asserts that the position of machine shop welder has been abolished and it does not plan to revive the job in the foreseeable future.

On the basis of such facts, the Regional Director found that the job of machine shop welder had been abolished, and recommended that the challenge to Cannon's ballot be sustained. In its exceptions, the Petitioner in effect asserts that Cannon was an eligible voter because he was within the voting group during the crucial payroll period established in the Direction of Election herein. We find, however, that even though Cannon may have been within the voting group during the eligibility period, his subsequent transfer before the election to a job outside the voting group terminated his eligibility to vote.[2] We shall therefore sustain the challenge to his ballot.

As the Petitioner failed to receive a majority of the votes cast in the election, we shall only certify the election's results.

[The Board certified that a majority of the valid ballots was not cast for District 37, International Association of Machinists, AFL–CIO, and that the said Union is not the exclusive representative of the employees at the Employer's Houston, Texas, plant in the voting group designated in paragraph numbered 4 of the Decision and Direction of Election herein.]

[2] See *National Container Corporation of Wisconsin*, 99 NLRB 1492, 1495–1496. *Manganese Ore Company*, 54 NLRB 1192, 1213–14.

Marshall Car Wheel and Foundry Co. of Marshall, Texas, Inc. ***and*** **United Steelworkers of America, AFL–CIO.** *Case No. 16–CA–443. January 5, 1956*

SUPPLEMENTAL DECISION, DETERMINATION, AND ORDER

On January 7, 1955, the United States Court of Appeals for the Fifth Circuit denied enforcement to an order issued herein by the Board on May 28, 1953,[1] based on findings that the Respondent had discriminatorily discharged certain of its striking employees and denied others full reinstatement privileges because of their prior concerted activity.

Holding that the Board erred in finding that the Respondent condoned an illegal strike which was timed without prior warning and might have resulted in substantial physical damage to the plant and pecuniary loss to the employer, the court concluded that the Board had no authority to compel the Respondent to reinstate employees who

[1] 105 NLRB 57; 107 NLRB 314 (Supplemental Decision and Order).

either participated in, authorized, or ratified the strike. However, the court's denial of enforcement of the Board's order was "without prejudice to further proceedings consistent with the views expressed in" the court's "opinion," and the court remanded the case to the Board with directions "to ascertain which employees were justifiably discharged or denied reinstatement in the light of" the principles set forth in the court's opinion.[2]

Thereafter, on March 7, 1955, the Board issued an "Order Reopening Record and Remanding Proceeding to Regional Director for Further Hearing."

Thereafter, all parties entered into a stipulation of facts in which the parties stipulated certain facts, hereinafter set forth, waived their right to a further hearing, and agreed that the Board, without resort to an Intermediate Report of a Trial Examiner or the issuance of proposed findings of fact and conclusions of law, "may make findings of fact and conclusions of law based on the facts stipulated, which facts are supplemental to those heretofore adduced in this case."

On November 3, 1955, the Board approved the aforesaid stipulation of facts, made the stipulation part of the record herein, and ordered that the above-entitled matter be transferred to, and continued before, the Board for the purpose of making findings of fact and conclusions of law.

Thereafter, all parties filed briefs which the Board has considered.

On the basis of the foregoing, the Board hereby makes the following findings of fact and conclusions of law:

1. In the aforesaid stipulation of facts, the parties agreed that all employees "named in the Board's Decision and Order dated May 28, 1953,"[3] except Woodrow Williams, Sam Hall, and Yourie Williams, "either participated in the walkout at 11:00 a. m. October 16, 1951, or authorized the walkout at the union meeting of October 15, 1951. . . ." As these employees participated in or authorized the strike, in accordance with the decision of the court of appeals, they engaged in unprotected activity and hence the Respondent justifiably discharged or refused reinstatement to these employees. Accordingly, we shall dismiss the complaint as to them.

2. In this case, a strike, economic in character, was voted by the Respondent's employees on the evening of October 15, 1951. On the following day, in accordance with their predetermined plan, approximately 45 percent of the Respondent's employees then at work walked out of the plant at 11 a. m., a time intentionally chosen by the striking employees when molten iron in the plant cupola was ready to be

[2] *N L R B.* v *Marshall Car Wheel and Foundry Co. of Marshall, Texas, Inc*, 218 F. 2d 409 (C A. 5)

[3] We take this to refer to those employees named in the appendix attached to the Decision and Order

poured off and when lack of sufficient help to carry out the pouring operation might well have resulted in substantial property damage and pecuniary loss to the Respondent. However, certain employees who did not honor the strike, together with the Respondent's supervisory staff, were able to pour off the molten metal and prevent any actual damage.

About noon on the same day, Union Representative J. A. Lee communicated with the Respondent's vice president and general manager, Emory E. Fry.. Lee asked Fry to meet with the Union's committee to discuss certain layoffs which were part of the reason for the strike; in addition, Lee offered to send back a number of the strikers to help pour the molten lead from the cupola. Fry declined the offer of help and stated that the strikers had quit their employment and, if they were restored, which was up to the foreman, "they would have to come back as new employees." At 3:30 p. m. of that same afternoon, Lee again telephoned Fry. Lee unconditionally applied for the reinstatement of the strikers. Fry repeated his earlier position to the effect that the men should apply to the foremen, and if they were hired, "they would be employed as new employees."

As a consequence of the Respondent's position, the Union then set up a picket line on October 17, 1951. In addition, on October 17 and again on October 18, 1951, the Union wrote the Respondent repeating the strikers' unconditional offer to return to work.[4]

On November 6, 1951, at a conference between the Union and the Respondent at which the Union repeated its unconditional application for the reinstatement of the strikers, the Respondent's attorney, who acted as spokesman for the Respondent at the meeting, asserted that to "apply for their jobs" the men were to "see their foremen as indicated" previously by Fry, adding that "the men would be rehired if their job had not been filled, that was the gist, without discrimination." The Respondent's attorney acknowledged, however, that "if they returned, they would be returned as new employees."

On November 8, 1951, the Union ended the strike and removed the picket line. Both before and after the strike ended, the Respondent rehired a number of strikers, but only as new employees.[5]

As a result of the Respondent's position that all employees on strike had absented themselves from the plant without permission and had therefore quit, the Respondent removed from its payroll the names of all employees who participated in the strike. This included not only the employees who walked out at 11 a. m., the inception of the

[4] Still later, all or most of the strikers signed individual unconditional applications for employment which the Union mailed to the Respondent. These the Respondent received on November 13, 1951. The Respondent made no reply to any of these communications.

[5] The consequence of according the reinstated strikers the status of new employees was that Christmas bonuses and vacation time were sharply cut down by not crediting the strikers for the period of their employment preceding the strike

strike, and thereby created a risk of property damage, but also all other participants in the strike without regard to when they joined it, among them being Woodrow Williams, Sam Hall, and Yourie Williams.[6]

Woodrow Williams was employed as a laborer whose job "was to clean brake shoe castings and to get them ready for inspection on the following morning." His tour of duty was from 4 p. m. until midnight. He did not attend the union meeting of October 15 at which the 11 a. m. walkout of October 16 was planned. At 4 p. m. on October 16, 1951, he went to the plant to commence work, but when told of the strike by striking employees, he joined the strike. He was discharged on October 16, 1951, the Respondent assigning as reason therefor his failure to report for work. He actively engaged in picketing, on one occasion, "carrying and swinging a stick similar to a billiard cue," which was confiscated by a police officer. He was reemployed by the Respondent on December 15, 1951, as a new employee.

Sam Hall did not go out on strike on Monday, October 16, 1951, but worked throughout that week.[7] On October 22, 1951, he joined the striking employees. He gave as his reason that he felt that he would be treating his fellow union members unfairly "if he cooperated with the Company." He picketed on various occasions between October 22 and November 8, 1951. The Respondent asserts that Hall "terminated his employment" because "he refused employment on October 22, 1951." Hall was reemployed by the Respondent on November 9, 1951, as a new employee.

Yourie Williams did not attend the union meeting of October 15, 1951. He was absent from work on October 16, 1951, due to a back injury sustained by him in the course of his employment on October 9, 1951. During the strike he drew workmen's compensation which was paid by the Respondent's insurance carrier. Williams' disability ended on October 29, 1951, at which time he was told by his doctor to report for work, and the Respondent was so advised. However, Williams did not report for work on October 29, instead, he joined the strike and was seen on the picket line after that date. He was discharged from employment on October 29, 1951, the reason assigned therefor by the Respondent being "failure to report for work after having been released by his doctor as able to work, pursuant to a company rule to the effect that any employee injured on the job who fails to report for work after having had a compensable injury is automatically discharged." The Respondent assigns as reason for this

[6] The facts stated in the next 3 paragraphs of the text are substantially as stipulated to in the stipulation of facts, referred to above

[7] The stipulation of facts does not disclose whether Hall attended the union meeting of October 15.

rule that "where an employee remains away from work after such an injury, it creates the possibility that further workmen's compensation may be claimed, which could result in an increase in the cost of workmen's compensation insurance payable by the Respondent." Williams was employed as a new employee on November 9, 1951.

DETERMINATION

On the basis of the foregoing, we conclude that the Respondent did not justifiably discharge, or deny reinstatement to, Woodrow Williams, Sam Hall, and Yourie Williams. They were unlawfully discriminated against, as the Board originally found, because they engaged in the strike.[8] In its opinion, the court of appeals, in view of the absence of specific findings on this issue, rejected the Respondent's intimation that reinstatement should be denied to all striking employees as a matter of law because of "the dereliction of these union officers and other strikers." The court made clear that reinstatement should be denied *only* to those who authorized or participated in the wrongful conduct and their aiders and abettors. Woodrow Williams and Yourie Williams did not attend the union meeting at which the wrongful strike action was planned. So far as appears, neither did Hall. None of them participated in the 11 a. m. walkout. By the time Woodrow Williams joined the strike, at 4 p. m. on October 16, the Union had offered to supply men to pour the molten metal and the emergency had passed. Hall remained at work at the inception of the strike and did not go on strike until a week later.[9] Yourie Williams was away from work on sick leave when the strike broke out and did not join the strike until October 29.

Thus, these three employees did not authorize the 11 a. m. walkout or participate in it; they joined the strike at a time when, prospectively, it no longer had an unprotected character. During the period

[8] As already indicated, this case was remanded by the court to the Board on the sole issue as to whether the employees involved were implicated in the strike misconduct of walking out at a time when great injury could have resulted to the Company's physical plant Hence we do not agree with the Respondent's contention that the conduct of Woodrow Williams in "carrying and swinging a stick similar to a billiard cue" while walking the picket line and the conduct of Yourie Williams in violating a company rule to report to work after recovering from an injury justify their discharge These matters are irrelevant to the remand issue. In any event, there is nothing in the stipulation of facts to indicate that Woodrow Williams was swinging the stick in a menacing manner or that any of his picket-line activities tended to coerce anyone. As for Yourie Williams' breach of the plant rule by joining the strike instead of reporting to work, the court ruled that, on the ultimate issue, "the real inquiry is the character of the concerted activity engaged in, not whether the rule [barring absence without permission] was incidentally breached thereby" Absenteeism is inherent in any strike. An employer may not successfully defend against the discharge of an employee for engaging in protected activity in the nature of a strike by claiming that the employee violated a company rule which would, if complied with, prevent the employee from engaging in such protected activity.

[9] Contrary to the Respondent's contention, Hall did not voluntarily terminate his employment by joining the strike

when they participated in the strike and picketing, so far as appears, they had no knowledge of the hazardous circumstances which existed at the time the strike began. By merely engaging in the strike or picketing, they did nothing to approve or ratify the unprotected strike activity or to aid or encourage the strikers in their wrongful conduct. Thus, the record does not establish that they authorized or participated in the wrongful strike action or that they were aiders or abettors.[10] We find, therefore, that these three employees did not engage in any unprotected activity or in any conduct which renders them unfit for reinstatement.

Such cases relied upon by the Respondent as *B. V. D. Company, Inc.*, 110 NLRB 1412, 1416, are inapposite. Unlike here, there the strikers in question who were denied reinstatement had knowledge of the widespread violence in which the picketing there was enmeshed, and by taking no steps to disavow it and by continuing the picketing under such circumstances, the Board inferred that they welcomed, approved, and ratified the wrongful conduct.[11]

We conclude, therefore, that Woodrow Williams, Sam Hall, and Yourie Williams should be reinstated by the Respondent, with back pay,[12] in accordance with the terms of our original Decision and Order.

[The Board dismissed the complaint as to those employees named in the appendix to the Board's Decision and Order, except Woodrow Williams, Sam Hall, and Yourie Williams.]

MEMBER BEAN took no part in the consideration of the above Supplemental Decision, Determination, and Order.

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[10] Contrary to an intimation in the Respondent's brief, although the Board's order of March 7, 1955, directing a further hearing, specified that evidence be taken as to participation in the strike and picketing, the Board did not thereby undertake to determine that any specific conduct constituted aiding or abetting the wrongful strike activity.

[11] Member Murdock does not adopt the distinction attempted to be drawn above between this case and *B. V. D. Company, Inc.* If the latter case is still deemed good law there would seem to be more reason to require union members who join a strike officially called by their union at a time when probable damage to property rendered the walkout unprotected, to disavow the unprotected conduct when they later joined the strike, than to require strikers as in *B. V. D. Company, Inc.*, to disavow violence committed chiefly by unknown persons and not on the picket line. However, Member Murdock dissented in *B. V. D. Company, Inc.*, pointing out that the decision of the majority therein was contrary to Board and court precedent which holds that strikers may not be denied reinstatement because of misconduct in which they do not participate or do not ratify. The decision of the Court of Appeals herein is in accord with that precedent rather than with the *B. V. D. Company, Inc.*, decision, because the opinion instructs the Board to deny reinstatement only to those employees who "either participated in, authorized or ratified the illegal walkout." Member Murdock therefore considers *B. V. D. Company, Inc.*, inapposite because it is not consistent with the principles laid down by the Court of Appeals in remanding the instant case.

[12] Back pay for Woodrow Williams, Sam Hall, and Yourie Williams will be payable from the time that they first unconditionally requested reinstatement until the Respondent offers them full reinstatement without prejudice to their vacation and Christmas bonus privileges. Such reinstatement was requested on October 17, 1951, in the case of Woodrow Williams, and on November 6, 1951, in the case of Sam Hall and Yourie Williams.