

**Delsea Iron Works, Inc. and Local 676, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.** *Cases Nos. 4-CA-2369 and 4-RC-4619. March 21, 1962*

### DECISION AND ORDER

On November 27, 1961, Trial Examiner Sidney Sherman issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging 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 supporting brief. Briefs in support of the Intermediate Report were filed by the General Counsel and the Charging Party.

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 [Members Rodgers, Fanning, and Brown].

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.<sup>1</sup> The Board has considered the Intermediate Report, the exceptions and briefs, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner with the following additions and modifications.

1. The Trial Examiner found that the Company's President Charles Jublou's statement to employee Elmer Martin at 2 p.m. on May 8, that, ". . . if you leave now I'll consider that you're quitting," constituted a discharge of Martin. He found that Jublou's statement that the strikers "had quit and he was going to replace every one of them" to Iron Workers Union Representative Arthur Lee at 5 p.m. Monday, May 8, amounted to a discharge of the other claimants. Contrary to this latter finding of the Trial Examiner, insofar as it included claimants Charles Carr and James Shafer, we find that their respective discharges did not occur at 5 p.m. on May 8.

Employee James Shafer did not learn of the walkout until he returned to the Respondent's plant from working elsewhere at 7:30 p.m. on May 8, and it cannot be said that he participated in the strike on that day. However, Shafer did join the strike the next day, May 9.

<sup>1</sup> The Trial Examiner ruled that he had no authority to consider whether there was an adequate showing made to support the petition in Case No. 4-RC-4619. We are satisfied that the Union had an adequate showing of interest in the unit found appropriate herein. *O. D. Jennings & Company*, 68 NLRB 516.

On May 9, striker Ronald Shafer made an anonymous call to Jublou claiming to speak for the employees. Jublou told him that "as far as he was concerned the men in the shop had all quit." We find that this statement of Jublou was not only a reaffirmation of his discharges of those who had struck the preceding day, but constituted a discharge of James Shafer, too. Employee Carr did not walk out on May 8. He worked not only that day but the next day, too. It was not until the 10th that Carr, because of the picket line, first withheld his services. On May 11, Jublou told Teamsters Representative Jackson that the men had "walked off the job, and that [although he had not in fact done so] he had replaced them with other men." Jublou, thus, not only again affirmed the earlier discharges but thereby discharged Carr, too.

2. We agree with the Trial Examiner that in striking to protest the Respondent's no-smoking rule the employees were engaging in a protected concerted activity. *Washington Aluminum Company, Inc.* 126 NLRB 1410.<sup>2</sup> In that case, the Board held that the walkout of a group of employees in protest of cold working conditions in the plant was a protected activity, even though, as here, no demand had been presented to the Employer prior to the walkout. We note, moreover, that here, the Respondent, in effect, told at least two employees that if they did not like the rule against smoking they could look for work elsewhere. Further, it is clear from the record here that shortly after the walkout and prior to discharging any employee, the Respondent was fully aware of the reason for the employees' action. Thus, the record shows that 30 minutes after the walkout began employee Carr told Jublou the reason for it was "on account of this smoking."

## ORDER

Upon the basis of 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, Delsea Iron Works, Inc., Millville, New Jersey, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in any labor organization of its employees by discriminating in regard to their hire, tenure, or any other term or condition of employment.

(b) In any other manner, interfering with, restraining, or coercing its employees in the exercise of their right to self-organization, to form, join or assist any labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted

<sup>2</sup> Enforcement denied 291 F. 2d 869 (C.A. 4); 370 U.S. 9, reversing and remanding 291 F. 2d 869.

activities for the purposes 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 is affected by the proviso in Section 8(a)(3) of the Act.

2. Take the following affirmative action, which is necessary to effectuate the policies of the Act:

(a) Offer the employees named in Appendix B, attached hereto, except Carr and Hackleton, immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges; offer such reinstatement to Hackleton upon appropriate application by him; and make all these employees whole in the manner set forth in the section of the Intermediate Report entitled, "The Remedy."

(b) Preserve and, make available to the Board or its agents, upon request, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due.

(c) Post at its plant at Millville, New Jersey, copies of the notice attached hereto marked "Appendix A."<sup>3</sup> Copies of such notice, to be furnished by the Regional Director for the Fourth Region, shall, after being duly signed by an authorized representative of the Respondent, be posted immediately upon receipt thereof, and be maintained by it for a period of 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

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

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<sup>3</sup>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"

## APPENDIX A

### 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** discourage membership in any labor organization by discriminating in regard to hire, tenure of employment, or any other term or condition of employment of any of our employees.

**WE WILL NOT** in any other manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form a labor organization, to join any labor

organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities, except to the extent that such right is affected by the proviso to Section 8(a)(3) of the Act.

WE WILL offer George Hockenbury, Samuel Kelley, Jr., Richard Langley, Orrin Lord, Philip Wolfe, Elmer Martin, William Bruce Reed, Elmer Shafer, James Shafer, Richard Shafer, and Ronald Shafer immediate and full reinstatement to their former or substantially equivalent positions without prejudice to their seniority or other rights and privileges and make them whole for any loss of pay suffered as a result of the discrimination against them. We will offer such reinstatement to Howard Hackleton upon application by him.

DELSEA IRON WORKS, INC.,  
*Employer.*

Dated----- By-----  
(Representative) (Title)

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

Employees may communicate directly with the Board's Regional Office, 1700 Bankers Securities Building, Walnut and Juniper Streets, Philadelphia 7, Pennsylvania, Telephone Number, Pennypacker 5-2612, if they have any question concerning this notice or compliance with its provisions.

#### APPENDIX B

Charles Carr  
Howard Hackleton  
George Hockenbury  
Samuel Kelly, Jr.  
Richard Langley  
Orrin Lord  
Philip Wolfe

Elmer Martin  
Elmer Shafer  
James Shafer  
Richard Shafer  
Ronald Shafer  
William Bruce Reed

#### INTERMEDIATE REPORT

This proceeding was heard at Philadelphia, Pennsylvania, on September 21 and 22, 1961. The issues litigated were whether the Respondent violated Section 8(a)(3) and (1) of the Act by the discharge of 13 employees, and whether such employees or their replacements were eligible to vote in a Board-directed election. After the hearing, briefs were submitted by the Respondent, the General Counsel, and the Charging Party.

Upon the entire record and my observation of the witnesses, I adopt the following findings:

##### I. THE BUSINESS OF THE RESPONDENT

The Respondent is a corporation organized under the laws of New Jersey, with its principal plant in Millville, New Jersey, where it manufactures steel products.

Respondent annually ships from the plant to out-of-State points products valued in excess of \$50,000.

I find that the Respondent is engaged in commerce within the meaning of the Act and that it will effectuate the policies of the Act to assert jurisdiction herein.

## II. THE LABOR ORGANIZATION INVOLVED

Local Union 676, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, hereinafter called the Charging Union or the Union, is a labor organization within the meaning of Section 2(5) of the Act.

## III. THE UNFAIR LABOR PRACTICES

The amended complaint alleges that on or about May 8, 1961, 13 named employees of Respondent concertedly ceased work and struck, that on the same date the Respondent discharged such employees, and has refused to reinstate them, because they engaged in concerted activities for mutual aid and protection and that the Respondent thereby violated Section 8(a)(3) and (1) of the Act.

Respondent's answer admits that 11 of the employees named in the amended complaint ceased work concertedly, but neither admits nor denies that they struck, alleging that Respondent has not been informed at any time of the reason for such concerted work stoppage. The answer states further that when the aforesaid 11 employees failed to report for work, the Respondent treated them "as having voluntarily quit" and refused to reinstate them "because they voluntarily left their jobs without permission and without notifying Respondent as to the reason or reasons for such cessation of work." As to the two remaining individuals named in the amended complaint (Carr and Hackleton), Respondent's answer avers that they were granted a "leave of absence" during the week of May 8, which leave was still in effect.

### A. The facts

On May 8, the Respondent had 15 production employees, of whom 11 were that day working in its shop, and 4 were employed on outside jobs—2 at the plant of a customer, Shield-Alloy, and 2 at Bordentown State Reformatory. None of the employees was at that time represented by any union. The principal officers of the Respondent were Charles Jublou and his wife. There is no dispute that between 9 and 9:30 a.m. on May 8, Mrs. Jublou told each of the 11 employees in the shop that the Respondent had adopted a no-smoking rule.<sup>1</sup> Two of the employees testified, without contradiction, and I find, that Mrs. Jublou told them in effect that if they did not like the no-smoking rule, they would have to look for other employment. Later the same morning 9 of the 11 employees in the shop discussed among themselves the new rule as well as other unsatisfactory conditions in the shop and decided to leave the plant in a body and contact a union to represent them in dealing with the Respondent in connection with the various unsatisfactory working conditions. Accordingly, all nine walked out at noon, at the beginning of the 30-minute lunch break. Seven of the nine proceeded to contact the two employees who were working on the Shield-Alloy job and solicit them to join in the group action. The other two, Carr and Hackleton, remained outside Respondent's plant, where they ate their lunch. About 12:30 p.m., the Jublous, who had gone out for lunch, returned to the plant and engaged in conversation with Carr and Hackleton. According to Mrs. Jublou's pretrial affidavit, which was adopted in this respect by Mr. Jublou at the hearing, Carr and Hackleton informed the Jublous that the nine employees had left the shop "after announcing that they were going to have a meeting about the no-smoking rule" with the two employees at Shield-Alloy. Hackleton testified, without contradiction, and I find, that he told the Jublous that he and Carr were "going to go home because the fellows walked out . . . and come back when it's all over," and that, when Mr. Jublou directed him to return to work, Hackleton said, "No, I have to work with them fellows when they come back . . . I'm not going to go back when the fellows stay out from work." At this point, either Mr. or Mrs. Jublou remarked, "they don't work here anymore now; they're done." Hackleton did not return to work. Carr testified, without contradiction, and I find, that in the

<sup>1</sup> Mrs. Jublou's pretrial affidavit, which was introduced in evidence, so states. In addition there was uncontradicted testimony by several of the employees that they and others were informed by Mrs. Jublou of the no-smoking rule in the morning of May 8

course of the foregoing conversation he told the Jubilous that he was considered going home because "the fellows have walked out and there's some kind of strike or some trouble," and that the employees' action was "on account of this smoking."<sup>2</sup> Carr, however, agreed to return to work that afternoon, but, when the picket line (see below) appeared on May 10, he refused to cross it and has not since worked for Respondent.<sup>3</sup>

Meanwhile, the nine other "claimants"<sup>4</sup> contacted Elmer Martin and Richard Shafer at the Shield-Alloy job and induced them to join in the group action. About 2 p.m., Martin returned to the Respondent's shop and told Mr. Jubilou that "the men were on strike" and he was joining them.<sup>5</sup> Thereupon Jubilou stated, ". . . if you leave now I'll consider that you're quitting."

Meanwhile the claimants contacted the Iron Workers Union and one of them informed Lee, a representative of that union, that they had struck because of the no-smoking rule and other matters and wanted the Iron Workers to represent them. About 5 p.m. on May 8, Lee called Mr. Jubilou and promised that the claimants would return to work provided that Respondent recognized and negotiated with the Iron Workers as the bargaining agent of its employees. Jubilou answered, according to Lee, that "the men had come out on strike at noon of that day . . . that as far as he was concerned they had quit and he was going to replace every one of them." Jubilou then referred Lee to his attorney, who informed Lee the next day that Respondent's position was as already stated by Jubilou. Mr. Jubilou's version was that he told Lee that the men had "walked out" without telling Jubilou why, and that as far as he was concerned they had quit. Jubilou however, denied telling Lee that the men had struck, asserting that he did not know at the time whether they had struck. I credit Lee's version, as, unlike Jubilou, he had no apparent immediate interest in the outcome of the instant case.<sup>6</sup> Moreover, in view of the findings above as to the explanations for the employees' action given to him by Hackleton, Carr, and Martin, I do not credit Jubilou's denial that he was not aware that the men had struck. All three of these employees were participants in the group action, they had told Jubilou, more or less explicitly, that the defecting employees were engaging in a strike,<sup>7</sup> and Jubilou vouchsafed no reason at the hearing for doubting the accuracy of their statements.

Accordingly, I find that about 5 p.m., on May 8, Jubilou told Lee that the claimants had struck and would be treated as having quit, thereby, in effect, announcing to a representative of the claimants that they were discharged. On May 9 Lee conveyed Jubilou's position to one of the claimants, after it had been confirmed by Jubilou's attorney.

About 7:30 p.m. on May 8, James Shafer, who had been employed on an outside job all day, returned to the shop, and was informed by Mrs. Jubilou of the walk-out. According to James Shafer's uncontradicted testimony, which I credit, Mrs. Jubilou told him "that she didn't know why they walked out—but that she had gone around and told them that they could not smoke any longer in the shop." When James Shafer stated that he could not return to work until he learned the reason for the walkout, Mrs. Jubilou announced, "As far as I'm concerned, the men quit." James proceeded to his home where he found three of the claimants, who informed him that they had struck because of the no-smoking rule and other adverse working conditions. James did not return to work.

<sup>2</sup> Mr. Jubilou's testimony corroborates Carr, admitting that Carr had mentioned the no-smoking rule as the reason for the walkout.

<sup>3</sup> Carr admitted that he had intended to quit the Respondent's employ, in any event, on May 12, 1961.

<sup>4</sup> This term is used hereinafter to refer to the individuals alleged in the complaint to have been unlawfully discharged.

<sup>5</sup> Mr. Jubilou testified that Martin announced, upon his return from Shield-Alloy, that he was "going home." However, he was not questioned about, and so did not deny, Martin's reference to a "strike."

<sup>6</sup> After May 8, there were no further communications between the claimants and the Iron Workers, and that union took no action on their behalf after May 9.

<sup>7</sup> Jubilou testified that he did not decide that the men had quit until the morning of May 9, when they failed to report for work "and no one had contacted me as to whether they were coming in or not." However, Jubilou admitted that Lee called him on May 8 and requested that he reinstate the men. If Jubilou was in fact in doubt before Lee's call as to whether the men had quit or struck, Lee's offer of a return to work in exchange for negotiations should have satisfied Jubilou that the claimants had not abandoned their employment.

On May 9, Jublou received a telephone call from one of the claimants, Ronald Shafer, who stated that he was speaking for the Respondent's employees and would like to meet with Jublou to discuss their problems. Jublou retorted that "as far as he was concerned the men in the shop had all quit. That's all there was to it." No meeting ensued.<sup>8</sup>

On May 10, the claimants began to picket Respondent's plant with a sign protesting substandard working conditions. On May 11, four of the claimants, who had been selected by the others to represent them, met with Jackson, a representative of the Charging Union. After some discussion, Jackson called Jublou. According to Jackson, he asked Jublou to reinstate the claimants,<sup>9</sup> but Jublou refused, stating they had "walked off the job, and that he had replaced them with other men."<sup>10</sup>

Jublou's version of this conversation was that Jackson told Jublou "he had some of my men signed up"; that Jublou commented, ". . . it looks to me like you're going to have to find them a job"; and that Jackson referred to a contract which he wanted Jublou to sign. At the hearing, Jublou adopted as true a statement in his wife's pretrial affidavit which attributed to Jublou an admission that he had rejected Jackson's request for reinstatement of the claimants, asserting that they had quit and been replaced.

There seems, therefore, to be no substantial dispute that Jublou on May 9, refused to reinstate the claimants, asserting that they had quit and had all been replaced, although only four had in fact been replaced. While, for reasons already indicated,<sup>11</sup> I do not regard this action of Jublou as the rejection of a valid request for reinstatement, I do regard it as proof that on that date Respondent intended to replace all the claimants regardless of any valid request they might make for reinstatement,<sup>12</sup> and that Respondent regarded the employer-employee relationship between it and the claimants as having been severed.

On May 15, the pickets adopted a new sign which announced a strike sponsored by the Charging Union. On May 25 counsel for the Union sent a letter to Respondent, which unconditionally requested reinstatement for all the claimants except Hackleton and Carr. None of the claimants has been rehired.

On May 29 the Union filed a petition for an election among the Respondent's employees,<sup>13</sup> and an election was held upon this petition on August 21, 1961. The tally of ballots shows that no votes were cast for, and 2 were cast against, the Union, and that 22 ballots were challenged. Eleven of the 22 ballots, comprising the ballots of 11 of the 13 claimants herein, were challenged by the Respondent. The remaining 11 challenges were by the Union and were directed against the ballots cast by replacements for the claimants.

## B. Discussion

### 1. Case No. 4-CA-2369

The General Counsel's primary position is that the Respondent in effect discharged the claimants on May 8 for engaging in a protected concerted activity. Respondent counters that (1) there was no strike but only a concerted quitting of work;<sup>14</sup> (2) if there was a strike, it was not protected; and (3) in any event, Respondent at no time discharged the claimants.

<sup>8</sup> Mr. Jublou did not testify about this incident, but Mrs. Jublou's pretrial affidavit, which was adopted by him at the hearing, contains some reference to the matter, which conflicts with Ronald Shafer's testimony. I credit Shafer.

<sup>9</sup> Jackson at first testified that this request for reinstatement was his "own idea." I do not credit his subsequent confused retraction of this admission, particularly in view of the testimony of one of the members of the committee representing the claimants that the request for reinstatement was not authorized in advance by the committee. While there was testimony by this claimant that he overheard Jackson's plea to Jublou for reinstatement and offered no objection, and that he was willing to return to work unconditionally, the same witness testified that he would not have returned unless the conditions that caused the walkout were removed, and that he did not discuss with the other claimants the conditions under which they would return. On this record, I am unable to find that Jackson's request for reinstatement was authorized or ratified by any of the claimants.

<sup>10</sup> As a matter of fact, by May 11 Respondent admittedly had hired only four replacements.

<sup>11</sup> See footnote 9, *supra*.

<sup>12</sup> Jublou was not aware, so far as the record shows, of any defect in Jackson's authority to request reinstatement, and the only reason he gave for not granting the request was that the claimants had "quit" and been "replaced."

<sup>13</sup> Case No. 4-RC-4619.

<sup>14</sup> The Board has held that a concerted quit is not protected by the Act *Crescent Wharf and Warehouse Company, and its successor, West Coast Terminals Co., Inc.*, 104 NLRB 860, 861-862.

As to (1), the evidence is overwhelming that the strikers did not intend to quit but intended only to absent themselves from work pending a resolution of their differences with the Respondent. This appears from the testimony of certain of the claimants at the hearing that their purpose in walking out was to obtain union representation in negotiating with the Respondent about their working conditions, particularly the no-smoking rule. Had they intended to abandon their employment, they would have had no interest in changing the conditions of such employment. That such was in fact their objective is corroborated by their subsequent conduct in soliciting first the Iron Workers, and then the Charging Union, to represent them in dealing with the Respondent, and in picketing at the Respondent's premises with signs protesting the working conditions. Moreover the Jubilous were amply apprised by the statements of Hackleton, Carr, and Martin on May 8 that the claimants regarded themselves as being on strike, and Mr. Jubilou's own characterization of the action of the claimants is not consistent with a belief that they had quit. In fact in his conversation with Lee on May 8 he referred to the group action as a "strike." While on other occasions he referred to such action as a "quit," he almost invariably qualified this by the phrase "as far as I am concerned" or the equivalent.

Thus, Mr. Jubilou told Lee and Ronald Shafer, that "as far as he was concerned" the men had quit. Mrs. Jubilou's remark to James Shafer on May 8 was in the same vein. By his own admission, Mr. Jubilou told Martin on May 8, that if he did not return to work Jubilou would "consider that" Martin was "quitting."

The foregoing are not the sort of statements that an employer makes about employees who are in fact quitting, but smack rather of the reaction of an employer to an employee's leaving his work for reasons of which the employer does not approve. In fact, the Respondent's answer to the amended complaint carefully refrains from alleging that the group action of May 8 was a quit, or that the Respondent so believed, and asserts only that the Respondent "treated [the claimants] as having voluntarily quit their employment."

In view of all these circumstances, I find that the claimants did not quit but struck, that the strike was precipitated by the no-smoking rule, and that this was known to the Respondent at all times here relevant.

The Respondent's second contention—that, if the group action of May 8 was a strike, it was unprotected—presents a somewhat novel legal question. Respondent argues that there was lacking here an essential ingredient of a protected strike namely, "notice or demand made upon the employer coupled with an effort to reach an amicable settlement." Respondent relies principally on two court decisions, denying enforcement of Board orders.<sup>15</sup>

It is true that in the *Washington Aluminum* case, *supra*, the court, in finding a strike unprotected, relied in part on the failure of the strikers to make any demand upon management before walking out. While the court noted that the Board had found that individual employees had prior to the walkout complained to management about the working condition which precipitated the walkout—inadequate heat in the plant, the court stressed the failure of the employees "to attempt to make inquiry concerning the causes of their physical discomfort or to present their claims or demands to the company prior to the walkout."

It thus appears to have been the position of the Board in that case that mere complaints prior to the walkout sufficed, whereas the court's position seems to have been that it was incumbent upon the employees to do something more before striking—either inquire into the cause of the inadequate heat or demand that management remedy the condition.

The aforesaid position of the Board sheds little light on the instant problem. Here, there was not even a prior complaint. The claimants walked out a few hours after the no-smoking rule was announced and because of that rule, but without having individually or collectively told management that they had any objection thereto, and *a fortiori*, without having satisfied the requirement of the court

<sup>15</sup> *N.L.R.B. v Ford Radio & Mica Corporation*, 258 F. 2d 457 (C.A. 2); *N.L.R.B. v. Washington Aluminum Company, Inc.*, 291 F. 2d 869 (C.A. 4), 370 U.S. 9 reversing and remanding 291 F. 2d 869. The *Ford* case seems distinguishable on the ground that the court there stressed, not the lack of prior notice of the strike, but the persistent refusal of the strikers to inform management of their grievances even after the strike had begun. Here, however, the Respondent on May 9 rejected a request by a striker (Ronald Shafer) to meet and discuss the grievances which gave rise to the walkout. Moreover, here, unlike the situation in the *Ford* case, the Respondent was informed within a half hour after the walkout that it was occasioned by the no-smoking rule and had no reason to believe that the objective of the strikers was such as to render the strike unprotected.

in *Washington Aluminum* that they inquire into the reason for the rule or demand that the rule be rescinded or modified.

However, it has been here found that about 5 p.m. on May 8, after having been advised by Carr and Hackleton that the walkout was because of the no-smoking rule, Mr. Jublou in effect announced to Lee that the claimants had been discharged. It is thus clear that Jublou reached the decision to discharge the claimants after he had been put on notice of their grievance.<sup>16</sup>

On these facts, the Board precedent most nearly in point appears to be the case of *Solo Cup Company*,<sup>17</sup> where the Board found that the respondent violated the Act by discharging four employees because, without having made any prior complaint or demand, they shut down their machines and left their work stations for about an hour, refusing to return until they had obtained a promise that management would explain to them the discharge of two fellow employees.

In enforcing the Board's order in that case, the court said:

The employees might well have exercised better judgment by sending a committee to the management at a more convenient time for making their protest and demand, but we are unable to conclude that ill judgment or lack of consideration adds up to illegality. Regardless of what we may think about the activities of the employees and the manner and time of making their protest and demand, we must conclude with the Board that their protest came within the protective purview of the Act. (p. 526)

While there is considerable force in the view of the court in *Washington Aluminum* that aggrieved employees ought to afford their employer an opportunity to avoid a strike by presenting their demands in advance of any strike action, that would seem to be a matter for legislative consideration. Section 7 of the Act establishes the right of employees to engage in "concerted activities for the purpose of . . . mutual aid or protection." The exercise of this right is not conditioned on the submission of any prior demand to the employer.

Section 13 of the Act provides:

Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications of that right.

However salutary would be such a limitation on the right to strike as the court imposed in *Washington Aluminum*, I believe that Section 13 of the Act precludes it. It is possible to conceive of a case where employees walk out of a plant and engage in picketing for reasons unknown to the employer and which they refuse at any time to divulge to him. In fact, that appears to be what happened in the *Ford Radio* case *supra*, as the court viewed the facts. Such a case may well arouse administrative or judicial ire. However, that is not this case. Here, Respondent was informed within a matter of minutes after the walkout of the reason therefor, and the very next day rejected an overture by one of the strikers looking toward adjustment of the strikers' grievance or grievances.<sup>18</sup>

<sup>16</sup> The General Counsel contends that the discharge occurred about 12:30 p.m. on May 8, when as already found, one of the Jublous, after conversing with Hackleton, announced that the strikers were "done." However, I credit Mr. Jublou's testimony that he told both Carr and Hackleton at that time to go back to work and he would get the matter "straightened out." Accordingly, whatever else he may have said at that time, I do not believe that Jublou finally decided to terminate the strikers until a few hours later when he admittedly told Martin, upon his refusal to return to work, that Jublou would consider that he had quit. The announcement to Lee at 5 p.m. that day promulgated this decision as to the other claimants.

<sup>17</sup> 114 NLRB 121, enf'd. 237 F. 2d 521 (C.A. 8).

<sup>18</sup> The General Counsel contends that any prior demand or complaint was excused in this case because of its apparent futility. He points to the evidence that Mrs. Jublou coupled her announcement of the no-smoking rule with the admonition that those who did not like it could look for other employment. However, there was no testimony that this admonition or its equivalent was addressed to more than three of the claimants (Ronald Shafer, Lord, and Hockenbury) nor was there any testimony that such admonition accounted for the failure of any of the claimants to protest the no-smoking rule before the walkout. Upon this state of the record, I do not believe that the General Counsel has sufficiently proved that the claimants' failure to make such protest was due to a conviction that it would be futile to do so. The record warrants the inference only that they believed that a protest by them while at work would be less effective than one made by a union on their behalf while they were on strike.

Accordingly, I find that the claimants engaged in protected concerted activity when they walked out on May 8.

As to Respondent's final contention—that it at no time discharged the claimants, but merely replaced them, as it claims it was privileged to do—I have already set forth my reasons for regarding Jublou's statement to Lee on May 8 as effecting the termination of the claimants. Moreover, the Jublous' constantly reiterated statements, and the admission in the answer, that the claimants were regarded as having quit amply attest that the Respondent regarded the employment relation of the claimants as having been permanently severed. Since it has been found that such severance was not in fact effected by any voluntary quit, there remains no alternative but to find that it was effected solely by the action of the Respondent.

In conclusion, I find that the Respondent on May 8 discharged the claimants for engaging in protected concerted activity, thereby violating Section 8(a)(3) and (1) of the Act, and that its disregard of the request of May 25 for reinstatement similarly violated the Act.

## 2. Case No. 4-RC-4619

In the order of the Acting Regional Director consolidating the instant cases for hearing, I was authorized to resolve, in addition to the issues in Case No. 4-CA-2369, the issues raised in Case No. 4-RC-4619, by the challenges to 22 ballots cast in the election held on August 21, 1961, of which 11 were cast by individuals who participated in the strike beginning on May 8<sup>19</sup> and 11 by their replacements. As I have found that all the claimants were unlawfully discharged on May 8, I find that the 11 claimants whose ballots were challenged were eligible to vote on August 5, the applicable eligibility date,<sup>20</sup> and that the challenges to their ballots should be overruled. As the 11 replacements whose ballots were challenged were hired as a consequence of the Respondent's unfair labor practice in discharging and refusing to reinstate the claimants, I find them ineligible to vote, and sustain the challenges to their ballots.<sup>21</sup>

The Respondent contends that the election was invalid because a sufficient showing of interest was not submitted to the Regional Director by the Union and the waiver of such a showing in Section 8(b)(7)(C) of the Act is not applicable here. The short answer to this contention is that this issue was not referred to me by the Acting Regional Director, and I therefore have no authority to consider it.

## IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Respondent set forth in section III, above, occurring in connection with the operations of the Respondent described 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 of commerce.

## V. THE REMEDY

It having been found that the Respondent engaged in unfair labor practices in violation of Section 8(a)(3) and (1) of the Act, it will be recommended that the Respondent cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

<sup>19</sup> The 11 comprised all the claimants, except Carr and Langley.

<sup>20</sup> Even if the claimants be viewed as permanently replaced economic strikers, they would still be eligible to vote under Section 9(c)(3) of the Act.

Respondent contends that Hackleton, one of the challenged voters, was on indefinite "leave of absence" on the eligibility date, and therefore not eligible to vote. The record shows only that Hackleton on May 12 told Mrs. Jublou that he planned to enter the "hott business," that after July 1 he did engage in that business for 2 days a week. He testified, and I find, that if he had continued to work for the Respondent he would have engaged in that business only outside of his regular working hours. There is accordingly insufficient basis for inferring that, absent his discharge, he would have quit or taken an indefinite leave of absence, or that he did not desire reemployment on the eligibility date. (While his name does not appear on the list of claimants whose reemployment was requested on May 25, by the Union, the reason for such omission was not litigated. There is an intimation in the Respondent's brief that Hackleton's name unlike that of the other claimants, did not appear on the "eligibility list for the election," but no evidence was adduced at the hearing to that effect.)

<sup>21</sup> See *Bear Brand Hosiery Co.*, 40 NLRB 807, 808. It is accordingly unnecessary to determine to what extent, if any, these 11 were permanent replacements for the claimants.

It has been found that the Respondent on May 8, 1961, discriminatorily discharged the employees whose names are set forth in Appendix B. I will recommend that the Respondent be required to offer all of them except Carr and Hackleton<sup>22</sup> immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and make them whole for any loss of pay suffered as a result of the discrimination against them by payment to them of a sum of money equal to the amount they would have earned from the date of their application for reinstatement<sup>23</sup> to the date of Respondent's offer of reinstatement, less net interim earnings, to be computed on a quarterly basis in the manner established by the Board in *F. W. Woolworth Company*, 90 NLRB 289. Actual earnings in any particular quarter shall have no effect upon the backpay liability for any other such period. It will also be recommended that the Respondent preserve and make available to the Board, upon request, payroll and other records to facilitate the computation of the backpay due.

As the unfair labor practices committed by the Respondent are of a character striking at the root of employee rights safeguarded by the Act, it will be recommended that the Respondent cease and desist from infringing in any manner upon the rights guaranteed in Section 7 of the Act.

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

#### CONCLUSIONS OF LAW

1. The Union is a labor organization within the meaning of the Act.
2. By discriminating in regard to the hire and tenure of the employees listed in Appendix B, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(3) and (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.]

<sup>22</sup> As to Carr and Hackleton, see footnote 23.

<sup>23</sup> As the claimants were on strike when discharged, they are entitled to backpay only from the date that they validly applied for reinstatement. I find that such date for all the claimants, except Carr and Hackleton, was May 26, 1961, when the Respondent received a letter from counsel for the Union unconditionally requesting reinstatement of all the claimants, except Carr and Hackleton. As for Hackleton, there was no evidence that he has as yet applied for reinstatement. Accordingly, he must be deemed to be still on strike, and his right to reinstatement and backpay will run from the date that he makes such application. As for Carr, as already noted, he testified that if he had not been discharged on May 8, he would have quit, in any event, on May 12. It follows that even if he should hereafter apply for reinstatement, he would not be entitled thereto or to any backpay, by reason of his discriminatory discharge.

**Pottsville Community Hotel Co., Inc. and Bartenders, Hotel and Restaurant Employees Union, Local 391, AFL-CIO. Case No. 4-CA-2394. March 21, 1962**

#### DECISION AND ORDER

On November 30, 1961, Trial Examiner James V. Constantine issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and is engaging in the unfair labor practices alleged in the complaint and recommending that he cease and desist therefrom and take certain affirmative action, as set forth in the Intermediate Report attached hereto. Thereafter, the Respondent filed exceptions to the Intermediate Report and