

In the Matter of MACKAY RADIO & TELEGRAPH COMPANY, A CORPORATION and AMERICAN RADIO TELEGRAPHISTS' ASSOCIATION, SAN FRANCISCO LOCAL No. 3

*Case No. C-16.—Decided February 20, 1936*

*Communications Industry—Interference, Restraint or Coercion: espionage; employment of strike-breaking agency—Strike—Employee Status: during strike—Discrimination: non-reinstatement following strike—Reinstatement Ordered, Strikers: discrimination in reinstatement—Back Pay: awarded.*

*Mr. Bertram Edises* for the Board.

*Mr. U. H. Merrick*, of New York City, and *Mr. Lawrence Livingston*, of San Francisco, Cal., for respondent.

*Mr. Stanley S. Surrey*, of counsel to the Board.

## DECISION

### STATEMENT OF CASE

On October 15, 1935, American Radio Telegraphists' Association, San Francisco Local No. 3, filed with the Regional Director for the Twentieth Region a charge that the Mackay Radio and Telegraph Company had engaged in and was engaging in unfair labor practices contrary to the National Labor Relations Act, approved July 5, 1935. On November 9, 1935, the Board issued a complaint against the Mackay Radio & Telegraph Company, hereinafter referred to as the respondent, said complaint being signed by the Regional Director for the Twentieth Region and alleging that the respondent had committed unfair labor practices affecting commerce within the meaning of Section 8, subdivisions (1), (2) and (3) and Section 2, subdivisions (6) and (7) of the National Labor Relations Act. In respect to the unfair labor practices, the complaint<sup>1</sup> alleged, in substance:

1. The respondent, through its agents and employees, during the period approximately October 7, 1935, to October 10, 1935, refused to reemploy A. B. Loudermilk, P. D. Phelps,<sup>2</sup> L. K. Bash, L. N. Rone and G. E. Palmer, operators employed by the respondent at its San Francisco office, for the reason that each had joined and assisted a

<sup>1</sup> The complaint was amended during the hearing on the case so as to make a few of the allegations conform to the proof there adduced. The respondent acquiesced in these amendments.

<sup>2</sup> Erroneously referred to in the complaint as "P. K. Phelps".

labor organization known as American Radio Telegraphists' Association, San Francisco Local No. 3, said refusal being contrary to Section 8, subdivisions (1) and (3).

2. The respondent, by its agents and employees, during the period approximately October 7, 1935, to October 10, 1935, did initiate and form a labor organization or plan and did dominate and interfere with the administration of said labor organization or plan and contribute financial and other support thereto contrary to Section 8, subdivisions (1) and (2).

The complaint and accompanying Notice of Hearing were served on the parties in accordance with Article V of the National Labor Relations Board Rules and Regulations—Series 1. The respondent filed an answer to the complaint admitting the allegations regarding the nature of its business but denying the allegations with respect to the unfair labor practices. Commencing on December 2, 1935, and concluding on December 20, 1935, a hearing was held at San Francisco, California, by Henry Eickhoff, Jr., the Trial Examiner designated by the Board, and testimony was taken. Full opportunity to be heard, to examine and cross-examine witnesses and to introduce evidence bearing upon the issues was afforded to all parties. The respondent at the outset moved to dismiss the complaint on constitutional grounds. It then participated in the hearing and at the close of the Board's presentation of evidence moved to dismiss the complaint on the ground of failure of proof. This motion was denied.

On December 19, 1935, the Board, pursuant to Section 35, Article II of its Rules and Regulations, directed that the proceeding be transferred to and continued before it. The Board denied a motion by the respondent to submit the case to the Trial Examiner with directions that he prepare and file an intermediate report. On January 20, 1936, counsel for the respondent pursuant to his request orally argued the case before the National Labor Relations Board, all members being present. Upon the entire record in the case, including the stenographic transcript of the hearing, the documentary and other evidence received at the hearing, the briefs submitted, and the oral argument, the following findings of fact are made.

## FINDINGS OF FACT

### I. MACKAY RADIO & TELEGRAPH COMPANY

The Mackay Radio & Telegraph Company is a California corporation engaged in the receipt and transmission by telegraph, radio and cable of national and international communications. Its principal office on the West Coast is in the city of San Francisco and it has other offices in Oakland, Los Angeles and San Diego, California;

Portland, Oregon; Seattle and Tacoma, Washington; Honolulu, Hawaii, and Manila, Philippine Islands. In the course and conduct of its business at these offices, the respondent receives and transmits telegraph, radio and cable messages from and to states and territories of the United States, including the State of California, and foreign countries. Its business is thus that of the continuous transmission of intelligence among the states of the United States, its territories, and foreign countries by means of a highly developed and integrated communications system. The respondent maintains an operating office in San Francisco which in Mackay parlance is known as the HB office and also a branch office in the Stock Exchange Building. Some of the circuits operated at the HB office are as follows: San Francisco to Los Angeles, San Francisco to Portland, San Francisco to Seattle, San Francisco to Honolulu, San Francisco to New York, San Francisco to Tokio, San Francisco to Shanghai. The radio and telegraph operators employed at the HB office are the persons who receive and transmit messages on these circuits.

The vice-president in charge of operations for the respondent is Ellery Stone, whose office, and that of the President, is in New York City. H. L. Rodman is the General Superintendent of the respondent and is actively in charge of its operations on the Pacific Coast. Stone and Rodman are in daily communication with each other regarding the operating problems of the respondent. The secretary of the respondent, Captain Edwin H. Dodd, who has his office in San Francisco, is Rodman's assistant for traffic operations and is also the purchasing agent. Andrew Jorgensen is the traffic manager in immediate charge of the HB operating force and reports to Captain Dodd. He has authority to hire and discharge operators and exercises daily supervision over the men. Three or four supervisors assisted Jorgensen in the conduct of the HB office. The metropolitan manager for San Francisco is F. L. Dewey, who is in charge of the commercial side of the work and the solicitation of customers. He supervises the Stock Exchange office.

## II. THE FORMATION AND ACTIVITY OF THE SAN FRANCISCO LOCAL OF THE AMERICAN RADIO TELEGRAPHISTS' ASSOCIATION

### *A. Formation and activity of the local*

The American Radio Telegraphists' Association, hereinafter referred to as ARTA, is a nation-wide labor organization which numbers radio operators among its members. The San Francisco Local of this organization, hereinafter referred to as the Local, was organized in the early part of 1934. The Local was divided into two divisions, one composed of the marine radio operators and the other of the land or point to point operators. The point to point division

was divided into three groups, each composed respectively of all those members who were operators employed by one of the three large communications companies operating on the Pacific Coast. One of these three groups was thus confined to the operators of the respondent employed in its San Francisco offices.

The number of respondent's operators who were members of the Local grew steadily in the ensuing months. As the Local thus increased in strength it commenced to negotiate with the respondent. In June 1934 a committee from the Local representing the Mackay group therein met with Tuel, then vice-president of the respondent, to discuss its demands for increased wages and certain working conditions in the HB office. Some of these demands were granted; final decision on the others was postponed until January 1935 at the respondent's request and then they were refused.

In September 1934 the San Francisco Local sent one of its members, Loudermilk, to New York for about a month to aid in the ARTA organization of the Mackay operators in that city in an attempt to prevent undermining of the San Francisco wage scale by payment of a lower scale in New York. In February 1935 an Administrative Committee of the Local was appointed for the purpose of contacting all of the operators in the Mackay system,<sup>3</sup> ARTA members and nonmembers, to ascertain their views on wages and working conditions. A lengthy questionnaire which covered these matters in detail was sent to the Mackay operators. After the receipt and compilation of this material, members of the local prepared a general agreement concerning wages and working conditions for the entire Mackay point to point system. This agreement was sent to all of the ARTA locals and ratified by them. It was then presented by the national officers of ARTA to the Mackay officials in New York in June 1935. They requested and were given more time in which to consider the agreement in view of contemplated bankruptcy proceedings that might affect the Mackay companies. The agreement was again presented in September 1935. The national officers of ARTA had requested that the Local send O. M. Salisbury to New York to assist them in the negotiations since they were not too familiar with point to point conditions. Salisbury, who was chairman of the point to point division of the Local and an operator employed in the HB office, went East for this purpose. He

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<sup>3</sup>The Mackay Radio & Telegraph Company of California, the respondent herein, is a subsidiary of a Massachusetts voluntary trust having the name "Mackay Companies". More than 99% of the preferred and common stock of that trust is owned by the Postal Telegraph and Cable Corporation, a Maryland corporation, all of whose common stock is owned by the International Telephone and Telegraph Corporation. There are a number of Mackay offices in the Eastern and other portions of the United States which are operated by the Mackay Radio & Telegraph Company of Delaware. Stone is also the vice-president in charge of operations for the Delaware concern. The term "Mackay" when used in the decision, unless the context indicates the contrary, refers to the entire Mackay system and thus includes all of the officers and operators in that system.

was given a leave of absence, the reason for the trip being clearly understood by the respondent. At the same time, at a meeting of the Local held prior to September 1935, the members voted in favor of a strike if such action became necessary to support their demands.

The marine operators had also presented the Mackay companies with a system agreement. On September 13, Salisbury wired Bash, who was chairman in his place, that while the Radio Corporation of America had signed such a marine agreement, Mackay had refused and was recommending non-ARTA marine operators to the steamship companies. He suggested a special meeting to consider joint action on the two agreements. Rathborne, Secretary of the Local, Bash and Russ, who was marine superintendent of the respondent, conferred that morning on the question of recommending non-ARTA operators but reached no agreement. Stone, the new vice-president in charge of operations for the respondent happened to be in San Francisco that day. In the afternoon a number of marine operators and ARTA members of the point to point Mackay group of the Local conferred with Stone. The marine agreement was discussed to some extent, Stone pointing out defects in the agreement RCA had signed. The point to point ARTA operators stated that they were considering joint action on the two agreements. Stone replied that he was taken by surprise and requested time to return to New York to study the point to point agreement. The request was granted. That evening a joint meeting of the marine and point to point members was held and a resolution adopted to the effect that the two divisions should unite for joint action on the two agreements, so that one could not be adopted to the exclusion of the other, and that the Mackay officials should have until September 23 to execute the agreements unless the ARTA officers negotiating such agreements believed negotiations were proceeding in a satisfactory manner. The vote was overwhelmingly in favor of the resolution, only three or four voting against it. In view of the strike vote taken at the meeting prior to September 1, the action taken at the September 13 meeting was really the fixing of a deadline at which the ARTA officers could call a strike if they deemed one necessary. At this time nearly all of the HB operators were members of the Local. As the ARTA admitted supervisory officials to membership, some of the supervisors in that office were also members.

#### *B. The October 7-8 strike*

On October 4 the ARTA negotiators in New York decided that a strike was advisable in view of the unsatisfactory state of the negotiations. Salisbury telephoned the Local and a meeting of the point to point group was held that evening. The strike had been set for 12 o'clock midnight, San Francisco time, and was to be nation-wide

over the Mackay system. A strike committee for San Francisco was appointed at the meeting. At midnight all of the HB office force then on duty went on strike, with the exception of the official in charge. The strike was conducted in an aggressive fashion. Picketing was commenced and continued during the entire strike, but in a peaceful fashion. With the exception of one or two men, the entire force, including the supervisors joined in the strike. They were joined by the men at the nearby transmitting stations at Palo Alto and Lobitos.

Elsewhere the strike was not so successful. It was planned and called on a nation-wide basis but the response varied. The strike at Seattle lasted for only a few hours. Only one man went on strike in Los Angeles. No one walked out at the Mackay offices in Washington, D. C.; New Orleans, Louisiana; West Palm Beach, Florida and Rockland, Maine. A few went on strike in Chicago but their action was ineffectual. In New York the operators remained on strike for a few hours but by October 5 most of them had returned to work. However, the men in the New York receiving and transmitting stations remained on strike for a longer period. Only at Portland, Oregon was the strike as effective as at San Francisco.

The respondent immediately concentrated its facilities in an attempt to reopen the San Francisco office and maintain its communication channels. The transcontinental operations were to be continued by relaying messages through Los Angeles. The coastwise service was being handled on Morse wires leased from another company. The respondent could thus dispense with radio operators on these circuits. However, radio operators were needed to maintain the trans-Pacific circuits. The respondent decided to meet this problem by having employees transferred from other stations, and operators from the Los Angeles office were dispatched at once to San Francisco. On Monday, October 7, a plane left New York with seven operators from that office. Two more operators were taken on the plane at Chicago.

Strike enthusiasm was maintained in San Francisco throughout Saturday and Sunday, October 5 and 6. But Monday brought discouragement and the ranks commenced to waver. Disheartening rumors were prevalent—the respondent was going to abandon the coastwise circuits entirely, the New York operators had let them down, and so on. The men knew of the presence of the “strikebreakers” from Los Angeles and of the plane that was bringing more from the East. At a meeting held in the ARTA hall Monday afternoon some of the members—McLaughlin, a supervisor, and Spanover, an operator—urged the men to return now to save their jobs. Only the persuasion of more militant voices prevented a decision then and there to abandon the strike. That evening Loudermilk called Salisbury in New York and after a brief discussion of the general situation, ad-

vised him to contact Stone next morning to arrange a return to work pending further negotiations. But on Monday night the strike was still on and the question of returning to work at San Francisco had been deferred until the regular morning meeting of Tuesday.

As Hatch, the chief electrician of the HB office and a union member, left the ARTA hall that Monday evening he met Burtz, an operator also on strike. Hatch confided his belief that the strike was lost and suggested that they call Jorgensen, the traffic manager and the person in charge of the HB operating room, to see if the men could return to work. Burtz agreed and the two spoke to Jorgensen, who was at the office, on the telephone. This was about ten o'clock in the evening. Jorgensen said that the men could come back if they returned in a body. Hatch then agreed to call the men together if Jorgensen would supply him with a list of telephone numbers and addresses. At Hatch's suggestion it was decided that the three would meet in his apartment at once. Jorgensen arrived in half an hour with a list of the operators in the HB office. He said that certain of the strikers would have to make out applications for reemployment to be passed on by Stone in New York and proceeded to check eleven names on the list. Hatch referred to the resulting list of eleven as a blacklist, using however a more descriptive but less polite expression. He then suggested that he would at once call the men to a meeting at the Bellevue Hotel and asked Jorgensen to be present to state the company's position. It was understood by all that this was a meeting of the men as HB employees and not as union members—the ARTA was out of the picture for the purposes of the meeting. On his way to the hotel Burtz notified McLaughlin of the meeting.

At the hotel Jorgensen arranged for a suite of two rooms. Hatch and Burtz proceeded to telephone as many of the operators as they could<sup>4</sup>—with an important exception. Hatch decided not to notify the eleven on the special list. He testified at the hearing that as the men at the meeting would have to vote on returning to work without these eleven he thought that their presence at the meeting might be embarrassing. He notified Jorgensen of this decision and the latter acquiesced. In addition, although Jorgensen saw Loudermilk, who was on the list, at the hotel before the meeting had commenced he did not tell Loudermilk that a meeting was to be held. Jorgensen in the meantime had arranged for a detail of police to be present at the hotel in case trouble arose.

It was now about 2 or 3 A. M. in the morning. At about 4:30 A. M., when 36 operators had finally arrived, the meeting got under

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<sup>4</sup>Jorgensen about a week later reimbursed Hatch for the telephone calls. The hotel on December 13 sent a bill for the rooms to Jorgensen as traffic manager of the Mackay Company. The bill had not been paid at the time of the hearing.

way. Hatch nominated Burtz for chairman but Burtz declined. Hatch then nominated McLaughlin and upon his acceptance the men confirmed the choice. McLaughlin stated that he understood the meeting was called to decide whether the men desired to return to work. He then called on Jorgensen to state the company's position. Jorgensen who had been standing in the next room near the open doorway between the two rooms stepped forward. He said that the strike would be forgotten and that all could return to work—with the exception of eleven men who had to file applications for reemployment which would be sent to Stone for approval. The list of eleven was then read twice—York, Palmer, Bash, Salisbury, Rone, Loudermilk, Patterson, Humphries, Dwyer, Westcott and Hardin.<sup>5</sup> General discussion ensued. Some of those on the list, including Loudermilk, York, Palmer and Patterson, had heard of the meeting from other sources and were present. Loudermilk pointed out that a vote to return to work would mean the jobs of the eleven on the list. It was finally decided that a two-thirds vote would govern and that the men on the list who were present could vote if they so desired. A vote was taken on the question of whether they should return to work—22 voted yes, 6 voted no and 8 failed to vote. Jorgensen then in effect said, "Let's all go back to work in a body". Most of the men went at once to the HB office and started to work. It was then about 6 A. M. in the morning. The news spread and other men reported to work in person or by phone Tuesday morning. The strike had collapsed in San Francisco. At one o'clock E. S. T. the ARTA vice-president in New York formally notified Stone that the nation-wide strike had been called off.

By late Tuesday afternoon all but four of the striking operators in San Francisco had returned to work. These four were Rone, Palmer, Bash and Loudermilk. That evening Palmer and Loudermilk applied for reinstatement and the other two made a similar request on Wednesday. All four were informed that no vacancies then existed but that they should fill out applications for reemployment which would be forwarded to Stone in New York. The four filled out applications which read, "please reinstate me in the HB Operating Force in my former position as Class A operator". Jorgensen forwarded the applications to Captain Dodd, his superior, stating:

"This application for employment, together with a number of others, which are being forwarded at the same time, is subject to final approval by Mr. E. W. Stone, Operating Vice-President.

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<sup>5</sup>This is the probable sequence of the names according to the record. As will be developed later, the main groupings are here important and the above appears accurate in that respect.

"There are no vacancies in the HB Operating force at present, and there were no vacancies at the time the applicant made his verbal application to me."

The applications were sent by Rodman, General Superintendent for the Pacific Coast, to Stone in New York, stating:

"Forwarded.

"In view of the fact that no vacancies now exist in the HB Operating force it is not recommended that Mr. Palmer be employed as requested by him.

"It is recommended that his application be placed on file and given consideration at such future time as any vacancies may occur in the HB Operating Room."

The applications were returned by Stone to Rodman, stating:

"Returned.

"Your recommendation is approved and there is no objection to favorable consideration being given this application when a vacancy occurs at San Francisco."<sup>6</sup>

The applicants were notified of their status. They have not yet been reinstated by the respondent. Jorgensen stated to one of them that he did not believe there would be any vacancy in the HB force at least until the summer of 1936.

### III. THE UNFAIR LABOR PRACTICES

#### A. *The discharges of the four HB operators*

The complaint alleges that these four operators were refused reinstatement because of their union membership and activity. The respondent denies this allegation and states that the men were refused reinstatement solely because at the times they applied there were no vacancies existing in the HB operating room. To arrive at a decision, we must first consider the chain of events that led to the placing of these men on the list of eleven, the circumstances surrounding their application for reinstatement and the nature of both their work for the respondent and their activities in behalf of the union.

#### 1. The discharges separately considered

*Rone.* Rone had entered the employ of the respondent in the spring of 1927 but had later left. He had resumed his connection with the respondent in January 1930 and had been with it ever since. He was a Class A operator on the basis of the respondent's classification

<sup>6</sup> Board Exhibits 4 (Palmer); 11 (Stone); 6 (Bash); 3 (Loudermilk)

system <sup>7</sup> and was earning the top salary of \$180 a month for an operator at the time of the strike. He had joined the ARTA Local at the time of its formation and ever since had been an active member and among the leaders in its activities. He was a member of the Administrative Committee which had contacted the Mackay operators as part of the preparation of a national agreement. Moreover, he had contacted the officials of the respondent many times in regard to union matters, including the conferences with Tuel in 1934 and with Stone in September 1935. During the strike he was a picket captain and was active in his duties, at one time visiting two of the supervisors at their homes and obtaining their applications for membership in the Local.

Rone did not attend the hotel meeting. At about seven o'clock Tuesday morning, October 8, he met McLaughlin and was informed by him that the men had returned but that he was on the blacklist. Rathborne, secretary of the San Francisco Local, informed him of conditions in general. Rone told him that he did not think that he, an officer in the Local, should apply for work until the other men had returned. Moreover, he had been informed that he was on the blacklist and thought he would not be reinstated. Consequently, Rone did not apply until about 3:30 o'clock Wednesday afternoon, October 9. Jorgensen then informed him that there were no vacancies and that he would have to sign an application for reemployment, which he then did.

*Bash.* Bash had been employed by the respondent since February, 1927. At the time of the strike he was a Class A operator receiving \$180 a month. He also was a charter member of the ARTA Local and one of its leaders. He was one of the three members of the Grievance Committee, or as it was later called, the Relations Committee of the Local that dealt with the respondent. When Salisbury went East, Bash became chairman of the point to point division in his place. He had participated in the Tuel and Stone conferences and during the strike was active in the picket line.

An operator informed him of the hotel meeting and he spoke to Burtz and later to Hatch by telephone at the hotel, both of the calls being made by him. Hatch said that it was an HB employees meeting on the question of returning to work and that Bash could neither attend nor vote. Whereupon Bash fainted. Next day York informed him of what had happened, stating that both were on the list but that he, York, had been temporarily employed. Bash thought he would be treated differently from York, since the latter was a supervisor. Bash was too ill to apply for work until Wednesday

<sup>7</sup> The HB operators are classified from Class A through Class E. The Class A operators are assigned to those circuits that demand first-class operators and are thus regarded by the respondent as its best operators.

October 9, when he saw Jorgensen at about 10 o'clock in the morning. The latter told him that there were no vacancies but that he could fill out an application and he did so. He was employed on a temporary job elsewhere at the time of the hearing and had then earned \$200.

*Loudermilk.* Loudermilk also was a Class A operator earning the top salary of \$180 a month. He had been with the respondent since 1933 and previously had spent seven years with RCA. He was probably the most active ARTA leader in 1934, being chairman of the point to point division and for a time a member of the Grievance or Relations Committee of the Local. He had conferred with Tuel in 1934 and later had made a trip to New York to aid in the organization of the ARTA Local at the office in that city. During this trip he had numerous contacts with the Mackay officials with respect to the conditions at the Chicago and New York offices and the operators there employed. He was not active in 1935 in the relations of the Local with the respondent because of some disagreement with the national officers of ARTA. He was on the picket line during the strike.

Loudermilk attended the hotel meeting. Prior to the commencement of the meeting Loudermilk and Jorgensen had a private conversation in which the former questioned him about the rumor that there was a special list. Jorgensen admitted that and when Loudermilk said he assumed he was on it, also admitted the correctness of the assumption. Loudermilk applied for work Tuesday afternoon accompanied by Palmer. They asked to see Rodman between 2 and 3 P. M. but were informed by his secretary that he was out. The other officials were not then in their offices so they left and returned about 5 P. M. Rodman avoided seeing them, telling his secretary he was too busy. However, they decided to wait. By chance, they met with Rodman in his office at about 6 P. M. and applied for reinstatement. Rodman told them they had to file applications which would be forwarded to Stone. Loudermilk asked Rodman what he thought of the chances of Stone's approving his application and he replied that they were not "very good. . . . The final decision on your application, and some others, is going to be made by Mr. Stone; and you must remember you have a national reputation. You are known in New York and in Chicago also as being a very active—or something of an agitator". Rodman in his testimony then added, "I may have put it a little stronger than that." Loudermilk thought that he did for he testified that Rodman said, "Well now, Loudermilk, why should he (Stone)—after all, you know you are the real leader—the ring leader of this organization. Why you are the No. 1 public enemy as far as we are concerned, you are the head of the list! Why you have a national reputation for causing us trouble!" After talking with Dodd and Jorgensen, one of whom told them that there

were no vacancies, they filled out applications, the time of application being placed at 9 P. M., October 8. At the time of the hearing Loudermilk had earned about \$245.99 through employment as a hosiery salesman.

*Palmer.* Palmer had been with the respondent since May, 1930. At the time of the strike he was a Class A operator receiving a salary of \$180 a month. One of the leaders of the Local, he was a member of the Grievance or Relations Committee in 1935 and had often met with the respondent's officials on union matters, including the two meetings with the vice-presidents, Tuel and Stone. He was a member of the Strike Committee and picketed during the strike. He was at the hotel meeting, having been notified of it by an operator. With Loudermilk he applied Tuesday afternoon, as described above.

Mention should be made of two of the other men on the list—Salisbury and York. The former was a Class A operator who also was a leader in the Local. He was the chairman of the point to point division of the Local and at the time of the strike was in New York assisting the ARTA officials negotiating with the Mackay officials. He did not apply for reinstatement since he was on leave of absence, but a short time before the expiration of that leave he asked to be permitted to resume his work in accordance with the understanding governing leaves with permission. He was required to answer a series of questions prepared by the respondent's attorney and forwarded to Rodman by Stone. These questions centered about his "loyalty" to the respondent in the light of his union affiliation and his views in regard to working conditions. In his answers Salisbury defended his union activity and stated that the respondent had shown a distinct "anti-labor attitude". But he knew of no reason why he could not give "undivided loyalty" to the respondent unless that term meant that he could not belong to a labor organization. The answers were sent to Stone. A day before his leave expired Rodman recommended to Stone that Salisbury should not be reinstated. Stone, who had the answers by that time, approved the recommendation and Salisbury was discharged. This occurred about the first of December, 1935.

York was a supervisor at the time of the strike. He was a fairly active union member, though not as active as the five leaders mentioned above. He was a member of the Administrative Committee and had also participated in the Tuel and Stone conferences. After his return to work he was demoted from supervisor to Class A operator with a \$10 reduction in monthly pay. There was apparently one more supervisor than was needed after the strike and York was the supervisor who was demoted although he was next to last on the seniority list of supervisors.

Returning to the above five operators on the list, Rone, Palmer, Bash, Loudermilk and Salisbury, the first four of whom are involved in the complaint in this case, we find that all are Class A operators. At the time of the strike, Loudermilk, Rone and Palmer were working on the San Francisco-New York circuit and Bash was on the San Francisco-Honolulu circuit. All five were efficient employees. Captain Dodd testified that of the five, Rone, Palmer, Salisbury and Loudermilk were good operators and Bash was fair but not in their class. Jorgensen said that these five were among his best operators, although he likewise thought Bash was not as capable as the others. McLaughlin, who supervised Bash, thought that he was a first class operator. At no time during the strike and in the period following it was their efficiency questioned. This group of five were the unquestioned leaders of the Local and its most active members. Their leadership and activity had become known to the respondent through repeated contacts with its officials.

2. The Respondent's testimony regarding the chain of events preceding the discharges

On Sunday, October 6, Rodman, General Superintendent of the respondent and in charge of operations on the Pacific Coast, conferred with Captain Dodd, the Secretary of the respondent and assistant to Rodman in charge of traffic operations. Rodman said that Stone had informed him that seven Mackay operators from New York and two from Chicago were to be sent to San Francisco. Any of these operators and any of the Los Angeles operators then in San Francisco who desired to remain permanently in San Francisco were to be allowed to do so pursuant to Stone's instructions. Rodman thought two of the Los Angeles operators desired to remain. Under these circumstances the belief was expressed that certain of the San Francisco operators would not be taken back when the strike was over.

On Monday afternoon, October 7, Rodman conferred with Jorgensen, who was in charge of the HB operating room under Dodd and Rodman. Rodman repeated to him what he had told Dodd the previous day. If all of the nine from the East remained in addition to the two from Los Angeles the HB office would not be overstaffed unless some of the San Francisco operators were not reinstated. Rodman stated: "Jorgensen, in such a case we will first take back the men that are most desirable, or most satisfactory to the company." The men in the HB room were then discussed for about an hour, their qualifications, operating ability and general desirability being considered. Rodman thought Jorgensen had a clear understanding as to which of the operators were most desirable to the respondent but

he took pains to impress upon him the idea that in deciding which men to reinstate, careful thought should be given to their general desirability and "overall general satisfaction" to the respondent as distinguished from their mere operating ability. No specific men were agreed upon but Rodman was "sure" Jorgensen understood him.

At about ten o'clock Monday evening Jorgensen received Hatch's phone call. He asked Hatch to wait and at once went into Rodman's office and asked, "if the men should want to return to work, should I take them back"? Rodman replied, "By all means. But remember, you are to take care of the men from New York and Los Angeles, but handle that in your own way." Jorgensen realized that he had to provide jobs for eleven men if the nine from the East decided to remain in San Francisco in addition to the two from Los Angeles. He decided to choose eleven of the San Francisco operators to whom only temporary employment would be given when the strike was over. If all of the eleven transferred operators decided to remain in San Francisco, these eleven San Francisco operators would have to be dropped. If only a few of the eleven chose to remain, then only a corresponding number of the San Francisco operators would not be reinstated and the temporary status of the remaining operators on the list of eleven would be changed to permanent employment. Those to be dropped in that event would be carefully selected from the entire list of eleven. In other words, the crux of the problem was the uncertainty as to the number of transferred operators that would remain. Since the total number transferred was eleven, Jorgensen decided that he must be prepared for the contingency that all might stay and hence to avoid the embarrassment of permanently reinstating some San Francisco operators and then being forced to drop them, he determined to give a temporary status to an equal number of San Francisco operators. But since it was more than possible that some of the transferred operators would not stay, as had been the case with the Los Angeles contingent, there would remain the problem of correspondingly paring down the list of eleven. This problem Jorgensen decided to leave for the future when the number became certain—he would then weigh each man on the list of eleven and only after such deliberate consideration would he determine whom to keep and whom to drop. His immediate concern was the list of eleven and to this task he turned his attention. He had only a short time—for he met Hatch in half an hour. It was too short a time to enable him carefully to consult the seniority list or the "error" list containing the number of errors per operator. But he had discussed the men with Rodman that day and he had been told that he was to pick those most desirable to the respondent on an "all things being considered" basis. So hurriedly he chose the eleven

whom he thought least desirable and then went to Hatch's house. There he marked them off on the list of the entire force.

Jorgensen testified that when he read the list of eleven at the hotel meeting and stated the restrictions applicable to those on the list he intended to convey the thought that all of the eleven were to return to active work at once along with the other men, but that their reinstatement would be temporary for a while. They would of course have to fill out applications to be passed on by Stone in New York. Jorgensen said he thought of Stone in this connection because it was Stone who had issued the orders in regard to the transferred operators. Moreover, since Stone was in charge of personnel for the entire Mackay system, including the California corporation operating on the Pacific Coast and the Delaware corporation operating elsewhere in the United States, he might be able to transfer some of the San Francisco operators who otherwise would have been dropped from the respondent's employ. But approval by Stone of an application for reemployment was not intended to be a condition precedent to such temporary return to work. Rather consideration of the application was to operate as a condition subsequent after all the eleven had returned on such a basis. Such were Jorgensen's intentions and such was the thought he intended to convey. However, he merely told the men at the meeting that they could return to work with the exception of eleven who would have to fill out applications for reemployment to be approved by Stone.

As described above, the operators returned to work Tuesday, starting at about six in the morning. Some of those on the list of eleven returned with the group at the hotel. At about 10:30 A. M. Jorgensen went home for some sleep and Captain Dodd relieved him. Dodd had learned about the list of eleven only that morning. The plane from the East had arrived that morning and had been met by Rodman and Dewey, the respondent's metropolitan manager for San Francisco. By 4 o'clock that afternoon 64 of the San Francisco operators had reported for work. Dodd knew then that only one of the Los Angeles men preferred to remain. He spoke to the two Chicago men and they expressed a desire to stay. Stone had informed him that two and possibly three of the New York men would stay—which would make in all 69 operators at least. Prior to the strike only 68 had been employed. Dodd decided to "close the books" and so reported to Rodman. He told him of the list and of which men had not as yet applied—Palmer, Rone, Bash, Loudermilk. Rodman at once called Stone in New York and described the situation, informing him that the full complement of operators had been reached and of the four, by name, who had not as yet applied. He discussed those on the list of eleven who had returned and recom-

mended that their reinstatement be confirmed on a permanent basis as there were no serious objections to them and they were "generally speaking, good operators". Stone approved this recommendation and the method that had been adopted in the reinstatement of the men. He told Rodman to forward to him the applications of those who had not returned. Stone later told Rodman to have applications filled out by everybody in view of the temporary severance of employment caused by the strike and this was done. When Jorgensen returned that evening Dodd informed him that all the vacancies had been filled. Only after the books had thus been closed, between 4 and 5 o'clock on Tuesday afternoon, did the remaining four operators apply for reinstatement. In the end five of the eighteen transferred operators remained in San Francisco, one of them being given a position outside of the HB operating room.

### 3. Consideration of the reasons for the discharges—conclusion

#### I

The respondent contends that the four operators not reinstated were denied reinstatement solely because there were no vacancies when they applied to the respondent.<sup>8</sup> While it is true that no vacancies then existed, the lack was due to the fact that the respondent had decided to employ at San Francisco four operators not previously employed at that office. These men, transferred from employment at other points, were really strikebreakers. The respondent is therefore contending that such strikebreakers are entitled to the four positions in question in preference to the men who had held them at the time the strike had commenced and who because of union activity had temporarily severed their active work on those jobs but not their status as employees of the respondent. See Section 2, subdivision (3) of the National Labor Relations Act. It might be argued by these four operators that the granting of such a preference to the strikebreakers was a discrimination in regard to tenure of employment of the type forbidden by Section 8, subdivision (3) of the Act and that therefore their claim under the Act to the four jobs is greater than that of the strikebreakers. However, since we find that a decision on the point is not necessary to the final judgment in this case, we will not decide the matter. Instead, we as-

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<sup>8</sup> Although the respondent fixed the time of application for Loudermilk and Palmer at 9 P. M., October 8, it should be noted that these two operators had attempted to see Rodman between 2 and 3 P. M. that afternoon and hence prior to the "closing of the books". While the disregard of that factor by the respondent is to some extent indicative of its attitude toward these men (compare the discussion *infra* concerning Phelps), we have accepted the time of application stated by the respondent for the purpose of the discussion in the text.

sume merely for the sake of argument that the respondent was entitled to retain these strikebreakers and that such retention was not a discrimination within the meaning of Section 8, subdivision (3). But as a consequence of such retention it became necessary to refuse reinstatement to four of the San Francisco operators employed at the time of the strike. In choosing the four to be in effect discharged, the respondent could not violate the provisions of Section 8, subdivision (3) and consequently a choice based upon discrimination for union membership or activity within the meaning of that subdivision would be unlawful. Thus the controlling question in this case is whether the respondent obeyed the mandate of that subdivision in the method it adopted and in the selection it made. In this connection it must be noted that the mere fact that the four operators are union members is not significant since in view of the almost 100% membership of the HB force, any four even if picked at random would be union members. But here the respondent has chosen the four leaders of the Local and it is that choice which is alleged to be a violation of the law.

The respondent asserts that the fact that the four not reinstated happen to be the leaders of the Local is entirely an accident and due to the fact that they were the last to apply, and only did so after the deadline in numbers had been reached. If they had been among the first to apply they would be employed today. Time and not the respondent picked the leaders of the Local.

The difficulty with this contention is that it was the respondent who chose the standard of time. And, significantly, it not only chose that standard on Tuesday afternoon at a time when the four leaders had not as yet reapplied but it deliberately shifted to that standard at that point. Whatever may have been the reasons for selecting the eleven who made up the list which Jorgensen read to the gathering at the hotel, and we will discuss that point later, it is clear that Jorgensen at that stage had not even considered the question of the time of application as being at all significant. If only some of the eleven eventually had to be dropped he then intended to select them only after a careful weighing of each employee on the list. But he testified that it was not to be a case of "first come, first served". Moreover, the very existence of the list was foreign to such a standard. Jorgensen and not time was to do the selecting. But on Tuesday afternoon coincident with the realization that the full quota had been reached and still the union leaders were as yet not reinstated, there was a shift to the time standard and the "first come, first served" rule was adopted for the first time. The four to be dropped were now the last four, whose identity was then known, to apply—not the four whom Jorgensen would decide were the least

efficient of the entire eleven. The list was in effect discarded. The inference seems clear that the respondent's officials readily perceived that circumstances had provided them with an excellent opportunity to rid the respondent of the leaders of the Local which had just caused it to pass through a costly strike and it did not fail to make the most of the opportunity. And in thus taking advantage of that opportunity the respondent committed a violation of the Act.<sup>9</sup>

## II

Our decision, however, need not rest on the above ground alone. For the moment let us assume that in applying the "first come, first served" rule until the HB quota was reached the respondent was not acting contrary to the Act insofar as the mere application of such a standard is concerned. Under such an assumption the failure to reinstate the last four to apply would not be a violation of the Act even if the four happened to be the leaders of the Local, unless some activity of the respondent was responsible for their being the last to apply and such activity was motivated by a desire to discriminate against them because of their union leadership. Translated to the facts in this case, if the respondent placed these four men on the list of eleven because of their union leadership and activity and if the presence of their names on that list led them in the final analysis to be the last to apply for reinstatement, the respondent in then applying the "first come, first served" rule would be acting contrary to the Act.<sup>10</sup>

We first address ourselves to the specific reasons advanced by Jorgensen to explain his choice of the eleven men on the list. In his testimony the following reasons were stated:

**YORK (Supervisor)**—in view of certain remarks directed against respondent's officials during the strike, his loyalty to the respondent was doubtful and therefore he was not suited to a supervisor's job; moreover, Jorgensen felt a supervisor should not strike.

**PALMER (Class A Operator)**—talked over the telephone and to other operators while working, read while working, all in violation of the respondent's rules.

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<sup>9</sup> We here accept in full for the sake of argument the respondent's contentions and testimony that on Tuesday afternoon it did decide to follow a time standard and on the basis of that testimony arrive at the above conclusion. However, we are by no means convinced on the record before us that the respondent fully thought out all of these contentions on or before that Tuesday. There are statements scattered throughout which indicate that the "plan" may have been evolved in its entirety only after the deliberate decision to refuse to reinstate these men for union activity and the consequent actual refusal.

<sup>10</sup> We have not considered the question of whether the mere placing of these men on the list of eleven because of their union leadership and activity would in itself be a violation of the Act, since such consideration is not necessary to a decision in this case.

RONE (Class A Operator)—left circuit without permission and spoke to other men, although not reprimanded personally for such conduct.

LOUDERMILK (Class A Operator)—about the same reasons as in Palmer's case; in addition these three operators were not amenable to discipline.

BASH (Class A Operator)—on one occasion was insubordinate, seemed preoccupied with other work, worked cross-word puzzles, talked to other operators.

SALISBURY (Class A Operator)—had violated his leave of absence to engage in "welfare work" in behalf of the respondent by negotiating on ARTA matters.

PATTERSON (Class B Operator)—had several bad errors on his record made in connection with the work of a customer the respondent was very anxious to retain.

HUMPHREYS (Class B Operator)—a "very poor tape operator"; while a good manual operator, had not come up to expectations as a tape operator.

WESTCOTT (Class C Operator)—had "many times" failed to show up for work because of being under the influence of liquor.

DWYER (Clerk on night trick)—many complaints received from night supervisor; "always" late for work, didn't heed admonitions.

HARDIN (Temporary student operator—Class E)—he would never be a good operator and had made many errors.

It should be noted that the only Class A operators chosen were the leaders of the Local. The last five listed above were not at all active in union matters and the reasons advanced by Jorgensen appear to be genuine and definitely related to efficiency as an operator. Hardin was permitted to resign on Tuesday instead of being discharged since Jorgensen did not want to handicap him with a bad record. But the reasons advanced in the cases of the five Class A operators are of a different nature. At best they seem but carefully recalled petty infractions of working rules which nearly every employee is likely to commit over a long period of employment and which are nearly invariably condoned by the company.

And in the case of Salisbury the reason is obviously a sham. Jorgensen knew that Salisbury went to New York for the sole purpose of assisting in the ARTA negotiations and that the descriptive term "welfare work" was probably used merely to embellish the respondent's records. While York was not as active a union member, it was his active participation in the strike in conjunction with his status as a supervisor that appears to have caused his selection. His case is thus different from that of the five Class A operators. Leaving York aside therefore, the list seems to be capable of divi-

sion into two parts. The last five men appear to have been chosen solely for reasons definitely related to efficiency of operation. The first five of the operators, on the other hand, appear to have been selected because of their leadership and activity in the Local and not because of their inefficiency as operators, especially when it is remembered that at least four of them were admitted to be among the best operators on the force. The large proportion of Class A operators, even aside from the efficiency of the particular men chosen from that Class, is certainly not consistent with an honest endeavor to maintain a high efficiency standard at a time when it is possible for the respondent to weed out its inefficient men. Since only a few of the strikebreakers were Class A operators this proportion becomes more significant. Finally, Jorgensen admitted that he had never laid off four, three—even two Class A operators at one time; he could not remember having laid off a single Class A operator since he became chief operator. The presence of these five on the list is made understandable, however, when we consider Jorgensen's purpose—"I was trying to put men on that list that were the least desirable at that time, to the company, that is, as I saw it", and that these "were the least desirable operators from the company's standpoint, out of the whole group".

The operators recognized the divisible nature of the list. Loudermilk at the hotel meeting asked Jorgensen "what in the world they had eleven men on that list for. I can recognize the company's reluctance to reemploy the five at the head of the list (referring to Palmer, Rone, Bash, Salisbury and himself), but I don't understand why you have these six others on there."

At this point it is necessary to remember that more than a Local of a union is involved. The San Francisco Local of the ARTA was the strongest in the Mackay system for it had succeeded in obtaining as members practically all of the force at the San Francisco office. Because of its strength and active leadership it was the dominant Local in the ARTA and in effect the center of ARTA activity. It had prepared and sponsored the agreement for the entire Mackay system and through Salisbury was pressing for its adoption. Consequently, in its attempt to deprive this Local of its leaders the respondent was in reality striking effectively at the national organization. We conclude that the four operators in question were placed on the list because of their union leadership and activity and therefore turn to the effect of that list upon the actions of the men named thereon.

Jorgensen, as stated above, testified that it was his intention to have the eleven return to work with the others on a temporary basis. But his actions and words were ill-chosen, to say the least, to communicate that intention. He knew that the eleven were not to be

notified of the meeting and did not protest. The presence of some of those on the list was accidental. When called upon to state the respondent's position Jorgensen merely said that eleven would have to submit their applications for reemployment and the applications would have to be approved by Stone. He made no reference to an immediate return to work on a temporary basis. Even if it be conceded that he could reasonably have thought that the above words adequately expressed his intentions, one would expect that if the reaction of those present indicated a complete misunderstanding of his remarks he would have taken the trouble to correct that impression. There is not much doubt as to what the reaction was. Loudermilk told the operators at the meeting that the vote was really on the question of whether they were willing to return to work although it meant leaving the eleven out of a job. Later in the meeting Loudermilk told the men not to be influenced by the effect on him—"If you want to vote on it, don't let me stand in your way. If I don't go back, it doesn't make any difference to you"—and Palmer added, "That goes for me too." Taking the view most favorable to the respondent, these reactions indicated a not too clear understanding of Jorgensen's intentions. Yet he did or said nothing to clarify the matter, although it is reasonable to assume that the men would have been more willing to return to work if it were clearly understood that all including the eleven could go back at that time.<sup>11</sup>

Two of the men who were on the list and who were present at the meeting testified as witnesses for the respondent. One of these, Patterson, testified that after the meeting while he was standing in the hotel lobby Jorgensen told him to come down with the rest. He therefore went to the HB office, but he said that he thought he had been asked to go there for the purpose of filling out an application and added, "I didn't have any idea that I would be allowed to go to work". For it was his understanding that those on the list would

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<sup>11</sup> Here, and elsewhere, we have for the sake of the argument adopted the version of Jorgensen's statement most favorable to the respondent. Jorgensen's testimony as to his statement is about that given in the text above. Hatch and York testified similarly. McLaughlin's testimony, on the other hand, although in some respects verbally similar to Jorgensen's, indicates that Jorgensen was very far from expressing his professed intentions. McLaughlin testified: "He told them that they could return to work unconditionally; that they would retain their former positions, capacities, and that the strike would be forgotten. And then he had a piece of paper in his hand and he said, '*Excepting these names*', and he read them off and said 'These men will have to submit an application for reinstatement.'" (Italics ours.) Patterson, who like McLaughlin, was the respondent's witness, testified that Jorgensen said that the eleven men "would not be allowed to return to work until their applications were approved by Mr. Stone". Chambers, an operator, testified similarly, stating that Jorgensen, after reading the list said, "Any man to be reemployed will have to submit his application to Mr. Stone". Finally, both Loudermilk and Palmer testified that McLaughlin prefaced Jorgensen's remarks by stating, "Mr. Jorgensen will read to you the list of men who are banned from returning to work." (Palmer said: "Men who will not be taken back to work"). Palmer's testimony in regard to Jorgensen's statement is similar to that of McLaughlin.

have to fill out applications and if they were approved they could then return to work—he did not understand that if he went back to the office he would be immediately put back to work at least on a temporary basis. At the office Jorgensen told him to go to work at once and only a day or so later did he fill out his application. The other, York, testified that after the meeting he went to the HB office to fill out an application since as no time was set, he “thought then was as good as any”. He did not know what his status was and he went to find out. At the office he first asked Jorgensen for an application and the latter replied he would get him one in a day or so but that now he should commence to work.

The evidence of Patterson and York indicates that they certainly did not believe they could return to work at once even on a temporary basis. It must be remembered that these two—and especially Patterson—were in the dark as to the respondent’s motive for placing them on the list. But when we consider that the four union leaders had every reason to believe that they were being black-listed for union activities, it is but natural to expect that they certainly would not think they could return to work at once if a person such as Patterson, with no inkling as to the respondent’s motive, held the same belief as to himself.

The four in question thought they would not be permitted to return to work and under the circumstances described above such a belief was not unreasonable. Holding that belief, it was natural that they would delay their request for reinstatement. Bash would not feel that there was any reason to rise from a sick bed and apply. Rone could wait for all of the men to return to work before he himself applied without being forced really to choose between his conscience and his job. These four were induced to postpone their applications because of the reasonable belief that they would not be permitted to return to work and that belief was planted in their minds by conduct of the respondent directed against them because of their union activities. To apply the “first come, first served” principle to these four operators under these circumstances constituted a violation of Section 8, subdivisions (1) and (3).

#### *B. The discharge of Phelps*

The fifth employee whom it is alleged the respondent refused to reinstate contrary to the Act because of union membership and activity is Phelps. He had been with the respondent since June 1928 and at the time of the strike was the manager of its branch office in the Stock Exchange Building in San Francisco, earning \$169.60 a month. Working under him were an operator and one or two telephone girls and clerks. One of the main duties associated with his

position was the solicitation of customers, especially those concerns that were members of the Stock Exchange. His immediate superior was Dewey, metropolitan manager for the respondent, who in turn reported to Rodman.

Phelps had joined the Local in the spring of 1934, but was not active in its affairs. Although he was present at the meeting on October 4 at which the strike was announced, he reported for work Saturday morning, October 5. He spent that morning in efforts to placate the regular customers of the Stock Exchange branch, requesting them to bear with the respondent until the present difficulties were straightened out. After he closed the office at noon, he discussed the situation with several of the strikers and decided to join the strike. The Stock Exchange office was normally closed on Saturday afternoon and Sunday. Phelps was not active on the picket line, although he did accompany Rone and another operator when they visited the homes of two of the supervisors to obtain their memberships in the Local.

Phelps was not informed of the meeting at the hotel, probably because he was in a different office and hence was overlooked, and did not attend it. On Tuesday morning, October 8, he learned that the strike was over by calling the headquarters of the Local. This was about 7 A. M. He immediately called Dewey at his office, but he apparently was not there. Phelps then at once went to the Stock Exchange office, but was denied admission by the guard, who had previously been told not to admit anyone and whose instructions had not as yet been changed. He next attempted to see both Dewey and Rodman at about 8 A. M., but was informed both were out. At about 9 A. M. he succeeded in seeing Captain Dodd. He inquired of Dodd about his status and Dodd replied that he did not know but would attempt to find out from Rodman that morning and hence Phelps should come back at about 1 P. M. Phelps sat outside of Dewey's office until that time and then spoke to Dodd again at 1 P. M. Dodd said he had spoken to Rodman, but had forgotten in the press of things to mention his case and suggested he return at 3 P. M. Phelps did so and on opening the door at that time was met by Rodman who, in an excited mood, told him to "Get out." Phelps left and finally contacted Dewey at the Stock Exchange office at about 3:30 P. M. Dewey said the matter was out of his hands and that he had better file an application. Phelps did so and saw Dewey the next day. Dewey then informed him that the managership of the Stock Exchange branch had been given to Duggan (or Dugan), one of the transferred employees from New York. On October 14 Phelps wrote Rodman requesting a meeting in order to explain the situation. Rodman saw him the next day and stated that his posi-

tion had already been given to Duggan but that he would recommend his reinstatement to some position.

Phelps in the meantime had visited the Regional Office of this Board preparatory to the filing of a charge. The next day, according to Phelps's testimony, Dewey informed him that Rodman did not want to recommend his reinstatement in view of his visit to the Regional Office. Phelps then attempted to withdraw his "complaint," but was informed by the Regional Director that it had been filed by the Local and not by him. However, he was told, if he were reinstated he would be dropped from the complaint. Phelps so informed Dewey. Rodman finally sent the application to Stone with the recommendation that Phelps should not be employed as there were then no vacancies in the Stock Exchange branch. This recommendation was approved and Phelps was not reinstated. Since that time Phelps had earned about six dollars as a hosiery salesman.

Conflicting testimony was offered at the hearing in regard to Phelps' efficiency. Letters were introduced in the record from various members of the Stock Exchange who were customers of the respondent, including the President of the Exchange, which testified to his ability and his qualifications for the position of manager of the Stock Exchange branch. While the respondent's officials testified on the other hand that they had once in June or July 1935 received a complaint which would have justified his being discharged, they had not taken such action, so that Phelps was still an employee at the time of the strike. Such retention is significant and we therefore conclude that on the whole record Phelps cannot be considered as either an inefficient employee or one whom the respondent regarded as too inefficient to retain his job.

The respondent at the hearing and prior thereto contended that Phelps was not reinstated because at the time he made application his position had already been filled. No claim of inefficiency was presented.<sup>12</sup> The respondent's officials testified that about noon on Tuesday, October 8, Dewey had given the position of manager of the Stock Exchange branch to Duggan, one of the employees transferred from New York who up to then had been only an operator. The respondent set the time of Phelps' application for reinstatement at 3:30 P. M., October 8, when he first contacted Dewey.

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<sup>12</sup> Nor was it contended, in explaining the refusal to reinstate, that Phelps had been guilty of conduct during the strike which would justify the respondent in not taking him back. The record indicates that one of the telephone operators reported to the respondent that she had been forcibly detained from going to work by several of the picketing strikers including Phelps. While from the record we conclude that the report was false and that the pickets had in no way detained her against her will, since the respondent did not rely upon such report, we need not further consider it or determine whether reliance upon it and refusal to reinstate on that ground would be justifiable.

We cannot accept the respondent's contention. Phelps was an employee on the payroll of the respondent at the time of the strike. After the strike was over he was not reinstated and a new employee was given his job. The new employee had been an operator in the New York office before that time and the position had not been promised him when he transferred from New York. Moreover, he was given the position at noon on Tuesday. Yet Phelps had contacted a responsible official of the respondent and applied for reinstatement at 10 A. M. that same day after having unsuccessfully attempted to reach some official since 7 A. M.<sup>13</sup> In fixing the time of application of the operators in the HB room the respondent considered telephone calls to Jorgensen and even calls to a supervisor as proper applications. To state that an application made to Dodd, Secretary of the respondent and active in the supervision and conduct of its affairs in San Francisco, was not sufficient and to insist instead that Phelps had to find Dewey, his immediate superior, and make application to him is to insist so strenuously upon technicalities as to arouse the inference that the respondent is concealing its real motive. It must be remembered that Dewey and Rodman had not remained at their desks that morning to receive applications, but instead had gone to the airport to meet the plane from the East. Under these circumstances, the placing upon Phelps of the risk of failure to contact Dewey and the prompt installation of Duggan in a position entirely different from the one which he had formerly held demand a clearer explanation than that offered by the respondent. That explanation, we feel, is linked with the statement of Rodman at the hearing that "we did not approve of a commercial man, in charge of an office, becoming a member of an organization such as ARTA", a belief that did not require further confirmation by the strike and Phelps' participation in it, for with Rodman the belief amounted to a "foregone conclusion." We, therefore, conclude that on the record before us the refusal to reinstate Phelps was a violation of Section 8, subdivision (3), and by the same token, subdivision (1).

*C. The alleged violation of section 8, subdivision (2)*

The complaint alleges that the respondent initiated and formed a labor organization or plan and contributed financial and other support thereto contrary to Section 8, subdivisions (2) and (1) of the Act. The proof advanced to support these allegations principally concerns the meeting at the hotel, a second meeting of the operators held October 9, and the subsequent signing of a petition renouncing

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<sup>13</sup> Dewey in effect so pointed out in a memorandum to Rodman dated October 16.

the ARTA. We have already described the hotel meeting and therefore consider now the second meeting on October 9.

On the morning of October 8 some of the operators in the New York or MK office had sent a telegram to the operating staff of the HB office, which telegram contained the following resolution adopted at that time by 47 members of the operating staff in New York (Respondent's Exhibit 10) :

"Whereas, the MK traffic center ARTA members were denied by the ARTA the right to select their own delegates to the ARTA National Negotiation Committee in conference with the Mackay Radio management, and whereas, the MK traffic center ARTA members were denied by the ARTA the pledged right to a written ballot on the strike question, and whereas, a strike was called without warning and without written ballot at a most inopportune time (3 A. M. Saturday October 5th) be it resolved that:

"The former ARTA members (both full-paid and deposit) of the MK traffic center, both as individuals and as a group, herewith renounce any and all affiliation with the ARTA, and in so doing pass censure on the ARTA officials for ill-advised and unwarranted strike action, and automatically disavow any ARTA member, official, delegate or committee seeking to act as spokesman in behalf of any MK traffic center employee, or group of employees.

"And, be it further resolved that a committee composed of H. B. Funke, J. S. French and C. F. McDonough is hereby named as a Relations Committee to act as spokesman for the MK traffic center employees in any conference with the Mackay Radio Management . . ."

This telegram was posted on the bulletin board of the respondent. The three individuals named in the telegram had apparently functioned as a Relations Committee<sup>14</sup> in New York prior to the strike and had opposed the organization and continuation of the ARTA Local in New York. McDonough was one of the operators who was transferred from New York to San Francisco during the strike.

On October 9 in the afternoon McDonough spoke to Hatch in regard to the situation in New York during the strike and Hatch said that if McDonough wanted to tell the operators about the same matter, he would assist him by preparing notices of the meeting and securing a room. Hatch then questioned some of the men about such a meeting and decided it was advisable to hold it. He accordingly prepared notices to the effect that an informal meeting would

<sup>14</sup> Not to be confused with the "Relations Committee" of the ARTA Local

be held in one of the respondent's rooms at 4 P. M. that day at which the men from New York would relate what happened there during the strike. The notices further stated that the question of the appointment of a "Relations Committee" may be discussed at the meeting. Hatch had secured permission to use the room and to hold the meeting. Jorgensen permitted those operators who were on duty at 4 P. M. and who desired to attend the meeting to leave their posts without loss of pay. McDonough had informed Rodman of the meeting earlier that afternoon.

About thirty to forty operators attended. McLaughlin again presided at the meeting and said that McDonough would relate to them the situation in New York. McDonough spoke about the failure of the strike in that office and the successful functioning of the Relations Committee. Some of the operators asked McLaughlin how long the "scabs" from the East would remain and Patterson also desired to know why he had been placed in the list of eleven. McLaughlin said he would call Jorgensen to answer the questions. Jorgensen came to the meeting, evaded a direct answer to Patterson's question and stated that all but a few of the men from New York would return. McLaughlin announced his resignation from the ARTA and discussed the advisability of forming a Relations Committee. He finally stated that such a matter should be postponed for the time being.

Shortly after the meeting McLaughlin spoke to McDonough about the advisability of circulating a petition similar to that signed in New York. With McDonough's ready encouragement and aid a petition was prepared which McLaughlin signed. He then secured the signatures of the supervisors and had the petition circulated in the HB office. It was circulated to all of the operators over a period covering a number of days and finally signed by more than a majority of the operators. It was then presented to Jorgensen who in turn had it transmitted to Rodman. Rodman acknowledged its receipt in a bulletin to the operators and informed them that a copy had been sent to Stone. The petition read as follows (Board Exhibit 13):

"We the employees of the San Francisco office of the Mackay Radio Telegraph Company of California, as individuals and as a group, herewith renounce any and all affiliation with the ARTA insofar as they are empowered to act for us and negotiate any contracts in our behalf, as employees of the Mackay Radio Telegraph Company of California, disavow any member, official, delegate or committee seeking to act as spokesman for any employee or group of employees in the point to point service of this company.

"We do maintain the right to elect a member of this office or a group of employees of this office to represent us with any grievances which we may have with the management, and ask

the right to present our grievances to the management as we feel they should be presented, not as members of the ARTA, but as a representative group of employees of the Mackay Radio Telegraph Company.”

A Relations Committee was never formed in the San Francisco office.

The respondent contends that the activities described above and the meeting at the hotel, even if considered reprehensible under the Act if participated in by the respondent, are here not traceable to it. These activities, it contends, were engaged in by a group of respondent's employees who desired to end the strike to save their jobs and who, being hostile to the ARTA, desired to supplant it by another form of organization. But their attempts in that direction were not actively encouraged or aided by the respondent.

We approach a consideration of this contention with the belief that the full explanation of the conduct of certain of respondent's employees is not contained in this record. At each step the respondent has offered an explanation that is to some extent plausible and which in turn plausibly links that step with the next development. But throughout there is a persistent undercurrent of another explanation that weaves the events together into a convincing whole that is far more consistent with the air of concealment and half-truth pervading the testimony concerning those employees.

Two of the employees in question are Hatch and McDonough and it is principally their activities to which we have reference. Hatch was the chief electrician and in that capacity supervised two employees. His part in the sudden collapse of the strike has already been related. His explanation of his actions and motives at that period is not convincing and much of his testimony is not credible. During the strike we find Hatch engaged in curious conduct. He suggested to Rone that they destroy the transmitters and offered to show him how such sabotage could be carried out. Hatch admitted that he had made the suggestion possibly once or twice as a “joke”—perhaps, however, with a “straight face”. Again, he apparently suggested to Phelps that they go down to the airport to intercept the men from the East. After the strike we find Hatch assisting McDonough in getting the men together, and this contact is also curious in view of McDonough's activities. McDonough had been a member of the Relations Committee in New York. He was the “straw boss” of the operators transferred to San Francisco. On his arrival in San Francisco he immediately succeeded in calling the men together and explaining that Committee to them. He was able with McLaughlin's ready cooperation to have circulated a petition denouncing the ARTA. McDonough, although an operator in New York,

was practically from the start assigned to "commercial" work involving the solicitation of customers in the business area. Although Dewey was in charge of the commercial department, McDonough reported not to him but directly to Rodman. This work was not as confining as regards both place and time and McDonough was able to converse rather freely with the HB operators and also to visit the respondent's station at Lobitos. After McDonough's visit to that place, the person in charge of the station suggested to the operators subject to his supervision that it might be a good idea to sign a petition announcing their withdrawal from the ARTA. Rodman testified that McDonough visited the Lobitos station for "educational purposes" and as part of the general plan of acquainting the Mackay employees with all parts of the system. McDonough returned to New York about the first of November.

Phelps' testimony regarding some of his conversations with Rodman is very suggestive. Rodman stated at one point: "We were all set for the strike. We had men in the bushes out here with rifles. We expected them to try to interrupt the C. P. cable. It sure would have been hot stuff for anybody monkeying with the cable or for anybody who tried to monkey with the transmitters or cable lines. They would have been surprised from the hillsides." One is reminded immediately of the coincidence of Hatch's suggestion to Rone. A little later in the conversation, Rodman said: "Didn't you know that a bunch of thugs were sent down to the airport to intercept a planeload of men coming in there? Well, we were ready for them. We diverted the plane ten minutes before it was supposed to land." Again Hatch's mind seems to have run in the same channel. Rodman also addressed himself to another subject: "We have had private investigators working for months and we have the whole thing right here. We know the whole story and we are not going to be dominated by a gang like that." This part of the conversation is strikingly similar to Rodman's conversation with Palmer and Loudermilk, as testified to by the two operators, in which Rodman accused the union organization of being dominated by Reds and Communists and said: "Why we have men who reported your meetings to us repeatedly for the past several months. We have had an agency, a detective agency, turning in reports on your leaders and their activities. Why I have a letter here in my possession—here is a letter which is proof that you men are communists." Rodman read part of the "letter"—it was really a report—to them and the document was later introduced in evidence. It contained a series of statements describing some of the ARTA leaders as communists.

Rodman denied that he had employed "armed guards in the bushes". But he admitted that during the strike the respondent had

employed guards at all points on the Pacific Coast where it operated, all of these guards being Pinkerton men. According to Rodman, about 18 Pinkerton men were employed by the respondent. As to the "report" mentioned above, Rodman said that it was attached to a memorandum from the respondent's office at Portland and then there followed this interesting bit of testimony:

Q. And who prepared this report?

A. An outsider.

Q. Meaning who?

A. I don't know.

Q. Well, as a matter of fact, it was a detective agency, wasn't it?

A. No, it was not.

Q. Then how do you know it was prepared by an outsider?

A. I do know that.

Q. Who was the outsider?

A. I know the outsider's name, but it would be a breach of confidence for me to mention it, I think.

Q. Can you tell us what the outsider's business was?

A. I don't know that he has any business.

Finally Phelps testified that Rodman during the conversation said:

"If it wasn't for such fellows as Hatch, McLaughlin, Burtz <sup>15</sup> and a few others, you fellows might have had a chance, but you can not win when you have got fellows like that. They are all supposed to be union men, but how do you know we haven't used a little strategy in this thing and had a few union men of our own in there to keep track of what was going on?"

In answer to a series of formal questions prepared by the respondent's attorney, Rodman denied that he, or any official of the company to his knowledge, had employed "any spy or person such as is generally known as a stool pigeon".

This Board is not unaware of the widespread use by employers of detective agencies and strike-breaking agencies. Nor is it unfamiliar with the activities and methods of these agencies and of employers in spying upon employees and unions and in inciting strikers to sabotage and violence in the hope that a strike may then be broken by the pressure of adverse public opinion thus aroused or the inter-

<sup>15</sup> At a meeting of the Local held on November 8, Burtz defended himself against charges that he among others had secretly engineered the meeting at the hotel. After some heated discussion the Local unanimously resolved that his action was wrongful, but unintentional in that he did not realize the consequences and had merely been the "tool of the Company". He was accordingly absolved of the charges and permitted to remain as a member in good standing.

vention of police and troops.<sup>16</sup> It is obvious that only in rare instances will testimony regarding such activities be clear and open. Normally the story must be pieced together from fragments of evidence and the inferences to be drawn from them. For these reasons the Board feels that this record may not contain a complete account of the activities of such persons as Hatch and McDonough and the motives prompting such activities.

However, the charge before us is a narrow one. The respondent is alleged to have initiated and formed a labor organization and to have contributed support thereto contrary to Section 8, subdivision (2), and by the same token, subdivision (1). It is no answer to this allegation to state, as the respondent apparently contends in its brief, that no labor organization was ever in fact formed, for an abortive attempt by an employer to form a labor organization is an unfair labor practice within the meaning of that Section. However, we feel that the record does not contain as complete an account as might be obtained with respect to that particular allegation in the complaint. But in view of our decision on the other allegations in the complaint we do not deem it advisable to delay the case in order to hold a further hearing for the purpose of taking more testimony on this point. We will, therefore, dismiss the complaint without prejudice insofar as it concerns this particular charge.

#### IV. EFFECT OF UNFAIR LABOR PRACTICES UPON COMMERCE

Interference with the activities of employees in joining and assisting labor organizations leads and tends to lead to labor disputes that burden and obstruct commerce and the free flow thereof. The effect that a labor dispute can have on the operations of a highly developed and complex communications system is graphically shown by the actual facts in this case. The total number of paid messages, handled by the San Francisco HB office on October 1, 1935 was 5499. On October 4, the day before the strike, the total was 5848. Then came the strike. On the first day of the strike, October 5, the total had fallen to 864. By the second day the operations were practically at a standstill—only 227 paid messages were handled on October 6. On October 7 the effect of the respondent's attempts to resume operations by using transferred operators and leased wires became noticeable as the number rose to 1152. The strike was over early on the morning of October 8—and the resumption of nearly normal operations is reflected in the messages handled—a total of 4489. By October 11 the total had reached 5498, apparently a normal

<sup>16</sup> See *In the Matter of Fruehauf Trailer Company*, decided December 14, 1935.

figure. Captain Dodd testified that during the strike the volume of traffic had "decreased enormously". Moreover he thought that there was a possibility that for some time after the strike the traffic might be less than was handled prior thereto—"It seemed to me that, with certain circuits having been stopped, would be news to customers that there had been a strike and difficulties, there was very easily a possibility that some people who had used Mackay Radio before the strike would not use them after the strike, or would not use the Mackay Radio service to as large an extent."

The tendency of an employer's interference with the activities of his employees in joining or assisting labor organizations to lead to a labor dispute burdening or obstructing commerce is also illustrated by the developments in this case. After the strike and the refusal of the respondent to reinstate the four employees involved in this case, the ARTA conducted a boycott against the Mackay system and urged that messages be sent via the other competing companies. Such conduct tends to a dislocation of the customary channels of interstate and foreign communication and thus burdens and obstructs commerce and the free flow thereof.

#### RULINGS MADE DURING THE HEARING

The respondent filed with the Board a statement of exceptions to certain rulings made by the Trial Examiner at the hearing before him in San Francisco and requested the Board to review those rulings. We will briefly consider the more important of those exceptions.

The respondent's fourth exception is the refusal of the Trial Examiner to exclude testimony relating to the organization and development of the Local. As we pointed out in *In the Matter of Pennsylvania Greyhound Lines, Inc.*, decided December 7, 1935, at page 7, such evidence is generally vital to a proper understanding of the issues in a case under the National Labor Relations Act. The exception is thus without merit. Respondent's fifteenth, twentieth, and thirty-second exceptions deal with rulings preventing it from questioning some of the discharged operators regarding their feelings toward "scabs", while the sixteenth, eighteenth, nineteenth and thirty-first exceptions deal with limitations placed on somewhat similar questions concerning a boycott instituted by the ARTA against the respondent and the attitude of some of the four operators toward that boycott. In the light of the record the rulings cannot be considered prejudicial to the respondent since the testimony in the record on those two points is sufficient clearly to indicate to the Board the respondent's contention in that regard and the evidence supporting that contention. The respondent attempted to introduce

such testimony to support the contention that these operators should not be reinstated even if it were found they were discharged contrary to the National Labor Relations Act. We feel that the contention is without merit for we find that there is nothing to indicate that these operators upon reinstatement would fail to perform their duties in a loyal and efficient manner and most of the operators so testified. Respondent's fourteenth and seventeenth exceptions deal with the Trial Examiner's limitations upon questions designed to explore the attitude of these operators toward the doctrines of Communism and the affiliation of the ARTA and its leaders with adherents of those doctrines. Here also we feel that the respondent has not been prejudiced by these rulings for the record is sufficient to indicate its contention on this point. Whatever may be the views of these operators on such a subject we do not believe that they can affect their reinstatement in the light of Jorgensen's emphatic testimony that the ability of an operator is the determinative question in the hiring or discharging of employees—personal feeling, religious beliefs, home life and political beliefs are never considered. Respondent's twenty-seventh exception is without merit as the documents admitted are relevant to the issues involved, as indicated in the decision. Respondent's second, third, fifth to tenth, inclusive, twelfth, thirteenth, twenty-first and twenty-ninth exceptions involve rulings concerning testimony which the Board has not considered in arriving at its decision and which are therefore not prejudicial to the respondent. The twenty-eight and thirty-fourth exceptions are taken to claimed rulings that the testimony of McLaughlin, Hatch, and other witnesses is binding upon the respondent. The Board has not so considered such testimony and hence the exceptions are not warranted. The remaining exceptions, which are either without merit or taken to rulings that have not prejudiced the respondent in view of our decision in the case, do not require separate discussion.

#### CONCLUDING FINDINGS OF FACT AND CONCLUSIONS OF LAW

In addition to the above findings of fact, the following concluding findings of fact are made:

1. The American Radio Telegraphists' Association, San Francisco Local No. 3, is a labor organization within the meaning of Section 2, subdivision (5) of the National Labor Relations Act.

2. By refusing to reinstate to employment A. B. Loudermilk, L. K. Bash and P. D. Phelps on October 8, 1935 and L. N. Rone and G. E. Palmer on October 9, 1935, thereby discharging said employees on the respective days, and by each of said discharges, the respondent did discriminate in regard to tenure of employment and has thereby

discouraged membership in the labor organization known as American Radio Telegraphists' Association, San Francisco Local No. 3.

3. By the acts described in paragraph 2 above, and each of them, the respondent has interfered with, restrained and coerced its employees in the exercise of the rights guaranteed in Section 7 of the National Labor Relations Act.

4. The aforesaid acts of respondent occurred in the course and conduct of commerce among the several states and with territories and foreign countries and directly and immediately affected employees engaged in operations in the course and conduct of such commerce and who, because of their services in connection with instrumentalities of such commerce, are an integral part of the instrumentalities of such commerce.

5. The aforesaid acts of respondent have led and tend to lead to labor disputes burdening or obstructing commerce among the several states and with territories and foreign countries and the free flow of such commerce.

Upon the basis of the foregoing the Board finds and concludes as a matter of law:

(a) Respondent, by discriminating in regard to the tenure of employment of A. B. Loudermilk, L. B. Bash, P. D. Phelps, L. N. Rone and G. E. Palmer, and each of them, has engaged in and is engaging in unfair labor practices affecting commerce within the meaning of Section 8, subdivision (1) and Section 2, subdivisions (6) and (7) of the National Labor Relations Act.

(b) Respondent, by discouraging membership in the labor organization known as American Radio Telegraphists' Association, Local No. 3, by discriminating in regard to the tenure of employment of A. B. Loudermilk, L. K. Bash, P. D. Phelps, L. N. Rone and G. E. Palmer, and each of them, has engaged in and is engaging in unfair labor practices affecting commerce within the meaning of Section 8, subdivision (3) and Section 2, subdivisions (6) and (7) of the National Labor Relations Act.

## ORDER

On the basis of the findings of fact and conclusions of law and pursuant to Section 10, subdivision (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the respondent, Mackay Radio and Telegraph Company, and its officers and agents, shall:

1. Cease and desist (a) from discharging or threatening to discharge any of its employees for the reason that such employees have joined or assisted American Radio Telegraphists' Association, San Francisco Local No. 3, or otherwise engaged in union activity, and (b) from in any manner interfering with, restraining or coercing its

employees in the exercise of their rights to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the National Labor Relations Act.

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

(a) Offer to A. B. Loudermilk, L. K. Bash, P. D. Phelps, L. N. Rone and G. E. Palmer immediate and full reinstatement, respectively, to their former positions, without prejudice to any rights and privileges previously enjoyed;

(b) Make whole said A. B. Loudermilk, L. K. Bash, P. D. Phelps, L. N. Rone and G. E. Palmer for any loss of pay they have suffered by reason of their discharge by payment, respectively, of a sum of money equal to that which each would normally have earned as wages during the period from the date of his discharge to the date of such offer of reinstatement, computed at the wage rate stated in the findings of fact as the rate each was paid at the time of his discharge, less the amount earned subsequent to discharge as shown in the findings of fact;

(c) Post immediately notices to its employees in conspicuous places in its various offices, including those located in San Francisco and elsewhere, stating (1) that the respondent will not discharge or in any manner discriminate against members of, or those desiring to become members of, the American Radio Telegraphists' Association, or persons assisting said organization or otherwise engaging in union activity, and (2) that such notices will remain posted for a period of at least thirty (30) consecutive days from the date of posting; And it is further ordered,

3. That the complaint be, and it hereby is, dismissed without prejudice with respect to the allegations of Paragraphs 8, 9, and 10 thereof and so much of the allegation of Paragraph 12 as depends upon the aforesaid allegations.