Loss of pay shall be determined by deducting from a sum equal to that which these employees would normally have earned for each quarter or portion thereof, their net earnings, if any, in other employment during that period. Earnings in one particular quarter shall have no effect upon the back-pay liability for any other quarter. The quarterly periods described herein shall begin with the first day of January, April, July, and October.[7] It is recommended further that Respondent make available to the Board upon request payroll and other records, in order to facilitate the checking of the amount of back pay due.[8]

Because of the Respondent's unlawful conduct and its underlying purpose and tendency, I find that the unfair labor practices found are persuasively related to other unfair labor practices proscribed and that danger of their commission in the future is to be anticipated from the course of the Respondent's conduct in the past.[9] The preventative purpose of the Act will be thwarted unless the order is coextensive with the threat. In order, therefore, to make effective the interdependent guarantees of Section 7, to prevent a recurrence of unfair labor practices, and thereby to minimize industrial strife which burdens and obstructs commerce, and thus effectuates the policies of the Act, I will recommend that Respondent cease and desist from in any manner infringing upon the rights guaranteed in Section 7 of the Act.

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. Clay M. Bishop and Robert E. White are partners doing business at Hyden, Kentucky, as New Hyden Coal Company. This partnership is engaged in commerce within the meaning of Section 2 (6) and (7) of the Act.
2. United Mine Workers of America is a labor organization within the meaning of Section 2 (5) of the Act.
3. By discriminating in regard to the hire and tenure of employment of Joe Baker, Carlos Stollings, George Huff, Orville Huff, and William W. Taylor, thereby discouraging membership in United Mine Workers of America, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (1) and (3) of the Act.
4. By interrogating employees as to when they thought the Union would come in, by asking employees if they belonged to the Union, if they had attended a certain union meeting, if they had any information concerning a strike, if they were going to strike, if they had voted to strike, and by polling its employees as to who would work the day a strike was to begin, Respondent interfered with, restrained, and coerced its employees in the exercise of rights guaranteed in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (1) of the Act.
5. The aforesaid labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

[Recommendations omitted from publication.]

[7] F. W. Woolworth Company, 90 NLRB 289.
[8] F. W. Woolworth Company, supra.
[9] N. L. R. B. v. Express Publishing Co., 312 U. S. 426.

KRAFT FOODS COMPANY *and* JOSEPH F. MURTHA. Case No. 4-CA-834. May 28, 1954

DECISION AND ORDER

On October 15, 1953, Trial Examiner Robert E. Mullins issued his Intermediate Report in the above-entitled proceeding recommending that the complaint be dismissed in its entirety, as set forth in the copy of the Intermediate Report attached

hereto. Thereafter, the General Counsel filed exceptions to the Intermediate Report and a supporting brief. The Respondent filed briefs[1] in support of the Trial Examiner's findings and recommendations.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. 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 to the extent consistent herewith.

The Trial Examiner found, and we agree for the following reasons, that the discharge of Joseph F. Murtha on the morning of January 23, 1953, was not violative of the Act. The record shows that Ternosky, the Respondent's assistant branch manager, discharged Murtha on the basis of a report by Neiman, the shop steward, to the effect that the men in the warehouse were threatening to strike and that Murtha was the cause of the disturbance. While Ternosky's testimony as to Neiman's report to him was no more than heresay with regard to the fact of Murtha's alleged activities, such testimony nevertheless establishes that in discharging Murtha, Ternosky entertained an honest belief that Murtha had engaged in activity violative of the no-strike clause of the existing collective-bargaining contract, for which he could have been properly discharged.

This prima facie honest belief having been established by the Respondent, it became the burden of the General Counsel to establish by a preponderance of the evidence that despite the Respondent's belief, Murtha's activity was not the inciting of a strike in violation of the no-strike clause.[2] This, we find, the General Counsel failed to do.

In arriving at this finding, we rely to a great extent upon Murtha's own testimony in which he admitted that after ascertaining that the Respondent proposed to use a nonunion merchandiser to make a delivery, he vigorously protested to Neiman, the shop steward. He further admitted that when Neiman displayed a reluctance to take positive action upon his complaint he, Murtha, told Neiman, in substance, that there was no need to call upon the Union for action and urged Neiman to inform the Respondent that the merchandise could not go out and it would not go out. This testimony Murtha reiterated upon cross-examination. We cannot believe that these words were innocuously offered by Murtha in an attempt to assist Nieman with his duties as shop steward or that they may be construed as indicative of a desire for the adjustment of a grievance within the framework of the existing bargaining agreement. On the contrary, we believe that Murtha's conduct during the morning clearly indicated that this final exhortation of Nieman was the climax of a period of agitation. It is established

[1] The Respondent's petition to file a reply brief is granted and the brief considered.

[2] Cf. Rubin Bros. Footwear, Inc., 99 NLRB 610.

that Murtha left his work station at least three times during the morning to seek out Neiman and remonstrate with him with regard to the Respondent's plan. Finally, climaxing the morning-long period of agitation and protest, he made these unequivocal utterances to Nieman not in seclusion but on the open floor of the warehouse within earshot of many of his fellow employees who had also observed his behavior during the morning.

We do not here hold, as our dissenting colleagues suggest, that an employee may not, with complete protection by the Act, as amended, attempt to process, or in fact urge a grievance, alone or through his union representative, regardless of whether or not a grievance procedure is provided in any current collective-bargaining contract.

In the light of the foregoing, we are satisfied that Murtha's words and actions were designed to incite strike action in violation of his no-strike contractual obligation[3] and were therefore unprotected by the Act.

[The Board dismissed the complaint.]

Members Murdock and Peterson, dissenting:

It is our considered belief that the conclusion of our colleagues to dismiss the complaint in this case does not properly reflect the evidence which is contained in this record and establishes a precedent dangerous in its implications. The majority opinion finds that the complainant, Murtha, incited strike action in violation of contract and that the Respondent lawfully discharged him for such activity. We submit, to the contrary, that the record compels the conclusion that Murtha engaged in activity protected by statute and that his discharge was in violation of the amended Act.

The issue in this case is whether or not the actions of Murtha which precipitated his discharge are within the protection of the National Labor Relations Act. Translated into the facts of this case as we see them the issue may be further defined as being whether or not an employee can be lawfully discharged for complaining to his union representative concerning a matter vitally affecting his working conditions. A brief description of the factual background surrounding this discharge is necessary to the resolution of this question.

For some time prior to his discharge, Murtha, as well as other employees in the unit represented by the Teamsters at the Respondent's plant, was disturbed by the Respondent's use of nonunit employees known as merchandisers for delivery duties otherwise done by employees in the unit. On the morning of January 23, 1953, Murtha protested to his shop steward,

[3] Cf. N. L. R. B. v. National Die Casting Company, 207 F. 2d 344 (C. A. 7), enforcement of 94 NLRB 845 denied; Harnischfeger Corp. v. N. L. R. B., 207 F. 2d 575 (C. A. 7); Dazey Corporation, 106 NLRB 553.

Neiman, concerning the latest incident of a merchandiser engaging in delivery work. Murtha requested, as he and others had done before, that the Union stop this practice and that Neiman convey this position to the Respondent. Neiman then spoke to the Respondent's assistant branch manager, Ternosky, who promptly discharged Murtha. The Trial Examiner found that the discharge was lawful on the ground that Murtha was "usurping the functions of the duly authorized bargaining agent" in regard to the Respondent's use of merchandisers and inciting his fellow employees to strike in violation of a no-strike clause in their contract. Our colleagues, while agreeing with the Trial Examiner that the discharge was lawful, modify his conclusions to the extent that they find only that Murtha's words and actions were designed to incite "strike action" in violation of the no-strike clause and that the Respondent had discharged Murtha because of an "honest belief" that he had done so. We cannot agree that the record or the law, however, supports either the Trial Examiner or our colleagues' basic conclusions.

The Trial Examiner, while apparently admitting that some confusion existed, found that for several years prior to the discharge the Respondent and the Teamsters had an oral agreement whereby the Respondent could use merchandisers to make emergency deliveries. The majority opinion is silent on this point. It is patent that the practice in question was of vital importance to Murtha and his fellow employees for it bore directly on the assignment of work with its attendant effects upon job tenure, wages, and hours. It is therefore important to examine the basis for the Trial Examiner's conclusion in this respect. The record contains undenied and otherwise corroborated evidence that (1) despite the alleged existence of such an oral agreement for "several years" it had never been made a part of the written contract between the parties; (2) none of the employees, up to the date of the discharge, had ever been informed of the existence of such an agreement or were aware of such existence; (3) the Respondent's witnesses admitted that continuing complaints had been made on the subject; (4) at a union meeting less than 2 weeks prior to the discharge, Murtha, among others, had vigorously protested the use of merchandisers for delivery duties and had been assured by the union business agent that the Union had never given permission for such use; and (5) according to the testimony of Respondent's own officers the union business agent had raised the merchandiser question only 9 days prior to the discharge. These facts, largely ignored by the Trial Examiner, are in complete conflict with his finding that such an agreement did exist; a finding based solely upon self-serving declarations of the Respondent's officers and the hearsay testimony of one witness. Under these circumstances, as seem indicated by the majority opinion's silence on the point, it is impossible to accept the Trial Examiner's finding that the grievance raised by Murtha and his fellow employees was in derogation of any contract or agreement between the Teamsters and the Respondent.

The issue therefore centers upon what was actually done by Murtha on the morning of January 23 to process his complaint. The Trial Examiner and our colleagues both find that his activity amounted to an incitement of his fellow employees to strike in violation of the no-clause in their contract. What are the facts?

It is established by the record that, on the morning of January 23, Murtha observed that the Respondent had again assigned delivery duties to a merchandiser. In the course of the morning he spoke to his shop steward, Neiman, on three occasions concerning the incident. While performing his work, he also asked the Respondent's dispatcher, when that individual approached Murtha's work station, whether the Respondent had scheduled further deliveries by the merchandisers. None of the witnesses who appeared at the hearing testified that he saw Murtha neglect his work at any time during the morning. Instead, according to undenied testimony, Murtha approached Neiman on all 3 occasions only in the course of his duties which carried him to various parts of the plant. It is this group of 3 hurried contacts between an employee in the course of his duties and his union representative which our colleagues characterize as a "morning-long period of agitation and protest."

Both the Trial Examiner and the majority opinion, however, lay great stress upon the substance of these conversations. On the first occasion in which Murtha spoke to Neiman, he protested the morning delivery by the merchandiser and asked that Neiman tell the Respondent to stop the practice. Neiman replied that the Union had condoned emergency deliveries by such employees. It should be noted that this was the first time any representative of the Union had so informed the employees and such advice was contrary to the statement of the Union's business agent at the meeting 2 weeks earlier. Later in the morning, in the second of his contacts with Neiman, Murtha asked that Neiman call the Union to check on its position in the matter--a reasonable request in view of the sudden change in the announced policy. The call was made but could not be completed. Murtha later returned and a call was again made to the union offices by the shop steward. Following this call, Murtha, according to the undenied testimony at the hearing, then did nothing further concerning the protest he had raised.

The Trial Examiner, as noted, finds that this activity constituted an incitement to strike. Our colleagues find that it was "designed" to incite strike action--a somewhat obscure differentiation. Yet none of the witnesses who appeared at the hearing testified that at any time they saw Murtha request any employee to strike or even temporarily stop work. None of the witnesses, including those of the Respondent, testified that Murtha caused any work stoppage or disruption in the work of any employee on that morning. On the contrary, those witnesses who worked on the warehouse floor in areas adjacent to Murtha's work station unanimously testified that Murtha did not request or cause any employee to strike or stop work.

In the complete absence, therefore, of any work stoppage caused by Murtha or any request on his part to any employee to strike, what remains to substantiate the conclusion that he, in fact, incited a strike? The Trial Examiner, while not discrediting the valid and uncontradicted testimony of these witnesses who had personally observed Murtha's activity instead accepts the testimony of Ternosky as to what Neiman allegedly told him that Murtha allegedly did. This, the statement by one person as to what he supposedly was told by a second person as to what a still different person supposedly did, is such obvious hearsay as to be inadmissible in any court of law. Yet the Trial Examiner concludes that it may be accepted in preference to the mass of contrary, valid evidence on the further specious ground that Ternosky also testified that Neiman had never reported such activity to him before. This reasoning - which amounts to piling hearsay on hearsay--is, to say the least, a novel concept. But, in fact, such compounding of the remnants of rumors is useless in providing support for the majority's conclusion, for, despite the erroneous statement of the Trial Examiner, at no time in Ternosky's testimony did he state that Neiman had told him that Murtha was actually threatening to provoke a strike.

The majority opinion, while tacitly rejecting the hearsay testimony of Ternosky as proof of an incitement to strike, nevertheless places great stress upon a single comment made by Murtha to Neiman. This comment, which Murtha testified as having made during their first conversation, was that "all he [Neiman] had to do was to say that's it, and they couldn't move the stuff." On cross-examination, Murtha restated the remark as "I told him he didn't need to call the Union; all he had to say is, it can't go out and it couldn't go out." These statements may, indeed, point to an overconfidence on the part of Murtha in the ability of his union steward to influence his employer. They may also be construed as the normal overstatements which parties in collective-bargaining disputes are not unknown to make in the heat of argument. They do not, however, under any interpretation, amount to an incitement of Respondent's employees to strike. The comment, whatever its precise meaning may have been in the legally untutored mind of its author, was quite clearly an attempt to persuade Murtha's union steward to consider and take forward a grievance; a grievance, indeed, which so far as the employees are concerned, was already recognized and supported by their Union. It was not, as the evidence previously mentioned clearly shows, attended by any attempt or effort on the part of Murtha to "talk up a strike" or request any such action among his fellow employees. Even given its broadest interpretation, therefore, as a single comment isolated from the context of his full complaint to Neiman, it can hardly support a finding of "incitement" when contrasted to the whole picture of Murtha's behavior on the morning in question. Accordingly, its meager probative value compared to the evidence of Murtha's other actions is certainly

far less proof of a conspiracy or a "design" to incite the employees.

It is therefore clear that the conduct of Murtha on the morning of his discharge, when viewed in its entirety, was activity protected by the Act. Murtha, in the course of his work and without requesting or causing any disruption of the work of other employees, spoke to his union steward briefly on three occasions. The subject of his conversation was a legitimate grievance which bore directly upon his working conditions. He requested that his union representative attempt to obtain a cessation of the practice of which he complained. This we submit, was an activity clearly and unquestionably within the rights guaranteed by Section 7 of the Act and entitled to the protection of his agency. Murtha, however, was discharged by his employer as a result of this protected activity. Such a patent violation of the Act cannot be justified and any attempt to so justify it by terming his actions to have been an attempt to cause a strike runs counter to the valid and admissible evidence in this record. Moreover assuming Respondent's honest belief that Murtha exceeded the bounds of protected activity, such belief provides no defense, because, contrary to the finding of our majority colleagues, the General Counsel has met the burden of establishing that Murtha did not in fact exceed such bounds. Nor is the lack of any obvious antiunion animus material for the direct effect of this discharge was to penalize an employee for the exercise of rights guaranteed by the Act.[4]

It is apparent, accordingly, that the decision of our colleagues to dismiss the complaint in this case raises serious implications. In the last analysis, the majority decision would seem to hold that an employee may be lawfully discharged for protesting to his union representative concerning a grievance which he has every reason to deem valid. To characterize such a protest as an attempt to "usurp the functions of the duly authorized bargaining agent,"[5] as does the Trial Examiner, is completely unwarranted. The entire extent of the limited protest made by Murtha was channeled solely to his union representative and sought the use of the Union's authority in support of its position as indicated by the statement of its business agent at the earlier meeting--not the evasion of its position. It is therefore impossible to conclude, as does the Trial Examiner, that "Murtha was seeking to compel the Respondent to accept his position" without reference to the Union, when it was to the Union and not the employees or the Respondent that Murtha went to lodge his protest. To indict that action as an attempt to evade the grievance procedure when the course taken by Murtha was precisely that prescribed by the contract in existence at the plant is

[4] See Rubin Bros. Footwear, Inc., 99 NLRB 610.

[5] Dazey Corporation, 106 NLRB 553, cited by the Trial Examiner as authority for this conclusion, involves a factual situation so completely divergent from that herein as to require no further analysis.

something we cannot understand. To accept such reasoning is to provide a legal basis for the discharge of any employee either so misguided or unfortunate as to seek the support of a labor organization on a grievance which that organization has, even sub rosa, decided against. We do not think that such sweeping authority on the part of this or any other union is either claimed or advisable.

As the complainant, Joseph Murtha, was clearly discharged as a result of activity protected by the Act, we would therefore find that the Respondent violated Section 8 (a) (1) and (3) and order the usual appropriate remedy.

Intermediate Report

STATEMENT OF THE CASE

This proceeding, brought under Section 10 (b) of the Labor Management Relations Act of 1947, 61 Stat. 136 (herein called the Act), was heard in Philadelphia, Pennsylvania, from July 27 to 28, 1953, pursuant to due notice to all the parties. The complaint, issued on June 4, 1953, by the General Counsel of the National Labor Relations Board,[1] and based on charges duly filed and served, alleged that the Respondent had engaged in unfair labor practices proscribed by Section 8 (a) (1) and (3) of the Act by its discharge of one Joseph F. Murtha. In its answer, duly filed, the Respondent conceded certain facts with respect to its business operations, but denied the commission of the alleged unfair labor practices.

All parties were represented at the hearing, afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce relevant evidence, to argue orally, and to file briefs and proposed findings and conclusions. At the close of its case, Respondent moved to dismiss the complaint. This motion was taken under advisement; it is disposed of as will appear hereinafter in this report. Oral argument was had by the attorneys for the General Counsel and the Respondent and subsequent to the hearing the latter submitted a brief which has been fully considered by the undersigned.

Upon the entire record in the case and from my observation of the witnesses, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

Respondent, a Delaware corporation, maintains offices and places of business in various States of the United States, including a branch office and warehouse at Philadelphia, Pennsylvania, where it is engaged in the sale and distribution of food products. Only its Philadelphia branch is involved in this proceeding. At this latter location the Respondent's annual purchases of materials and supplies exceed $4,000,000, at least 75 percent of which are received from points outside the Commonwealth of Pennsylvania. Its annual sales of finished products from this branch likewise exceed $4,000,000, and of this amount approximately 30 percent are shipped across State lines to points outside the Commonwealth of Pennsylvania. Upon the foregoing facts, the Respondent concedes, and I find, that the Kraft Foods Company, is engaged in commerce within the meaning of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Food Driver Salesmen, Dairy and Ice Cream Workers Union, Local No. 463, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America,

[1] The General Counsel and the staff attorney appearing for him at the hearing are referred to herein as the General Counsel and the National Labor Relations Board as the Board.

AFL, herein called Teamsters (or the Union), is a labor organization within the meaning of the Act.

III. THE UNFAIR LABOR PRACTICES

A. Background and sequence of events

For a number of years the Respondent has had contractual relations with the Teamsters, its agreement during the period in question covering all the production and warehouse employees but not the sales or merchandising personnel.[2] In addition to the customary grievance and arbitration provisions this contract also had a no-strike clause wherein the Union agreed that it would not "authorize, sanction or approve any strikes, work stoppages or slowdowns."

On January 23, 1953, the Respondent discharged Joseph F. Murtha, one of its warehousemen. The General Counsel alleges, and the Respondent denies, that this action was discriminatory. It is this discharge which constitutes the only issue herein, there being no allegations of any separate or independent violation of any other kind.

B. The discharge of Murtha

Shortly after 11 a. m. on January 23, Fred Neiman, shop steward for the Teamsters and a warehouse employee, reported to Emil J. Ternosky, assistant branch manager, that he was having trouble on the floor because Charles Young, a merchandiser, "had taken out [some merchandise] for delivery and the [warehousemen] were going to go out on strike." After Ternosky asked for an explanation, Neiman told him that because of objections Murtha had raised when Young was assigned to deliver a truckload of orders that morning, a state of turmoil prevailed among the employees and that the warehousemen were planning a walkout unless the matter was settled. Ternosky then reminded Neiman that the agreement with the Teamsters permitted the use of merchandisers. The shop steward replied that he was aware of this fact and had so informed Murtha. A few minutes thereafter, Robert Bradley, warehouse supervisor, reported to Ternosky that the shop steward had just reported trouble on the warehouse floor, in that Murtha was "riling up the boys, and they were going to go on strike on account of this merchandiser taking out merchandise." Bradley asked that Ternosky come down to the warehouse section immediately.[3] The latter testified that at this point he recalled the fact that Murtha had been severely reprimanded only a short while before in connection with another incident and that after hearing Neiman's account, he determined to dismiss the employee at once. Murtha was thereupon ordered to report to the office where Ternosky told him that he was discharged. When the employee inquired whether this was "For the incident that happened downstairs," his superior answered, "Yes and for the episode we had previously."[4]

The General Counsel alleged that on the morning in question there was in fact no work stoppage and that Murtha's opposition to the use of a merchandiser for delivery work was a legitimate effort on his part to protest this particular practice of the Company. The Respondent contended that Ternosky was entitled to rely on the steward's report that Murtha had provoked discussion of a strike; that, in the light of the prior warning given this employee, his superior was justified in regarding such reported conduct on the day in question as "the last straw"; and, finally, that Murtha's activity was unprotected since the practice about which he complained was in conformity with the current collective-bargaining agreement between the Company and the Union which contract had a no-strike clause.

It is plain from the record that the Respondent had a verbal agreement with the Teamsters whereby the Company could use merchandisers to make emergency deliveries. Several of the company officials responsible for negotiating contracts with the Union[5] credibly testified that

---

[2] The latter, known as merchandisers, are concerned principally with erecting displays in supermarkets and, in various other ways, assisting the sales personnel on their routes.

[3] The branch offices were located on the second floor of the building and the warehouse area covered a large section on the first floor

[4] The findings and quotations in the foregoing paragraph are based on the credited and uncontradicted testimony of Ternosky.

[5] William H Buchanan, branch manager, John G. Gleason, personnel manager for Kraft's eastern division, and Ternosky.

this had been the situation for several years. They further testified that on about January 14, during the course of negotiations for a contract covering the female production employees, Thomas Barson, union business agent, had asked that they consider certain grievances recently raised by the employees and that one of these protests concerned the Company's alleged abuse of the practice of using merchandisers to make deliveries. When the company representatives assured Barson that they had not and would not resort to this practice except in emergency situations the Teamsters' official agreed that they were free to continue to do so.[6] Respondent's testimony in this connection was not contradicted. Indeed, Thomas E. Fowler, Jr., one of the General Counsel's witnesses, testified that on January 23 he was present when Neiman told Murtha that the union agreement permitted merchandisers to make emergency deliveries.

Murtha testified that at no time on the morning in question did he desert his post or call upon his fellow employees to strike. His version of events in this regard was corroborated by a number of his ardent partisans who followed him to the stand.[7] On the other hand, Murtha testified that when he discovered that Young had been assigned to deliver a load of company products, he immediately set out to locate Neiman, that when he lodged his protest about Young's assignment with the steward, the latter told him he had no intention of doing anything about it, that he (Murtha) then insisted something should be done, and when Neiman indicated that before taking any action it would be necessary to contact the Teamsters' office for advice, he told Neiman that this was unnecessary since Neiman, as shop steward, could halt the practice by simply delivering an ultimatum to the Company.[8]

Despite Murtha's testimony that he did nothing further about the matter that morning, Fowler testified that Murtha subsequently contacted the dispatcher to learn whether Young would be taking out any other orders, that he returned later to urge that Neiman call the union headquarters, that when this telephone call could not be completed Murtha came back a third time for the same purpose and that on this occasion Neiman had a telephone conversation with Barson in which the business agent stated that the Company's procedure on letting merchandisers take out deliveries was entirely proper. In the light of this testimony, in particular that of Murtha himself, it is apparent that Murtha suggested to Neiman that he take steps to halt the practice about which the employee was concerned and, further, that the activities of the latter in support of this proposal were not confined to an isolated conversation with the steward but extended over a considerable period of time that morning.

At a union meeting on about January 10, Murtha and other employees had protested the use of merchandisers in making deliveries. Shortly thereafter Barson discussed the Company's practice in this regard with the Respondent's management, but the fact that Murtha was one of the members who had protested against this practice never came to the attention of any supervisory official of the Respondent.[9] There is no evidence of any kind that prior to January 23 the Respondent had knowledge of Murtha's concerted or union activities which would distinguish him from any other employee on the payroll. Moreover, there is nothing in the record to indicate that the Respondent had a background of hostility to organized labor. In fact, it had had contracts and, apparently, amicable relations with the Teamsters for years. Insofar as Murtha was concerned it is likewise plain that about 2 months before his discharge he had engaged in a gross breach of conduct involving one of the young female secretaries on the office staff because of which Buchanan, the branch manager, had reprimanded him severely and warned that any future misconduct would result in his immediate dismissal.

C. Conclusions

Here, the Respondent and the Union had a contract wherein the latter agreed that it would not "authorize, sanction or approve any strikes, work stoppages, or slowdowns." This placed

---

[6] Barson was not called as a witness; counsel for the Respondent stated that at the time of the hearing he was no longer with the Teamsters and that efforts to contact him prior to the hearing had been unsuccessful.

[7] Joseph A. McCarrick, James D. Malizia, L. P. Hoffman, and Fowler.

[8] Murtha testified, "I told him it was not necessary [to telephone the Teamsters' office]; all he had to do was to say that's it, and they couldn't move the stuff." (Emphasis supplied.) On cross-examination, Murtha reiterated, "I told him[Neiman] he didn't need to call the Union; all he had to say is, it can't go out and it couldn't go out."

[9] This finding is based upon the credited, undenied testimony of Ternosky, Buchanan, and Gleason.

the Union and its agents under an affirmative duty to discourage walkouts or any action verging on a strike during the term of the contract.[10] Consequently, when the shop steward was confronted with a demand by Murtha that he immediately take steps to end a company practice which the union officials had previously sanctioned, and that he do so with the simple declaration that the merchandise "can't go out," Neiman had reason to be concerned about the Union's obligation to discourage strikes or slowdowns. Moreover, it is clear that Murtha's efforts to get action were not confined to a single, casual, conversation with Neiman, but that, in fact, he came to Neiman about the matter several times that morning. The General Counsel offered various witnesses to testify that they did not see Murtha soliciting anyone to strike. On the other hand, Ternosky credibly testified that never before had Neiman reported to him, as he did on this occasion, that a strike was being discussed among the warehouse employees and that groups of men were away from their work.[11]

When Neiman, the shop steward and duly designated employee representative, notified Ternosky that Murtha was threatening to provoke a strike, Ternosky was entitled to rely on this information (in the absence of collusion)[12] in deciding what action he would take. Furthermore, it is apparent from Ternosky's impulsive reaction to the steward's remarks that he was concerned only with the report that Murtha was causing a disturbance and not with the nature of the complaint. Certainly there is no evidence that Ternosky was impelled by any animus against union or concerted activity when he hastily decided that Murtha, already the subject of one serious reprimand and a warning that he would be given only one last chance, should be dismissed.[13] Consequently, it is my conclusion that in effecting the discharge of this employee the Respondent engaged in no violation of the Act.

The General Counsel's argument that Murtha's conduct was protected concerted activity so that the employee was immune from discipline or discharge is without substance. Regardless of the vigor or lack of vigor with which Murtha pressed his demand for action on Shop Steward Neiman, his goal was to compel the Respondent to abandon its practice of using nonunion men on emergency deliveries despite the fact that that issue was already the subject of an agreement between the Company and the Teamsters. Moreover, his conduct was not directed toward accomplishing this objective through the Union, for Murtha himself testified that he sought to convince Neiman that the latter could stop the practice in question by acting on his own and without contacting the Teamsters' headquarters. In so doing, Murtha was seeking to compel the Respondent to adopt his position without reference to the Union's business agent and without resort to the grievance procedure established by the collective-bargaining contract. In view of these facts, here, as in Dazey Corporation, 106 NLRB 553, the employee's activity was directed toward usurping "the functions of the duly authorized bargaining agent selected by the employees" and, as such, was unprotected. Finally, this conclusion is supported by the additional fact that the contract between the Company and the Union had a no-strike provision. Cf. N. L. R. B. v. Rockaway News Supply Company Inc., 345 U. S. 71.[14]

---

[10] The contract specifically provided that the steward "see that each member of the Union lives up to the rules of the Union and the Employer; and that this contract is not breached by either the Employer or the Union." (Emphasis supplied.)

[11] The General Counsel did not call Neiman as a witness.

[12] The General Counsel conceded that he was not alleging that there had been any conspiracy between the Company and the Teamsters.

[13] Murtha never sought to protest his dismissal as a grievance under the contract. At the hearing, he conceded that the Teamsters' business agent had refused to represent him in the matter.

[14] The decision in N. L. R. B. v. Nu-Car Carriers, Inc., 189 F. 2d 756 (C. A. 3), cert. denied 342 U. S. 919, on which the General Counsel relied at the hearing, is not in conflict with this conclusion. Apart from the fact that in the Nu-Car case the Respondent had engaged in numerous acts in violation of the employees' organizational rights, the decision there is clearly distinguishable from the present situation. In Nu-Car the Board held that the discharge of the spokesmen for a minority group which was dissatisfied with certain provisions in the contract dealing with the owner-operator system of truck transportation was a violation of the Act because the dissidents had attempted to induce their union to change a working condition and the discharge was an interference with the efforts of a minority group to effectuate such a change. Here, there was no evidence that the Respondent, through Ternosky or any of its other supervisors, had knowledge of any efforts on Murtha's part

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.]

---

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-