

3. All of the Respondent's production and maintenance employees, including the truck driver, but exclusive of supervisors as defined in the Act, buyers, salesmen, and office employees, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act.

4. The Union was on October 2, 1950, and at all times since has been, entitled to act as the exclusive representative of the employees in the aforesaid unit, for the purposes of collective bargaining, within the meaning of Section 9 (a) of the Act.

5. By his refusal, on October 3, 1950, and at all times thereafter, to bargain collectively with the Union as the exclusive representative of his employees in a unit appropriate for collective bargaining, the Respondent engaged and has continued to engage in unfair labor practices within the meaning of Section 8 (a) (5) of the Act.

6. By his interrogation of the employees with respect to their union affiliation, and by his course of conduct in connection with the negotiation and execution of an agreement with his employees, directly, the Respondent interfered with, restrained, and coerced his employees, and has continued to interfere with, restrain, and coerce them; thereby he did engage and has continued to engage in unfair labor practices within the meaning of Section 8 (a) (1) of the Act.

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

[Recommended Order omitted from publication in this volume.]

KELCO CORPORATION *and* UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA, CIO.¹ *Case No. 5-C-2218. June 29, 1951*

Supplemental Decision, Order, and Recommendation

On April 3, 1951, Trial Examiner William F. Scharnikow issued his Supplemental Intermediate Report in the above-entitled proceeding, pursuant to a remand order of the Board, finding that three claimants, Raymond A. Fronckowski, Marion A. Kolb, and William B. MacMillan, had participated in a physical attack upon a fellow employee, thereby forfeiting their right to reinstatement and back pay; and that two other claimants, Harold W. Ruth and Milton A. Popiolek, had not engaged in any conduct which would justify such a forfeiture, as set forth in the copy of the Supplemental Intermediate Report attached hereto. Accordingly, the Trial Examiner recommended that the Board amend its Order herein, which had been conditionally denied enforcement by the United States Court of Appeals for the Fourth Circuit pending proceedings on remand,² by deleting from paragraphs 2 (a) and 2 (b), which provided for reinstatement

¹ Since this proceeding originally arose the Union has severed its connections with the CIO.

² *N. L. R. B. v. Kelco Corp.*, 178 F. 2d 578.

and back pay, the names of Raymond A. Fronckowski, Marion A. Kolb, and William B. MacMillan.

Thereafter, the Respondent filed exceptions to the Supplemental Intermediate Report and a brief. The General Counsel filed a brief in support of the Supplemental Intermediate Report. The Respondent's request for oral argument is denied, as the record and briefs adequately present the issues and the positions of the parties.

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 Supplemental Intermediate Report, including the credibility findings of the Trial Examiner, the Respondent's exceptions and brief, the General Counsel's brief, and the entire record in the case. We hereby adopt the findings,³ conclusions, and recommendations of the Trial Examiner.⁴

In addition, the court, on July 6, 1950, entered an order directing the Board "to proceed to pass upon specific questions as to the reinstatement and back pay" of the remaining 17 claimants, and to "incorporate specific provisions with regard thereto in its amended Order." Thereafter, the General Counsel and counsel for the Respondent reached agreement upon terms for the settlement of the reinstatement and back-pay rights of these 17 claimants, and incorporated their agreement in a stipulation dated January 30, 1951, which was approved by the Board on March 27, 1951. That stipulation provides in part:

No further action will be required of the Respondent under paragraph 2 (a) and 2 (b) of the Board's Order with respect to all persons named therein, except Harold W. Ruth, William B. MacMillan, Raymond M. Fronchowski (sic), Milton A. Popiolek and Marion A. Kolb, whose cases are now pending before a Trial Examiner of the Board.

Because there are therefore no longer any specific questions remaining as to the 17 complainants mentioned above, we shall amend our Order herein of September 21, 1948, to delete from paragraphs 2 (a) and 2 (b) each of their names, as well as those of the three complainants (Fronckowski, Kolb, and MacMillan) who, we have found, forfeited their rights to reinstatement and back pay.

Order

Upon the entire record in the case, and pursuant to Section 10 (c) and (e) of the National Labor Relations Act, as amended, the Na-

³ The Trial Examiner inadvertently stated in his Supplemental Intermediate Report that the Board's Order was issued September 20, 1948, and provided in paragraphs 2 (a) and 2 (b) for reinstatement and back pay for 18 rather than 17 additional claimants.

⁴ Member Reynolds on the entire record would also deny reinstatement to Ruth and Popiolek.

tional Labor Relations Board hereby orders that its Order in this proceeding dated September 21, 1948, be, and it hereby is, amended to *delete* from paragraphs 2 (a) and 2 (b) the following names:

Marvin Baseman	William C. Marvell
James Stephen Bowen	Edwin J. Mooney
Pat Compello	Nelson W. Neal
Raymond Frankell	William H. Rixham
George E. Fich	James E. Rutledge
Raymond A. Fronckowski	Richard Sebeck
Walter Hasenei	W. M. Stratton
Harry F. Hecker	Charles J. Sturgill
Marion A. Kolb	Robert T. Zellers
William B. MacMillan	Joseph Z. Ziemplak

Recommendation

The Board respectfully recommends to the United States Court of Appeals for the Fourth Circuit that the said Order, as thus amended, be enforced.

MEMBERS MURDOCK and STYLES took no part in the consideration of the above Supplemental Decision, Order, and Recommendation.

Supplemental Intermediate Report Upon Remand

Mr. Sidney J. Barban, for the General Counsel.

Messrs. Edward L. Rich and *David D. Merrill*, of Baltimore, Md., for the Respondent.

STATEMENT OF THE CASE

On September 20, 1948, the National Labor Relations Board, herein called the Board, issued a Decision and Order¹ in the above-entitled proceeding, which provided, among other things, that 23 employees of the Respondent, herein called the Claimants, who had been discriminatorily discharged, should be reinstated to their former or substantially equivalent positions and should be made whole by the Respondent for any loss of earnings suffered by them during the period of discrimination against them.

On December 20, 1949, upon petition by the Board for a decree enforcing its order, the United States Court of Appeals for the Fourth Circuit remanded the case to the Board (1) for the purpose of taking and considering evidence proffered by the Respondent but rejected by the Trial Examiner and the Board in the original hearing, that, as found by a Maryland circuit court judge in issuing an injunction against them, five of the Claimants (i.e., Raymond A. Fronckowski, Marion A. Kolb, William B. MacMillan, Harold W. Ruth, and Milton A. Popiolek) had engaged in acts of violence of a serious character during a strike at the Respondent's plant in November 1946; and (2) for the purpose of considering possible amendments of its order with respect to the

¹ 79 NLRB 759.

reinstatement and indemnity of these five Claimants before making further application to the court for its enforcement.²

On July 6, 1950, the court entered a further order directing the Board also "to proceed to pass upon specific questions as to the reinstatement and back pay" of the 18 Claimants other than the 5 whom the Respondent alleged to have engaged in violence and to "incorporate specific provisions with regard thereto in its amended order to the end that this Court may enter a final order enforcing same as an entirety if this shall appear proper."

Pursuant to these orders of the court, the Board issued an order on April 13, 1950, and an amending order on July 11, 1950, by which it reopened the record in the case and remanded the proceeding to its Regional Director for the Fifth Region (Baltimore, Maryland) for the purpose of conducting a further hearing to take the additional evidence as directed by the court.

Pursuant to a notice of further hearing, and orders postponing and rescheduling such hearing from time to time, all of which were issued by the Regional Director and duly served upon the Respondent, the hearing was held on December 11, 1950, before the undersigned Trial Examiner duly designated by the Chief Trial Examiner. The General Counsel for the Board³ and the Respondent were represented by counsel and participated therein. Full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence was afforded all parties.

At the opening of the hearing, the General Counsel and counsel for the Respondent told the undersigned that they had reached agreement upon terms, which the Regional Director would immediately recommend to the Board, for the settlement of the reinstatement and back-pay rights of the 18 Claimants other than the 5 who allegedly committed acts of strike violence. They asked that they be permitted at that time to adduce evidence on the strike-violence issue only, and that the hearing then be adjourned without further date pending the Board's approval or disapproval of the settlement of the other issues as recommended by the Regional Director. The undersigned granted this request upon condition that the Regional Director immediately submit the proposed partial settlement to the Board, and that counsel keep the undersigned advised of their action and the action of the Board with respect to the partial settlement proposal. Accordingly, on December 11, 1950, both the Respondent's counsel and the General Counsel submitted evidence on the strike-violence issue, rested their cases on that issue, and waived oral argument with respect thereto. The undersigned thereupon adjourned the hearing indefinitely.

On March 27, 1951, the Board approved a stipulation entered into between the Respondent and the General Counsel, dated January 30, 1951, for the settlement of the back-pay and reinstatement claims of the 18 Claimants other than the 5 whose alleged acts of misconduct were tried before the undersigned.⁴ Since

² *N. L. R. B. v. Kelco Corp.*, 178 F. 2d 578.

³ The General Counsel and the staff attorney appearing for him at the hearing are herein referred to as the General Counsel.

⁴ The undersigned, of course, takes notice of the Board's minutes concerning this action. On March 30, 1951, he also received from the chief law officer of the Fifth Region, a copy of a letter written by the latter to the Respondent's counsel on March 29, 1951, and advising the Respondent of the Board's approval of their stipulation. Copy of this letter is incorporated in the exhibit file as Trial Examiner's Exhibit 1. Before that, in compliance with their promise to advise the undersigned of their progress in presenting and securing the Board's approval of their stipulation, the General Counsel (through the chief law officer) and the Respondent's counsel had forwarded to the undersigned copies of a number of letters which passed between them in the course of resolving difficulties which arose concerning the final form of their stipulation.

this action by the Board left as the only issues to be decided by the undersigned, those which had been fully tried on December 11, 1950, the undersigned issued an order closing the hearing on April 2, 1951, and caused copies thereof to be served on the General Counsel and the Respondent.

In the meantime, the undersigned had received briefs from the General Counsel and the Respondent on February 21, 1951.

Upon the entire record⁵ in the case and from his observation of the witnesses, the undersigned makes the following:

FINDINGS OF FACT

I. THE ISSUES AND THE APPLICABLE PRINCIPLES

The only issues presented to the Trial Examiner are whether Raymond A. Fronckowski, Marion A. Kolb, William B. MacMillan, Harold W. Ruth, and Milton A. Popiolek, or any of them engaged in conduct during the 1946 strike which should, as a matter of policy, deprive them or any of them of the rights to reinstatement and back pay set forth in paragraphs 2 (a) and 2 (b) of the Board's order.⁶

In its opinion remanding the present case to the Board for further action, the court of appeals clearly stated the standards to be applied to the evidence; i. e., that only "serious acts of violence on the part of striking employees," and not merely acts exceeding the bounds of lawful conduct "in a moment of animal exuberance," should bar reinstatement and back pay.⁷

II. THE INCIDENTS

A. *The incident involving nonstriker Merrick*

Truck driver Anthony Merrick, who continued driving the Respondent's truck to and from the Respondent's plant during the strike, testified, but Claimant Milton A. Popiolek denied, that on one occasion in the middle of October, Popiolek came up to the truck which Merrick was about to drive out of the yard, and said either, "Tony, you want to watch out. We are going to get rough." or "Tony, you want to watch out. The boys are going to get tough." The undersigned credits Merrick's latter version of the remark made to him by Popiolek and finds no basis therein for excluding Popiolek from reinstatement or back pay.

⁵ The transcript contains two obvious misspellings of names. The correct spelling in each case is used in the briefs as well as in the previous record, the original Trial Examiners' Intermediate Report, the Board's Decision, and the Opinion of the Court. The undersigned accordingly orders that the following corrections be made in the present transcript: Myron Montello to Miro Monacelli; and James Hergehan to James Hergenbahn.

⁶ In his brief, the General Counsel states:

Of the five employees involved here only Milton A. Popiolek appeared at the hearing and testified in his behalf. The remaining four employees have either stated that they desired to have no further part in the proceedings or have failed to cooperate with the Agents of the Board and the General Counsel upon request. For these reasons the General Counsel is pressing at this time only the rights of Milton A. Popiolek under the Order and Decision of the Board.

However, the issues as to all five of these men were fully tried at the hearing and the General Counsel in later portions of his brief argues in effect that all of them are entitled to reinstatement and back pay. The undersigned, therefore, deals in this Report with all the questions raised at the hearing.

⁷ 178 F. 2d at 580-582, and authorities therein cited.

B. Incident involving nonstriker Monacelli

After work, on or about November 1, 1946, Miro Monacelli, a welder, who continued working during the strike, passed through the picket line at the Respondent's plant at the corner of Baltimore Street and Haven Street and, walking half a block south on Haven Street, was stopped there by a group of about 10 strikers including Popiolek, MacMillan, Ruth, Kolb, and Fronckowski.

Popiolek and a few others in the group asked Monacelli to join the strike and Monacelli refused. MacMillan said, according to Monacelli's uncontradicted testimony on this point, "You better watch your step from now on." Monacelli further testified that Popiolek told him, "We are getting desperate. This is all the talking we are going to do." Popiolek denied making this statement to Monacelli, but testified that he first asked Monacelli to tell an investigator for the General Counsel about a foreman's having questioned him about their union, and that when Monacelli refused, Popiolek then told Monacelli "that would be the last time I was going to ask him about it." Monacelli and Popiolek were the only witnesses who testified as to this conversation. Although the undersigned credits Monacelli's testimony and finds that MacMillan told him "You better watch your step from now on," he also credits Popiolek's testimony and finds that after Monacelli refused to give information to the General Counsel's investigator, Popiolek told him that was the last time he would ask Monacelli about it.

At the conclusion of this conversation, Monacelli continued walking homeward, first to Lombard Street (the next intersection), then left on Lombard Street a block and a half, and then across a vacant lot to the back gate of his yard. In the meantime, a number of the strikers with whom he had just spoken, including MacMillan, Fronckowski, Kolb, and Popiolek, walked rapidly after him to catch up with him. When they reached the point where Monacelli entered the lot Popiolek and all of the following group except MacMillan, Fronckowski, and one other man who was not identified, stopped on the sidewalk. MacMillan, Fronckowski, and the unidentified man went halfway across the lot and, when Monacelli stopped at his gate, they told him that he "had better not come to work the next day, it would just be too bad."

The undersigned finds nothing in the evidence concerning these incidents to justify withholding reinstatement or back pay from MacMillan, Fronckowski, Kolb, or Popiolek. The striking group was admittedly attempting to induce Monacelli to join them in their strike. MacMillan's remark on Haven Street and his later remark in the lot behind Monacelli's home can be regarded only as his spontaneous expressions of bitterness at their failure and not as a threat that the group intended to commit any violence upon him. While the Respondent argues that the group "chased" Monacelli, the evidence as already summarized, shows clearly that Monacelli had no difficulty in leaving them and that they merely walked rapidly after him in an apparent desire to continue talking with him. Certainly, if they intended to assault him, they would at least have run after him.

C. First incidents involving nonstriker Hergenbahn

Sheet metal worker James Hergenbahn, who worked throughout the strike, testified that on October 24, 1946, strikers Ruth and Popiolek "got in front of" him at the plant gate as he was leaving for home. On direct examination, Hergenbahn testified that either Ruth or Popiolek (he couldn't remember which) told him that he "had better get sick tomorrow and not come to work." On cross-examination, however, he testified first that they said, "If you know what is

good for you, you will get sick tomorrow and stay home," but then he testified that he was not sure about the exact words and that it could have been, "Why don't you get sick and don't come in tomorrow?" Ruth did not testify but Popiolek denied that he, or anyone who was ever with him, made the remarks to which Hergenbahn testified. The undersigned credits Popiolek's denial.

Hergenbahn further testified that as he was about to enter the plant on the following morning, October 25, 1946, he met Ruth and Popiolek, that Ruth stepped in front of him, but that before Ruth did or said anything, a policeman arrested Ruth and took him away. As already noted, Ruth did not testify. Popiolek denied having been with Ruth when he was arrested, and the undersigned credits his denial. The undersigned, however, finds in accordance with the undenied portion of Hergenbahn's testimony, that on the morning of October 25, 1946, Ruth stepped in front of him as he was entering the plant but that Ruth was arrested before he said or did anything.

Here again, the undersigned finds nothing in the evidence to justify withholding reinstatement or back pay from either Popiolek or Ruth. The undersigned has credited Popiolek's denial that either he or anyone with him suggested to Hergenbahn that if he knew what was good for him, he would "get sick tomorrow and not come to work," and his further denial that he was with Ruth when the latter was arrested. As to Ruth, Hergenbahn's testimony at most would support findings that on October 24, Ruth said merely, "Why can't you get sick and don't come in tomorrow," and that on the following day Ruth stepped in front of him and was arrested before he said or did anything. Upon these findings, there clearly appear to have been no "serious acts of violence" or threats thereof on the part of either Ruth or Popiolek which should bar their reinstatement or back pay.

D. Assault upon Hergenbahn

Hergenbahn testified that, as he walked along Baltimore Street to a bus stop after work on election day, November 5, 1946, strikers MacMillan, Fronckowski, and Kolb set upon and beat him 3 or 4 blocks from the Respondent's plant and then left the scene of the assault (as they had arrived) in an automobile driven by a fourth man. Although Hergenbahn could not see the driver clearly enough to recognize him, he testified that the car was striker Ruth's blue Ford. Notwithstanding the apparently intended implication of his testimony that striker Ruth was the driver of the "get-away" car and thus a participant in the assault, Respondent's counsel stated at the hearing that he would attempt to prove, by striker Popiolek's testimony, that Popiolek had in fact been the driver of the car. In response to questions put to him in this connection, however, Popiolek testified that after the nonstriking workers, including Hergenbahn, had left the Respondent's plant on that election day, Popiolek took strikers Fronckowski and Kolb in his 1937 Dodge car from the Respondent's plant where they had been picketing, and that he drove them along Baltimore Street and deposited them at various points beyond the scene of the alleged assault, but that he neither witnessed, nor participated in, any assault. As has been noted, neither MacMillan, Fronckowski, Kolb, nor Ruth testified at the hearing.

The undersigned finds no reason for not believing either Hergenbahn's testimony or Popiolek's testimony so far as they thus relate to the assault upon Hergenbahn on November 5, 1946. Although Popiolek testified that he drove Fronckowski and Kolb along Baltimore Street after Hergenbahn had left work that afternoon, the relative times of Hergenbahn's leaving work, Popiolek's leaving the plant and depositing Fronckowski and Kolb on Baltimore Street at

some point beyond the scene of the assault, and the time of the assault were not clearly enough fixed to enable the undersigned to judge whether, consistently with both Hergenbahn's and Popiolek's testimony, Fronckowski and Kolb might not have returned in another car after leaving Popiolek. The undersigned therefore credits both Popiolek's denial that he witnessed or participated in the assault, and Hergenbahn's testimony that he was assaulted by Fronckowski, Kolb, and MacMillan. The undersigned, however, rejects any implication that Ruth was the driver of the "get-away" car merely because it was a blue Ford which Hergenbahn believed was Ruth's car.

Upon this evidence as to their assault upon Hergenbahn the undersigned will recommend that the Board amend its order to withhold from Fronckowski, Kolb, and MacMillan any right to reinstatement and back pay.

Upon the basis of the foregoing findings of fact and upon the entire record, the undersigned makes the following:

CONCLUSIONS OF LAW

1. By their assault upon James Hergenbahn on November 5, 1946, Claimants Raymond A. Fronckowski, Marion A. Kolb, and William B. MacMillan forfeited their rights to reinstatement and back pay under the Board's Order.

2. The evidence does not warrant the conclusion that either of the Claimants Milton A. Popiolek or Harold W. Ruth engaged in any misconduct which justifies a forfeiture of their rights to reinstatement or back pay under the Board's Order.

Recommendations

Upon the basis of the foregoing findings of fact and conclusions of law, the undersigned recommends that the Board amend its Order issued in the present proceeding on September 20, 1948, by deleting from paragraphs 2 (a) and 2 (b), the names of Raymond A. Fronckowski, Marion A. Kolb, and William B. MacMillan, and thus excluding these three men from the benefits of these provisions.

AMERICAN WRITING PAPER CORPORATION, ET AL. *and* UNITED PAPER WORKERS OF AMERICA, CIO, PETITIONER

CROCKER-McELWAIN COMPANY *and* UNITED PAPER WORKERS OF AMERICA, CIO, PETITIONER. *Cases Nos. 1-RC-2177 and 1-RC-2176.*
June 29, 1951

Decision and Order

Upon separate petitions duly filed under Section 9 (c) of the National Labor Relations Act, a consolidated hearing was held before Robert S. Fuchs, hearing officer. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Pursuant to the provisions of Section 3 (b) of the Act, the Board has delegated its powers in connection with this case to a three-member panel [Chairman Herzog and Members Murdock and Styles].