

**Roylyn, Inc. Employer-Petitioner and International Association of Machinists, District 727, Local 758, AFL-CIO.** Case 31-RM-142

August 22, 1969

**DECISION AND DIRECTION TO OPEN AND COUNT CHALLENGED BALLOTS**

Pursuant to a stipulation for certification upon consent election, an election by secret ballot was conducted on August 9, 1968, under the direction and supervision of the Regional Director for Region 31, among the employees in the unit agreed upon by the parties. At the conclusion of the election, the parties were furnished with a tally of ballots which showed that of approximately 132 eligible voters, 117 cast ballots, of which 36 were for the Union, 53 were against, and 28 were challenged. The challenged ballots were sufficient in number to affect the results of the election. No objections were filed to conduct affecting the results of the election.

Pursuant to the provisions of the National Labor Relations Board Rules and Regulations, after reasonable notice to the parties and opportunity to present relevant evidence, the Regional Director conducted an investigation of the issues raised by the challenges and on November 6, 1968, issued and served upon the parties his Report on Challenged Ballots, attached hereto, recommending that the challenges to the ballots cast by Charles Weyhrauch, Otto Hager, Robert Knapp, Frank Van Wagner, and John Bozis be sustained, and further recommending that the challenges to the ballots cast by Imants Bozis, Thomas Byrd, James Brazier, Jarold Comer, Lynn Davis, Walter Dietrich, Emery Gant, Donald Heath, Frank Lewis, John Roberts, William Stuckenbroker, Jack Wiley, James Anderson, A. E. Berthold, Lawrence Clarke, Lawrence Henry, Garvin Keith, James MacIsaac, Frank Rodriguez, Stephen Scordato, Mitchell Truesdale, Ralph Wortelboer, and Faustina Asbury be overruled and that their ballots be opened and counted. Thereafter, the Employer filed timely exceptions to the Regional Director's recommendation regarding the challenges to ballots cast which were overruled, and to the challenge of the ballot of Charles Weyhrauch, which was sustained. No exceptions were filed by the Union.

Upon the entire record in this case, the Board finds:

1. The Employer-Petitioner is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

2. The Union is a labor organization claiming to represent certain employees of the Employer.

3. A question affecting commerce exists concerning the representation of the employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

4. The parties agreed, and we find, the following employees constitute a unit appropriate for the

purpose of collective bargaining within the meaning of the Act:

All production and maintenance employees, including shipping and receiving employees, janitors, truckdrivers, leadmen and working foremen; but excluding all office clerical employees and watchmen, and also excluding guards, supervisors, and professional employees, as defined in the Act.

5. The Board has considered the Regional Director's Report and the Employer's exceptions thereto, and as the exceptions raise no material or substantial issues of fact or law which would warrant reversal or require a hearing, we hereby adopt the Regional Director's findings and recommendations.

Our dissenting colleagues conclude that some of the strikers abandoned their jobs, apparently basing this upon their interpretation of employee rights or employer obligations under the contractual vacation clause. It is clear from that Article of the contract that employees could request vacations for periods other than the general vacation period which the employer customarily designated.<sup>1</sup> It cannot be determined from the face of the contract what rights were conferred by that provision upon the employees or what obligations devolved upon the company. We are not called upon and do not purport to determine that question.

The sole issue in this proceeding upon which our colleagues disagree is whether the action of certain employees herein, i.e., signing a quit slip in order to obtain vacation pay, is sufficient to show that economic strikers abandoned their interest in their struck jobs and lost the status of economic strikers for purposes of eligibility.<sup>2</sup> On the facts of this case it is patent that the strikers did not wish to abandon their employee status and did not sign the quit slips with that intent. Therefore, there could be no such abandonment regardless of other possible legal effects of their action.<sup>3</sup> Accordingly, we find that the Employer has not affirmatively shown by objective evidence that these strikers abandoned their interest in their struck jobs, and that the presumption that an economic striker remains in such status has not been rebutted.<sup>4</sup>

ARTICLE VII: VACATIONS

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4 Vacation periods shall conform to the requirements of the Company's operations and the Company reserves the right, in accordance with its past practice to designate a general vacation period for all employees, provided ninety (90) days notice thereof is given. It is further agreed that such general vacation period will fall between the dates of June 15th and September 15th. The company agrees, however, to give due consideration to requests made by employees for vacation during periods other than those herein set forth.

<sup>1</sup>*Pacific Tile and Porcelain Company*, 137 NLRB 1358, 1359.

<sup>2</sup>We do not, of course, question the validity of the statement that an employer need not finance a strike against itself. However, this is not relevant in the instant case, where the only issue is whether an abandonment occurred.

<sup>3</sup>*Cf. Guyan Machinery Company*, 155 NLRB 591, 593-594; *S & M Manufacturing Company*, 165 NLRB No. 59.

As we have adopted the Regional Director's recommendation that the challenges to the 23 above-designated ballots be overruled and these ballots may effect the results of the election, we shall direct that the Regional Director open and count these ballots and cause to be served on the parties a revised tally of ballots and an appropriate certificate.

### DIRECTION

It is hereby directed that, as part of his investigation to ascertain the representative for purpose of collective bargaining with the Employer, the Regional Director for Region 31 shall, pursuant to the Board's Rules and Regulations, within 10 days from the date of this Direction, open and count the ballots cast by Imantz Bozis, Thomas Byrd, James Brazier, Jarold Comer, Lynn Davis, Walter Dietrich, Emery Gant, Donald Heath, Frank Lewis, John Roberts, William Stuckenbroker, Jack Wiley, James Anderson, A. E. Berthold, Lawrence Clarke, Lawrence Henry, Garvin Keith, James MacIsaac, Frank Rodriguez, Stephen Scordato, Mitchell Truesdale, Ralph Wortelboer, and Faustina Asbury, and thereafter prepare and cause to be served upon the parties a revised tally of ballots including therein the count of the above-mentioned ballots and an appropriate certificate.

CHAIRMAN McCULLOCH and MEMBER ZAGORIA dissenting:

We would not adopt the Regional Director's Report on Challenges, insofar as it finds eligible eight strikers who signed termination slips in whole or in part to secure immediate receipt of vacation pay.<sup>5</sup>

The collective-bargaining agreement which had just expired provided that employees were to receive 1, 2, or 3 weeks of vacation, with pay. It further provided that vacation periods were to conform to the requirements of the Company's operations. The Employer had the right, in accordance with its past practice, to designate a general vacation period for all employees, providing 90 days' notice was given, and providing further that such general vacation period was to fall between the dates of June 15 and September 15. There was, however, a provision that laid off or terminated employees would receive pay in lieu of vacation, at the time of layoff or termination.

It appears that the Employer attempted to continue operations during the strike, but did not designate a general vacation period, nor did it agree that any striking employee could take a vacation during the period of the strike. Rather, the eight strikers, whose status is under consideration, voluntarily came to the Employer's premises, on dates between January 8 and June 7, 1968, and

<sup>5</sup>The eight strikers are I. Bozis, Byrd, Comer, Davis, Gant, Lewis, Roberts, and Stuckenbroker.

agreed to sign termination slips in order to receive their vacation pay at once. These requests by the strikers were clearly in advance of the general vacation period contemplated by the contract. The employees signed the termination slips, and received their accrued vacation pay.

We can readily understand how strikers, pressed for funds during a strike, might take the action taken by the eight strikers in this case. However, the Employer was under no contractual obligation to pay the strikers vacation pay at the times they requested such payment. Nor, indeed, is there any legal or moral requirement that an employer help finance a strike against himself by paying sums of money not contractually due the strikers. These employees knowingly and voluntarily quit their jobs. They may have had mental reservations, to the effect that their real purpose was to obtain the vacation pay. But we cannot presume that these employees, fully informed that the only way to get the money immediately was to quit, did not make a reasoned choice to do so. We therefore see no legal or ethical justification for restoring to the strikers the employment status which they agreed to give up in order to realize a desired contractual benefit.<sup>6</sup> We would, accordingly, sustain the challenges to the ballots of the eight strikers in question, along with the four challenges sustained by the Regional Director. As the remaining 16 challenged ballots are insufficient to affect the results of the election, we would certify the results.

<sup>6</sup>The cases cited by the Regional Director, in which no effect was given to termination forms signed by strikers to assist them in securing other employment, are distinguishable in that they did not involve the giving of a *quid pro quo* by the employer, or the implementation of a contractual agreement.

### REPORT ON CHALLENGES

Pursuant to a petition filed on July 19, 1968, and a Stipulation for Certification Upon Consent Election thereafter executed by the parties, an election by secret ballot was conducted under the direction and supervision of the Regional Director for Region 31 on August 9, 1968, among the employees of the Employer in the unit agreed appropriate.<sup>1</sup> After the election each party was furnished with a tally of ballots which showed that of approximately 132 eligible voters, 117 cast ballots, of which 36 were for the Union, 53 were against, and 28 were challenged. The challenged ballots are sufficient in number to affect the results of the election.

Pursuant to Section 102.69 of the Board's Rules and Regulations, Series 8, as amended, after reasonable notice to the parties to present relevant evidence, I have completed an investigation of the challenged ballots, duly considered all evidence submitted by the parties and otherwise disclosed by the investigation, and hereby issues this Report thereon.

<sup>1</sup>All production and maintenance employees, including shipping and receiving employees, janitors, truckdrivers, leadmen and working foremen, but excluding all office clerical employees and watchmen, and also excluding guards, supervisors and professional employees, as defined in the Act.

Charles Weyhrauch was challenged by the Union on the ground that he was not employed in the bargaining unit. The others were challenged by the Employer: James Brazier, as a technical employee; Ralph Wortelboer, Frank Van Wagner, Mitchell Truesdale, Stephen Scordato, Frank Rodriguez, James MacIsaac, Garvin Keith, Lawrence Henry, Lawrence Clarke, John Bozis, Alfred Berthold, Faustina Asbury, and James Anderson as strikers who had secured other employment, and Jack Wiley, William Stuckenbroker, John Roberts, Frank Lewis, Robert Knapp, Donald Heath, Otto Hager, Emery Gant, Walter Dietrich, Lynn Davis, Jarold Comer, Thomas Byrd, and Imants Bozis as strikers who had voluntarily quit. The election took place against the background of an economic strike initiated by the Union on or about January 3, 1968, and which is still continuing.

*Charles Weyhrauch.* The Union claims that Weyhrauch is employed as a guard and therefore is ineligible. The Employer contends that Weyhrauch is classified as a bargaining unit trainee and has only been temporarily assigned to observation of pickets and, therefore, is eligible to vote. Weyhrauch was employed early in the strike as a uniformed Pinkerton guard assigned to the Employer's location. He told an officer of the Employer that he would like to learn a trade, inquired as to the possibility of employment, and thereupon was hired with the prospect of becoming a shop trainee. When he started work for the Employer about June 15, 1968, however, his immediate assignment was to watch for persons placing nails in the driveway of the Employer's plant. It appears that littered nails had caused numerous flat tires during the course of the strike. Certain pickets were suspected as the perpetrators and Weyhrauch was delegated to this assignment because he had learned to recognize the pickets during the course of his Pinkerton duties. The Employer assigned its own employee rather than a Pinkerton man to this duty because the Pinkerton guards, by terms of the agreement between Pinkerton and the Employer, would not remove littered nails, whereas Weyhrauch could and did perform such service after being hired by the Employer. In this employment he wore no uniform and was not armed. He states that his assignment was to watch the pickets to see that they did not try to put down nails or to destroy property and to remove any nails put down on company property. He was told that as soon as things quieted down he would be brought into the shop, but, except for brief shop assignments, apparently totaling less than 8 hours in all, he remained on the outside assignment until well after the election.

The agreed-upon unit description specifically excludes watchmen, as well as guards. The Employer concedes that Weyhrauch was used for observation of the pickets but argues that this was only a temporary assignment. Inasmuch as it was substantially the only assignment given Weyhrauch from the start of his employment until after the election, the undersigned concludes that Weyhrauch was employed as a watchman or guard at all times pertinent herein and, accordingly, recommends that the challenge to his ballot be sustained.

*Imants Bozis and Thomas Byrd.* The Employer claims that Bozis and Byrd were strikers who voluntarily terminated their employment prior to the election date and, thereby, became ineligible voters. The Union contends that they did not abandon their status as strikers and, therefore, remained eligible. Bozis and Byrd were unit employees who joined in the strike at its inception. On February 9, Bozis returned to the Employer's plant and signed two company forms, a "Notice of Change of

Status" and a "Notice to Employee Change in Relationship," which showed that he voluntarily terminated to take other employment and showed that a check for 30 hours vacation pay was to be mailed to him. The space provided on the Notice to Employee form to show the name of the prospective new employer was left blank. Byrd signed similar forms on June 7, 1968, which showed as reason for termination, "resigned to obtain vacation money" and showed 32 hours vacation pay due him. Both Bozis and Byrd have had short periods of employment during the strike and, in fact, Bozis was employed at the time he signed the termination forms; but each asserts that he has not abandoned his position with the Employer and intends to resume such employment on the termination of the strike. Other than the signed termination forms, no evidence has been offered to the contrary.

The investigation shows that the Employer, in accordance with its interpretation of the union contract, refused to distribute accrued vacation pay to any striker unless the striker signed termination forms, except in certain instances where it declared a striker permanently replaced and awarded the striker a check for his vacation accrual along with notice of the replacement. Both Bozis and Byrd state that they needed their accrued vacation pay, requested it of the Employer, and learned that they would have to sign termination forms to get it. Bozis, who told the Employer that he was taking another job, signed the forms without question. Byrd, when told that he would have to show himself as voluntarily quit in order to get the pay, refused to do so and threatened that he would file charges. Several days later an agreement was reached in accordance with which Byrd signed the termination forms, but with the added notation, "resigned to obtain vacation money," and thereupon received his vacation pay.

The Board has stated that an economic striker is presumed to continue in such status and, hence, to be an eligible voter, unless the challenging party shows affirmatively by objective evidence that the voter has abandoned his interest in the struck job.<sup>2</sup> The undersigned concludes that, in the circumstances present in this case, the signing of termination forms for the purpose of obtaining vacation pay does not, standing alone, provide sufficient basis for a finding that the signator has abandoned the strike. Accordingly, it is recommended that the challenge to the ballots of Bozis and Byrd be overruled.

*James Brazier, Jarold Comer, Lynn Davis, Walter Dietrich, Emery Gant, Otto Hager, Donald Heath, Robert Knapp, Frank Lewis, John Roberts, William Stuckenbroker, Frank Van Wagner, and Jack Wiley.* The employees in this group all are strikers who are claimed by the Employer to have voluntarily terminated their employment and, in addition, to have taken other and substantially equivalent employment. The Union contends that none of them has abandoned his status as a striker eligible to vote.

Brazier started with the Employer in May 1966. On March 6, 1968, he secured a job which payed less than his previous position with the Employer and he was still so employed at the time of the election. On July 29, 1968, he signed termination forms which showed, "voluntarily terminated for:—personal reasons," and further showed, "46 hours vacation." Brazier states that he considers his present employment temporary and intends to return to the Employer when the trade dispute is settled.

<sup>2</sup>*Pacific Tile and Porcelain Company*, 137 NLRB 1358

Comer started with the Employer in July 1962. He applied for jobs at two plants where suitable vacancies existed but was rejected when he stated that he was on strike and intended to return to the Employer when the strike ended. In April 1968, he appeared at the Employer's plant and said that he wanted to terminate in order to get his vacation pay and to seek other employment. He signed termination forms which included the statement, "I voluntarily terminate my employment with Roylyn to accept employment with another company," and also showed 30 hours vacation due. Comer did not gain other employment until June 1968, when he got a job at \$3 an hour, which he left in July for a job which paid \$3.50 an hour and at which he still was employed at the time of the election. When the strike started Comer was earning \$3.79 an hour. He states that because of his accumulated seniority at Roylyn, the higher pay, his familiarity with the work, and certain fringe benefits which he considers superior, he intends to return to it when the strike is settled.

Davis started with the Employer in January 1963. Soon after the strike started he was offered employment at another plant at a rate of \$4.10 an hour, as compared to his rate of \$4.05 an hour at the time the strike started. He started work at the new job on or about January 22, 1968, and was still so employed at the time of the election. After being offered the new job, Davis phoned the Employer and was told that he would have to terminate if he wished to get his vacation pay. On January 18, 1968, Davis appeared at the Employer's office and signed forms stating that he was terminating for other employment and that, "I am voluntarily terminating my position with Roylyn, Inc. effective this date. Am taking a permanent position with another company." One of the forms also showed 32 hours vacation accrued. Davis states that he has, at all times, intended to return to the Employer when the strike is settled, despite his present higher rate of pay and fringe benefits he considers equivalent, because of his seniority with the Employer and the fact that overtime work granted by the Employer last year made his total earnings an estimated \$2500 more than the anticipated annual earnings on his present job.

Dietrich started with the Employer in April 1965. After applying for employment at several plants and being rejected when the prospective employers learned he was on strike, he heard that one plant was hiring and thereupon went to the Employer's office, on February 21, 1968, and stated that he wanted to quit so that he could get the other job. He signed termination forms showing voluntary termination to take a job with a specified company, further stating, "This is to notify Roylyn that I am voluntarily terminating myself to take another permanent position" and showing 54 hours accrued vacation. He got the desired job but was laid off a month later. In April he got another job at which he is still employed. He now earns \$3.75 an hour as compared with his rate of \$3.58 with the Employer and declares that he is pleased with his present job but that he still intends to return to the Employer when the strike is over because his present place of employment requires an hour of driving each way, whereas the Employer's plant is only 5 minutes' drive from his home. He points out that he took off 1 hour early from his present job in order to vote, and, like all the other strikers who voted, he furnished his own transportation in going to vote and was not compensated for his time or expense.

Gant started with the Employer in March 1966. He got another job in March 1968, but was fired when his new

employer learned that he had not terminated his employment with the Employer. In April he found another job but was laid off after a month. On June 10, he went to the Employer and signed termination forms showing as reason, "Voluntary resignation to seek other employment," and showing 60 hours vacation accrued. He left his job in July to take yet other employment, which lasted until shortly after the election, when he was laid off again. He since has found other employment but states that he, at all times, has intended to return to the Employer when the strike is settled. He states that he signed the termination forms because he had to do so to get his vacation pay.

Hager started with the Employer in February 1963. He suffered a heart attack in December 1967, and was not able to resume work until June 1, 1968, at which time he told the Union he was joining the strike. On June 10 he went to the Employer's office, said that he wanted to quit in order to get his vacation money and to get another job, and signed termination papers. The termination forms showed as the reason for resignation, "to take another job with L. A. Trade Tech.," and also showed 58 hours vacation accrued. In addition, Hager gave the Employer a signed letter which, in its entirety, stated.

Due to the conditions which prevailed at Roylyn, Inc. prior to my heart attack of Dec. 30, 1967, and the conditions which currently exist, I have been advised by my Doctor not to return to work at Roylyn, Inc.

I therefore must terminate as of this date, June 10, 1968, for financial reasons. I must return to work but will not be able to withstand such pressures as I have been subjected to by Roylyn management in the past.

Hager did not get the job for which he had applied at L. A. Trade Tech., but about a week after he signed the termination forms he applied and was hired at another establishment, where he is still employed. When interviewed for his present job, Hager was asked what he would do if the strike were settled at Roylyn, and he replied that he intended to stay at the new job. At the time of the election<sup>3</sup> Hager was earning \$4.05 an hour, including a night shift differential, as compared with the rate of \$3.99 an hour earned at the time he became ill, but since the election he has received a pay increase. Hager states that despite the difference in earnings and the fact that the Employer's plant is about a 25-minute drive from his home, as compared with a 10-minute drive to his new job, he, at all times relevant, has intended to return to work for the Employer because he considers the fringe benefits and some of the working conditions superior; and he points to the fact that he lost 1/2 hour of worktime without compensation in order to vote in the election. He explains that by "conditions which prevailed," mentioned in the termination letter quoted above, he refers to work pressures occasioned by the fact that he had to take care of a variety of tasks at the Employer, while the mention of "conditions which currently exist" refers to the strike.

Heath started with the Employer in September 1965. On June 17, 1968, after he had been refused other employment because he was on strike, he appeared at the Employer's office, said he wanted to terminate in order to get other employment, and signed termination forms. The forms show as reason for the termination, "to seek other work," and show 12 vacation hours accrued. In July he secured a job on which he is still employed. At the time of the election he was earning \$3.15 an hour, as compared

<sup>3</sup>Changes in status after the election are immaterial. *T E Mercer Trucking Co.*, 138 NLRB 192

with his rate of \$2.87 at the time the strike started, but he states that he would return to the Employer if the strike were settled because his present employer is planning to move to a location some 30 miles from his home, whereas the Employer's plant is within walking distance; because he now is on night shift, whereas he worked days at the Employer's plant; and because he considers the Employer's fringe benefits and working conditions superior.

Knapp started with the Employer in July 1962, and joined the strike at its inception. Knapp was denied employment at several establishments, including the one where he later was hired, because the prospective employers learned that he was on strike. On June 17, 1968, he went to the Employer's office and stated that he was quitting in order to get his vacation pay and because he needed a notice of termination in order to get other work. He signed termination slips which showed as reason for termination, "to seek other employment," and showed 30 hours vacation accrual. In July he reapplied at a plant where he previously was rejected, showed a copy of his termination slip, and was hired for a job which he still retains. His present hourly rate is 3 cents an hour less than with the Employer, but his total earnings are approximately \$20 a week more, due to increased overtime. He states that he would return to the Employer only if a strike settlement provided for a pay increase, all the improved benefits sought by the Union, and termination of "scabs."

Lewis started with the Employer in December 1965. On June 6, 1968, Lewis went to the Employer's office, advised the Employer that he was taking a job in San Diego, California, and asked for his vacation pay. He learned that he would have to sign termination forms to receive it, and he signed such forms on June 6 and 10, which showed as reason for resignation, "to take another job with Wayne Hudson, San Diego," and showed 80 hours vacation due. He started to work in San Diego about a week later, but left his family in Los Angeles. Before going to San Diego, Lewis had applied for jobs in the Los Angeles area, but had been refused when the prospective employers learned he was on strike. His San Diego employer is a relative who was aware that Lewis was on strike and that he hoped to return to his job with the Employer. In the new job Lewis earned \$90 a week, as compared to over \$130 a week (including overtime pay) with the Employer. He drove to Los Angeles without compensation in order to vote in the election, and left the San Diego job late in August in order to seek work in the Los Angeles area. He states that it has been his intention, at all times, to return to the Employer when the strike is settled.

Roberts started with the Employer in May 1960. He was refused employment at some plants when he said that he was on strike. On February 23, 1968, he applied for work at another plant, saying that he was terminating from the Employer and did not intend to return there. Immediately thereafter he went to the Employer's office and said he wanted to terminate in order to get his vacation pay and to avoid any complications on his new job. He signed termination forms which showed as his reason for resigning the taking of another job with the named new employer, stating, "I am voluntarily terminating for another job," and showed 48 hours vacation pay due. His new employment at the time of the election paid \$3.55 per hour, as compared with his \$3.38 rate when the strike started, but he states that he had intended to return to the Employer when the strike ends, even though he might have to take a cut in pay, because

the new job is 50 miles from his home, whereas the Employer's plant is about 15 miles distant and because he preferred the working conditions at the Employer.

Stuckenbroker started with the Employer in August 1961. He secured another job about 2 weeks after the strike started and is still so employed. On May 6, 1968, he went to the Employer's office, asked for his accrued vacation pay, and was told that he could get the pay only if he agreed voluntarily to terminate. Stuckenbroker signed termination forms which state, "Strike conditions, new employment, forces me to voluntarily quit," and shows 30 hours vacation due. Stuckenbroker states that his new employment had nothing to do with his signing the termination forms, and that his sole reason was to procure the vacation payment in order to pay some bills. His new job pays \$3.66 an hour, including a night shift differential, as compared to \$3.69 an hour earned when the strike started. His total earnings now are greater than his total with the Employer because of increased overtime hours, but Stuckenbroker states that it is his intention to return to the Employer when the strike ends because of his seniority at the Employer, fringe benefits granted by the Employer which he considers superior, and his preference for a day-shift assignment which he enjoyed with the Employer.

Van Wagner started with the Employer in January 1953. On July 1, 1968, he secured employment which he still retains. On July 30, he went to the Employer's office, advised the Employer that he had secured other employment and desired his vacation pay, and, upon being advised that he would have to terminate in order to receive the pay, signed termination forms. The forms showed the purpose of the resignation was to take another job with the named new employer, and showed 100 hours vacation pay accrued. Van Wagner earns \$3 an hour at his present job, as compared to \$3.79 earned when the strike started, and the reduction in total earnings is proportionately even greater because there is no overtime work at the new job. At the time he was hired he told the new employer that he planned to work only for 1 more year before retiring and that he would stay on the new job unless the strike were settled at Roylyn, and unless the strike settlement included the Employer's agreement to the pension plan proposed by the Union, and Van Wagner states that this was still his intention at the time of the election.

Wiley started with the Employer in October 1963. About a week after the strike started he obtained another job which he still holds. On January 17, 1968, he advised the Employer of his new employment and termination forms were prepared which, however, he did not sign. A copy of a termination notice from the Employer, together with a vacation check and final pay, were mailed to him soon after. Wiley earns \$3.06 on his new job, as compared with \$2.87 earned when the strike started. At the time of his hire he told the new employer that he intended the new job to be permanent, but he states that soon after he started on the new job he found he did not like the nature of the work and decided he would return to the Employer when the strike ended, and declares that it is still his intention. He points to the fact that he has maintained his membership in the Union, even though his present employment does not require him to do so.

Each employee in this group, except Wiley, has stated that he signed the termination forms only because this was required in order to procure vacation pay or as a means toward gaining other employment, or for both reasons. Many of those in the group, like Comer, Dietrich, Gant,

and Knapp, either were told directly by prospective employers that they would be hired only if they gave termination notice to the struck employer, or they learned that to be the case by hard experience. In such circumstances, the undersigned finds that the termination slips, signed or unsigned, generally carry little weight in establishing whether the striker genuinely was signifying the abandonment of his job with the Employer.<sup>4</sup> An exception appears in the case of Hager, who stated that his health condition would not permit him to work for the Employer under the conditions which prevailed prior to the strike. Inasmuch as there is no reason to assume that the outcome of the strike would change the conditions which Hager's doctor found deleterious to his health. Knapp, likewise, has set such conditions on reinstatement as to lead to the conclusion that he has in fact abandoned his position with the Employer. In the case of Van Wagner, the investigation has confirmed the evidence offered by the Employer that Van Wagner has announced his intention to retire about July 1969, and has stated that he would go back to work for the Employer only in the event that the Employer should adopt a pension plan whereby approximately 6 months' additional work would render him eligible for a pension. The undersigned concludes that Hager, Knapp, and Van Wagner are not eligible voters, and recommends that the challenge to their ballots be sustained. As to Brazier, Comer, Davis, Dietrich, Gant, Heath, Lewis, Roberts, Stuckenbroker, and Wiley, the undersigned concludes that the evidence offered by the Employer in each case is insufficient to rebut the presumption that they are eligible voters and, accordingly, recommends that the challenges to their ballots be overruled.

*James Anderson, A. E. Berthold, John Bozis, Lawrence Clarke, Lawrence Henry, Garvin Keith, James MacIsaac, Frank Rodriguez, Stephen Scordato, Mitchell Truesdale, and Ralph Wortelboer:* The employees in this group all are strikers who joined the strike at its inception and are claimed by the Employer to have obtained other regular and substantially equivalent employment thereafter. The Union contends that none of them has abandoned his status as a striker eligible to vote. The Employer has offered evidence that Anderson was hired elsewhere in April 1968, but was subsequently laid off and was unemployed at the time of the election; that Berthold, in February, was hired at a job which he still holds; that John Bozis, in April 1968, procured a permit to operate a machine shop and went into business for himself; that Clarke secured other employment at a rate higher than he earned before the strike, and told an employer representative that he was leaving Roylyn; that Henry secured other employment at a higher rate of pay and requiring the payment of a very high initiation fee; that Keith secured other employment at a higher rate of pay and told his new employer that he was abandoning his job at Roylyn; that MacIsaac held other employment for 2 weeks in July; that Rodriguez secured other employment; that Scordato secured other employment; that Truesdale secured other employment at a higher rate of pay after telling the interviewer that he wanted a permanent job; and that Wortelboer, during the period of the strike and prior to the election, was hired as a full-time permanent employee first at one job and then at another, each of

which jobs he quit. As to Clarke, Henry, and Keith, it also is asserted that in their post-strike employment they made voluntary contributions to insurance or retirement plans sponsored by their new employers.

None of the employees in this group signed termination forms. Anderson, Bozis, Henry, Rodriguez, Scordato, and Truesdale still have vacation pay due them from the Employer, which, they state, they have not claimed because they do not wish to sign termination forms. Berthold, Clarke, Keith, MacIsaac, and Wortelboer received notices from the Employer advising them that each had permanently been replaced and tending the vacation pay due.

John Bozis started with the Employer in August 1962, and was earning \$3.94 an hour when the strike started. He secured other employment about January 15, 1968, at a rate of \$3.95 an hour, but was laid off about the end of March because he would not work 10 hours a day as required by this employer. Meanwhile, Bozis had been setting up a machine shop in premises which he leased on a month-to-month basis and which he furnished with a lathe and tools costing a total of approximately \$6,200. He secured a municipal business permit early in April, had business cards printed, installed a telephone in the shop, and subcontracted to do machine work for other businesses. Since April 1, 1968, he has worked an average of 20 hours a week in the shop, plus an average of 20 hours a week soliciting business, and has netted roughly \$650 a month after paying monthly expenses of about \$100. He has no help in the shop. Bozis states that he still intends to return to the Employer when the strike is settled and to operate the shop in his spare time. He points to the fact that he has not signed termination forms to claim his vacation pay and that he has continued to perform picket duty on weekends at the Employer's plant.

Clarke started with the Employer in December 1958, and was working day shift and earning \$3.49 an hour when the strike started. He secured other employment in May 1968, which he held until shortly after the election. On this job, at the time of the election, he earned \$3.43 an hour, working nights, and voluntarily contributed to insurance plans. He states that he told the new employer that he hoped to return to his former job when the strike was settled.

Henry started with the Employer in June 1963, and was earning \$4.25 when the strike started. In March 1968, he secured employment at a rate of \$4.67 an hour, but his total earnings were about the same as before the strike due to the difference in overtime. He was required to join the incumbent union, whose initiation fee is \$225, but Henry has been permitted to pay the fee in installments and has been told that it could be cancelled in part if he returned to his former employment. Henry states that it is his intention to return to the Employer when the strike ends, and points to the fact that he has refused to sign termination forms to claim vacation pay due him and that he lost work time in order to vote in the election.

It appears that the investment of time and money made by John Bozis in his machine shop operation, including the fact that he would not work the hours required to retain his interim employment, are such that he could not reasonably have been expected to abandon the investment or relegate the shop to a spare-time operation. The undersigned concludes that Bozis had abandoned his employment with the Employer at the time of the election and recommends, accordingly, that the challenge to his ballot be sustained. As to the other employees in this group, it does not appear that the challenging party has

<sup>4</sup>*Guyan Machinery Company*, 155 NLRB 591, 593; *S & M Manufacturing Company*, 165 NLRB No. 59. The matter of *S & M Manufacturing Company*, 172 NLRB No. 104, cited by the Employer, clearly is inapplicable.

sustained the burden of proof that any of them has abandoned the struck job.<sup>5</sup> Accordingly, the undersigned concludes that Anderson, Berthold, Clarke, Henry, Keith, MacIsaac, Rodriguez, Scordato, Truesdale, and Wortelboer were eligible voters and recommends that the challenges to their ballots be overruled.

*Faustina Asbury*: No evidence has been offered by the Employer in support of its challenge to Asbury's ballot. Asbury started with the Employer in January 1959, and joined the strike at its inception. She secured other employment in May 1968, which she held until some time after the election. The undersigned concludes that she was an eligible voter and recommends that the challenge to her ballot be overruled.

### Conclusion

For the reasons set forth above and upon the investigation as a whole, the undersigned has concluded that Imants Bozis, Thomas Byrd, James Brazier, Jarold Comer, Lynn Davis, Walter Dietrich, Emery Gant, Donald Heath, Frank Lewis, John Roberts, William Struckenbroker, Jack Wiley, James Anderson, A. E. Berthold, Lawrence Clarke, Lawrence Henry, Garvin Keith, James MacIsaac, Frank Rodriguez, Stephen Scordato, Mitchell Truesdale, Ralph Wortelboer, and Faustina Asbury were striking employees eligible to vote in the election and, accordingly, has recommended that

the challenges to their ballots be overruled; and, further, has concluded that Charles Weyhrauch was not a unit employee and that Otto Hager, Robert Knapp, Frank Van Wagner, and John Bozis had abandoned the strike and, accordingly, has recommended that the challenges to their ballots be sustained. Inasmuch as the overruled challenged ballots are sufficient to affect the results of the election, it further is recommended that they be opened and counted and a revised tally of ballots issue.

As provided in Section 102.69 of the Board's Rules and Regulations, Series 8, as amended, any party desiring to take exception to this Report and the recommendations herein may, within 10 days from the date of issuance of this Report, file with the Board in Washington, D. C. 20570, eight copies of such exceptions. The party filing the same shall serve a copy thereof upon the other party and shall file a copy with the Regional Director of Region 31, National Labor Relations Board, 10th Floor, Bartlett Building, 215 West Seventh Street, Los Angeles, California 90014.

<sup>5</sup>The Employer's assertions as to certain challenged strikers, such as that one "is permanent full-time employee," or that a new employer will not hire strikers intending to return to the former employer, are insufficient to require further investigation. *Pacific Tile and Porcelain Company, supra*. To the extent not specifically discussed, I have assumed as true all allegations made by the challenging party setting forth statements purportedly made by challenged voters concerning their intentions as to reinstatement with the Employer