Lee A. Consaul Co., Inc.; F.H. Hogue Produce Co.; J.W. Olberg & Son; L.M. McLaren Produce, Inc.; Vurkusovich, Inc.; Admiral Packing Company; the Woods Company, Inc.; Ritz Distributing Company; Bruce Church, Inc.; Pete Pasquinelli; G&S Produce Company, Inc.; L.T. Malone Company; the Garin Company; Shippers Labor Committees of Imperial, San Joaquin Valley, Blythe and Yuma Valley, Unincorporated Associations Acting for and in behalf of their Members, and their various Member Companies *and* Gary L. Buckelew, Bruce Munroe *and* George Crowell, Jim J. Cash, Charles Ellis *and* Emmett W. Clagett *and* Keith R. Jones. Cases 28-CA-1320-1, 28-CA-1320-2, 28-CA-1321, 28-CA-1322, and 28-CA-1323

April 24, 1969

DECISION AND ORDER REMANDING FOR FURTHER HEARING

BY CHAIRMAN MCCULLOCH AND MEMBERS FANNING AND BROWN

Upon charges filed by the above-named individuals, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 28, issued a Third Amended Complaint dated May 5, 1967, against the Respondents, alleging that the Respondents had engaged in and were engaging in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the National Labor Relations Act, as amended. Copies of the charge and the Third Amended Complaint were duly served upon the Respondents.

The Third Amended Complaint alleged, in substance, that Respondents had discharged and refused to reinstate 192 named employees because they engaged in a strike and in union and concerted activities for their mutual aid and protection. The Respondents, in their answer, denied the commission of the alleged unfair labor practices and asserted various affirmative defenses.

On September 25, 1967, Respondents filed a Motion for Dismissal of Entire Complaint on the ground that the alleged discriminatees "engaged in an unauthorized minority strike in derogation of the Union's representative status, thereby engaging in an unprotected activity under the National Labor Relations Act, as amended." The Regional Director on September 28, 1967, referred the aforesaid Motion to a Trial Examiner pursuant to Section 102.25 of the Board's Rules and Regulations. The Associate Chief Trial Examiner issued an Order, on October 6, 1967, referring Respondent's motion "to the Trial Examiner who will conduct the hearing. . . ."

The parties stipulated before the Trial Examiner that the initial hearing would be limited to the issue of whether a strike against the Respondents which occurred in June 1965 was unprotected activity under Section 7 of the Act, and that the Trial Examiner could enter a preliminary decision ruling on that issue. All other issues in these cases were accordingly reserved, including the claim of Respondents that the employees involved are agricultural laborers exempt from the provisions of the Act. The parties also stipulated that the employees who worked for the Respondents in the 1965 melon season and participated in the strike or work stoppage were discharged or terminated because they took part in the strike or work stoppage.

In accordance with the stipulations of the parties, Trial Examiner Ramey Donovan, after a hearing on the issue raised by Respondents' motion to dismiss, issued his Decision on March 27, 1968, granting the motion and dismissing the Third Amended Complaint in its entirety. Thereafter, the General Counsel and the Charging Parties filed exceptions to the Decision and supporting briefs, and the Respondents filed a brief in support of the Decision.[1]

By Order dated July 19, 1968, the Board remanded the instant proceeding for the purpose of taking evidence with respect to Respondents' contention that the Board was without jurisdiction since the employees involved were exempt agricultural workers. Thereafter, Respondents Lee A. Consaul Co., Inc., and G&S Produce Company, Inc., stipulated that their employees were engaged in packing melons and other produce which were produced by other concerns, that they therefore are not exempt as agricultural workers, and that they are employees within the meaning of the Act. Pursuant to said stipulation, the parties joined in a motion requesting the Board to rule upon the issue initially considered by the Trial Examiner. The Board, having duly considered the matter, hereby grants that motion.

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 the case. For the reasons set forth below, the Board does not adopt the Trial Examiner's dismissal of the complaint in its entirety.

The instant proceeding involves a strike that occurred in the course of negotiations for a new collective-bargaining agreement. Over a period of

[1] Sec 102 27 of the Board's Rules and Regulations provides that any party may obtain review of a Trial Examiner's action in granting a motion to dismiss the complaint in its entirety However, the parties have acquiesced in proceeding by way of exceptions instead of a request for review

years there has existed a multiemployer bargaining unit, to which the 13 Respondents and other produce packers belonged, the employees being represented by "United Packinghouse, Food and Allied Workers and Its Local No. 78-B". Prior to the strike in question the most recent contract had been between the Union and the Shippers Labor Committee, representing 62 employers in the Imperial Valley, San Joaquin Valley, Blythe, all located in California, and Yuma Valley, Arizona.

This contract expired on March 15, 1965. In February 1965,[2] negotiations for a new contract began. No agreement had been reached by June, and the employees continued working without a contract. On June 10 the Union's negotiating committee submitted a comprehensive contract proposal, which it labelled a "final offer." The next day the Employer committee submitted its own version of a "final offer," which the Union committee told the Employer committee it would submit to the membership in accord with the Employers' request, but with a recommendation that it be rejected. The Union committee pointed out that because the membership was widely scattered, it could not submit the proposal to the entire membership before July 1. The negotiating meeting was adjourned without date for renewal.

The next day, June 12, the Union executive board met to discuss the status of negotiations. Executive Secretary Feller, a full-time official of the Union who was its chief spokesman on the negotiating committee, but was not a member of the executive board, reported on the latest events. The executive board unanimously agreed that the Employers' proposal should be submitted to the membership with a recommendation that it be rejected, but that negotiations be continued. The executive board proceeded to schedule a series of meetings of the various segments of the membership over the next 2 weeks. According to the credited testimony of Feller, he told the executive board in the course of his status report that there were a number of issues which, if unresolved, would be strike issues, but that if future negotiations failed to produce any satisfactory results, any strike to be considered should not be in the Yuma area, where a previous strike had failed. A member of the executive board testified that he had suggested that a strike might be in order.

The first of the scheduled membership meetings was held at 7:30 a.m. on June 16, for the employees classified as packers and lidders in the Yuma area. The meeting was called for 7 a.m. and although a quorum was present at that time, Merriman, the Union president, waited a half hour or until about 100 members were present before calling the meeting to order. Merriman gave the floor to Feller, who presented the factual background and expressed the view that the Employers' proposal would be rejected and negotiations continued, but that meanwhile there should be no work stoppage. Someone made a motion that the meeting be recessed for 1 hour in order to get more packers to participate in the proceedings. Merriman did not entertain the motion.[3] When Feller finished speaking, a motion was made to withdraw the Union's contract proposal to the Employers, to reject the Employers' offer, and to continue negotiations. The motion was carried, apparently without opposition, by about 125-150 members then present. It was then about 8:30 or 8:40 a.m., and Merriman adjourned the meeting without a motion.

At this time there were still latecomers arriving at the meeting, some of them asking what was going on, and, upon being informed, shouting for a "revote." These requests were ignored by Merriman, who left the hall with Feller, indicating to the latecomers that they should have been there at 7 a.m. After Merriman and Feller left, a group, which by this time numbered around 200, stayed on. At about 10 a.m. Union Vice-President Cook, who had been present when the meeting convened at 7:30 and had left afterward, returned and assumed the position of presiding officer at the request of some of those present. A motion was made to stay in session and not to return to work until negotiations were resumed and the Employers made a meaningful contract offer. The motion was carried, apparently without dissent, and the meeting continued in session on into the afternoon, or at least was in session in the afternoon when a delegation went to Feller at the Union office and asked him to come and speak to those assembled at the hall. Feller went, and told them that he did not recognize the meeting as an official union meeting. He said that the work stoppage was unauthorized and was interfering with negotiations, and urged the men to return to work. He relayed to them a message from the Employers that the strikers would be discharged if they were not back at work by 5 p.m. Feller also issued a mimeographed notice, in the name of the Union, urging members to resume work, stating that this was the "official position of the Union." Sometime the same day a steering committee formed by the strikers delegated Montgomery, a member of the Union negotiating committee, to request the Employers' Labor Committee to come and talk to the strikers. The Employers' representatives who were contacted refused on the ground that they could not negotiate with anyone except the union representatives.

Another meeting of the strikers was held the entire next day, June 17, at another hall they hired. Feller was again requested to speak to them, which he did, repeating much of what he had said the previous day, and adding that the Employers could

[2] All dates refer to 1965 unless otherwise indicated.

[3] The Union had arranged with the Employers that the reporting time for work be moved from 8 to 9 a.m. to allow the employees to attend the 7 a.m. meeting and arrive at their work stations, some distance away, without penalty.

not negotiate with anyone but the Union, that the Employers had thousands of college students in Arizona who could be used as "scabs," and that he believed the union people should wait until the season reached the California area before striking.[4] Feller also introduced Tauer, an international representative, who told the strikers that what they were doing was wrong (for which he was booed), and that the Union committee had plans for a strike when the time and place were right.

Negotiations resumed the same day (June 17) between the Union negotiating committee and the Employers' committee, resulting in a new and substantially higher contract offer by the Employers on June 19. The Union committee caucused and decided to submit the new offer to the membership without any recommendation. Meanwhile, the offer was reduced to writing, in the form of a "memorandum of understanding" to which was added a provision that no Employer would be required to reemploy its striking employees. This memorandum was signed by representatives of both parties, subject to ratification. The Union membership ratified the contract, its choice being limited to acceptance or rejection *in toto*, by a vote of 522 to 194. A contract was signed on June 22.

The Trial Examiner found that the Union's executive board, at the time of the strike, had reached a consensus that there would be a strike in the California section early in July if the Employers either refused to resume negotiations or, in resuming, refused to improve their contract offer. In reaching this consensus, the Trial Examiner reasoned, the executive board had implicitly decided not to strike at the time and place the actual strike took place; i.e., at Yuma, Arizona. He further found that since the executive board was responsible for establishing union policy, subject to the wishes of the full membership expressed at a meeting, and there having been no meeting of the full membership at which this policy could have been countermanded, the consensus and implied decision of the executive board were also that of the Union. The Trial Examiner thereupon concluded that a strike opposed to such a consensus is necessarily in derogation of the Union's status as exclusive bargaining representative, and, therefore, under the rule of *N.L.R.B.* v. *Draper Corporation*,[5] is unprotected activity. While not regarding it as essential to his conclusion, the Trial Examiner adverted in this connection to the strikers' attempt to communicate with the Employers' committee directly, which the Trial Examiner characterized as an attempt to bypass the Union leadership in negotiations.

One of the principal factors the Board has relied on in deciding whether an "unauthorized" strike is protected is whether its objective is in support of, or in opposition to, the objectives of the union.[6] At the same time, we have indicated that a strike might under some circumstances be unprotected, even when its objective is in support of union policies, if it is undertaken in the face of some *final action* taken by the Union as bargaining representative and has the purpose or effect of exerting pressure to modify that final action.[7] We have also held that express disapproval of the strike by the Union administrative officials does not in itself render the strike unprotected,[8] and that a strike does not lose its protected status because not called in the manner prescribed by union constitutions and bylaws.[9] It seems clear to us that concerted strike action by employees for the purpose of securing increased benefits may not lightly be characterized as "unprotected" activity, subjecting them to peremptory discharge. There is no reason why an employer should have carte blanche in discharging such employees for engaging in such conduct unless the walkout occurred in circumstances which indicate actual prejudice to the integrity of the collective-bargaining relationship.

In the present case, the strike was clearly in support of the Union's objectives, the executive board having recommended rejection of the Employers' last offer and the continuation of a demand for a better one. Indeed, within 5 days after the commencement of the walkout, the negotiations, which had continued over a 4-month period, were brought to a conclusion with the parties reaching agreement on the basis of a new and substantially higher offer by Respondents.

However, the Trial Examiner, in finding the strike unprotected, viewed the walkout as contravening a no-strike "consensus" that purportedly represented the official position of the Union. We disagree. As the Trial Examiner himself found, the executive board of the Union, subject to formal action of the membership, is the source of union policy. The only action of the executive board at times material to the strike was the approval of a recommendation that the membership reject Respondents' last offer and that negotiations continue. Executive secretary Feller, himself not a member of the executive board, was plainly opposed to a strike at Yuma and did convey his opinion to the executive board. However, Feller's position was not proposed in such fashion as to elicit a determination as to whether or not the executive board endorsed his views. Therefore, there is no evidence that the board adopted a position either for or against a strike. While the record shows that Feller and international representative

[4] Apparently a good number of the employees in the unit worked in Arizona first, then shifted to California later in the season Feller felt that a strike at this time would be ineffective because of the ease with which the Employers could replace strikers with college students

[5] 145 F 2d 199 (C.A 4, 1944)

[6] *Hoffman Beverage Company*, 163 NLRB No 134 (TXD)

[7] *Sunbeam Lighting Company, Inc*, 136 NLRB 1248, enforcement denied 318 F 2d 661 (C.A 7)

[8] *Hoffman Beverage Company, supra*, fn 6, *R C Can Company*, 140 NLRB 588, 596, enfd 328 F 2d 974 (C A 5)

[9] *M&M Bakeries, Inc*, 121 NLRB 1596, 1604, enfd 271 F 2d 602 (C A 1)

Tauer opposed and made efforts to curtail the walkout, their views, not having been adopted by the Union, merely stand as the independent opinions of union officials and are not to be regarded as the equivalent of formally declared union policy.[10] In the circumstances, we find that the evidence fails to disclose that the Union had arrived at any final position with respect to the strike issue. Therefore, the effort by the strikers to secure a favorable and prompt resolution of the contractual dispute was not shown to have had the purpose or effect of bringing pressure to bear upon the Union to alter any established course it had taken during collective-bargaining negotiations. Nor is a different result required by the abortive attempt of the strikers to have members of the Employers' Labor Committee address them. The evidence concerning this incident is too meager to warrant a finding that the purpose of the invitation was either to bypass, supplant or undermine the strikers' designated-bargaining representative. Accordingly, we find, on the basis of the record before us, that the strike constituted "concerted activities for the purpose of collective bargaining" expressly protected by Section 7 of the Act, and that Respondents violated Section 8(a)(3) and (1) by discharging employees for participation in said strike.[11]

In accordance with the stipulations of the parties, we find that the employees of Respondents Lee A. Consaul Co., Inc., and G&S Produce Company, Inc., are "employees" within the meaning of the Act. We shall order these cases to be remanded, pursuant to the stipulations, for litigation of all remaining issues.

ORDER REMANDING

It is hereby ordered that the record in this proceeding be, and it hereby is, reopened, and that a further hearing be held before Trial Examiner Ramey Donovan for the purpose of taking evidence and reporting his findings, conclusions, and recommendations on all of the issues in these cases not heretofore resolved.

IT IS FURTHER ORDERED that this proceeding be, and it hereby is, remanded to the Regional Director for Region 28 for the purpose of arranging such further hearing, and the said Regional Director be, and he hereby is, authorized to issue notice thereof.

IT IS FURTHER ORDERED that, upon the conclusion of such hearing, the Trial Examiner shall prepare and serve on the parties a Supplemental Decision containing findings of fact, conclusions of law, and recommendations to the Board, relating to the issues herein remanded and that, following service of such Supplemental Decision on the parties, the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

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[10] See, e.g., cases cited at footnote 8, *supra*

[11] The statutory remedies accruing to those participating in the strike were not waived by the provision in the June 22 contract that no Employer would be required to reemploy its striking employees See *Old Town Shoe Company*, 91 NLRB 240, 243, fn 11