw two men near the point of the attack at about the time it happened and that neither of these was Calhoun.

The question of identification is a serious and perplexing one and it is not without some misgivings that I find that it must be resolved against Calhoun. I am convinced of the honesty and sincerity of the identifying witness, Burket, and do not believe that he testified falsely in naming Calhoun. I believe that his failure to make the identification outside the police station is understandable in view of the gathering dusk and the disability he then suffered in being without glasses. The later identification made from a photograph of course may have been influenced by suggestion. If so Burket could have retracted when he saw Calhoun face to face. Had he been uncertain, I believe that he would have done so.

I find that Calhoun was one of Burket's assailants on the evening of September 17.

During the course of the strike, a number of windows in the refinery were broken and the safety of some of the workers menaced by the projection of marbles into or toward Respondent's premises. When arrested in connection with the attack on Hopkins, marbles were found in Calhoun's possession and a slingshot in his car..

It is the theory of the amended complaint that none of the charging parties was guilty of the specific acts of violence charged against him, or if he was,[15] that Respondent has used such conduct as a pretext to cover discharges which in actuality were motivated by its resentment over the strike.

Respondent, denying that it acted in respect to these individuals with a discriminatory motivation, alludes to factors which tend to negate such an inference—that it replaced none of the strikers before the strike was settled, that it denied reinstatement to only 17 of the 452 who applied for reinstatement, that it continued to bargain with the Union during the course of the strike, and that it provided a tribunal where those refused reinstatement could be heard and where Respondent's action could be reviewed.

In the circumstances of this case, a presumption of discrimination as to each of the charging parties was established by Respondent's refusal to reinstate and it then became the burden of Respondent to overcome that presumption by affirmative evidence. I have found that Lyman and Calhoun were guilty of the conduct with which Respondent charged them. I find that the evidence supports Respondent's contention that each was refused reinstatement because of such conduct and not because of his participation in the strike. In consequence, I will recommend that the allegation of discrimination as to those two individuals be dismissed.[16]

I have reached a different conclusion with respect to Rice, Bell, and Waite. The complained-of conduct of none of them resulted from cold caluclation or from any planned scheme of intimidation. Leslie's remark to Rice was provocative; Bell's contact with Just was spontaneous and unrehearsed; the Cox incident was unplanned and, except for its natural effect upon Mrs. Cox in the circumstances, hardly worth noting; the involvement of Waite with Durkos and O'Haver as-

[15] Except as to Calhoun, counsel for the General Counsel conceding at the hearing that if Calhoun was correctly identified by Burket, the refusal to reinstate him was not discriminatory.

[16] *Sam'l Bingham's Son Mfg. Co.*, 80 NLRB 1612.

sumed importance to Respondent principally because of a fear that it would engender ill-feeling between the members of two unions.

It is of great importance that the rights of Rice, Bell, and Waite, guaranteed by the Act, to participate in concerted activity, to advertise the cause of the Union, and peaceably to persuade workers not to enter the refinery, not be defeated "by insubstantial findings of fact screening reality." These rights cannot be denied by drawing from "a trivial rough incident or a moment of animal exhuberance the conclusion that otherwise peaceful picketing has the taint of force." [17]

The conduct of Rice, Bell, and Waite upon which Respondent seeks to justify its refusal to reinstate those individuals does tend to divert attention from the fact that each was, except for these minor incidents, engaged in peaceful picketing throughout the course of the strike. Recalling that picket lines are manned by humans possessing the strengths and weaknesses of their specie, reacting sometimes predictably and sometimes not to the same stimuli, responding quickly or not at all to the excitement of the moment, judgment of the importance of any incident requires careful and calm appraisal. Rights expressly guaranteed by statute assume an ephemeral quality if they can be exercised only by persons so phlegmatic that they cannot be induced to overstep the bounds of propriety or by persons uneasily aware that the slightest misstep will result in loss of employment.

Respondent is, of course, an employer of wide and varied experience. It is reasonably to be assumed that at some time in the past and, more probably, at many times it has had for consideration the disciplining of employees for conduct occurring away from their employment. On such occasions did Respondent as here accept *ex parte* accusations or did it also seek an explanation from the one accused? Did it discharge individuals for conduct no more serious than that of which Rice, Bell, and Waite stand accused? The record in this case provides no answer and I regard it as Respondent's burden to supply it. In the absence of evidence to the contrary, I believe the inference to be fair, and it is here drawn, that the conduct of Rice, Bell, and Waite, had it occurred at a time other than during the course of a strike would not have resulted in their loss of employment.

I find therefore, that by refusing to reinstate Rice, Bell, and Waite, Respondent discriminated in regard to their hire and tenure of employment because of their participation in the strike and because of their activity in support of the strike. Respondent thereby discouraged concerted activity among its employees, interfered with, restrained, and coerced them in the exercise of rights guaranteed in Section 7 of the Act, and thereby violated Section 8 (a) (1) and (3) of the Act.

III. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in Section II, above, occurring in connection with the operations of Respondent described in Section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

IV. THE REMEDY

Having found that Respondent has engaged in unfair labor practices, it will be recommended that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

[17] The quoted matter in this paragraph is excerpted from *Milk Wagon Drivers Union* v. *Meadowmoor Dairies, Inc.*, 312 U. S. 287, 293.

Having found discrimination in regard to the tenure of employment of Lilbourne L. Rice, John W. Waite, and John W. Bell, it will be recommended that Respondent offer each of the above-named individuals immediate and full reinstatement to his former or substantially equivalent position,[18] without prejudice to his seniority or other rights and privileges, and make each of them whole for any loss of pay he may have suffered by reason of the discrimination against him, by payment to each of a sum of money equal to that which he normally would have earned as wages from the date, in each case, of the application for reinstatement to the date of offer of reinstatement less his net earnings[19] during that period.

It will further be recommended that the allegation of discrimination in respect to Stanley N. Lyman and Wayne A. Calhoun be dismissed.

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

CONCLUSIONS OF LAW

1. By discriminating in regard to the hire and tenure of employment of Lilbourne L. Rice, John W. Waite, and John W. Bell, and thus interfering with, restraining, and coercing employees in the exercise of rights guaranteed in Section 7 of the Act, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (1) and (3) of the Act.

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

[Recommended Order omitted from publication in this volume.]

[18] *Chase National Bank*, 65 NLRB 827.
[19] *Crossett Lumber Co.*, 8 NLRB 440.