

sale and retail truck drivers, all employees in the engineering department, guards, and supervisors as defined in the Act.

2. All employees in the engineering department, including the working foreman,<sup>11</sup> but excluding the chief engineer,<sup>12</sup> guards, and supervisors as defined in the Act.

If a majority of the employees in each of the voting groups 1 and 2 select the Packinghouse Workers, they will be taken to have indicated their desire to constitute a single unit. If a majority of the employees in voting group 2 select a labor organization which is not selected by the employees in voting group 1, the employees in voting group 2 will be taken to have indicated their desire to constitute a separate unit. If a majority of the employees in voting group 1 alone vote for Packinghouse Workers, that Union will be certified for such unit. The Regional Director is instructed to issue a certification of representatives consistent herewith to the bargaining agent or agents selected for such unit or units, which the Board, under the circumstances, find to be appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act.

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

<sup>11</sup> The parties agree that this employee is not a supervisor, and we so find.

<sup>12</sup> The parties agree that this employee is a supervisor, and we so find.

W. TODD DOFFLEMYER, LEWIS L. DOFFLEMYER, AND ROBERT T. DOFFLEMYER, INDIVIDUALLY AND AS CO-PARTNERS D/B/A DOFFLEMYER BROS. and FLOSSIE M. BATY. *Case No. 20-CA-650. November 5, 1952*

### Decision and Order

On April 8, 1952, Trial Examiner William E. Spencer 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. Thereafter, the Respondent filed exceptions to the Intermediate Report, and a supporting brief.

The Board<sup>1</sup> 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 Intermediate Report, the Respondent's exceptions and brief, and the en-

<sup>1</sup> 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 Styles and Peterson].

tire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, with the following modifications and additions.

1. We find, like the Trial Examiner, that the Respondents' packing shed employees are not exempt from the Act as agricultural laborers. In reaching this conclusion, the Trial Examiner relied, among other factors, upon the fact that the Respondents employ "a very substantial nucleus" of employees who work solely in the packing operations. The record shows that this nucleus normally comprises 80 percent of the employees engaged in the packing operations. In view of this fact, and the other factors cited by the Trial Examiner, we find that, applying the criteria of the Wage and Hour Administrator, the packing shed employees are not agricultural laborers.<sup>2</sup>

2. The Trial Examiner found that Flossie M. Baty had been discharged as a result of the concerted walkout, in which her son participated, and which is fully described in the Intermediate Report. The Respondent contends, in effect, that this concerted activity was not protected by the Act, because the purpose of the walkout was to compel the Respondent to grant an increase which it could not lawfully grant without the prior approval of the Wage Stabilization Board.

Assuming, *arguendo*, that payment of the requested increase would have required prior Wage Stabilization Board approval, we would still find the walkout to be protected. It is clear that the normal and proper procedure during a period of wage stabilization is to negotiate an increase and then apply to the proper stabilization agency for approval.<sup>3</sup> We have, accordingly, held that concerted activity to compel an employer to negotiate a wage increase is protected by the Act,<sup>4</sup> *so long as no demand is made that the agreement be effectuated pending action by the stabilization agencies.*<sup>5</sup>

The record in the instant case does not show that the employees, in demanding an increase, contemplated that the Respondent would grant their demand without complying with established stabilization procedures. We find, therefore, that the purpose of the walkout was not to compel a violation of the law, and that the walkout constituted protected concerted activity. As we find that Baty was discharged because of her son's participation in the walkout, we find,

<sup>2</sup> *Colorado River Farms*, 99 NLRB 160, and cases cited therein.

<sup>3</sup> See Wage Stabilization Board Release No. 112, issued September 21, 1951, which states, in part:

... Nothing in the law prevents the parties from making any wage agreement they desire, subject to Board approval, and from submitting their agreements to the Board for approval . . . the important question under wage stabilization is not what the parties may agree upon but what the Board will approve. . . . The Board, therefore, cannot, and will not undertake to prescribe the permissible limitations before-hand within which the parties can or must bargain.

<sup>4</sup> *Union-Buffalo Milk Company*, 58 NLRB 384; *Rockwood Stove Works*, 63 NLRB 1297.

<sup>5</sup> *The American News Company, Inc.*, 55 NLRB 1302.

like the Trial Examiner, that her discharge violated Section 8 (a) (3) of the Act, and independently violated Section 8 (a) (1) of the Act as well.

### 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 Respondents, W. Todd Dofflemyer, Lewis L. Dofflemyer, and Robert T. Dofflemyer, individually and as co-partners doing business as Dofflemyer Bros., their agents, personal representatives, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in a labor organization of their employees by discharging or otherwise discriminating against any of their employees because of membership in a labor organization or other concerted activities.

(b) In any like or related manner interfering with, restraining, or coercing their employees in the exercise of their right to self-organization, to form or join labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act, or to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

2. Take the following affirmative action, which we find will effectuate the policies of the Act:

(a) Upon request, offer Flossie M. Baty reinstatement to her former or substantially equivalent position during the next packing season, upon the same terms, conditions, and considerations normally extended to their seasonal employees.

(b) Make whole Flossie M. Baty for any loss of pay she may have suffered by reason of the Respondents' discrimination against her.

(c) Upon request, make available to the Board or its agents, for examination and copying, all records necessary to analyze the amounts of back pay due and the right of reinstatement under the terms of these recommendations.

(d) Post at their storage plant and packing shed, copies of the notice attached hereto marked "Appendix A."<sup>6</sup> Copies of said notice, to be furnished by the Regional Director for the Twentieth Region, San

<sup>6</sup> In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "Pursuant to a Decision and Order" the words "Pursuant to a Decree of the United States Court of Appeals, Enforcing an Order."

Francisco, California, shall, after being duly signed by the Respondents' representative, be posted by the Respondents immediately upon receipt thereof at their storage plant, and immediately upon resumption of operations at their packing shed, and maintained by them for a period of sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for the Twentieth Region, in writing, within ten (10) days from the date of this Order, what steps the Respondents have taken to comply herewith.

## Appendix A

### NOTICE TO ALL EMPLOYEES

Pursuant to a Decision and Order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

WE WILL NOT discourage the formation of or membership in any labor organization of our employees by discharging or refusing to reinstate any of our employees or in any other manner discriminating in regard to their hire or tenure of employment, or any term or condition of their employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form, join, or assist any labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities.

WE WILL offer Flossie M. Baty reinstatement to her former or substantially equivalent position without prejudice to any seniority or other rights and privileges previously enjoyed, upon her application during the 1953 packing season, to the extent that her services are required under the usual considerations extended to persons employed in packing shed operations during prior seasons, and make her whole for any loss of pay suffered as a result of our discrimination against her.

All our employees are free to form, join, or assist any labor organization, and to engage in any self-organization and other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from such activities except to the extent

that such right is affected by an agreement made in conformity with the proviso to Section 8 (a) (3) of the Act.

W. TODD DOFFLEMYER, LEWIS L. DOFFLEMYER,  
and ROBERT T. DOFFLEMYER, individually  
and as co-partners d/b/a DOFFLEMYER BROS.,  
*Employer.*

By \_\_\_\_\_  
(Representative) (Title)

Dated \_\_\_\_\_

This notice must remain posted for 60 days from the date hereof and must not be altered, defaced, or covered by any other material.

### Intermediate Report and Recommended Order

#### STATEMENT OF THE CASE

This proceeding, brought under Section 10 (b) of the National Labor Relations Act as amended (61 Stat. 136), herein called the Act, was heard at Visalia, California, on March 17, 1952, pursuant to due notice to all parties. The complaint, dated February 4, 1952, issued by the General Counsel of the National Labor Relations Board and duly served on the Respondents, was based on a charge filed by Flossie M. Baty, an individual, and alleged in substance that the Respondents discharged Baty because of the concerted activities of her son in conjunction with other employees, thereby engaging in unfair labor practices within the meaning of Section 8 (a) (1) and (3) and Section 2 (6) and (7) of the Act. The Respondents in their duly filed answer denied the jurisdiction of the Board and the commission of the alleged unfair labor practices, and moved to dismiss the complaint. Ruling was reserved on this motion, renewed at the hearing, and it is denied in accordance with the findings below. All parties were represented at the hearing, were afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence bearing on the issues, to argue the issues orally upon the record, and to file briefs and proposed findings. Oral argument and the filing of briefs and/or proposed findings were waived.

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 THE RESPONDENTS

William Todd Dofflemyer, Lewis L. Dofflemyer, and Robert T. Dofflemyer, copartners doing business as Dofflemyer Bros., are engaged in the business of packing and shipping grapes, and for that purpose maintain a packing shed and storage plant near Exeter, California. During the fiscal year ending September 30, 1951, Respondents packed and sold grapes valued in excess of \$200,000, of which amount, by value, in excess of \$40,000 was sold and shipped from their place of business to purchasers located outside the State of California. All grapes packed and shipped by Respondents are grown on a ranch owned by Lewis L. and Robert T. Dofflemyer and operated by a partnership under the name of T. F. Dofflemyer & Sons, or on property owned and operated individually by one or more of the copartners. The ranch operated by T. F. Dofflemyer & Sons

consists of approximately 80 acres, and immediately adjoins the land on which the packing shed and storage plant are located. Lewis L. Dofflemeyer individually owns and operates a ranch on which he raises oranges and these are packed and shipped by the Respondents. The Respondents pack and ship no products except those grown on land owned and operated by the copartners individually or in partnership.

It is the Respondents' contention, ably supported in a memorandum filed at the hearing, that the employees involved in this proceeding are agricultural laborers and therefore exempt from the provisions of the Act. Admittedly, they were engaged in the packing and shipping of grapes which partakes of the nature of an industrial operation, but the Respondents argue that inasmuch as they pack and ship only products from their own farms, the packing and shipping operations are incidental to and in conjunction with the agricultural enterprise, and therefore distinguishable from enterprises which pack and ship produce for others as a separate commercial venture. *N. L. R. B. v. Campbell*, 159 F. 2d 184, 187 (C. A. 5).

The Board normally asserted jurisdiction over packing shed operations similar to Respondents' prior to July 1946 when a rider to the Board's appropriation required the Board to define "agriculture" as defined in Section 3 (f) of the Fair Labor Standards Act, a rider which has been included in the Board's appropriations since that date. Pursuant to this rider the Board, while continuing to assert jurisdiction over packing shed workers engaged in packing produce not grown by their own employer, or where the processing materially changed the product to enhance its market value, ceased by 1948 to assert jurisdiction over packing shed workers where neither of these factors was present. *Robert Fig Company*, 88 NLRB 1150; *Di Giorgio Fruit Corporation*, 80 NLRB 833; *Salinas Valley Vegetable Exchange*, 82 NLRB 96; *Burnett & Burnett*, 82 NLRB 720. Under these decisions, I think the Board would decline to assert jurisdiction in the case at bar because the packing shed workers here involved were engaged in packing produce grown by the copartners, their employer, individually or in partnership, and while the grading and preparation of the grapes for shipping undoubtedly enhanced the market value of the product and, in fact, was necessary to make it marketable, these processes did not materially change the nature of the product as would, for instance, a canning operation. However, in a more recent decision in the *Imperial Garden Growers* case, decided October 18, 1950 (91 NLRB 1036-1038), the Board reconsidered and reevaluated its position, and guided by the interpretation of Section 3 (f) of the Fair Labor Standards Act by the Wage and Hour Division of the Department of Labor, established new criteria for determining its jurisdiction in this category of cases. The prevailing criteria is best stated by the Wage and Hour Administrator's own interpretation of Section 3 (f) :

. . . Factors to be considered include, among others, the size of the ordinary farming operations, the investment in the enterprise as compared to that in the farm operations, the amount of time spent by the farmer and his employees in each of the activities, the extent to which the operations in question are performed by ordinary farm employees, the degree of industrialization involved, the degree of separation established by the employer between the two types of business operations, and the type of product resulting from the operation of the enterprise . . . it is usual in many such operations to hire separate work forces for the packing operation, rather than to use the ordinary farm laborers, and to pay such workers in accordance with scales established for packing operations in commercial packing houses, rather

than at farm labor rates. Where these and other factors indicate that the packing is performed as a distinct and separate enterprise rather than as a subordinate and established part of the employer's own farming operations, the Department of Labor would not consider the activity to be one defined as "agriculture" by Section 3 (f) of the Fair Labor Standards Act.<sup>1</sup>

With the application of these criteria to the case at bar I am convinced and find that the packing shed operations of the Respondents herein, as was the case of the employer in *Imperial Garden Growers* (cited in text, *supra*), are not merely incidental to or in conjunction with the Respondents' farming operations, and that their packing shed employees are not "agricultural laborers" but "employees" within the meaning of the Act.

The Respondents' enterprise, both agricultural and industrial, is substantial. The 80-acre ranch owned by the partners individually and operated by a partnership is valued at \$1,000 an acre. The Respondents' packing shed though purchased in 1915 for \$2,500 now has an appraised value of considerably more than that figure. Their storage plant, operated in conjunction with the packing shed, was constructed at a cost of from \$80,000 to \$100,000. The combined value of the equipment of packing shed and storage plant is approximately \$8,000. During the packing season which normally begins in August and ends late in November, with a lull in September, Respondents employ as many as 50 to 60 persons in their packing shed operations.<sup>2</sup>

Some farm labor is used in the packing and shipping operations, but it is clear from records submitted by the Respondents and from the testimony of their bookkeeper, Alice B. Dofflemyer, and their packing shed manager, Robert Todd Dofflemyer, that there is a very substantial nucleus of employees who are employed by the Respondents only during the packing season and who do no work on the various farms owned by the partners. It appears that with rare exceptions, farm labor is used in the packing operations only to supplement the work of regular packing shed employees when and as needed and there is no pattern of regularity in this use of farm labor. In short, it is "usual" in Respondents' operations to "hire separate work forces for the packing operations, rather than to use the ordinary farm laborers." Concerning the skills applied in the packing operations, William Todd Dofflemyer testified, "the packer has to be very good. She has to have quite a lot of qualifications. . . ." The prevailing wage scale for packing shed workers is 5 cents an hour higher than the scale for agricultural workers and the pay periods fall on different days of the week.

The degree of separation of Respondents' packing shed from their farming operations is further emphasized by the fact that the two classifications of employees are carried on separate payrolls and have separate and distinct supervision.

From the foregoing it appears that the prevailing criteria for the assertion of the Board's jurisdiction are satisfied in all essential respects.

## II. THE LABOR ORGANIZATION INVOLVED

On October 29, 1951, eight of Respondents' packing shed employees acting in concert for the purpose of obtaining a wage increase, constituted themselves a labor organization within the meaning of Section 2 (5) of the Act.

<sup>1</sup> Labor Relations Reporter (Wages and Hours Section) Vol. 25, No. 3, November 14, 1949. See also, *Imperial Garden Growers*, 91 NLRB 1037.

<sup>2</sup> These figures are drawn from Respondents' payroll records for the closing weeks of the 1951 packing season.

## III. THE UNFAIR LABOR PRACTICES

On October 29, 1951, about 2 weeks before the end of Respondents' packing season, some 8 of the approximately 21 male packing shed employees, at a meeting away from the plant which occurred during the noon hour, agreed to demand a wage increase and to "walk out" if they did not receive it. When the men returned to the plant at the close of the lunch hour, their spokesman, Howard Brown, conferred with Foreman Warren Ivan Brown, Jr., and Robert T. Dofflemyer, one of the respondent partners and manager of the packing operations. Employee Brown demanded an increase of 10 cents an hour for male employees then receiving \$1 an hour, and an increase of 5 cents an hour over the \$1.15 he himself was then receiving. Dofflemyer expressed doubt that the increase could be granted without violating Government regulations, and asked employee Brown to delay further action until his father, William Todd Dofflemyer, had completed a call to Los Angeles for the purpose of finding out "what exactly we could do, under the law." William Todd Dofflemyer testified that he completed the call to Los Angeles at his house, was informed by a Mr. Coleman, associated with the Agricultural Producers Labor Committee, that Government wage regulations restricted an increase to 10 percent of wages paid during the prior year, and that employee Brown's demand was in excess of this amount except as to himself, and that he transmitted this information to employee Brown.<sup>3</sup> Brown refused to compromise on the wage issue and on refusal of his demand, he and the 7 other male employees in the group left the plant. It does not appear that they thereafter returned to the plant for the purpose of seeking reinstatement, and the Respondent did not recall them. Among those who participated in the demand for a wage increase, and the walkout which followed on the refusal of the demand, was Bill Wade Baty, son of Flossie M. Baty, also employed in the packing house. It is alleged that on the day following the walkout Mrs. Baty was discharged because her son had participated in the wage demand and walkout.

Mrs. Baty, who suffered from high blood pressure, testified that the excitement in the plant attending the walkout affected her to a degree that she realized that she would have to visit her doctor on the following day and therefore would not be able to work. She testified that she informed her forelady, Jennie C. Cate, that she would have to visit her doctor on the following day and therefore would not be able to work, and that Mrs. Cate said, "All right, but you will be back?" to which she responded, "Yes." It was her further and undisputed testimony that on a prior occasion during this same packing season she had taken 2 days off for the purpose of receiving medical treatment after receiving Forelady Cate's permission.<sup>4</sup>

On the following day, accompanied by her son, Baty stopped at the packing shed on her way to see her doctor, and asked Cate if the pay checks were ready, this being Tuesday, the regular weekly payday. Cate informed her that Dofflemyer apparently had the checks and she and her son should return later in the day. During these conversations, according to Baty, Cate said, "You will be back tomorrow, won't you?" and when Baty replied, "Yes," added, "Well, I hope so. I am very short of packers."

After Mrs. Baty had visited her doctor, she and her son returned to the plant, and when William Todd Dofflemyer came in, Bill Baty asked him if the checks were ready. Dofflemyer replied that Foreman Brown would give him his

<sup>3</sup> No evidence of probative value was offered to show that the wage demand was actually in excess of an amount permissible under Government regulations.

<sup>4</sup> Cate did not recall this incident.

check, and Forelady Cate would give his mother hers. Mrs. Baty went into the packing shed and asked Forelady Cate to get her check for her. Cate went into Dofflemyer's office and after being there about 5 minutes, handed Baty her check and, according to Baty, said, "This is all." Baty, thinking she had reference to the check, remarked that the check did not cover her wages for the previous day, a Monday, which customarily would have been held back until the following week. Cate replied, "I did not mean that. They won't let me use you any more." When Baty asked why, Cate replied, "On account of Bill, your son, walking out with the other boys. Mr. Dofflemyer is terribly upset over it . . . I wish these silly boys hadn't have done that. You know, they cannot ever work for him again, or you, either." It was Baty's further testimony that Cate instructed her not to return to the plant for her final check but to call at Cate's house for it, and that at her, Baty's, suggestion the check was sent to her through one of her neighbors.

This testimony, if believed, establishes beyond doubt that Baty was discharged, and that she was discharged, as alleged in the complaint, because of her son's concerted action with other male employees in the wage demand and walkout. The Respondents contend, however, that Baty was not discharged but quit, and Cate and William Todd Dofflemyer testified in support of Respondent's position.

Dofflemyer testified that no one was discharged during the 1951 packing season, and that when a discharge occurred it was the policy and practice of the Company to pay the discharged employee in full for his or her services at the time the discharge occurred. He denied that he had any conversation with Cate regarding Baty's employment, and testified that on the afternoon of October 29, the date of the walkout, Reip, Cate's assistant forelady, informed him that Baty had said she would "try and stick it out until 5 o'clock" that day, and when he inquired if that meant Baty was going to quit, Reip said, "I think that is what she means, that she is going to quit." Thereupon, according to Dofflemyer, upon identifying Baty whom he did not know personally as a packer whose work had been signally unsatisfactory,<sup>5</sup> he informed Reip, "I guess we won't cry about that, if she is going to quit, that is all right." Reip was ill at the time of the hearing and the Respondent did not seek to present her testimony by deposition or otherwise.

Forelady Cate testified that on October 29 Baty said a number of times that she was going to quit but that she, Cate, encouraged her to continue at her work, and that on the following day when Baty received her check, Baty said, "Oh, Jennie, I forgot to tell you. The doctor said that my blood pressure was too high, and I could not work any more." She testified that packers turned in the clippers furnished them by the Respondent only when they quit or at the end of the packing season, and that Baty turned hers in to Assistant Forelady Reip on October 29. She further testified, however, that some of the packers left their clippers at the plant and "mostly clippers are there in the stalls when they go to work the next morning," and that on occasion packers left their clippers with her at the close of the day's work. Baty denied that she left her clippers with Reip on this occasion, admitted that she left them with Cate, and testified that she did so because she had intended to return to work on the following day after her visit to the doctor. Actually, she received an injection for her high blood pressure on her visit to the doctor, and testified that this normally incapacitated her for work during the balance of the day. Cate denied that she had any con-

<sup>5</sup> Each packer is identified by number. Baty's number was 14. The Respondent presented evidence showing that the work of packer 14 was defective, but inasmuch as Respondent contends that Baty was not discharged but quit, this evidence has little if any bearing on the severance of her employment.

versation with William Todd Dofflemyer on the occasion when Baty picked up her check, or that on any occasion she inquired of Baty if she would return to work following her visit to the doctor. She admitted on cross-examination, however, that when Baty informed that she would have to absent herself from work in order to visit her doctor, she also informed Cate that she would be back, and that Cate replied, "Well, that will be fine." Concerning the state of her recollection, Cate testified on cross-examination:

Q. Well, what is your best recollection on the last day that she [Baty] worked? Did she last work on the day that the men walked out?

A. I cannot think clearly on that. I just do not remember.

Q. October of last year has been some time ago, has it not?

A. Yes.

Q. And things do slip your memory, do they not?

A. Yes.

She admitted that in a statement she gave to a field examiner of the Board's Regional Office on the termination of Baty's employment, she made no mention of Baty's having said that she was going to quit. She denied having any conversation with Baty when the latter received her check, as to the manner in which Baty was to receive her wages for the last day worked, but admitted that she actually sent Baty's final check to her through a neighbor.

It is not easy, of course, to determine such a delicate matter of credibility as is presented when two elderly ladies of equally refined appearance flatly contradict each other and this is particularly so when neither is a disinterested witness. There was, however, on Cate's part an admittedly faulty recollection of matters occurring as recently as last October, and had Baty repeatedly stated on the last day that she worked that she was going to quit, as Cate testified she did, it is difficult to see how such a matter should have escaped her attention when, prior to the hearing, she gave a statement to the Board's field examiner. Baty's denial of these statements involving her quitting was unequivocal and convincing. Be that as it may, and assuming without finding that at various times during the last day that she worked Baty made statements to the effect that she was quitting, or intended to quit, it is clear from Cate's testimony that such statements were not regarded by Cate as an actual quitting, because, as Cate admitted on cross-examination, when Baty informed her that she would absent herself from work in order to visit her doctor, she stated that she would return to work following her visit to the doctor, and Cate replied, "That will be fine." This shows a clear intention on Baty's part *not* to quit but to resume work after her visit to the doctor and is inconsistent with the theory apparently advanced by Respondent's counsel through Cate's testimony that Baty left her clippers with Reip because she was quitting her employment. Dofflemyer's testimony that he was informed by Reip at 4 o'clock on the afternoon of October 29 that Baty had said that she would "try and stick it out until 5 o'clock," being hearsay, is without probative weight but in any event might very well have had reference to physical discomfort arising from Baty's high blood pressure and therefore is by no means indicative of an actual quitting. Finally, in order to credit Cate's testimony that when Baty received her check at the plant on October 30 she informed Cate that her physical condition was such that she could not work any more, it is necessary not only to discredit Baty's firm testimony to the contrary but to attribute to her a cunningness of design which she did not appear to me to possess. Of course it is conceivable that she may have quit and then on second thought wished that she hadn't, but it would seem logical

under such circumstances that she would have returned to the plant, where following the walkout there must have been an urgent need for help, and asked for her job back.

On consideration of the entire testimony I am convinced that Baty did not quit but was discharged. Cate, as forelady, had the authority to discharge the women packers working under her supervision, and whether or not she actually conferred with Dofflemyer on the matter (contrary to her testimony and Dofflemyer's, I find that she did), I credit Baty's testimony that Cate informed her on the occasion of her discharge that Dofflemyer was "terribly upset" over the walkout of male employees, and that she would not be permitted to work any more in the plant because of her son's participation in the wage dispute. I further find that that was the actual cause of her discharge. In reaching this conclusion I have not ignored Dofflemyer's testimony that on discharge an employee was paid in full whereas Baty was not. In view of Dofflemyer's testimony that there were no discharges during the 1951 season and his failure to refer specifically to the application of such a policy, I am not convinced that this was Respondent's invariable practice, followed in all cases regardless of the timing and place of discharge and the circumstances under which it was effectuated.

No question has been raised that the concerted action of the men in seeking a wage increase and in withholding their services when their demands were refused, constituted concerted activities within the meaning of the Act, and that punitive action against any employee because of such concerted activity would be violative of the Act, Respondent's sole defenses asserted at the hearing being that the Board lacked jurisdiction and that Baty was not discharged but quit. I find that the concerted activity of the male employees in seeking a wage increase and in withholding their services in order to obtain it was concerted activity within the meaning of the Act, and that the discriminatory action directed against Baty because of her son's participation in the concerted activities was of the same order of legal significance as if directed against the son. In similar situations the Board has held that by their concerted activities in seeking to improve their working conditions, the employees thus engaged constitute themselves a labor organization within the meaning of the Act, and that an employer's punitive action against an employee because of these activities constitutes discrimination within the meaning of Section 8 (a) (3) of the Act as well as interference, restraint, and coercion within the meaning of Section 8 (a) (1) of the Act, but that in any event the remedy under a violation of either section of the Act is the same. *The Ohio Oil Company*, 92 NLRB 1597; *Duro Test Corporation*, 81 NLRB 976; *Gullett Gin Company v. N. L. R. B.*, 179 F. 2d 499. It is accordingly found that by their discharge of Flossie M. Baty, the Respondents violated Section 8 (a) (1) and (3) of the Act.

#### IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Respondents, set forth in section III, above, occurring in connection with the operations of the Respondents, set forth 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.

#### V. THE REMEDY

Having found that the Respondents have engaged in unfair labor practices within the meaning of Section 8 (a) (1) and (3) of the Act, I shall recommend

that they cease and desist therefrom and take certain affirmative action which will effectuate the policies of the Act.

Having found that the Respondents discharged Flossie M. Baty because of the concerted activities of her son, Bill Baty, it will be recommended that the respondents make whole Flossie M. Baty for any loss of pay she may have suffered as a result of the discrimination against her, by payment to her of a sum of money equal to the amount she would have earned as wages between October 30, 1951, to the close of the 1951 packing season, less her net earnings during that period. *Crossett Lumber Company*, 8 NLRB 440. Loss of pay shall be computed in accordance with the formula enunciated by the Board in *F. W. Woolworth Co.*, 90 NLRB 289. It will also be recommended that the Respondents make available to the Board, upon request, payroll and other records to facilitate the checking of the amount of back pay due. *F. W. Woolworth Co.*, *supra*. It will further be recommended that upon her application during the 1952 packing season, the Respondents offer Flossie M. Baty reinstatement to the position she held on the date of her discriminatory discharge, if and when her services are required, according to its normal policy of reinstating its experienced packing shed workers during periods of seasonal employment.\*

I am not convinced on the basis of the record herein that the discharge of Flossie M. Baty is related to other unfair labor practices proscribed by the Act to a degree that a danger of their commission in the future is reasonably to be inferred from the course of the Respondents' conduct in the past, and therefore will recommend that the Respondents be ordered to cease and desist only from the unfair labor practices found herein to have been committed.

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

#### CONCLUSIONS OF LAW

1. Employees of the Respondents by acting concertedly for purposes of collective bargaining and other mutual aid and protection, were constituted a labor organization within the meaning of Section 2 (5) of the Act.

2. By discriminating in regard to the hire and tenure of employment of Flossie M. Baty, because her son engaged in concerted activities with and on behalf of other employees for the purpose of collective bargaining and other mutual aid and protection, the Respondents interfered with, coerced, and restrained their employees in the exercise of rights guaranteed in Section 7 of the Act, and the Respondents have thereby engaged in and are engaging in unfair labor practices within the meaning of Section 8 (a) (1) of the Act.

3. By engaging in such discrimination, thereby discouraging formation of and membership in labor organizations, the Respondents have engaged in and are engaging in unfair labor practices within the meaning of Section 8 (a) (3) of the Act.

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

[Recommendations omitted from publication in this volume.]

\* Evidence was offered to show that Baty's work was more than averagely poor but Todd Doffmeyer admitted that she would not have been discharged on that account. It is not suggested herein that the quality of her work not be taken into account in the matter of her reinstatement, but only that she be offered reinstatement upon the same considerations as would be extended to any other employee of equal proficiency previously in the Respondents' employ.