

equivalent positions, without prejudice to their seniority or other rights or privileges, and make them whole for any loss of pay suffered by reason of the discrimination by payment to each of them of a sum of money equal to that which he or she would have earned as wages from the date of the discrimination to the date of the reinstatement, less his or her net earnings during such period in accordance with the formula prescribed in *F. W. Woolworth Company*, 90 NLRB 289, together with interest on such sum, such interest to be computed in accordance with the formula prescribed by the Board in *Isis Plumbing & Heating Co.*, 138 NLRB 716.

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

CONCLUSIONS OF LAW

1. *Ventre Packing Co., Inc.*, is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. *Truck Drivers & Helpers Local 317, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America* is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

3. By laying off and discharging George Monsour, Charles Hildreth, Frank Smith, and Maxine Buchanan and by discharging them and Georgianna Rosenberger, Elizabeth Smorol, Estella Black, and Shirley McGregor, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

4. By granting to its employees increases in wages on April 1, 1966, the Respondent engaged in an unfair labor practice within the meaning of Section 8(a)(1) of the Act.

5. The Respondent, since the dates of the layoffs and discharges described in section III, above, by failing and refusing and continuing to fail and refuse to reinstate said employees to their former or substantially equivalent position of employment, has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

[Recommended Order omitted from publication.]

American River Constructors and K.W. Sherrod. Case 20-CA-3795.

March 22, 1967

DECISION AND ORDER

BY CHAIRMAN McCULLOCH AND MEMBERS BROWN
AND ZAGORIA

On August 26, 1966, Trial Examiner James R. Webster issued his Decision in the above-entitled proceeding, finding that the Respondent had not engaged in unfair labor practices as alleged in the complaint, and recommending that the complaint be dismissed in its entirety, as set forth in the attached Trial Examiner's Decision. Thereafter, the General Counsel filed exceptions to the Trial Examiner's Decision and a supporting brief. The Respondent

filed an answering brief to the General Counsel's exceptions to the Trial Examiner's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and briefs, and the entire record in this case, and finds merit in the General Counsel's exceptions. Accordingly, the Board adopts the findings of the Trial Examiner only to the extent that they are consistent with the decision herein.

The complaint alleges that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to employ K.W. Sherrod on August 25, 1965, because he had engaged in union and other protected activities.

As described more fully in the Trial Examiner's Decision, Sherrod, in June 1964, was working as a driver at the Respondent's French Meadows jobsite. At all relevant times Respondent, through a chapter of Associated General Contractors, and Local 150, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, hereinafter referred to as the Union, were parties to a collective-bargaining agreement covering Respondent's employees in the area involved in this case. As a result of protests from a number of its drivers, Respondent on June 17 appointed Sherrod as working foreman. The drivers, however, felt that a nonworking foreman would be preferable and, at a union meeting on July 14, Union Steward McAdams proposed that employees refuse to work until a nonworking foreman was appointed. Sherrod then addressed the drivers, reminding them of the no-strike clause in the agreement and suggesting that there would be less "trouble" if they offered to quit if their demands were not met. The drivers accepted Sherrod's advice and they approached the Respondent's Superintendent Jiles. Acting as the drivers' spokesman, Sherrod explained to Jiles the nature of their complaint; he threatened that the drivers would quit unless they received orders only from their own foreman in the future. Jiles agreed that from then on only he or their foreman would give them orders, and the drivers returned to work.

On July 25, the Respondent demoted Sherrod from his position as working foreman and transferred him from French Meadows to Oxbow, a less desirable site. Sherrod continued to work for Respondent at various jobsites between July and December 22, at which time he was laid off because of lack of work. Early in January 1965, Respondent sent Sherrod a termination slip, indicating for the

first time that he was not "OK for rehire." On August 25, Sherrod was dispatched by the Union to the Respondent's Hell Hole worksite, in response to the Respondent's request for drivers, but he was refused employment by the Respondent.

The Trial Examiner initially found that Sherrod was refused reemployment, not because of his alleged poor safety record and his preference for employment at Hell Hole or French Meadows, but rather because of his activity relating to the driver grievance in July 1964. The Trial Examiner further found that in talking to employees about grievances and in pressing for their correction, Sherrod was engaged in protected activity; he concluded, however, that Sherrod was refused employment for the unprotected activity of encouraging and participating in employees' threat to quit in the face of a no-strike clause in the bargaining agreement. He therefore recommended that the complaint be dismissed.

We agree with the Trial Examiner that Sherrod was refused employment because of his activity in July 1964; we also agree with the Trial Examiner that Sherrod was engaged in protected concerted activity in discussing grievances with other employees; however, contrary to the Trial Examiner, we find that, even if Sherrod's participation in the threat to quit was unprotected, the Respondent's subsequent conduct constituted condonation of the unprotected aspect of Sherrod's otherwise protected activity.¹

A court of appeals has recently stated that the Board's doctrine of condonation "prohibits an employer from misleadingly agreeing to return its employees to work and then taking disciplinary action for something apparently forgiven."² It is apparent that Respondent was displeased with the manner in which Sherrod had participated in the employee activity in July 1964 designed to obtain a nonworking foreman; however, Respondent took steps to manifest its displeasure and to punish Sherrod. Thus, within 2 weeks, Respondent demoted Sherrod from his position as foreman and transferred him to a less desirable worksite, admittedly in part because he had "stirred up" the drivers.³ Thereafter, for a period of about 5 months, Respondent continued to employ Sherrod more or less continuously at three separate worksites; during this period, on two separate occasions, Sherrod was rehired by Respondent after having been laid off for economic reasons.⁴ By this affirmative conduct, Respondent made it amply clear that it had already punished Sherrod for his part in the July incidents and that, apart from such punishment, it was willing to forget and forgive. In view of the foregoing and the

record as a whole, we find that the Respondent is scarcely in a position to assert that its refusal to rehire Sherrod was based on the allegedly unprotected aspects of Sherrod's activity in July 1964; as we have already found that the Respondent refused to rehire Sherrod because of his July 1964 activity, which was otherwise protected, we find, contrary to the Trial Examiner, that by such conduct the Respondent violated Section 8(a)(3) and (1).

In view of the foregoing, and the record as a whole, we find that Respondent violated Section 8(a)(3) and (1) by refusing to rehire Kenneth W. Sherrod on August 25, 1965, because he had engaged in union and other protected activity.

The activities of the Respondent, as set forth in the Trial Examiner's Decision, as modified above, occurring in connection with the operation of the business of the Respondent, 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 thereof.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, American River Constructors, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in Teamsters Local 150, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization of its employees, by discriminatorily refusing to hire or rehire Kenneth W. Sherrod, or any of its employees, or in any other manner discriminating in regard to hire or tenure of employment or any 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 labor organizations, to join and assist labor organizations, 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 therefrom, as guaranteed in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the purposes of the Act:

(a) Offer to Kenneth W. Sherrod immediate and full reinstatement to his former or substantially equivalent position, without prejudice to his seniority and other rights and privileges.

¹ We therefore find it unnecessary to reach the question, decided by the Trial Examiner, whether a threat to quit in the face of a no-strike clause is unprotected activity.

² *Packers Hide Association, Inc. v. NLRB*, 360 F.2d 59 (C.A. 8).

³ On July 27, 1964, Sherrod filed a grievance over his demotion

and transfer; at the hearing, counsel for the Respondent admitted that Sherrod's demotion and transfer were in part due to the fact that he "kept the other Teamster employees stirred up."

⁴ On August 3, Sherrod was hired at Hell Hole after being laid off on July 29 at Oxbow, on December 8, he was rehired at Hell Hole after being laid off at the site on November 10.

(b) Notify Kenneth W. Sherrod if presently serving in the Armed Forces of the United States of his right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

(c) Make whole Kenneth W. Sherrod for any loss of pay he may have suffered by reason of the Respondent's discrimination against him by payment to him of a sum of money which he normally would have earned as wages from the date of the refusal to hire to the date of the Respondent's offer of reinstatement, less his net earnings during said period, in accordance with *F.W. Woolworth*, 90 NLRB 289, with interest thereon at the rate of 6 percent per annum, as set forth in *Isis Plumbing & Heating Co.*, 138 NLRB 716.

(d) Preserve and, upon request, make available to the Board and its agents, 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 under the terms of this Order.

(e) Post at all the Respondent's projects copies of the attached notice marked "Appendix."⁵ Copies of said notice, to be furnished by the Regional Director for Region 20, after being duly signed by the Respondent's representative, shall be posted by said Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to its employees are customarily posted. Reasonable steps shall be taken the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director for Region 20, in writing, within 10 days from the date of this Order, what steps have been taken to comply herewith.

⁵ In the event that this Order is enforced by a decree of a United States Court of Appeals, the words "a Decision and Order" shall be substituted for the words "a Decree of the United States Court of Appeals Enforcing an Order"

APPENDIX

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, as amended, we hereby notify our employees that:

WE WILL NOT discourage membership in Teamsters Local 150, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization of our employees, and WE WILL NOT discriminatorily refuse to hire or rehire Kenneth W. Sherrod, or any of our employees, or discriminate in any other manner

in regard to hire or tenure or employment or any term or condition of employment.

WE WILL NOT in any manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form labor organizations, to join or assist any labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of mutual aid or protection, as guaranteed in Section 7 of the Act.

WE WILL offer to K.W. Sherrod immediate and full reinstatement to his former or substantially equivalent position, without prejudice to his seniority and other rights and privileges previously enjoyed, and make him whole for any loss of pay suffered as a result of the discrimination against him.

All our employees are free to become or remain, or to refrain from becoming or remaining, members of any labor organization, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3) of the Act, as amended.

AMERICAN RIVER
CONSTRUCTORS
(Employer)

Dated _____ By _____ (Representative) _____ (Title)

Note: We will notify K.W. Sherrod if presently serving in the Armed Forces of the United States of his right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

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

If employees have any question concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 13050 Federal Building, 450 Golden Gate Avenue, Box 36047, San Francisco, California 94102, Telephone 556-0335.

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

JAMES R. WEBSTER, Trial Examiner: This case, with all parties represented, was heard before me in Sacramento, California, on April 19 and 20, 1966, on complaint of the General Counsel and answer of American River Constructors, herein called Respondent. The complaint was issued on December 23, 1965, upon a charge filed on September 28, 1965. It alleges that Respondent terminated the Charging Party, K.W. Sherrod, on August 25, 1965, because of his activities on behalf of Teamsters Local 150, International Brotherhood of

Teamsters, Chauffeurs, Warehousemen and Helpers of America, thereby violating Section 8(a)(1) and (3) of the National Labor Relations Act, herein called the Act.

The General Counsel and the Respondent have filed briefs herein and they have been carefully considered. Upon the entire record and my observation of the witnesses, I hereby make the following.

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

Respondent, a joint venture sponsored by Kaiser Engineers, a division of Kaiser Industries Corporation, is, and at all times material herein has been, engaged in the construction of a series of dams, powerhouses, and tunnels on the American River as part of a hydroelectric development for the Placer County, California, Water Agency. During the past year, in the course and conduct of its business operations, Respondent purchased and received goods and materials directly from outside the State of California valued in excess of \$50,000. Also, during the past year, Respondent has purchased and received goods and materials valued in excess of \$50,000 from suppliers located in California, who received said goods and materials directly from outside the State of California.

I find that Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Teamsters Local 150, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called the Union, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICE

A. *Issue and Prefatory Statement*

The principal issue in this case is whether or not Sherrod was placed in an ineligible-to-hire category and was refused employment on August 25, 1965, because of his role in encouraging employees to agree to, and to threaten, a strike in violation of a no-strike clause, or because he was a spokesman for employees in a grievance matter, and whether or not he was engaged in protected or unprotected activity.

The American River Project covers a distance of approximately 45 to 50 miles along the American River with a series of construction sites. The three worksites involved in this case are called Oxbow, Hell Hole, and French Meadows. Respondent's principal administrative offices are located at a place called Walker Ranch. At Hell Hole and French Meadows there is considerable overtime work for drivers whereas at Oxbow a workweek normally consists of approximately 40 hours.

Respondent adheres to a collective-bargaining agreement executed between the Union at a chapter of the Associated General Contractors covering the area involved. Pursuant to this agreement the Union is used for referral of drivers. The contract has a no-strike clause as follows:

It is mutually understood and agreed that during the period when this agreement is in force and effect,

the Union or Local Union will not authorize any strike, slow-down, or stoppage of work in any dispute, complaint or grievance arising under the terms and conditions of this Agreement, except such disputes, complaints, or grievances as arise out of the failure of any individual employer to comply with the provisions of the hiring clause, Sections 3(A) and 3 (B) hereof and except as otherwise expressly provided in this Agreement. . . .

Sherrod has worked for Respondent at the following jobsites and on the following dates prior to the alleged refusal to employ on August 25, 1965.

May 8-12, 1964, Oxbow (quit); May 21-July 25, 1964, French Meadows (transferred to Oxbow); July 29, 1964, Oxbow (1 day; reduction in force); Aug. 3-Sept. 5, 1964, Hell Hole; Sept. 6-Nov. 6, 1964, French Meadows; Nov. 6-10, 1964, Hell Hole (laid off; snowstorm); Dec. 8-22, 1964, Hell Hole (laid off; break in dam).

On July 25, 1964, Sherrod was demoted from a position as working foreman and transferred from French Meadows to Oxbow. The reasons assigned for this action were (1) a safety incident and (2) because he "stirred up the Teamster employees."

Sherrod's last termination, prior to August 25, 1965, was in a reduction in force following a break in one of the dams on December 21, 1964. In the early part of January 1965 a list of the employees laid off was reviewed by Bradley Johnson, a field manager of industrial relations for Respondent. He was assisted in this by Alfred Davis, safety engineer, and Larry Balliett, personnel representative. On this occasion the file of Sherrod was marked that he was ineligible for rehire. Johnson testified that he did this "because of the records in Mr. Sherrod's file of terminations, some quits, and because of his safety record." Also Sherrod was sent a termination slip dated January 5, 1965, and the Union a letter dated January 12, 1965, to the same effect.

In the last part of July or early August 1965, Sherrod went to Respondent's administrative offices at Walker Ranch and talked with Johnson. He told Johnson that he was near the top of the Union's area-preference out-of-work list and that he would soon be dispatched for work somewhere. He wanted to find out if he would be allowed to go to work at Hell Hole. Sherrod wanted employment at this jobsite because of the higher earnings from overtime. He did not want to pass up other job opportunities, however, and wait for referral to Hell Hole if he would not be accepted.

Bradley reviewed Sherrod's personnel folder and asked him why he had quit at Oxbow in May 1964. Sherrod replied that he had wanted to get work "up the hill" (French Meadows or Hell Hole) where he could work more hours. Johnson asked him if he would work at Oxbow, and Sherrod replied that he could not afford to work 40 hours a week there if he could work 70 or 80 hours a week "up the hill." Johnson told him he could not choose his jobsite, and stated that because of his past trouble with the Company, he could not come back to work on the project. At this meeting Sherrod also inquired about some additional backpay he stated was due him under an arbitrator's

award in connection with a grievance he had filed on his demotion and transfer to Oxbow on July 25, 1964.¹

On August 25, 1965, Sherrod was dispatched by the Union with two other drivers to Respondent's Hell Hole jobsite for employment. One of these three refused work there; Sherrod and the other referral were issued rehiring slips and told to sign into camp and get their meal tickets. Personnel Representative Balliett was present at this jobsite during this time and recognized Sherrod. He immediately informed the person in charge there that Sherrod was not for rehiring. When Sherrod returned from the camp for his work assignment, he was informed that he could not be employed and he was paid 2 hours' "showup time." He was also given a termination slip marked "not eligible for rehiring."

B. *Union Activities of Sherrod*

In June 1964, Sherrod was employed by Respondent at French Meadows on the "swing shift" as a belly-dump driver. There were approximately 15 to 20 drivers on this shift at that time and there was no foreman over the drivers. The union contract that Respondent followed provides that when there are seven or more drivers on a jobsite, one shall be designated as foreman or working foreman.

The drivers expressed among themselves and to Union Steward Bob McAdams some dissatisfaction over the fact that pit foremen, in charge of aggregate pits, were on occasions changing the orders of drivers or giving them new orders. On June 17, 1964, Sherrod called a meeting of the drivers, and McAdams and the drivers took the matter up with Day-Shift Driver Foreman Lester Johnson before commencing their work. Johnson called Superintendent O.J. Jiles on the two-way radio and reported that the drivers were not going to work until they got a foreman. Jiles then came to the area bringing Day-Shift Superintendent Raymond Martin with him. Martin or Jiles told the drivers that he did not have authority to designate a foreman, but that soon he would be able to do so. McAdams stated, "We are not going for any more of that. It is either tonight or no Teamsters." Jiles then offered the position of working foreman (who receives 12-1/2 cents per hour more than drivers) to McAdams, but McAdams replied that he could not take it as he was job steward. Jiles offered it to Sherrod who accepted the position. The drivers then went to work.²

On July 14, 1964, Union Steward McAdams called a meeting of drivers. Sherrod was asked to bring the drivers on his "spread." The meeting took place on the lunch hour, about 8:30 p.m. McAdams related that he had just had an argument with a pit foreman over contradictory orders given to drivers by different supervisors and stated that they needed a nonworking foreman. He stated that if they had a foreman on the same level of authority as the pit

foreman and other foremen, they would stand a better chance in the event of disagreement. He suggested that they refuse to work until a nonworking foreman was appointed.

Sherrod then took over the meeting. He told the men that this would be the wrong way to handle the matter; that they could not refuse to work; that to do so would be, in his opinion, a violation of the contract and would get them and the Union into trouble. He advised them that if they wanted to refuse to take orders from the various foremen, they could quit or offer to quit as a group, and in this way they would display power and unity. He, or someone, stated that he realized some of the drivers could not quit because of financial problems, and anyone fitting into this category was asked to step outside of the circle or group of men. None left the group.³

The group then went to Superintendent Jiles who was seated nearby in a station wagon. Sherrod acted as spokesman. He told Jiles that there had been several instances where different foremen had given contradictory orders to drivers and that the men were 100 percent in agreement that they would take orders only from him (Jiles) or from Sherrod in the future, and that if that was not agreeable with him, the men would offer to quit in a group. Jiles stated that he wanted to have a nonworking foreman on that shift but that Respondent's administrative office would not allow him to have one. He agreed, however, that the only persons the drivers would have to take orders from would be himself or working foreman Sherrod. The drivers then continued with their work.

C. *Sherrod's Safety Record*

There are two incidents mentioned by Respondent as reflecting on Sherrod's safety record. The first was an incident in which Sherrod, as working foreman, directed that one truck push another truck that was stuck. This occurred on July 23, 1964. There was no damage or injury on this occasion. Respondent contends that this was an error in judgment by Sherrod because of possible damage to a truck. On July 25, 1964, Sherrod was transferred from French Meadows to Oxbow because of this incident and because he "kept other Teamster employees stirred up." Sherrod filed a grievance on this matter resulting in a hearing before an arbitrator.

Respondent's attorney, Berner, stated in the arbitration proceedings that one of the reasons for Sherrod's transfer and demotion was that he "kept the other Teamster employees stirred up to the point where he was affecting production by having meetings on the side, having discussions with the men while they were supposed to be working." He elaborated on this in a letter to the Board dated October 20, 1965, in which he stated that Sherrod "took the position that the Teamsters should have a non-working foreman. And, when it appeared to Sherrod that

¹ Sherrod testified that Johnson told him that because of his past "union" trouble with the Company, he could not clear the office. Johnson denied this expression. From my appraisal of the witnesses and of their testimony, I find that Industrial Relations Manager Johnson did not use the word "union" when telling Sherrod he could not be employed. The "trouble" was, however, and as will be found herein, certain union activities of Sherrod.

² In the position of working foreman, Sherrod was not a supervisor within the meaning of the Act.

³ There is considerable testimony regarding the matter of this circle—as to whether or not a circle or mark was physically drawn on the ground. Sherrod and one other witness testified that it was.

One employee, Richard Henry, who later became a union representative, testified that he did not know of any circle and thought he would have recalled it if one had been drawn on the ground; but he did testify, however, that the men were asked to cross from one area to another or an imaginary line, if they were unable to leave the job because of their financial condition. I find it not material to determine whether or not a line was physically placed on the ground or whether it was a line or a circle. As a point on credibility it is not determinative. The witnesses generally agree that some means was employed to separate those who could not afford to quit their jobs.

the Company was moving too slowly in providing the group of Teamster drivers with a non-working foreman, he spearheaded a move whereby the Teamster drivers refused to take orders from the Pit Foreman on the job." Attorney Berner contended in his letter that this necessitated the presence of the job superintendent at periodic intervals during the shift to give orders to the drivers, and that when the job superintendent was not available, the drivers were idle on the job, thus creating a loss of production. However, there is no evidence of any loss of production. The first meeting of June 17 occurred before the drivers started to work. The second meeting of July 14 occurred during the lunch period.

The second safety incident was an accident involving a dumptruck driven by Sherrod and a private logging truck. This accident occurred in October 1964 and was investigated by Safety Engineer Davis. The accident was a minor one and no criticism was made nor disciplinary action taken at the time.

D. Other Factors Bearing on the Issue

As previously mentioned, Sherrod's file was reviewed following a reduction in force in December 1964 and was marked that he was ineligible for rehire. In January 1965 a meeting of supervisors was called by Respondent to discuss the resumption of operations and the recall of employees. The supervisors were told that no employees would be recalled by name unless they were cleared by Bradley Johnson or by the general superintendent. Following this meeting, Lester Johnson, the nonworking day-shift foreman over the drivers at Hell Hole, called Bradley Johnson on the telephone and advised him that he would need about 8 or 10 drivers.⁴ Later the same day Bradley Johnson called Lester Johnson on the telephone and asked him to prepare a list of troublemakers and send it to him, and told him, "Be sure Ken Sherrod is on the list." Lester Johnson then prepared his list which contained about eight or nine names, including Sherrod's, and dispatched it to Bradley Johnson.⁵

On September 28, 1965, Sherrod filed the charge in this case. Shortly thereafter Bradley Johnson had a conversation with Lester Johnson regarding Sherrod. (At this time Lester Johnson was employed by a truck broker having a subcontract with Respondent to haul concrete aggregate; he had been laid off from Respondent in March 1965.) Bradley Johnson stated that Sherrod had an unfair labor practice suit against Respondent, and he asked Lester Johnson "if there were any safety incidents that he was familiar with concerning Sherrod." At the time Bradley Johnson had discussed the case with a Board field examiner and was investigating Sherrod's work record.

E. Conclusions

Respondent contends that it objects to employment of Sherrod because of the two safety incidents, his effort to

get employment at Hell Hole or French Meadows rather than at Oxbow, and the incidents of his "stirring up" the drivers at French Meadows in the summer of 1964.

Based on statements of Respondent's attorney in the arbitration hearing and in his letter to the Board on October 20, 1965, the statements of Industrial Relations Manager Johnson to Foreman Johnson in January and in the fall of 1965, the nature of the safety incidents charged to Sherrod, the logic in senior employees seeking better paying jobs, and related testimony, I find that the safety incidents and Sherrod's preference for employment at Hell Hole or French Meadows were not actual or proximate causes of Respondent's action against Sherrod; these were merely added as points on the negative side in Respondent's evaluation of Sherrod as an employee. I find that the real reason Sherrod was placed in the ineligible-to-hire category and was refused employment on August 25, 1965, was his union activities in "stirring up" the drivers in June and July 1964. In doing so, was Sherrod engaged in "protected" union activities?

On June 17, 1964, Sherrod called a meeting of the drivers on the matter of a grievance that there was no working or nonworking foreman on their shift. He participated in the meeting, but Union Steward McAdams was the spokesman for the group. The grievance was presented to Respondent by the drivers with the threat that it was to be remedied that evening "or no drivers." On July 14, 1964, there was another meeting of drivers on a related working condition grievance. Union Steward McAdams advocated that they refused to work until the grievance was corrected. Sherrod took over the meeting; he recommended that they offer to quit or quit instead and that they do this as a group to display power and unity, and he acted as spokesman for the group.

In talking with employees about grievances and in pressing Respondent for corrections of grievances, Sherrod was engaged in protected union activities. In encouraging and participating in a threat to quit in a group, in face of a no-strike clause, Sherrod was engaged in unprotected union activities.⁶ The issue is, was Sherrod refused employment because of his "protected" union activities? I find that this is not the case. Sherrod was refused employment for his role in "stirring up" the drivers. The drivers were stirred up or encouraged to offer to quit in a group, and in fact to quit if their demands were not met. The drivers agreed to do so. It is true that similar action might have been taken irrespective of Sherrod. McAdams was encouraging a refusal to work until Sherrod took over the meeting. Sherrod was of the opinion that a threat by employees "to quit" if demands were not met would not constitute a violation of the contract. But a strike is a refusal in concert to work to enforce a demand for certain concessions and it is no less so by having other labels. A notice of an unconditional abandonment of employment, however, is in a different category and is not activity protected by Section 7 of the Act. But, I find that there was no intention by Sherrod or by the drivers

⁴ Lester Johnson, as nonworking foreman, discharged drivers, determined the number of drivers needed and hired them through Respondent's main office and the union hiring hall, and generally directed the drivers at the Hell Hole jobsite. I find that he was a supervisor within the meaning of the Act.

⁵ Bradley Johnson denied requesting the list of troublemakers or receiving such a list from Lester Johnson. He acknowledged that he had many telephone conversations with Lester Johnson,

and that it was very possible Lester Johnson requested drivers on the occasion mentioned. I credit Lester Johnson's testimony, it is consistent with other action of Respondent, and it is logical that management would want to know employees whom their supervisors would prefer not to be reemployed.

⁶ *Kraft Foods Co.*, 108 NLRB 1164; *Stockham Pipe Fittings Company*, 84 NLRB 629. For a similar case involving attempt to induce slowdown, see *General Electric Co.*, 155 NLRB 208.

unconditionally to abandon their employment with Respondent.⁷

It was Sherrod who called the first meeting, took over the second meeting, encouraged quitting in a group if the grievance were not corrected, and acted as spokesman for the group. He is the one against whom Respondent took the disciplinary action, complained of herein, of placing him in an ineligible-to-hire category; and this action does not become illegal because similar action may not have been taken against others in the group.⁸ Also I do not find, in the circumstances of this case, that because Sherrod was not terminated for this conduct and was again employed by Respondent from August 3 to December 22, 1964, that Respondent thereby condoned Sherrod's action in encouraging group quitting.⁹ On July 25, 1964, disciplinary action was taken against Sherrod because of the incidents of his "stirring up" the drivers and because of a safety incident occurring on July 23. A grievance was filed over this disciplinary action, a hearing was held on March 24, 1965, and the arbitrator's opinion and award is dated July 12, 1965.

Respondent's attorney, in the arbitration hearing and in his letter to the Board of October 20, 1965, complains that Sherrod had meetings and discussions with drivers and that spearheaded a move to get drivers to refuse to take orders from pit foremen. It could be contended that Sherrod's protected and unprotected activities were motivations for the discrimination against him and that his protected activities were "a part" of the reason for the discrimination. I am of the opinion that there is insufficient evidence to conclude that Sherrod was discriminated against because of his "protected" union activities and that his action in inciting employee agreement to and threat of strike action was merely a pretext. There is not extensive evidence on his other, or protected, activities. He testified that he had only about five discussions with other drivers on the grievance; there is no evidence that he incited the drivers to complain about being given orders from pit foremen. And, there is an absence of evidence of conduct violative of Section 8(a)(1) of the Act or of union animus by Respondent.

I find that Sherrod was placed in an ineligible-to-hire category and was refused employment because of unprotected union activities in encouraging and participating in a decision and threat of group quitting to enforce certain demands, in face of a no-strike clause, and that this action against him by Respondent is not violative of Section 8(a)(3) of the Act.¹⁰

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

⁷ See *Crescent Wharf and Warehouse Company*, 104 NLRB 860, for a discussion of the distinction between a notice of intent to resign because of certain conditions and a threat to resign if conditions were not met. The latter would normally be protected activity except in the face of a no-strike clause.

⁸ *California Cotton Cooperative, etc.*, 110 NLRB 1494; *Lenscraft Optical Corporation*, 128 NLRB 807

⁹ *Stockham Pipe Fittings Co.*, *supra*

¹⁰ *Alton Box Board Company*, 155 NLRB 1025. Also see *Metal Blast, Inc. v N L R.B.*, 324 F.2d 602 (C.A. 6), enfg. 139 NLRB 540. In this case the Board held that the discriminatee was discharged for his protected activities (insisting that layoffs be accomplished on basis of seniority) rather than because he allegedly incited a wildcat strike.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has not violated Section 8(a)(3) or (1) of the Act as alleged in the complaint.

RECOMMENDED ORDER

It is recommended that the complaint be dismissed.

International Association of Heat and Frost Insulators and Asbestos Workers, Local No. 8, AFL-CIO and Preformed Metal Products Company, Inc. Case 9-CC-378-2.

March 22, 1967

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZAGORIA

On November 17, 1966, Trial Examiner Sidney J. Barban issued his Decision in the above-entitled proceeding, finding that Respondent had engaged in and was engaging in certain unfair labor practices alleged in the complaint and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent filed exceptions to the Decision and a supporting brief. The Charging Party filed cross-exceptions and a brief in support thereof.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions, cross-exceptions and briefs, and the entire record in the case, and hereby adopts the findings,¹ conclusions, and recommendations of the Trial Examiner, as herein modified.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor

¹ The Trial Examiner found that there is no probative evidence that Baldwin's desire to use the Preformed jacketing in any way violated the bargaining agreement or infringed upon work regularly or traditionally performed by Baldwin's employees. Accordingly, he concluded that, as the work involved was not properly reserved to Baldwin's employees, there was no substance to the Union's defense that it was justified in forcing Baldwin to stop using a product manufactured by Preformed Metal Products. Therefore, we rely upon this ground alone in affirming the Trial Examiner's finding of a violation of Section 8(b)(4)(i) and (ii)(B) of the Act, and find it unnecessary to pass upon, and do not adopt, the Trial Examiner's further conclusion that Baldwin did not have control over whether the Preformed product should be used.