V THE REMEDY

Having found that the Respondent has engaged in and is engaging in certain unfair labor practices affecting commerce, I shall recommend that it cease and desist therefrom, and take certain affirmative action designed to effectuate the policies of the Act

It has been found that the Respondent, by discharging and failing to reinstate Robert Sadler, has discriminated against him in respect to his hire and tenure of employment, and has thereby violated Section 8(a)(3) and (1) of the Act I shall therefore recommend that the Respondent cease and desist from such discrimination I shall also recommend that the Respondent offer Sadler immediate and full reinstatement to his former or substantially equivalent position, without prejudice to his seniority or other rights and privileges [83] I shall further recommend that the Respondent make Sadler whole for any loss of pay he may have suffered by reason of the aforesaid discriminatory treatment, by payment to him of a sum of money equal to that which he normally would have earned, less his net earnings, from November 26, 1958, the date of the beginning of the discrimination against him, to the date of a proper offer of reinstatement to substantially equivalent employment, computation of the amount of backpay due to be made in the customary manner [84] I shall further recommend that the Respondent preserve and, upon request, make available to the Board, payroll and other records to facilitate the checking of the amount of backpay due

As the unfair labor practices committed herein by the Respondent are of the type which strike at the roots of employee rights safeguarded by the Act, it will also be recommended that the Respondent cease and desist from interfering in any manner with the exercise by its employees of rights guaranteed in Section 7 of the Act

Upon the basis of the foregoing findings of fact, and upon the entire record in this case, I make the following

CONCLUSIONS OF LAW

1 Local 2022, United Brotherhood of Carpenters and Joiners of America, AFL–CIO, is a labor organization, within the meaning of Section 2(5) of the Act

2 By discriminating in regard to the hire and tenure of employment of Robert Sadler, the Respondent has engaged in and is engaging in unfair labor practices, within the meaning of Section 8(a)(3) of the Act, and has also thereby interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act, thus engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act

3 The aforesaid unfair labor practices are unfair labor practices affecting commerce, within the meaning of Section 2(6) and (7) of the Act

[Recommendations omitted from publication]

[83] *The Chase National Bank of the City of New York, San Juan, Puerto Rico, Branch,* 65 NLRB 827

[84] *Crossett Lumber Company,* 8 NLRB 440, *Republic Steel Corporation* v *N L R B,* 311 U S 7, and *F W Woolworth Company,* 90 NLRB 289, 291–294

Tailored Trend, Inc. *and* Oscar Swerdlik. *Case No 4–CA–1846 January 26, 1960*

DECISION AND ORDER

On September 24, 1959, Trial Examiner Leo F Lightner issued his Intermediate Report in the above-entitled proceeding finding that the Respondent had not engaged in certain unfair labor practices alleged in the complaint and recommending dismissal of the complaint in its entirety Thereafter, the Charging Party filed exceptions and

a brief in support thereof; the Respondent subsequently filed a brief in reply.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to a three-member panel [Chairman Leedom and Members Rodgers and Jenkins].

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 briefs, and the entire record in the case, and hereby adopts the Trial Examiner's findings, conclusions,[1] and recommendations.

[The Board dismissed the complaint.]

[1] In agreement with the Trial Examiner, and for the reasons stated in the Intermediate Report, we find that the five alleged discriminatees named in the complaint were not discharged, discriminatorily or otherwise. Accordingly, we do not find it necessary to decide whether the activity of these persons, in meeting with Respondent's president, Heller, in an attempt to secure increased compensation, constituted protected activity under the circumstances herein, and we do not adopt the Trial Examiner's discussion of this issue

INTERMEDIATE REPORT AND RECOMMENDED ORDER

STATEMENT OF THE CASE

This proceeding was heard before Trial Examiner Lightner in Philadelphia, Pennsylvania, on May 4 to 7, 1959, on the complaint of the General Counsel and answer of Tailored Trend, Inc., herein called the Respondent. The issues litigated were whether the Respondent violated Section 8(a)(1) and (3) and Section 2(6) and (7) of the Labor Management Relations Act, 1947. The parties presented oral argument, and briefs filed by General Counsel and Respondent have been carefully considered.

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

FINDINGS AND CONCLUSIONS

I. THE BUSINESS OF THE RESPONDENT

Respondent is a Pennsylvania corporation, maintaining its principal place of business at Philadelphia, Pennsylvania, and engaging in the manufacture of ladies' suits. In the course and conduct of its business Respondent annually sells and ships goods to points outside the Commonwealth of Pennsylvania in an amount in excess of $50,000 in value. I find that Respondent is engaged in commerce within the meaning of the Act.

II. THE LABOR ORGANIZATIONS INVOLVED

Local 2, International Ladies' Garment Workers' Union, AFL–CIO, and Local 69, International Ladies' Garment Workers' Union, AFL–CIO, herein collectively called the Union, are each a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background and sequence of events*

The primary issue to be resolved is whether Oscar Swerdlik, Marie R. Swerdlik, Tillie Snyderman, Maria Pincus, and Elizabeth Warth were, as alleged in the complaint, discharged by the Respondent, on December 12, 1958, who thereafter failed and refused to reinstate Oscar Swerdlik, Marie R. Swerdlik, Maria Pincus, and Elizabeth Warth, because they requested changes and improvements in their terms and conditions of employment and engaged in other union activity and concerted activities for their mutual aid and protection, in the exercise of rights guaranteed in Section 7 of the Act.

The Union has represented the production employees, estimated as 110 to 115 in number, in Respondent's Philadelphia plant for an unspecified number of years. A collective-bargaining agreement entered into in 1955 expired by its terms on December 31, 1957, approximately 6 months prior to the end of the spring 1958 season, which ended in May or June 1958 and was extended to cover that season. This agreement contained a guarantee of the minimum number of units to be produced in a season, but did not contain the piece rates to be paid for specific work. Historically, piece rates for each craft, some 12 to 15 in number, had been agreed upon by subsequent negotiation between plant management and the representative or representatives of the particular craft involved, and were negotiated for each style. When they could not agree the shop chairman, Jacob Blank, and the union manager, Harry Dordick, participated. Herman Heller, president of Respondent, conducted these negotiations on behalf of the Company for approximately the last year. Joseph Messina, shop foreman, conducted them for one of the preceding years. Oscar Swerdlik and Marie Swerdlik, his wife, were, individually and jointly, the representatives of the craft identified as the "Marking and Trimming Section" in these negotiations. (The five alleged dischargees constituted the entire marking and trimming section on December 12, 1958.)

During negotiations in January to March 1958, for the fall 1958 season (June to November 1958) Heller advised the union representatives that the labor cost per unit, or ladies' suit, approximated $16.50 and that he would have to close the Philadelphia factory. His negotiations were with Mr. Dubinsky, president, Mr. Stolberg, executive vice president, and Mr. Rubin, vice president (for shops outside of New York City) of the International union, and Dordick. An agreement was made that the workers in the shop, piece rate and week (hourly) workers, would receive $10 a suit, a flat price without reference to simplicity or complexity of a style. Supervision, overhead, and other expenses were excluded. The agreement was to run for one season, ending in October. To determine the amount each worker would receive "the union delegate was to break down the earnings of the workers for the past period." The allocations among the various crafts were agreed upon between the employees and the union representatives. (Subsequently, $2.65 was allotted for time workers, based on unit cost for the preceding year The price for marking and trimming was set at 30 cents per unit. The prices for piece workers "set" by the Union, the shop chairman, were subject to "approval" by Heller, who then gave them to the bookkeeper for payment. As a result of the prices set and the agreement to pay $10 a unit, there was a balance due the employees of approximately $5,300 at the end of the season. This amount was distributed on a pro rata percentage of earnings basis, by agreement. The amount due was $10 times the number of units, less actual labor cost.)

B. *Agreement re spring 1959 season*

The agreement for the fall 1958 season had a reopening provision. It also contained a provision for a 6-month extension, if agreeable to the employees.

Blank and Dordick went to New York City the first week in November 1958 and talked to Mr. Handmacher, identified as president of Handmacher-Vogel (Parent Corporation). They explained that the people in the shop were resentful because they lost money in comparison to the former rates. Handmacher and Heller contended they should continue working the spring season under the same conditions and same prices as the fall season.

Heller, Rubin, and Dordick agreed to a continuation of the existing agreement, subject to the approval of the employees.

Dordick returned to Philadelphia, and called a meeting of the employees of Respondent, by post card notice, on November 11, 1958. At this meeting he explained his efforts to get more money, and advised they would either have to continue working for the price of $10 per garment or close the shop. The overwhelming majority voted to return to work.[1] Dordick advised Heller of the acceptance of the agreement by the employees.

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[1] It appears unimportant and unnecessary to resolve the evidentiary conflicts as to how many voted for and against. Oscar Swerdlik first testified that his group, Pincus being absent, voted against going back to work Thereafter, the following day, on redirect, he testified he and a majority first voted to return to work, then a vote was taken on delaying the return to work until a committee visited the International in New York which he voted against. In view of the pages of record devoted to development of his first answer, his claim of misunderstanding the initial "question" on how he voted, on cross-examination, appears untenable. (Warth testified she did not vote)

C. *The November 11, 1958 meeting*

Dordick testified that there was a motion to continue working under the same price of $10 per garment. He stated that the prices (piece rates) would be settled on the same system as the fall season, i.e. "one price—easier garment or harder garment," the same system, "because we haven't got more money."

His testimony included as background, the existence of 32 operations, "and every operation there's a certain group of people that are interested for their specific operation. When we start to settle garments before the season starts in, we always see for ourselves five, six garments. Everyday, almost, comes in new styles—harder styles, easier styles—that we have to settle them again. When we established the price of $10 per garment—easier garment or harder garment, one price—we agreed among ourselves at the meeting, then in the various branches, that whatever operation we settled should be one uniform operation. At the meeting we are referring to, at the 11th of November, I explained to the people we'd have to continue on the same basis, the same system because we haven't got more money."

Dordick, also testified, "at the meeting, we do not discuss any particular operations at the meeting, but after the meeting we try to divide the operations and divide the money. The procedure is the Shop Chairman (Blank) and the committees sit down and try to settle all these grievances." To the extent Dordick's testimony conflicts with that of Oscar Swerdlik and Marie Swerdlik, I credit Dordick for reasons set forth hereafter.

Jacob Blank is shop chairman, and, as such, represents the employees, but does not hold a position in the Union. He is also an employee of Respondent.

Blank's testimony corroborated that of Dordick relative to the November 11 meeting. Blank spoke at the meeting. He told the employees "you're in the shop, it's your union, nobody is imposing anything upon you. It is up to you to accept—or reject—if you do accept, you'll have to vote for it. Then after you'll accept—you should have in your mind that you'll not be able to come to the Union, to the shop and start working, and ask for money. There is no money, there is no more money. This is the price you have. So before you vote, you should make up your mind, you shouldn't then make any disturbances in the shop and then come to holler chairman you want more money. There is no more money." Blank testified the prices were set the "same as before, if the markers and trimmers prices were 30 cents, it is 30 cents."

Blank denied that Dordick mentioned, at the meeting, that some crafts were making 40 to 50 percent less than they used to make, "he didn't say anything like that." He also denied that Dordick said there would be some adjustment of rates and testified there had been no adjustments. I credit Blank where his testimony conflicts with that of Oscar Swerdlik and Marie Swerdlik for reasons stated hereafter.[2]

D. *Events between November 24 and December 12*

Oscar Swerdlik worked for Respondent since January 1952, Marie Swerdlik, his wife, worked about 8 years, Elizabeth Warth about 7 years, Maria Pincus since 1950, and Tillie Snyderman reputedly about 17 years. They comprised the marking and trimming section at the time here considered.

The Swerdliks and Pincus reported to work, for the spring 1959 season, about November 24, 1958. Warth reported on December 2. Snyderman did not appear at the hearing, her reporting date is not indicated.

It is not disputed that the price per piece for marking and trimming was set, when they started to work, at 30 cents, the same as the season before.

The sole dispute was one of entitlement to additional pay for claimed additional work.

Oscar Swerdlik contends that the first day (November 24) Shop Foreman Messina brought over a pattern and told the markers and trimmers they would have lots of

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[2] Oscar Swerdlik testified that, at the November 11 meeting, Dordick made a statement "after he has a clear picture the wages we were earning—is shown that some sections made less between 40 and 55 percent; this whole section would be adjusted and for additional work will be paid And he mentioned like markers and trimmers as to shingling" Marie Swerdlik also testified that the statement about adjustments was made It is patent from the entire record that neither the markers and trimmers nor the union officials knew there would be "shingling" before November 24, and Swerdlik later acknowledged this fact. There had been no "shingling" required in the previous 2 years Similarly, Swerdlik's recitation of discontinuance of specific operations (reduction in canvas work, etc.) related to knowledge obtained on or after November 24

additional work. He quoted Messina as having said "you will be paid for this whole additional work." He related a conversation in the following week when Dordick allegedly told Messina, "If you gave to the people some additional work, find some money somewhere to pay them." Swerdlik recited two conversations in the third week (ending December 12) quoting Messina as saying that Heller would be in on Friday "and will be settled for all this additional work."

Swerdlik and his wife went to Dordick's office (Union) between November 24 and 28 to obtain an additional allowance for "marking backs," which they claimed was additional work. According to Swerdlik, Dordick acknowledged this was additional work, but asked "from where will I get the money?" Presumably at the same time Swerdlik mentioned the "shingling," called attention to the former price of 25 cents for "shingling" a front, and requested 16 cents for "shingling" a pocket. The following week Blank told Swerdlik "we offer you 10 cents" for the shingling, and told him they had no more money.

The second week, Messina gave them a pattern to mark all the ends of the fronts and all around the bottom, for a ribbon. Swerdlik took it to Blank claiming it was work for which they were not paid in the previous season. (Allegedly because of a mistake which Blank admitted.)

Marie Swerdlik's testimony was substantially the same as that of Oscar, relative to conversations with Messina. She quoted Messina as first saying he told Dordick they were to be paid for the additional work and later stating that Mr. Heller said "he will pay us." Pincus testified similarly. Warth worked only the last week but claimed to have overheard Messina promise Marie Swerdlik they would be paid for extra work.

Messina testified that, about November 24 or 25, he had a conversation with Oscar and Marie Swerdlik relative to a fabric known as biella, a very thin nature fabric requiring "shingling" of the collar and pockets. They asked "Who is going to pay?" In the prior season this group frequently complained about too much work, asking "who's going to pay," Messina advised them "you have the Union, the Union takes care of your prices, go to the chairman, I have nothing to do with the prices."

Messina admitted telling them "this additional work known as shingling, I'm sure you will get paid—when Mr. Dordick comes I'll explain to him what you have to do, and I'm sure he will have to pay for this. This is additional work." Shingling was described as different from the other operations because "it's not a usual operation on the garments to do that in most factories." It was not done in the fall 1958 season because of the nature of the fabrics. Messina made the decision to do shingling in the week before the factory started, about November 19 or 20. He first told the markers and trimmers after November 24 and had not previously told anyone in the Union. (See footnote 2.) It was his responsibility to make the decision.

Messina acknowledged telling the markers that he expected the Union would make an adjustment for the shingling, but denied any similar conversation in regard to any other type of operation. He, however, admitted there were other discussions with the marking and trimming section, concerning operations other than shingling as to which the members of the section said they wanted more money. He repeatedly told them "I have nothing to do with the prices." Messina related that in the fall season they had made many complaints about extra work, and in the spring season they started again—"that's their nature to complain"—I told them "you go to your chairman."

Messina advised Dordick, near the end of the week of November 24, of the shingling requirements and that there would be no shingling of the front as was done "a few years ago." (According to Oscar Swerdlik the shingling of the front was done at a rate of 25 cents.) Messina estimated the value of shingling in this season, for collar and pocket at 8 to 10 cents.

Messina outlined the operations of the marking and trimming section as being comprised of any marking to be done on the garment, trimming, rotating, including any floorwork "we call basting" such as pockets, marking welts, flaps. It could be a number of pockets or no pockets. It sometimes requires special marking for an insert. Each style varies, some with very little work such as marking a collar. Pulling out, basting, and rotating is standard. Every season the styles are changed and this requires a different kind of marking and a different kind of trimming.

Messina related a complaint on Style 639 which required a marking that was not done in the previous season. It required a marking and cutting the roll edge "—a fold and cut in two." He testified this was basic. In the last week they complained about Style 641, they were required to draw parallel lines about 2 inches

above the bottom. They refused to do it[3] because they were asking for additional pay as additional work and Messina had to go to Blank and sent him over "so he should straighten them out—because it was more his business than mine." Messina told Blank "you got to keep them working." Marie Swerdlik then came to Messina and said that Oscar will do the work—"you have to promise me that you make me see Mr. Heller." Messina promised that when Mr. Heller was in he would set up an appointment for Marie Swerdlik. He called Heller in New York and told him of the trouble with this group.

The first complaint in the spring season was about the shingling. On December 9, they shingled 15 or 20 garments for shipment, but refused to complete the lot. However, they complained mainly about Style 639, for they had to mark it across the center of the back and slash it. Messina stated that all he was interested in was getting the work out. He admitted saying he would speak to the Union about it, but denied having said "This will be taken care of," or that he would speak to Mr. Heller about pay for it. He did send the shop chairman over on numerous occasions.

To the extent the testimony of Messina conflicts with that of the markers and trimmers I credit Messina. He was direct and forthright, he particularly avoided certainty beyond all doubt in areas where the facts were of little import to him at the time of the event, he explained quite satisfactorily to my view, his dual usage of the word "complaint" in his report to the Board investigator as distinguished from his use of that word in his testimony. In so finding, I am not unmindful of Messina's duties and responsibilities as plant foreman, and the fact, known to all, that he had no rate setting responsibility for more than a year before the new system of $10 a suit was negotiated.

It appears undisputed that the markers and trimmers did not unqualifiedly accept the rates allocated to them by the Union, i.e., 30 cents for marking and trimming and 10 cents for shingling. There was no dissatisfaction with the basic 30-cent price, rather certain marking and trimming allegedly was "extra," and it appears they believed that acceptance of payment, for finished work, would foreclose such a claim. Also, they had not accepted the allotted 10 cents for shingling. Customarily payment was made by turning in a worksheet to the bookkeeper showing number of pieces and style. Instead, at the end of the first week they requested and obtained a payment "on account." At the end of the second week such an "on account" payment was refused. The bookkeeper advised them that the chairman advised her the prices were "settled" obviating any further need for an "on account" payment. All four testified they had not turned in the workbooks *because the prices for the additional work was not settled.* The workbooks had not been submitted for payment prior to the hearing.

E. *Events of December 12, and thereafter*

On December 12, 1958, Messina advised President Heller the markers and trimmers were dissatisfied, and had not been working properly. Heller told him to bring the group in, at about 10 a.m.

Making certain all were present Heller stated, "There'll be no fighting, no argument." He then recited his agreement with the Union, pointed out that they had worked the previous season on all styles, both hard and easy ones, at 30 cents per garment, he asked them if they had attended the union meeting (which approved the agreement) and was advised they had. He then told them that when they were at the meeting it was understood that the price of the garments were to remain the same for the following season. He explained that he did not have any more money to give them, that he had an agreement with the Union where a suit was to cost $10 and no more, since he did not have any more money for them—*they would either have to go back and work at the prices they were getting* or they would have to get their hats and coats and leave.[4] The essence of this statement was corroborated by Messina.[5] Specifically, Messina testified Heller said, "Those are the prices; if you don't like take the coat and hat . . . something like that."

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[3] Swerdlik denied any refusal to work, yet Shop Chairman Blank testified to his intervention, at the request of Messina, because of a refusal.

[4] Swerdlik acknowledged that Heller stated at the outset "Joe Messina told me that you wanted to be paid for additional work."

[5] Counsel for the General Counsel, in his brief, requests an amendment of the transcript which would admittedly destroy the value of Messina's testimony on this point, my memory coincides with the record which is otherwise unimpeached, accordingly the request is denied.

The alleged dischargees did not dispute the substance of the statement except they deny having been given a choice of returning to work or leaving and allege an outright discharge.

It is important here to note the unrebutted and unrefuted testimony of Blank, shop chairman. Immediately before the meeting in Heller's office, on December 12, Marie Swerdlik came to him and said, "We wouldn't work if we don't get any more money for our work." This statement was made with knowledge that Messina had arranged an appointment with Heller for that morning. Marie Swerdlik, present throughout the hearing, was not called in rebuttal. Blank advised Heller of the remark prior to the meeting in the latter's office, and urged Heller to call Dordick.

While there is testimony that Marie Swerdlik advised Blank and Joseph Bormack, (described as business agent of the Union, and as assistant manager), who happened to be present, immediately after leaving Heller's office that the group had been "fired" this testimony is at best self-serving and cannot be held to establish the fact independent of all the other evidence herein.

Bormack's testimony was that Marie Swerdlik approached him immediately after the meeting with Heller, at which time he was with Blank. She advised him that Heller had told them to get their hats and coats and go home. He said "as business agent I'll advise you to go back to work and leave the rest to us, to me or Mr. Dordick." She is then quoted as saying "When Mr. Heller needs us, he'll call us back."

The group left the plant sometime before 11 a.m. on December 12, and between that date and the time of the hearing never applied for reinstatement. Respondent commenced hiring replacements on Monday, December 15, and all were replaced by new employees. It is conceded that Snyderman refused an offer of reinstatement.

Analysis and Evaluation of Evidence and Concluding Findings

Under the system in effect under the 1955 contract, extending through the spring 1958 season, management (Heller for the last year) bargained with the representatives of each craft as to the piecework rate to be paid for each style. In the spring 1958 season alone there were some 120 such separate styles. The plant had 12 to 15 separate crafts. Negotiations would thus appear an interminable process. Oscar and Marie Swerdlik represented the markers and trimmers in these negotiations. Oscar Swerdlik admitted that a discussion of rates, in September 1957, became so heated between Dordick, Bormack, and Heller, with Swerdlik participating, that the latter became ill and was taken to a hospital, he had previously limited his testimony to an alleged affable relationship in the following (spring 1958) season. Heller, to the contrary, related that negotiations with the Swerdliks occurred at least every other week and that on at least a dozen occasions in the year, the discussions became heated, that when he was unable to settle with the Swerdliks; Dordick and Blank were called in. Heller described heated discussions over piecework prices as commonplace in the industry. Heller's testimony that he had never discharged any of the employees with whom he had engaged in these interminable and heated arguments is undisputed, I find accordingly.

Dordick and Heller testified to the new agreement for the payment of a total labor cost of $10 per suit commencing the fall 1958 season.[6] Oscar Swerdlik denied the existence of an agreement. I credit Dordick and Heller for reasons apparent herein. Dordick and Heller testified that $10 was a flat price, regardless of style and regardless of difficulty of production, I so find. In fact, the existence of such an agreement was the subject of a stipulation. It is also clear, and I find, that the agreement terminated the past practice of individual negotiation of rates by craft, and for each style.

The stipulation expressly provides, and I find, that the agreement between the Company and the Union was that the $10 would be allocated among the various crafts by agreement between the employees and the union representatives, it was then presented to the employer who would place it in effect unless it was felt the proposed allocation was unreasonable. I find such an allocation was here effected. However, the amount so allocated approximated $7 after allowance for payment of hourly workers, out of the total.[7] I further find that the amount of 30 cents was

[6] Dordick testified that the reason the Union agreed to the reduction was that the firm wanted to close the shop, that since 132 families were working in the shop "we decided that better half a loaf of bread than nothing"

[7] This agreement apparently is the basis for Oscar Swerdlik's assertion "we have to pay the time workers out of our money." He also testified that the agreement was for $11 a

allocated for marking and trimming in the fall 1958 season, and was renewed for the spring 1959 season. In addition, in the latter season, 10 cents was allotted for "shingling."

It is equally clear, however, that the markers and trimmers had not despaired or abandoned the hope of obtaining an additional allocation under the guise of extra work, nor had they accepted the alleged proffer of 10 cents for shingling as final. This is demonstrated not alone by the refusal to turn in "workbooks" and receive pay for completed work. They attempted to prevail upon Dordick and Blank to allow additional amounts. Failing in that effort they told Messina on December 9 they would not do certain work. He prevailed upon Blank to speak to them about work stoppages. Upon the insistence of Marie Swerdlik, Messina set up the meeting with Heller. The purpose, so far as Marie Swerdlik and her group were concerned, appears in her testimony, "we was so happy because we was sure that this time Mr. Heller will pay us for this promise of adjustment for the additional work and for shingling." [8]

It should be here noted that the record is barren of even a scintilla of evidence of union animus on the part of the Respondent, except to whatever extent it may reasonably be implied from the particular circumstances in the case at bar.

In view of the express limitation of Section 9(a) of the Act [9] it would not appear that any different result would obtain were it found that these employees were fired, quit, or engaged in an abstention from work. The limiting language is italicized in the footnote. In *Dazey Corporation,* 106 NLRB 553, 554, the Board held that where employees acted in derogation of the authority of the exclusive bargaining agent—the concerted activity for which they were discharged was not protected under the Act and provides no basis for (finding) and 8(a)(3) violation of the Act. The Board, citing *N.L.R.B.* v. *Draper Corporation,* 145 F. 2d 199 (C.A. 4), set forth that activity of a minority group of employees in an effort to usurp the functions of the duly authorized bargaining agent selected by all the employees has been held not to be protected by the Act. "In so doing, particularly where the demand upon the Respondent was accompanied by a strike threat—(the employees) were clearly and deliberately engaged in an activity having as its primary objective the forcing of the Respondent to deal independently with them to the detriment of the (bargaining agents') statutory position as exclusive bargaining representatives." See also *Douds* v. *Local 1250, etc., (Oppenheim Collins & Co.),* (C.A. 2) 173 F. 2d 764, 769, relative to the limitations resulting from the amendment of Sections 9(a), i.e., "grievances—must be outside of and not covered by the collective bargaining agreement." See also *Medo Photo Supply Corporation,* 321 U.S. 678, enforcing 43 NLRB 989, cited in *Dazey Corporation* at 555.

That this minority of five sought, by such a conference, to upset the collective-bargaining agreement for $10 a suit by obtaining an "additional" allowance is patent. They were clearly and deliberately engaged in an activity having as its primary objective the forcing of the Respondent to deal independently with them to the detriment of the bargaining agents' statutory position as exclusive bargaining representative. General Counsel urges that the "Union was, at the same time, the representative for its members and the Company" and thus, having dealt "with the Union as agent of the Employer, they were not usurping the functions of their collective bargaining representative—in seeking an adjustment from the employer." Suffice it to say, the elasticity in mental gymnastics is not inexhaustible.

It is, however, not necessary to reach the above question. The record permits no doubt that these employees were, understandably, unhappy by reason of the cut in pay they suffered. They were determined not to work unless an adjustment was made, as stated by Marie Swerdlik to Blank. They had already refused to do certain work, as specified by Messina. They used a refusal to perform certain work as a lever to obtain a conference with Heller, for the sole purpose of discussing

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suit and $1 is taken off the price of the garment and given to the Union for the health and welfare fund, while previously the employer had paid 6 to 8 percent, of the payroll. Heller, whom I credit, testified the health and welfare payments remained at 6 or 6½ percent of the payroll Swerdlik later admitted he had never seen the agreement and was stating what Dordick had told him, obviously hearsay.

[8] Such adjustments, or bargaining sessions, were discontinued under the new agreement.

[9] Section 9(a), in part: "That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, *as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect."* [Emphasis supplied.]

an adjustment of rates for claimed "extra marking and trimming" and for "shingling." Blank had advised Heller of the reported attitude, immediately before the conference.

It is reasonable to infer, and I find, that Heller knew he could not obtain adequate replacements except by training. The new season was barely started and production would be impaired. These employees, it may reasonably be inferred, also knew this. Messina outlined the importance of "marking and trimming" at the beginning, in the middle, and at the end of the operation. The marking was a prerequisite to the performance of operations by other crafts. The economic impact of a withholding of services must have been apparent to all.

After the conference with Heller, Marie Swerdlik talked to Bormack and testified he said there was nothing he could do—"He was laughing." I find the latter assertion incongruous.[10]

After leaving the plant, the group waited 10 days before contacting anyone relative to their jobs. They then went to see Dordick, and were advised they had been replaced. It would thus appear reasonable to infer they waited 10 days, albeit vainly, for the fulfillment of Marie Swerdlik's prediction "when Mr. Heller needs us, he'll call us back."

Under all the facts outlined, I find there was neither a "firing" nor a "quitting" as the latter term expresses intent to permanently sever relations. Rather, there was a voluntary departure from the plant of these five employees who were offered the alternative of working at the rate agreed upon or "getting their hats and coats."

In view of the above findings it is my conclusion that this record does not establish that these employees were discharged, discriminatorily or otherwise, and the record does not contain the preponderant evidence needed to establish discriminatory terminations within the meaning of the Act. Accordingly, I recommend that the complaint herein be dismissed in its entirety.

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

CONCLUSIONS OF LAW

1. The Respondent, Tailored Trend, Inc., 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.]

[10] I find it unnecessary to further detail the inconsistencies, evasions, and patent inaccuracies which have caused me to discredit those portions of the testimony of both Swerdliks which conflict with the testimony, set forth, of witnesses called by the Respondent. In view of this, and in view of the findings and conclusions based on the record as a whole, the testimony of Pincus and Warth is not persuasive where it conflicts with the credited testimony of Respondent's witnesses.

Yorktowne Hotel (Community Hotel Company, Incorporated)[1] *and* Hotel and Restaurant Employees & Bartenders International Union, AFL–CIO, Petitioner.

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DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed, a hearing was held before Morris Mogerman, hearing officer. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.[2]

[1] The Employer's name appears as amended at the hearing.

[2] The Employer questions the Petitioner's showing of interest on the grounds that several cards were submitted to the hearing officer at the hearing However, showing of interest is an administrative matter not litigable by the parties *O D. Jennings & Co.*, 68 NLRB 516. We find nothing in the circumstances of this case to warrant an exception