Ace Drop Cloth Co., Inc. *and* District 65, Wholesale, Retail, Office and Processing Union, Independent.
Case 2-CA-11630

September 26, 1969

DECISION AND ORDER

BY MEMBERS FANNING, BROWN, AND JENKINS

On June 18, 1969, 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 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 and the General Counsel filed exceptions to the Trial Examiner's Decision and the General Counsel filed an answering brief.

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 made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Decision, the exceptions, brief, and the entire record in this case, and hereby adopts the findings,[1] conclusions, and the Recommended Order of the Trial Examiner.[2]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby adopts as its Order the Recommended Order of the Trial Examiner, and orders that Respondent, Ace Drop Cloth Co., Inc., New York, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order, as modified herein:

Delete paragraph 2 and 2(a) and substitute the following:

"2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

"(a) Offer to Nicolasa Kercado and Sarah Mungin immediate and full reinstatement to their former or substantially equivalent positions without prejudice to any seniority or other rights and privileges previously enjoyed and make them whole for any loss of pay suffered as a result of Respondent's discrimination against them in the manner set forth in "The Remedy." In the event however, it is determined in subsequent compliance proceedings or any supplemental proceedings that may be necessary that Sarah Mungin cannot be offered immediate reinstatement because there is no job vacancy to which she is entitled, she shall be placed on a preferential hiring list and hired whenever a vacancy occurs for which she is qualified."

2. Delete from the Appendix the third indented paragraph and substitute the following:

> WE WILL offer Nicolasa Kercado and Sarah Mungin immediate and full reinstatement to their former or substantially equivalent positions without prejudice to any seniority or other rights and privileges previously enjoyed by them and make them whole for any loss of pay suffered as a result of Respondent's discrimination against them. In the event, however, that it is determined in subsequent compliance proceedings that Sarah Mungin cannot be offered immediate reinstatement because there is no job vacancy to which she is entitled, she shall be placed on a preferential hiring list and hired whenever a vacancy occurs for which she is qualified.

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

SIDNEY J. BARBAN, Trial Examiner: This matter[1] was heard before me at New York, New York, and Mt. Vernon, New York, on April 28, 29, and 30, 1969, on allegations in the complaint issued February 18, 1969, as amended at the hearing (based upon charges filed on August 21, 1968).[2]

[1] Respondent's name as amended at the hearing.

[2] The charges in this matter were originally filed under the name of District 65, Retail, Wholesale and Department Store Union, AFL-CIO District 65 disaffiliated from Retail, Wholesale and Department Store

[1] Contrary to Respondent's contention, we agree with the Trial Examiner that the General Counsel could properly amend the complaint at the hearing to allege that employee Mungin was discriminatorily denied reinstatement after evidence was adduced at the hearing to that effect despite an earlier dismissal by the Regional Director of a charge embracing such allegation. We note particularly that Respondent did not request additional time because of the amendment of the complaint and that such issue was fully litigated at the hearing.

With respect to this same issue, the Trial Examiner further stated that he would consider conduct occurring 6 months prior to the amendment of the complaint on April 29, 1969, which he considered equivalent to a reinstatement of the charge. Apart from Respondent's opposition to the amendment of the complaint which we have previously rejected, there is no exception to the Trial Examiner's further finding as to when the 6 months limitation period of Sec. 10(b) began, and we adopt such finding, *pro forma*.

[2] The Trial Examiner found and we agree, that Respondent discriminatorily denied reinstatement to employees Kercado and Mungin. He thereafter recommended that they both be offered full and immediate reinstatement with backpay for each from July 30, 1968, and January 29, 1969, respectively. Respondent contends, however, that only one position is available and that Mungin, therefore, is not entitled to reinstatement nor *ipso facto*, to any backpay. It is not entirely clear from the present record whether one vacancy or more existed subsequent to the striking employees unconditional offer to return to work on July 17, 1968. It is clear, however, that Kercado, an earlier discriminatee, is entitled to fill the vacancy left by the departure of Botsaris. We shall, therefore, leave for determination in compliance proceedings, whether Mungin is in fact entitled to immediate reinstatement and backpay from January 29, 1969, or whether she is merely entitled to preferential hiring, for any vacancy which arose subsequent to January 29, 1969. The Trial Examiner's Recommended Order and notice are modified accordingly.

The original charges in this matter asserted that the Respondent, *inter alia*, had refused to bargain with the Union, and had refused to reinstate Nicolasa Kercado, Cruz Maria Rivera, and Sarah Mungin because of their "protected activity," in violation of the Act. On March 5, 1969, the Regional Director for Region 2 of the Board advised the parties that his investigation of the charges showed that Mungin and Rivera were striking employees of Respondent for whom no position was available when reinstatement was requested, and that, therefore, "the evidence is insufficient to warrant the issuance of a complaint" as to those two employees. So far as appears, there was no appeal taken from this action of the Regional Director The parties were advised that the remaining portions of the charges were "being processed further." The complaint originally alleged that the Respondent had violated the Act by refusing to bargain with the Union in good faith, and by refusing to reinstate Nicolasa Kercado, a striking employee, on or about August 1, 1968, upon her offer to return to work. At the hearing, after the testimony of Sarah Mungin on direct, General Counsel was permitted to amend the complaint to allege that Respondent had discriminatorily refused reinstatement to Mungin

Respondent contends that the amendment of the complaint alleging that Respondent violated the Act in respect to Mungin is barred under Section 10(b) of the Act, inasmuch as the Regional Director had previously refused to proceed on the charges naming her. However, it is well settled that where a valid charge exists (as continued to be true in this matter even after the Regional Director's action of March 5, 1969), such charge will support allegations in the complaint concerning matters occurring within 6 months of the original charge, where such matters are "related to and arose out of the same situation as that conduct alleged to be unlawful in the timely filed charges." See *Stainless Steel Products, Incorporated*, 157 NLRB 232, 234. Even if it were to be held that the Regional Director's action extinguished the basis for a complaint as to Mungin, for lack of a viable charge as to her, it is considered that the General Counsel's action here was the equivalent of a request for the reinstatement of the original charge as to Mungin. See *Textile Machine Works, Inc.*, 96 NLRB 1333, 1335, fn. 1. In such case, the General Counsel would be limited in his allegations as to Mungin to a period of 6 months preceding the date of his request, made on April 29, 1969. See *Olin Industries, Inc*, 97 NLRB 130, cf. *Koppers Company, Inc*, 163 NLRB No. 64. As hereinafter discussed, General Counsel's relevant evidence falls within that period

The answer to the complaint admits allegations sufficient to support the assertion of jurisdiction under current standards of the Board, and to support a finding that the Union is a labor organization within the meaning of the Act. The answer denies the commission of any unfair labor practices.

Upon the entire record in this case,[3] from observation of the witnesses, and after due consideration of the brief filed by the General Counsel, the Trial Examiner makes the following

FINDINGS AND CONCLUSIONS

THE FACTS

A. *The Alleged Refusal To Reinstate Kercado and Mungin*

On January 5, 1968, five of Respondent's employees, Nicolasa Kercado, Sarah Mungin, Maria Rivera Cruz (also referred to as Cruz Maria Cruz), Lee Ernst Brumby, and Francisco Perez (also referred to as Frank Perez Gonzalez), who apparently comprised the entire production and maintenance unit at Respondent's operations, went to the Union's office and signed cards authorizing the Union to represent them for the purpose of collective bargaining with the Respondent. Shortly thereafter, Union representative Mario Abreau met with Respondent seeking recognition and a collective-bargaining agreement covering these employees, as set forth in more detail hereinafter. The Respondent at the outset made clear to the employees its opposition to the Union, interrogating them as to their reasons for wanting the Union, attempting to get them to withdraw from the Union, promising them benefits if they would do so, and threatening that their action would cause Respondent to close the plant, because it was asserted that Respondent could not afford the Union. During these activities and the work stoppage which followed, it appears that Nicolasa Kercado was a leader and the spokesman for the employees and was so recognized by Respondent.

About the first of February, 1968, Respondent discharged Brumby. The remaining four employees in the production and maintenance unit went out on strike in protest of the discharge. It is not contended here, however, that the discharge of Brumby violated the Act, or that the work stoppage was an unfair labor practice strike.[4]

Perez shortly thereafter abandoned the strike and returned to work About this time, Respondent hired 4, perhaps 6, women operators who were generally inexperienced in Respondent's operations to replace Kercado, who had 7 years experience, Mungin, who had been with Respondent for 5 years, and Rivera, whose employment history is not shown.

During various collective-bargaining sessions during the strike, the Union requested that Respondent reinstate Brumby and the strikers, and on or about June 13, 1968, requested reinstatement of the strikers without Brumby. Respondent stated that it was willing to discuss reinstatement of the strikers at the conclusion of the contract negotiations, but asserted that it had no obligation to take them back on the ground that they had

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Union, AFL-CIO, by a resolution adopted on or about April 15, 1969 General Counsel's motion is granted to conform the Charging Party's name to its present name as set forth above The Charging Party will be referred to herein as the "Union" in respect to its activities both before and after April 15, 1969

[3] General Counsel's motion to correct the transcript, which is received as TX Exh 2, is hereby granted and the transcript ordered corrected in accordance therewith

[4] The Union filed charges against Respondent on February 5, 1968, in Case 2-CA-11500, asserting that the Respondent had violated the Act, *inter alia*, by discharging Brumby, intimidating, threatening, and coercing employees, and refusing to bargain with the Union. Without admitting that it had violated the Act, the Respondent signed a settlement agreement on April 4, 1968, in which it agreed not to interrogate, threaten, offer, promise or grant benefits to its employees in connection with their exercise of rights under the Act, and to bargain with the Union It is clear that the Regional Director had determined not to proceed on the charge relating to Brumby Although evidence of conduct prior to the settlement was adduced at the hearing in this matter, it was not alleged, nor has it herein been considered, as conduct independently violative of the Act It has been considered as background evidence insofar as it sheds light on Respondent's conduct alleged to have been violative of the Act

been replaced.

According to Union representative Abreau, on July 17, 1968, he went to Respondent's plant and advised Morris Mathios (also spelled Mathias in the complaint and in the record), president of the Respondent, that the picket line was being withdrawn, that the strike was over, and that the strikers were unconditionally offering to return. Mathios agrees that Abreau said that Kercado was ready to come back to work, but denies that Abreau made an offer as to the other two strikers, or that Abreau said that strike was over or that the picket line would be withdrawn. I am inclined to credit Abreau in the circumstances. The Union had, indeed, decided to call the strike off and withdraw the picket line, and Abreau had been instructed by his superior in the Union to so advise the Respondent and make an unconditional offer on the part of the strikers to return to work. No reason appears why he should not have done so. Possibly Morris Mathios did not clearly understand Abreau, particularly since only Kercado accompanied Abreau inside the plant, and was the only striker whom Morris Mathios saw at the time. In any event, Jerry Mathios, vice president of Respondent, admitted that Respondent understood at that time and thereafter that it had an obligation to reinstate the strikers if job opportunities occurred.

Thereafter, on July 19, 1968, one of the replacement employees, Areti Botsaris, who had been doing work previously done by the three strikers, left work because of pregnancy. According to Respondent, it was understood that she would be absent for about 9 months, but could return to work thereafter, when she arranged for the care of her child. As of the time of the hearing, Botsaris had not returned to work, or otherwise advised Respondent that she still intended to come back Prior to the time that Botsaris left work, according to Jerry Mathios, arrangements had been made to hire a friend of Botsaris, a Mrs. Helen Tsmaras, to take Botsaris' place. Tsmaras began work for Respondent on Tuesday, July 30, 1968, and, with a short interruption for medical treatment, has continued in Respondent's employ until the time of the hearing.

Late in 1968, Respondent received a large order, which, it is stated, required the employment of additional experienced help Jerry Mathios, vice president of Respondent, testified that he therefore sent Kercado a letter, dated December 9, 1968, stating, "Your job is available now. Please return to work immediately. Thank you." Respondent has a certificate of mailing from the Post Office, but apparently did not ask for a receipt of delivery. Kercado, testified that although she has been available for work, she has not heard from Respondent since July 17, 1968, concerning work at Respondent's operations. When Respondent did not hear from Kercado, on December 23, 1968, it sent an identical letter to Rivera (addressed to Cruz Maria Cruz), and likewise obtained a certificate of mailing from the post office. Rivera, who had moved from the address to which the letter was sent but had filed a forwarding address with the post office, testified that she did not receive the Respondent's letter. It was testified that neither the letter to Kercado, nor the letter to Rivera was returned to Respondent.

After the letter to Rivera, to which it received no response, Respondent learned that it would not receive the large order which it expected, and consequently had no immediate pressing need for additional help. However, in January 1969, after a visit from an agent of the Board's Regional Office, apparently investigating the charges in this matter, during which, it is stated, the agent reminded Respondent of its continuing obligation to the strikers, Jerry Mathios consulted with Respondent's attorney who advised that Respondent "might was well" send out a letter to Sarah Mungin also. By letter dated January 27, 1969, Respondent sent Mungin the same message previously mailed to Kercado and Rivera. Though it was admitted that at this time Respondent had no immediate need for another operator, Jerry Mathios testified that the offer to Mungin was for a permanent position. He stated that since Mrs Botsaris had given no indication that she was going to return, Respondent would have released Tsmaris, who had been hired to replace Botsaris, to make room for Mungin

After Mungin received Respondent's letter, she called the Respondent, late in January. What was said during this conversation is critical and is in dispute. Mungin's account, in relevant part, on direct testimony is as follows:

> Oh, the letter said that my job is now available and to report to work and I called up because at that time I can't remember if I had an appointment to go someplace or not . . But I called up to the company and talked to Morris Mathios and —
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> I said, "Hello, Morris." He said, "Yes." I said, "This is Sarah." I said, "I got your letter" He told me, he said, "I'm telling you there is no Puerto Ricans, there is no negroes, nobody speaks English here. I am telling you that."[5] That was his words. He said none of the old girls are here. The boy that was left on the job [Francisco Perez] is not here no more . . . He said. "He is not here anymore." He said, "I don't want none of them here no more, none of the old girls here no more."
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> He told me to think about it and call back or something I didn't call back

Mungin denied that she had asked Morris Mathios if the other girls had come back, or whether Perez was still there According to Mungin, "I didn't get a chance to say nothing but 'Hello,' and I said 'Morris?,' and he did all the talking. He told me that -he said none of the old girls were here. He said no negroes and no Spanish. Even [Perez] gone. Those were his words."

Morris Mathios gave the following account of the conversation, in pertinent part:

> I picked up the phone. I says, "Hello." Mrs. Mungin says, "This is Morris?" [Mathios answers.] "Yes." [Mungin replies.] "This is Sarah. I received your letter." I says- she wanted to know if any of the old workers are back to work. I says to her, "No Just the Greek workers are working here only."[6] Then she took a moment of time. She says. "Well, I will let you know in a day or two. I have something pending."

On cross-examination, Morris Mathios stated that Mungin had said to him during this conversation, that she had received Respondent's letter, and that she was "ready to come to work," and that he told her that her job was

[5]Mathios testified that the Respondent's operators (the job held by Mungin) were all of Greek ancestry, as was Mathios himself

[6]Notwithstanding Mathios' notion that all of his workers were of Greek ancestry, Respondent's counsel directed Mathios' attention to the payroll sheets for the last 2 weeks in January 1969, from which Mathios testified that one "colored girl" and one Puerto Rican were working for Respondent at the time

available

Patently, the two accounts have a number of points of similarity. However, they differ materially in point of emphasis Thus, Mungin asserts that when she called about the job offer in Respondent's letter. Mathios replied in harshly discouraging terms that he didn't want her Mathios' version, in essence, is that Mungin asked the facts, he told her, and that the facts apparently discouraged her. He did not, however, specifically deny her testimony that he had said he didn't "want none of them here no more. none of the old girls here no more "

After a full and careful consideration of the entire record, and giving weight to the impression made by the witnesses, I have come to the conclusion that Mungin's testimony gives the more substantially credible account of what occurred In particular, it is noted that at the time Respondent sent Mungin the letter offering her job back, it did not, in fact, have a vacant position for her, and quite obviously made the offer only in a tactical attempt to put an end to any latent obligation it had to her as a striker I have no doubt that Respondent was induced to do so because it had no response from its previous letters to Kercado and Rivera, and assumed that Mungin would also not answer. In order to take Mungin back at this time, Respondent would have been compelled to discharge Tsmaris. who had been put to work in the first instance notwithstanding the availability of strikers having considerably more experience In the circumstances, I am convinced Mathios did not want to reemploy Mungin, and sought to discourage her from coming back to work, in substantially the manner to which she testified.

B. *The Alleged Refusal To Bargain*

As previously noted, in early April 1968, Respondent, without admitting that it had violated the Act, assented to the settlement of previous charges against it, in part, by agreeing to bargain with the Union as the representative of its employees in an appropriate unit of "all production and maintenance employees, including shipping clerks and drivers, excluding salesmen, office clerical employees, guards, and supervisors as defined in the Act," and to execute any agreement agreed upon.

The complaint in the present matter alleges that since on or about June 18, 1968, Respondent has negotiated with the Union in bad faith, with no intention of entering into a final, binding collective-bargaining agreement, as particularly evidenced by Respondent's alleged actions on June 18, in reducing its wage offer, and on June 19, withdrawing its previous agreement to "union shop, new workers, no moving, subcontracting, welfare provisions, struck goods and successors" clauses given in prior negotiations.

The facts show that in a context of some resistance, on the basis of expressed inability to afford a union contract, particularly in the absence of Union organization of its competitors, Respondent recognized the Union as the bargaining representative of its employees in the unit noted above, in January 1968, and commenced some preliminary bargaining The Union submitted a lengthy, mimeographed bargaining contract, somewhat altered by inked-in markings. as a proposal

The Respondent and the Union thereafter met and negotiated on the Union's contract proposals on February 19, April 15, May 1, and June 13, 1968. During the February 19 meeting, the parties were able to agree on a number of items, principally of a non-economic nature. Among the matters which remained in issue, the parties were in dispute over the duration of the contract, Respondent insisting upon a 3-year agreement, while the Union sought a 2-year contract. At the April 15 meeting, Union Secretary-Treasurer Cleveland Robinson, who there appeared for the only time at these meetings, made an offer for a 3-year contract which modified some prior Union proposals, increased the proposal for holidays and vacations, items which had previously been agreed to, and proposed increased minimum rates and an additional wage increase for the third year During the meetings on May 1 and June 13, however, the Union eliminated the changes proposed by Robinson to which Respondent objected, and, according to the credited testimony of Union Assistant-Secretary Manheim, the Respondent and the Union disposed of each of the Union's contract proposals (by agreement upon the item as proposed or modified, or by elimination of the proposal), except those relating to minimum wage rates, wage increases, and the duration of the agreement [7]

With respect to economic terms. the Respondent had previously offered a $3 wage increase effective at the inception of the agreement and another $3 increase in 18 months, for a 3-year agreement at the June 13 meeting, the Union proposed a $4 increase immediately, and another $4 after 12 months for a 2-year contract; Respondent offered a pay scale for general help starting at $70 increasing to $80 with increments at 6 month intervals, and for operators, a starting rate of $74 increasing to $76 after 6 months and to $79 after 1 year, with a maximum of $88 at the end of the contract, "based upon productivity." (Respondent's proposal also originally provided that inexperienced operators would start at $64, with periodic increases) the Union proposed that the minimum wage scale be $2 higher than that proposed by the Respondent: for general help $72 to $82 00, with the same progressions proposed by Respondent, and for operators $76 to $90 with a $3 progression every 3 months

When Respondent's counsel indicated interest in the Union's proposals, but stated that Respondent would still want a 3-year agreement, the Union stated that it would agree to a third year, if the Respondent would agree to "an arbitration at the beginning of the third year," or if Respondent would agree to a cost of living increase for the third year. Respondent's counsel stated that he would take these proposals up with his client and would advise the Union. Thereafter. by letter dated June 19, 1968, Respondent's counsel advised the Union as follows

> I discussed your most recent proposals with my client and although they are not acceptable they constitute a step in the right direction At the same time, my client on the basis of his experience in the last few months feels that the following rates would be more realistic. For general help he proposes a starting pay of $64. with progressions over the contract period to $76; for operators the rate would be $64. to start with progressions to $80. Increments would be at the rate of $2 every six months, except for operators where the increments would be $3. every six months for the first year and a half Inasmuch as his former employees received higher pay, their rates, if rehired, would be the same as previously paid.

[7] In respect to the Union's proposed "Struck Goods" clause when Respondent's counsel expressed agreement in principle but objected to the Union's language, it was agreed that Respondent would draft the language, and the Union stated that it would accept the language drafted by Respondent's counsel

Manheim called Respondent's counsel, Duker, and expressed his surprise and shock at the reply, stating that this approach made it impossible to reach agreement. Duker answered, "Look, this is what my client has told me to tell you. What can I say." Manheim requested that another meeting be set up, with Duker's client present. Such a meeting was eventually set up for July 3, 1968. According to Manheim's uncontroverted testimony, in pertinent part, the following occurred:

> Well, we discussed the question of minimums and wages and I asked them why they were not prepared to accept the proposal that I had made which was only . . . a dollar more a year [than] their proposal of three dollars in each year of the contract. . .
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> . . . I said that obviously we could not go, at this point, below the proposals they had made before. They couldn't be serious about that. And I said if . there was some way to bridge the gap between the proposals they had originally made and those I made and I was prepared to react to them. They just kept repeating that they could not they would not pay more than the proposals. . . in that letter I think it was Mr. Mathios who said that, "Look, if I can get people at that rate, why should you object? If I have to pay more I'll pay more but if I can get them at this wage why should you object?" I told him that. . . from what he had said on previous occasions, that. . . the people he employed, not alone the people that we organized, but the people he hired since then were hired at more. . . He obviously was not serious.
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> He said, "well, I may have had to pay them that. Maybe I can get people for less. I don't want to be required to pay more than that. I am complying with the law It's not illegal to pay $64."

Manheim accused Respondent of attempting to renege on its commitments in an effort to avoid reaching an agreement, and insisted upon a complete contract proposal from Respondent. Duker agreed to submit a complete proposal within a few days.

Respondent's contract proposal was submitted with a covering letter dated July 19, 1968. In form, it consisted of a copy of the Union's mimeographed proposal, extensively revised. Among the revisions, the following may be particularly noted:

The "Union Shop" clauses (sec. 2), providing for compulsory Union membership on the 30th day following the effective date of the agreement, or later hire, and for a checkoff of union dues upon written authorization, which had previously been agreed upon as proposed by the Union, was revised by Respondent to provide only for maintenance of membership of employees who were or became members of the Union, and eliminated reference to checkoff of Union dues.

Section 3 of the proposed contract, "New Workers," which had been previously agreed, was revised to eliminate reference to the use of the Union as a preferred source for hiring new workers.

Section 5 of the proposed contract, "Basic Crew," which had been previously agreed with certain modifications, was eliminated.

Section 7 of the proposed contract, "No Moving," which had previously been agreed as modified, was revised to eliminate reference to severance pay for workers who did not desire to transfer to a new location requiring extra travel time.

Section 8 of the proposed contract, "Sub-Contracting," which had been previously agreed, was eliminated.

With respect to Section 19 of the proposed contract, "Security Plan," Respondent had previously agreed to a certain contribution to the Security Plan, to which the Union had assented. In Respondent's revised proposal all reference to the Security Plan was stricken.

Section 26 of the proposed contract, "Struck Goods," with respect to which Respondent had agreed to submit revised language, was eliminated without alternative proposal.

Section 31 of the proposed contract, "Successors & Assigns," which had previously been agreed, was eliminated.

C. *The Identity of the Union*

Because of a policy disagreement with Retail, Wholesale and Department Store Union, AFL-CIO, herein called RWDSU, as previously noted, on or about April 15, 1969, District 65 passed a resolution disaffiliating from that organization. Both before and after April 15, District 65 was a separate entity, with its own officers, constitution and members, existing for the purpose of dealing with employers in collective bargaining concerning wage, hours, and other terms and conditions of employment of its members. There is no claim that RWDSU has asserted any interest in the organization of Respondent's employees, or was in any way involved in the collective bargaining between the Union and the Respondent. Nor is there any evidence that the employees of Respondent who designated the Union as their bargaining agent were influenced to do so because of the Union's affiliation with RWDSU. In fact, the constitution of RWDSU provides that the right and authority to represent the members of an affiliate in collective bargaining matters rests solely with the affiliate, subject to broad policy considerations established by RWDSU (General Counsel Exhibit 1, Article VII, Sections 9(b),(c), Article XVII). So far as this record shows, no limitation upon the authority of District 65 to represent its members had been established. The constitution of RWDSU also provides that the right of affiliates to disaffiliate "at any time shall be inviolate," subject to the procedures provided. There is no showing that RWSDU has contested the disaffiliation, or that the disaffiliation has caused any schism in District 65, or otherwise affected District 65's capacity to represent its members in collective bargaining

There being no evidence sufficient "to prove a change in the organic structure, composition, or leadership" of the Union, it is therefore held that the identity of the Union continued intact at all times material herein, and that the Union was at all times the duly designated representative of the appropriate unit set forth above for the purposes of collective bargaining. The mere change of name and affiliation was not sufficient to destroy this status. See *N.L.R B.* v. *Weverhaeuser Company, etc.*, 276 F.2d 865, 873 (C.A. 7).

Analysis and Conclusions

1. *The job rights of Kercado and Mungin* Respondent was aware that unconditional offers to return to work had been made on behalf of economic strikers Kercado and Mungin as early as June 13, 1968, and admittedly understood that Kercado was present seeking reinstatement on July 17, 1968. Respondent's ostensible

reason for refusing to reinstate the strikers was that they had been permanently replaced by newly hired workers. The General Counsel contends, however, that when one of the replacement employees, Botsaris, left on July 19, 1968, for an extended period to have a baby, from which leave Respondent was not sure she would return, Respondent should have offered the vacant position to Kercado, Respondent's most experienced operator, rather than hiring Tsmaris, an inexperienced worker, to start work on July 30, in that position. Respondent's refusal to do so, General Counsel asserts, was motivated, in violation of the law, by the fact that Kercado had been a leader in the Union movement among the employees, and in the strike

Respondent's basic obligation to reinstate strikers who have been validly replaced was recently set forth by the Board in *The Laidlaw Corporation,* 171 No. 175, wherein it was stated ". . . economic strikers who unconditionally apply for reinstatement at a time when their positions are filled by permanent replacements: (1) remain employees; (2) are entitled to full reinstatement upon the departure of replacements unless they have in the meantime acquired regular and substantially equivalent employment, or the employer can sustain his burden of proof that the failure to offer full reinstatement was for legitimate and substantial business reasons."

Respondent, while it has not specifically explicated its reasons for preferring Tsmaris over Kercado in filling the vacancy left by Botsaris, has indicated that its defense is based, first, upon the assertion that at some indefinite time (apparently within a month) prior to July 17, when Kercado last offerred to return to work, Respondent had already made arrangements to employ Tsmaris, and secondly, upon the claim that the vacancy was merely temporary pending the return of Botsaris. These assertions clearly do not establish "legitimate and substantial business reasons" for the failure to offer reinstatement to Kercado upon the departure of Botsaris, within the requirement of *Laidlaw*

Thus, there is no showing of a commitment to Tsmaris such that Respondent could claim that either it or Tsmaris were bound thereby, or that it would have been inequitable to prefer Kercado over Tsmaris. Cf *Pioneer Flour Mills,* 174 NLRB No. 174 (TXD) (there the replacement employees, two of whom had left other employment, had been extensively processed by the employer before being put to work almost simultaneously with the strikers' offer to return). Moreover, the record is convincing that Respondent was aware that Kercado was willing to return unconditionally on June 13, prior to the time of Respondent's asserted final arrangements with Tsmaris.[8] Moreover, there was ample time between July 17, when Kercado's offer to return was confirmed, and July 30, 1968, when the vacancy was filled, for Respondent to rescind its asserted arrangements with Tsmaris, and to fulfill its acknowledged obligation to Kercado. Inasmuch as Respondent now claims that it was willing to discharge Tsmaris after she was employed 6 months in order to make room for another striker, Mungin, no reason (other than Respondent's desire not to reinstate Kercado because of her Union and concerted activities) appears for its failure to prefer Kercado over Tsmaris in July 1968. The choice of Tsmaris over the much more experienced Kercado is all the more inexplicable since Respondent admittedly was experiencing great increases in cost of production at the time, stemming from the strike, and certainly, in part, from the employment of new and inexperienced help.

The further claim that Respondent was excused from offering the Botsaris' vacancy to Kercado because it was allegedly temporary in nature requires little comment. Whatever might be the case where a truly temporary or casual opening is involved, upon which I do not pass, the opening here was for a substantial period of time, with a substantial possibility that Botsaris would never return, which actually has occurred. In the circumstances of this case, Respondent clearly, under the principles of *Laidlaw,* had an obligation to offer the vacancy to Kercado, and failed and refused to do so. In fact, as previously indicated, I am convinced on the record as a whole that Respondent was motivated in its actions in this respect because of Kercado's exercise of her rights under the Act, as detailed herein. Respondent's refusal and failure to offer reinstatement to Kercado in July, 1968, therefore constituted a violation of Section 8(a)(1) and (3) of the Act.

The record is further convincing that Respondent's actions in respect to Mungin were in bad faith. Respondent offered Mungin her job back at a time when it had no opening for her, now asserting that if she came back, Respondent would have discharged a replacement employee whom Respondent had previously preferred over the strikers. In fact, as is clearly evident, Respondent offerred Mungin employment in order to gain a legal advantage for itself, in the expectation that she would not reply to the offer, as Kercado and Rivera had previously failed to respond to similar letters Then, when Mungin did reply, Respondent advised her that working conditions would not be comfortable for her, she would be among strangers speaking a strange tongue, and that Respondent did not actually want her or the other strikers in the plant. It is found that Respondent thereby made clear to Mungin that she was not wanted, and, in effect, withdrew its previous, apparently genuine, offer, and refused Mungin reinstatement because she had been engaged in union and strike activities.

It has been settled since the decision of the Supreme Court in *N.L.R.B.* v. *Mackay Radio & Telegraph Co.,* 304 U.S. 333 that, although an employer may in good faith replace striking employees, the employer may not refuse to reinstate strikers just because they exercised their rights under the Act, even though their jobs may have been filled during the strike. Thus, the Court stated (304 U.S. at 346, 347):

> The assurance of respondent to those who accepted employment during the strike that if they so desired their places might be permanent was not an unfair labor practice nor was it such to reinstate only so many of the strikers as there were vacant places to be filled. But the claim put forward is that the unfair labor practice indulged by the respondent was discrimination in reinstating striking employees by keeping out certain of them for the sole reason that they had been active in the union As we have said, the strikers retained, under the Act, the status of employees. Any such discrimination in putting them back to work is, therefore, prohibited by Section 8.

* * * * *

[8] Jerry Mathios' testimony tended to vary as to whether he (or Respondent) knew of Kercado's availability prior to the employment of Tsmaris. To the extent that his testimony conflicts with the findings herein (if it does), the testimony is not credited

The Board found, and we cannot say that its finding is unsupported, that, in taking back six of the eleven men and excluding five who were active union men, the respondent's officials discriminated against the latter on account of their union activities and that the excuse given that they did not apply until after the quota was full was an afterthought and not the true reason for the discrimination against them.

Under the circumstances of the present case, it is abundantly clear, and I find, that Respondent's actions in respect to Mungin in the last of January 1969, constituted a refusal to reinstate Mungin to the job which she had previously held because of her strike and Union activities, and not because she had been replaced, and Respondent thereby violated Section 8(a)(1) and (3) of the Act [9]

2. *The asserted refusal to bargain.* In essence, the General Counsel's contention is that Respondent's conduct beginning with its letter of June 19, revising Respondent's wage offer downward, and by subsequently withdrawing a number of agreements to contract proposals evidences bad faith bargaining designed to prevent the parties from arriving at a complete agreement. It is noted, in particular, that immediately prior to June 19, when Respondent initiated these shifts in position, before the Union had called off its strike, the parties had come to agreement on all non-economic and some economic terms for a collective-bargaining contract, and the Union had evidenced, by concessions and modified proposals, a substantial interest in coming to terms with Respondent on an agreement.

Respondent admits that it thereafter reduced prior offers and withdrew previous agreements made in collective bargaining, but apparently contends that it was warranted in its actions, in that, (1) its actions were a tactical manuever similar to that of Union representative Robinson at the April 15 meeting, in changing proposals previously agreed by the Union, (2) Respondent's deteriorating economic position required reduction and withdrawal of economic items previously acceptable, and (3) opposition to the Union by replacement employees justified revision of the union shop and new workers proposals.

However, the record does not support these positions Thus, if in fact, the Respondent had radically changed its position in direct response to Robinson's asserted objectionable conduct, a different situation might be presented.[10] However, Respondent did not do so, but continued its prior offers and bargained with the Union in two succeeding meetings for further concessions from the Union, including elimination of the various changes requested by Robinson. Respondent cannot now assert that its later withdrawals of offers and agreements were occasioned by Robinson's conduct.

Neither does a claim that opposition of replacement employees to the Union, or that Respondent's financial position was deteriorating support Respondent's actions in this matter. Respondent's asserted financial difficulties were known from early during the strike, and certainly by June 13, the last meeting between the Union and the Respondent, but Respondent gave no indication of those problems during the negotiations, or that it might have to recede from previous offers and agreements. The assertion that Respondent was justified in reducing previously offered wage scales because Respondent was convinced it could hire employees for less was clearly specious. Even the replacement employees were hired at rates higher than those in Respondent's revised proposal.

The claim that Respondent was motivated in changing its position with respect to the contract proposals because of asserted employee opposition to the Union is contained in an affidavit of Jerry Mathios only. Although this would ordinarily constitute inadmissible evidence of the fact, see *N L R.B.* v. *Quest-Shon Mark Brassiere Co., Inc* , 185 F.2d 285 (C.A 2), since it was offered and received without objection, it has been given full consideration. See *Syracuse Engineering Co., Inc* v. *Haight,* 97 F.2d 573 (C.A. 2). Nevertheless, since Jerry Mathios did not give any direct evidence on the point when he was a witness, and since I find it highly improbable in the circumstances of this case that Respondent would have remained unaware of the opposition of the replacement employees to the Union, if that occurred, until mid-July, as is claimed, I have concluded that this evidence is entitled to, and have given it no weight

The changes proposed by the Respondent on June 19 and thereafter unilaterally repudiated offers made and agreements reached on numerous contract proposals after a considerable period of collective bargaining, and necessarily tended to bring the progress made to that point in achieving a bargaining agreement to a screeching halt. In the circumstances of this case, it is found that the Respondent's unilateral action in proposing a contract with substantially changed provisions at the late stage of negotiations shown by the record was a negation of its duty to bargain in good faith, and that Respondent thereby refused to bargain within the meaning of Section 8(a)(5) of the Act. See *The Marley Company,* 150 NLRB 919.

CONCLUSIONS OF LAW

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

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

3. The following unit of Respondent's employees is appropriate for collective bargaining within the meaning of Section 9(b) of the Act

> All production and maintenance employees, including shipping clerks, and drivers, employed by Ace Drop Cloth Co., Inc., at its place of business in New York City, excluding salesmen, office clerical employees, guards and supervisors as defined in the Act.

4. Since January 5, 1968, the Union has been and continues to be the exclusive representative of the employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. The Respondent has engaged in and is engaging in unfair labor practices in violation of Sections 8(a)(1), (3) and (5) of the Act, which unfair labor practices affect commerce within the meaning of Sections 2(6) and (7) of

[9] In coming to this conclusion, full consideration has been given to evidence adduced by Respondent of certain intemperate and abusive language used by Mungin on the picket line to nonstriking employees However, inasmuch as Respondent asserts that it was thereafter willing to accept Mungin for permanent employment in her previous position, it is manifest that Respondent did not consider Mungin's conduct as disqualifying her for further employment

[10] I do not pass upon whether Robinson's actions were proper, or whether they would have justified counter measures by Respondent The negotiations were not litigated in sufficient detail for that It is noted, as General Counsel argues, that Robinson's actions could be justified, on this record, as a good faith attempt to adjust to Respondent's insistence on a 3-year contract.

the Act.

THE REMEDY

It having been found that the Respondent has engaged in unfair labor practices in violation of Section 8(a)(1), (3), and (5) of the Act, it will be recommended that Respondent cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

It will be recommended that Respondent offer Nicolasa Kercado and Sarah Mungin immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges and made them whole for any loss of earnings they may have suffered by reason of the discrimination against them[11] to the date of reinstatement, less interim earnings, and in a manner consistent with Board policy set out in *F W Woolworth Company*, 90 NLRB 289, to which shall be added interest at the rate of 6 percent per annum as prescribed by the Board in *Isis Plumbing & Heating Co.*, 138 NLRB 716

The General Counsel requests that the Respondent be specifically ordered to reinstate its offers to the Union as they existed on June 13, 1968. However, I find that this would be inappropriate and unnecessary. It has been found that the withdrawal of Respondent's offers and agreements as of that date were in bad faith It will be recommended that the Respondent be ordered to bargain with the Union, upon request, in good faith, in accordance with the Board's normal form and practice.

RECOMMENDED ORDER

Upon the basis of the above findings of fact and conclusions of law, and upon the entire record in this case, it is recommended that the Respondent, Ace Drop Cloth Co , Inc., New York, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging or otherwise discriminating against, or refusing to reinstate or to employ employees in order to discourage membership in or support of District 65, Wholesale, Retail, Office and Processing Union, Independent, or any other labor organization, or because such employees engage in concerted activities under the Act

(b) Refusing to bargain collectively in good faith with District 65, Wholesale, Retail, Office and Processing Union, Independent, as the exclusive bargaining representative of employees in the appropriate unit found herein.

2 Take the following affirmative action which it is found will effectuate the purposes of the act·

(a) Offer Nicolasa Kercado and Sarah Mungin immediate and full reinstatement to their former or substantially equivalent positions and make them whole for any loss of earnings they may have suffered by reason of the discrimination against them, in accordance with the provisions of the section entitled "The Remedy" above

(b) Preserve and make available to the Board, or its agent, upon request, payroll and other records to facilitate the computation of backpay

(c) Upon request, bargain collectively, in good faith, with District 65, Wholesale, Retail, Office and Processing Union, Independent, as the exclusive representative of the employees in the appropriate unit found herein with respect to rates of pay, wages, hours of employment or other terms and conditions of employment, and, if an agreement is reached, embody such understanding in a signed agreement.

(d) Post at its plant in New York, New York, copies of the notice attached marked "Appendix."[12] Copies of said notice, on forms provided by the Regional Director for Region 2, after being duly signed by Respondent's representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify said Regional Director, in writing, within 20 days from the receipt of this Decision, what steps Respondent has taken to comply herewith.[13]

[11] It has been found that the date of discrimination against Kercado was July 30, 1968, when Tsmaris began work Although the exact date of Mungin's conversation with Morris Mathios in January 1969, was not fixed, it is reasonable to infer that this occurred no later than January 29, 1969, and that the discrimination against Mungin occurred on that date, and it is so found

[12] In the event this Recommended Order is adopted by the Board, the words "a Decision and Order" shall be substituted for the words "the Recommended Order of a Trial Examiner" in the notice In the further event that the Board's Order is enforced by a decree of the United States Court of Appeals, the words "a Decree of the United States Court of Appeals Enforcing an Order" shall be substituted for the words "a Decision and Order "

[13] In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read "Notify said Regional Director, in writing, within 10 days from the date of this Order what steps Respondent has taken to comply herewith "

APPENDIX

NOTICE TO ALL EMPLOYEES

Pursuant to the Recommended Order of a Trial Examiner 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, upon request bargain in good faith with District 65, Wholesale, Retail, Office and Processing Union, Independent, for your working conditions in the appropriate unit set forth below

All production and maintenance employees, including shipping clerks and drivers, employed by the company, excluding salesmen, office clerical employees, guards and supervisors as defined in the National Labor Relations Act, as amended.

WE WILL, if an agreement is reached, sign a written contract with the Union setting forth our agreement.

WE WILL offer Nicolasa Kercado and Sarah Mungin immediate and full reinstatement to their former or substantially equivalent positions without loss of seniority or other rights and privileges, and WE WILL make them whole for any loss of pay because they were denied employment.

WE WILL NOT discharge, or refuse to employ, or refuse to reinstate any employee because of membership in a Union, or activities in support of a Union, or because employees go on strike or engage in other concerted action for mutual aid or protection of

working conditions.

ACE DROP CLOTH CO., INC.
(Employer)

Dated By
(Representative) (Title)

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, 36th Floor, Federal Building, 26 Federal Plaza, New York, New York 10007, Telephone 212-264-0300.