

labor force. Although the seasonal employees work in close contact with the regular employees, we are of the opinion that their tenure of employment is not sufficiently regular or substantial to entitle them to participate in the election, and accordingly, we find that they are ineligible to vote.³

[Text of Direction of Election omitted from publication in this volume.]

³ *Gerber Products Company, supra*; *The Heekin Can Company*, 88 NLRB 726.

DEENA ARTWARE, INCORPORATED *and* UNITED BRICK AND CLAY WORKERS OF AMERICA, AFFILIATED WITH THE AMERICAN FEDERATION OF LABOR. *Case No. 9-CA-44. July 6, 1951*

Supplemental Decision

On October 25, 1949, the National Labor Relations Board, herein called the Board, issued its Decision and Order in this case,¹ in which it found that Deena Artware, Incorporated, herein called the Respondent, had engaged in and was engaging in certain unfair labor practices affecting commerce, and ordered the Respondent to cease and desist therefrom and take certain affirmative remedial action.

The Board thereafter petitioned the United States Court of Appeals for the Sixth Circuit to enforce its Order against the Respondent. On October 12, 1950, the court granted a motion by the Respondent to remand the case to the Board for the purpose of receiving and considering additional evidence. The order of remand does not indicate that the court has as yet considered the merits of the Board's Decision and Order.

Pursuant to the remand, a further hearing was held before Herman Marx, the Trial Examiner who presided at the original hearing. On February 9, 1951, the Trial Examiner issued his Supplemental Intermediate Report, in which he found that the additional evidence received required no change in the Board's Decision and Order, and recommended that the Board reaffirm it without modification, as set forth in the copy of the Supplemental Intermediate Report attached hereto. Thereafter, the Respondent filed exceptions to the Supplemental Intermediate Report and a supporting brief.

The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Supplemental Intermediate Report, the Respondent's exceptions and brief, and the entire record in the case (including the original record), and

¹ 86 NLRB 732.

95 NLRB No. 6.

hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, with the following additions.

1. Following issuance of the Board's cease and desist order, the Respondent now seeks, for the first time, to find a defense for its past unfair labor practice conduct in the provisions of the Union's constitution relating to strike procedures. Apparently, it contends that because its employees, who struck in protest over the Respondent's unlawful refusal to bargain with their Union, neglected to satisfy self-imposed procedural requirements for strike action, their concerted activity lost the protection of the Act. Like the Trial Examiner, we find no merit in this argument, even assuming, although the evidence on this point does not affirmatively establish the fact, that Local 908 did not comply with the constitutional provisions of its parent body.²

2. At the reopened hearing the Respondent introduced further evidence in support of its original contention that some of the strikers had engaged in illegal secondary picketing activity. It proved that an employee working on behalf of Black & Son, an independent contractor not mentioned in the original hearing who was performing work on the Respondent's premises, refused to cross the strikers' picket line. On the Respondent's property, the contractor was building a monorail joining the plant to the warehouse. The monorail was designed to connect the two buildings at their respective doors, which some of the employees used in the regular course of their work in going from one building to the other. Further evidence received pursuant to the remand shows, with greater particularity than appeared at the original hearing, the names of strikers who picketed that portion of the Respondent's premises where an extension to the existing warehouse was being constructed by the independent contractors, Vandavelde and Augustus. No evidence was offered to show, nor does the Respondent claim, that the employees picketed any premises other than the sole property of the Respondent in Paducah.

As the additional evidence placed in the record pursuant to the remand is limited to picketing at the Respondent's immediate premises, we perceive no reason for altering the Board's earlier conclusion that all picketing was primary, and therefore entirely protected by the Act. Our decision here reaffirms the principle enunciated by the Board in *United Electrical, Radio and Machine Workers of America, et al. (Ryan Construction Co.)*.³ We note that after issuance of the Board's Decision and Order herein, the Supreme Court of the United States, in its recent decision in *N. L. R. B. v. International Rice Milling Co.*,⁴ cited the Board's decision in the *Ryan* case with approval. Indeed,

² Cf. *Automobile Workers Union v. O'Brien*, 339 U. S. 454, and *Intertown Corporation (Michigan)*, 90 NLRB 1145.

³ 85 NLRB 417.

⁴ 340 U. S. 902, decided June 4, 1951, reversing 183 F. 2d 21 (C. A. 5).

the principle of the *Ryan* case finds further support in the language of the Supreme Court where, in holding picketing at the employer's immediate premises to be lawful, it said, "There were no inducements or encouragements applied *elsewhere* than at the picket line."⁵ [Emphasis supplied.]

For the foregoing reasons, and also for the further reasons set forth in the Supplemental Intermediate Report, we conclude, as did the Trial Examiner, that the additional evidence received pursuant to the order of remand neither requires nor justifies any change in the Decision and Order issued in this case. Accordingly, we hereby affirm that Decision and Order without modification.

MEMBER STYLES took no part in the consideration of the above Supplemental Decision.

Supplemental Intermediate Report

PREFATORY STATEMENT

In its decision (86 NLRB 732) in the above proceeding, dated October 25, 1949, the National Labor Relations Board¹ found that the Respondent had violated Section 8 (a) (1), 8 (a) (3) and 8 (a) (5) of the National Labor Relations Act (49 Stat. 449-457, as amended by 61 Stat. 136-163), herein referred to as the Act. In brief, the Board held that the Respondent had interfered with, restrained, and coerced its employees at its Paducah, Kentucky, plant, in the exercise of rights guaranteed to them by the Act; that it had failed and refused to bargain in good faith with the Union as the duly designated representative of the plant's employees; and that it had discriminatorily discharged and refused to reinstate 66 employees because they had engaged in concerted activities protected by the Act. The Board's order appended to its decision directed the Respondent to cease and desist from its unlawful conduct; to bargain collectively with the Union; to offer reinstatement to the 66 employees; and to make the said employees whole for any loss of pay they suffered as a result of the discrimination against them.

Thereafter, the Board filed a petition in the United States Court of Appeals for the Sixth Circuit praying for the enforcement of its order. The Respondent subsequently filed a motion in the court of appeals requesting that the cause pending in the court be remanded to the Board, "with direction to hear such new evidence as may be necessary to ascertain the facts upon the issues referred to in this motion and to make a new decision and order upon a reconsideration of the entire case."

⁵Our conclusion that all picketing at the Respondent's premises was "primary" in character is also in accord with the opinion of the Kentucky court of appeals, which had occasion to consider the picketing activities at the warehouse construction area. In vacating the temporary injunction of a lower court directed to the very picketing here claimed to have been illegal, that court said: "The area which was picketed was contiguous to the warehouse, which unquestionably could be picketed, and it might reasonably be said to be an integral part of one industrial facility in the process of physical expansion, since it is separated from the remainder by a mere artificial line." 28 LRRM 2025.

¹The National Labor Relations Board will be referred to herein as the Board; Deena Artware, Incorporated, as the Respondent; and United Brick and Clay Workers of America, as the Union. References herein to the General Counsel include the attorney who represented him at the hearing before the Examiner.

The basic matters upon which the Respondent sought leave of the court to adduce additional evidence before the Board may be briefly summarized as follows:

1. The authority of one Edmund F. Grimes to participate in collective bargaining negotiations between the Union and the Respondent.

2. The right of the Respondent's employees to strike and the cause of the strike.

3. The legality of the picketing at the Respondent's premises.

On October 12, 1950, the court of appeals entered an order granting the Respondent's motion. Pursuant to the provisions of that order, the Board, on November 13, 1950, entered an order reopening the record of its proceedings and remanding the case to the Regional Director for the Ninth Region of the Board "for the purpose of conducting the further hearing," and authorizing him "to issue notice thereof." The Regional Director thereupon issued a notice of hearing dated December 8, 1950. Copies of the notice were thereafter duly served upon the Union and Respondent.

Pursuant to the terms of the said notice, a hearing (referred to herein as the second hearing) was held on January 8, 1951, at Paducah, Kentucky, before the undersigned, Herman Marx, duly designated as the Trial Examiner by the Chief Trial Examiner. All parties were represented by counsel, participated therein, and were afforded a full opportunity to examine and cross-examine witnesses, adduce evidence bearing on the issues, submit oral argument, and file briefs. The parties waived oral argument at the second hearing. The General Counsel has filed a brief. The Union and the Respondent have not done so.

Upon the entire record of this proceeding, and from my observation of the witnesses therein, I make the following:

SUPPLEMENTAL FINDINGS OF FACT

A. The authority of Edmund F. Grimes to participate on behalf of the Union in the collective bargaining negotiations

Edmund F. Grimes is an organizer employed by the American Federation of Labor. The record of the hearing (referred to herein as the first hearing) upon which the Board's Decision and Order is based contains undisputed evidence that prior to the Union's selection as the Respondent's employees' bargaining agent at an election conducted by the Board, Grimes participated actively in the organization of the plant; that, without objection by the Respondent, he was a signatory, on behalf of the Union, to the agreement between it and the Respondent for the holding of the election; that the Respondent's attorney who appears for the firm in this proceeding signed the agreement in its behalf; that on the day preceding the election, at the invitation of George H. Weiner, the Company's president, Grimes addressed its employees and was introduced to them by Weiner as a representative of the Union; that Allie Messer, the Union's vice president,² and Earl Bellew, its international representative, requested Grimes to attend the bargaining meetings with Bellew and to give the latter "all assistance possible" in negotiating a contract; that without any objection by the Respondent, Grimes, together with Bellew and a committee of 10 of the Respondent's employees, represented the Union at its first bargaining meeting with management

² Messer testified at the second hearing, without contradiction, and I find, that he is also a member of the Union's executive board; that he is the highest ranking of the Union's officials resident in Kentucky; that he has the function of supervising and directing in that State the Union's organizational work and collective bargaining negotiations; and that he requested Grimes, because of his greater experience in such matters, to assist Bellew in the negotiations.

representatives; and that the Respondent excluded Grimes from the second meeting, stating that it did so because he was "not a member or officer" of the Union. The record of the first hearing contains much additional evidence bearing on the question of the Respondent's good faith in the bargaining negotiations, but as the relevant evidence is fully discussed in the findings adopted by the Board, no additional analysis of the evidence need be made here. The only question presented at this point is whether the evidence adduced at the second hearing warrants a reversal of the finding that Grimes was authorized by the Union to participate in the bargaining negotiations.

To support its position that Grimes' exclusion was justified, the Respondent produced at the second hearing copies of minutes of meetings of the Union's local, of which employees of the Respondent were members; and of an affidavit executed by George Meany, secretary-treasurer of the American Federation of Labor,³ describing Grimes' employment by the Federation and his duties and functions.⁴

The Respondent is correct in its claim, as expressed in the motion for remand that the minutes of the local do not contain any authorization by it for Grimes to participate in the bargaining negotiations for the Union. However, it must be borne in mind that the bargaining agent selected by the Respondent's employees was the Union and not its local. The point at issue is whether Grimes was authorized by the Union to participate in the negotiations and not whether one of its locals did so. Thus, the minutes of the local contribute nothing to the Respondent's position.

The Meany affidavit describes Grimes as an organizer of the Federation, asserting that he works under supervision of other officials of the Federation and that he has "no authority to make contracts on behalf of or otherwise bind" that organization. Initially, it may be pointed out that neither Meany nor the Federation is a party to this proceeding, nor was Meany produced as a witness. However, irrespective of the question whether the affidavit is probative evidence,⁵ its contents do not support the Respondent's position. It is clear that the Federation is not the bargaining agent selected by the employees, and whether or not Grimes has authority to bind the Federation is wholly beside the point. It was within the Union's province to authorize Grimes to participate in the bargaining negotiations,⁶ notwithstanding the fact that he was "not a member or officer"

³ The affidavit had been filed by the Federation in support of a motion to set aside service of process upon it in an action brought against it and the Union in the United States District Court for the Western District of Kentucky.

⁴ The Respondent also introduced a document entitled "Itemized statement of expenses from reports of A. F. of L. Organizer E. F. Grimes," and purporting to list Grimes' salary and expenses for the period from the week ending May 29, 1948, to September 18, 1948. The purpose and meaning of the exhibit are far from clear. Apparently it is drawn from an attachment to answers to interrogatories addressed by the Respondent to one or more of the defendants in the action it brought in the United States district court. Neither the relevant interrogatory nor the answer to which the itemization apparently applies is in evidence. If the purpose of the exhibit is to show that Grimes' salary and expenses were paid by the Federation, it may be noted, first, that the exhibit is silent on that question, second, that it covers a period after the bargaining negotiations between the Union and the Respondent had terminated, and, finally, that the mere fact that Grimes was a paid employee of the Federation has no bearing on the question whether the Union authorized him to participate in the meetings. In fact, the evidence is undisputed that one of his functions as an employee of the Federation is, upon request, to assist its member affiliates such as the Union, in collective bargaining negotiations.

⁵ The affidavit was offered at the first hearing as an exhibit, but was rejected. It was received at the second hearing because it falls within the purview of the order of remand.

⁶ See, among other cases, *Hancock Brick and Tile Co.*, 44 NLRB 920; *The Oliver Corporation*, 74 NLRB 483; *New Era Die Co.*, 19 NLRB 227, enforced as modified, 118 F. 2d 500 (C. A. 3).

of the Union or that he was unauthorized to contract for the Federation which was a stranger to the bargaining negotiations.

The record of the first hearing (see testimony of Grimes and Bellew), as well as the evidence adduced at the second (see testimony of Messer), establishes Grimes' authority to participate in the negotiations. Accordingly, I find that the Union authorized Grimes to participate in the negotiations in its behalf and that his exclusion was without any legal justification.

B. The right of the employees to strike and the cause of the strike

The evidence at the first hearing established, and the Board found, that on May 26, 1948, the Union's negotiating committee decided to call a strike; that they notified the plant's employees of their decision; that 66 employees responded to the call and went on strike; that on May 29, 1948, the striking employees made an offer to the Respondent's plant superintendent (who is vested with authority to hire and discharge employees) to return to work "unconditionally"; that the superintendent refused to reinstate the employees, stating that it was his understanding that the employees who struck on May 26 "were discharged"; and that the strikers subsequently made written applications to the Respondent to return to work, but that the Respondent refused to reinstate them.

At the second hearing, the Respondent introduced copies of minutes of meetings held by Local No. 908 of the Union both before and after the strike commenced; a copy of the Union's constitution; and an excerpt of testimony given by Bellew at the trial of an action brought by the Respondent against the Union and others in the United States District Court for the Western District of Kentucky.

The minutes of the local for May 7, 1948, show that Bellew reported to the membership at that meeting that bargaining negotiations with the Respondent were deadlocked, that he had gone as far as he could go with the negotiations, but that "before we call a strike," he would like to use the facilities of the conciliation service "and see if they can help us." The next entry in the minutes for May 7 discloses that a motion was made and seconded "that we go on strike at the plant of Deena Artware Inc. 632 South 3rd St. due to the breaking off of negotiations by the Company, and that we give Earl Bellew, International Representative full power and authority to name the day and hour of the strike." The motion was carried unanimously.

Section 6 of article XVI of the Union's constitution prescribes the organization's procedure for approving a strike of a local. In sum, before members of a local may strike, they are required to submit, "over the seal" of the local, to the parent body's president a "detailed statement" of the controversy; it is the president's duty then to furnish a copy of the statement to each member of the Union's executive council; and if, after investigation, the council approves, "a strike may be ordered." Locals are forbidden to strike "without sanction of the Executive Council."

The nub of Bellew's relevant testimony in the district court is that on May 26 he did not "submit a detailed statement over the seal" of the local, as provided in the constitution, and that he could not recall whether he had done so at any other time in May 1948.

The Respondent has submitted neither oral argument nor a brief in connection with the second hearing. Reference may be made, however, to the motion for remand for a statement of the Respondent's position with respect to the exhibits referred to above. There it is asserted that the evidence sought to be adduced

would show that the local⁷ did not take necessary and proper steps to vest⁸ in Bellew "power or authority to call a strike at any time." While not stated in terms, it is evident that the Respondent challenges the legality of the strike because of an alleged noncompliance by Bellew with the provisions of the constitution.

The Respondent misconceives both the law and the evidence. Bellew did not "call a strike." The minutes for May disclose that the local (of which substantially all the strikers were members) resolved to strike almost 3 weeks before the strike broke out, leaving it to Bellew to "name the day and hour of the strike," apparently to afford the negotiators an opportunity to invoke the facilities of the conciliation service. As found by the Board, it was the negotiating committee which decided on May 26 to place the local's previous resolution in effect. Hence, whether Bellew sent "a detailed statement over the seal" of the local to the Union's president is beside the point; for it does not establish that the local did not do so. Be that as it may, the Union's constitutional machinery for its own governance is not the concern of the Respondent.⁹ Such hypertechnical emphasis upon the internal affairs of the Union and its local cannot obscure the basic fact that the 66 employees saw fit to leave their employment in order to implement their demands upon the Respondent and that it was their undoubted right to do so under Section 7 of the Act, without discriminatory reprisals, notwithstanding the provisions of their constitution.⁹

In the findings adopted by the Board, it concluded that the root causes of the strike were the Respondent's unfair labor practices, as well as the employees' desire to give economic implementation to their request for a contract embodying an improvement in wages, hours, and other working conditions. The Respondent contends in its motion for remand that that conclusion is erroneous and refers to the undisputed evidence (set out in the Board's findings) at the first hearing that a meeting between a conciliator and the Respondent's and Union's representatives was scheduled for May 26, 1948, at the office of the Respondent's counsel; that the meeting was postponed by the conciliator who undertook to notify Bellew; and that notice of the postponement did not reach Bellew, as a result of which the Union's agents arrived at the meeting place but found neither the conciliator nor the Respondent's representatives there. The claim is advanced by the Respondent, as at the first hearing, that the strike which commenced later that day resulted "solely" from Bellew's "annoyance" at the failure to notify him of the postponement. This contention was analyzed in detail in the Board's findings and rejected because it ignores a number of important operative facts and principles to which brief reference will be made again below.

⁷ In the motion the Respondent refers to both the Union and the local as "the union." To avoid any confusion with the parent body, this Report will refer to the subsidiary as "the local."

⁸ *Alaska Juneau Gold Mining Co.*, 2 NLRB 125, 143; *Lane Cotton Mills Co.*, 9 NLRB 953, 967-8, enforced 111 F. 2d 814 (C. A. 5), cert. dismissed 311 U. S. 723.

⁹ The General Counsel, at the second hearing, presented the testimony of Harold H. Fleagal (referred to as Flegal at the first hearing), president of the Union, to the effect that sometime in April 1948, Bellew informed him that the Respondent had discharged nine members of the negotiating committee and that the plant's employees were disturbed about the matter; and that he (Fleagal) told Bellew that "he should strike the plant if that was necessary to put those nine men back to work." Fleagal also testified that in 1937, subsequent to the promulgation of the constitution (in 1928), the Union's executive body, in order to expedite its business, delegated to the president and secretary-treasurer the power to authorize strikes. In view of the conclusion reached regarding the right of the 66 employees to strike, it is unnecessary to consider the effect of Fleagal's testimony.

The Respondent now places emphasis on the local's minutes as substantiating the claim advanced, but they do not do so. The resolution to strike (minutes for the meeting of May 7) asserts that "we go on strike . . . due to the breaking off of negotiations by the Company." The local's decision to strike antedated the incident of the postponed meeting and the strike by almost 3 weeks and it is obvious that the postponement could not have had anything to do with the resolution. Moreover, it may be borne in mind that what is termed "the breaking off of negotiations by the Company," was preceded, as found by the Board, by a course of conduct by the Respondent throughout the bargaining conferences "to frustrate the Union's efforts to achieve a meeting of the minds on any important issue." Thus, the minutes of May 7 do not support the claim that the isolated incident of the postponed meeting or Bellew's "annoyance" at the postponement caused the strike; if anything, they negate that contention. The only other reference in the minutes to the reason for the strike appears in the local's proceedings for May 29. There the question was put (by an unidentified member) as to the reason for the strike, and Bellew responded that "it seemed that negotiations had broke off and the meeting with the conciliator and company had been put off without" notification to him or the committee. But even this colloquy does not support the claim that the "sole" cause of the strike was Bellew's "annoyance" at the conciliator's failure to notify him. Bellew adverts not only to the failure of notification but states the added reason that "negotiations with the Company had been broke off," in substantially the same language employed in the resolution of May 7 where the local reached its decision to strike.

Whatever interpretation may be given to the somewhat limited language of the minutes, it is inappropriate to isolate them from the entire context of events and to give them exclusive emphasis. The Respondent's claim as to the "sole" reason for the strike ignores not only some of its own evidence in the form of the minutes, but the Respondent's whole course of conduct covering a period of almost 2 months before the strike. This included coercive threats voiced to employees by the Respondent's president and acts of reprisal leveled at them soon after the Union won the election; the exclusion of the employees' most experienced representative from the negotiations; and the Respondent's failure and refusal to bargain in good faith. Moreover, the Respondent's thesis overlooks the undoubted right of the 66 employees to leave their work in concert in order to secure a collective bargaining agreement, and that they did so for that reason, among others, is manifested by the picketing signs which appeared at the very inception of the strike. For that reason alone, it is plain that the cessation of work was a concerted activity protected by the Act, and that the discharge of the employees and the refusal to reinstate them contravened the statute.

Based upon the entire record, consisting of the evidence presented at both hearings, I find and conclude that the strike which occurred at the plant was a lawful concerted activity and was the exercise of a right guaranteed to the employees by Section 7 of the Act; and that the cause of the strike was the Respondent's unfair labor practices, as well as the employees' desire to secure economic concessions from the Respondent.¹⁰

C. *The picketing of the Respondent's premises*

Although the findings adopted by the Board contain a detailed description of the plant's location, some additional reference to the site is appropriate here

¹⁰ It is well settled that employees who strike for economic reasons are entitled to reinstatement if they apply for it, as in this case, before replacements are hired. Hence, apart from the Respondent's antecedent unfair labor practices, the discharge of, and refusal to reinstate, the 66 employees on May 29 was unlawful. *N. L. R. B. v. Mackay Radio and Telegraph Co.*, 304 U. S. 333.

to facilitate consideration of the evidence adduced at the second hearing. The Respondent's premises consist of a factory, a warehouse, and the construction site of an addition to its plant facilities. The block in which the premises are situated is bounded by Third, Ohio, Second, and Jackson Streets. The factory is at the northeast corner of Third and Ohio Streets and extends along both streets. The warehouse is near the northwest corner of Second and Ohio Streets and is separated from the factory by a railroad right-of-way containing a double set of tracks which intersect Ohio and Jackson Streets. The main entrance to the factory faces the corner of Third and Ohio Streets. At the rear of the factory, facing the tracks is another entrance which is frequently used by employees. This door may be approached from Second Street by walking along the right-of-way or by cutting across the lot containing the construction site. The warehouse has an entrance on Ohio Street and a loading door on the side of the building facing the tracks. Employees work not only in the factory but also in the warehouse, and during the day a factory employee may have occasion to go to the warehouse for supplies several times (see Scillion's testimony at second hearing). In so doing, it is necessary to cross the tracks and enter the warehouse through either one of its two doors.

The construction site is immediately adjacent to the rear of the warehouse, and the proposed addition was to have been physically joined to it. At the time of the strike, work on the addition had progressed as far as the laying of the foundation. The work on the structure was being performed for the Respondent by an independent contractor.

There was evidence at the first hearing that in the course of picketing the Respondent's property, some pickets followed a route which began on the Ohio Street side of the warehouse, turned north on Second Street, and proceeded past the warehouse and the construction site adjacent to its rear as far as Jackson Street, turned west on that street to the railroad tracks, and then south along the tracks past the rear entrance of the factory to the beginning point on Ohio Street. According to the evidence, the purpose of the route was to cover the various entrances to the plant and warehouse.

The Respondent contends, as it did at the first hearing, that the picketing past the construction site was what it terms a "secondary boycott" by the Union in violation of Section 8 (b) (4) [as phrased in the answer, the Respondent's defense presumably has reference to Section 8 (b) (4) (B)], and that, as a consequence, the strikers forfeited their right to reinstatement.

The Board rejected that contention, holding that, as the picketing was confined to the Respondent's immediate premises, the picketing was *primary* and not *secondary*. In view of its holding, the Board found it unnecessary to consider the status, under Section 8 (b) (4) (B), of secondary picketing by a certified collective bargaining agent, or the effect of such picketing upon the reinstatement rights of discriminatorily discharged employees.

With respect to the picketing, the Respondent, at the second hearing, adduced evidence in the form of answers to interrogatories propounded to the Union in the district court action, and testimony concerning a specific picketing incident on September 3, 1948. As stated in the motion for remand, the purpose of the additional evidence was to show that the construction site was in fact picketed, the names of the pickets, and the dates on which such picketing occurred.

Apparently stress is placed on the names of the pickets because of the well-established principle that unlawful conduct by a Union or an individual cannot affect the reinstatement rights of a striker who does not participate in such

conduct.¹¹ The relevant answers to interrogatories state, in substance, that certain named¹² individuals on various occasions¹³ picketed past the construction site, but that they did not picket it "exclusively, but only as part of the plaintiff's (Respondent's) entire property at Paducah, Kentucky, which said persons were picketing."

The scant information contained in the answers adds little, if anything, to the record of the first hearing. Clearly, whether viewed on the basis of the answers alone or in the light of the whole record, the picketing was primary in nature.

The relevant evidence bearing on the incident of September 3, which involved a striker named Hines, may be summarized briefly.¹⁴ About the beginning of September 1948, an independent contractor, Ray Black and Son (not the contractor engaged in building the addition), commenced the construction for the Respondent of an overhead conveyor system which was to run across the right-of-way between the factory and the warehouse and was to connect the two structures. The contractor dug a hole in the space between the two buildings and sank a few anchor bolts in the space along the right-of-way between the two buildings approximately 15 feet from Ohio Street. On the morning of September 3, a truck driver employed by a supplier of the contractor delivered two loads of concrete to the site. A short while later that morning, he returned with a third load, but left without delivering it when he saw Hines carrying a picket sign. The picket's route was on Ohio Street parallel to the factory and warehouse, and in walking along Ohio Street he crossed the right-of-way which intersects it.

To hold that Hines' picketing was a "secondary boycott" is to do violence both to the provisions of the Act and to well-established concepts of the nature and objects of lawful picketing. Clearly, Hines had a right to pass with a picket sign up and down the street on which the Respondent's plant facilities were located.¹⁵

Upon the basis of the evidence adduced at the second hearing, as well as upon the record as a whole, I find and conclude that the picketing in question did not contravene the provisions of the Act.

¹¹ *N. L. R. B. v. Ohio Calcium Co.*, 133 F. 2d 721 (C. A. 6); *Republic Steel Corporation v. N. L. R. B.*, 107 F. 2d 472 (C. A. 3), enforced as modified, 311 U. S. 7; *N. L. R. B. v. Mt. Clemens Pottery Co.*, 147 F. 2d 262 (C. A. 6); *El Paso Electric Company*, 13 NLRB 213, enforced 119 F. 2d 581 (C. A. 5).

¹² The evidence specifies the names of 12 persons who engaged in such picketing. Four of these (Bennett, Fowler, Capps, and Story) were not employees of the Respondent at the time in question. It may be noted that Capps and Story were members of the Teamsters Union which had a labor dispute with the independent contractor who was engaged in the construction work. The picketing by Bennett, Fowler, Capps, and Story is irrelevant to any issue in this proceeding.

¹³ The motion for remand adverts to the dates upon which alleged picketing of the construction site occurred. In view of the findings made herein, whether the picketing involved took place on one date rather than another is of no moment.

¹⁴ The Respondent produced two somewhat varying versions of the picketing incident (see testimony by Champion and Scillon). In view of the conclusions reached herein, it is unnecessary to go into the details of the testimony or to attempt a reconciliation of the two versions.

¹⁵ See *Ryan Construction Corporation*, 85 NLRB 417. I have noted *International Rice Milling Co., Inc.*, v. *N. L. R. B.*, 183 F. 2d 21 (C. A. 5), where the court held that a union had violated Section 8 (b) (4) because its pickets had refused to permit a truck driver employed by another employer to enter the premises of the employer against whom the strike was directed. The Supreme Court has granted certiorari in the *International Rice case* (340 U. S. 902). Without touching on the theory expressed by the court of appeals, it may be observed that (1) the question at issue in that case was the legality of the union's conduct and not whether employees who engage in conduct forbidden to a union by Section 8 (b) (4) thereby forfeit their reinstatement rights; and (2) the pickets' activities in the *International Rice case* were specifically directed at the driver seeking to enter the plant, whereas in the instant case there is no substantial evidence that the picketing was directed at the employees of the independent contractors.

Recommendations

As reflected in its motion for remand, the Respondent seeks "a new decision and order upon a reconsideration of the entire case." The Respondent, however, has filed neither a brief nor a motion defining explicitly the scope of the "new decision and order" which it seeks. I have concluded in effect that the evidence adduced upon the remand does not warrant any modification of the findings of fact, conclusions of law, and remedy embodied in the Board's Decision and Order. It would, therefore, be needlessly repetitive for the Board to issue a Decision and Order reiterating the provisions of the one now in effect. Accordingly, upon the basis of the entire record in this proceeding, including the evidence adduced at both the first and second hearings, and upon the foregoing findings of fact, I recommend that:

1. The Board construe the Respondent's position before it as in effect an application for the entry of a new Decision and Order containing such modification of the one now in effect as may be warranted by a reconsideration of the additional evidence adduced at the second hearing; and
2. The Board enter a Decision and Order denying the application for modification of the Decision and Order now in effect and reaffirming its terms and provisions.

CENTRAL PACKING COMPANY, AND RABBI M. BURNSTEIN AND TIBOR STERN¹ and UNITED PACKINGHOUSE WORKERS OF AMERICA, LOCAL NO. 36, CIO, PETITIONER. *Case No. 17-RC-962. July 6, 1951*

Decision and Direction of Election

Upon a petition duly filed under Section 9 (c) of the National Labor Relations Act, a hearing was held before Eugene Hoffman, 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].

Upon the entire record in this case, the Board finds:

1. The Employer, as defined in paragraph numbered 2, below, is engaged in commerce within the meaning of the Act.
2. The Petitioner, a labor organization, claims to represent the five schochtim and the two tag men performing kosher butchering work at the plant of Central Packing Company, herein called the Company, at Kansas City, Kansas. The Petitioner contends that these workers are employed by the Company with which it desires to bargain. The Company contends that it does not employ these workers, but that they are employed by Rabbi Burstein and Stern. The Rabbi, while desiring to control the provisions of any collective bargaining agreement for these employees which may touch upon the religious aspects

¹ The name of the Employer is amended to conform with our finding herein.