BEAVER MEADOW CREAMERY [1] *and* BERT DELARME. *Case No. 6–CA–500. April 3, 1953*

Decision and Order

On October 31, 1952, Trial Examiner Robert E. Mullin issued his Intermediate Report in the above-entitled proceeding finding that the Respondent had engaged in and was engaging in certain unfair labor practices in violation of the Act, 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 has reviewed the rulings of the Trial Examiner made at the hearing and finds 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 entire record in the case, and hereby adopts the findings,[2] conclusions, and recommendations of the Trial Examiner with the exceptions and modifications set forth below:

1. In agreement with the Trial Examiner, we all find that the Respondent interfered with, restrained, and coerced its employees in violation of Section 8 (a) (1) of the Act, as fully set forth in the Intermediate Report.

2. We all also agree with the Trial Examiner's conclusion that the Respondent discharged Bert DeLarme in violation of Section 8 (a) (3) and (1) of the Act, as fully set forth in the Intermediate Report.

Contrary to the Trial Examiner, however, the Board is *unanimously* of the opinion that the Respondent's offer of reinstatement to DeLarme on September 23 was unconditional at the time it was made. The Board does not regard as an improper condition the fact that the offer was made to avoid any prejudice to DeLarme pending the outcome of the unfair labor practice proceeding. The Respondent had a right to discharge DeLarme at any time for cause. It did no more than to inform him of its legal right in the event the charge could not be supported by a preponderance of evidence.[3] Moreover, while DeLarme could choose, as he did, to join the strikers when confronted by the

[1] The name of the Employer appears as amended at the hearing.

[2] The Intermediate Report contains a misstatement of fact which does not affect the Trial Examiner's ultimate conclusion, or our concurrence therein. Accordingly, we note the following correction:

The record shows that the Union initiated an organizational campaign at the Respondent's creamery on September 6, 1951, not early in September 1951, as the Trial Examiner found, and that DeLarme was discharged on the following day

[3] Cf. *Kansas Milling Company* v. *N. L. R. B.*, 185 F. 2d 413 (C. A. 10).

picket line, the Board has declined to find that an unconditional offer of reinstatement is made conditional because of the existence of a strike.[4]

Chairman Herzog and Board Members Houston and Styles believe, however, that the Respondent, following the termination of the strike, was under an obligation to renew its offer to DeLarme in order to toll a back-pay award from that time. Respondent's letter to DeLarme clearly stated that unless he accepted "promptly" he would "be considered to have voluntarily terminated [his] employment." The offer was therefore limited in time and expired before the termination of the strike 7 weeks later. While the majority Members agree that DeLarme's right to strike does not, as indicated above, obligate the Respondent to pay him for the period he refused to work because of the strike, they are persuaded, and find, that DeLarme's exercise of this right did not warrant a discontinuance of the Respondent's offer of reinstatement. As the offer had terminated and was no longer open to DeLarme when the strike terminated, they find, under the special circumstances of this case, that he was entitled to a new offer of reinstatement.

Board Members Murdock and Peterson believe, on the contrary, that the Respondent was under no obligation to renew its original unconditional offer of reinstatement. They cannot accept as sound Board policy a requirement that an employer press a discharged employee with successive unconditional offers of reinstatement in order to toll back pay. DeLarme, having originally elected to accept the Respondent's offer, appeared at the plant for that purpose. Confronted by the picket line, however, he decided to join the strikers. At no time after the strike did he request reinstatement. Absent such a request on his part, the partial dissenters would find that he is entitled to back pay only from the date of his discharge to the date of the Respondent's original offer.

Order

Upon the entire record in this case, and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Beaver Meadow Creamery, Inc., DuBois, Pennsylvania, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in any labor organization of its employees, by discharging, laying off, or refusing to reinstate any of them

[4] *Stafford Operating Compnay*, 96 NLRB 1217.

because of membership or activities on behalf of any labor organization, or by discriminating in any other manner in regard to hire and tenure of employment or any term or condition of employment.

(b) Interrogating employees concerning their union membership and activities, threatening to discharge or lay off employees or holding out job advantages because of union membership and activities or the lack of it, or in any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist labor organizations, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities except to the extent that such rights 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 the Board finds will effectuate the policies of the Act:

(a) Offer to Bert DeLarme immediate and full reinstatement to his former or substantially equivalent position without prejudice to his seniority or other rights and privileges.

(b) Make whole Bert DeLarme for any loss of pay which he may have suffered by reason of the discrimination against him by payment to him of a sum of money equal to that which he normally would have earned in wages from the date of his discharge to the date of his receipt of the letter offering him reinstatement, and from the date of the termination of the strike to the date of a valid offer of reinstatement by the Respondent, less his net earnings during said periods.[5]

(c) Upon request, make available to the Board or its agents, for examination and copying, all payroll records and reports, and all other records necessary to analyze the amount of back pay due and his right of reinstatement under the terms recommended herein.

(d) Post immediately at its plant at DuBois, Pennsylvania, copies of the notice attached to the Intermediate Report and marked "Appendix."[6] Copies of said notice, to be furnished by the Regional Director for the Sixth Region, shall, after being duly signed by the Respondent's representative, be posted by the Respondent immediately upon receipt thereof and maintained by it for sixty (60) consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken

[5] The said loss of pay shall be computed on a quarterly calendar basis in accordance with the formula adopted by the Board in *F. W. Woolworth Co*, 90 NLRB 289.

[6] This notice shall be amended by substituting the words "A Decision and Order" for the words "The Recommendations of a Trial Examiner" in the caption thereof. 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."

by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

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

Intermediate Report

STATEMENT OF THE CASE

This proceeding, brought under Section 10 (b) of the National Labor Relations Act, 61 Stat. 136 (herein called the Act), was heard in Clearfield, Pennsylvania, on June 19 and 20, 1952, pursuant to due notice to all parties. The complaint, issued on May 9, 1952, by the General Counsel of the National Labor Relations Board,[1] and based on charges duly filed and served, alleged in substance that the Respondent had engaged in unfair labor practices proscribed by Section 8 (a) (1) and (3) of the Act by (a) discriminatorily discharging Bert DeLarme on September 7, 1951, and thereafter refusing to reinstate him; and (b) since that date by engaging in other specified acts of interference, restraint, and coercion. In its answer, duly filed, the Respondent denied that it is subject to the Act and further denied the commission of any unfair labor practices.

At the hearing the General Counsel and the Respondent were represented by counsel. All parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce relevant evidence, to argue orally, and to file briefs and proposed findings and conclusions. Oral argument was waived. Subsequent to the close of the hearing, the General Counsel submitted a brief.

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 RESPONDENT

Respondent, a Pennsylvania corporation with its principal office and place of business in DuBois, Pennsylvania, is engaged in the processing, manufacture, sale, and distribution of milk, butter, eggs, and related products. During the 12-month period prior to the hearing, the Respondent purchased raw products and other materials valued at approximately $1,350,000, of which approximately $378,000 worth was shipped to the Company's plant from points outside the Commonwealth of Pennsylvania; in the same year, the Respondent sold finished products valued at approximately $1,350,000, of which approximately $54,000 worth was sold and shipped to out-of-State customers. Upon the foregoing facts, I find that the Beaver Meadow Creamery, Inc., is engaged in commerce within the meaning of the Act. *Collins Baking Co.* v. *N. L. R. B.*, 193 F. 2d 483, 485 (C. A. 5); *Kress Dairy, Inc.*, 98 NLRB 369; *Stanislaus Implement and Hardware Company, Limited*, 91 NLRB 618–619.

II. THE LABOR ORGANIZATION INVOLVED

United Construction Workers, District 50, affiliated with United Mine Workers of America, herein called the Union or Construction Workers, is a labor organization within the meaning of Section 2 (5) of the Act.[2]

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[1] The General Counsel and his representative at the hearing are referred to herein as the General Counsel, and the National Labor Relations Board as the Board

[2] The Union was not in compliance with Section 9 (f), (g), and (h) of the Act at the time of the hearing; nor is it in compliance at present.

III. THE UNFAIR LABOR PRACTICES

A. *Background and sequence of events*

The Union initiated an organizational campaign at the Respondent's creamery early in September 1951. The discharge of Bert DeLarme, an issue herein, occurred on September 7. On the following day, a representative of the Construction Workers called upon the Company to request recognition. In answer, the Respondent declared that it would not grant this demand until the Union was certified as the bargaining agent for its employees. On September 19, the employees went on strike and established a picket line before the entrance to the plant which, except for one brief interval, was maintained until about November 13, when the Union abandoned the strike.

B. *The discharge of DeLarme*

1. Introduction

Bert DeLarme was hired by the Respondent in December 1949. He started working in the butter and cream section, later drove a truck, and in the summer of 1950, was transferred into the egg room where he and 1 or 2 other employees candled and graded eggs. Thereafter, however, he continued to spend approximately 3 forenoons a week in the creamery where he printed butter.

Early in September, DeLarme discussed with William Bolam and Howard Caylor, two fellow employees, the question of organizing their coworkers. On the evening of September 6, DeLarme met Tony Ross, field representative for the Union, at a hotel in DuBois. After a discussion with Ross as to the steps he should follow in organizing the Beaver Meadow plant, DeLarme obtained a supply of union application cards for distribution among the employees. During the noon hour on the following day, DeLarme brought several friends [3] together in his car, then parked in front of the creamery where he related the details of his meeting with Ross. All in the group, including DeLarme, signed application cards at this time. Those present also decided to hold an organizational meeting that evening to which the other employees would be invited.[4] Later that day, in asking some of his coworkers to attend the meeting, however, DeLarme told them that its purpose was to plan a birthday party for William Brennan, the plant superintendent. At the hearing, DeLarme explained that this was a ruse, adopted because he feared that one of the rank-and-file employees, a nephew of the plant president, might report to his uncle on any announcement for a union meeting. At about 5 o'clock on the same afternoon, Plant Superintendent Brennan came to DeLarme, handed him his pay, and told him he was being discharged because there had been "too many complaints on eggs." [5] Brennan then contacted the other employees individually to tell them that there would be no party for him that night.[6]

The following day Ross called on J. J. Kirk, president of the Respondent, to ask for recognition of the Union. The initial request was declined. It was raised again at a number of subsequent meetings held to discuss a consent election but no agreement was reached.

During the period subsequent to DeLarme's dismissal, Kirk questioned two of his employees about their part in the union campaign. On Saturday, September 8, Kirk called in Shugarts to ask whether he was interested in joining the local

[3] Caylor, Bolam, and Homer D Syphrit.
[4] The creamery had approximately 20 employees at the time.
[5] The quotation is from DeLarme's testimony.
[6] This finding is based on the credited testimony of Brennan, Syphrit, and Caylor.

country club. When Shugarts answered in the affirmative, Kirk gave him an application card with the suggestion that he sign it and return the card the following Monday. After Shugarts came to work on September 10 he told the plant president that he had decided that joining the country club would be too expensive, whereupon Kirk asked whether anyone had approached him over the weekend with "a card to join a union." Shugarts acknowledged that this had happened. Kirk then asked whether he had joined and when the employee conceded that he had, Kirk pressed him for details of the occasion. The following day the plant president called Syphrit into his office to ask whether he had joined the Union. Syphrit denied that he had done so although, in fact, he had signed an application for membership in the Construction Workers some days before. In concluding the conversation, Kirk told Syphrit that as long as he "stayed away from the union" he and "a few others would have a job" as long as they wanted, whereas the other employees would "just come and go." [7]

2. The contentions of the parties

The General Counsel argues that DeLarme was dismissed after Kirk discovered that he was endeavoring to organize the plant and for the purpose of discouraging the attempt to unionize the Beaver Meadow employees. This is denied by the Respondent. The position of the latter embraces several grounds: (a) That DeLarme was a supervisor; (b) that he was discharged for neglect of his duties; and (c) that in any event he rendered himself ineligible for reinstatement by rejecting an offer of reemployment in September, and by engaging in misconduct during the strike.

a. *The question of DeLarme's status*

The egg department was a very small unit at the plant. In addition to DeLarme it seldom had more than one other employee, customarily a girl. Occasionally a second girl was added to help candle eggs during a rush period. After being assigned to this work, DeLarme candled eggs, filled crates, checked out shipments for the driver-salesmen, helped load and unload trucks, and kept a record of the stock on hand. At the same time, however, DeLarme was available for other assignments at the plant and approximately 3 forenoons a week he printed butter in the creamery. At the time of his discharge he was earning $1.04 an hour.

The Respondent's argument that DeLarme was a supervisor finds support in the testimony of J. J. Kirk. According to the plant president, in July 1950, DeLarme was promoted to the position of foreman of the egg department, where the employees received a 5-dollar increase to a guaranteed weekly wage, and thereafter was in complete charge of the department with the power to hire and fire. Kirk testified, however, that DeLarme's supervisory status did not extend beyond the egg department and that when DeLarme worked in other departments, as he frequently did, he had no supervisorial duties.

DeLarme denied that Kirk or anyone else had ever informed him that he was a supervisor, or that he had authority to discipline, discharge, or hire anyone. Several other employees at the creamery testified that they had never heard or understood that DeLarme had any supervisory functions. Syphrit, who held DeLarme's job for a short while subsequent to the latter's dismissal, stated that he was never told that, upon assuming DeLarme's duties, he would be a foreman.

Kirk's testimony was largely uncorroborated and, in important particulars, it was lacking in detail. No personnel records were offered to support his state-

[7] The findings and quotations in this paragraph are based on the credited, undenied testimony of Homer D. Syphrit and James H Shugarts.

ment that DeLarme was promoted to a supervisory status on going to the egg department. Moreover, from Kirk's own testimony it was apparent that the fact DeLarme was paid a guaranteed weekly wage had no significance, for Kirk later stated that all the regular rank-and-file employees in the creamery were paid in the same manner. Only the plant superintendent was on a salary; DeLarme and the other employees punched a time clock. In addition, DeLarme's wage rate was lower than that of several other nonsupervisorial employees in the creamery. Although Kirk testified that he "believed" that DeLarme had once discharged an employee working in the egg department, he could not recall either her name or any other detail connected with the alleged dismissal. Kirk's testimony received little corroboration from William Brennan, plant superintendent throughout the period when DeLarme was in the egg department. According to Brennan, DeLarme "was more or less directing the work" in the egg department in that he instructed new employees on how to candle and grade the eggs but that, on the other hand, he was not responsible for inspecting their work. Brennan credibly testified that he never told DeLarme that the latter had authority to discipline, discharge, or hire any employees and that he had never heard DeLarme referred to as a foreman or a supervisor.

Even if, as Kirk testified, DeLarme was known as a "department head," that in itself is far from determinative of his status under the Act. Moreover, I feel that it is most significant that the testimony of the plant president in this connection was afforded little support by that of the plant superintendent who was DeLarme's immediate superior during the period in question. An examination of the duties and responsibilities which DeLarme exercised makes it apparent to me that he had no authority to discipline, discharge, or hire any employee, or to effectively recommend such action, and that such direction of other employees as he exercised was limited to the routine giving of instructions.[8] For this reason it is my conclusion that, at the most, DeLarme occupied a position in the egg department similar to that of a "lead man" and that he did not have the prerequisites of a supervisor as that term is used in the Act. *Sears Roebuck & Company*, 91 NLRB 1411, 1413–1414; *Southern Industries Co.*, 92 NLRB 998, 1000–1001; *Muskogee Dairy Products Co.*, 85 NLRB 520, 521.

b. *Analysis of testimony with respect to the discharge*

In answer to the General Counsel's allegation that DeLarme was discriminatorily dismissed, the Respondent has averred that he was discharged solely for neglect of duty.

The Respondent's position that DeLarme was dropped for carelessness and neglect of duty was supported by the testimony of the plant president. Kirk testified that in the spring of 1951 customers started reporting shortages in the egg orders which they received, that DeLarme seemed to have difficulty keeping an accurate inventory of his stocks on hand, that in July several of the driver-salesmen, including one Walter Newell, complained about shortages and spoiled eggs in the crates which DeLarme loaded on Newell's truck, and that about 3 weeks before DeLarme's dismissal he warned him that if the shortages continued DeLarme would be relieved. According to Kirk, on the morning of September 7, when a customer called to complain about receiving poor quality eggs as well as about cases that were short the full number purchased, he concluded

[8] In a somewhat similar situation where the Board found that the employee in question was not a supervisor, it described the instructions he gave as "merely those which any more experienced employee would naturally give those less experienced." *Manson News Agency, Inc.*, 93 NLRB 1123, 1125–1126.

that DeLarme should be discharged, had his check made out, and told Brennan to dismiss him.

To corroborate Kirk's testimony the Respondent offered in evidence 4 letters which it had received from customers, covering requests for credits on shortages or substandard eggs which driver-salesmen had delivered. In addition, a memorandum was introduced which referred to an occasion in April when the egg department credited 1 patron with 100 dozen more eggs than the patron had delivered and, in consequence, the Respondent lost $35 through an overpayment. In further support of its contention that DeLarme had been derelict in his recordkeeping the Respondent introduced a summary of the net shortages in the egg department for a 6-month period prior to September 7, which the plant bookkeeper had prepared some months after DeLarme's dismissal.[9]

Kirk's testimony about DeLarme was not corroborated by that of his plant superintendent at the time. According to Brennan, during the period when DeLarme was in the egg department there had been a number of complaints about egg candling and crating but only a relatively small number of these were due to any of DeLarme's work. Kirk himself conceded that few of the complaints about inadequate candling and shortages were traceable directly to DeLarme, but that he felt all complaints about the operations of the egg room should be attributed to DeLarme since the latter was in charge.[10] In connection with the incident in July regarding Newell, DeLarme testified that the eggs which Newell returned because they had spoiled were eggs which Kirk had specifically told him not to candle on the ground that spoilage would never be a problem with that particular type. DeLarme's testimony in this regard was corroborated by Newell. It was not contradicted by Kirk. Although Kirk testified that he had received rather numerous complaints about DeLarme from the driver-salesmen, none of the latter was placed on the witness stand to corroborate this assertion. On the other hand, both Newell and another driver-salesman, Shugarts, testified that they had never filed any complaints with Kirk.

Kirk's testimony to the effect that DeLarme had become an increasingly serious problem because of negligence displayed in keeping an inventory for the egg department was not borne out by the documentary evidence adduced. The record of egg shortages and overages which was offered by the Respondent showed that at the time of his discharge in September the monthly total of the shortages was decreasing rather than increasing. Thus although in March a net shortage of 120½ (dozen) was reported, in April 131½, and in May 151½, in June the number was only 29, in July 92½, and in August it was down to 36½.[11] Most of the documentary evidence which the Respondent offered in support of its attack on the employee's efficiency antedated his discharge by several months. One letter covered claims totaling $6.49 which arose in January and February, another, dated July 13, requested credit for $1.65, a third, dated October 2, was not received by the Respondent until over 3 weeks after DeLarme had been discharged. The memorandum concerned with overpayment of a patron was dated April 6. Only 1 letter bore a September date; this one noted a customer's request for a rebate of $1.20. As to none of the instances to which the letters or memorandum referred was evidence offered to establish DeLarme's responsi-

[9] The Respondent did not, through any of its testimony regarding shortages, seek to impute a dishonest motive to DeLarme. Its counsel frankly stated, "We are not accusing Mr. DeLarme of taking these eggs."

[10] The egg candlers were required to label their work by initialing each crate. DeLarme testified that there had been some complaints about cases he had prepared but that most of the complaints had been directed to the girl who worked with him in the candling room. This testimony was not contradicted.

[11] The Respondent's egg sales ranged from 300 to 1,600 dozen per day.

bility for the circumstances out of which the specific complaint arose. Moreover, the Respondent made no effort to prove that any of these complaints was ever brought to DeLarme's attention. Kirk's testimony on the matter of whether he had told DeLarme that his work was unsatisfactory was greatly lacking in detail. On direct examination Kirk stated that he had warned the employee in August, about 3 weeks before his actual dismissal. On cross-examination, however, he could give no specific information about this occasion or any other on which he purportedly reprimanded DeLarme. Even less convincing was his testimony with respect to the incident which supposedly led to the employee's dismissal on September 7. Although on direct examination he testified that this decision was made after getting a complaint about DeLarme from a customer in Rockport, Pennsylvania, on cross-examination he could not recall the name of the customer or any other details with regard to the complaint.

c. Concluding findings

Kirk denied that he had any knowledge of DeLarme's union activities at the time he ordered his discharge. From the testimony outlined above however, it is apparent that prior to September 7, DeLarme had been no serious problem for the Respondent. Moreover, none of the reasons advanced by Kirk satisfactorily explains why on that particular date the Respondent should conclude that DeLarme's dismissal was imperative and so abruptly put it into effect. In the light of these considerations, as well as Kirk's subsequent interrogation of employees regarding their union affiliation and his statement to Syphrit that as long as the latter stayed away from the Union he "would have a job," it is inferable that Kirk had learned of DeLarme's solicitation on behalf of the Construction Workers and that the real reason for his precipitate dismissal was, in fact, a suddenly acquired knowledge of DeLarme's interest in organizing the creamery and a desire on the part of the plant president to eliminate the one who appeared to be the instigator of the movement.

Any doubts in this connection, however, were removed by Brennan's testimony on the issue. According to the latter, about 4 o'clock on the afternoon of September 7, Kirk asked whether he would like to have a union at the plant. When Brennan answered that it was a matter of indifference to him, Kirk stated that "If you don't know it, there is a union afoot here, . . . action to form a union," that DeLarme was the "instigator," and that Brennan would have to fire him "under the pretense that he had too many complaints on eggs." According to Brennan, Kirk also told him that an employee meeting was planned for that evening, that it had been disguised as a party for Brennan, and that he (Kirk) wanted the latter to get in touch with all the employees to tell them there would be no party. Brennan testified that he immediately carried out these instructions by notifying DeLarme of his dismissal and by contacting each employee to state that he did not care to have any party sponsored for his benefit. Brennan seemed to be a completely honest and forthright witness. At the time of the hearing he was no longer in the Respondent's employ, having left in April 1951, but the record contains no evidence of any kind that would indicate he departed because of difficulties or friction with Kirk which would serve to impugn his credibility here. Other than to deny that DeLarme was dismissed for union activity, Kirk did not controvert Brennan's testimony.

During the course of his employment there were times, no doubt, when the Respondent was not completely satisfied with DeLarme's performance of his duties. The only issue before the Examiner, however, is whether the motivation for his discharge was the employee's union activities, as alleged by the General Counsel, or Kirk's dissatisfaction with his work, as averred by the Respondent.

On the basis of the facts found in the foregoing paragraphs it is my conclusion, and I find, that DeLarme was discharged because of his organizational efforts and to discourage the fledgling union movement.

C. *DeLarme's alleged ineligibility for reinstatement; conclusions with respect thereto*

In its answer the Respondent alleged that DeLarme had lost any reinstatement rights he may have had by his conduct during the strike, in that (1) "DeLarme set out on a campaign of harassing and embarrassing the Respondent's president, [and] had the President of the Respondent Company arrested on a false charge concerning the use and operation of trucks . . ." and (2) "DeLarme and others [denied] officers and employees of . . . Respondent access to the plant," as a result of which it was "necessary to call the law enforcement agency in connection therewith."

It appears that during the strike DeLarme and several of the striking employees learned that, despite the union picket line, some cream was being hauled in what they assumed to be company trucks. In a conversation DeLarme had with Martin Beam, driver of one of the trucks, however, Beam claimed that he had bought the truck. DeLarme testified that when he discovered that, despite the truckdriver's asserted ownership, the Respondent's license plates were still on the vehicle, he discussed the matter with the Pennsylvania State Police and then swore out a warrant for Kirk's arrest. According to DeLarme, at a subsequent hearing before a justice of the peace the complaint he had made was dismissed solely because he had filed it against "J. J. Kirk" instead of against "Beaver Meadow Creamery by J. J. Kirk."[12] Insofar as DeLarme's testimony is concerned the record in connection with this matter is not entirely complete. His testimony, however, was uncontroverted and the Respondent made no effort to avail itself of the opportunity to add any further details. In view of such facts as the record now reflects, all of which have been set forth above, I can see no ground for the assertion that by his part in this matter DeLarme lost any rights to reinstatement.[13]

D. *The Respondent's offer to reemploy DeLarme; conclusions with respect thereto*

On September 23, Kirk delivered a letter to DeLarme wherein the Respondent referred to the charge which the latter had filed and stated:

> We deny the charge and intend to contest the matter, however, in order that you will not be prejudiced in any manner pending the outcome of decision in said case you are hereby notified and requested to return to work for the company. If you fail, neglect or refuse to return to work promptly you will be considered to have voluntarily terminated your employment.
>
> Your return to work for us will be without prejudice to either of our rights in respect to the subject.

The strike began on September 19. On September 22, the picket line was withdrawn and the parties met to discuss a possible agreement on an election. No accord was reached, however. DeLarme testified that he went to the plant on the morning of September 24, prepared to report for work but that he did not

[12] In fact, the driver had had the title transferred. However, the Company's license plates were still on the truck at the time DeLarme swore out the warrant.

[13] The record, moreover, contains no evidence whatsoever that supports Respondent's allegation, set forth in the answer, that DeLarme engaged in violence or misconduct while picketing the plant.

enter the building because picketing had been resumed. No subsequent offer of reemployment was ever made to him.

The Respondent contends that its offer fulfilled any obligation it may have had to reemploy DeLarme and, further, that any such obligation ended when the employee failed to signify his acceptance promptly. The General Counsel argues that the Company's offer was insufficient to satisfy the requirements of the Act because it was conditional on its face and that, in any event, when DeLarme found pickets at the entrance on reporting to the plant, he was under no duty to cross the picket line in order to comply with its terms.

When DeLarme was confronted with the necessity of ignoring the pickets to enter the plant he, of course, could elect to join the strikers, despite the admonition in the letter of September 22 that he return promptly or be terminated. Under these circumstances, the Respondent cannot now urge that by his failure to report for work on September 24, DeLarme rejected its offer. In any case, here, the Respondent's offer, by its terms, was plainly conditioned upon the outcome of the unfair labor proceeding. The Board has long held that to be valid an offer of reinstatement must be an unconditional assurance that the individual will be reemployed in his former or substantially equivalent position. *N. L. R. B.* v. *Electric City Dyeing Co.*, 178 F. 2d 980, 983 (C. A. 3); *N. L. R. B.* v. *Van Deusen*, 138 F. 2d 893, 895 (C. A. 2); *Pacific Powder Co*, 84 NLRB 280, 281; *Continental Oil Co.*, 12 NLRB 789, 806. In the light of these considerations it is my conclusion that the Respondent was relieved of none of its obligations under the Act by its letter to DeLarme, or by the course of conduct which DeLarme subsequently followed.

E. *Other alleged acts of interference, restraint, and coercion; conclusions with respect thereto*

Kirk's interrogation of employees Shugarts and Syphrit, discussed above, is of a type proscribed by Section 8 (a) (1) of the Act. I so find. Further, as noted above, when the plant president learned that the employees had planned an organizational meeting in the guise of a party for Superintendent Brennan, he instructed Brennan to tell each employee immediately that he was not "interested in having a party." Under the circumstances present here, this, too, must be considered as a discriminatory attempt to thwart an employee move to meet for organizational purposes which violates the Act.

The General Counsel also alleged that the Respondent engaged in further acts of interference during the strike by threatening the strikers with termination unless they returned to work. The employees struck on September 19. The following day the Respondent distributed a letter to its employees in which it concluded

> The plant is ready to operate if and when you choose to return to work. If you do not return to work on or before September 24th, 1951, we will consider you to have terminated your employment with this Company.

On the following day the Respondent addressed another letter to its employees in which it stated that the Company would recognize the Union whenever the latter was certified by the Pennsylvania State Labor Relations Board but went on to say that this offer was extended

> on condition that you return to work on or before September 24, 1951, and if the plant is not opened by that time, there will be few, if any jobs there, so, if the subject matter is not determined promptly, it makes little difference.

The language of these letters plainly carried a threat to terminate the strikers without regard to whether they had been replaced and because of the fact that

they were then engaged in concerted activity. In consequence, the letters, as a "tactical step designed to coerce the employees into resuming work" (*Rockwood Stove Works*, 63 NLRB 1296, 1297) were a further violation of Section 8 (a) (1) of the Act. *Collins Baking Co.* v. *N. L. R. B*, 193 F. 2d 483, 486 (C. A. 5).

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

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

V. THE REMEDY

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

It having been found that the Respondent discriminated with respect to the hire and tenure of employment of Bert DeLarme, it will be recommended that the Respondent offer him immediate and full reinstatement to his former or substantially equivalent position without prejudice to his seniority or other rights and privileges (*The Chase National Bank of the City of New York, San Juan, Puerto Rico, Branch*, 65 NLRB 827) and make him whole for any loss of pay suffered as a result of the discrimination against him by payment to him of a sum of money equal to that which he normally would have earned in wages from the date of his discharge to the date of a valid offer of reinstatement by the Respondent, less his net earnings during said period. *Crossett Lumber Co.*, 8 NLRB 440. The said loss of pay shall be computed on a quarterly calendar basis in accordance with the formula adopted by the Board in *F. W. Woolworth Co.*, 90 NLRB 289.

Since a discriminatory discharge "goes to the very heart of the Act" (*N. L. R. B.* v. *Entwistle Mfg. Co.*, 120 F. 2d 536 (C. A. 4)), I will recommend that the Respondent be ordered to cease and desist from in any manner infringing upon the rights of employees as guaranteed by Section 7 of the Act. See *May Department Stores* v. *N. L. R. B.*, 326 U. S. 376, 386–392.

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. The Respondent is engaged in commerce within the meaning of the Act.
2. The Union is a labor organization within the meaning of Section 2 (5) of the Act.
3. By discriminating in regard to the hire and tenure of employment of Bert DeLarme, thereby discouraging membership in a labor organization, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (3) of the Act.
4. By such discrimination and by interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (1) of the Act.
5. 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.]

Appendix

NOTICE TO ALL EMPLOYEES

Pursuant to the recommendations of a Trial Examiner 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 membership by our employees in any labor organization, by discriminating in regard to hire or tenure of employment or any term or condition of employment.

WE WILL NOT interrogate employees concerning their union membership and activities.

WE WILL NOT threaten to discharge employees because of their union membership and activities or hold out job advantages should they refrain from such membership and activities.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form 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, or to refrain from any or all 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.

WE WILL offer to Bert DeLarme immediate and full reinstatement to his former or substantially equivalent position without prejudice to any seniority or other rights and privileges enjoyed and make him whole for any loss of pay suffered as a result of the discrimination against him.

BEAVER MEADOW CREAMERY, INC.,
Employer.

Dated ---------- By ----------
(Representative) (Title)

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

SPALDING AVERY LUMBER COMPANY, BURKE LUMBER & COAL COMPANY, EDWARDS & BROWNE COAL COMPANY, FULLERTON LUMBER CO., E. S. GAYNOR LUMBER COMPANY, SKIDMORE SAWMILLS, FORD LUMBER & COAL CO., AND OMAHA HARDWOOD LUMBER CO. *and* GENERAL DRIVERS, WAREHOUSEMEN & HELPERS LOCAL UNION NO. 383, A. F. OF L. *Case No. 18–CA–429. April 3, 1953*

Decision and Order

STATEMENT OF THE CASE

Upon a charge filed on August 8, 1952, by General Drivers, Warehousemen and Helpers Local Union No. 383, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A. F. of L., herein called the Union, the General