

warranting a finding that the *Estrellita* comes within the jurisdiction of the Act, we defer to the law of the flag, which is itself a substantial contact,¹⁰ and find that we are without jurisdiction to proceed. We shall, therefore, dismiss the petition.

[The Board dismissed the petition.]

MEMBER RODGERS, concurring:

This is yet another one of those cases in which the Board has been asked to assert jurisdiction over vessels owned by American ship-owners, but registered under the flags of foreign nations and operated almost entirely by foreign citizens.¹¹

While I am not persuaded that the so-called jurisdictional factors here are essentially different from those in a number of cases where the Board has justified an assertion of jurisdiction, I concur in dismissing the instant petition—but for the reasons I asserted in my dissenting opinions in the other cases.¹²

¹⁰ See *Lauritzen v. Larsen*, 345 U.S. 571, 584.

¹¹ *West India Fruit and Steamship Company, Inc.*, 130 NLRB 343; *Peninsular & Occidental Steamship Company, Inc.*, 132 NLRB 10; *Hamilton Bros., Inc.*, 133 NLRB 868; *Eastern Shipping Corporation, et al.*, 132 NLRB 930; *United Fruit Company*, 134 NLRB 287; *Owens-Illinois Glass Company*, 136 NLRB 389. See also *Grace Line, Inc.*, 135 NLRB 775.

¹² See *Sociedad Nacional de Marineros de Honduras (United Fruit Company) v. Frank W. McCulloch, Chairman*, 300 F. 2d 222 (D.C.D.C.); *Empresa Hondurena De Vapores (United Fruit Company) v. Ivan C. McLeod, Regional Director*, 201 F. Supp. 82 (C.A. 2). *Owens-Illinois Glass Co. v. McCulloch, et al.*, 50 LRRM 2041 (D.C.D.C.), April 13, 1962, enjoining representation election order in Board Case No. 12-RC-1293.

Biscayne Television Corporation and Local No. 666, International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, AFL-CIO

Biscayne Television Corporation and Local 780, International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, AFL-CIO

Biscayne Television Corporation and Motion Picture Film Editors, Local 780, International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, AFL-CIO and National Association of Broadcast Employees and Technicians, AFL-CIO.
Cases Nos. 12-CA-494, 12-CA-587, and 12-RC-348. May 31, 1962

SUPPLEMENTAL DECISION AND ORDER

On November 30, 1959, the Board issued its Decision and Order in the above-entitled cases,¹ finding that the Respondent interfered with,

¹ 125 NLRB 437.

137 NLRB No. 43.

restrained, and coerced its employees in the exercise of their statutory rights in violation of Section 8(a)(1) of the Act, and that it discharged newsroom employees Cal Marlin, Charles Filer, and Joseph Lipari and demoted Hal Weand on August 12, 1958, for union activity in violation of Section 8(a)(3). With respect to the 8(a)(1) violation, the Board provided the usual remedy, ordering that the Respondent cease and desist from its 8(a)(1) conduct and post a notice to that effect.

With respect to the 8(a)(3) violations, the Board's remedy ordered immediate and full reinstatement of the discriminatees to their former or equivalent positions with backpay, dismissing, if necessary, all persons hired subsequent to the date of discrimination. It was also provided that if there was not then sufficient work available for the discriminatees, the Respondent was to distribute all available positions among all of the eligible employees on a nondiscriminatory basis and place the discriminatees on a preferential hiring list. The remedy further stated that since the date of the discrimination, the Respondent may have permanently reduced its newsroom operation for non-discriminatory economic reasons, and that one or more of the discriminatees might have been discharged in the work-force reduction even if the selection had been made on a nondiscriminatory basis. The Board stated that this possibility was to be taken into consideration in determining the amounts of backpay due them.

On April 21, 1961, following a petition by the Board for enforcement of its Decision and Order, the United States Court of Appeals for the Fifth Circuit handed down its opinion, in which it affirmed the Board's findings with respect to the 8(a)(1) and 8(a)(3) violations, but found the Board's remedy improperly left the issue of economic management changes to the compliance stage of the instant proceeding and ordered the instant case remanded for further proceedings with regard to that issue.²

On February 10, 1962, following a supplemental hearing held pursuant to the court's remand decree, Trial Examiner John H. Dorsey issued his Supplemental Intermediate Report, a copy of which is attached hereto, finding, in effect, that the discriminatees herein had not been discriminatorily discharged or demoted and recommending that the Board find that they are not entitled to reinstatement or backpay. Thereafter, the General Counsel filed exceptions to the Intermediate Report and a supporting brief.

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, Leedom, and Fanning].

The Board has reviewed the rulings made by the Trial Examiner at the supplemental hearing and finds that no prejudicial error was

² *N.L.R.B. v. Biscayne Television Corporation*, 289 F. 2d 338 (C.A. 5).

committed. The rulings are hereby affirmed. The Board has considered the Supplemental Intermediate Report, the exceptions and brief, and the entire Supplemental record in this case, and finds merit in the exceptions of the General Counsel and accordingly adopts the findings, conclusions, and recommendations of the Trial Examiner only to the extent consistent herewith.

In accord with the court's opinion, which is the law of the case, we reject the Trial Examiner's findings that the Respondent discharged Marlin, Filer, and Lipari and demoted Weand on the basis of comparative ability, and we reaffirm the Board's 8(a) (3) findings with respect to them.

With respect to the remedy, it was stipulated that on June 6, 1960, Filer died; that on October 17 and 20, 1960, respectively, Marlin and Lipari declined offers of reinstatement; and that on January 6, 1961, Weand resigned. We therefore find, in accord with the Trial Examiner, that the Respondent has been thereby relieved of its obligation to offer these discriminatees reinstatement to their former or equivalent positions. We further find that Respondent's backpay obligation with respect to each employee terminated no later than the dates set forth above.

The question remains as to whether the Respondent's current backpay obligation terminated at any time before the above dates. The primary purpose of the remand and the supplemental hearing was to afford the Respondent the opportunity to establish that *subsequent* to the August 12, 1958, discriminatory discharges and demotion, it made economic management changes of such a nature as to relieve it of some or all of its backpay obligation, as set forth in the Board's remedy. The Respondent thereupon sought to show that during the nearly 3-year period since the original hearing in this proceeding, it successfully operated its newsroom with 2 to 3 employees, as compared with the 6 employees employed before the date of discriminations. The record, however, fails to establish the Respondent's claim. Thus, there is an unexplained increase in the Respondent's total newsroom expenditures for stringer, or free-lance, story purchases from \$690 in 1958 to \$750 in 1961, together with a daily average increase in expenditures for that purpose of from \$1.89 in 1958 to \$2.90 in 1961. There is also the omission from the Respondent's newsroom labor costs of any expenses chargeable to James Jenkins and Roger Burnham, who the Respondent conceded had assisted in newsroom operations during this period.³ Additionally, there is no evidence that the Respondent made any significant economic management changes *subsequent* to the date of the discharges. In these circumstances, we

³ The Respondent's only explanation for the omission of Jenkin's expenses was that he was apparently only a temporary employee. The Respondent described Burnham as a night editor who from time to time assisted the newsroom in camera assignments.

conclude that the Respondent has failed to establish, and there is no basis in the record for finding, that absent the discriminations, the Respondent would have terminated Filer, Marlin, or Lipari, or demoted Weand, at any time after August 12, 1958, and before the respective dates of Filer's death, Marlin's and Lipari's refusal of reinstatement, and Weand's resignation. We therefore find that the Respondent has failed to establish that its backpay obligation terminated at any time before such dates.

Accordingly, we find that the estate of Charles Filer is entitled to backpay from August 12, 1958, to the date of his death, on June 6, 1960; that Cal Marlin is entitled to backpay from August 12, 1958, to October 17, 1960, the date of his refusal of reinstatement; that Joseph Lipari is entitled to backpay from August 12, 1958, to October 20, 1960, the date of his refusal of reinstatement; and that Jay Weand is entitled to backpay from August 12, 1958, to January 6, 1961, the date of his resignation.

It is hereby ordered that the Board's Order in the above-entitled case be, and the same hereby is, amended by striking paragraph 2(a) thereof and by inserting in lieu thereof the following:

(a) Make Cal Marlin, the estate of Charles Filer, Joseph Lipari, and Jay Weand whole for any loss of pay suffered by these employees by reason of the discrimination against them, in the manner set forth in the section in the Intermediate Report entitled "The Remedy," as modified by the Board's Supplemental Decision and Order.

It is further ordered that the Appendix to the Board's decision in the above-entitled case be, and the same hereby is, amended by striking the fifth paragraph of the "Notice to All Employees" therein set forth and by substituting in lieu thereof the following:

WE WILL make Cal Marlin, the estate of Charles Filer, Joseph Lipari, and Jay Weand whole for any loss of earnings resulting from the discrimination against these employees.

SUPPLEMENTAL INTERMEDIATE REPORT PURSUANT TO BOARD ORDER UPON REMAND FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

STATEMENT OF THE CASE

The Board issued its Decision and Order on November 30, 1959 (125 NLRB 437), in which it held, *inter alia*, that Biscayne Television Corporation, herein called Respondent, had, on August 12, 1958, discharged Cal Marlin, Charles Filer, and Joseph Lipari; and demoted Jay Weand in violation of the Act. It ordered Respondent to offer the four employees:

. . . immediate and full reinstatement to their former or substantially equivalent positions without prejudice to their seniority or other rights and privileges previously enjoyed and make each whole for any loss of pay each has suffered by reason of the discrimination against him, in the manner set forth in the section in the Intermediate Report entitled "The Remedy" as modified herein.

"The Remedy" which the Board found necessary to effectuate the policies of the Act relative to the discriminatory discharges and demotion is (125 NLRB at pp. 438, 439):

We have found, in agreement with the Trial Examiner, that the Respondent unlawfully discriminated against Cal Marlin, Charles Filer, and Joseph Lipari by discharging them, and against Jay Weand by demoting him. However, it appears that since the date of the discharges and the demotion the Respondent may have permanently altered its method of operations, so that it no longer requires the same number of employees in its news department as it did prior to the discharges and the demotion. It is therefore possible that some of these employees might have been affected in such a curtailment of operations, absent the Respondent's unfair labor practices. The record, however, furnishes no basis for determining the order in which these employees might have been discharged or demoted. Under these circumstances, we shall order the Respondent to offer these employees immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority and other rights and privileges, and in the event that there is insufficient work for Marlin, Filer, and Lipari, or in the event that Weand's former position has been discontinued, we shall order the Respondent to dismiss, if necessary, all persons newly hired after the Respondent's discrimination. If there is not then sufficient work available for them, all available positions shall be distributed among all of the eligible employees without discrimination against any employee because of concerted activities, in accordance with the system of seniority or other nondiscriminatory practice heretofore applied by the Respondent in the conduct of its business. The Respondent shall place those employees, if any, for whom no employment is available, on a preferential list, with priority in accordance with such system of seniority or other nondiscriminatory practice heretofore applied by the Respondent in the conduct of its business, and thereafter offer them reinstatement as such employment becomes available and before other persons are hired for such work.

We shall order the Respondent to make whole those employees against whom it has discriminated for any losses that they may have suffered because of the Respondent's discrimination, by payment to each of them of a sum of money equal to the amount that he normally would have earned as wages from the date of such discrimination to the date of the offer of reinstatement, or placement on a preferential list, as the case may be, less his net earnings during said period, the backpay to be computed on a quarterly basis in the manner established by the Board in *F. W. Woolworth Company*. . . .

As it is possible, however, that one or more of these employees might have been discharged in the reduction of the work force even if the Respondent's selection has been made on a nondiscriminatory basis, this possibility will be taken into consideration in determining the amounts of backpay due to these employees, in compliance with our Order herein.

The Board petitioned the United States Court of Appeals for the Fifth Circuit for enforcement of its Order. The opinion of the court issued on April 21, 1961 (289 F. 2d 338 C.A. 5).¹ The court enforced the Board's Order except as to "The Remedy" which it modified. The court held:

We think this [The Board's Remedy] is artificial. It is fraught with much uncertainty which will provoke more controversy, not less. What, and all, these employees are entitled to is the right each would have enjoyed under employment policies and practices customarily followed by this Employer had they not been discriminatorily discharged or demoted. Neither the status as a victim of discrimination nor union membership affords any added rights of any kind. The discriminatee is neither better, nor worse, off. If under the Employer's [Respondent's] established employment practices, a discriminatee, at the time of the layoff, had a right to displace another person in the same job, or in some other job, or had a right to priority in filling vacancies or new positions occurring subsequently in such job or some other jobs or had any other such priorities, then the Employer must offer reinstatement (and back wages) in such jobs for such times as such employment practices would accord. The obverse is equally plain. Under the Act, discrimination by the Employer does not compel it to make work for these persons. Such discrimination does not require the Employer to discharge or layoff others to provide jobs for these discriminatees. Nor does it compel the Employer to give a priority right in

¹ *N.L.R.B. v. Biscayne Television Corporation*

rehiring as old jobs become vacant or new positions are created. What the Act does in this situation is twofold: first, it prohibits altogether anti-union discrimination; second, it requires the Employer to accord to these persons whatever rights, privileges and priorities—but no more—they would have had under the nondiscriminatory employment customs, practices and policies followed and applied by this particular Employer in the exercise of its management prerogatives. *NLRB v. American Steel Building Co.*, 5 Cir., 1960, 278 F. 2d 480.

It is obvious from the Board's decision and what we have briefly stated that further proceedings before the Board are essential. It could be most unfair to leave some or all of these contingent uncertainties to coercive compliance proceedings where mistaken action runs the risk of contempt. The further proceedings will determine whether these economic management changes have been made, and if so, with respect to each discriminatee the right, if any, to reinstatement, back wages and related problems in accordance with the principles here announced. Consequently, while thus modified, we approve the order and in effect enforce it, the matter is remanded for further proceedings.

The remedy as specified by the court in its opinion is the law of the case.

Pursuant to the court's remand the Board issued its Order reopening the record and remanding the proceeding to the Regional Director for further hearing. The hearing was held before John H. Dorsey, the duly designated Trial Examiner, at Miami, Florida, on October 3, 1961. Respondent and the General Counsel were each represented by counsel, and each filed a brief.²

I. THE DETERMINATIONS TO BE MADE

Counsel for the General Counsel contended during the course of the hearing and argues in his brief that the rights of the discriminatees to reinstatement and backpay, as provided for in the Board's Order, are modified by the court's opinion only if Respondent made "economic management changes *after* the discriminatory change of August 12, 1958" (emphasis supplied);³ or, after the close of the hearing on the issues raised by the pleadings. I do not so construe the court's opinion. According to the court, "the Board acknowledges that reinstatement and consequent reimbursement of backpay of the discriminatees cannot be forced on the Employer [Respondent] if the job of these persons *has been* abolished by reduction in forces"; and "the Employer was free to establish that by virtue of these economic nondiscriminatory reasons [reduction in forces], the job of such discriminatee was, or has become, no longer available. In such event the reinstatement (and backpay) would cease as of such moment"⁴ [emphasis supplied]; and "The further proceedings [on remand] will determine whether these economic management changes [reduction in forces] have been made, and if so, with respect to each discriminatee the right, if any, to reinstatement, back wages and related problems in accordance with the principles here announced."⁵

There is nothing in the court's opinion which makes the application of the principles enunciated therein dependent on a finding that Respondent "had *permanently* changed its method of operation."⁶ [Emphasis supplied.] A finding that a change is "permanent" could only be founded on speculation.

II. FINDINGS OF FACT

The findings of fact in the Board's Decision and Order (125 NLRB 437) are *res judicata*. They are incorporated herein by reference thereto. Suffice to say: insofar as here material, the Board found that Respondent had, on August 12, 1958, discharged Marlin, Filer, and Lipari and demoted Weand in violation of the Act; and, as remedial action ordered reinstatement and backpay for each of them in the manner set forth in the section of its Decision captioned "The Remedy" (125 NLRB at 440 and 438-439). The court, as stated, *supra*, enforced the Board's Order except as to "The Remedy" which it modified.⁷

² Counsel for the Charging Party entered an appearance subsequent to the hearing. He did not file a brief.

³ Quoted from the General Counsel's brief.

⁴ 289 F. 2d at p. 339.

⁵ 289 F. 2d at p. 340.

⁶ Quoted from the Board's Order Reopening Record and Remanding Proceeding to Regional Director for Further Hearing, issued July 24, 1961.

⁷ 289 F. 2d at 340.

A. Facts adduced at hearing on remand

Immediately prior to the discriminatory discharge-demotion occurrence Respondent employed in its news department five photographer-reporters—Ben Silver, Dick Lobo, and discriminatees Weand, Marlin, and Filer; also, one laboratory technician not qualified as a photographer-reporter, discriminatee Lipari. On August 12, 1958, it discharged Marlin, Filer, and Lipari; and demoted Weand from chief photographer to photographer-reporter-laboratory man and reduced his salary from \$110 per week to \$95. Respondent contends that the discharges-demotion were brought about due to a reduction in force resulting from a change in the format of its newscasts, described in the Board's opinion; and the discharges-demotion would have been effectuated, as they were, absent the unfair labor practices.

Since Filer died on June 6, 1960; Weand resigned on January 6, 1961; and Marlin and Lipari rejected offers of reemployment on October 17 and 20, 1960, respectively, the rights and entitlements of each, under the Board's Order, terminated as of the date specified for each of these occurrences.

From August 12, 1958, to the date of the hearing on remand, October 3, 1961—a period of more than 3 years—Respondent has continued the same newscast format and has operated with three photographer-reporters except for 6 months (September 3, 1958, to March 10, 1959) during which period Dick Lobo, a photographer-reporter, was in the military service. In Lobo's absence Respondent operated with two photographer-reporters. Respondent adduced evidence that public acceptance of its newscast has improved as a result of the change of format initiated in 1958.⁸ I find this to be persuasive evidence that Respondent substantially altered its operations when it changed the format of its newscast and having done so it no longer required the same number of employees in its news department as it did prior thereto. There remains to be determined whether under Respondent's employment policies and practices, customarily followed, the discharges, or any of them, had a "right" to continuation of employment in place of the employees retained; and, whether Weand had a "right" to be continued in the job of chief photographer and/or the pay he had received for that job.

1. Contentions of the parties

Respondent contends that the two photographer-reporters (Marlin and Filer) and the laboratory technician (Lipari) were, and would have been absent its unfair labor practices, selected for discharge on the basis of comparative ability and Respondent's requirements; and Weand was demoted since due to the reduction in force it did not need a chief photographer. The reasons given by Respondent are a defense to reinstatement and backpay provided the "rights," if any, of discharges-demotee, under employment policies and practices customarily followed by Respondent, were not abrogated.

The General Counsel contends that: (1) Marlin, on the basis of ability and seniority, should have been retained in place of Lobo; (2) Weand should be made whole for the difference in pay between what he received as chief photographer prior to August 12, 1958, and as photographer-reporter-laboratory man from that date to the date of his resignation (January 6, 1961); and (3) the reduction in force was not "economic management changes."⁹

2. Respondent's employment policies and practices

Eugene Strul, Respondent's news director since 1957, testified that it has always been his objective to staff the news department with photographer-reporters who had a degree, or its equivalent, in journalism. The job of the photographer-reporter entails the shooting of the film of a newsworthy event and reporting the story of the event. Respondent had some problems arising because a well-qualified photographer did not have the ability to report the story—discriminatee Marlin was cited as an example. This testimony was corroborated by Zeke Segal, a witness called on behalf of the General Counsel. Segal had been Respondent's new assignment editor from 1958 until October 1960. He was the immediate supervisor of the photographer-reporters.

There is nothing in the record which proves that Respondent had any established employment policies and practices, with relationship to the news department, which

⁸ American Research Bureau Rating

⁹ General Counsel's contention that the Board's remedy was modified by the court only if Respondent had made permanent changes after the hearing on the merits is disposed of, *supra*.

it customarily followed. Specifically, there is nothing in the record which proves that a discriminatee, at the time of layoff, had a "right" to displace another person in the same job, or in some other job, or had a "right" to priority in filling vacancies or new positions occurring subsequently in such job or some other job or had any other such priorities, or that a demoted employee had a "right" to continue to receive the rate of pay he had received in an abolished job.

The General Counsel raised an issue concerning seniority rights. The only relevant evidence is that in a reduction in force in the news department, made in June 1957, two employees were discharged without regard to seniority. I find that the discriminatees had no "rights" by reason of seniority.

The issue as to whether the discriminatees had a priority "right" in filling vacancies or new positions is moot. The only vacancy for a photographer-reporter occurring after August 12, 1958, was occasioned by the promotion of Lobo in November 1960. In anticipation of the vacancy Respondent offered it to Marlin and Lipari in October; both rejected it.¹⁰ There is no evidence of creation of new positions.

In his brief the General Counsel says:

If one thing is clear from the record, it is that Respondent evidently can expand or contract its work force at will, depending apparently on the quality of the service it decides to offer the public, or the whims of News Director Strul.

I so find.¹¹

There being no established employment policies and practices which vested job retention "rights" in any of the employees in the news department, there remains the question as to whether the criteria—ability in the light of Respondent's requirements—was adhered to by Respondent in selecting the employees to be discharged and demoted in effectuating the August 12, 1958, reduction in force.

3. With respect to each discriminatee the right, if any, to reinstatement and back wages

Filer: Zeke Segal, Respondent's news assignment editor and immediate supervisor of the photographer-reporters who was called as a witness on behalf of the General Counsel, testified that Filer was incompetent. I find he was selected for discharge on the basis of comparative ability.

Lipari: Segal testified that Lipari was a laboratory technician not qualified as a photographer-reporter and upon reduction of the staff was properly selected for discharge because of his limited ability. The laboratory work, after Lipari's discharge was performed by the demoted Weand who was also a qualified photographer-reporter. I find that Lipari was selected for discharge on the basis of comparative ability.

Marlin: Segal testified that: (1) in his opinion Marlin was "a cracker-jack cameraman" and should have been retained; (2) Strul, Respondent's news director and Segal's superior, had aimed since 1958 to staff the photographer-reporter jobs with persons having the equivalent of a college degree in journalism; (3) Lobo had the equivalent of a college degree in journalism and was a better reporter than Marlin; (4) he did not have the right to hire or fire; and (5) he had not been consulted by Strul about the selections for discharge but he and Strul often discussed the respective abilities of the photographer-reporters.

Strul's uncontradicted testimony is that Segal "complained on a number of occasions about his [Marlin's] inability to bring in the facts and information with the story that he filmed."

Since the ultimate decision as to ability and selection for discharge was vested in Strul; and, it having been proven that Lobo was possessed of the qualifications which Strul sought, I find that Marlin was discharged rather than Lobo on the basis of comparative ability.

There is no contention by the General Counsel that discriminatees Filer, Lipari, or

¹⁰ Filer had died on June 6, 1960

¹¹ The General Counsel argues that Respondent should have placed, at least, one of the discriminatees in Lobo's job while he was in military service. That it did not replace Lobo during the period of his military service was, I find, the exercise of a prerogative of management not in derogation of any "right" of the discriminatees.

Strul, Respondent's news director, testified that he "felt that it was wise to have three men overall, it was not impossible to operate with just two, and we gave it a whirl and we found that it worked."

The court held that the discrimination did not require Respondent to provide jobs for the discriminatees 289 F. 2d at 340.

Marlin should have replaced Ben Silver or Weand, the other two photographer-reporters retained after the August 12, 1958, reduction in force.

Weand: Segal testified that: (1) up to August 12, 1958, Weand carried the title of chief photographer and after that date he became a combination laboratory man and photographer-reporter; (2) as chief photographer the duties of Weand were to oversee the technical side of the film work done by other photographer-reporters plus "filming shots himself"; (3) after August 12, 1958, to the date of his resignation, Weand's "duties were strictly in the lab to take care of the laboratory and to go out and film stories"; (4) there was no job of chief photographer after August 12, 1958; and (5) it would have been "ridiculous" to have a chief photographer after August 12, 1958, since "I had two reporter-photographers including Weand and I think it was just Weand and Silver while Lobo was in service." I find this uncontroverted testimony of a witness called on behalf of the General Counsel convincing that due to the reduction in force, made on August 12, 1958, Respondent had no need for and abolished the job of chief photographer and demoted Weand to a job as described in Segal's testimony, *supra*. Also, no evidence having been adduced to the contrary, I find that Weand had no "right" to continue to receive the pay of chief photographer after August 12, 1958.

Applying the law of the case, set forth in the court's opinion, I find: (1) Filer from the date of his discharge to the date of his death had no "right" to reinstatement and consequently is due no backpay; (2) Lipari and Marlin from the date of their discharge to the date each was offered reinstatement had no "right" to reinstatement and consequently neither is due backpay; and (3) Weand had no "right" to the wages of chief photographer after that job was abolished and is due no backpay.

4 The "economic management change"

In his brief the General Counsel appears to argue that the August 12, 1958, reduction in force was not an economic change. He compares labor costs for the photographer-reporters and the costs for "stringer" films before and after August 12, 1958. If by "economic management changes" is meant a reduction in labor costs, I find the record does not support the General Counsel's contention. The record shows that Respondent substantially reduced its labor costs for photographer-reporters after August 12, 1958. The General Counsel implies that this was accomplished by "the total expenditures for stringer story purchases increased from \$690 in 1958 to \$750 in 1961, with an intermediate high of \$930 in 1960 . . . also that the average daily expenditure has increased from \$1.89 in 1958 to \$2.90 in 1961."

The amount of Respondent's total biweekly payroll (the total biweekly amounts include base pay, overtime, and time worked on documentary films) for each payroll period from January 4, 1958, to August 2, 1958, shows a mean of approximately \$1,000; and, after August 30, 1958, to the end of the year a mean of less than \$500. After 1958 through the payroll period immediately preceding the hearing on remand the mean has been about \$700. In the light of this reduction in labor costs the increase in the costs of purchase of stringer stories from \$690 to \$750 per year, an increase of \$60 a year, plus about \$1 per day increase in expenditures for such stories, does not prove that the reduction in force was not an economic change; nor, does it show justification for the need of one or more additional photographer-reporters on Respondent's staff after August 12, 1958.¹²

RECOMMENDATIONS

Under the law of the case as specified in the court's opinion (289 F. 2d 338) it is recommended that the Board issue its Order that: (1) Filer had no "right" to reinstatement in the period from the date of his discriminatory discharge (August 12, 1958) to the date of his death and is due no backpay; (2) Marlin had no "right" to reinstatement in the period from the date of his discriminatory discharge (August 12, 1958) to the date he rejected Respondent's offer of reinstatement (October 17, 1960) and is due no backpay; (3) Lipari had no "right" to reinstatement in the period from the date of his discriminatory discharge (August 12, 1958) to the date he rejected Respondent's offer of reinstatement (October 20, 1960) and is due no backpay; (4) Weand from the date of his discriminatory demotion (August 12, 1958) to the date he resigned (January 6, 1961) had no "right" to the difference in pay from that he received and what he would have received had he continued in the job of chief photographer and is due no backpay; (5) Filer's entitlements under the Board's

¹² While the record does not divulge the exact basic weekly salary of a photographer-reporter, it appears to be about \$90 per week.

Order terminated as of the date of his death (June 6, 1960); (6) the entitlements of Marlin and Lipari, under the Board's Order terminated on the date each rejected Respondent's offer of reinstatement (October 17 and 20, 1960, respectively); and (7) Weand's entitlements under the Board's Order terminated as of the date of his resignation (January 6, 1961). Further, that the Order recommended herein, if affirmed by the Board, or, such Order as the Board may determine to issue after consideration of exceptions, if any, to this Supplemental Intermediate Report, be filed with the United States Court of Appeals for the Fifth Circuit and copies be served upon the parties to this proceeding. Further, if any party is aggrieved by the Board's Order which issues pursuant to these proceedings it shall initiate appropriate action in the United States Court of Appeals for the Fifth Circuit within 20 days after the filing of the Board's Order in that court.

Local 1070 of the United Brotherhood of Carpenters and Joiners of America (B. W. Horn Company) and Ray Marruffo. Case No. 21-CB-1619. May 31, 1962

DECISION AND ORDER

On March 6, 1961, Trial Examiner Wallace E. Royster 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.¹

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The Board has considered the Intermediate Report and the entire record in this case, including the exceptions and brief, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.²

ORDER

The Board adopts the Recommended Order of the Trial Examiner as its Order with the following changes:

1. Paragraph 2(d) of the Recommended Order shall be modified to read: Notify the Regional Director for the Twenty-first Region, in writing, within 10 days from the date of this Order of the steps the Respondent has taken to comply herewith.

¹ The Respondent's motion to reopen the record to introduce additional evidence is denied. Respondent seeks to establish that the Employer, by a memorandum agreement in 1956, adopted the terms of the Southern California General Contractors agreement dated May 1, 1954. From the Respondent's own testimony it is clear that the 1954 agreement (not in evidence) has been superseded by the 1959 General Contractors agreement which is in evidence. Further, even if we assume that the Employer is bound by the 1959 agreement, the agreement contains nothing that would justify or excuse Respondent's conduct herein.

² In addition to *Insulation Contractors of Southern California, Inc., et al*, 110 NLRB 638, which the Trial Examiner cited, we also rely on *Brunswick Corporation (Local Union 65, United Brotherhood of Carpenters and Joiners of America, AFL-CIO)*, 135 NLRB 574, and *Falstaff Brewing Corporation (Brewers and Maltsters Local Union No. 6, etc.)*, 128 NLRB 294, enfd. 301 F. 2d 216 (C.A. 8)