V. THE REMEDY

Since it has been found that the Respondent has engaged in unfair labor practices, the Trial Examiner will recommend that the Respondent cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

It has been found that the Respondent discriminated against Z. Fred Sprewell, Clarence Pope, Horace H. Noles, Marion D. Stone, and Tommie Lee Farmer. It will be recommended that the Respondent offer Sprewell, Pope, Noles, and Stone immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority and other rights and privileges, and make all of the above employees whole for any loss of pay they may have suffered by reason of Respondent's discrimination against them, by payment to them of sums of money equal to that which they normally would have earned as wages from the dates of discrimination to the date of an offer of reinstatement, or to the dates of reinstatement in the case of Farmer, less their net earnings during such period. Said backpay shall be computed on a quarterly basis in the manner established by the Board in *F. W. Woolworth Company*, 90 NLRB 289.

It has been found that from December 15 through 31, 1959, the Respondent engaged in conduct violative of Section 8(a)(1) of the Act. It is also found that such conduct substantially and materially interfered with the employees' free choice at the election. Accordingly, it will be recommended that the election be set aside and that a new election be held.

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. Southwire Company is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. Local 613, International Brotherhood of Electrical Workers, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.
3. By discriminating against Z. Fred Sprewell, Clarence Pope, Horace H. Noles, Marion D. Stone, and Tommie Lee Farmer, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.
4. By discharging Taylor Summerlin and Clyde W. Jordan the Respondent did not engage in any unfair labor practice within the meaning of the Act.
5. By interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.
6. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

[Recommendations omitted from publication.]

Norton & McElroy Produce, Inc. *and* Sales Drivers & Helpers, Local 274, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Petitioner. *Case No. 28–RC–848 (formerly 21–RC–6888). September 12, 1961*

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, a hearing was held before Daniel F. Gruender, hearing officer. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

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 McCulloch and Members Leedom and Fanning]

Upon the entire record in this case, the Board finds:

1. The Employer is engaged in commerce within the meaning of the Act.

2. The labor organization involved claims to represent certain employees of the Employer.

3. The Employer seeks dismissal of the petition on the ground that the employees sought are agricultural laborers. The Petitioner, in its brief [1] to the Board, concedes that the employees' work is incidental to the Employer's farming operations insofar as the employees work for the Employer on land which the Employer owns or leases and does the planting and growing, and therefore, are agricultural laborers within the meaning of the Fair Labor Standards Act.[2] However, the Petitioner contends that the employees sought are not agricultural laborers where the Employer does the harvesting, packing, and shipping, and another party, which either owns or leases the land, does the planting and growing. For reasons herein indicated, we agree with the position of the Petitioner.

The Employer is an Arizona corporation engaged in the business of growing and shipping vegetables and fruits in Arizona and California. In connection with the shipping of lettuce, the Employer employs truckdrivers and stitchers, the employee classifications sought by the Petitioner. The function of the stitchers is to drive onto a field in a truck loaded with unopened, flat cartons, stitch the cartons together on the truck, and pass the cartons down to the field crew to be packed with the harvested lettuce. The stitchers work all day on the truck in the fields performing these functions. The truckdrivers drive onto the fields, pick up the packed cartons, and drive to a cooling plant which may be as far as 20 miles away. Most of their driving is over public roads. The drivers spend from 15 to 33 percent of their time in the fields; the rest of the time is spent driving to and from a cooling plant. Neither classification of employee engages in any other activity.

During the spring of 1961 the Employer shipped lettuce from five different locations in Arizona (not including Yuma County, which is excluded by stipulation of the parties), under, basically, three different

[1] The brief is a composite brief, pertaining to subject matter in this case and also in Cases Nos. 28–RC–842, 28–RC–837, 28–RC–835, 28–RC–833, 28–RC–838, 28–RC–851, 28–RC–850, 28–RC–843, 28–RC–870, 28–RC–871, 28–RC–866, 28–RC–845, and 28–RC–847 The decision in those cases are in accordance with this decision and are not published in NLRB volumes

[2] Section 2(3) of the Labor-Management Relations Act excludes from its coverage "any individual employed as an agricultural laborer" The Board's annual appropriation rider requires the Board to follow the definition of the term "agricultural" contained in Section 3(f) of the Fair Labor Standards Act That section defines agriculture as follows: "'Agriculture' includes farming in all its branches and among other things includes the cultivation and tillage of soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities . and any practices . . . performed by a farmer or on a farm as an incident to or in conjunction with such farming operations . ."

types of economic arrangements. The first arrangement, on the Rala Singh acreage, involved the owner of the land growing and cultivating the lettuce, and the Employer, who purchased one-half interest in the crop, harvesting, shipping, and selling the crop at a fixed charge of $0.85 per carton. The Employer also sent in some of its own employees to thin about 20 of the 160 acres on this farm. A variation of this arrangement involved the Harquahala acreage, owned and farmed by another party. The Employer paid this other party for its share in the growing and labor costs. Each had one-half interest in the crop and each harvested, shipped, and sold his own one-half interest. The second arrangement involved the J. B. Ranch acreage, owned by Norton and McElroy as individuals [3] and cultivated under the name of Westside Ranches. The Employer paid Westside Ranches cost ($300 per acre) plus 20 percent for growing the lettuce. The Employer harvested, shipped, and sold the lettuce. The third arrangement involved the Aquila Farms, an operating company which did the growing with its own employees on land owned by Eagle Farms, a corporation. Three corporations, including the Employer herein, owned one-third interests in both Aquila Farms and Eagle Farms. Each partner-corporation harvested, shipped, and sold one-third of the crop independently, and, after taking out costs, put the remaining proceeds back into Aquila Farms which paid the bills. The three partner-corporations then equally split the profits or losses. A similar arrangement involved the Wilcox acreage, land owned by the Employer but leased to a partnership between the Employer and another corporation. Some of the Employer's employees did some of the hoeing and thinning. This spring the harvesting was done by the other corporation, but in the fall both corporations will jointly do the harvesting. Similar arrangements existed during the spring and fall of 1960 and will exist during the fall of 1961. The record indicates that the planting and harvesting of lettuce in Arizona is a seasonal industry, in operation during the spring and fall.

In varying degrees the Employer did some hoeing and thinning on most of the above acreage in order to expedite harvesting and to keep on some of its crew who otherwise would have been subject to layoff at those particular times. The lettuce is shipped under label-names belonging exclusively to the Employer and is marketed by the Employer.

The pivotal question turns on whether the practices herein, i.e., the stitching of the packing cartons and the hauling of the packed cartons to the cooler, are performed "by a farmer or on a farm as an incident to or in conjunction with such farming operations." [4]

[3] The record does not establish whether Norton and McElroy are the sole shareholders of the Employer

[4] The first part of the Section 3(f) definition is not applicable since the employees involved herein are not themselves engaged in farming activities See *Farmers Reservoir & Irrigation Company* v *McComb, Wage and Hour Administrator,* 337 U S. 755, 763.

As previously interpreted by the Board and the Court of Appeals for the Ninth Circuit, Section 2(3) of the Act categorizes an employee in the position of the truckdrivers in the instant case, as an agricultural laborer to the extent he is engaged in regularly hauling farm produce for his employer from his employer's own farm, but not an agricultural laborer to the extent he regularly hauls the produce for his employer from an independent grower's farm.[5] The conclusion that a driver hauling from a farm other than his employer's is not an agricultural laborer applies also when his employer has undertaken to do the harvesting for the grower.[6] The rationale which supports this interpretation is that where a driver engages in hauling, itself a nonfarming task, for an employer who himself grows and cultivates the produce hauled, then the hauling is incidental to or in conjunction with such farming operations, but where a driver hauls for an employer engaged in shipping and selling, nonfarming operations, his work is incidental to those operations and the second portion of the Section 3(f) definition is not applicable. If his employer ships from his own farms, but also from other growers' farms, the driver is not an agricultural laborer to the extent he regularly hauls from the independent growers' farms. Even where the shipper engages in some incidental farm practices on a grower's farm, his drivers would not thereby be converted into employees engaged in work incidental to or in conjunction with these farm operations rather than to the employer's primary operation, shipping and marketing. The same distinction applies to a stitcher, who also is performing a nonfarm task. When he stitches cartons for his employer who is not the grower of the produce, his work is incidental to the shipping operations of his employer, not the operations of the grower.[7] Although the stitcher works "on a farm," his work must be incidental to farming operations in order to qualify for the agricultural exclusion.[8]

The truckdrivers and stitchers in the instant case are agricultural laborers and subject to the Section 2(3) exclusion only to the extent that they are employed *by a farmer* in work incidental to or in conjunction with *such farming* operations. We cannot hold under any of the economic arrangements herein that the Employer is a "farmer." In all the arrangements the Employer either invested in a crop cultivated by another or, together with other parties, set up a separate entity which, *with its own employees*, cultivated the crop. Those em-

[5] *N L R B.* v. *Olaa Sugar Company, Ltd, et al*, 242 F. 2d 714, mod. 114 NLRB 670, supp order in 118 NLRB 1442; see also *Waldo Rohnert Company*, 120 NLRB 152, 154

[6] *Olaa Sugar Company, Ltd, et al.* 114 NLRB 670, 684, et seq. (This portion of the case was not modified)

[7] In *Grower-Shipper Vegetable Association of Central California, et al*, 107 NLRB 953, stitchers were found to be agricultural laborers. The significant fact which determined that finding was that they worked for their employers on their employers' own farms

[8] *Farmers Reservoir & Irrigation Company* v. *McComb, Wage and Hour Administrator*, 337 U S 755, 766, footnote 15

ployed by the shipper, in the shipping operation, are not employed in the farming operation, which is independent, even though the shipping operation has invested in, or owns a share in, the farming operation.[9]

Accordingly, we find that a question affecting commerce exists concerning the representation of employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

4. The appropriate unit.

We find that all truckdrivers and stitchers[10] employed by the Employer in Arizona, except in Yuma County, excluding all office clerical employees, watchmen, guards, and supervisors as defined in the Act, constitute an appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.[11]

5. In accordance with the usual practice in seasonal operations of this kind, the Board will direct that the election be held at or about the approximate seasonal peak, on a date to be determined by the Regional Director, among the employees in the appropriate unit who are employed during the payroll period immediately preceding the date of the issuance of the notice of election by the Regional Director.

[Text of Direction of Election omitted from publication.]

[9] *Id.*, p. 768; cf. *Lucas County Farm Bureau, etc.*, 128 NLRB 458, enfd. 289 F. 2d 844 (C.A. 6).

[10] The petition was amended at the hearing to delete the classification of "gluers."

[11] The parties are in agreement as to the composition of the unit. However, in its composite brief (see footnote 1) the Petitioner makes the alternative contention that a multiemployer unit would be appropriate. There is no bargaining history for the employees of the Employer in the geographical area covered by the instant petition and the Employer objects to such a unit in its composite brief. Accordingly, a single-employer unit is found appropriate.

Straits Aggregate & Equipment Corp. and Rogers City Cement Products, Inc.[1] *and* United Stone and Allied Products Workers of America, AFL–CIO–CLC, Petitioner.

Case No. 7–RC–4868. September 13, 1961

DECISION AND DIRECTION OF ELECTIONS

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, a hearing was held before James P. Kurtz, hearing officer. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

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 McCulloch and Members Rodgers and Leedom].

[1] The petition was amended at the hearing to include Rogers City Cement Products Inc., hereinafter called Rogers, as an Employer.