For the foregoing reasons, I will recommend that the complaint be dismissed in its entirety.

Respondent, in an able brief filed with the Examiner, raised several additional arguments in support of its motion to dismiss. However, in view of the conclusions set forth above, I deem it unnecessary to pass upon any further aspects of the case.

On the basis of the foregoing and upon the entire record herein, I have reached the following:

CONCLUSIONS OF LAW

1. The Respondent, Kraft Foods Company, is engaged in commerce within the meaning of Section 2 (6) and (7) of the Act.
2. The Union is a labor organization within the meaning of the Act.
3. The Respondent has not engaged in unfair labor practices as alleged in the complaint within the meaning of Section 8 (a) (3) and (1) of the Act.

[Recommendations omitted from publication.]

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prior to January 23 to induce his Union to change the practice in question. Moreover, and most importantly, there was no evidence of any hostility on the part of the Respondent, as there was in the Nu-car case, toward any efforts of the employees to persuade the Union to abandon its agreement with the Respondent.

MONTGOMERY WARD & COMPANY *and* LOCAL 1627, RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL. Case No. 18-CA-559. May 28, 1954

DECISION AND ORDER

On January 6, 1954, Trial Examiner C. W. Whittemore issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices, and recommending that it cease and desist therefrom and take certain affirmative action as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the Respondent filed exceptions to the Intermediate Report and a supporting brief. The Respondent also requested oral argument. This request is denied as the record and brief, in our opinion, adequately present the issues and the positions of the parties.

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

On September 16, 1953, the Union began picketing the Respondent's store for the purpose of obtaining certain economic benefits in a collective-bargaining contract then under negotiation. All employees continued working.

On September 17, a Railway Express driver, Dupey, came to the store to deliver a number of packages. Ferrell, the Re-

spondent's receiving clerk, said to Dupey, "You don't want to cross no picket line," and Dupey left with the packages undelivered. That afternoon an agent of Railway Express reported this occurrence to store officials, who relayed it to the Respondent's vice president and manager of labor relations, Barr, who ordered that Ferrell be discharged, and he was.

On the same day, a man named Morrow, who was visiting the store to see a friend, a department head named McRae, went to the furniture department, talked to salesman Menard, and said he was interested in a piece of linoleum, although he was not buying at that time. Menard said that Morrow would need a remnant, and that there was none in stock. As Morrow was leaving, Menard said, "Why don't you come back after this thing is over and I'll fix you up with a remnant?" Morrow repeated this conversation to McRae, saying to McRae, "I guess Paul [Menard] wasn't too anxious to wait on me." McRae reported this incident to Assistant Store Manager Somes, and Menard was discharged after a report to Barr, and on Barr's orders.

The Respondent asserts that it discharged Ferrell because he had discouraged the delivery of packages which it was his duty to receive, and Menard because, by suggesting to a prospective customer that he come back after the picketing, he had violated his obligation as a salesman. The Trial Examiner rejected this explanation. He found that the Respondent "seized upon these incidents as pretexts, marked them up far beyond their real value, labelled them[6] 'disloyal,' and hoped that the Board would agree that the discharges were for 'cause.'" The actual motive, the Trial Examiner is convinced, was discriminatory and for the purpose of discouraging the Union's protected activity of picketing.

This pretext conclusion of the Trial Examiner is not, in our opinion, sustained by the evidence present in the record. There is absolutely no affirmative evidence to support an inference of discriminatory motivation. There is no evidence of unfair labor practices by the Respondent apart from the alleged unlawful discharges, and no evidence of hostility by the Respondent to the Union or the two discharged employees. The case found by the Trial Examiner therefore rests entirely on the discharges themselves and the Respondent's explanation for those discharges. The Trial Examiner found that Ferrell and Menard were guilty of the conduct with which they were charged by the Respondent. These offenses were serious and not trivial. The Respondent paid them to exercise their best efforts on its behalf: in the case of Menard to make and encourage sales; in Ferrell's case to accept deliveries. Both men failed in their duty to the Respondent: Menard by indicating a preference for not making an immediate sale, and Ferrell by successfully discouraging deliveries to the store. Both men, although continuing to work, were thereby cooperating with the outside pickets in achieving the latter's objective. "An employee,"

however, "cannot work and strike at the same time. He cannot continue his employment and openly or secretly refuse to do his work. He cannot collect wages for his employment, and, at the same time, engage in activities to injure or destroy his employer's business."[1] The fact that an employer discharges individuals for engaging in such unprotected activity certainly raises no inference of a discriminatory motive.

Accordingly, we find that the evidence fails to establish that the discharge of Menard and Ferrell violated Section 8 (a) (3) of the Act. We shall therefore dismiss the complaint.

[The Board dismissed the complaint.]

Member Murdock took no part in the consideration of the above Decision and Order.

[1] The Hoover Company v. N. L. R. B., 191 F. 2d 380, 390 (C. A. 6).

Intermediate Report

STATEMENT OF THE CASE

Charges having been duly filed and served, a complaint and notice of hearing thereon having been issued and served by the General Counsel of the National Labor Relations Board, and an answer having been filed by the above-named Respondent, a hearing involving allegations of unfair labor practices in violation of Section 8 (a) (1) and (3) of the National Labor Relations Act, as amended, 61 Stat. 136, hereincalled the Act, was held in Escanaba, Michigan, on January 6, 1954, before the undersigned Trial Examiner.

In substance the complaint alleges and the answer denies that the Respondent: (1) On September 18, 1953, discriminatorily discharged employees Edward J. Ferrell and Paul A. Menard because they engaged in concerted activities with other employees and to discourage membership and activity in the charging Union; and (2) thereby interfered with, restrained, and coerced employees in the exercise of rights guaranteed by the Act.

At the hearing all parties were represented, were afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence pertinent to the issues, to argue orally upon the record, and to file briefs. Counsel argued briefly but waived the filing of briefs. The Respondent's motion to dismiss the complaint, upon which ruling was reserved at the conclusion of the hearing, is disposed of by the following conclusions and recommendations.

Upon the entire record in the case, and from his observation of the witnesses, the Trial Examiner makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

Montgomery Ward & Company is an Illinois corporation, having its principal office and place of business in Chicago, Illinois. It is engaged in the sale and distribution of merchandise at retail and maintains mail-order houses, warehouses, and retail stores in various States of the United States, including a retail store at Escanaba, Michigan, with which these proceedings are concerned.

Its annual purchases for the Escanaba store are valued at more than $750,000, about 95 percent of which are shipped to said store from points outside the State of Michigan. The annual sales at the said store are valued at more than $750,000, of which 6 percent are shipped to points outside the State of Michigan.

The Respondent concedes that it is engaged in commerce within the meaning of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Local 1627, Retail Clerks International Association, AFL, is a labor organization admitting to membership employees of the Respondent at its Escanaba store.

III. THE UNFAIR LABOR PRACTICES

The setting of this controversy may be quickly described. On September 16, 1953, after prolonged but unsuccessful efforts to obtain a satisfactory contract renewal, the Union undertook a somewhat novel course of action designed to obtain its demands. Although its employee-members continued at work, the Union placed pickets before the entrances to the store, bearing placards urging the public not to patronize it. At the same time the Union distributed handbills which, in substance, asked the public to "Please Stay on the Outside and Help our People on the Inside" to obtain a satisfactory contract. (The picketing was done, at least during the period before the discharges here at issue, by one former employee and nonemployee union officials).

Two days after the pickets appeared two employees--Ferrell and Menard--were summarily discharged. There is no dispute that at the time of the discharges the Respondent knew Ferrel to be, and Menard to have been, active union leaders, and that it also knew of the picketing activities being conducted by the Union. Ferrell was on the current negotiating committee, and Menard had previously been chairman of the same committee.

The motive for discharging these two employees is the major issue. The specific incidents leading to the dismissal of each are as follows:

As to Ferrell: Ferrell was the store's receiving clerk. When express, freight, and parcel post deliveries were brought to the store, it was his duty to receive, check, and see that they were properly disposed of. There is no credible evidence that he failed to perform all such activities after the pickets appeared on September 16. On September 17, however, a local driver for the Railway Express Company, Arthur Dupey, came with a number of packages to the delivery elevator at the rear of the store and rang the bell. Ferrell came down, saw him in the delivery truck and said: "You don't want to cross the picket line, do you? " Dupey replied, "No, I don't want to cross no picket line," and promptly drove off without leaving the packages. [1]

As to Menard: Menard was head of the store's furniture department.[2] Also on September 17 Donald Morrow, an advertising solicitor for a local newspaper, visited the store according to his custom to pick up his friend, Lawrence McRae, another department head, to go out for coffee. McRae was busy. While waiting, Morrow wandered into the furture department--according to his own testimony not as a customer since he had no intention of buying anything. While there, talking with Menard, he noticed a roll of linoleum and remarked that he was building an addition to his house and eventually would need a piece of such material. They discussed prices and the size he would need. Menard said he would need a remnant, and that there were no remnants in the store at the time. Their conversation shifted to other subjects. As Morrow left to seek McRae, Menard said "Why don't you come back after this thing is over and I'll fix you up with a remnant? " [3]

Both of the foregoing incidents were reported the same day to the assistant store manager, Gilmore Somes--the Ferrell matter coming to his attention from Ward Kortan, agent for the Railway Express (who in turn had received his information from Dupey) and the Menard occurrence coming to his attention from McRae (who had been told by Morrow). Somes, in his turn, telephoned to the store manager, Gordon Jenson, who at that time was in another city, and reported what had been reported to him.

Jenson returned to the Escanaba store the next day, September 18. He went to the express office, where Dupey told him what had happened, in language quoted above.[4] Upon the basis of

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[1] The quotations are from and the findings based upon the credible testimony of Dupey, a witness for the Respondent.

[2] No claim is made by the Respondent that he was a supervisor within the meaning of the Act.

[3] The quotations are from the credible testimony of Morrow, a witness for the Respondent.

[4] The Trial Examiner does not accept, as credible, Jenson's testimony that Dupey "stated that he (Ferrell) refused" to accept the delivery. It is significant that Barr, an official of the Company and also an attorney, who testified after both Jenson and Dupey, did not claim that the report had reached him by the Jenson-Barnhill route that Ferrell had refused to accept the delivery.

reports received by him, and without questioning either Ferrell or Menard, Jenson called Attorney Barnhill, at the Chicago office, reported what had been reported to him, and recommended the discharge of both employees. Barnhill, in his turn, reported to John A. Barr, vice president of the Respondent, manager of labor relations, and also counsel of record. Descending these various steps of command, Barr told Barnhill, and Barnhill told Jenson that he should go ahead and dismiss Ferrell and Menard. Jenson promptly fired them. The Respondent continues to refuse to reinstate either of them.

In substance, General Counsel contends that the Respondent, resenting the picketing pressure (which shortly thereafter apparently caused the store to close at least temporarily), retaliated by discriminatorily discharging two known union leaders and seized upon the above-described incidents as mere pretexts.

On the other hand Barr claimed that he approved the dismissals because both employees, in effect, violated their obligation of "faithfulness" to their employer while on the job in the line of duty. Specifically, he claimed that Ferrell had "discouraged the delivery of packages," and that Menard was guilty of "a violation of his duty of aggressive salesmanship."

The preponderance of credible evidence--adduced by the Respondent itself, and the reasonable inferences which necessarily flow from such evidence, support the contentions of General Counsel. Of particular significance, in the opinion of the Trial Examiner, is the fact that in neither case did the Respondent, by either its store manager or its top official in the matter of labor relations, make any effort to confront the employee with any charge of any sort. In particular does the case of Menard fail even to approach a failure to be "aggressive." Morrow, the Respondent's own witness, stated that he was not a customer, that he had no intention of buying. And the Respondent's treatment of this case cannot be ignored in considering that of Ferrell. Ferrell refused no shipments, on the contrary the evidence is clear that he received all shipments delivered after September 16 except that which Dupey voluntarily declined to leave.

Further doubt upon the sincerity of Barr's claim is cast by his incredible statement that it "was not an unusual practice" to discharge employees without giving them an opportunity to give their "version of an alleged act." It may be considered almost common knowledge that in the retail field complaints from customers against employees are of daily occurrence. In an establishment that size of Montgomery Ward & Company, if discharges automatically followed complaints, the turnover would resemble that of the Grand Central Station in New York City. And in this case no complaint was brought by any customer.

The Trial Examiner is convinced, and concludes, that the Respondent seized upon these incidents as pretexts, marked them up far beyond their real value, labelled them "disloyal," and hoped that the Board would agree that the discharges were for "cause." The actual motive, the Trial Examiner is convinced, was discriminatory and for the purpose of discouraging the Union's protected activity of picketing. As Barr said: "The Escanaba store at that time was operating under the handicap of a picket line which had been established a few days before for the purpose of discouraging customers from making purchases at the Store. . . ." An by thus retaliating against two of the Union's most active negotiators, past and present, the Respondent interfered with, restrained, and coerced its employees in the exercise of rights guaranteed by the Act.

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

It has been found that the Respondent has engaged in and is engaging in unfair labor practices. It will be recommended that it cease and desist therefrom and take certain affirmative action in order to effectuate the policies of the Act.

It has been found that the Respondent has discriminated against two individuals in regard to their hire and tenure of employment. It will therefore be recommended that the Respondent offer to Edward J. Ferrell and Paul A. Menard (upon resumption of the store operations) immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority and other rights and privileges, and make them whole for any loss

of pay they may have suffered by reason of the discrimination against them, by payment to each of them of a sum of money equal to that which he would have normally earned less net earnings,[5] which sum shall be computed on a quarterly basis during the period from the discriminatory discharge to the date of proper offer of reinstatement, in accordance with Board policy set out in F. W. Woolworth Company, 90 NLRB 289. It will also be recommended that the Respondent make available to the Board, upon request, payroll and other records to facilitate the checking of the amount of back pay due.

In the Trial Examiner's opinion, the commission of unfair labor practices generally is reasonably to be anticipated from the Respondent's unlawful conduct as found above. It will therefore be recommended that the Respondent cease and desist not only from the unfair labor practices herein found, but also from in any other manner infringing upon the rights of the employees guaranteed in the Act.

Upon the basis of the above findings of fact and upon the entire record in the case, the Trial Examiner makes the following:

CONCLUSIONS OF LAW

1. Local 1627, Retail Clerks International Association, AFL, is a labor organization within the meaning of Section 2 (5) of the Act.
2. By discriminating in regard to the hire and tenure of employment of Edward J. Ferrell and Paul A. Menard, 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.
3. By interfering with, restraining, and coercing its employees in the exercise of rights guaranteed by 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.
4. The aforesaid unfair labor practices are unfair labor practices within the meaning of Section 2 (6) and (7) of the Act.

[Recommendations omitted from publication.]

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 as amended, we hereby notify our employees that:

WE WILL NOT discourage membership in Local 1627, Retail Clerks International Association, AFL, or in any other labor organization of our employees, by discriminatorily discharging and refusing to reinstate any our our employees, or in any other manner discriminating in regard to their hire and tenure of employment or any term or condition of employment.

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 labor organizations, to join or assist the above-named labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all 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 National Labor Relations Act.

WE WILL offer to Edward J. Ferrell and Paul A. Menard immediate and full reinstatement to their former or substantially equivalent positions without prejudice to their seniority and other rights and privileges, and make them whole for any loss of pay suffered as a result of the discrimination against them.

[5] Crossett Lumber Company, 8 NLRB 440.

All our employees are free to become or remain members of the above-named Union or any other labor organization. We will not discriminate in regard to their hire or tenure of employment or any term or condition of employment because of their membership in or activity on behalf of any such labor organization.

MONTGOMERY WARD & 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.

MACK MANUFACTURING COMPANY *and* AMALGAMATED PLANT GUARDS LOCAL 506, UNITED PLANT GUARD WORKERS OF AMERICA, Petitioner. Case No. 4-RC-2258. May 28, 1954

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9 (c) of the National Labor Relations Act, a hearing was held before William Naimark, hearing officer. The hearing officer's rulings made at the hearing are free from prejudicial error are are hereby affirmed.

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

1. The Employer is engaged in commerce within the meaning of the Act.

2. The Petitioner seeks to be certified as representative of the plant guards employed at the Employer's Allentown, Pennsylvania, plant. The Employer contends that the Petitioner is not eligible to represent the Employer's guards, because it is indirectly affiliated with a nonguard union, contrary to the provisions of Section 9 (b) (3) of the Act, as amended.[1] The Employer asserts that the filing of the instant petition by the Petitioner has not altered the indirect affiliation recently found by the Board to have existed between the Petitioner's coaffiliate, Local 504, and Local 677, UAW-CIO,[2] a nonguard union representing the Employer's production and maintenance employees, as the Petitioner has succeeded to the benefits of the guard organizational work done by Local 677. The Employer urges that the Board should not certify either the Petitioner's international or any of its locals until (a) the international prevails upon Local 677 to post a notice to the employees stating that it no longer is interested in organizing the Employer's guards,

[1] Section 9 (b) (3) provides, inter alia, that " . . . no labor organization shall be certified as the representative of . . . guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards." (Emphasis supplied.)

[2] 107 NLRB 209.