

**Alabaster Lime Company, Inc. and United Steelworkers of America, AFL-CIO. Case 10-CA-8822**

January 18, 1972

**DECISION AND ORDER**

BY CHAIRMAN MILLER AND MEMBERS JENKINS  
AND KENNEDY

On September 3, 1971, Trial Examiner Sidney J. Barban issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting 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 authority in this proceeding to a three-member panel.

The Board has considered the record and the Trial Examiner's Decision in light of the exceptions and brief and has decided to affirm the Trial Examiner's rulings, findings, and conclusions and to adopt his recommended Order, as modified herein.

We find, contrary to the Trial Examiner, that Respondent did not violate Section 8(a)(1) and (3) of the Act by discharging Frank I. Washington, Jr.

On June 12, 1970, a state court issued an injunction providing in part that no more than four pickets could be maintained at any one time at Respondent's plant and quarry. Approximately 11:15 p.m. on July 30, Supervisor Frank Rikard, believing that more than four pickets were present on the picket line and wishing to obtain a picture of this conduct, drove from the plant and parked his car in a church parking lot which is located to one side of the picket line. He then positioned his headlights on the picket line and took a picture. At this time one of the pickets, Washington, approached Rikard's car, opened the car door, asked Rikard what he was doing, and told Rikard that he had no right to take pictures. Washington then threatened that he would whip Rikard's ass for doing so. At this point, Washington reached into the car across Rikard's body in an attempt to seize the camera which was on the front seat beside Rikard. To prevent any further confrontation, Rikard shifted the car into reverse and accelerated, forcing Washington out of the car. Rikard then closed the car door and drove back into the plant.

On the basis of these facts, the Trial Examiner found that Washington did not engage in misconduct sufficient to justify his discharge. The Trial Examiner concluded that Respondent, by discharging Washington for this misconduct, violated Section 8(a)(1) and (3) of the Act.

We disagree with the Trial Examiner's conclusion. A threat of physical harm and violence, immediately followed by an attempt to enter the car and seize the

camera from beside Supervisor Rikard, is serious misconduct in any setting. It takes on added significance when proximate to an emotionally charged picket line.

Accordingly, we find that Respondent did not violate Section 8(a)(1) and (3) of the Act by discharging Frank I. Washington, Jr., for his misconduct during the strike.

**ORDER**

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Trial Examiner as modified below and hereby orders that Respondent, Alabaster Lime Company, Inc., Alabaster, Alabama, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's recommended Order, as so modified:

1. Delete from paragraph 2(a) the name Frank I. Washington, Jr.
2. Substitute the attached notice for the Trial Examiner's notice.

**APPENDIX**

**NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government**

WE WILL NOT discourage membership in, or activities on behalf of, United Steelworkers of America, AFL-CIO, or any other labor organization, by discharging employees for engaging in a strike or other concerted activity protected by the National Labor Relations Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed in Section 7 of the Act.

WE WILL cancel, withdraw, and rescind the discharges of the following employees, and remove any reference to such discharges from the Company's records:

Frank Miller, Jr.  
Horace E. Massey

Lawrence Carter  
Harold D. Cummings

ALABASTER LIME  
COMPANY, INC.  
(Employer)

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

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.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Peachtree Building, Room 701, 730 Peachtree Street, N.E., Atlanta, Georgia 30308, Telephone 404-526-5760.

## TRIAL EXAMINER'S DECISION

### STATEMENT OF THE CASE

SIDNEY J. BARBAN, Trial Examiner: This matter was heard at Birmingham, Alabama, on July 7 and 8, 1971. The complaint, issued on March 17, 1971 (based on charges filed on January 25 and 28, 1971, and served on Respondent on those dates), alleges that Respondent violated Section 8(a)(1) and (3) of the Act by discharging eight employees because of their membership in the above-named Charging Party, herein called the Union, or because of their concerted activities within the meaning of the Act.

Respondent's answer, as amended, denies the commission of any unfair labor practices, but admits allegations of the complaint sufficient to justify the assertion of jurisdiction under current standards of the Board (\$50,000 interstate outflow) and to support a finding that the Union is a labor organization within the meaning of the Act.

Prior to the opening of the hearing in this matter, Respondent requested the Regional Director to consolidate a hearing on objections and challenges in Case 10-RM-559 with the instant case, on the basis of similarity of issues. The Regional Director rejected Respondent's motion, and the latter appealed the ruling. On the opening date of the hearing, the Acting General Counsel affirmed the Regional Director's ruling. During the hearing, Respondent requested the Trial Examiner to order the proceedings consolidated. The Trial Examiner rejected the motion on the basis that it was untimely, and no proper showing was made that Respondent would be prejudiced by separate proceedings in the representation case. In its brief, Respondent requests that this ruling be reconsidered, but asserts no further factual or legal basis therefor. Upon further consideration of the matter, I am satisfied that the original ruling was correct and it is affirmed.

Upon the entire record in this case, and after due consideration of the briefs filed by the General Counsel and the Respondent, the Trial Examiner makes the following:

### FINDINGS AND CONCLUSIONS

#### A. *The Issues*

Respondent discharged the eight employees involved herein because of alleged misconduct during a strike at Respondent's plant. It is indicated that these eight and others cast challenged ballots in a representation election conducted by the Regional Director on June 4, 1970 (all dates hereinafter in 1970 unless otherwise noted). The General Counsel asserts that these discharges violated the

Act and should be set aside. He does not request an order requiring reinstatement or backpay. The principal issues to be resolved are: (1) whether the eight employees engaged in misconduct in connection with the strike justifying their discharge, and (2) whether the discharge of one employee, Frank Miller, Jr., occurred more than 6 months prior to the filing of the original charge in this matter, barring the Board, under the provisions of Section 10(b) of the Act, from finding that discharge to be in violation of the Act.

#### B. *Background*

On June 6, 34 employees of Respondent in an appropriate unit represented by the Union went on strike. The strike continued current at the time of the hearing in this matter. On June 12, Respondent secured an injunction from the Law and Equity Court of Shelby County, Alabama, in an *ex parte* proceeding (later affirmed by the Supreme Court of Alabama, 242 S.2d 658), restraining the Union, certain named strikers, and others unnamed, in essence, from maintaining more than four pickets at Respondent's premises, obstructing, or by any restraint, coercion, intimidation, or force impeding or interfering with ingress to or egress from Respondent's premises. Because of various activities, considered hereinafter, occurring on July 3, 29, 30, 31, and August 1, Respondent discharged each of the striking employees with whom we are here concerned, advising each of them, by letter, that the basis for the discharge was "your overt and flagrant violation of the injunction," otherwise unspecified.

On August 5, Respondent filed petitions with the Law and Equity Court for contempt citations against each of these employees specifying the conduct complained of. Respondent's counsel stated at the hearing that the statements in these petitions "in sum and substance" set forth the basis upon which each was discharged. Suggestions at the hearing and in Respondent's brief of other bases for the discharges will be considered hereinafter. According to Respondent's counsel, not disputed by the General Counsel, these petitions for contempt citations are being held in abeyance by the court pending further complaints as to similar conduct on the part of the employees on strike.

On a date not shown in the record, during the strike, Respondent filed a petition with the Regional Director, in Case 10-RM-559, for an election to determine whether the employees desired the Union to continue to represent them. Pursuant to an agreement between the Respondent and the Union as to the terms of the election, the Regional Director conducted a secret ballot election in the appropriate unit on January 20, 1971. A majority of those voting cast ballots against the Union, which filed timely objections to the conduct of the election, including an objection that the agent conducting the election had refused to permit 10 discharged employees to vote, although the agent had been advised that the Union intended to file charges with the Board claiming that the discharges were in violation of the Act. On appeal from the Regional Director's decision finding the objections without merit, the Board reversed as to the ground noted above and ordered a new election. *Alabaster Lime Company*, 190 NLRB No. 113. A new election was conducted on June 4, 1971, and, according to

the statement of the General Counsel, the Regional Director is presently investigating certain challenges to voters and Respondent's objections to the election.

### C. *The Discharges*

The following findings of fact are in substantial part based on credibility resolutions reached after careful consideration of the testimony of all of the witnesses, the probabilities inherent in the situations presented, and, in particular, the impression made upon me by the demeanor of the witnesses at the hearing. Testimony inconsistent with the following findings is discredited.

#### 1. Frank Miller, Jr.

Respondent's petition to cite Miller in contempt of court asserts as the ground of his misconduct that on July 3, he "did prevent five of complainant's employees . . . from crossing the picket line and working at complainant's plant as they had previously done during the strike." This was the basis for Miller's discharge. Respondent's evidence is that Miller and another striker were seen talking to an outside trucker at the picket line and the trucker thereafter refused to cross the line, on the date in question, and, on the same date, five employees who had previously worked requested a supervisor to bring them their checks as they no longer would cross the picket line. Neither the truckdriver nor the five employees were produced as witnesses. Miller insisted that he merely requested employees and truckers to respect the picket line, and engaged in no other conduct which would restrain those persons from entering the plant. Miller's testimony is credited.

Where an employee engaged in a lawful strike is discharged for alleged misconduct in connection with that strike, denied by the striker, such discharge may be justified only if it can be shown that the employee, in fact, engaged in such misconduct. *N.L.R.B. v. Burnup & Sims, Inc.*, 379 U.S. 21. Obviously, no showing of misconduct justifying the discharge of Miller appears here. Respondent contends, however, that Miller was discharged prior to June 25, and thus more than 6 months prior to the date that the original charge in this case, thus barring a finding that the discharge violated the Act. The facts are set forth below.

Respondent, on July 8, sent Miller a registered letter, addressed to him at "General Delivery, Alabaster Alabama," advising that he was discharged immediately for violating the injunction of the court. Respondent's witness, Charles H. Fortner, testified that the unopened letter was returned to the Respondent by the post office, on a date he does not remember, with the notation "unclaimed," and with the date "July 23, 1970" stamped thereon. Miller denied that he refused any letter from the Respondent and referred to one letter he had previously received from the Respondent while on the picket line. Miller receives his mail at the Post Office Box 495. He testified that he went to the post office infrequently, and irregularly, to check on his

mail, stating that it was more normal for his wife to go. There is no evidence as to why Respondent sent its letter to Miller addressed to "General Delivery" rather than his box number, or that the post office ever notified Miller that it was holding a letter for him.

After the post office returned the letter addressed to Miller, Fortner states that he had two employees, on a date he does not recall, take the letter to Miller's home, where the latter's 11-year old daughter signed an undated receipt for it. Neither of the two persons who finally delivered the letter testified. Miller recalled receiving it about the middle or latter part of July.

In the absence of any other explanation, it is inferred that the stamped date, July 23, 1970, was placed on the envelope by the post office and that the letter was, therefore, in the hands of the post office on that date. The record is silent, however, as to when this envelope was returned to Respondent, or as to how soon after its return it was taken to Miller's house.

For the purposes of the running of the statute of limitations, the cause of action arising out of Miller's discharge arose at the time he was advised (actually or constructively) of his discharge.<sup>1</sup> Of course, if Miller deliberately put himself in a position of avoiding notification, as by refusing the letter sent by the Respondent, I would have no doubt that he must be held to have received notification at that time. However, Miller denies refusing the letter, and the post office marking indicates only that it was unclaimed, not refused. The fact that the post office held the letter for approximately 2 weeks supports that conclusion. Though Miller was aware that other employees had been discharged, this does not establish that he knew he was to be discharged or that such letter awaited him at the post office.

The burden of showing that the discharge letter was delivered to Miller's home on July 23 or 24, which would be outside the statutory 6-month period, rather than on July 25 or thereafter, rests with the Respondent. See 9 Wigmore, *Evidence* §2538 (3d ed.). Neither Fortner's testimony, nor the record as a whole, indicates that the earlier rather than the later dates are correct. Respondent did not produce the two employees who delivered the letter, or account for their absence. In this situation, it is found that the allegations of the complaint relating to Miller's discharge are not barred by Section 10(b) of the Act, and, upon the record as a whole, Respondent, by discharging Frank Miller, Jr., allegedly for misconduct in connection with the strike, violated Section 8(a)(1) of the Act. Inasmuch as the discharge would have the inevitable effect of discouraging membership in and activities on behalf of the Union, I find that the discharge further violated Section 8(a)(3) of the Act.

#### 2. Harold D. Cummings

Respondent's petition to cite Cummings in contempt of

<sup>1</sup> Respondent asserts that "the date an employer discharges strikers and mails them registered letters, constitutes the date on which the statute [of limitations] begins to run," citing *N.L.R.B. v. Textile Machine Workers*, 214 F.2d 929 (CA 3) (br., p. 21). That case however, was not concerned with, and did not decide, whether the date of mailing or the date when the employee was advised of the employer's action started the running of the

statute. It is therefore inapposite to the issue involved here. But see *N.L.R.B. v. Shawnee Industries, Inc.*, 333 F.2d 221, 224 (CA 10), agreeing with the Board that as to an applicant for employment, "the limitation period begins when the facts of [the] discriminatory hiring policy became known to [the] applicant."

court asserts as the ground of his misconduct that on July 29, he, "while riding in a motor vehicle on old Highway 31 between Alabaster and Calera, in Shelby County, Alabama, did make threatening gestures with a rifle or shotgun to one of complainant's employees." This forms the basis Cummings's discharge. On the stated date, Cummings, one of the strikers, was riding with another person, Larry Crocker, not then employed by Respondent, in a pickup truck. The truck had a gun rack at the back of the cab, with a rifle in the rack. Crocker was driving the pickup truck. The truck passed a station wagon driven by Joe E. Anderson, a nonstriking employee of Respondent, with his wife and children therein, at normal speed, and, contrary to Anderson's wife, without particular incident. The truck later turned off into a bumpy side road. At some point, while the truck was within the sight of the Anderson station wagon, the rifle was taken out of the rack and placed on the seat, or floorboard, of the truck. It was not held outside the cab of the truck or intentionally pointed at the Andersons. This was the entire incident. On August 3, Respondent sent Cummings and six other strikers letters notifying them of their discharges because of conduct asserted to be in violation of the injunction, as noted above. Cummings refused to accept his letter, which was delivered to his home, and it was read to him in November at a meeting between the Union and Respondent. There is no issue as to the timeliness of the charges filed in respect to Cummings' discharge.

On the basis of the above and the record as a whole it is found that Cummings did not engage in the misconduct during the strike for which he was discharged, and that Respondent, by discharging Harold D. Cummings for alleged participation in such misconduct therefore violated Section 8(a)(1) and (3) of the Act.

### 3. Horace E. Massey

Respondent asserted in its petition for contempt citation against Massey, another of the strikers, that he, on July 31, "did drive his automobile, containing several passengers, by the picket line and threatening language was heard emanating from said automobile; and such actions threatened and intimidated employees of [Respondent] while they were leaving [Respondent's] lime plant." This, as discussed hereinafter, was the only basis for his discharge.

Very late on the evening of July 31, Massey, with his wife and some friends, was driving away from the picket line in front of the plant and towards the post office in Alabaster when he passed two cars coming toward him. The first was driven by Frank Rikard, a supervisory employee, and the second by Steve Wheat, a nonstriking employee of Respondent. These two had left the plant by skirting a blocked side entrance of the plant, driving over railroad right of way to a city street. Rikard asserts, and the Masseys deny, that as their cars passed a jeer, described by Rikard as "A-h-h-h," emanated from the Massey vehicle. Massey continued on and turned into the post office to which he was proceeding. Wheat heard nothing and noted nothing out of the ordinary in respect to the passing Massey car. As described hereinafter, almost immediately thereafter, Wheat then became involved in an incident with two other employees.

The following night, August 1, Wheat spoke with Massey at the nearby police station, at which time Massey, in the course of their conversation, told Wheat, in the words of the latter, that "they were going to stop them scabs from coming through," or, as Wheat later said, "he wasn't going to let them—let us in no more." The record does not indicate any other activity of Massey, however, allegedly interfering with ingress to or egress from Respondent's premises. Notwithstanding Respondent's contention that this latter comment by Massey to Wheat formed part of the basis for Massey's discharge, the record is convincing that Respondent's management was unaware of it when Massey's discharge letter was dispatched on August 3, and that it did not figure in his discharge. On August 3, Respondent's counsel interviewed and took a statement from Wheat, and apparently others, which clearly formed the basis for the discharges. Wheat did not include this incident in his statement, and is not certain when he first disclosed it to Respondent. It is not mentioned in the petition to have Massey cited for contempt, filed on August 5, where it would certainly have been mentioned if known. Although Respondent suggested that Fortner, the author of the discharge letters, would testify as to this point, he did not testify as to the basis of Massey's discharge.

The alleged jeer at Rikard, if made, would not constitute misconduct justifying discharge of a striker, even if it were heard by a rank-and-file worker. In this case there is no contention that it was heard by anyone other than a supervisor. The comment to Wheat made the following night, as found above, was not a basis for the discharge, but clearly an after event now asserted to support Respondent's action. Even so, the comment, as reported by Wheat, is rather general and unspecific. Nor is it shown that Massey engaged in any such activity. If relevant to this proceeding, I would not find that this comment without more constituted misconduct justifying discharge of a striker.

On the basis of the above, and the entire record, it is found that Respondent, by discharging Massey for allegedly making a jeering noise at Frank Rikard, interfered with, restrained, and coerced its employees in the exercise of their rights under Section 7 of the Act, and thereby violated Section 8(a)(1) and (3) of the Act.

### 4. Frank I. Washington, Jr.

Respondent asserted in its petition to have striker Washington held in contempt that on July 30, he "did threaten one of [Respondent's] employees with physical harm and violence, while said employee was attempting to take photographs of the picket line which had more than four pickets; and on . . . July 31, 1970, did participate in an automobile chase on public roads . . . to threaten two of [Respondent's] employees who were attempting to leave [Respondent's] plant, with physical violence and harm."

On the evening of July 30, Supervisor Rikard decided to take a photograph of the picket line because he considered that there were more than four pickets there at the time. About 11 p.m., he drove out of the plant and pulled up to one side of the picket line, shining his headlights directly upon picket Washington, who came over to Rikard's car, opened the door, and asked what Rikard was doing. When Washington ascertained that Rikard had taken a picture,

Washington told Rikard that he had no right to do that, that Washington would whip his "a—" for doing so, and attempted to seize the camera, which was then on the seat of the car. Rikard put the car in reverse, dragged Washington several feet before he was completely out of the car, closed the door, and went back into the plant.

On the following night Washington was present at the Alabaster Shopping Center during an incident described hereinafter, but in which he did not otherwise participate.

I find that Washington did not engage in misconduct sufficient to justify his discharge in these circumstances. Picture taking during a strike by either side is normally a provocative action. In this particular case, Rikard drove off Respondent's property, late at night, parked his car with headlights shining upon the pickets, and proceeded to photograph them. Washington responded instinctively and abruptly. The incident was quickly over, with Washington undoubtedly experiencing the more physical damage. Such physical encounters are not to be condoned, but in the circumstances, and in the absence of any other misconduct attributable to him, this momentary exhibition of overexuberance at the picket line should not be sufficient to disqualify Washington for further employment with Respondent. As discussed immediately hereinafter, it is further found that Washington did not participate in misconduct as alleged on the following night, July 31.

For the reasons stated, and upon all the facts, it is found that Respondent, by discharging Frank I. Washington, Jr., for alleged misconduct during the strike, violated Section 8(a)(1) and (3) of the Act.

#### 5 and 6. Bobby E. Sammons and Dean Whitner

Respondent's reasons for discharging these two striking employees arise from the same incidents and will be considered together. The petitions to have them judged in contempt read alike, that each of them on July 31, "did participate in an automobile chase on public roads . . . and the purpose of said automobile chase was to threaten, with physical harm and violence two of [Respondent's] employees who were attempting to leave [Respondent's] plant; and on . . . August 1, 1970, did assault and beat one of [Respondent's] employees while he was attempting to leave [Respondent's] lime plant." The incidents will be considered separately.

*The incident of July 31:* As noted above, about 11 p.m., on this evening, employee Wheat left Respondent's plant by a circuitous route in his car, following the car driven by Supervisor Rikard. As Wheat turned off the street on which the post office is located, he noted that he was being closely followed by another car. He states that through his rear view mirror he noted one person hanging out of the window of the car, whom he identified as Whitner, making swinging arm motions, followed by noises as his car was struck, as by rocks. Wheat speeded up, and following Rikard, turned into the parking lot of the local shopping center, which was otherwise deserted. Wheat stopped his car and started to get out. The car which had been following Wheat stopped, and Whitner and Sammons got out of that car and started

toward Wheat. Rikard pulled his car between Wheat and the other two, and shouted to Wheat to go get the police. Whitner called to Sammons to get Wheat before he got away. Wheat quickly drove away and went back to the plant, entering by the main entrance. Before Wheat left the shopping center, Washington and another striking employee drove up in a pickup truck. These two got out of the truck, but otherwise did not participate in the incident. When Wheat drove away, Sammons and Whitner got in the car in which they had come and left. Washington and the other striker left in the pickup truck.

*The August 1 incident:* On this evening, after 11 p.m., employee Henry Edge drove out of Respondent's plant, with employee Steve Wheat and Supervisor Avery Hurt on the front seat beside him. There were about 10 to 15 pickets at or in the neighborhood of the picket line at the time. Whitner and Sammons, and perhaps some other unidentified pickets, had stones in their hands. Edge detoured somewhat to get around the pickets, when a stone flew through the open car window and hit him on the shoulder. Whitner and Sammons reached through the window and grasped Edge's arm and around his neck. One of them rubbed a stone along the side of his head. Hurt seized a hand revolver which Edge, who has a commission as a deputy sheriff, carried in his car, and shot it into the ground. Edge accelerated the car, Whitner and Sammons withdrew, and the car careened across the road and came to rest against a railroad embankment. The police came up in time to prevent any further incident.

There is no question but that Whitner and Sammons engaged in misconduct justifying their discharge. The chase of Wheat and the stoning of his car, as well as their menacing conduct on the shopping center parking lot were inexcusable acts of violence and intimidation.<sup>2</sup> This tendency to militant tactics to accomplish their purposes was further confirmed the following night in the assault on Edge and those riding in his car. It will be recommended that the allegations of the complaint that Respondent violated the Act by discharging Dean Whitner and Bobby E. Sammons be dismissed.

#### 7 and 8. Ossie Lee Allen and Lawrence Carter

According to Respondent's petition to have these two men cited in contempt, each was present on the picket line on August 1, at a time that there were more than four pickets and acts of violence occurred, and that at that time Allen carried a chain, and Carter carried a stick or rod, allegedly in intimidation of employees entering or leaving. On the night in question, when the incident involving Edge, Wheat and Hurt occurred, as described above, Carter was at the picket line carrying a flexible stick which was referred to as a cane or walking stick. Allen was carrying a chain described as a "log chain" about three-eighths inch in diameter, and about 4 feet long. These men engaged in no other alleged misconduct.

I do not agree with Respondent that mere presence on or at the picket line at a time that misconduct occurs, without more, implicates a striker in the misconduct. Nor do I agree

<sup>2</sup> In the absence of any evidence that Washington engaged in a chase of Wheat or Rikard, or engaged in any intimidatory conduct on this occasion, or that Washington was engaged in a common course of conduct in this

instance with Sammons and Whitner, I do not find that Washington engaged in misconduct disqualifying him from employment merely because he appeared on the scene while this incident was taking place

that presence on or at the picket line at a time when more than four pickets were there, allegedly in violation of the injunction of the court, in and of itself constitutes misconduct under the decisions which have passed on like conduct under the Act. See *N.L.R.B. v. Cambria Clay Products Company*, 215 F.2d 48, 54 (C.A. 6). Whether the court's injunction has been violated is for the court, not the Trial Examiner. It is noted that the court has reserved judgment on these matters.

Respondent made no attempt to prove, and the record would not sustain a finding that there was a plan or conspiracy among the strikers to impede ingress to or egress from the plant that evening. Massey's remark to Wheat, discussed above, raises a suspicion, but that was purely hearsay as to the fact. In these circumstances, I do not believe that the carrying of a flexible stick, variously described as a cane or walking stick, on the picket line should be considered necessarily intimidatory, or misconduct on the part of Carter in the absence of any other untoward conduct. I have a completely different reaction toward the chain carried by Allen. There does not appear to be any valid reason for carrying such a chain on the picket line, and I find Allen's action inherently intimidatory.

On the basis of the above, and the record as a whole, I find that Carter's conduct did not constitute misconduct justifying his discharge, and that Respondent, by its discharge of Lawrence Carter for his conduct during the strike therefore violated Section 8(a)(1) and (3) of the Act. Having found that Allen did engage in misconduct which justified Respondent's action, it will be recommended that the allegations of the complaint with respect to Ossie Lee Allen be dismissed.

#### 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. By discharging Frank Miller, Jr., Horace Massey, Frank I. Washington, Jr., Lawrence Carter, and Harold D. Cummings for alleged misconduct during a lawful strike, Respondent violated Section 8(a)(1) and (3) of the Act, which unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.
4. Respondent did not engage in unfair labor practices in violation of the Act in discharging Bobby E. Sammons, Dean Whitner, and Ossie L. Allen.

#### THE REMEDY

It having been found that the Respondent has engaged in

<sup>3</sup> In the event no exceptions are filed as provided by Sec 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

<sup>4</sup> In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by

unfair labor practices in violation of Section 8(a)(1) and (3) 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.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I issue the following recommended:<sup>3</sup>

#### ORDER

Respondent, Alabaster Lime Company, Inc., its officers, agents, successors, and assigns, shall:

##### 1. Cease and desist from:

(a) Discouraging membership in, or activities on behalf of United Steelworkers of America, AFL-CIO, or any other labor organization, by discharging employees for engaging in a strike or other concerted activity protected by the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed in Section 7 of the Act.

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

(a) Cancel, withdraw and rescind the discharges of Frank Miller, Jr., Horace E. Massey, Frank I. Washington, Jr., Lawrence Carter, and Harold D. Cummings, heretofore made, and remove any reference to such discharges from Respondent's records, and notify each of these employees immediately by personal letter of such action.

(b) Post in conspicuous places at its operations located at Birmingham, Alabama, copies of the attached notice marked "Appendix,"<sup>4</sup> a signed copy of which shall also be sent by mail to each of Respondent's employees who went on strike on June 6, 1970, and to the Union, at addresses to be furnished by the Regional Director. Copies of said notice, on forms provided by the Regional Director for Notice 10, after being duly signed by Respondent's authorized 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 Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 10, in writing, within 20 days from the receipt of this Decision, what steps have been taken to comply herewith.<sup>5</sup>

Except to the extent found herein, the allegations of the complaint that the Respondent violated the Act are dismissed.

Order of the National Labor Relations Board" shall be changed to read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

<sup>5</sup> In the event that this recommended Order is adopted by the Board after exceptions have been filed, this provision shall be modified to read: "Notify the Regional Director for Region 10, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith"