

Floyd Fuel Company and Milton Vernon Enix

Floyd Fuel Company and Richard Vincon Lambert, Kenneth Stone, Junior Ray McCauley, James L. Chambers, George W. Pifer, and Virgil Green. *Cases Nos. 6-CA-1606, 6-CA-1612, 6-CA-1645, 6-CA-1646, 6-CA-1649, 6-CA-1652, and 6-CA-1657.*
February 4, 1960

DECISION AND ORDER

On September 17, 1959, Trial Examiner Thomas A. Ricci issued his Intermediate Report on the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices but had not engaged in other unfair labor practices alleged in the complaint, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the Respondent and the General Counsel filed exceptions to the Intermediate Report and supporting briefs.

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 Bean and Fanning].

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and briefs, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, with the modifications herein noted.¹

The Trial Examiner found that the following conduct of the Respondent violated Section 8(a)(1) of the Act because it implied to the employees that if they persisted in their strike resolve they risked economic reprisal by the Respondent: (a) The statement of Altieri, assistant to the president of the Respondent, that employees would be discharged if they dared to strike; (b) the statement of Respondent's president, immediately before the strike, that if the employees did not want to work they could pick up their checks and leave; (c) the notation of "voluntary quit" on the strikers' final paycheck; (d) the summary eviction of striking employees from company shacks, although there was no evidence that such shacks were needed to house replacements, and the period for which rent had been paid had not yet expired; and (e) the precipitate discontinuance of Respondent's contributions to defray the cost of the strikers' hospitalization insurance premiums. We adopt the Trial Examiner's violation finding, but rely only on (a), (b), and (d), above. As to (c), we do not believe that

¹ In the absence of any exceptions thereto we adopt *pro forma* the Trial Examiner's finding that the Respondent did not in fact discharge the strikers and so did not violate the Act in that respect.

the record warrants a finding that the "voluntary quit" notation was intended by the Respondent as other than a reference to the fact that the employees had voluntarily left the premises and not been discharged. Under the circumstances of this case, we will not infer intent to coerce employees from the hastily prepared checks, nor do we believe that such notation was reasonably calculated to have a coercive effect. As to (e), the record shows, and we find, that the Respondent's payment of the insurance premiums was terminated in the same manner as that of any other employees who were dropped from Respondent's payroll for whatever reasons.

ORDER

Upon the entire record in this case, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Floyd Fuel Company, Tunnelton, West Virginia, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Threatening its employees with discharge in reprisal for strike action, and stating or implying to its employees that as strikers they will lose their employee status.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their right to self-organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959.

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

(a) Post at the Respondent's plant in Tunnelton, West Virginia, copies of the notice attached hereto marked "Appendix."² Copies of said notice, to be furnished by the Regional Director for the Sixth Region, shall, after being duly signed by the Respondent's representative, be posted by the Respondent immediately upon receipt thereof, and maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to its employees are customarily posted. Reasonable steps shall be taken by the Re-

² 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 Decision and Order" the words "Pursuant to a Decree of the United States Court of Appeals, Enforcing an Order."

spondent to insure that said notices are not altered, defaced, or covered by any other material.

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

IT IS FURTHER ORDERED that the complaint be, and it hereby is, dismissed insofar as it alleges unfair labor practices other than those found herein.

APPENDIX

NOTICE TO ALL EMPLOYEES

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

WE WILL NOT threaten our employees with discharge in reprisal for strike action or state or imply to them that as strikers they will lose their employee status.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the right to self-organization, to form labor organizations, to join or assist any labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment in conformity with Section 8(a) (3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959.

All our employees are free to become or remain, or refrain from becoming or remaining, members of any labor organization.

FLOYD FUEL COMPANY,
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.

INTERMEDIATE REPORT AND RECOMMENDED ORDER

STATEMENT OF THE CASE

On two complaints issued by the General Counsel, and on separate answers duly filed by Floyd Fuel Company, herein called the Company or the Respondent, a hearing in the above-entitled cases was held before the duly designated Trial Examiner on July 23 and 24, 1959, at Kingwood, West Virginia. The issues litigated are whether the Respondent violated Section 8(a)(1) of the statute in its attitude

towards and treatment of a group of strikers, and whether it violated Section 8(a)(3) of the Act in the discharge of employee Enix. All parties were afforded full opportunity to introduce evidence, to examine and cross-examine witnesses, and to argue orally at the hearing. After the close of the hearing, a brief was received from counsel for the Respondent.

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

FINDINGS OF FACT

I. THE BUSINESS OF THE COMPANY

Floyd Fuel Company is a West Virginia corporation having its principal office and place of business at Tunnelton, West Virginia. It is engaged in the operation of coal mines in the State of West Virginia and annually sells and ships goods valued in excess of \$50,000 from West Virginia to points outside that State. I find that the Respondent is engaged in commerce within the meaning of the Act.

II. THE UNFAIR LABOR PRACTICES

A. *The case as a whole*

The events giving rise to this proceeding occurred at a coal mine in Tunnelton, West Virginia, in January 1959. About 40 employees, almost the total complement, went on strike on January 21 because they were dissatisfied with their wage rates and the Respondent refused their demand for a raise. Six of them filed separate charges alleging that they were discharged for having engaged in concerted activities. A seventh employee, Vernon Enix, was admittedly discharged on January 20, the day before the strike, and he filed a seventh charge. Separate complaints were issued, one on behalf of all the strikers, and one for Enix only. The complaint as to the strikers alleges a technical discharge as to them, because it is conceded they refused to work for the established wages, and that the strike was strictly an economic one; the unfair labor practice as to them, therefore, is said to be, not discrimination in employment, but only coercion in their right to engage in concerted activity, in violation of Section 8(a)(1) of the statute. The complaint as to Enix alleges unlawful discharge in violation of Section 8(a)(3). The Respondent asserts Enix was discharged for just cause, and denies the commission of any illegal acts.

Although 18 witnesses were called, there is very little disagreement among them as to what was said and done. As to the pertinent facts, only two credibility issues need be decided: did Lobb, the president of the Company, at the moment he refused a wage increase to the assembled employees after their chosen spokesman had made the demand, say to them that they were "fired" or "discharged"? The evening before, when the president's assistant, Altieri, appeared at the mine to learn what was in the wind, did he tell some employees they would lose their jobs if they struck? On all other pertinent matters the facts are uncontradicted, and disagreement centers entirely on what inferences are to be drawn from what was said and done.

The dissatisfaction leading to the strike seems to have stemmed from two matters of concern to the employees: the physical condition of the plant and its equipment and wages. Actually, it is clear on the total record that what the employees wanted was more money, and that one of the reasons why they felt entitled to raises was that in their opinion undesirable working conditions warranted them. Had the Respondent satisfied their wage demands, they would unquestionably have continued to work, for the employees had all donned working clothes, put on their mining lamps, and held lunch pails in their hands only 10 minutes before starting time at the entrance to the mine when the wage demand was made and refused.

There is a great deal of testimony concerning the condition of the mine—whether electric wires were properly strung and covered, whether the moving belts were safe, whether the ventilation system operated correctly, whether the coal cutting machines had proper safety devices, etc. A number of employees who later went on strike and now testify for the General Counsel in support of the complaint, described conditions in the mine as very poor in these respects. Other employees testifying for the Respondent, as well as some of its supervisory personnel, said that conditions were good, and, as they clearly showed, that the mine was inspected from time to time by State authorities and found to be in good working order, even including an inspection made by three inspectors only several days before the strike. I find no occasion, and no useful purpose would be served in this case, for considering this conflicting testimony and passing judgment upon the proper or improper condition of the mine. So far as the issues of this case are concerned,

it suffices to say, as the record amply shows, that a number of employees thought conditions might be improved, discussed these things among themselves from time to time, and on occasion individually complained or brought specific matters to the attention of some supervisor. There can be no question that matters of this type are embraced within the statutory phrase "conditions of employment"; all that is relevant here is that there was some concern in the minds of the employees on this subject. The merits of their complaints are beside the point.

B. *The pertinent facts*

1. Concerted activities and the strike

There was no union activity among these employees. The case rests upon their efforts to band together to present a solid front to the Respondent to gain mutual improvements in their conditions of employment, activities also protected by Section 7 of the Act. In support of the complaint, the General Counsel introduced evidence tending to show two matters of interest to the employees with respect to which, he would have it, they in fact engaged in "concerted" activities. The first, as stated above, is a concern over physical conditions of employment in the mine, meaning physical danger and other personal inconveniences. On this aspect of the case the testimony shows without contradiction that for some time before January 21, 1959, there was talk among employees about exposed wires in the mine, about the fact that the moving belts on which they entered the mine required them to move from one belt to another while they were in motion, about the asserted insufficiency of oxygen supplied by the ventilating system, and matters of like kind. Some of the employees spoke to their foremen or to the plant superintendent on occasions.

Also, sometime in December 1958, one employee, Humphrey, wrote an anonymous letter to the West Virginia Department of Mines, complaining about such conditions. There is no evidence whatever indicating that any employees, as a group, ever took any action, or planned to act together in an attempt to remedy these complaints, or to bring them to the attention of management representatives as a group.

The second condition of employment over which a number of employees were dissatisfied was wages. During the period before January 21, variously estimated by different witnesses as a few days, or a week, or even more, some of the employees decided to select a spokesman to voice their common demand for more money from the Company. They chose one Woodard, an employee. Sometime during Monday, January 19, Woodard spoke to the plant superintendent, Gray, and said he wished to speak to Lobb, the president of the Company. Gray inquired the reason, but Woodard refused to tell him. Gray did nothing about Woodard's demand, and sometime between 9 and 9:30 a.m., January 20, down in the mine where they were at work, Woodard again spoke to Gray and requested to speak to Lobb. This time he told Gray that he wished to speak to the president about the matter of wages for the employees. Gray now attempted to communicate with Lobb, was unable to locate him, and sometime in the middle of the day succeeded in speaking on the telephone to Altieri, the assistant to the president. Altieri came to the mine early that afternoon, sometime before 3:30, the end of the first shift.

When Altieri arrived at the mine, Superintendent Gray told him that Woodard wanted to speak to the president about raises. Altieri, perhaps a half hour after the shift had ceased work, went to a shanty, close to the mine entrance, in which three of the miners stayed during the week because they lived in distant towns. His conversation with them gives rise to the first of the two questions of credibility presented by this record.

According to Cosner, Altieri started by asking them why the employees wished to see Lobb and he answered by saying it was because they needed a raise and wanted to talk to Lobb about it. Cosner continued to testify that Altieri then said, "He understood we were going to come out on strike if we didn't get to talk to Mr. Lobb," and that "if we did pull a strike on account of that he would fire the whole bunch of us." According to Jones, the second employee, Altieri said: "What is this I hear about you boys coming out in the morning . . . if you do just figure on losing your job." Triplett, the third employee, quoted Altieri as saying, "He understood the men were coming out the next morning or coming on strike . . . you are going to keep fooling around until you have no job here. You are going to be fired."

Altieri admitted having opened the conversation by asking the three men "what was wrong, what they had in mind, and what Woodard wanted." He said they denied "knowing anything about it," or "what was going on." He denied having threatened to fire them, or saying their jobs were endangered. He added he was

accompanied by Gray, the superintendent, who stood in the door and listened. Gray corroborated Altieri.¹

I do not credit Altieri's denials. He admitted that he knew, before going to the men in the shanty, that Woodard intended to speak to Lobb about a raise. He nevertheless testified that his purpose in going to speak to the men was to ask what Woodard wanted and what the men intended to do. He also admitted asking them, "Are you boys working tomorrow." Altieri had no reason to inquire of the employees why Woodard wished to speak to the president, for he already knew. Moreover, there is no indication that any of the employees had hinted at strike action, or not working the next day. Whether Altieri had heard, in some fashion, of any planned strike action, or whether he imagined such action might take place, it is clear it was he who injected the subject of strike action into the conversation. The testimony of the three employees was consistent, clear, and perfectly persuasive. I found nothing in their demeanor to indicate they might not be telling the truth. On the other hand, Altieri's virtual admission of having raised the question of strike, shows that he approached the three employees with an intent to dispel any such thought from their minds. In these circumstances, and, on the basis of Altieri's demeanor on the stand, I credit the three employees. In reaching this conclusion I have also considered Gray's testimony in which he corroborated Altieri's denial that the word "fired" or any threat of discharge had been used.

Lobb arrived at the mine at about 6:15 the next morning, January 21. Altieri was with him. Between 6:30 and 6:45, the employees of the first shift—about 20—were ready to go to work. They had put on their work clothes, taken their lamps from the lamp room, and had their lunch pails with them. They stood in a group when Lobb asked Woodard what he wished to speak about. Woodard told Lobb he had been selected as spokesman for the employees and that they wanted a raise. He did not specify further. A number of employees testified that Woodard also referred to the "working conditions," while asking for the raise. Others said he did not use those words. It would appear that he did use such a phrase, for Superintendent Gray, who was also present, said that Woodard explained "we have been loading a lot of coal here . . . under the conditions we are working under that we ought to have a raise." In any event, there is no question but that Woodard did not specify anything concerning what conditions of work he had in mind.

Lobb replied that for economic reasons the Company could give no raises whatever. It is at this point that the second conflict in the testimony arises. Woodard did not appear as a witness.

All the witnesses, employees, the superintendent, and Lobb himself, testified in agreement that Lobb also said to Woodard and indirectly to all of the employees within hearing, that if they did not care to continue working at the established wages and under those conditions, they could go to the office and be paid off immediately. One of the major props of the General Counsel's contention that the Respondent "discharged" the employees for their concerted activities is the assertion that Lobb actually told them that morning that they were fired. He was quoted, by persons who heard him, as follows: Employee Humphrey—" . . . those of you that don't want to work under those conditions pick up your check. It will be waiting for you." Employee Cosner—" . . . if we didn't want to work under them conditions and for them wages we could go to the office and pick up our time." Employee Jones—"He said if we didn't like the working conditions and the wages we was fired and we could pick up our checks on the way out." Employee Simmons—"If you don't like the working conditions you can get out" Simmons added, "That's the exact words," and Humphrey expressly said Lobb never used the word "fired." These employees testified in support of the complaint.

Lobb explicitly denied having used the words "fired" or "discharged." He testified he only told them "if they were not satisfied and if they wanted their checks . . . that we would pay them off, because it had been a custom of our Company if anybody left they got their checks." His assistant, Altieri, Superintendent Gray, and Goldstrom also testified Lobb did not literally discharge the men.

¹ Apparently in further corroboration of Altieri's denial, the Respondent called Goldstrom, the company coal inspector who also worked at the mine. Goldstrom said Altieri did not threaten to discharge the employees, but only asked them to vacate the shanties if they were not going to work. Neither Altieri nor Gray placed Goldstrom in or near the shanty when Altieri spoke to Cosner, Jones, and Triplett. Goldstrom obviously was referring to a conversation between Altieri and certain employees which took place the following day concerning continued occupancy of the shanties after the strike started. His testimony on this point is therefore meaningless.

On the total evidence, and considering the testimony of all the witnesses, I am unable to find that Lobb in so many words told the employees that if they did not work they were discharged. Only one of the witnesses, Jones, put such a word in his mouth, and I do not credit him against all the others. If Lobb is to be judged as having discharged the employees that day, the finding must stand as an inference based on the unequivocal words he used in telling them that they could have their money right away. In the light of his own testimony, I credit the General Counsel's witness as to the phrases he used.

Woodard told Lobb, as soon as his demand for a raise had been refused, that the men would have to discuss the matter. Immediately almost all the 20 employees of the first shift entered the lamp room, closed the door, and discussed the matter among themselves. When 7 o'clock came, Gray, the superintendent, opened the door and called in to them to "go to work." They waited a while longer and then emerged. Most of them replaced their lamps, removed their work clothes, and left the premises. Of the 20, 4 or 5 went to work. According to Lobb, Woodard told him at that point that the men were quitting. As stated above, Woodard did not testify. Of the approximately 20 employees scheduled to work on the afternoon shift, only 2 reported to work. The rest joined the strike.²

Later that day, in the early afternoon, some of these employees began to picket the mine. They established a picket line about 2 miles away from the mine proper, at a point where a private road leaves the public highway to enter several mining properties, one of which is that of the Respondent. The picketing continued for a period of time, sporadically. So far as appears on this record, it was a fairly constant thing for a month or two, then tapered off. It appears that there has been no picketing for a period of 1 month before the hearing and that for the few months earlier there had been very little and only occasional picketing.

The foregoing evidence of Lobb telling the employees they could be paid off immediately, is one of the facts upon which the assertion of discharge rests. There are three others.

The first is that shortly after the men decided to cease work, Altieri spoke to five or six of them in the small shanties which they occupied as sleeping quarters. It appears the Company owns several small wood shanties, used by employees who live 40, 50, or 80 miles away. They pay a very small rent; in one instance a shanty was occupied by three men for \$8 per month. These facilities are made available by the Company only for employees. Altieri admitted, as the employees testified, that within the hour of the inception of the work stoppage, he spoke to them in their shanties and told them they would have to vacate the shanties because they were needed for replacements. The Company also instituted dispossess proceedings against some of them before a justice of the peace a few days later. The record shows that in each instance the employees personally or otherwise agreed before the justice of the peace that they would vacate and did so.

Final paychecks were prepared on the very day, January 21, for each of the employees who ceased work. Attached to each final paycheck there appeared the following notation on the Company's stub: "Wages in full to date—payee having voluntarily quit." The employees picked up their checks, almost all of them, on the following Saturday, January 24. A few called for them earlier.

The third fact on which the General Counsel relies to establish the fact of "discharge," is that the Respondent ceased paying for Group Hospitalization insurance on behalf of the strikers. For some years the Company had been maintaining such hospitalization for its employees, paying the full premium of \$9.15 per month for each. The premium was paid each month with the Company submitting to the insurance company a list of names on which all employees appeared; each month new employees were added to the list, and all employees who had severed their employment were removed. On about February 15, when the Company submitted to the insurance company the usual monthly statement, the name of each of the employees who had gone on strike was deleted and no premium was paid for them. In due course, the insurance agency in charge of the policy wrote a form letter to each employee advising him that his coverage had been terminated, and inviting him to continue the insurance individually by himself sending the premium to the insurance company. Each employee was covered for a 30-day grace period.

² Some employees testified that four or five men of the afternoon shift worked. However, Daniels, assistant foreman of the afternoon shift, who worked that day, said that only two, including himself, did not go on strike.

2. The discharge of Enix

Milton Enix worked for the Respondent for about 1 year, up to January 20, 1959, a Tuesday. He worked primarily as a loader, but was also experienced on a coal-cutting machine. He had on occasions complained to Superintendent Gray about the ventilating system, and about defective conditions on the cutting machine. Before the start of the workshift at 7 o'clock Tuesday morning, because another employee—White, a cutter—did not appear for work, Supervisor Stone asked Enix to work on the cutting machine that day. Enix refused, because as he said, that particular cutting machine was "hot." By this he meant that electricity ran through the machine and endangered the operator. Stone reported Enix's refusal to Superintendent Gray. Gray then ordered Enix to go to work on the cutting machine. Again Enix refused. Thereupon, Gray discharged him. As Gray was filling out a discharge slip, Enix said to him: "You put down on there why I am not running that machine . . . if you fire me over this I will be in the Mine Inspector's office before this day is over." According to Enix, Gray then answered: "I wouldn't doubt but that you have already been there." Cosner corroborated Enix on this conversation and Gray did not contradict it.

Enix left the plant and never worked again.

C. Analysis and conclusions

1. The alleged violation of Section 8(a)(3)

When Enix was discharged at about 6:55 a.m., Tuesday, January 20, no representative of the Respondent knew why Woodard wished to speak to President Lobb, anything about the employees' concerted plan to ask for raises, or of any other concerted activity its employees may have been carrying on. It will be recalled that Superintendent Gray first learned from Woodard what the employees desired at about 9 or 9:30 that morning, after he had discharged Enix. Thus, the General Counsel does not, as he cannot, argue that the Respondent discharged Enix because of any belief it might have had that he was one of the group behind Woodard's emissary function the next day.

It is the General Counsel's theory that the concerted activity for which Enix was discharged was the common complaint among many employees that conditions in the plant were dangerous in some respects. And it is true that some employees had complained and had discussed these matters among themselves. It is also true that Enix, like others, had spoken to other employees of being dissatisfied with physical conditions, and had even personally mentioned some of them to Superintendent Gray. To further support his contention that all this common disgruntlement amounted to concerted activities, the General Counsel points to Humphrey's action in sending an anonymous letter to the State authorities the month before and to the fact Woodard mentioned working conditions when asking for the raise.

I do not believe the General Counsel has established that concerted activities took place among these employees before the designation of Woodard to ask for raises. His analogy, in his oral argument, to an orchestral presentation in which each musician plays his own instrument, and the audience hears a combination of tones, or a "concert," I think is ill taken. There is nothing on this record to indicate that any employees at any time decided to act together to remedy any of their complaints concerning dangerous conditions. There is nothing to indicate that Humphrey did not act absolutely independently in writing to the mine authorities.³ Certainly, even assuming that the General Counsel's theory of what constitutes concerted activities were valid, there is no evidence that the Company was aware that its employees were dissatisfied in any "concerted" sense. Indeed, on the record as a whole, it appears instead that the employees thought more of concealing from the Company the very fact they voiced their complaints to one another.⁴

³ From the transcript:

TRIAL EXAMINER: Is there any testimony to indicate that the writing of that letter was a thing that the employees considered doing together? That there was any discussion among the employees, "Let's write a letter?"

Mr. GRUPP: There is nothing in the record to show that, no.

TRIAL EXAMINER: Is there anything in the record to show that anyone ever thought of writing a letter except whoever this anonymous person may have been?

Mr. GRUPP: There is not.

⁴ Enix himself described the talk that went on: "Lots of times we would congregate together, the men would, and talk it over as we started feeling our way around at the

The General Counsel also argued that Gray suspected Enix of having written the anonymous letter, and discharged him for that reason. He conceded, however, that an employer has the right, under this statute, to discharge an employee for such conduct if it so chooses. I do not think the record supports the factual assertion that Gray believed Enix to have written the letter. It is true Gray made an attempt to learn who had written the letter by questioning employee Morris about the matter. But it is also true that the mine inspection that took place pursuant to the anonymous letter, did not enter that part of the mine in which Enix worked. Against this, Gray's retort, *after* Enix threatened the superintendent with a complaint to the authorities, that no doubt Enix had already done so, falls far short of showing Gray had previously decided Enix to be the culprit.

On sum total, considering both the fact that no real concerted activities by the employees has been shown on this record before the discharge, and the absence of any substantial evidences pointing to any knowledge or suspicion on the part of the Company of such action, I can only conclude that the General Counsel has not satisfied the affirmative burden resting upon him to show that the Respondent discharged Enix for any activity other than his refusal to carry out a work assignment. Whether this action was arbitrary or not, whether the cutting machine in fact was defective or not, are not matters of concern to the issue of this case. I shall therefore recommend dismissal of the complaint involving Enix.

2. The violation of Section 8(a)(1)

On the question of its treatment of the strikers, the essential allegation of the complaint, asserting a violation of only Section 8(a)(1) of the statute, is that the Respondent unlawfully coerced them in the free exercise of the rights guaranteed in Section 7. The concerted activity in which they engaged was in joining together to present a common front to the Respondent in their demand for an increase in pay, and going on strike to compel the Respondent to yield. That this activity is protected by the statute is too well established to warrant extended discussion at this late date.⁵ When, in the afternoon of January 20, before any strike action was even contemplated, Altieri, the assistant to the company president, told three of the employees they would be discharged if they dared to strike, his threat was a direct interference with this basic statutory right. Coming when it did, his statement could hardly be called a defensive tactic during an economic struggle. Accordingly, I find that by Altieri's statements to the employees at that time, the Respondent unlawfully coerced its employees and thereby violated Section 8(a)(1) of the Act.

The General Counsel also contends that by telling the strikers that they were no longer employees of the Company, the Respondent in fact implemented Altieri's threat and discharged them, in outright punishment for having carried on the protected activity. On careful appraisal of the entire record, I think it clear that by various means the Respondent did further coerce and restrain its employees in this right to strike by implanting in their minds the thought that they had thereby lost their employee status. I am not satisfied, however, that the evidence in its entirety can support a finding of actual discharge.

Despite Altieri's threat, no representative of the Respondent ever literally told any striker that he was discharged. In saying to them, at the moment they began to manifest a possible intention to withhold their services, that they "pick up" their checks "on the way out," and that they could "get out," Lobb certainly used strong language. While these phrases could easily have been construed, in the heat of the moment, as oblique termination notices, there is also a possible explanation for them in the uncontradicted testimony of Lobb that it was a fixed practice always to pay employees immediately for the day or days' wages due when they left work for any reason. No such justification can be advanced for the Respondent's decision to mark the final paycheck of each striker "voluntarily quit." This was a gratuity by the Respondent not warranted by the facts. Lobb impressed me as a very intelligent and highly experienced businessman. As he has long been in commerce, I am sure he well knew the difference between voluntary resignations and a strike. There-

first start, because we was afraid that someone would go and inform on us, and we might be discharged. So we felt our way around, and it happened for some time, and as the time grew, we got a little more bolder with it, and in all of these conversations we agreed with each other that—who would be a good man to go out and talk to Mr. Lobb for us, . . . "

⁵ *N.L.R.B. v. United States Cold Storage Corp.*, 203 F. 2d 924 (C.A. 5), and cases cited therein.

fore, while quick preparation of the paychecks might be explained by a desire to continue the past practice of making earnings available as soon as possible, this direct way of telling the strikers so quickly that the Company no longer considered them to be employees, necessarily tended to convey the thought that they were finally separated.

Similarly, Altieri's rush, in company of the mine superintendent, to tell five or six employees that they must immediately vacate the shanties which they rented and occupied as employees, further strengthened the impression which the Respondent was conveying. The sudden action bespoke a finality to their employer-employee relationship. No employer is obligated to make his property or facilities available to strikers, or to any employees who choose to withdraw their services. And yet, it does appear that rental payments, however small, had been made to the end of the month. Thus, the Respondent's unseemly haste in evicting the strikers from their sleeping quarters appears much more as an intimidating technique than as a proper concern for replacements yet to be found. In like measure, cancellation of the employees' hospitalization insurance, at the very earliest possible moment, although quite defensible in itself, when viewed in the total context of what preceded it, must have appeared as the final curtain to those strikers who had not returned by the next month.

While no single one of these separate facts revealing the Company's reaction to the employees' decision to strike, standing alone, can convincingly establish the Respondent's hostile and coercive attitude towards the employees, when I view them together I am convinced they reflect a determination to intimidate the employees in order to compel them to abandon any intention to strike and to remain at work. A desire by an employer to persuade his employees to remain at work is lawful and proper. Such right, however, cannot serve to excuse conduct which necessarily and in fact coerces the employees in their statutory rights. I think, therefore, that Altieri's direct statement that striking simply meant having no jobs, Lobb's emphatic stress upon immediate final payment, the written statements to each employee that he had quit, and the haste in dispossessing them from their quarters on the premises, all add up to a direct message by the Respondent that if the employees persisted in their strike resolve they risked economic reprisal by the Company. I find that by all this conduct the Respondent coerced the employees and thereby violated Section 8(a)(1) of the Act.

Whether the Respondent in fact discharged them so as to have severed their employer-employee relationship is another matter. With respect to that argument of the General Counsel, I think this case is determined by the Board's decision in *Kerrigan Iron Works, Inc.*, 108 NLRB 933. As the Board viewed this question in a comparable context there, the issue, restated, is whether or not the employer intended to sever the employee relationship. The Board evaluated that question on the basis not only of what an employer says to employees who are on strike, but also in the light of the totality of its conduct. In order to appreciate the total picture, in the *Kerrigan* case the Board remanded for the purpose of learning what had developed subsequent to the strike and subsequent to the employer's statement to the strikers that they were "permanently terminated" if they did not quickly abandon the strike. And the Board considered of importance the fact that, contrary to the words it used, the company in fact took back all the strikers who cared to return. Indeed, this fact was the major consideration supporting the Board's ultimate conclusion that the employer had not discharged them.

At the mine involved in the case at bar, 41 miners struck on January 21. By the time of the hearing, 6 months later, 20 of them had returned to work. Every striker who offered to return was accepted. There is no indication that the Respondent discriminated against any of these when they returned. Moreover, it is clear on the entire record that the Company at all times desired to have them back. By contrast, in the *Kerrigan* case, of the approximately 135 employees who went on strike, 35 returned to work within a month, and by the time of the hearing, a year later, 14 more had returned. Thus perhaps 85 still remained on strike. Moreover, unlike the Respondent here, the employer in *Kerrigan* wrote a letter to each employee, a month after they had started the strike, presenting them with a virtual ultimatum of discharge or abandonment of the strike. Neither Lobb, nor any representative of this Respondent, ever used the word "discharge." If in circumstances where direct discharge language is used with calm deliberation a month after the initial heat of strike action has cooled and only a third of the employees have returned, the Board refuses to find discharges in fact, necessarily the same conclusion must be reached where no discharge language is used at all, the only indication of discharge intent is given almost as part of the *res gestae* of the strike action, and one-half of

the strikers peacefully return and are welcomed.⁶ Accordingly I find that the evidence as a whole does not affirmatively establish that the Respondent discharged any of the strikers.

III. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Respondent set forth in section II, above, occurring in connection with the operations of the Respondent set forth in section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

IV. THE REMEDY

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

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

CONCLUSIONS OF LAW

1. Floyd Fuel Company, Tunnelton, West Virginia, is an employer within the meaning of Section 2(2) of the Act.

2. By threatening its employees with discharge in reprisal for strike action, and by telling its employees that strikers lose their employee status, the Respondent has interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed by Section 7 of the Act, and has thereby committed unfair labor practices within the meaning of Section 8(a) (1) of the Act.

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

[Recommendations omitted from publication.]

⁶The recent Board decisions upon which the General Counsel relies primarily, both issued after the *Kerrigan Iron Works* case, are inapposite here. In *Brookville Glove Co.*, 114 NLRB 213, the employer wrote personal letters to each employee, one 3 and the other 7 days after the strike started, saying they were no longer employees if they did not abandon the strike, the second letter accompanied by a termination notice. When the strikers later attempted to return, the employer refused to accept them except as "new employees." In *Ford Radio & Mica Corporation*, 115 NLRB 1046, telegrams were sent to the strikers saying unless they returned to work they were "discharged without further notice," and when they offered to abandon the strike 2 days later the employer refused to take them back, expressly saying "they had been discharged."

**Independent Linen Service Company of Mississippi and Laundry,
Dry Cleaning & Linen Workers International Union, Ind.,
Local No. 218. Case No. 15-CA-1456. February 4, 1960**

DECISION AND ORDER

On October 9, 1959, Trial Examiner George A. Downing issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the Respondent filed exceptions to the Intermediate Report and a brief in support thereof.

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-126 NLRB No. 58.