Arthur F. Finney
Billy E. Foster
Jasper E. Foster
Charles L. Fowler
Richard G. Gaines
William L. Green
Thomas G. Griffin
W. E. Guin
Charles H. Harvey
Louis A. Hellmann
Jesse L. Henderson
Herbert K. Hill
Auston J. Hodges
Juan C. Holman
John L. Jackson
Raymond E. Jackson
Roosevelt Jefferson
Willie Jones [1]
William E. Jordan
Daniel A. Keklikian
Charley F. Key
Jeff King, Jr.
Roland D. Kurtz
Jackie L. McDonald
Hughie McGee
Joseph Marshall [2]
Leon Mayham
Jack Merschen
Buddy Miller
Robert L. Mitchell
Clarence E. Montgomery
Robert G. Montgomery
Roy Moore
Jerry Murdock
Charles H. Newsome
Earl Norah
Elonzo Norah
Cass Patterson
James Powell
Milburn A. Rainwater
Kenneth H. Reid
Charles H. Robinson
Clyde F. Rodgers
Victor B Roughton
Timothy Rucker, Jr.
Herman E. Russell
Haywood Scott
Donald Shandrow
Charles R. Sharp
Bill Sharpe
Jewell D. Simmons
Odell Simmons
William H. Simpson
George Smith, Jr.
Odell Smith
Gerard Sparks, Jr.
Milton E. Stegall
Robert V. Stephens
Percy J. Steward
William J. Sweet
Edward Taylor, Jr.
Howard Taylor
Thomas Taylor
Duard P. Tison
Norman F. Triefenbach
Linneus F. Trokey
James M. Walker
Curnel Walters
Floyd Walters
Clarence Washington
John H. Webster
George C. White
Emmett Williams, Jr.
Eddie D. Woods
James A. Wren
Edgar C. Wyatt

[1] The ballot of Willie Jones was also challenged by the Board agent because his name did not appear on the eligibility list

[2] The ballot of Joseph Marshall was also challenged by the Board agent because his name did not appear on the eligibility list.

Wholesale Delivery Drivers & Salesmen's Union, Local No. 848 ***and*** **Servette, Inc.** *Case No. 21-CC-359. October 30, 1961*

DECISION AND ORDER

On November 9, 1960, Trial Examiner Wallace E. Royster issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent did not engage in any unfair labor practices and recommending that the complaint be dismissed in its entirety as set forth in the Intermediate Report attached hereto. Thereafter, the General Counsel filed exceptions to the Intermediate Report and a supporting brief.

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 brief, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.

We agree with the Trial Examiner's conclusion that the appeal to the various store managers doing business with Servette did not constitute a violation of Section 8(b)(4)(i)(B), since the record establishes that the store managers whom the Respondent sought to persuade not to do business with Servette were not "individuals" as

that term is used in Section 8(b)(4)(i)(B). We do so, however, only for the reasons set forth in the *Carolina Lumber Company*[1] and *Minneapolis House Furnishing Company*[2] cases. We therefore find it unnecessary to consider, and do not adopt, that portion of the Trial Examiner's opinion concerning the possible effect on a labor organization's liability under Section 8(b)(4)(i)(B) of its inducement or encouragement of supervisory or management personnel to engage in a strike or other withholding of services.

We also agree, on the basis of our recent *Lohman Sales Company*[3] decision, that the Respondent's handbilling of the various stores doing business with Servette was protected by the publicity proviso to Section 8(b)(4).

[The Board dismissed the complaint.]

MEMBER RODGERS, dissenting:

As I pointed out in my dissenting opinion in *Lohman Sales*, 132 NLRB 901, the proviso to Section 8(b)(4) does not protect handbilling of secondary employers in furtherance of a dispute with a distributor; the proviso contemplates, at most, the protection of handbilling of a secondary distributor in furtherance of a dispute with a primary employer who produces a product. And the bare and simple fact is that Servette *does not* produce any products.

Accordingly, I would find the Respondent's threats to handbill, and its subsequent handbilling activities, constitute violations of Section 8(b)(4)(ii)(B) of the Act.

Moreover, were I to reach the question of the truth or falsity of the handbilling itself, I would find the handbilling to be unlawful, at least with respect to the Kory and McDaniels Markets, in that its purpose was not to truthfully advise the public.[4]

The facts disclose that in these instances the Respondent's handbills contained false information as to a material fact which, in my opinion, could only serve to mislead the public and result in injury to another neutral employer. In pertinent part, the handbills read:

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[1] *Local 505, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, et al (Carolina Lumber Company)*, 130 NLRB 1438

[2] *Upholsterers Frame & Bedding Workers Twin City Local No 61, etc (Minneapolis House Furnishing Company)*, 132 NLRB 40.

[3] *International Brotherhood of Teamsters, Local 537 (Lohman Sales Company)*, 132 NLRB 901.

[4] The second proviso in Section 8(b)(4) states:

> That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that *a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer,* as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution [Emphasis supplied]

[The Respondent] urgently requests that you do not buy the following products distributed by SERVETTE, INC.

* BRACH'S CANDY
* SERVETTE CANDY
* GOOD SEASON SALAD DRESSING
* OLD LONDON PRODUCTS

Servette admittedly stocks and distributes all of these products. However, certain of the retail stores, namely, McDaniel Market and one of the Kory Markets, purchased certain of these materials not from Servette but from Certified Grocers of Southern California. The latter concern is, like Servette, a distributor of grocery items; but Certified Grocers is, unlike Servette, a neutral employer not involved in the Respondent's dispute.

I cannot read the proviso in Section 8(b)(4) as a license for such inaccurate and misleading handbilling with respect to neutral employers.

CHAIRMAN McCULLOCH took no part in the consideration of the above Decision and Order.

INTERMEDIATE REPORT AND RECOMMENDED ORDER

STATEMENT OF THE CASE

This matter was tried before Wallace E. Royster, the duly designated Trial Examiner, in Los Angeles, California, on August 8, 1960. Upon a charge filed by Servette, Inc., herein called Servette, the General Counsel of the National Labor Relations Board issued his complaint alleging that Wholesale Delivery Drivers & Salesmen's Union, Local No. 848, herein called the Respondent, had engaged in and was engaging in unfair labor practices within the meaning of Section 8(b)(4)(i) and (ii)(B) and Section 2(6) and (7) of the National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, herein called the Act.

Upon the entire record in the case, I make the following:

FINDINGS OF FACT

I. THE BUSINESS ENTITIES INVOLVED

Servette is a California corporation engaged in and near Los Angeles, California, in the distribution at wholesale of candy, holiday supplies, and specialty merchandise. During the past year Servette purchased and received from points outside the State of California goods and commodities to a value exceeding $50,000.

Kory's Markets, Inc., McDaniels Markets, and Daylight Markets, herein called respectively Kory, McDaniels, and Daylight, separately operate chain retail food supermarkets in the Los Angeles area. Each annually sells foodstuffs and commodities valued at more than $500,000, and annually purchases foodstuffs, supplies, and commodities from suppliers located outside the State of California to a value in excess of $50,000. Kory, McDaniels, and Daylight regularly and customarily purchase, handle, stock, and sell products distributed by Servette.

II. THE ALLEGED UNFAIR LABOR PRACTICES

The Respondent, concededly a labor organization within the meaning of Section 2(5) of the Act, since early February 1960 [1] has been engaged in a labor dispute with Servette and has struck and picketed Servette's warehouse in Los Angeles.

In the period from February 3 through March 10, the Respondent, in aid and in support of its strike against Servette, sought to enlist the cooperation of retail mar-

[1] All the incidents involving the Respondent took place in 1960.

kets stocking products distributed by Servette by encouraging such markets to cease doing business with Servette. The actions of the Respondent in this respect are alleged to constitute violations of the Act.

The testimony of Kenneth Kennish, manager for McDaniels in Maywood, California, is that within the period mentioned agents of the Respondent told him they had a dispute with Servette and asked him to cease dealing with Servette. The agents warned Kennish that if he failed to cooperate they would pass out handbills to customers. The handbills were in the form below:

TO THE PATRONS OF THIS STORE

WHOLESALE DELIVERY DRIVERS & SALESMEN'S LOCAL NO. 848 urgently requests that you do not buy the following products distributed by SERVETTE, INC.

* BRACH'S CANDY
* SERVETTE CANDY
* GOOD SEASON SALAD DRESSING
* OLD LONDON PRODUCTS

The SERVETTE COMPANY which distributes these products refuses to negotiate with the Union that represents its drivers. The Company is attempting to force the drivers to sign individual "Yellow Dog" contracts.

These contracts will destroy the wages and working conditions that the drivers now enjoy, and will set them back 20 years in their struggle for decent wages and working conditions.

The drivers of Servette appreciate your cooperation in this fight.

The handbills were passed out by Respondent's agents but Kennish continued his purchases from Servette.

Sam Gross, the manager of another McDaniels market, testified that within the same period agents of Respondent asked him to remove merchandise distributed by Servette from his shelves. No threat to handbill customers was made on this occasion. At a meeting of McDaniels' managers, according to Gross, they were told by higher officials to use their best judgment in the matter and to do as they thought wise. Gross either diminished his purchases from or ceased doing business with Servette.

The testimony of Maurice Hattem, another McDaniels' manager, is that an agent of Respondent requested him not to handle Servette merchandise and showed him the handbill reproduced above without saying that it would be distributed. Hattem diminished the amount of business that he gave to Servette or terminated it.

The testimony of Henry Tessler, a manager of a Daylight market, is that agents of the Respondent in the period mentioned told him of the dispute with Servette and asked him to cooperate by not handling Servette products. The agents said that they were passing out handbills to the customers of those markets who refused cooperation. The agents left the store and did not handbill.

The testimony of Pete Givigliano, manager of a Kory market, is that in late February agents of the Respondent told him of the dispute with Servette and showed the handbill, saying that they were going to pass these out to Kory customers unless Kory ceased doing business with Servette. The manager answered that he must get advice from the Kory central office. Some handbilling then was done by Respondent's agents to customers of that market. The next week the manager refused to permit Servette to stock the shelves and advised Servette that this action was taken because of the handbill. Agents of the Respondent on two subsequent occasions visited the market to assure themselves that Servette merchandise was not on display.

The testimony of Cecil Phillips, another Kory manager, is that in late February or early March two men passed out handbills in front of his store. It is a reasonable inference, and I draw it, that the handbills were the same as that set forth earlier in this report. Phillips asked the men why they were handbilling. They left without asking him to stop handling Servette merchandise and he has not done so.

The testimony of Harley Salts, a Kory manager, is that on February 25, five men, identifying themselves as striking employees of Servette, told him of the dispute with Servette and asked him to remove Servette products from the shelves. Salts said that he would ask advice from his supervisor. The men passed out handbills that afternoon. The same five men on March 5 and 12 passed out handbills to customers at the market. Salts did not stop dealing with Servette.

The testimony of Frank Franchino, a Kory manager, is that on March 8 agents of the Respondent passed out the described handbill to his customers. When he asked them to leave they replied that they would stop handbilling if he would quit handling Servette merchandise. Franchino continued to do business with Servette.

The testimony of Larry Drum, a Kory manager, is that agents of the Respondent passed out the described handbills to his customers within the time period indicated.

The testimony of the several market managers is undisputed; the Respondent does not deny that the described incidents took place; I credit the testimony summarized above.

Some of the markets mentioned buy Good Season Salad Dressing and Old London Products from a supplier other than Servette.

The first question for consideration is whether by these requests of the various managers the Respondent was inducing or encouraging any individual to strike or to refuse, in the course of his employment, to perform services for his employer with an object of forcing or requiring the markets to cease doing business with Servette. Decision turns upon the interpretation given the phrase "any individual" in the context of Section 8(b)(4)(i)(B) of the Act. This matter has been the subject of a number of Intermediate Reports by various Trial Examiners and of a U.S. District Court decision [2] by Judge Wyzanski in Massachusetts. The Board has not yet decided the point. I have considered this matter before (*Amalgamated Meat Cutters and Butcher Workmen of North America, AFL–CIO (Peyton Packing Company, Inc.)*, 131 NLRB 406. I am of the opinion now as then that "any individual" does not include any of the market managers who were approached by Respondent's agents in this case. No wiser now than then, I adopt and set forth in the following paragraphs that portion of the earlier report which deals with that question.

The section of the Act referred to appears in identical language in the bill known as S. 748 introduced by Senator Goldwater in late January 1959, then sometimes referred to as the "Administration Bill." On the appearance of Secretary of Labor Mitchell before a Senate Subcommittee on February 4, Senator Kennedy asked the Secretary, "Would it be a violation of . . . your bill if the business agent of the Clothing Workers Union at company A spoke to the plant manager and requested him not to order materials—nonunion materials—from the racketeer plant in Pennsylvania?" Secretary Mitchell answered, "We don't think it would be, Senator." Senator Kennedy persisted, "Now supposing the plant in Pennsylvania was a nonunion plant, would it be a violation under your bill for union leaders in another company to go to his plant manager and ask him not to buy goods from the nonunion plant?" The Secretary replied, "Request him not to buy? No."

Following this appearance, Secretary Mitchell submitted answers to certain questions which had been raised in the course of his testimony in a letter to Senator Kennedy. In reference to the section of the Act of interest here, the Secretary wrote, "This is intended to reach secondary activity which is directed at a single employee and not primary activity. It is not intended to include any person acting as an agent of an employer, such as supervisory or managerial personnel." In the same communication the Secretary said, "A mere request of an employer or his agent would not be a violation of section [8(b)(4)(i)(B)] unless, under all the circumstances, it is found as a matter of fact that the request is accompanied by an express or implied threat of reprisal or force." Then speaking to a postulated case, the Secretary wrote, "Although the superintendent is employed by the school board, it is assumed that he is a supervisor, in which case only the 'threat,' 'coercion,' and 'restraint' provision of the proposed section 8(b)(4(ii), and not the 'inducement' or 'encouragement' provision of the proposed section 8(b)(4)(i), is applicable to him, as it is the intent of the proposed bill that only section 8(b)(4)(ii), and not section 8(b)(4)(i), is to apply to employers (in the generic sense) and to their agents, such as supervisors."

During the debate in the Senate on April 17, 1959, Senator Humphrey suggested that Section 8(b)(4)(i) posed a dilemma in that it appeared to forbid a labor organization to appeal to a supervisor to decline to accept a shipment from a struck employer. Senator Humphrey observed "to prohibit the union from approaching [supervisors] would be to cut off the union from its normal channels of communication. It would be a mockery to say that the union is free to persuade a neutral employer to assist it, but to deny the union access to the employer's supervisory managerial staff." On April 21 following, Senator Goldwater, saying that he desired to allay some of the fears expressed by his colleagues, commented that 8(b)(4)(i) was intended to reach inducements directed at a single employee but made no mention of the supervisor problem.

On July 27, 1959, speaking of H. R. 8400 which contained the identical provision here for interpretation, Congressman Griffin commented that the law as it then

[2] *Alpert* v. *Excavating and Building Material Chauffeurs and Helpers Local Union No. 379, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Consalvo Trucking, Inc.)*, 184 F. Supp. 558 (D.C. Mass.).

existed did not provide a penalty against inducement and encouragement of farm laborers, railway workers, and supervisors to engage in secondary boycotts. The amendment as finally adopted would, Congressman Griffin said, correct this situation by changing "employees" to "any individual employed by any person." On August 11, speaking in support of the change in Section 8(b)(4), Congressman Rhodes said, "Since farm laborers, railway labor, and supervisors are not 'employees' within the meaning of the Act, unions may now without penalty induce them to engage in secondary boycotts. The Landrum-Griffin bill corrects this by changing the word 'employees' . . . to 'any individual employed by any person.'"

It is the obvious scheme of the Act, as recently amended, to permit a labor organization to seek by means of persuasion the cooperation of a secondary employer in aid of a primary labor dispute, while forbidding the use of threats, restraints, and coercion upon that employer to bring about the same result. It is also clear that a union may not use such persuasion directed to "any individual" in an employment relation with the secondary employer to induce or encourage "any individual" to strike or refuse to perform services in aid of a forbidden objective. As "any individual" excepting those who are sole proprietors or partners, is commonly employed by a "person," a literal reading of 8(b)(4)(i) would appear to forbid a union by means of persuasion even though short of threats, coercion, or restraint, to induce or encourage the president of a corporation to refuse to perform services for his corporate employer with an object of forcing or requiring the corporation to cease doing business with any person. Such an interpretation of Section 8(b)(4)(i) would sharply limit the area in which (4)(ii) would find application. If a union may not ask the employee agent of a person whose business is in commerce to cease doing business with another person without violating the Act, then except as to sole proprietorships and partnerships, (4)(ii) is surplusage. Furthermore, a disparity would exist in that a union could use its arts of persuasion (always short of threats, coercion, or restraint) to the utmost when dealing with a proprietor or a partner but be forbidden to use the same devices if the "person" exists in corporate form. Considering Section 8(b)(4) in its entirety and the practice by labor organizations, which according to legislative history, led to its adoption, I am convinced that a literal reading of 8(b)(4)(i) in the situation of this case would not accomplish the legislative objective. I believe that the interpretations given by Secretary Mitchell, Senator Humphrey, Congressman Griffin, and Congressman Rhodes are not necessarily inconsistent. Viewing the section as a whole, the varying constructions may reasonably be explained in that they probably postulated different fact situations. Although not called upon here to decide, it seems not unlikely that a labor organization in an effort to persuade an employer to cease doing business with some other person might violate Section 8(b)(4)(i) if it was thus inducing or encouraging a managerial employee to refuse to perform services for his employer. The answer to this must be reached by considering whether the managerial individual is being induced or encouraged to do something against the interest of his employer rather than the contrary. Inducement or encouragement to bring about a strike of supervisory or management personnel is inimical to the secondary employer's interest and, given the forbidden objective, may well constitute a violation of Section 8(b)(4)(i), but that is not the factual setting of this controversy.

The managers of McDaniels Markets were authorized to decide as they best could whether to continue doing business with Servette in the face of threatened or actual handbilling. This, a policy decision, was one for them to make. The evidence is persuasive that the same authority was vested in the managers of Kory. Some of them ignored the handbilling and continued to use Servette products. Others removed the Servette merchandise or diminished the volume of business done with Servette. None of these managers, I find, was in any respect refusing to perform services for his respective employer. Each, as he was empowered to do, decided what course of action would best solve the dilemma with which he was faced. Respondent's object under the facts here must have been to induce the various store managers to cease doing business with Servette by holding out the prospect that failure to do so would result in diminished trade. I do not understand how in reacting to this pressure the store managers were in any respect depriving their employers of their services in the slightest degree. In no genuine sense was the Respondent inducing or encouraging the managers as individuals to take any action. The inducement and encouragement was directed rather to the business entities. The varying reactions of the managers were reactions to the effect or possible effect of handbilling upon the businesses they managed. I find that no store manager was induced or encouraged to refuse in any manner to perform any services for his employer.

Because of the circumstance that not all of the markets purchased all of the four items listed in the handbill from Servette, it is contended by the General Counsel

that the handbilling is to that extent and in that particular untruthful. It is the fact that all of the stores where the handbilling took place or where such action was threatened did business with Servette and purchased from that organization at least one of the items listed on the handbill. It is also the fact that all of the listed items were distributed by Servette. I find no misrepresentation to exist in the wording of the handbill.

CONCLUSIONS OF LAW

1. The Respondent is a labor organization within the meaning of Section 2(5) of the Act.
2. Servette, Kory, McDaniels, and Daylight are persons within the meaning of Section 2(1) and Section 8(b)(4) of the Act and each is engaged in commerce within the meaning of Section 2(6) and 7 of the Act.
3. The Respondent has not engaged in unfair labor practices within the meaning of Section 8(b)(4)(i) or (ii) of the Act.

It is hereby recommended that the complaint be dismissed in its entirety.

Kahaly Quilting Company *and* District 65, Retail, Wholesale Department Store Union. *Case No. 2–CA–7961. October 30, 1961*

DECISION AND ORDER

On August 31, 1961, Trial Examiner John F. Funke issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had not engaged in and was not engaging in any of the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety, as set forth in the Intermediate Report attached hereto. Thereafter, the General Counsel filed exceptions to the Intermediate Report and a supporting brief.

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 brief, and the entire record in the case, and hereby adopts the Trial Examiner's findings, conclusions, and recommendations.

[The Board dismissed the complaint.]

INTERMEDIATE REPORT

STATEMENT OF THE CASE

This proceeding, with all parties represented, was heard before the duly designated Trial Examiner on August 14 and 16, 1961, at New York, New York. The complaint alleged that Kahaly Quilting Company, herein the Respondent, violated Section 8(a)(1), (3), and (5) of the Act and the answer denied the commission of any unfair labor practices.

Oral argument was waived and no briefs were submitted.

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

FINDINGS AND CONCLUSIONS

I. THE BUSINESS OF RESPONDENT

Kahaly Quilting Company is a partnership consisting of Joseph Kahaly, William Kahaly, and Emil Kahaly, operating a plant at 355 Butler Street, Brooklyn. It is