

"A," cost clerks "B," payroll clerk senior, payroll machine operator, receptionist, steno-clerk, timekeeper, typist-clerks, and works accounting assistant in the accounting department; the purchasing clerk and purchasing assistant in the purchasing department; production control clerks, order clerks "A," order clerks "B," order and record clerks, production clerk "B," steno-clerk, typist-clerks, and the pricing clerks in the production control department, but excluding all other employees and all supervisors as defined in the Act.¹³

We shall also grant the plant-clerical employees an opportunity to express their desires as to whether or not they wish to be added to the existing production and maintenance unit. We shall, therefore, direct an election in the following voting group which we find may appropriately be added to the existing production and maintenance unit at the Employer's St. Johnsbury, Vermont, plant: All expeditors, the chief expeditor, chief schedulers, schedulers, storekeepers, and the dispatcher. If a majority of the employees in this voting group vote for the Petitioner, they will be taken to have indicated their desire to be included in the production and maintenance unit currently represented by the Petitioner, and the Regional Director shall issue a certification of results of election to that effect.

[Text of Direction of Election omitted from publication.]

¹³The unit appears as stipulated to by the parties, with the exception of the determinations herein made. The classifications as set forth are in accord with the Employer's Exhibits Nos. 2, 3, and 4.

The parties agreed to exclude the following employees: As confidential employees: The manager's secretary, manager's department; typist-clerks, personnel department; steno-clerk (Elsie Padham), production control department; steno-clerk (Constance Marden), foundry department; steno-clerk (Priscilla LaPlante), manufacturing services department; steno-clerk (Lorna Quimby), engineering department. As a supervisor, the clerk-chief, foundry factory.

B. V. D. Company, Inc. and International Ladies' Garment Workers' Union, AFL. Case No. 15-CA-479. May 2, 1957

**SUPPLEMENTAL DECISION, DETERMINATION,
AND ORDER**

On December 14, 1954, the Board issued a Decision and Order in this case in which it found that the Respondent had engaged in certain unfair labor practices in violation of the National Labor Relations Act and ordered it to take remedial action designed to effectuate the policies of the Act.¹ It found, *inter alia*, that the Respondent had discriminated against a large group of employees, but denied reinstatement and back pay to those who, it found, had "invited and accepted the benefit" of "widespread physical violence, destruction of property,

¹ 110 NLRB 1412

117 NLRB No. 182.

intimidation and threats which accompanied the strike" and "took no steps to discourage or repudiate it."

Thereafter, the case was considered by the United States Court of Appeals for the District of Columbia upon the Board's petition for enforcement of its Order and upon the Union's petition to review and set aside part of the Order. On May 3, 1956, the court handed down its opinion and judgment,² and, on June 27, 1956, it issued its decree affirming the Board's Order in part, setting it aside in part, and remanding it to the Board for reconsideration "insofar as it denies reinstatement and back pay remedy to certain unfair labor practice strikers. . . ."

After issuance of the court's decree, the Respondent, in a letter dated July 6, 1956, asked the Board to deny reinstatement and back pay to the discriminatees in dispute upon the basis of the principles laid down in the court's decision and, if necessary, to reopen the record to take additional evidence bearing on alleged violence in connection with the picket line. The Union opposes the Respondent's motion.

The court disagreed with that part of the Board's decision withholding reinstatement and back pay to those strikers who, the Board found, had approved and ratified the strike violence by their failure to abandon the picketing or to disassociate themselves from it in any other way. The court observed that the record did not support a finding that the picketing employees directly or indirectly had participated in or authorized the misconduct. It held that neither the strikers' failure to abandon the picketing nor their failure to disassociate themselves from it in other ways suggested by the Board ("by admonishment, denunciation or public pronouncement") constituted ratification by the strikers. Their silence, said the court, cannot be taken as a basis for inferring that the strikers "acquiesced in the wrongs of others with whom no agency relationship is shown." 237 F. 2d at 552. Addressing itself particularly to the doctrine of ratification, the court said:

A conclusion of ratification drawn from mere failure to abandon picketing would curtail an important statutory and constitutional right. Curtailment of this right is justified only when violence has "given to the picketing a coercive effect whereby it would operate destructively as force and intimidation." *Milk Wagon Drivers Union of Chicago, Local 753 v. Meadowmoor Dairies, Inc.*, 1951, 312 U. S. 287, 298 . . . As the Union points out, the Board made no finding that the picket line itself had "a coercive effect," or that the picketers themselves contributed to the violence. [237 F. 2d at 551.]

² *International Ladies' Garment Workers Union v. N L R. B.*, 237 F. 2d 545 (C. A., D. C.).

Holding that there was no connection between the picketing strikers and the violence, the court found no basis for the Board's decision denying relief to some of the discriminatees and it ordered the Board to reconsider its decision in this respect.

The court of appeals has thus set aside the Board's conclusion that the 37 strikers whose rights were in issue had ratified the strike violence and so forfeited their right to relief under the Act. Its opinion suggests that, in other circumstances, ratification might be found from failure to abandon picketing where that picketing exerted "a coercive effect." But whatever the intendment of this suggestion in other circumstances,³ the court has indicated there was no such coercion in this case. In this connection the court said:

The plant continued in operation throughout the strike, and there is no evidence that any employee who wished to work was prevented from crossing the picket line. Indeed, on May 14, 1952, three months before the strike ended, the State court granted the strikers permission to resume picketing, suggesting that, even if the picket line had been enmeshed in violence for the first three days, its coercive character had been dissipated and did not reappear for the remainder of the strike. [237 F. 2d at 551-552.]

The Respondent would have the Board reopen the record to consider a part of the union organizer's testimony that was stricken by the Trial Examiner. The printed transcript shows the following testimony: Plant Superintendent Nicholas testified that the parties arranged a meeting in July 1952 to discuss ways of ending the disorder which had marked the strike; that at the meeting the union organizer reached into her briefcase and said, "Well, I have a contract right here, and we can get peace right away"; and that the Respondent's attorney replied that the parties were not there "to discuss a union contract with anybody." On motion, the Trial Examiner struck this testimony as to what was said at the meeting as irrelevant.

The Trial Examiner's ruling did not prejudice the Respondent. The testimony does not warrant a finding that any of the unfair labor practice strikers participated in, authorized, or ratified the violence. The union representative's statement, even if made, does not establish the strikers' responsibility for the misconduct within the principles enunciated in the court's opinion. In the light of the court's opinion, requiring proof of individual wrongdoing, we cannot find that this one bit of testimony in a lengthy record constitutes sufficient proof on this basic issue.⁴

³ Cf. *Milk Wagon Drivers v. Meadowmoor Dairies, Inc.*, 312 U. S. 287.

⁴ The Respondent's argument with respect to the excluded testimony is but a reiteration of the same argument made both to the Board and to the court.

At the hearing and in its briefs to the Board the Respondent argued that the July 1952 meeting proved direct participation and responsibility of outside union leaders for the

The Respondent would also have the Board reopen the record to receive "additional substantial evidence of the coercive effect exercised by the picket line violence." The Respondent does not say what evidence it proposes to introduce at a reopened hearing. It does not say that the additional evidence was newly discovered or unavailable at the time of the hearing. As the Respondent has not shown adequate reason to reopen the record, we deny the motion.⁵

Pursuant to the terms of the court's decree, we shall order the Respondent to offer reinstatement and back pay to those discriminatees named in the appendix attached to this Supplemental Decision, Determination, and Order.

SUPPLEMENTAL REMEDY

We shall order the Respondent to offer to the employees named in the appendix attached to this Supplemental Decision, Determination, and Order, who have not already been offered reinstatement, immediate and full reinstatement to their former or substantially equivalent positions,⁶ without prejudice to their seniority or other rights and privileges, and make them whole for any loss of pay suffered by reason of the discrimination against them. Said loss of pay for each employee, based upon earnings which he normally would have earned from the date of the discrimination against him to the date of the Respondent's unconditional offer of reinstatement, less net earnings,⁷ shall be computed on a quarterly calendar basis in accordance with the formula adopted by the Board in *F. W. Woolworth Co.*⁸

ORDER

Pursuant to a decree of the United States Court of Appeals, the entire record in the case, and Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, B. V. D. Company, Inc., Pascagoula, Mississippi, its officers, agents, successors, and assigns, shall:

1. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Offer those employees named in the notice attached hereto marked "Appendix," who have not already been offered reinstatement, immediate and full reinstatement to their former or substantially

violence and was important evidence in establishing a conspiracy. The Board considered the rulings of the Trial Examiner, including the exclusion of the testimony the Respondent would now have reconsidered, and held that there was no prejudice in any of the rulings.

In its brief to the court the Respondent argued similarly that the union organizer's statement at the July 1952 meeting with company representatives should have impelled the Board to find a conspiracy. The court did not disturb the Board's ruling.

⁵ *Tyrrell County Lumber Company*, 101 NLRB 155, enf'd 203 F. 2d 951, 952 (C. A. 4); *Santa Clara Lemon Association*, 112 NLRB 92, 94, enf'd 240 F. 2d 554 (C. A. 9).

⁶ See *The Chase National Bank of the City of New York*, 65 NLRB 827.

⁷ See *Crosssett Lumber Co.*, 8 NLRB 440.

⁸ 90 NLRB 289.

equivalent positions, without prejudice to any seniority or other rights and privileges previously enjoyed by them, and make whole all employees named in the attached appendix in the manner set forth in the section of this Supplemental Decision, Determination, and Order entitled "Supplemental Remedy."

(b) Post at its plant in Pascagoula, Mississippi, copies of the notice attached hereto marked "Appendix."⁹ Copies of such notice, to be furnished by the Regional Director for the Fifteenth Region, shall, after being duly signed by the Respondent's authorized representative, be posted by the Respondent immediately upon receipt thereof, and maintained by it for sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

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

MEMBER MURDOCK, concurring:

I dissented from the original decision which denied reinstatement and back pay to the employees here involved. I am therefore pleased to be joined with two of my colleagues in correcting the Board's original error and ordering reinstatement and back pay for these employees pursuant to the opinion and remand of the court of appeals.

I concur separately because, although otherwise in agreement with the main opinion, I differ in one respect with their interpretation of the opinion of the court of appeals. Although the difference is academic insofar as the result in this case is concerned, nevertheless, as it involves a principle of law which may be important in the future, I wish to make clear that I do not read the court's opinion in that respect as I believe my two colleagues who have signed the main opinion do. Chairman Leedom and Member Bean state that the opinion of the court of appeals "suggests that, *in other circumstances* ratification [of strike violence] might be found from failure to abandon picketing where that picketing exerted a 'coercive effect.'" [Emphasis supplied.] If by this statement they intend to suggest that the court meant that the mere failure of pickets to abandon a picket line itself wholly peaceful, might in some circumstances be deemed a ratification of violence committed elsewhere so as to disqualify the pickets from reinstatement and back pay, I cannot agree. The whole tenor of the court opinion is a reaffirmation of the established law

⁹ In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "Pursuant to a Supplemental Decision, Determination, and Order" the words "Pursuant to a Decree of the United States Court of Appeals, Enforcing an Order."

that "absent an agency relationship an employee may not be charged with misconduct committed by others. . . ." As the court reiterates at the conclusion of its opinion, "such a relationship is an essential prerequisite to the inference" of ratification of violence by strikers—"their silence provides no rational basis for inferring that they acquiesced in the wrongs of others with whom no agency relationship is shown."

Consequently, I cannot agree with our dissenting colleague that the court's opinion introduces "a new principle" of law on imputation of responsibility for violence.

MEMBER RODGERS, dissenting:

As I interpret the decision of the court of appeals, the court, relying on the *Meadowmoor* case, held that if the picketing herein, albeit peaceful in itself, acquired from the background of violence in which it was set "a coercive effect whereby it would operate destructively as force and intimidation," then the failure of the pickets to abandon the picketing would constitute ratification of the misconduct and the pickets would therefore forfeit their right to reinstatement. Alternatively, the court held that the pickets would also forfeit their right to reinstatement if, apart from the picketing, they participated in, authorized, or ratified the violence. But in this connection the court found that the pickets did not participate in, authorize, or ratify the violence. Hence, it follows that the only issue left for the Board's consideration upon remand was whether the picketing acquired "a coercive effect" from its background of violence.

The majority disposes of that issue by stating that "the court has indicated that there was no such coercion in this case." This suggests that the court acted idly in remanding the case to the Board. But it is clear from the court's decision that the court did not decide whether the picketing acquired a coercive effect. The majority relies upon the court's statement that the action of the State court in permitting the strikers to resume picketing suggests that "even if the picket line had been enmeshed in violence for the first three days, its coercive effect had been dissipated, and did not reappear for the remainder of the strike." Obviously, this comment by the court is at best dicta, and cannot be properly considered a finding of fact.

I am not prepared on the basis of the present record to decide whether the picketing acquired a coercive effect from its background of violence or whether and when that effect was dissipated. The issue was not litigated or considered in the original proceedings. It was raised for the first time by the court. Moreover, the Respondent was prevented by the Trial Examiner from fully developing the back-

ground of violence in this case and the possible coercive effect of the picketing on the ground that under the then governing principles the violence must be directly attributed to the pickets. Under these circumstances, and especially since the court has introduced a new principle into this case, I believe that the Board is obliged to grant the Respondent's request to reopen the record.

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

APPENDIX

NOTICE TO ALL EMPLOYEES

Pursuant to a Supplemental Decision, Determination, and Order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

WE WILL offer to any of the employees named below who have not already been so offered, immediate and full reinstatement to their former or substantially equivalent positions without prejudice to any seniority or other rights and privileges previously enjoyed by them, and we will make them whole for any loss of pay suffered as a result of the discrimination against them:

Ruthie Faggard	Alda Renfroe	Helen Pierce
Ona Lee Lynn	Gladys Scovel	Annie Miller
Gracie Clark	Claire Beasley	Hazel Williams
Inez Reeves	Lona Pace	Dolores Wilson
Fannie Smith	Jaunice Hill	Abny Smith
Elizabeth Mills	Lucy Heflin	Leonard Swearinger
Annie L. Bryant	Ruby Lee Goff	Aileen Swearinger
Lela Pope	Lena May	V. P. Vernon
Vadis Peden	Ina Goff	Frances Vernon
Annie Louise Peden	Ethel Baker	Seth Ettredge
Mary Cranford	Delmar Ashley	Sallie Shumaker
Clara Davidson	Mary Goff	Fronia Nellums
Bessie Bush		

B. V. D. COMPANY, INC.,
Employer.

Dated _____ By _____
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.