

On the basis of the foregoing undisputed findings, we conclude, as did the Acting Regional Director, that the Employer engaged in interference, restraint, and coercion of its employees in the exercise of their free choice of a bargaining representative, and shall order that the election of May 11, 1953, be set aside.<sup>2</sup> We shall direct the Acting Regional Director to conduct a new election at such time as he deems appropriate.

### ORDER

IT IS HEREBY ORDERED that the election of May 11, 1953, be, and it hereby is, set aside; and

IT IS FURTHER ORDERED that this proceeding be remanded to the Acting Regional Director for the Region in which this case was heard for the purpose of conducting a new election at such time as he deems the circumstances permit a free choice of a bargaining representative.

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<sup>2</sup>In view of our decision herein, it is unnecessary to consider the Petitioner's other objections to the election.

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COWLES PUBLISHING COMPANY *and* THOMAS P. HOWARD *and* THOMAS P. HOWARD, ERNEST P. CAGLE, FRANK CASTAGNA, ORVAL DEAN, JAMES DRIES, C. EDWIN ELKINS, CLAYTON ELLIS, GEORGE GRADER, HAROLD J. HIMMELSBACH, JAMES S. HOGAN, PHILLIP M. O'NEILL, JOSEPH PEDERSEN, W. STANLEY RIDDLE, JR., ORVIN TJOSTOLVSON, GEORGE WEBER, GEORGE PETERSON. Cases Nos. 19-CA-729, 19-CA-762, 19-CA-762-1, 19-CA-762-2, 19-CA-762-3, 19-CA-762-4, 19-CA-762-5, 19-CA-762-6, 19-CA-762-7, 19-CA-762-8, 19-CA-762-9, 19-CA-762-10, 19-CA-762-11, 19-CA-762-12, 19-CA-762-13, 19-CA-762-14, and 19-CA-762-15. August 20, 1953

### DECISION AND ORDER

On April 24, 1953, Trial Examiner Martin S. Bennett issued his Intermediate Report in the above-entitled proceeding, finding that 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. The Trial Examiner found further that Respondent had not engaged in certain other unfair labor practices alleged in the complaint and recommended dismissal of those allegations of the complaint. Thereafter, the General Counsel and Respondent filed exceptions to the Intermediate Report and supporting briefs.

The Board<sup>1</sup> has reviewed the rulings made by the Trial Examiner and finds that no prejudicial error was committed. The rulings are hereby affirmed.<sup>2</sup> The Board has considered the Intermediate Report, the exceptions and briefs, and the entire record in the case and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner with the following modifications:

In agreement with the Trial Examiner, and for the reason detailed in the Intermediate Report, we find that the Respondent discharged the striking inserters on August 23, 1952, thereby violating Section 8 (a) (1) of the Act.

#### THE REMEDY

The Trial Examiner, in section V of the Intermediate Report, recommended the back pay for the inserters be computed from the date of their discriminatory discharge on August 23, 1952, rather than from August 29, when they applied for reinstatement. Under ordinary circumstances, an employee who is discharged in violation of the Act is awarded back pay from the date of the discharge, and not from the date he applies for reinstatement. However, where, as in this case, employees are discriminatorily discharged while engaged in a strike, it is the Board's practice to award back pay from the date of the discharges' unconditional request for reinstatement, rather than from the date of discharge, as their loss of wage cannot conclusively be attributed to their discharge until the employees indicate their willingness to abandon the strike.<sup>3</sup> The Trial Examiner did not follow this practice in the instant case but awarded back pay from the date of discharge of the inserters on August 23 rather than from August 29, the date they sought reinstatement. In so doing, the Trial Examiner cited the absence of any evidence in the record that the inserters remained on strike after their discharge. However, it is clear that the inserters did not work for the Respondent during the period from August 23 to 29, and there is no evidence that they accepted other employment of any kind, or that they took themselves entirely out of the labor market. Nor is there any evidence that prior to August 29, 1952, they abandoned the demands for which they had struck on August 23. Under these circumstances, we find that the strike continued until August 29 and we will, in conformity with our usual practice, compute back pay from August 29 instead of August 23.

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<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 [Members Houston, Styles, and Peterson].

<sup>2</sup>The Respondent's request for oral argument before the Board is hereby denied, inasmuch as the record, including the exceptions and briefs, adequately presents the issues and the positions of the parties.

<sup>3</sup>Kallaher & Mee, Inc., 87 NLRB 410, 413.

## ORDER

Upon the entire record in this case, and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that Respondent, Cowles Publishing Company, Spokane, Washington, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interfering with, restraining, or coercing its employees in the exercise of the right to present grievances and to engage in concerted activities for mutual aid or protection.

(b) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form, join, or assist 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 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 the Board finds will effectuate the policies of the Act:

(a) Offer to the 16 employees named in Appendix A, attached to the Intermediate Report, save Orval Dean, immediate and full reinstatement to their former or substantially equivalent positions without prejudice to their seniority or other rights and privileges.

(b) Make whole the aforesaid 16 employees for any loss of pay they may have suffered by reason of Respondent's discrimination against them, in the manner set forth in the section entitled "The Remedy," in the Intermediate Report and the Decision and Order herein.

(c) Upon request, make available to the Board or its agents for examination or copying all payroll, social-security, and personnel records necessary to analyze the amounts of back pay due under the terms of this Order.

(d) Post at its plant at Spokane, Washington, copies of the notice attached to the Intermediate Report as Appendix A.<sup>4</sup> Copies of said notice, to be furnished by the Regional Director for the Nineteenth Region, shall, after being duly signed by Respondent's authorized representative, be posted immediately upon receipt thereof and maintained by it for sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that

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<sup>4</sup> This notice shall be amended by substituting for the words "The Recommendations of a Trial Examiner," the words "A Decision and Order." In the event that this Order is enforced by a decree of a United States Court of Appeals, the notice shall be further amended by substituting 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."

said notices are not altered, defaced, or covered by any other material.

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

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges that Respondent has refused to bargain collectively with the representatives of its employees.

## Intermediate Report and Recommended Order

### STATEMENT OF THE CASE

This proceeding, brought under Section 10 (b) of the National Labor Relations Act, 61 Stat. 136, is based upon charges duly filed by 16 individuals, whose names appear hereinafter in Appendix A, against Cowles Publishing Company, herein called Respondent. Pursuant to said charges, the General Counsel of the National Labor Relations Board issued a consolidated complaint on February 13, 1953, against Respondent alleging that it had engaged in unfair labor practices within the meaning of Section 8 (a) (1), (3), and (5) of the Act. Copies of the charges, complaint, and notice of hearing hereon were duly served upon Respondent.

Specifically, the complaint, as amended, alleged that Respondent had discharged the 16 complainants herein on or about August 23, 1952, and had thereafter denied them reinstatement because they had engaged in a strike and in concerted activities, and that Respondent, on and after August 23, had refused to bargain with an appropriate unit of its employees in the inserter classification. Respondent's answer denied the commission of any unfair labor practices; admitted that the group of employees in question had presented certain economic demands and had shortly thereafter ceased work; alleged that they were replaced by new employees prior to any request for reinstatement; and alleged that the inserters were part-time temporary employees.

Pursuant to notice, a hearing was held at Spokane, Washington, from March 24 through 26, 1953, before the undersigned Trial Examiner, Martin S. Bennett, duly designated by the Associate Chief Trial Examiner. All counsel were afforded the right to examine and cross-examine witnesses and to introduce evidence bearing on the issues. At the close of the General Counsel's case, Respondent moved to dismiss the complaint on the grounds of (1) lack of compliance by the charging parties with the provisions of Section 9 (f), (g), and (h) of the Act, and (2) a failure of proof as the substantive allegations of the complaint. The motion was denied with leave to renew at the conclusion of the hearing and it was duly renewed. Ruling was reserved and the motion is disposed of by the findings hereinafter made. The parties were afforded an opportunity to argue orally and to file briefs and/or proposed findings and conclusions. Oral argument was presented and briefs have been received from all parties.

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 RESPONDENT

Cowles Publishing Company is a Washington corporation having its principal place of business at Spokane, Washington, where it is engaged in the publication of a daily newspaper known as the Spokesman Review. In the course and conduct of its business, Respondent regularly utilizes national and international news services including that of the Associated Press. Respondent has, during the year preceding the instant hearing, paid the sum of approximately \$20,000 for news items received from national news services. Respondent also realizes an annual revenue in excess of \$50,000 from the sale of newspapers outside the State of Washington and from the publication of advertisements for clients located outside the State of Washington. Respondent admits and I find that it is engaged in commerce within the meaning of the Act.

## II. THE UNFAIR LABOR PRACTICES

## A. Introduction

The issues presented for decision herein are: (1) Did Respondent unlawfully discharge a group of its employees known as inserters as a result of their concerted activities, and (2) did Respondent unlawfully refuse to bargain with its employees in an appropriate unit? Initially, a brief description of the duties of these employees may be helpful.

Inserters are a group of employees whose duties consist of manually assembling and inserting various sections of the weekly Sunday newspaper as it comes from the pressroom to the mailing room where, with two exceptions not material herein, the mailers perform their duties. Also employed in the mailing room are the mailers who are represented by Mailers Union, Local 91, affiliated with International Typographical Union, A. F. of L. The inserters have never been represented, insofar as the record indicates, by a labor organization.

These inserters work on a piecework basis with remuneration based upon a fixed rate per thousand papers assembled. The rate varies with the size of the issue. Their hours of employment are irregular and they are permitted to select their own hours of work between Monday and Friday, provided that they turn out a designated quota of work. Apparently their duties consist, during the weekdays, of assembling those sections of the Sunday papers which are prepared in advance. Saturday is the crucial day of the workweek and the inserters are required to report for work at 6 p.m. During the evening, and until sometime between 2:30 and 4 a. m. Sunday morning, they then process four editions of the Sunday paper by manually assembling and inserting the newly printed sections of the paper.

At the time material herein, there were approximately 21 inserters regularly employed by Respondent. Although a smaller number was employed on weekdays, a larger group would report on Saturday. On Saturday night, August 23, 17 inserters were on duty, apparently an average number for the occasion. It may be noted that the mailing room had 2 shifts of mailers and that on Saturday night both shifts customarily worked. One shift started at 10 p.m. and the other shift started at an earlier hour not disclosed by the record, in any event, the earlier shift was on duty at 6 p. m.

Respondent has in effect raised the contention that inserters are not employees under the Act. It stresses that these workers were for the most part students in colleges and in a law school in the Spokane area and that their employment terminated with their schooling. This claim is partially borne out by the record, and I find that the inserters were initially students who either financed their education or supported themselves during their schooling with this employment which conveniently permitted them to select morning or afternoon work, as their school schedules dictated. There is other evidence, however, that Respondent did not enforce this policy, if it be such, of making the duration of employment commensurate with that of their schooling. In some instances, inserters continued in its employ after their schooling was concluded. Moreover, even if Respondent's purported policy were rigidly enforced, this contention would be of no avail. These inserters worked under supervision of the mail room foreman. The methods and manner of performance of their duties were prescribed and supervised by the latter. Deductions were made from their pay for social security. I find, under the foregoing circumstances, that they were not independent contractors.

The Board has held that part-time employees who worked but 1 or 2 days weekly and had an average tenure of 3 to 4 months were employees under the Act. Great Atlantic and Pacific Company, 99 NLRB 1500. See also Ninth Street Skookum Growers, 99 NLRB 944, and L. Antonsanti Inc., 100 NLRB 267. And, for an analogous situation involving copy boys and girls on a newspaper whose tenure averaged 6 months to 1 year, see A. S. Abell Co., 81 NLRB 87. See also Florsheim Boot Shop, 80 NLRB 1312. I find, therefore, that the inserters employed by Respondent are employees within the meaning of the Act. J. L. Hudson Co., 103 NLRB 1378.

## B. Sequence of events

The record indicates that for some months prior to August of 1952 dissatisfaction existed among Respondent's inserters concerning working conditions. This was predicated primarily upon their rate of pay, deemed by them to be inadequate on occasion, and also on locker room conditions; the dissatisfaction in the latter respect related to an inadequate number of lockers and to the fact that there was but one shower. With respect to their rate of pay, dissatisfaction would arise on occasions when Respondent would set a piecework rate which the men deemed to be inadequate for a particular issue that chanced to be larger than the norm. It

also appears that this rate of pay was not necessarily publicized before work commenced upon a particular issue. This dissatisfaction with wages was enhanced somewhat by the fact that in April of 1952, mailers in the mailing room had received and thereafter enjoyed a wage increase negotiated by their collective-bargaining representative. This contrast to their own situation, which the inserters deemed to be unsatisfactory, whether rightly or wrongly, served only to aggravate matters.

On a number of occasions during the summer of 1952, the inserters informally discussed their dissatisfaction with working conditions. Also considered was the means whereby these grievances could be brought to the attention of management. Matters ultimately came to a head on or about August 17. The Sunday edition on which the men worked on Saturday night, August 17, was an unusually heavy one and the rate of pay assigned to the edition was not received with favor. At the close of the shift, sentiment was expressed in favor of taking some definitive action the following week.

Thomas Howard, one of the inserters, then prepared a resolution for submission to management. It was agreed that the resolution would be presented on Saturday, August 23, and that the men would then decide what further action was to be taken. By August 23, the resolution was signed by all 21 of the inserters regularly employed by Respondent.<sup>1</sup> The signed resolution read as follows:

#### A RESOLUTION

WHEREAS IN THE COURSE OF THE TWENTY EIGHT MONTHS LAST PAST THE COST OF LIVING HAS INCREASED BY THE PROVERBIAL LEAP AND BOUND, AND WHEREAS THE UNDERSIGNED, EACH AN INSERTER EMPLOYED BY THE COWLES PUBLISHING COMPANY AT ITS SPOKANE PLANT, HAVE NOT RECEIVED AN INCREASE IN PAY COMMENSURATE (SIC) WITH THE RISING COST OF LIVING DURING SAID PERIOD OF TIME, AND WHEREAS IN OTHER CITIES AND AT OTHER NEWSPAPER PLANTS THE TYPE OF WORK PERFORMED BY THE UNDERSIGNED IS DONE BY ORGANIZED WORKERS AND AT A GREATER COST TO EMPLOYERS THAN IS SUFFERED BY THE COWLES PUBLISHING COMPANY AT ITS SPOKANE PLANT, AND WHEREAS THE UNDERSIGNED DO NOT ENJOY ANY OF THE PRIVILEGES OF THE ORGANIZED WORKER IN REGARD TO PAID VACATIONS, SICK BENEFITS, RETIREMENT PROGRAMS, PAID HOLIDAYS, ETCETERA, AND WHEREAS THE SAID COMPANY HAS GRANTED AT LEAST TWO SUBSTANTIAL PAY INCREASES TO THE ORGANIZED MAILERS DURING SAID PERIOD OF TIME, AND WHEREAS THE UNDERSIGNED PERFORM THE TYPE OF WORK WHICH IS ORDINARILY DONE BY ORGANIZED MAILERS AT OTHER PLANTS, AND WHEREAS THE WORK PERFORMED BY THE UNDERSIGNED IS OF A DIFFICULT AND STRENUOUS NATURE, AND WHEREAS THE COWLES PUBLISHING COMPANY HAS INCREASED THE COST OF ITS SUBSCRIPTION AND OTHER RATES DURING SAID PERIOD OF TIME, AND WHEREAS THE LOCKER FACILITIES MADE AVAILABLE TO THE UNDERSIGNED BY SAID COMPANY ARE NOT ADEQUATE:

BE IT THEREFORE RESOLVED THAT WE, THE UNDERSIGNED, DEMAND OF THE COWLES PUBLISHING COMPANY THAT THE FOLLOWING STEPS BE TAKEN IMMEDIATELY:

1. THAT AN INCREASE OF TWENTY PER CENT (20%) OVER AND ABOVE THE PRESENT RATE OF PAY BE GRANTED FOR ALL WORK DONE BY THE INSERTERS.
2. THAT AN INDIVIDUAL LOCKER BE PROVIDED FOR EACH INSERTER.
3. THAT THE STANDARD BY WHICH THE COMPANY DETERMINES THE AMOUNT OF PAY TO BE RECEIVED BY THE INSERTERS BE POSTED IN AN APPROPRIATE PLACE AND THAT THE COMPANY'S INTERPRETATION OF THAT STANDARD ALSO BE POSTED BEFORE WORK IS TO BE COMMENCED ON ANY PARTICULAR ISSUE.

BE IT FURTHER RESOLVED THAT WE, THE UNDERSIGNED, IN THE EVENT THAT THE ABOVE DEMANDS ARE NOT MET BY THE COWLES PUBLISHING COMPANY, WILL TAKE THE OBVIOUS AND ONLY COURSE LEFT TO US IN ORDER TO BRING ABOUT CONDITIONS WHICH WE FEEL ARE FAIR TO BOTH SAID COMPANY AND TO OURSELVES.

<sup>1</sup>There is testimony that a draft of the resolution was in existence prior to August 17. In any event, the resolution involved herein was drawn up in its final form on or about August 18 and, as will appear, was presented on August 23.

On August 23, the inserters reported for work at 6 p. m and met briefly in their locker room as planned. After several final signatures were affixed to the resolution, the men proceeded to consider various proposals as to their method of procedure. These ranged from a proposal that they strike immediately at 6:15 or 6:20, when the papers were due to start coming through for processing, to one that strike action be postponed for 1 or more weeks. They ultimately voted to present the resolution forthwith and to strike at 7 p. m. if their demands were not met. Howard happened to have the resolution in his possession and the men decided that he should present it to management. The men then assumed their duty stations as the first papers appeared on schedule.

It may be noted, at this point, that Night Foreman Miller of the mailing room was on vacation that week and that his place was temporarily filled by a mailer, James Munkers, who, in the absence of Miller, had been designated as acting foreman. No other representatives of management in the production department were on duty that night save Don Scott, assistant to Production Manager Edmonds. Respondent stipulated and I find, on the entire record, that Miller, Scott, and Munkers as well as Day Foreman Dana Crooks, Production Manager W. D. Edmonds, and Circulation Director Eldon Clark responsibly direct employees, have authority to hire and fire, and are supervisory employees.

As the papers started to come through, Howard, accompanied by inserter Phillip O'Neill, approached Munkers and handed him the resolution. Howard explained that it was signed by all the inserters and that Munkers would be remiss if he failed to bring it to the attention of the production manager promptly, inasmuch as the men had decided to go on strike at 7 p. m. if their demands were not met. Munkers did bring the petition to the attention of Assistant Production Manager Scott at 6:30 or 6:40. The latter immediately telephoned his superior, Edmonds, and advised him that the inserters intended to strike or walk off the job at 7 p. m. Edmonds contacted Circulation Director Clark and arrangements were made for Edmonds, Clark, and Miller to proceed forthwith to the plant. They did so and Edmonds, driven by Clark, arrived at 7:10 or 7:15, as Edmonds testified.

In the interim, critical action had taken place at the plant. The inserters, after presentation of the resolution by Howard, had proceeded about their regular duties. At 7 o'clock, however, they ceased work. There is some conflict as to whether papers were on hand for processing at that moment. Although it appears that some inserters still had papers left to be processed from the previous run, this conflict is of no significance, for it is clear, and I find, that papers from the following run were either starting to come through or were about to do so. I further find that all the inserters on duty ceased work in concert at 7 p. m., as they had threatened, in support of their resolution and its economic demands.

At this point, Acting Foreman Munkers appeared on the immediate scene and directed them to either work on the papers or to leave the mailing room; it is deemed immaterial that Munkers may also have used an expletive on the occasion, as some testimony indicated, contrary to that of Munkers. The men adopted the latter alternative and forthwith left the mail room and walked to their locker room. Matters were in this state when top management arrived on the scene shortly after 7 p. m. According to the credited testimony of Howard, Acting Foreman Munkers suggested to the inserters at 7:10 or 7:15 p. m., as they congregated outside their locker room, that they wait about the plant inasmuch as Production Manager Edmonds would shortly be ready to see them. At approximately 7:35, Munkers again approached the group of inserters and stated that "if any of you men want your jobs back, go upstairs to talk to Edmonds and do it one at a time."<sup>2</sup>

The inserters then held a discussion as to their next step and voted in favor of presenting themselves at Edmonds' office in a group and not individually. They did so and a group consisting of the 16 complainants herein, plus 1 other inserter who did not file a charge, proceeded to the office of Edmonds who, it may be noted, customarily handles collective bargaining for Respondent with its organized employees. The men were asked to wait outside for a few minutes by Edmonds' assistant, Scott, and were then invited in; it was then 7:50 p. m. Present for management were Edmonds, Scott, Crooks, and Miller. The only speaker was Edmonds who, with the resolution before him, proceeded to say, according to the testimony of Howard, "that what we had done was unprecedented . . . You did not give us any time to con-

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<sup>2</sup>Munkers testified that no one had instructed him to send the men to Edmonds' office, which is located on an upper floor of the building, and that he had no knowledge as to how the inserters later appeared there. Not only did Munkers equivocate in parts of his testimony, but Howard's testimony is supported by that of O'Neill, Elkins, Dean, Ellis, and Himmelsbach in varying degrees. I do not credit Munkers' testimony herein.

sider the demands . . . We can not operate our business in this manner . . . We can not do business this way . . . You men have seen fit to take this kind of action and as a result we have no other alternative. Consequently you gentlemen are all through." Edmonds, who had been seated while he spoke, then stood up and the meeting, which lasted but several minutes, was over. None of the inserters spoke and they, as well as the management representatives, forthwith left the room.<sup>3</sup>

Respondent made great efforts to get the newspaper out that evening and successfully did so. According to Munkers, his superior, apparently Scott, instructed him several minutes before 7 p. m. to obtain the services of persons to perform this inserting work. Munkers attempted to contact various persons who did inserter work in emergencies. The second shift of mailers, due to start work at 10 p. m., was brought in at 8. Other employees of the paper were impressed into service. Employees of an outside printing concern were brought in, in an undisclosed number, that evening.

The record demonstrates, however, that permanent replacements were not made for at least several days. According to the testimony of Herbert Pitts, an assistant to Edmonds, which I credit in substance, Respondent obtained the services of 4 to 6 new inserters on the following Monday, August 25. Respondent's records show that 8 inserters were on duty that day, 1 of whom was not a new employee. The record does not disclose how many of the remainder, if not all, were permanent replacements. All, however, did work on the following Saturday, August 26. It will be recalled that the services of the inserters were urgently required on Saturday evenings and that there was considerable leeway between Monday and Friday as to the hours and extent of their work. I find therefore, under the foregoing circumstances, that as of 7:50 p. m. on Saturday evening, August 23, when the complainants herein were discharged by Respondent, they had not been permanently replaced. It appears, however, that they had been replaced by August 29, as Respondent contends.

The only other contact between the group of inserters and Respondent took place on August 29 when Howard, O'Neill, and Riddle met with Edmonds at a prearranged meeting. Also present were Scott and Pitt. Howard was recognized by Edmonds as spokesman for the group of inserters and he unconditionally requested reinstatement for the entire group of inserters under the same conditions that existed prior to August 23. Edmonds replied that the inserters had quit their jobs and had subsequently been replaced. Although Howard's testimony was silent on the topic, Riddle testified that O'Neill said something about "bargaining." O'Neill gave some unclear testimony as to whether the subject of bargaining was mentioned. According to Edmonds, 1 of the 3 inserters asked whether Respondent was refusing to bargain collectively and he, Edmonds, replied that if legal matters were considered, he wished to have his attorney present. The meeting then ended.

## C. Conclusions

### 1. The discharges

Although Edmonds testified that he did not know how the group of inserters happened to come to his office on the night of August 23, the germane fact is that this group of employees presented a resolution wherein they sought betterment of their working conditions. They then struck at 7 o'clock in support of their resolution and, at 7:50 p. m., appeared at Edmonds' office whereupon he took the action described above.

Nor does the fact that this concerted activity by the men came without notice to Respondent, as it contends and as I find, and at a time well calculated to be most effective, alter the legal status of the participants therein. Moss Planing Mill Co., 102 NLRB 404. Conceivably, another group similarly situated might well have proceeded less hastily and with more notice to Respondent. But it is not my province to pass upon their wisdom but solely to decide, independently of other considerations, whether the inserters were unlawfully discharged in derogation of their rights under the Act.

<sup>3</sup>Howard's testimony is supported by that of O'Neill, Riddle, Ellis, Himmelsbach, and Dean. Night Foreman Miller and Circulation Director Clark substantially agreed with Howard's version, although in less detail, save that their testimony was silent as to the final words of dismissal. Edmonds was called as a witness by the General Counsel but was not questioned concerning the content of his remarks. He was not thereafter called as a witness by Respondent. Under all the foregoing circumstances, Howard's corroborated testimony has been credited.

Initially, Respondent has raised the contention that the complaint herein issued improperly in that the inserters constituted themselves a labor organization within the meaning of Section 2 (5) of the Act, by holding meetings, preparing and presenting a resolution to management, and then striking in support of their economic demands. Respondent further claims, on this posture, that this purported labor organization has not complied with the provisions of Section 9 (f), (g), and (h) of the Act. It cites in support of this claim the decision in N. L. R. B. v. Alside, Inc., 192 F. 2d 678 (C. A. 6).

In that decision, the court held that the Board had no jurisdiction to issue a complaint against the employer pursuant to charges filed by one individual who was president and chief protagonist of a labor organization. The charge was not limited to his own discharge but related to those of other discharged employees. The court held, under those circumstances, that the charging party was acting as a front "for a labor organization which had not complied with the non-Communist affidavit provision of Section 9 (h)." The labor organization there involved, it is significant to note, was United Steel Workers of America, CIO, a labor organization in the customary concept of the term. That the present case is distinguishable from the Alside decision was noted by that court which stated that "employees acting individually may assert their rights before the Board without the restrictions of Section 9 (h)." And the court went on to cite the cases in two circuits which upheld that view, viz, N. L. R. B. v. Augusta Chemical Co., 187 F. 2d 63 (C. A. 5), and N. L. R. B. v. Clausen, 188 F. 2d 439 (C. A. 3), cert. den. 342 U. S. 868. It is interesting to note that in the Augusta Chemical decision, a noncomplying labor organization had been in the background and had assisted the individual charging parties in making out their charges. Nevertheless, the court stated, "It may not be said that individual employees have no right to act individually in asserting and vindicating their rights."

It is clear and I find that the present case has no similarity to the situation where the objectives of the Act are met by keeping a noncomplying labor organization, in the customary concept of the term, from obtaining the benefits of a certification and a bargaining order which, in its very essence, accrue directly to a labor organization. See Campbell Soup Co., 76 NLRB 950. I find, therefore, that there is no issue herein for fronting for a labor organization and that Section 9 (h), which imposes obligations on labor organizations and not individuals, has no application herein.

As found, Respondent's employees engaged in a strike on August 23 in support of their economic demands and were discharged within the hour. That this was in fact a discharge, and not a tactical maneuver, is demonstrated by the fact that Respondent thereafter took steps to procure permanent replacements. It is true that the strike took place without any advance notice to Respondent, prior to presentation of the grievances, that the employees were contemplating strike action. This fact does not, however, affect their rights under the Act. See Harnischfeger Corp., 103 NLRB 47.

Contrary to Respondent's claim, this was not a permanent quitting of employment. True, a strike or concerted activity of this nature is in its very essence a withholding of employment and is therefore a form of quitting of employment, but it is also conduct which is expressly protected by the Act N. L. R. B. v. Augusta Chemical Co., supra, and N. L. R. B. v. Kennametal, Inc., 182 F. 2d 817 (C. A. 3). Section 7 of the Act guarantees employees the right to engage in concerted activities for their mutual aid or protection. This right embraces the right to strike in support of their demands. U. A. W. v. O'Brien, 339 U. S. 454, and N. L. R. B. v. International Rice Milling Co., 341 U. S. 665. Furthermore, employees have the right to engage in concerted activities for their mutual aid or protection, even though no union activity be involved. N. L. R. B. v. Phoenix Mutual Insurance Co., 167 F. 2d 983 (C. A. 7), cert. den. 335 U. S. 845; and N. L. R. B. v. Kennametal Inc., supra.

While an employer, confronted with an economic strike, is free to hire permanent replacements, a discharge of the strikers prior to the time their places have been filled by permanent replacements has been uniformly held to constitute an unfair labor practice. N. L. R. B. v. Mackay Radio and Telegraph Co., 304 U. S. 333, N. L. R. B. v. Globe Wireless, Ltd., 193 F. 2d 748 (C. A. 9), N. L. R. B. v. Kennametal, Inc., supra. In the present case, the 16 complainants were discharged flatly and almost immediately upon their cessation of work on August 23, in fact within the hour, and prior to the hiring of permanent replacements. As stated by the court in the Globe Wireless decision, "The violation thus was a fait accompli." All of the foregoing decisions recognize, and I find, that the discharges were therefore violative of Section 8 (a) (1) of the Act and that Respondent thereby interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed by Section 7 of the Act, more specifically the right to engage in a concerted activity for mutual aid or protection.

Most courts also agree, in a context similar to the present one, that Respondent's conduct would also be violative of Section 8 (a) (3) of the Act. See, e. g., Tovrea Packing Co., 12 NLRB 1063, enf. 111 F 2d 626 (C. A. 9), cert. den. 311 U. S. 668, and N. L. R. B. v. Kennametal Inc., supra. I deem it unnecessary to treat with that problem in this instance for, in any event, the customary remedy adopted by the Board, when conduct of this nature violates Section 8 (a) (1), is identical with that applied to remedy a violation of Section 8 (a) (3). N. L. R. B. v. Smith Victory Corp., 190 F. 2d 56 (C. A. 7), enf. 90 NLRB 2089, and Kitty Clover, Inc., 103 NLRB 1665.

## 2. The alleged refusal to bargain

Aside from the issues of appropriateness of unit and majority representation therein, I am of the belief that the allegation of the complaint claiming a refusal to bargain must be dismissed on more basic grounds. Initially, it must be noted that the theory of the General Counsel herein is that Respondent refused to bargain with his inserter employees on August 23 and again on August 29, 1952. The General Counsel stresses, however, that the inserters, in meeting with Production Manager Edmonds, as set forth above, appeared each for himself as a principal. He argues that what each may do through an agent each may do himself and that a principal can be in no lower standing than his agent.

But this issue may not be disposed of by an attempted application of the laws of agency. It is precisely on the basis of this contention by the General Counsel that I believe the issue must be resolved adversely to him, inasmuch as he concedes that the inserter employees did not select a collective-bargaining representative. Apparently he desires a finding that this was a sporadic grouping for a limited purpose which did not constitute a labor organization.

However, the language of the statute makes it an unfair labor practice only "to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a)." Section 9 (a) provides further that:

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment. . (Emphasis added.)

But the General Counsel has conceded, as I find, that the employees herein did not select a collective-bargaining representative, and the statute requires only that an employer bargain collectively with the representatives of his employees, not with a group of employees acting as principals. While the bargaining representative need not be a labor organization, it still must be a designated representative. See Ford Motor Co. v. Huffman, 345 U. S. 330.

It would appear that the conduct of the inserters, rather than constituting an attempt to bargain collectively within the meaning of Section 8 (a) (5) of the Act, falls within the language of the proviso to Section 9 (a) of the Act, which states

Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment.

I conclude, therefore, that Section 9 (a) spells out the requisites to collective bargaining and that the proviso thereof then proceeds to protect the right of employees to present grievances independently of a bargaining representative. For interference with that right, Section 8 (a) (1) provides a remedy, as heretofore found, and not Section 8 (a) (5). The facts herein do not disclose an attempt to engage in collective bargaining, as defined by the Act, but solely one to present grievances. Moreover, the meeting of August 29, as found, related primarily to an attempt to persuade Respondent to reinstate the group. And when mention was casually made of collective bargaining, Edmonds merely asked to have his counsel

present, after which the matter was dropped. In view of the foregoing considerations, I shall recommend that the complaint be dismissed insofar as it alleges a refusal to bargain.<sup>4</sup>

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

The activities of Respondent set forth in section II, above, occurring in connection with its operations 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 thereof.

### IV. THE REMEDY

Having found that 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

Having found that Respondent has discriminated with respect to the hire and tenure of employment of the 16 employees named in Appendix A attached hereto, I shall recommend that Respondent offer to each immediate and full reinstatement to his former or substantially equivalent position, without prejudice to seniority or other rights and privileges. See The Chase National Bank of the City of New York, San Juan, Puerto Rico, Branch, 65 NLRB 827.<sup>5</sup>

It will further be recommended that Respondent make them whole for any loss of pay suffered by reason of the discrimination against them. Said loss of pay, based upon earnings which each would normally have earned from the date of the discrimination against them to the date of the offer of reinstatement, less net earnings, shall be computed on a quarterly basis in the manner established by the Board in F. W. Woolworth Company, 90 NLRB 289; N. L. R. B. v. Seven-Up Bottling Co., 73 Sup. Ct. 287. In the case of Dean, back pay shall be tolled as of the date he left the area. The record does not indicate that the discharged employees remained on strike subsequent to their discharge although they did seek reinstatement on August 29 and, accordingly, it is not recommended that back pay be tolled for this period.

It is also recommended, in order to satisfy the remedial objectives of the Act, that Respondent be ordered to cease and desist from in any other manner infringing upon its employees' rights guaranteed in Section 7 of the Act.

It will further be recommended that the allegations of the complaint with respect to the alleged refusal to bargain be dismissed

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

### CONCLUSIONS OF LAW

1. By interfering with, restraining, and coercing the 16 employees named hereinafter in Appendix A in the exercise of the rights guaranteed by Section 7 of the Act, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (1) of the Act.

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

3. Respondent has not refused to bargain collectively within the meaning of Section 8 (a) (5) of the Act.

[Recommendations omitted from publication.]

### APPENDIX A

#### 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

<sup>4</sup>It becomes unnecessary, therefore, to treat with the issue of whether the complaint properly contained an allegation of refusal to bargain, despite the noncompliance with Section 9 (f), (g), and (h) of the Act.

<sup>5</sup>In the case of Orval Dean, it appears that he left the area on September 28 or 29 and does not desire reinstatement; accordingly, reinstatement is not recommended in his case.

WE WILL NOT interfere with, restrain, or coerce our employees in the exercise of the right to present grievances and to engage in concerted activities for mutual aid or protection.

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

WE WILL offer the employees named below immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed and make them whole for any loss of pay suffered as a result of the discrimination against them.

Thomas P. Howard  
Frank Castagna  
C. Edwin Elkins  
George Grader  
James S. Hogan  
Joseph Pedersen  
Orvin Tjostolvson  
George Peterson

Ernest P. Cagle  
James Dreis  
Clayton H. Ellis  
Harold J. Himmelsbach  
Phillip M. O'Neill  
W. Stanley Riddle, Jr.  
George Weber

WE WILL make whole Orval Dean for any loss of pay suffered as a result of the discrimination against him.

All our employees are free to become, remain, or refrain from becoming or remaining members of any labor organization.

COWLES PUBLISHING COMPANY,  
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.

LUDWIG BAUMANN COMPANY *and* LOCAL 804, DELIVERY AND WAREHOUSE EMPLOYEES UNION, AFL. Case No. 2-CA-2856. August 20, 1953

**DECISION AND ORDER**

On May 25, 1953, Trial Examiner Sidney Lindner issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices within the meaning of Section 8 (a) (1) and (5) 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 the charging Union filed a brief in reply thereto and in support of the Intermediate Report.