

*Council of Santa Barbara County, AFL-CIO, et al. (Sullivan Electric Company),*³ we said:

. . . Thus, by attributing a bargaining objective to the Respondents' picketing and by resorting to a strictly literal construction of the statute, it is arguable that the picketing falls within Section 8(b)(7)'s prohibition against picketing to force an employer "to recognize or bargain with a labor organization as the representative of his employees." Nevertheless, after analyzing the overall Congressional purpose behind the enactment of this section,¹ we are convinced that the words "recognize or bargain" were not intended to be read as encompassing two separate and unrelated terms. Rather, *we believe they were intended to proscribe picketing having as its target forcing or requiring an employer's initial acceptance of the union as the bargaining representative of his employees.* [Emphasis supplied]. When viewed in this posture, it is clear that Sullivan had recognized and extended bargaining rights to the Respondents long before the disputed picketing commenced here and that such picketing therefore was not designed to attain those statutory objectives. . . .

¹ *International Hod Carriers, etc., Local 840, AFL-CIO (Charles A. Blunne, d/b/a C. A. Blunne Construction Company)*, 135 NLRB 1153.

We are requested by the General Counsel to conclude that the Respondents' strike—admitted by all parties to be economic—became unlawful under Section 8(b)(7)(C) after the Company's replacement of its striking employees because the Unions thereafter failed to file a valid petition for an election in accordance with Section 9(c). We cannot agree, and do not find, that the former section was intended by Congress to encompass such a situation. Accordingly, we find that the Respondents have not violated Section 8(b)(7)(C) of the Act and shall order that the complaint be dismissed in its entirety.

[The Board dismissed the complaint.]

³ 146 NLRB 1086.

Marshall Maintenance Corp. and Local 731, United Automobile, Aircraft, and Agricultural Implement Workers of America, AFL-CIO. *Case No. 22-CA-1113. November 16, 1964*

SUPPLEMENTAL DECISION AND ORDER

On December 19, 1963, the Board issued a Decision and Order¹ in the above-entitled proceeding, finding the Respondent had dis-

¹ 145 NLRB 538.

149 NLRB No. 72.

charged John J. Welch and Paul Brown in violation of Section 8(a)(3) and 8(a)(1) of the Act and ordering Respondent to reinstate them and to make them whole for any loss of pay they may have suffered as the result of the discrimination practiced against them.

On January 13, 1964, the Respondent filed a motion seeking, *inter alia*, to reopen the proceeding in order to submit certain newly discovered evidence which it claimed bore on the suitability of Welch and Brown for reinstatement and backpay. By Order dated April 14, 1964, the Board granted Respondent's motion to reopen the record.²

Thereafter, a supplemental hearing was held before Trial Examiner Joseph I. Nachman. On August 3, 1964, the Trial Examiner issued an attached Supplemental Decision, in which he made findings on the basis of the evidence submitted at the supplemental hearing. The Trial Examiner concluded that Welch and Brown had not engaged in any conduct "which would warrant relieving Respondent of the duty to reinstate them with backpay." The Trial Examiner accordingly recommended that the Board reaffirm its remedial Order of December 19, 1963, with one exception. Respondent has filed exceptions to the Supplemental Decision with 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 [Chairman McCulloch and Members Fanning and Brown].

The Board has reviewed the rulings of the Trial Examiner made at the supplemental hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Supplemental Decision, the exceptions and brief, and the entire record of the reopened hearing, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.³

ORDER

IT IS ORDERED that the Board's Order of December 19, 1963, in this case be, and it hereby is, affirmed with the following modifications:

1. Amend paragraph 2(a) to read as follows:

"(a) Offer to John J. Welch and Paul Brown, and each of them, immediate, full, and unconditional reinstatement to their former or substantially equivalent positions, without prejudice to their seniority

² Other requests contained in Respondent's motion were denied in the instant Order and in an Order issued on the same date in Case No. 22-RC-1438.

³ In its Order of December 19, 1963, the Board directed Respondent to reinstate Welch and Brown with backpay but allowed it to condition its offer of reinstatement to each upon his divesting himself of certain interests in the operation and ownership of an enterprise which was in direct competition with Respondent. As that enterprise has since gone out of business and been dissolved, the Trial Examiner recommended that the Board remove these conditions from its reinstatement order. We adopt this recommendation.

or other rights and privileges, and make each of them whole in the manner set forth in the Remedy Section of the Intermediate Report of Trial Examiner Mullin herein, dated July 24, 1962, with interest on the backpay due at the rate of 6 percent per annum.”

2. Add the following as paragraph 2(e) :

“(e) Notify Brown and Welch, and each of them, if presently serving in the Armed Forces of the United States, of their right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act of 1948, as amended, after discharge from the Armed Forces.”

3. Amend the final paragraph of the Appendix attached to the Intermediate Report of Trial Examiner Mullin to conform with paragraph 2(a) of the Order, as amended above.

TRIAL EXAMINER'S SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

After due notice to all parties, the instant matter was heard by Trial Examiner Joseph I. Nachman at Trenton, New Jersey, on May 27, 1964, pursuant to an order of remand issued by the Board on April 14, 1964. Full opportunity was afforded the parties to adduce evidence, to examine and cross-examine witnesses, and to argue orally on the record. Oral argument was waived. Briefs on behalf of the General Counsel and Respondent have been received and duly considered.

Upon the entire record in the case, including my observation of the witnesses, I make the following:

FINDINGS OF FACT

Background

On December 19, 1963, the Board issued its Decision and Order in this matter, adjudicating, *inter alia*, the Marshall Maintenance Corp., herein called Respondent or Company, had discriminatorily discharged John J. Welch and Paul Brown (145 NLRB 538).¹ To remedy this violation, the Board, in accord with its usual practice, directed Respondent to reinstate Welch and Brown with backpay, but gave Respondent the privilege, if it so desired, to condition the offers or reinstatement upon Welch and Brown divesting themselves “of all interest in the operation of, and any substantial interest in the ownership of,” Cooperative Maintenance, Inc., herein called Cooperative, a competing enterprise in which they were engaged.²

On January 13, 1964, Respondent filed with the Board a motion for, *inter alia*, “clarification, reconsideration, and modification” of the Order of December 19 and for “reopening for the proceedings to submit newly discovered evidence.” Basically the contentions advanced in this motion were (1) that the reinstatement of Welch and Brown should be conditioned upon their divesting themselves of *all*

¹ The Board also determined that ballots, cast under challenge, by Welch and Brown, in a representation proceeding involving Respondent (Case No. 22-RC-1438), were properly counted, and by order entered on the same day in the representation proceeding, reissued the certification theretofore issued but subsequently vacated pending consideration by the Board of the exceptions filed by Respondent in Case No. 22-CA-1113.

² This provision was incorporated in the Order because the Board found “persuasive” Respondent’s argument that if it should be required to reinstate Welch and Brown, “proper safeguards should be made that these employees divest themselves of all interest and affiliations” with any enterprise “engaged in the same or similar type of business” as that of Respondent. In this connection the Board found that shortly after their discharge, Welch and Brown, together with one Gulden, formed a corporation to engage in the same type of work as Respondent, and stated:

. . . If Brown and Welch are still engaged in this enterprise, it means they are in direct competition with their former employer. It would manifestly be improper to require Respondent to employ anyone whose loyalty and efforts as an employee might be affected by his own self interest as an entrepreneur and business competitor.

financial interest in the competing enterprise, and (2) that the record be reopened to receive evidence allegedly indicating that by misrepresentations made to the New Jersey Unemployment Compensation Board, Welch and Brown had each received \$800 in benefits during 1962, to which they were not lawfully entitled. This latter fact, Respondent urged, rendered Welch and Brown unsuitable for reinstatement to any position with it, as the nature of its business left it entirely dependent upon the honesty of its employees. As to (1), the Board stated that it "was not persuaded" by Respondent's argument, and "reaffirmed its belief," expressed in its Decision of December 19, 1963, that:

. . . the loyalty of Welch and Brown to the Respondent and their efforts on its behalf, can reasonably be insured if they divest themselves of all interest in the operation of any competing enterprise even though they also continue to own a less than substantial interest in such enterprise.³

As to (2), the Board granted Respondent's motion to reopen the record and directed a hearing:

. . . for the limited purpose of receiving further evidence bearing on the suitability for reinstatement of John J. Welch and Paul Brown, and their right to backpay and the date on which the right of each to reinstatement and backpay may have ceased.⁴

Facts Developed at Current Hearing

A. *The competitive business*

Respondent is engaged in moving, installing, repairing, and servicing industrial machinery. Welch and Brown were employed by Respondent for some years as mechanics. Their discharge, which the Board found discriminatorily motivated, occurred on November 24, 1961. Early in December 1961, Welch and Brown, together with one Gulden,⁵ formed Cooperative (which was chartered on or about December 5, 1961), to engage in the same type of work as that performed by Marshall. Advertising material was distributed, and various firms, including former customers of Marshall, were solicited for business. Several jobs were performed on a bid basis, all apparently prior to May 31, 1962.⁶ A financial statement for the period January 1 to May 31, 1962, shows gross income for Cooperative of \$2,807.55. Cost of materials and operating expenses reduced the gross income to an operating profit of \$1,202.58. No part of this operating profit was paid to any of the owners of Cooperative, either in the form of wages, salaries, or dividends. For the calendar year 1962, however, Cooperative had a loss of \$70.11, again without any moneys being paid by the latter to or for the benefit of any of the three stockholders. It is denied that Cooperative ceased operating toward the end of 1962, and on November 22, 1963, Welch, Brown, and Gulden executed, pursuant to the statutes of the State of New Jersey, an instrument dissolving Cooperative by consent of all stockholders. In the dissolution of the Corporation there was returned to Brown a truck which he had contributed and used for the benefit of the corporation, and he was given certain money to pay for gasoline and repair bills incurred in the use of the truck; Welch got the tools which the corporation had accumulated; and Gulden received the remainder of the cash on hand, amounting to about \$300. With this, all affairs of Cooperative were wound up and concluded.

It is not controverted that the nature of Marshall's business is such that its employees perform their duties at the premises of Marshall's customers; for the most part they work without supervision; make their own time reports which consti-

³ Whether their ownership in the competing enterprise was substantial or not, the Board held, could be determined when Respondent had offered reinstatement.

⁴ The order of remand also directs that upon conclusion of the hearing the Trial Examiner conducting the same shall prepare and serve upon the parties a supplemental decision containing findings of fact, conclusions of law, and recommendations.

⁵ Gulden had also been employed by Respondent in a supervisory capacity, and was discharged along with Welch and Brown. Gulden's discharge was not involved in the prior proceedings.

⁶ One job performed in February 1962 for Hoeganaes Spong Iron Corporation, for which Cooperative was paid \$2,123.55, appears to have been its major source of income.

tute the basis for billing the customer for services rendered, which reports are accepted and relied upon by Marshall; they have access to the customer's premises at times when the plant is not in operation and security and protective measures are frequently relaxed to permit Marshall's employees to perform their duties during nonworking hours of the customer's plant. In short, Marshall must necessarily rely on the honesty and integrity of its employees for the faithful and proper performance of their duties and the maintenance of customer satisfaction.

B. The collection of unemployment compensation

On November 27, 1961, following their discharge the preceding November 24, Brown and Welch applied to the Division of Employment Security of the State of New Jersey, herein called Division, for unemployment compensation. For the weeks ending December 3, 1961, through April 29, 1962, both inclusive, Brown and Welch each received unemployment benefits.⁷

On October 26, 1962, the Division notified Brown and Welch that they were not qualified to receive the unemployment compensation benefits paid them as set forth, above, and that they each had to refund the entire amount they had received. The stated reason for this determination was "You were not unemployed during the time you collected benefits as you were Treasurer of Cooperative Maintenance Co. for whom you performed service for remuneration." In accordance with established procedure the foregoing determination came on for review before the Appeal Tribunal. Brown and Welch testified before that body, and on January 25, 1963, the latter issued its decision affirming the prior determination. The matter was then reviewed by the Board of Review, which issued its decision June 14, 1963. The Board of Review, after considering the activity of the claimants in connection with the affairs of Cooperative Maintenance, concluded that during the 6-week period from November 27, 1961, through January 7, 1962, when Cooperative was in its formative stage, there were no earnings, that Brown and Welch performed no services for it, that they were unemployed and available for work, and hence were entitled to the benefits they had received for that period. However, for the remaining 16 weeks for which they had received unemployment benefits, the Board of Review concluded that Brown and Welch had performed some maintenance work for Cooperative that resulted in a profit in which they were entitled to share, and that they were not, therefore, during the 16-week period, unemployed individuals available for work. The Board of Review, accordingly, modified the decision of the Appeal Tribunal and directed that Brown and Welch each refund the benefits received for the 16-week period.⁸ It is to be noted that the Board of Review made no finding that in collecting the unemployment benefits, Brown or Welch had made any material misrepresentation, or had withheld any pertinent information from the Division.

C. Voting at the Board Election

Respondent's final contention, raised at the hearing but not included in its Motion to the Board, is that on January 25, 1962, when the Board election was held, Brown and Welch were actively engaged in business in direct competition with Marshall, and that by presenting themselves as voters, they evidenced such lack of character as to rendered them unsuitable for reinstatement. The record in this case and in the companion representation case,⁹ of which I take official notice, shows that at the January 25 election, Brown and Welch voted challenged ballots; that a hearing on these challenges was consolidated with the hearing of the unfair labor practice case; that the Board, approving the recommendations of Trial Examiner Mullin, ruled that Brown and Welch were eligible voters whose ballots should be counted; and on the basis of the tally of ballots revised after counting the votes of

⁷ This was a period of 22 weeks at \$50 per week, a total of \$1,100, the maximum benefits under the laws of New Jersey.

⁸ The total amount to be refunded by each was \$800 (16 weeks at \$50 per week). However, payment of this was suspended by the Board of Review pending conclusion of the proceedings before the Board, when it will be determined whether Brown and Welch are entitled to reinstatement and/or backpay.

⁹ Case No 22-RC-1438

Brown and Welch, the Board certified the Union as the collective bargaining representative of Marshall's employees. See Board's Order of December 19, 1963, in Case No. 22-RC-1438.¹⁰

Analysis and Concluding Findings

I find and conclude, on the basis of the entire record, that Respondent has shown no adequate ground for denying reinstatement and backpay to Brown and Welch, and that it should be ordered to do so forthwith. The reasons for said conclusion, set forth separately with respect to each ground urged by Respondent, are as follows:

1. The competitive enterprise

Respondent argues that as the Board has found that Brown and Welch were discriminatorily discharged by Respondent, they continued, by virtue of Section 2(3) of the Act, to be "employees" of Respondent;¹¹ that inherent in the employment relationship is the obligation on the part of the employee to refrain from any conduct inimicable to the employer's business interests; and that Brown and Welch, having engaged in competition with Respondent, were guilty of such breach of their duty of loyalty to Respondent as to justify denial of reinstatement, the remedy normally granted by the Board. Although I am in accord with Respondent to the extent that it argues that Brown and Welch remained employees after discharge, and that normally there is inherent in the employment relationship the duty of loyalty on the part of the employee,¹² I find and conclude that on the facts of the instant case, Respondent should not be permitted to rely upon its own unlawful conduct to defeat reinstatement merely because the discharged employees sought—albeit not successfully—to earn a livelihood after they were discriminatorily discharged. Not only were they free to utilize the talents they possessed in the field of their greatest experience, but the law required them to do so in order to minimize, to the fullest extent possible, Respondent's backpay liability. Had Brown and Welch immediately upon their discriminatory discharge obtained employment with one of Respondent's competitors, and in pursuance of such employment solicited work for and otherwise sought to promote the business of their new employer, Respondent would not be here to contend that such conduct constituted disloyalty to it. The fact that Brown and Welch did for this for Cooperative, a firm in which they each had a financial interest, does not require a different result, since there is no evidence that they had reached a definite decision not to return to work for Respondent, even if reinstatement were offered. See *L. B. Hosiery Co., Incorporated*, 99 NLRB 630, 634.

No contention is made that while employed by Respondent, Brown and Welch failed to perform their duties in a proper manner, or were other than satisfactory employees. Indeed, it is plain that such contention could not be effectively urged. For as the Trial Examiner presiding at the earlier hearing, with Board approval, found:

Both Welch and Brown had excellent work records. Welch had been hired in 1958 at a starting rate of \$2.05. Thereafter he received approximately a dozen merit increases, the last on July 20, 1961. At the time of his discharge he was getting \$2.80 per hour. Brown had a similar record. He had been hired in 1959 at \$2.25, had received 6 merit increases, the last on July 27, 1961, and at the time of his termination was getting \$2.75 per hour. There was no evidence that either had ever been warned of impending dismissal.

¹⁰ The motion to reopen the record filed by Respondent on January 19, 1964, also urged cancellation of the certification issued to the Union, and the direction of a new election. In support of this request Respondent urged that since the election in January 1962, the Unit had greatly expanded, and that only a small number of those who voted in the election were now in Respondent's employ. The Board denied this portion of the motion as "presenting nothing not previously considered," but provided that such denial was without prejudice to Respondent's right to renew the motion upon the issuance of a final order in Case No. 22-CA-1113 following this Supplemental Decision pursuant to the Board's remand. See Order of April 14, 1964, in Case No. 22-RC-1438.

¹¹ The section referred to defines the term "employee" and provides that it shall include "any individual whose work has ceased . . . because of any unfair labor practice . . ."

¹² See, i.e., *N L.R.B. v. Local Union No. 1229, International Brotherhood of Electrical Workers*, 346 U.S. 464, affg. 94 NLRB 1507 (*Jefferson Standard Broadcasting Company*).

No supervisor offered any criticism of their work. Although Marshall testified that for some time their work had been "deteriorating" as he described it, he conceded that he had never admonished them for any inadequacies and the extreme generality of his criticism offered at the hearing demonstrated that it was an afterthought.

Accordingly, I find and conclude that by forming and promoting the business venture of Cooperative, in the manner and under the circumstances set forth above, neither Brown nor Welch engaged in conduct which "made [them] unemployable by Respondent" (*National Furniture Manufacturing Company, Inc.*, 134 NLRB 834, 835), so as to excuse Respondent from its duty to remedy its unlawful conduct by reinstating Brown and Welch to their former positions, with backpay as provided in the remedy provisions of the Board's Order of December 19, 1963.¹³

2. The unemployment compensation benefits

On this branch of the case Respondent contends, in effect, that an employee who accepts unemployment benefits to which he was in fact not entitled, thereby exhibits that lack of moral character which suffices to make him unemployable by Respondent. I am unable to concur in the applicability of so broad a rule. For the improper receipt of unemployment benefits to establish that lack of moral character justifying departure from the Board's usual order requiring reinstatement as the appropriate remedy for a discriminatory discharge, the evidence must, at a minimum, establish that such benefits were obtained by reason of a willful concealment, or an intentional misstatement of fact which, if disclosed, the employee knew or had reason to believe, would result in the denial of compensation. There is no evidence before me, nor did the New Jersey authorities find, that Brown or Welch had intentionally misstated or willfully concealed any fact. The only finding made in the final decision was that during the last 16 weeks of the 22-week compensation period, Brown and Welch, because they were officers of Cooperative and actively promoting the latter's business interests, were not "unemployed and available for work," and for that reason were not entitled to the compensation they had received for that period. Whether Brown and Welch were in fact employed and unavailable for work is not an issue in this proceeding, but on the facts here, I find and conclude, that it has not been established that in applying for and receiving the unemployment compensation, they did not demonstrate such deficiency of integrity and character as to make them unemployable by Respondent and justify the withholding of the usual reinstatement remedy. *Henry Verscharen, d/b/a Verscharen's Food Centers*, 110 NLRB 1475, 1478, footnote 4; *Overnight Transportation Company*, 133 NLRB 1488.¹⁴

3. Voting at Board election

In this connection Respondent contends that on January 25, 1962, when Brown and Welch presented themselves at the polls as eligible voters and sought to vote at the election being held under the auspices of the Board, Cooperative had been fully organized and Brown and Welch were actively promoting its business for their own self interest; under these circumstances, Respondent argues, for them to present themselves at the polls claiming the status of employees of Marshall was, by quote from Respondent's brief, "not only cold-blooded affrontery but indicates a total lack of comprehension, and is indicative of lack of moral character and of trustworthiness."

The issue whether Brown and Welch were entitled to vote at the election has been decided by the Board and is not before me on this remand. In view of that decision and the results I have reached on the other branches of the case, as above set forth, I find and conclude that voting at the Board election on January 25, 1962,

¹³ The question whether Brown and Welch, as a condition of their reinstatement, should divest themselves of "all interest in the operation of, and any substantial interest in the ownership of," Cooperative, is now moot. As above stated, Cooperative has long since ceased to function, and was formally dissolved and liquidated as of November 22, 1963.

¹⁴ In *Overnight Transportation, supra*, the Board directed reinstatement with backpay of a discriminatee who had pleaded guilty and was convicted of having "knowingly [made] a false statement to obtain [unemployment] benefits" to which he was not entitled. This conclusion was reached because the offense involved only 1 week when the employee unintentionally failed to report earnings of \$19 77.

does not indicate moral turpitude on the part of Brown or Welch, nor warrant departure from the Board's usual practice of requiring reinstatement with backpay for discriminatorily discharged employees.

CONCLUSION OF LAW

1. Neither Brown nor Welch has engaged in any conduct which would warrant relieving Respondent of the duty to reinstate them with backpay.

RECOMMENDED ORDER

Upon the foregoing findings of fact and conclusion of law, it is recommended that the Board reaffirm its order of December 19, 1963, in all respects, except that paragraph 2(a) thereof be amended to read as follows:

Offer to John J. Welch and Paul Brown, and each of them immediate, full and unconditional reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make each of them whole in the manner set forth in the Intermediate Report of Trial Examiner Mullin, with interest on the backpay due at the rate of 6 percent per annum.

**Robert Casebeer & Herman Foland, d/b/a Casebeer & Foland,
A Partnership and National Maritime Union of America,
AFL-CIO, Petitioner.** *Case No. 20-RC-5887. November 16, 1964*

DECISION ON REVIEW AND DIRECTION OF ELECTION

On May 25, 1964, the Regional Director for Region 20 issued a Decision and Order in the above-entitled proceeding in which he dismissed the petition on the ground that the captains of the whaling boats involved are independent contractors and the crewmen are their employees rather than employees of the Employer.¹ Thereafter, pursuant to Section 102.67 of the Board's Rules and Regulations, Series 8, as amended, the Petitioner filed with the Board a timely request for review of such Decision and Order asserting that the Regional Director's decision was clearly erroneous. A statement in opposition was filed by the Employer. On August 3, 1964, the Board, by telegraphic order, granted the request for review. Thereafter, the Employer filed a brief in support of the Regional Director's Decision and Order.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, the Board has delegated its powers in connection with this case to a three-member panel [Chairman McCulloch and members Brown and Jenkins].

The Board has considered the Petitioner's request for review, the Employer's opposition thereto and supporting brief, and the entire

¹In support of this the Regional Director relied upon *F. Alioto Co., d/b/a Frank Alioto Fish Co., et al.*, 129 NLRB 27, and certain earlier cases to the same effect.