

WE WILL NOT in any manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form labor organizations, to join Local #79, International Brotherhood of Boilermakers, Iron Ship Builders and Helpers of America, AFL, or any other 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 and 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 bargain collectively upon request with the above-named labor organization as the exclusive representative of all employees in the bargaining unit described herein with respect to rates of pay, hours of employment, or other conditions of employment, and if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All production and maintenance employees at our plant, including the shipping clerk, inventory clerk, and so-called seasonal employees, but excluding the office clerical employees, professional employees, watchmen, guards, and supervisors as defined in the Act.

All our employees are free to become, remain, or refrain from becoming members of the above-named union or any other labor organization, except to the extent that this right may be affected by an agreement in conformity with Section 8 (a) (3) of the Act.

BAR-BROOK MANUFACTURING COMPANY, 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.

TEXTILE MACHINE WORKS, INC. *and* PAUL J. GSSERT,
ET AL.

TEXTILE MACHINE WORKS, INC. *and* WILLIAM G. BAUER

TEXTILE MACHINE WORKS, INC. *and* UNITED STEELWORK-
ERS OF AMERICA C.I.O. Cases Nos. 4-CA-118, 4-CA-277,
and 4-CA-343. June 17, 1953

SUPPLEMENTAL DECISION AND ORDER

On November 5, 1951, the Board issued its Decision and Order in the above-entitled proceeding,¹ 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. Among the unfair labor practices found to have been committed by the Respondent was its discriminatory refusal to employ 85 former employees, herein called discriminatees, in violation of Section 8 (a) (3) of the Act. As a defense to the allegations of the complaint that the refusal to employ the discriminatees violated

¹196 NLRB 1333.

Section 8 (a) (3) of the Act, the Respondent contended that the discriminatees had not applied for and were not denied employment, but that they had applied for reinstatement as this term is technically used by the Board in its remedial orders. In substance, the Respondent asserted that if, arguendo, it had in the past unlawfully discharged the discriminatees, they had permitted their rights to reinstatement under the Act to lapse by failing to file charges based upon their discharges within the 6-month period specified in Section 10 (b) of the Act; that when the discriminatees subsequently presented themselves to the Respondent, they actually sought reinstatement, not employment as new employees, which reinstatement the Respondent was privileged to refuse to accord them.

Contrary to the Respondent's view, the Board found that the discriminatees had not sought reinstatement as that term is technically understood, but that they had in fact applied for employment which they were unlawfully denied. In so finding, the Board cited its decisions in Pennwoven, Inc., 94 NLRB 175, and Childs Company, 93 NLRB 281. Subsequent to the issuance of the Board's Decision and Order herein, the United States Courts of Appeals for the Third and Second Circuits, respectively, denied enforcement in the Pennwoven and Childs cases (194 F. 2d 521 and 195 F. 2d 617, respectively) of that part of the Board's order in each case based upon findings of violation of Section 8 (a) (3) of the Act. In view of the Board's citation of its decisions in these cases in the instant case, the Board, on November 28, 1952, issued a notice to the parties to show cause why the Board should not reexamine and reconsider its findings of fact and conclusions of law in its Decision and Order in the light of the Pennwoven and Childs court decisions. In response to this notice, the Respondent, the General Counsel, and the United Steelworkers of America, CIO, one of the charging parties, signified their approval of appropriate reexamination and reconsideration of the Board's Decision and Order.

Having carefully reexamined and reconsidered the entire record in this case, especially in the light of the Pennwoven and Childs court decisions, we are satisfied that the Board correctly found and concluded that all the discriminatees in this proceeding, with one exception noted hereinafter, had applied to the Respondent for new employment and not for reinstatement with restoration to former rights, and that the Respondent's discriminatory refusal to employ them pursuant to such applications for employment was in violation of Section 8 (a) (3) and (1) of the Act. We have reached this conclusion for the reasons set out below.

Neither the Pennwoven nor the Childs court decision disturbed the legal principle upon which the Board's 8 (a) (3) findings in those cases, as well as in the instant case, fundamentally rest. That principle, affirmed by the Supreme Court in *Phelps Dodge Corp. v. N. L. R. B.*, 313 U. S. 177, holds that the refusal by an employer to grant employment because of past union or strike activities is an unfair labor practice.

The crucial disagreement by the courts with the Board's findings in *Pennwoven* and *Childs* was not in derogation of the *Phelps Dodge* principle but turned solely on a construction of the decisive facts in these cases. In brief, the Board had found that certain former employees in each case had requested jobs as new employees from their former employers, and had been denied employment in one case because of their past union activities, and in the other because of nonmembership in a union. The Board, applying the principle of *Phelps Dodge* to the facts as it found them, held such denials of employment violative of Section 8 (a) (3) of the Act. The court, in each case, however, construed the requests of the individuals, not as applications for new employment, but as assertions of reinstatement rights as this term is remedially used by the Board. As the vindication of these reinstatement rights had been barred by the 6-month limitation of Section 10 (b) of the Act, no unfair labor practice could be found on the refusal to reinstate. Concluding, therefore, that the Board's findings of fact were not supported by the evidence, the court denied enforcement of the Board's order in each case.

Similarly, the Board's determination of the question in the instant case, whether the discriminatees had sought new employment or reinstatement, depended on the particular facts of this case, which are clearly distinguishable from the controlling facts in *Pennwoven* and *Childs*.

In *Pennwoven* the requests consisted of letters from three employees to their former employer. These letters were alike except for the statement of employment records in each. One of these letters was quoted at length in the court's decision as follows:

My employment with *Pennwoven, Inc.*, was severed on June 30, 1948 by the company when the second shift was temporarily eliminated. I was laid off without regard for my seniority which was guaranteed to protect my job under the then existing labor agreement between *Pennwoven, Inc.*, and Local No. 12318 of District 50--United Mine Workers of America, which at that time was recognized by *Pennwoven, Inc.*, as the sole and exclusive bargaining agency for all production and maintenance employees of *Pennwoven, Inc.*

At the time of my lay-off on June 30, 1948, I was employed by *Pennwoven, Inc.*, for 16 years and 3 months, and should have been retained because employees with less seniority were retained in your employ.

Since my lay-off on June 30, 1948 *Pennwoven, Inc.*, has hired new employees without offering me reinstatement to my former job.

I have been available for re-employment at all times since June 30, 1948 and am available at this time, but to date have not received any offer from *Pennwoven, Inc.*, of re-employment.

I believe my separation from employment with Pennwoven, Inc., and refusal of re-employment was and is due solely to membership in and activities on behalf of the American Federation of Labor, and my efforts to induce my fellow employees to join the A. F. of L. and have the A. F. of L. certified as bargaining agent for production and maintenance employees of Pennwoven, Inc.

This action constitutes a violation of my rights as a worker under the National Labor Relations Act as amended, and also constitutes an unfair labor practice by Pennwoven, Inc., under the Act.

Before seeking redress under the provisions of the National Labor Relations Act I am herewith informing you of my availability for re-employment and would appreciate any early statement of my status as an employee of Pennwoven, Inc.

In construing this letter, the court said merely,

We find it impossible to understand this letter as anything but a demand for reinstatement to a former position with all the benefits that such reinstatement could bring. The Board calls the letter "an unconditional application for employment". If that is a fact-finding we cannot accept it. If it is comment or argument we are likewise compelled to disagree. There is nothing we can say to support our position which is any stronger argument for it than the text of the letter itself.

Necessarily the court's construction of the foregoing letter as a "demand for reinstatement to a former position with all the benefits that such reinstatement could bring," was derived from a reference to the letter as a whole. The court's result must, therefore, have been obtained from the combined effect of the following elements in the letter:

(a) The recital of facts regarding the employer's alleged unlawful conduct (as to which more than the 6-month statutory period provided in Section 10 (b) had run), with specific reference to the employer's failure to offer the aggrieved employee "reinstatement to [her] former job."

(b) Emphasis upon the specific seniority, in terms of precise years and months, earned by the employee in the employer's service.

(c) The statement of the employee's "availability for re-employment," coupled with a threat to seek redress under the Act for the employer's termination of her employment, and a demand for "an early statement of [her] status as an employee of Pennwoven, Inc."

The court undoubtedly concluded that the statement of "availability for re-employment" was so intertwined with reminders of the employer's discriminatory conduct and refusal to offer

reinstatement, the employee's seniority, the threat of redress for failure to reemploy, and the demand for a statement of status as an employee of the employer, as to mean only that the employee still regarded herself entitled to rights available under the Act, and that the letter as a whole was a demand for restoration of these rights with a threat of invocation of the Act's processes for the employer's failure to accord them to her.

In the Childs case there was a background of a discharge of an employee by the employer on January 29, 1948, and a charge filed with the Board in September 1948 alleging the discharge to have been violative of Section 8 (a) (3) of the Act. On June 24, 1948, the aggrieved employee, Potter, had written the employer, as the court found, complaining of the employer's conduct in connection with the discharge. On July 8, 1948, the employer replied advising Potter that his complaint was receiving consideration. On October 23, 1948, Potter again wrote to the employer (just after the filing of the charge in September) reminding the employer of his June 24 letter voicing "complaint against my loss of job with the company," and the employer's failure to satisfactorily dispose of his complaint as promised in its letter of July 8. He concluded this letter by referring to his decision to take his complaint to the Board. On October 28 the employer replied explaining the reason for the termination of Potter's employment, and informing him that "Under these circumstances the Company cannot restore you to your former position." The next day Potter filed an amended charge with the Board reiterating his original charge filed in September and adding: "On October 23, 1948 I wrote to the Company and requested that I be reinstated to my former position. On October 28, 1948, I was informed by the Company that pursuant to the terms of the existing labor contract, they could not reinstate me to my former position." On April 10, 1949, Potter again sent a letter to the employer in which he included the following remarks:

Please except this as another request to be reestablished in the employment of the company with former rights. As well as compensary losses I have so suffered as a results. Which you perhaps are aware is claims I have pending with the National Labor Relations Board. (Sic)

In disagreeing with the Board's conclusion that Potter's October 23, 1948, letter was a request for new employment and not a demand for reinstatement, Judge Augustus Hand, speaking for the majority, said,

We cannot see any justification for the conclusion of the Board that Potter was asking for new employment rather than reinstatement to his former position and rights. His letter of October 23, 1948 refers to two things: (1) his letter of June 23 in which he complained generally of the

Company's failure to oppose the Union's request for his discharge, and (2) the charge he had filed with the Board in September, in which he complained only of the illegality of his discharge. How either reference can be construed as a demand for new employment rather than one for restoration of former rights is beyond our comprehension. In the amended charge filed October 29, 1948, he himself said that the letter was a request for reinstatement to his former position. The letter of April 10, 1949, ties in with all his former utterances and is to be read as interpreting and reaffirming them. It conclusively shows that he was at all times seeking reinstatement to his former rights and not merely new employment.

It is thus evident that here, as in Pennwoven, the court's interpretation of Potter's request as a demand for reinstatement was formed by regarding the request in relation to Potter's assertion of rights flowing from his alleged unlawful discharge, and his invocation of Board action to secure those rights. Especially significant, in this connection, is the court's reliance on Potter's April 10, 1949, letter to explain the intent of his October 23, 1948, request. Also particularly noteworthy is Potter's demand in his April 1949 letter to be restored to employment with "former rights" and compensation for losses resulting from his discriminatory discharge. These are the elements customarily comprising a Board-ordered reinstatement remedy.

In distinguishing the instant case from Pennwoven and Childs, we emphasize at the outset the absence here of the decisive elements delineated in our analyses of the foregoing court decisions. Absent from the requests by the discriminatees in this case, with the exception hereinafter noted, are the Pennwoven or Childs assertions of past discrimination by the respondent coupled with claims of rights flowing from such alleged discrimination, or threats of Board action for the failure of the respondent to accord these rights. We turn then to the relevant facts in the record upon which the Board's conclusion rests, that these requests evinced the desire of the discriminatees for employment and not for reinstatement with restoration of rights and pecuniary losses.

As detailed in the Board's Decision and Order, the discriminatees were part of a group of striking employees who on September 3, 1947, ended their strike against the Respondent by signifying their desire to return to work. On that occasion, pursuant to the Respondent's instructions, they entered their names, addresses, and telephone numbers in a register² maintained by the Respondent in its employment

²According to the Respondent's employment manager, this register is continuously maintained in the employment office to record the names and other information concerning persons who daily visit the office applying for employment. The employment manager testified that his usual practice is to refer to the register each day to satisfy the Respondent's immediate personnel needs by securing employees from among the applicants whose entries appear in the register.

office, and left the premises to await recall to work. None of the discriminatees was ever recalled. Instead, the Respondent notified them by mail in September and October 1947 that they had been discharged.³ No charges were filed alleging that these discharges were unlawful, and we do not find that they were.

On March 21, 1949, a meeting was held by an official of the United Steelworkers of America, CIO, which was attended by some of the discriminatees. As a result of events which transpired at this meeting,⁴ most of the discriminatees visited the Respondent's employment office and presented their requests for employment. In general, the discriminatees were informed that there was no work available for them at the time but that they would be called when jobs became available. Although, as revealed by the Board's analysis of the record, jobs subsequently became available for which the discriminatees were qualified, they were refused employment by the Respondent. These refusals to employ are the basis for the complaint in this case.

In contending that these requests constituted demands for restoration to their former jobs and privileges and not just applications for employment, the Respondent asserted that the testimony of the discriminatees regarding their conversations with the Respondent's employment officials and clerks reveals that they were trying to recover "their old jobs back." This, the Respondent argued, is equivalent to a demand for reinstatement as that term is used by the Board in its remedial orders. Apart from our disagreement with such reasoning, we find that the Respondent's argument is not applicable to the requests of 21 discriminatees which contain not even the slightest mention of a desire for "old jobs," but clearly reflect the desire of these discriminatees for any employment as new employees. We are equally satisfied that the Respondent's argument is not applicable to the requests of 16 other discriminatees who, in the course of their conversations with the Respondent's representatives, directly or indirectly referred to an interest in their "old jobs," but also made other statements which convincingly showed that they wanted employment as new employees. Because we have relied upon the interchange between each of these 37 discriminatees and the Respondent's representatives in reaching our conclusions, we set forth the credited testimony of these discriminatees as to what was said in each instance:

³One discriminatee, Paul H. Gassert, had been discharged on August 4, 1947, before the strike, allegedly for insubordination. The circumstances relating to his discharge are detailed in the Board's Decision and Order.

⁴As noted by the Board at footnote 13 in its Decision and Order, the Trial Examiner had excluded testimony which the General Counsel sought to elicit as to the events of this meeting, and rejected the General Counsel's offer of proof to the effect that the Steelworkers' representative had informed his audience that the Respondent was hiring, and had advised those desiring to obtain jobs with the Respondent to apply. Although the Board was of the opinion that this evidence should have been admitted, it indicated that it did not need to rely therein in reaching its ultimate conclusions, and did not, therefore, reverse this ruling by the Trial Examiner.

Anthony Pietrowski spoke to the employment manager on March 26, 1948, and "asked for a job." He was told that there was no work and that he should come back. He returned about a month later, but an employment clerk refused to let him see the manager.

Joseph Marko asked an employment clerk on March 23, 1948, "for a job." He was informed that "whatever happens to these fellows (other discriminatees who had applied for work) will happen to you."

George Herzog told the employment manager on March 22, 1948, that he had formerly worked in department 1 and asked for his "job back." When apprised that there were no jobs open, he inquired "wasn't there any jobs open in any other department." He was informed that men were not then needed.

Robert Guistwite told the employment manager on March 24, 1948, "I would like to have my job or any other job, anything at all," and was advised there was nothing open at that time, and if something did open he would be informed.

Stanley Savage said to an employment clerk on April 15, 1948, "I come over to see if there was any jobs open," and was told only to sign the register. He also asked the employment manager "Is there anything open," but this inquiry merely evoked the manager's laughter.

William H. Pike, Jr., asked an employment clerk in March 1948 "if there was any jobs open," and was told there were none then but that he would be informed when there were openings.

Walter S. Davis came to the employment office between March 22 and 25, 1948, and asked a clerk for his "job back," and when that was refused requested a form "to make out an application for employment." This request was denied and he was informed that he would be notified if there were to be any jobs open.

Catherine M. Frees said to an employment clerk on March 24, 1948, that she "came over for a job, it didn't make no difference what kind of work it was." He told her he had nothing then.

Harry S. Koch spoke to the employment manager in March 1948 and asked him "for a job." The manager replied that there were no jobs open then but that he would keep him in mind and let him know.

Stella Quaintance asked an employment clerk on March 24, 1948, for "a job" and was told he did not have anything. She asked "if they were going to hire any more girls" and was told by the clerk that he did not know.

Aaron Becker asked an employment clerk in the spring of 1948 "if they had any jobs open in the foundry" and was told there were none.

Charles Di Stasio spoke to the employment manager on March 22, 1948, and said, "I'd like to have my job back." The manager replied, "Oh, you can't have your job back. You got to start as a new man." Di Stasio then said, "O.K., its O.K. with me." He was told, "Well, there's no work in there right now. You got to wait until you're sent for."

Russell J. Hartranft asked an employment clerk on April 1, 1948, "if he had any jobs open." He was told there were no openings and that he would be called when needed.

Herman O. Burkhart asked an employment clerk on August 26, 1948, "about getting [his] job back, or any other job." He was told there was nothing open.

William Miller stated to an employment clerk on April 2, 1948, that he "wanted employment." He was told that if the employment manager wanted him he would call him.

Alpheus Groff applied for "employment" on March 28, 1948, and was told by an employment clerk he would be sent for when needed.

Earl G. Detweiler had been at the employment office on October 22, 1947, and had asked whether "there was anything doing on [his] job or anything else." He was told there was nothing for him. He continued calling at the employment office weekly thereafter until February 7, 1948. On this last occasion he asked an employment clerk if he knew when the company would send for him. The clerk told him he did not know.

James P. Robinson told an employment clerk on March 22, 1948, that he would like to get his old job back "or any other job that's available." The clerk consulted with the employment manager and told Robinson that the manager had no time to bother with him.

Norman Miller asked an employment clerk on March 26, 1948, "if anything was open" and was told there was nothing open at the time.

Cletus R. Slusser asked an employment clerk on March 24, 1948, "if there was anything doing ... is there anything open?" He was told there was nothing open.

Clayton Schweitzer told an employment clerk in December 1949 or January 1950 that he had come "to seek my employment" in the foundry where he had formerly worked. The clerk ascertained that he had worked for the company during the 1947 strike and then informed Schweitzer that the employment manager was not present and could not be reached.

Lester Matz asked an employment clerk about the second week in April 1948, "if there was any jobs open" and was informed there were no openings then.

Arthur Bordner asked an employment clerk on March 7, 1948, "if they were hiring anyone" and was informed that they were not.

Clarence Warczyglowa went to the employment office on March 22, 1948. On that occasion several other former employees were present including Joseph Grimm who had been president of the shop local before the strike. Grimm asked the employment manager "about these fellows that are here, about getting their jobs back." The manager replied, "the only way you would get your jobs back is to start as new employees." Grimm then asked for applications, but the manager said he had the old applications and that it would be sufficient for the men just to register; that "as the time comes we will call you."

Joseph O'Connell asked an employment clerk in the spring of 1948 "if there was any hiring, anything doing at present." The answer was no.

Cyrus W. Speicher applied at the employment office in March 1948 and was asked by an employment clerk "how come I was back for my job," to which he replied, "Well, I'm out of a permanent job at the present time, I was back quite often for my job but I never got it." He testified he had gone to the employment office to ask for "my old job or another job; I wasn't too particular."

George Clay asked an employment clerk on March 23, 1948, "about coming back," and was informed "we don't take anybody back yet." He testified that on this occasion he "was just looking for a job."

Charles I. Race asked an employment clerk on March 22, 1948, "for work." After he had been identified as a participant in the 1947 strike against the Respondent, he was told there was no work.

Leroy Haring asked an employment clerk in November 1947 "about my job back or any other job" but was told there was nothing available. He again "inquired about work" in February, April, and around Thanksgiving time or December 1948, and was told each time that there was nothing for him.

Ferdinand J. Mayer asked an employment clerk on March 22, 1948, for "a job."

William G. Bauer asked the employment manager in the fall of 1948 for his "job back." He was told that due to transfers of employees between departments he could not then be placed. Bauer returned to the employment office about 50 times in 1949 and 1950 and asked the employment clerks "for work, any kind of work."

John Marko spoke to the employment manager on March 29, 1948, and asked him "about my old job." The manager told him he "couldn't get back to [his] old job," and turned him down for a job in the foundry for which Marko also applied on the ground that he wasn't heavy enough for the job. Marko then requested the manager to contact him "if there should be anything open."

Conrad H. Chlebowski went to the employment office on March 22, 1948, to apply for a job. He was informed that the employment manager was not in and that he would be notified "if anything was open."

Harry Mull went to the employment office on March 23, 1948, to apply for a job. He was informed that the employment manager was not in.

Robert Heist asked an employment clerk on March 20 or 22, 1948, "If I could have my job back" and "if there was any work for me." He was informed that if there were any work for him he would be notified.

John A. Roth asked an employment clerk on April 3, 1948, to be "rehired."

Samuel S. Leone told an employment clerk on March 22, 1948, "I have come back to be reinstated on my job, if possi-

ble, and if there was an opening over there to the foundry." He was told he would be referred to the employment manager.

As to the remaining discriminatees, whose requests consisted generally of inquiries about when they would get "their old jobs back," the Board, in its Decision and Order, said,

We reject the Respondent's contention that these applications were not for employment, but for "reinstatement" as this term is technically used by the Board. In so finding we are mindful of the fact that some of the applications were requests for "our old jobs back," "reinstatement to our old jobs," or for "reemployment." Whatever the language used by the applicants, however, it is clear that in no sense did they expressly or impliedly attach conditions to their requests such as a demand for return to a former position with back pay, seniority, and other rights and privileges which the Board customarily specifies in a remedial order requiring an employer to reinstate employees. We are satisfied that the discriminatees, who without exception are industrial factory workers, did not use the terms they employed in the technical sense of labor law experts, but merely expressed themselves in the ordinary manner of former employees seeking jobs from their old employer, and presented themselves as new applicants seeking new employment.

We affirm this view with respect to all but one of the discriminatees.⁵ The Respondent's contrary view that the requests for "old jobs back" were equivalent to demands for reinstatement might be more persuasive had there been associated with them the elements appearing in the Pennwoven and Childs requests. However, unlike the situation in those cases, there is no evidence here of assertions by the discriminatees that they had been unlawfully discharged by the Respondent; there are no claims of legal entitlement to their former positions based on allegations of such unlawful conduct, nor are there demands to be made whole for pecuniary losses resulting therefrom. There is moreover a total absence of threats of Board action for the Respondent's failure to comply with such demands: In effect, there is nothing to differentiate the requests of the discriminatees from ordinary applications for employment, but the utilization of words denoting a desire for "old jobs back."

The soundness of the Board's view is emphasized by regarding the phrasing of the request in relation to the attendant acts and circumstances which shaped and reflected their true meaning. The discriminatees had worked for the Respondent at manual jobs which were neither unique nor distinctive. These jobs were like many others on the Respondent's payroll in identical or closely related classifications. Their requests, therefore, could not reasonably have been taken to mean that they were claiming specific identifiable jobs to which they regarded

⁵ Angelo Tomeo.

themselves still entitled. A more likely construction, which we adopt, was that they used the words "old jobs back" in the practical sense of industrial workers to convey information to the Respondent required by the situation. In effect they were informing the Respondent that they were its former employees whose old jobs had been as laborers, grinders, benchhands, or any one of the numerous classifications by which their jobs had been designated, and that they wanted to come back to work for the Respondent in capacities for which past employment with the Respondent qualified them. We are convinced that the Respondent's employment representatives so regarded these requests. No discriminatee was turned down on the ground that he was seeking reinstatement and not employment. Instead, their requests were handled precisely as the Respondent customarily handled applications for employment from individuals seeking work for the first time. In most cases the discriminatees made identifying entries in the employment register used by the Respondent to register all applicants for employment. Those who did not register were identifiable from other records in the Respondent's possession including their registration after the termination of the 1947 strike. To the inquiries about "old jobs back," the response generally was that there were no openings at that time but that the discriminatees would be called when jobs became available. There were no protests by the discriminatees that they wanted present restoration to certain jobs and not promises of future employment as jobs became available, but the record shows complete compliance with the Respondent's procedures and acceptance of its conditions.⁶

Viewed as a whole, the foregoing circumstances convincingly reflect a mutual understanding by the discriminatees and the Respondent's representatives that the requests by the former were for employment and not for the legal remedy of reinstatement. The Respondent's refusal, for reasons proscribed by the Act, to offer the discriminatees employment when suitable jobs became available was therefore, in accordance with the Phelps Dodge principle, violative of Section 8 (a) (3) and (1) of the Act.

Upon reconsideration of the record we believe, contrary to the Board's finding in the Decision and Order herein, that the complaint should be dismissed as to Angelo Tomeo, one of the discriminatees. As distinguished from all the other discriminatees, Tomeo at no time within 6 months before the filing date

⁶On March 22, 1948, the day after the union meeting which led to the filing of the requests by the discriminatees, the Respondent's employment manager told Clarence Warczyglowa and Charles DiStasio when each asked about getting his "job back" as described above, that they could receive employment only as new employees. Warczyglowa then asked for an application and DiStasio replied that "it's O.K. with me." We infer from the discriminatees' unhesitating acquiescence to the employment manager's condition on these two occasions and his failure to state the condition to other discriminatees who spoke of "jobs back" or used similar terms, that any doubt which the Respondent may have entertained as to the desire of the discriminatees for new employment was dispelled when they first started to file requests for employment.

of the charge in this proceeding appeared in person at the Respondent's employment office to request employment. However, by letter dated April 5, 1948, he advised the Respondent as follows:

I hereby apply for reinstatement to the same position that I held as of -----.

This reinstatement to be without prejudice that might be inferred from my participation in the work stoppage of -----.

We are satisfied that the foregoing letter⁷ imparts, particularly in the light of the Pennwoven and Childs court decisions, Tomeo's demand for restoration to his former position with the rights and privileges he would have enjoyed had the Respondent not discharged him after the 1947 strike. This is tantamount to a demand for technical reinstatement which the Respondent could have justifiably refused.

We deem it pertinent in this Supplemental Decision and Order to make it clear that the Board's findings of 8 (a) (3) and (1) violations in this proceeding do not in the slightest degree depend upon the view attributed by the court to the Board in its Pennwoven decision, namely that "a discriminatory failure to reinstate an employee is to be treated like a continuing tort." The court interpreted the Board's holding in that case as predicated on the view that a reinstatement remedy for a discriminatory failure to recall to work is available indefinitely under the Act and may be prescribed by the Board although the charge as to the underlying illegal conduct is filed more than 6 months after its occurrence; that Section 10 (b) has the effect in such cases of limiting only the assessment of back pay, which may not be computed for a period more than 6 months before the filing date of the charge. The court believed that computation of back pay in the Pennwoven case was ordered on this basis. The Board did not mean to rely on any such theory and believed that it was not doing so in its Pennwoven decision. In view, however, of the court's interpretation, we must point out that in the instant decision the Board has not proceeded on any such theory in finding discrimination or in framing its order. Thus, the Board specified that it made no finding that the 1947 discharges constituted violations of the Act or, in any event, called for remedial action. As our original decision herein plainly shows, we refer to the circumstances concerning these discharges only for the judicially approved purpose⁸ of establishing the Respondent's antiunion motive as to the conduct

⁷The record does not indicate the dates inserted by Tomeo in the blank spaces, but we assume that he referred to the last position he held as an employee of the Respondent and to the August 1947 strike.

⁸N.L.R.B. v. Clausen, et al., 188 F. 2d 439 (C.A. 3), enforcing Fredrica Clausen, d/b/a Luzerne Hide and Tallow Company, 89 NLRB 989.

which occurred in 1948 and thereafter.⁹ Our order, specifying the precise date of the discrimination found as to each individual and the period for which back pay was awarded, is consistent with the underlying basis for our findings as explicated in our original decision in this case and as here reiterated.

For the reasons hereinabove stated, we affirm our Decision and Order of November 5, 1951, as supplemented and modified by this Supplemental Decision and Order.

IT IS HEREBY ORDERED that the complaint herein be, and it hereby is, dismissed as to Angelo Tomeo and that the notice to all employees, marked "Appendix," required by the Board in its Decision and Order to be posted by the Respondent be amended by deleting therefrom the name of Angelo Tomeo.

Chairman Herzog took no part in the consideration of the above Supplemental Decision and Order.

⁹At footnote 24 in its Decision and Order the Board said, "Our consideration of such evidence is not to be taken as a finding that the Respondent committed an unfair labor practice before March 8, 1948; in evaluating this evidence we are merely endeavoring to clarify and impart meaning to events which occurred after March 8, 1948."

ST. PAUL POSTAL EMPLOYEES COOPERATIVE CAFETERIA COMMITTEE *and* LOCAL 556, HOTEL, RESTAURANT & CAFETERIA EMPLOYEES UNION, A. F. of L., Petitioner.
Case No. 18-RC-1888. June 17, 1953

DECISION AND ORDER

Upon a petition duly filed under Section 9 (c) of the National Labor Relations Act, a hearing was held before James A. Karigan, 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 [Members Houston, Murdock, and Styles].

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

1. Prior to 1945 the cafeteria concession in the United States Post Office Building in St. Paul, Minnesota, was operated by the Dolan Company. In 1945 the arrangements governing the operation of the cafeteria concession by the Dolan Company were terminated. At that time and in accordance with "Rules and Regulations issued by the Post Office Department For the Operation and Conduct of Post Office Cafeterias in Federal or Leased Buildings," the St. Paul Postal Employees Cooperative Cafeteria Committee, hereinafter called the Committee, was organized for the purpose of operating a cafeteria in the base-