

Armstrong Cork Company *and* John W. Florin, Donald J. Heider, Gerald D. Herrick, Hoyt B. Gilley, and Kenneth Jacobson. *Cases Nos. 19-CA-954, 19-CA-954-1, 19-CA-954-2, 19-CA-969, and 19-CA-969-1. June 28, 1955*

DECISION AND ORDER

On April 8, 1955, Trial Examiner Martin S. Bennett issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had not engaged in any unfair labor practices in violation of the Act and recommending that the complaint be dismissed in its entirety. Thereafter, one of the Charging Parties, Hoyt B. Gilley, filed exceptions to the Intermediate Report and a supporting memorandum.¹

The Board has reviewed the rulings made by the Trial Examiner 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 and the memorandum, and the entire record in the case and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner with the following modification:

We find, as did the Trial Examiner, that the January 7, 1954, work stoppage violated the no-strike clause of the contract between the Respondent and Local 97. The work stoppage was, therefore, an unprotected activity. It is also clear that the five employees in question were discharged because they participated in such unprotected activity. Their discharges therefore did not violate the Act. Accordingly, we find it unnecessary to consider or pass upon the Trial Examiner's additional conclusion that the January 7 work stoppage was not protected because it had as one of its objectives the removal of the employees' foreman.

[The Board dismissed the complaint.]

¹ Gilley's request for oral argument is hereby denied as the record, including the exceptions and memorandum, adequately presents the issues and positions of the parties

INTERMEDIATE REPORT AND RECOMMENDED ORDER

STATEMENT OF THE CASE

This proceeding is brought under Section 10 (b) of the National Labor Relations Act, 61 Stat. 136, herein called the Act. Charges having been filed by five above-named individuals against Armstrong Cork Company, herein called Respondent, the General Counsel of the National Labor Relations Board issued a consolidated complaint on or about December 20, 1954, alleging that Respondent had engaged in unfair labor practices within the meaning of Section 8 (a) (1) and (3) of the Act. Copies of the charges, the consolidated complaint, and notice of hearing thereon were duly served upon Respondent.

Pursuant to notice, a hearing was held at Seattle, Washington, on February 17, 1955, before the duly designated Trial Examiner, at which time Respondent pre-112 NLRB No. 186.

sented argument in support of a motion to dismiss the complaint, claiming that the complaint did not state a cause of action. It contended that the Federal Rules of Civil Procedure were applicable herein and that its motion was in the nature of a motion for summary judgment pursuant to Rule 56 thereof. Inasmuch as the Federal Rules of Civil Procedure are applicable to Board proceedings only with respect to the introduction of evidence, and not with respect to pleadings before the Board, the motion was denied. *N. L. R. B. v. Globe Wireless Co.*, 193 F. 2d 748 (C. A. 9); *United Mine Workers of America, District 31*, 95 NLRB 546; and *Del E. Webb Construction Co.*, 95 NLRB 377. Moreover, even under Federal Rule 56, it appearing that a conflict existed between the parties concerning the material facts herein, the motion did not properly lie. *Hycan Manufacturing Co. v. H. Koch and Sons*, 219 F. 2d 353 (C. A. 9); *Ford v. Luria Steel and Trading Corp.*, 192 F. 2d 880, 882 (C. A. 8); *Estep v. Norfolk and Western Railway*, 192 F. 2d 889, 893 (C. A. 6); *Stevens v. Howard D. Johnson Co.*, 181 F. 2d 390, 394 (C. A. 4); and *Zigzag Spring Co. v. Comfort Spring Corp.*, 89 F. Supp. 410, 413.

Thereafter, Respondent having filed an answer denying the commission of any unfair labor practices, a hearing was held at Seattle, Washington, from March 1 through 3, 1955, inclusive, before the duly designated Trial Examiner, on the merits of the case. The parties were represented; participated in the hearing; and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce relevant evidence.¹ At the close of the hearing, the parties were afforded an opportunity to argue orally and to file briefs. Oral argument was waived and ruling was reserved on a motion by Respondent to dismiss the complaint. This motion is disposed of by the findings and conclusions hereinafter made. Briefs were duly submitted by the 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

Armstrong Cork Company is a Pennsylvania corporation which is engaged in business throughout the United States, the Territory of Alaska, and various countries of the world. It operates 16 plants in the United States, which are grouped into 5 divisions. Four divisions are respectively engaged in the manufacture and sale of floor coverings, glassware, industrial materials, and building materials. The fifth division, the insulation division, is engaged in the sale and installation of insulation materials and is the division directly involved herein. Respondent's net sales for the year 1953 totalled \$217,484,369, of which a substantial proportion, estimated to be in excess of 50 percent, represents shipments of its products across State lines. The project directly involved herein was a \$500,000 subcontract for the sale and installation of insulation in Alaska, and the major portion of the materials was shipped to Alaska from outside thereof. I find that the operations of Respondent, over which the Board has previously asserted jurisdiction, affect commerce. See *Armstrong Cork Co.*, 103 NLRB 133²

II. THE LABOR ORGANIZATION INVOLVED

Local 97, International Association of Heat and Frost Insulators and Asbestos Workers, is a labor organization admitting to membership the employees of Respondent.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Introduction; the issues

In July 1953, Respondent, as subcontractor, entered into a contract with Ward Cove Builders, the latter being a joint venture organized by several general contractors, for the installation of insulation materials in a construction project undertaken by Ward Cove Builders at Ketchikan, Alaska. This project involved the construction of a pulp mill for the Ketchikan Pulp Company. The value of Respond-

¹ One document, not available during the course of the hearing, has since been proffered in evidence by the General Counsel with the concurrence of Respondent. It is hereby received in evidence, together with a covering letter of submission, as General Counsel's Exhibit No. 11.

² The findings herein are based upon Respondent's annual report for the year ending December 31, 1953, as well as on the testimony of A. J. Stream, district manager in Seattle, Washington, of Respondent's insulation division.

ent's subcontract was approximately \$500,000. Work on this subcontract commenced early in November 1953 and its completion date, past or future, is not disclosed herein.

On January 7 and 8, 1954, all but one of the men in Respondent's insulation crew engaged in certain concerted activities as a result of which they were discharged.⁹ Some of the men, none of them complainants herein, were later reinstated or re-hired upon application. The instant complaint attacks the discharge of five of the group, namely, John W. Florin, Donald J. Heider, Gerald D. Herrick, Hoyt B. Gilley, and Kenneth Jacobson, claiming that they were discharged for engaging in a protected concerted activity, namely the presentation of a grievance. Respondent contends that they were discharged after stopping work in violation of the no-strike and grievance clauses of their contract, this constituting an unprotected concerted activity. As will appear, there is also a question whether one of the objectives of the concerted activity was unlawful or unprotected under the Act.

It is readily apparent that the remote location of the job and the absence of responsible parties on both sides complicated industrial relations on this project. Thus, the crew of Respondent was under the direction of Foreman Miles Strickland. The next higher representative of Respondent was his brother, Harry Strickland, the project manager, whose office was in Seattle, Washington, but who, from time to time, would visit the job for brief periods.

The Union involved, Local 97, is a small one with a membership of approximately 50. Its home office is in Anchorage, Alaska, where Business Agent Henry Moore resides. From that location, he attempts to look after the interests of union members who are engaged in construction work throughout the entire Territory of Alaska, the Territory over which Local 97 asserts jurisdiction and in which it is recognized by Associated Insulation Contractors, an employer association of nine members, including Respondent. The only representative of the Union on the construction site at Ketchikan was the job steward, Hoyt B. Gilley.

Thus, grievances were handled on the job site in Ketchikan, a substantial distance from both Anchorage and Seattle, by Foreman Miles Strickland as the only representative of Respondent, and by Job Steward Gilley, the only representative of the Union. The record herein well demonstrates, as did the demeanor of these two men at the hearing, that they inevitably had difficulty in comprehending or reaching one another, figuratively speaking. On the one hand, Strickland was reticent and not overly articulate, whereas Gilley was quite the opposite and was aggressive in his contacts with Strickland over the items in dispute between them. It is clear that the great difference of temperament in the two men; their difficulty in reaching each other, figuratively; and the remoteness of the next echelon of authority resulted in a well-nigh impossible situation in terms of industrial relations

B. *The contracts*

The earliest contract in evidence between Local 97 and Associated Insulation Contractors is dated November 22, 1952, and expired on December 1, 1953. Article V thereof provides as follows:

There shall be a Joint Trade Board consisting of equal members of the Associated Insulation Contractors in Alaska and equal members of Local 97. Said Trade Board shall have the right to investigate all labor operations of the parties to this Agreement within its prescribed limits so far as any of the provisions of this Agreement are involved in connection with which any question may arise and for this purpose shall have the right to summon, question and examine any party to this Agreement or their representatives or agents.

There shall be no lockouts except when of a general nature and ordered by a Building Trades Employers' Association; or strikes except when of a general nature and ordered by a Building and Construction Trades Council with the approval of the International Association of Heat and Frost Insulators and Asbestos Workers. Trade disputes or grievances shall be settled without cessation of work and in cases where the parties to this Agreement fail to agree, the matter in dispute shall be referred to the Joint Trade Board.

In case any disputes arise, notice must be given in writing to the Secretary of the Trade Board by aggrieved party within five (5) days.

⁹ Harry Strickland, project manager for Respondent on this job, estimated the crew to be 11 in number. The testimony of Hoyt Gilley, job steward on the job, places the number of the crew as high as 15. Certain documents signed by the crew support the latter figure. In any event all but one of the crew were discharged as a result of the activity.

The Joint Trade Board shall be governed by the following By-Laws:

1. Regular meetings shall be held quarterly in January, April, July and October.
2. Joint special meetings shall be called by the Chairman of the Joint Trade Board on written request of either side, stating object for which meeting is to be called, but no matters shall be discussed at special meetings except those designated in said written request. [Emphasis supplied.]

Several months prior to the expiration of this agreement, a new agreement was negotiated by the same parties. It became effective December 1, 1953, and was almost identical save for an increase in wage rates. Article V, quoted above, appears in identical form in the new agreement. A reading of the clause discloses that it provides (1) there shall be no strikes except of a general nature, and only when ordered by a Building and Construction Trades Council and approved by the parent organization of Local 97; (2) trade disputes or grievances shall be settled without cessation of work, and (3) in cases of disagreement the matter in dispute is to be referred to a Joint Trade Board. The foregoing clearly sets up a broad no-strike clause, save under specified circumstances, as well as a peaceful procedure, although not fully spelled out, for the handling of grievances.

Turning to the actual dispute, the facts are not in major conflict. Gilley, upon arriving at the job sometime between November 10 and 14, 1953, immediately became job steward, having been so designated by Business Agent Moore prior to leaving Anchorage, and actively attempted to improve working conditions for the men. The matters in dispute included (1) the use of hot mud, the latter a term used in the trade for heated insulation material—it appears that this is a common technique of running a steam line to the insulation material, thereby making it easier for the men to handle the material in a cold climate; (2) a protest by the men over the practice by Respondent of withholding, for income tax purpose, a portion of their expense allowance, the basis for which, whether or not due to instructions from the Bureau of Internal Revenue in Alaska, does not appear in the record; (3) dissatisfaction with transportation from Ketchikan to the job site; (4) a desire for a rope and pulley to haul materials; and (5) the most disputed item, *viz*, a claim that the daily expense allowance should be \$10 rather than the \$5.75 being paid by Respondent. As will appear, the business agent of Local 97 agreed with Respondent that the smaller figure was the correct one under the circumstances. The record supports this view and further establishes that, although not originally a grievance between the men and Respondent, one of the objectives of the men by January 7, 1954, was to procure the replacement of Foreman Miles Strickland by another foreman.

Gilley repeatedly took up these matters, save the last, with Foreman Miles Strickland. The latter took steps to bring in a steam line for the purpose of making hot mud available. Due to the absence of a needed part, there was a delay in the installation of this line and, for some reason, Strickland never was able to put across to Gilley the fact that he was endeavoring to remedy the situation. The other grievances apparently lapsed into the background because of the emphasis placed upon the \$10 expense rate.

The original contract, in effect until December 1, 1953, provided as follows on this topic:

ARTICLE IX

Subsistence or first class board and roof shall be furnished by the employer on all Government Jobs where camp facilities are provided. For men not living on the Base, travel allowance of \$3.50 per working day shall be allowed by the shops within a radius of five miles from the Federal Building for each employee residing in the Anchorage or Fairbanks area.

For men not living on the Base, travel allowance of \$5.00 per working day shall be allowed by the shops within a radius of ten miles from points as designated above.

Travel allowance shall be paid only when men supply their own means of transportation.

On jobs more than ten miles from the Federal Building of Anchorage or Fairbanks, actual expenses not to exceed \$10.00 per day shall be allowed; except where men are working at Eilson Air Force Base on A. I. O. Maintenance and Repair Work where camp facilities are not provided, an amount equal to the current allowable camp subsistence rate per day shall be paid.

Where men live on the Base, the employer will furnish subsistence at the camp and transportation to and from the job site free of cost to the employee.

This transportation shall be safe and lawful; the men shall be seated in reasonable comfort and protected from the elements.

Of the 5 complainants, the record shows the dates when 4 commenced work; Gilley and Herrick started in November and Heider and Florin in mid-December. On December 1, 1953, the new contract went into effect containing substantially similar language on this topic of expenses, although one phrase, namely, "where camp facilities are not provided" appeared twice in the later agreement, but only once in the former. The additional insertion was in the fourth paragraph of the article which then read:

On jobs more than ten miles from the Federal Building of Anchorage or Fairbanks, *where camp facilities are not provided*, actual expenses not to exceed \$10.00 per day shall be allowed; except where men are working at Eilson Air Force Base on A. I. O. Maintenance and Repair Work where camp facilities are not provided, an amount equal to the current allowable camp subsistence rate per day shall be paid. [Emphasis supplied.]

The General Counsel stresses this disparity whereas Respondent contends and has demonstrated that no change was intended; that in any event, the interpretation of the contract had always been that which Respondent asserts herein, namely that \$10 a day was paid, beyond a certain distance from Anchorage, only when a camp was not provided; and that when a camp was provided and the men chose not to live in the camp, they would then be allowed only the amount the employer would pay the operator of the camp to house and feed them, in this case \$5.75 a day. Considerable rancor developed between Gilley and Miles Strickland over this claimed \$10 rate, Gilley claiming, as he testified, that the \$10 rate was uniformly paid under such conditions. On the other hand, Strickland insisted that the lower rate was the correct one.

The record demonstrates that this lower rate was agreed upon in a conference held approximately in October 1953 between Business Agent Moore of Local 97, Harry Strickland, and District Manager A. J. Stream of Respondent, in the presence of Tom Myall, manager and consultant of Ward Cove Builders. This meeting was held so as to furnish the latter organization with the rates of pay and expenses to be paid under their cost-plus contract with Respondent. This meeting did clarify the expense situation, namely, that Ward Cove would furnish a camp for the men of the Respondent, which they did for various crafts on the job; that \$5.75 would be paid to men who preferred not to stay at the camp; and that a \$10 rate would be paid if no camp facilities were provided. This was not a contract, but was rather an oral clarification or interpretation of the existing labor contract and its appearance in written form was made only by reference in a letter from Respondent to Business Agent Moore in December 1953.

Gilley, achieving no success in his efforts to extract the \$10 allowance from Miles Strickland, and having been repeatedly advised by the latter to take the matter up with his business agent, contacted Business Agent Moore in Anchorage by mail and by telephone. At some point these contacts became annoying to Moore and he refused to accept further collect telephone calls. I find, however, that he acquainted Gilley with his view that the job did not call for the payment of the \$10 rate. Miles Strickland, on the other hand, kept his brother Harry, in Seattle, informed of the dispute and of his difficulties with Gilley. Harry Strickland, in turn, cleared the matter with International Vice President Kammer of Local 97, who also lives in Seattle. Kammer, who had received correspondence from Gilley, even took the matter up during this period with the office of the international president in Washington, D. C., and was advised that the \$10 rate was not payable under the circumstances. Kammer, who devotes a portion of his time to his union duties and also works part time for Respondent, so advised Strickland.

These explanations of the expense situation did not placate Gilley who continued to press Miles Strickland for a change. In this respect, it may be noted that Gilley's testimony concerning expense allowances then paid in the Ketchikan and Anchorage areas was not marked by clarity. Gilley was supported in his efforts by the other men and their efforts finally resulted in the following pattern. The men would customarily eat lunch in their shack between 12 and 12:30 p. m. Miles Strickland, who apparently ate his lunch elsewhere, was in the habit of returning to the shack at the close of the lunch period. At that time, Gilley and the men would regularly get after him on their grievances, primarily the \$10 expense issue. These discussions which took place at least once a week and ultimately more often, would then continue

into working time. Finally, Miles Strickland took a stand and insisted that all these discussions during working time would have to stop.⁴

C. *The discharges*

Gilley, upon arriving at the job site in November 1953, had promptly visited the office of Ward Cove Builders in order to collect his travel expenses, pursuant to instructions received from the representative of Respondent in Anchorage. He utilized the occasion to take up with Tom Myall, the project manager for Ward Cove, the matter of the daily expense allowance. Gilley claimed that the amount should be \$10, whereupon Myall stated that a \$5.75 rate had been determined to be applicable to the job. This contact by Gilley of the general contractor, Ward Cove, met with the displeasure of Miles Strickland, the only representative of Respondent on the scene. Gilley received at least two warnings from Strickland to refrain from such conduct. According to Gilley, soon after the visit to Myall in November, Strickland told him to stay away from Myall and stated, "The less you see of Tom Myall, the better off we will be."

As set forth above, Gilley took up the requested \$10 expense allowance repeatedly with Foreman Miles Strickland. The latter did discuss it with him, but refused to accede to the request, claiming that it was a matter beyond his authority and that Gilley should contact his business agent.

Gilley made another attempt to see a representative of Ward Cove at a time he placed in December, but which I am persuaded was several days prior to January 7, in accord with the credited testimony of Ralph Hawkins, project manager for Ward Cove and a colleague of Tom Myall, and also the testimony of Miles Strickland. Gilley telephoned Hawkins, according to the latter, and asked to see him concerning the grievances, urging Hawkins to meet the men on the job site. Hawkins refused to visit the job site, but agreed to meet Gilley in person if he would call at his office that afternoon. Prior to the time set for the meeting, Gilley telephoned Hawkins and canceled the meeting, stating that Miles Strickland had promised in the interim to rectify conditions.

Miles Strickland had learned from Hawkins of the impending meeting. According to Gilley, Strickland spoke to him at lunch time that very day and informed him that he had no right to visit Hawkins concerning the grievances and that he, Miles Strickland, would not support him if he did, allegedly promising that the grievances would be redressed. According to Miles Strickland, Gilley asked him if he knew of the projected meeting; he proceeded to inform Gilley that there would be no meetings with Hawkins and that if the men did hold such a meeting on company time, they would be terminated. On either version, I find that Gilley and the men were warned not to absent themselves on company time for the purpose of visiting Ward Cove concerning their dispute.

On January 7, 1954, the men, led by Gilley, determined to visit Tom Myall concerning their grievances. With the exception of one man who remained at work, the entire crew left the job site shortly after lunch and proceeded to the office of Ward Cove. They had no intention of engaging in a strike as such at that time. Tom Myall received them and discussed their grievances with them. His interest in the matter is not definitively disclosed by the record save that he was presumably interested in avoiding a work stoppage on a subcontract which would delay completion of the project.

Hawkins was present during the major portion of the meeting and took notes of the discussion. The men proceeded to discuss the identical grievances previously taken up with Miles Strickland, but added a new one, namely, that they wanted a new foreman placed on the job in lieu of Miles Strickland.⁵ During the latter stages of

⁴ I do not credit Gilley's testimony that Miles Strickland did not take this position. The testimony of Strickland impressed me as the more objective and here, as elsewhere, where in conflict with that of Gilley, has been relied upon. Similarly, I have credited the testimony of Hawkins, project manager for Ward Cove, where in conflict with that of Gilley.

⁵ Gilley, Heider, Florin, and Herrick testified that the topic of a new foreman was introduced into the conversation by Myall who allegedly stated that it appeared to him the men were dissatisfied with their supervision. Hawkins testified that the demand for a new foreman was brought up by the men who claimed they desired a new foreman. Myall also testified that he did not introduce the topic. I credit the version of Myall and Hawkins, particularly in view of the impressive testimony of the latter. Moreover, even on the basis of the testimony of the four complainants, it would appear that Myall was merely recapitulating or restating what the men had previously voiced.

this meeting, Miles Strickland entered the room briefly, informed the men that they were supposed to be at work, and withdrew. The meeting ended soon thereafter and the men returned to work, having been absent from work 1 hour or slightly less.

During this day, Miles Strickland, who it appears had learned of the proposed visit, had been in telephonic communication with his brother, Harry Strickland, in Seattle. He received authority from his brother to discharge Gilley and Heider; the latter it may be noted functioned as an assistant job steward. This conversation apparently took place early in the day and was based on an assumption that these two alone planned to visit Ward Cove. Another call was made later in the day, Miles Strickland informing his brother that the entire crew had visited Myall. Harry Strickland promptly determined to fly to Ketchikan on the next plane. Miles Strickland proceeded to make out termination slips and final paychecks for Gilley and Heider. He sought them out separately, presented the papers, and informed them that they were discharged.

According to Heider, Strickland stated on this occasion that he was a "troublemaker" and a "union agitator." Strickland denied that he called him an agitator, but conceded that he might have called him a troublemaker. He further testified that Heider wished to engage him in fistcuffs on this occasion but that he declined the invitation. According to Strickland, he selected Gilley and Heider because he felt that they were chiefly responsible for the difficulties between him and the men inasmuch as they were continually approaching him on these grievances. As indicated, the record shows Gilley to have been the leader in this respect.

Late on the afternoon of January 7, the men learned of the discharge of Gilley and Heider. They proceeded in a body, save Gilley and Heider, to the office of Myall and protested the two discharges. It is not clear whether or not they brought up their grievances again. Myall advised them to return to work and they did so and completed the day.

On January 8, the men reported for work and worked until approximately 2 p. m. when they gathered in their shack and discussed the situation. They decided to leave the job site and hold a meeting in town. Before leaving, they made out and signed two brief documents. The first advised Miles Strickland, who was not on the job site at the time,⁶ that they were proceeding to town on business. It was signed by 13 employees including all the complainants. The second document was signed by 16 employees, including the complainants, and stated "VOTE OF NO CONFIDENCE ASKING FOR REMOVAL OF FOREMAN STRICKLAND." The first document was left in the shack on the desk of Miles Strickland, but the second, introduced in evidence herein, was never presented to Respondent. The crew then left the job site, with the exception of one man; met briefly in a nearby restaurant and beer parlor; and proceeded to town where they held a meeting that evening. In the interim, Harry Strickland arrived in Ketchikan at approximately 2 p. m. and proceeded directly to the job site. It appears that he arrived there shortly after the men had entered the nearby restaurant and beer parlor. He went to the shack and found the first note described above. At this point, it may be noted that I do not accept the testimony of the men that there was no work for them to perform on the job site. The credited testimony of Harry Strickland discloses that there was ample work for them to perform, as he observed, and that the absence of the apprentice, Heider, was not an insuperable bar to their continuing at work.

Harry Strickland promptly proceeded to make out termination slips for every employee who had left the job that afternoon, this being the entire complement, save one. This was done pursuant to a decision he had made on the previous day, upon being advised that the crew had left the job in the afternoon to visit Myall. Due to the absence of the men from the job site, the termination slips and final paychecks were not delivered to them until the following day, January 9.

On January 9, a three-man delegation, consisting of Gilley, another crew member, and a representative of the local building trades council, visited Strickland. He refused to talk to them, informed them that the men were all discharged, and ordered them off the job site. Thereafter, a number of the men visited Harry Strickland, apologized for their conduct, and were rehired. None of the complainants took this step. The business agent of the Union, Henry Moore, had attempted to fly to Ketchikan from Anchorage upon learning of the difficulties, but was delayed some days due to adverse weather conditions and arrived subsequent to the discharges.

⁶ The General Counsel contends in his brief that Miles Strickland did not come to work that day. While he may not have been on the job site, because the men allegedly did not see him there, this does not nevertheless establish that he was not proceeding about his Employer's business on that day.

D. *Contentions and conclusions*

Initially it is to be noted that the employees concerned in this dispute were working under an agreement negotiated for their benefit by their collective-bargaining representative. In fact, they had just received a substantial wage increase under the terms of the new agreement which became effective on December 1, 1953. Consequently, whether to their advantage or disadvantage as they may have viewed it, such language as the agreement contained which was restrictive of their right to engage in concerted activities was binding upon them. See *Foid Motor Co v. Huffman*, 345 U. S. 340.

It is clear that the five complainants were discharged, as the General Counsel contends, because of their concerted activities in presenting grievances to the local representative of Ward Cove Builders. However it is also established, as Respondent contends, that a concerted activity, whether constituting a full-fledged strike or not, in derogation of a no-strike clause, or even, in the absence of a no-strike clause, merely in violation of a contract clause, is unprotected under the Act. *N. L. R. B. v. Sands Manufacturing Co.*, 306 U. S. 332; *N. L. R. B. v. Kaiser Aluminum & Chemical Corp.*, 216 F. 2d 366 (C. A. 9); *N. L. R. B. v. Sunset Minerals, Inc.*, 211 F. 2d 224 (C. A. 9); *N. L. R. B. v. American Manufacturing Co.*, 203 F. 2d 212 (C. A. 5); and *N. L. R. B. v. Dorsey Tralers*, 179 F. 2d 589 (C. A. 5). As found below, the evidence demonstrates that the activities herein fall within the scope of the foregoing decisions.

(1) In the present case, the foreman, Miles Strickland, met with the job steward and discussed the grievances with him on a number of occasions. He had not yielded to him on these matters, save on one, and it appears that due to the personalities involved he, Strickland, may not have gotten across to Gilley the fact that this grievance, hot mud, was being taken care of. That the Act does not require concessions by the representative of management is now established. *N. L. R. B. v. American National Insurance Co.*, 343 U. S. 395. Consequently, this is not a situation of management refusing to treat with and consider the grievances, in which event it might be claimed that there had been a prior breach of the contract by Respondent.

(2) Nor does it appear that Respondent had breached the contract by payment of the \$5.75 rate as an expense allowance. A study of the two agreements discloses that they are substantially similar on this topic, although the new agreement, effective on December 1, 1953, does clear up the ambiguity in the former. Moreover, although the former agreement was in effect when some of the complainants had entered the Respondent's employ, the latter was in effect when others did and was in effect at the time all of the men saw fit to leave the job in pursuit of, *inter alia*, the \$10 expense allowance.

The testimony of A. J. Stream, Respondent's district manager in Seattle, as well as that of Business Agent Moore of Local 97, establishes that the contract did not contemplate the payment of the higher rate under the conditions prevalent in Ketchikan, namely, a location where a camp was provided, but rather only when a camp was not provided. This, it may be noted, was not a situation where the men were in need of finding accommodations for their families in Ketchikan. Accordingly, based upon an inspection of the contracts, and particularly the parol testimony as to the interpretation placed upon the contracts, I find that Respondent did not commit a prior breach of the contract by payment of the lower rate. See *Milwaukee Gas Light Company*, 111 NLRB 837; and *Finnian v. Rokuz Holding Corp.*, 130 A. C. A. 892 (Calif.).

(3) Although not contending that Ward Cove Builders and Respondent were anything other than independent entities, the General Counsel has contended that the practice in the area warranted the men in proceeding to Myall with their grievances. The fact still remains, however, that the members of the crew absented themselves from work and proceeded to visit someone other than their own Employer in order to redress their grievances. Contrary to the contention of the General Counsel, the record does not support a finding that Ward Cove Builders had control over the labor relations of Respondent. The contract does provide the right to remove an unsatisfactory employee and to veto the appointment of supervisory personnel but there is no evidence of its exercise. And in any event, as I find, they were independent entities. Moreover, even if they were not, the contract language forbidding stoppages is broad enough to encompass the instant stoppage. Whether a strike or not, the men were bound by the language of their contract, despite the problems posed by the absence of a higher echelon of authority on

both sides. See *N. L. R. B. v. Denver Building and Construction Trades Council, et al.*, 219 F. 2d 870 (C. A. 10), and *Ridgeway v. I. A. C.*, 130 A. C. A 983 (Calif.).

(4) The record will not support a finding that Respondent was motivated herein by any union animus. In fact, the record discloses quite the contrary, namely, that the relationship between the Union and Respondent was an established and amiable one. The comment allegedly made by Miles Strickland to Heider at the time of his discharge even if credited, is insufficient to constitute, on this record, substantial evidence of discriminatory antiunion motivation. See *Terri Lee, Inc.*, 107 NLRB 560.

(5) It is true that the grievance or no-strike language of the contract is not a model of clarity. But article V of the contract does clearly state that there shall be no strikes except when of a general nature, when ordered by a building and construction trades council, and with the approval of the parent organization of Local 97, and further that "Trade disputes or grievances shall be settled without cessation of work and in cases where the parties to this Agreement fail to agree, the matter in dispute shall be referred to the Joint Trade Board." Moreover, the testimony of Union Vice-President Kammer discloses that a job steward acts beyond the scope of his authority in proceeding as far as this one did with a grievance to the general contractor.

In this case, the men very definitely had grievances, whether justified or not is immaterial herein, and they did stop work on January 7 in clear violation of the foregoing language. And it was on the basis of their activity on January 7 that Harry Strickland decided that all participants would be discharged, a decision which he promptly implemented after his arrival on the scene on January 8. Nor is it significant herein that the men did not intend to engage in a full-fledged strike as such. The contract went beyond forbidding a strike for it forbade any "cessation of work." It is clear, and I find, that the men violated the language of the contract by stopping work on January 7 and visiting Myall.

(6) In any event, another element is present herein which compels a finding adverse to the complainants. While some testified that on January 7 the subject of replacing their foreman was introduced by Myall, the testimony of their leader and apparently chief spokesman, Gilley, is to the contrary. For he testified that "One of the main reasons" the men visited Myall on January 7 was to "get rid of Strickland." While a protest to a higher level of management concerning conditions imposed by a foreman is not an unprotected activity, such is not the case where the object is to procure the removal of a management representative, namely the foreman. See *N. L. R. B. v. Reynolds International Pen Co.*, 162 F. 2d 680 (C. A. 7).

This objective, it is clear, was in the forefront on January 7 and consequently the activity undertaken by the men cannot constitute a protected activity under Section 7 of the Act. Thus, the decision to eliminate the men because they had left the job on January 7, even though Harry Strickland may have been ignorant of this particular objective, cannot be found to be violative of the Act. Moreover, on January 8, when the men left the job, they did so only after recording their no-confidence vote in Miles Strickland, an act consistent with the position taken on the prior day with Myall.

In sum, I find that the men violated their contract by walking off the job on January 7 and 8 and, moreover, that one of their key objectives, namely the replacement of a foreman, removed the activity from the protection of the Act. As stated in the *Sands* case, "The Act does not prohibit an effective discharge for repudiation by the employee of his agreement any more than it prohibits such discharge for a tort committed against the employer." Accordingly, it is recommended that the complaint be dismissed. *N. L. R. B. v. Sands Manufacturing Co.*, *supra*; *N. L. R. B. v. Sunset Minerals, Inc.*, *supra*; *Terri Lee, Inc.*, *supra*; and *Michigan Lumber Fabricators, Inc.*, 111 NLRB 579.

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. The operations of Respondent, Armstrong Cork Company, affect commerce within the meaning of Section 2 (6) and (7) of the Act.
2. Local 97, International Association of Heat and Frost Insulators and Asbestos Workers, is a labor organization within the meaning of Section 2 (5) of the Act.
3. Respondent, Armstrong Cork Company, has not engaged in unfair labor practices within the meaning of Section 8 (a) (1) and (3) of the Act.

[Recommendations omitted from publication.]