

the Employer's contention that they were confidential employees. However, even assuming that their duties were a consideration in their specific inclusion, we do not believe that the Board intended to include them regardless of where they performed these functions. The physical location of employees is often a controlling factor in deciding their unit placement.<sup>3</sup> We are satisfied that the physical location of the employees was the controlling circumstance by which the original scope and composition of the unit was determined, since only clericals at specific plant buildings were included, and the purchasing clerks were placed therein even though their duties were more closely related to those of the general office clericals than to the other unit clericals. It follows then that a change in their location destroys the basis for their initial placement in the unit and serves to sever whatever ties they formerly shared with the employees in the unit.

Accordingly, we shall amend the unit description by deleting therefrom the classification of "buyer clerks."

[The Board amended the certification heretofore issued in the above-captioned proceeding by specifically deleting, in the unit description, the classification of "buyer clerks."]

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<sup>3</sup> In proceedings similar to that here, the Board has reexamined unit determinations and has amended them so as to remove previously included employees because there has been a change in the location of the employees, even though the change has not affected their duties. See, e.g., *General Electric Company*, 123 NLRB 1193

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**District 15, United Mine Workers of America and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 13**

**District 15, United Mine Workers of America and Edna Coal Company. Cases Nos. 27-CC-65-1 and 27-CC-65-2. August 2, 1961**

### DECISION AND ORDER

On March 13, 1961, Trial Examiner William E. Spencer issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that said complaint be dismissed as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the General Counsel filed exceptions to the Intermediate Report and a supporting brief and the Respondent also filed exceptions to certain findings in the Intermediate Report and a brief in support of those exceptions and in support of the Trial Examiner's recommended order.

The Board<sup>1</sup> has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, exceptions and briefs, and the entire record in this case and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner with the following modification:

The Trial Examiner found, and we agree, that the record fails to establish that the Respondent either induced or encouraged Hover, the discharged Gregory employee, to picket, or that the Respondent ratified or adopted such picketing as its own. For this reason alone we find that the Respondent did not engage in activity proscribed by Section 8(b)(4)(i)(ii)(A) and (B). Having found that the Respondent was not responsible for Hover's picketing, we do not adopt, or find it necessary to discuss, the Trial Examiner's findings with regard to the issue of the legality of the object of the picketing.

Accordingly, we adopt the Trial Examiner's recommendation that the complaint be dismissed in its entirety.

[The Board dismissed the complaint.]

<sup>1</sup> Pursuant to Section 3(b) of the Act, the Board has delegated its powers in connection with this case to a three-member panel [Members Rodgers, Fanning, and Brown].

## INTERMEDIATE REPORT AND RECOMMENDED ORDER

### STATEMENT OF THE CASE

In this proceeding, heard before Trial Examiner William E. Spencer of the National Labor Relations Board, herein called the Board, at Denver, Colorado, on January 13, 1961, and Grand Junction, Colorado, on January 17 and 18, 1961, District 15, United Mine Workers of America, herein called the Respondent, the Union, or UMW, was charged by the General Counsel of the Board with threatening Edna Coal Company, herein called Edna, in violation of Section 8(b)(4)(ii)(B) of the National Labor Relations Act, as amended, herein called the Act; and engaging in other conduct, to be described in detail hereinafter, violative of Section 8(b)(4)(i)(A)(B) of the said Act. The Respondent in its duly filed answer denied the commission of the alleged unfair labor practices. All parties, except the Teamsters, participated in the hearing and were afforded full opportunity to examine and cross-examine witnesses and to introduce evidence relevant and material to the issues. All motions on which rulings were reserved are disposed of in the findings and conclusions below. The General Counsel and the Respondent filed briefs.

Upon the entire record in the case, upon consideration of the briefs filed with me, and from my observation of the witnesses, I make the following:

### FINDINGS OF FACT

#### I. THE BUSINESS OF THE EMPLOYERS

Edna is a partnership engaged in the mining of coal at locations near Oak Creek and Nucla, Colorado, and maintains its principal office in Denver, Colorado. During a representative 12-month period Edna sold and caused to be shipped directly to points and places located outside Colorado, coal valued in excess of \$50,000. The operation most directly involved in this proceeding is the Nucla mine, known as the Navajo mine. There is no showing that this operation, considered independently of the Oak Creek operation, would come under the Board's formula for asserting jurisdiction, but, contrary to the Respondent's contention, this is immaterial, inasmuch as the Board, in determining its jurisdiction, looks to the total operations of the Employer involved and not to a particular segment to which the labor dispute is restricted.

Everett Gregory Trucking Contractors, Incorporated, herein called Gregory, with its principal office in Denver, is engaged in the transportation of coal and other goods

by motor vehicle in the State of Colorado. During the year preceding issuance of this complaint, Gregory received revenue in excess of \$50,000 for services performed for Edna.

It is found that Edna and Gregory are employers within the meaning of the Act, and that the Board has and will assert jurisdiction herein.

## II. THE LABOR ORGANIZATION INVOLVED

District 15, United Mine Workers of America, is a labor organization within the meaning of the Act, and the bargaining representative of certain Edna employees within an appropriate unit.

## III THE UNFAIR LABOR PRACTICES

### A. Background and focus of dispute

Edna is engaged in two coal mining operations in Colorado, one at Oak Creek, the other at Nucla, the latter being known as the Navajo mine. The Oak Creek operation began about 1946; the Nucla operation, dating from the actual delivery of coal mined at the Navajo mine, about June 1959. Navajo is a strip-mining operation. Trucks hauling coal from the mine are driven into the working area of the mine itself where they are loaded. The coal has been mined and processed at the time it is loaded onto the trucks. It is loaded by means of a conveyor belt. Its ownership remains vested in Edna until it has been delivered to the purchaser. Most of the coal mined at Nucla is sold to a single purchaser, a power plant.

Edna had a bargaining contract with the Respondent covering its Oak Creek operation prior to the beginning of its Nucla operation. The agreement covering the latter operation, according to Edna's Wendell W. Brown, was executed about December 1958, which would be prior to the actual production of coal at the Navajo mine. It is assumed that the contract then in existence covering the Oak Creek operation was extended to cover the new mining operation at Nucla, inasmuch as all witnesses referred to a single contract covering both operations. The validity of the contract is not in issue. At Oak Creek the drivers who haul coal from Edna's mining operations are members of the Respondent, covered by Respondent's contract with Edna. At the Navajo mine, however, Edna contracted for the delivery of its coal and therefore does not employ its own drivers. The basic controversy herein revolves around the Respondent's claim that its contract with Edna calls for Navajo drivers to be included in the appropriate unit, and its repeated demands that Edna employ drivers at the Navajo mine who are members of the Respondent.<sup>1</sup>

Edna first contracted for the delivery of its coal from the Navajo mine in approximately June 1959. According to L. M. Cooley, at that time managing partner of Edna, Earl Stucker, Respondent's representative located at Nucla, approached him as operations were getting underway at Navajo, and demanded that Edna employ only truckdrivers who were members of the Respondent. Cooley replied—and this has been the position of Edna consistently maintained since—that the delivery of the coal in question was not a "mining operation" and that Edna had no control over the employee drivers of its trucking contractor. According to Cooley, Stucker then made the threat that the Respondent would not permit coal to be loaded into the trucks of the trucking contractor unless the drivers were members of the Respondent. This testimony is credited. A short time later, according to Cooley, Fred Hefferly, Respondent's secretary-treasurer, made statements whose "import" was a demand "that Edna see and be responsible that the drivers of the trucks delivering coal to the powerplant at Nucla became members of the United Mine Workers Union," and a threat that if the demand was not complied with, Edna would be "restrained" in further deliveries from the Navajo mine.<sup>2</sup> Hefferly testified that prior to this conversation, Cooley had indicated to him that it was the intent of Edna to include the truckdrivers in the bargaining unit represented by the Respondent.<sup>3</sup> Further, ac-

<sup>1</sup> Presumably, Respondent's contract with Edna contains a union-shop clause, requiring all employees within the appropriate unit to become members of the Respondent within a stipulated period. The contract itself was not offered in evidence.

<sup>2</sup> Cooley, in testifying, apparently was unable to distinguish between what he regarded as the "import" of something said and what was actually said, and consequently most of his testimony on conversations with union representatives was of the nature of conclusions.

<sup>3</sup> Hefferly's credited testimony: "I had previously discussed the matter of contract with Mr. Cooley and it was the intent of the Company when I talked with Mr. Cooley to include about six truckdrivers in the bargaining unit there. I particularly remember that because I asked him how many men would be working in the operation and he said anywhere from 20 to 25, including about six truckdrivers."

ording to Hefferly, he discussed the matter of Nucla drivers with Cooley about June 15, at which time Cooley advised him that the matter had not been settled yet, and that he was meeting with his partners that afternoon and would advise Hefferly of Edna's decision.<sup>4</sup> Cooley did not thereafter advise Hefferly of Respondent's decision to contract for the delivery of coal from the Navajo mine.

Edna's agreement with a local contractor for hauling coal proved unsatisfactory, and about February 1960 Edna made a new contract, which was oral, with the Gregory Trucking Company, and from then to the present coal mined by Edna at Nucla has been hauled by Gregory drivers. That Gregory is an independent contractor is clear and is not disputed.

According to the credited testimony of Edna's managing partner, Wendell W. Brown, who succeeded Cooley in that post, he participated in a telephone conversation with Hefferly, with Stucker on an extension phone, in February 1960. In this conversation Hefferly said that Edna would have to require drivers at the Navajo mine to become members of the Respondent, to which he, Brown, replied that Edna had no control over Gregory drivers; that he thought the Respondent had no jurisdiction over the transportation of coal to customers, and knew "of no instances where coal was transported to the customer under the jurisdiction of the Respondent." Hefferly replied that there was a difference of opinion in the matter and that the best thing to do would be to resort to arbitration provided in the contract. Brown agreed that this was "probably" the thing to do. The matter was not, however, then or thereafter submitted to arbitration.

#### *B. Organization of Gregory drivers*

On about November 15, 1960, Respondent's Stucker met with the four Gregory drivers employed to haul coal from the Navajo mine: Earl and Larry Widener, brothers; George Waid; and Tom Hover. The meeting was held at the home of an Edna employee, and in addition to Gregory's drivers was attended by Stucker and several Edna employees. Stucker explained the benefits to be had through membership in the Respondent and gave the four drivers authorization cards which he asked them to consider but suggested they defer a decision until some later date. Earl Widener testified that Stucker said the Union had a contract with Edna requiring drivers to be members of the Union, and if Gregory was not agreeable to "coming in," another trucking contractor would be. Larry Widener testified that Stucker said when the Navajo mine was opened it was "intended" for the drivers to belong to the Union; that he had told Brown and Cooley this would eventually come to pass; that since Edna opened the mine on a shoestring the Respondent had "permitted" the mine to operate with drivers not affiliated with the Union but had since advised Edna the drivers would have to come into the Union.

On November 29, Stucker again met with the four drivers, answered various questions concerning job security and the like if they joined the Respondent. Hover, one of the drivers, voiced complaints over the pay and working conditions of his employment by Gregory, and sought Stucker's guarantee that he would not be discharged by Gregory for joining the Respondent. Stucker replied that he could make no such guarantee but in such event would represent the discharged employee before the Board or other governmental agency. Earl Widener then said, "I want you to know that if anybody fires you, Tom, that I am going to be the man that will fire you." It then developed that Earl Widener, though then a member of the Teamsters union, was Gregory's foreman vested with the full authority to hire and fire. Apparently, the Respondent had no prior knowledge of the extent of his authority or membership in the Teamsters of any of Gregory's drivers. According to Stucker, Widener's supervisory powers make him ineligible for membership in the Respondent, as, indeed, he would be in any appropriate unit approved by the Board. After considerable discussion, Hover announced that he was going to "stick his neck out" by signing an authorization card, and he did so. At this same meeting, George Waid also signed a card. On the following day, November 30, after work, Hover and Waid went to the union office where they signed applications for membership. On this same day, Gregory had brought an additional truck to haul coal from the Navajo mine, driven by Earl Story who had not previously worked on this job.

<sup>4</sup> Hefferly's credited testimony: ". . . I told Mr Cooley it was our position, as it was at the Edna Coal Company at Oak Creek, that the truckdrivers were members of our union and that we expected the same situation to exist at Nucla. Mr Cooley at that time said he realized those truckdrivers up there were members of our union, always had been, but that down here they were hauling their coal directly to a power plant and he didn't know what the position of the Company definitely would be, but he was meeting with his partners that afternoon."

*C. Hover's discharge and picketing*

On December 2, a Friday, when Hover reported for work at the mine, Foreman Earl Widener told him that he was laid off as of the close of that day. The only reason he gave for the discharge was that Gregory was bringing in an older man to haul in Hover's place. It appears, however, that Hover was senior to Larry Widener. On December 4, Hover saw Stucker at the latter's house where Stucker took an affidavit from him for filing with the Board in support of unfair labor practice charges against Gregory and Edna. Hover asked Stucker if he had a right to "fight" for his job, and Stucker replied, "You are over 21, my friend, you can do anything you like as far as I am concerned."

On the evening of December 4, after a discussion with his wife over the "dirty deal" he had had from Gregory, Hover decided to picket the Navajo mine and he and his wife constructed and lettered a picket sign. On the following day, December 5, Hover began picketing, for a matter of an hour or so, opposite the entrance to the mining operation itself, and then and for the balance of the time he engaged in picketing, opposite the entrance to the mine office and lot where Gregory trucks were kept when not in use, where they were repaired and refueled, and where various trucking supplies owned and used by Gregory were stored. The crudely lettered text of Hover's picket sign read:

EVERETT GREGORY  
TRUCKING CO. IS UNFAIR  
TO ORGANIZED LABOR.  
I HAVE BEEN DISCHARGED  
FOR JOINING U M W A  
PLEASE HELP ME  
DON'T CROSS  
THE PICKET LINE

On about December 15, Gregory moved his trucks away from the Navajo mine site, but Hover continued his picketing in the same location. His picketing occurred from approximately 6 a.m. to 10:30 or 11 a.m. Respondent's superintendent of the Navajo mine, Allan R. Ross, testified that on the morning of December 5 he asked Hover who authorized him to picket the mine, and Hover replied, "Nobody authorized him, he was doing it on his own. He felt . . . he shouldn't have been laid off by the Everett Gregory Trucking Company because he had more seniority than the driver who replaced him." To members of the Edna pit crew he said, "I am fighting for my job."

Hover continued his picketing through December 27, the date on which a Federal district court issued a temporary injunction pursuant to petition filed with it by the General Counsel. He actually stopped picketing on December 30, after Edna employees had returned to work, on the advice or direction of Respondent's Stucker. During the period of the picketing, through December 27, with few exceptions, Edna employees at the Navajo mine quit work or refrained from work at such times as Hover was picketing. The afternoon and evening shifts regularly reported for work but, with some exceptions, were told there was no work for them. On December 19 and 20, the two shifts did work at Ross' direction. On December 17, Edna's Brown had sent a letter to Navajo employees advising them that there was work available.

*D. Hefferly's role in picketing and work stoppage*

We turn now to evidence purporting to establish that Hover's picketing was at the Respondent's instigation and that it and the work stoppage engaged in by Edna employees in observance of the picketing are attributable to the Respondent.

We have previously reviewed the opposing views held by Edna and the Respondent with respect to the inclusion of Navajo drivers in the appropriate unit, and various threats of work stoppages by Respondent if Edna persisted in having its coal hauled by nonunion drivers. The 6-month limitation bars these conversations between the bargaining principals as evidence constituting an unfair labor practice, but they are essential as background material in properly evaluating conduct and statements occurring within the 6-month period prior to the filing of a charge.

Fred Hefferly, secretary-treasurer of Respondent, and its official agent, with his office in Denver, had a telephone conversation with Edna's Brown on December 2. Brown testified that Hefferly said: There was labor trouble at Nucla and he was going to Nucla to "straighten it out"; the trouble had arisen because Navajo drivers did not belong to the Union and they would have to join; until they joined there would be no more loading of coal into trucks at that mine; he, Hefferly, would throw up a picket line that Edna employees at the mine would not cross; "no GD Teamster

scabs were going to haul that coal." Brown asked that the Union follow procedures established under their contract with Edna for settling disputes.

Following this conversation with Hefferly, Brown, according to his testimony, talked to Edna's attorney and advised him that there was a chance of a strike at the Navajo mine because of the drivers. By letter dated December 5, Edna's attorney, Donald C. McKinlay, demanded that the Union cease its work stoppage at the Navajo mine and that its members report for work at the opening of business December 6. The letter continued, "The work stoppage is in violation not only of the contract between you and Edna Coal Co., but also of the applicable law," and contained, also, the following paragraph:

This will also serve to confirm the telephone call of Mr. Fred K. Hefferly to Mr. W. W. Brown on Friday afternoon, December 2, 1960 stating that until Gregory Trucking Company signed a contract with the United Mine Workers, a picket line would be thrown up at the Navajo mine which your members [Edna employees] would not cross.

Hefferly replied to the McKinlay letter with a telegram dated December 6 and also an answering letter. The telegram stated that the sender was unaware of any work stoppage at the Navajo mine, but that "in case same is true," was wiring local officers to return the men to work. Regarding the telephone conversation with Brown, the telegram stated that it was specifically directed at the discharge of a truckdriver by Gregory. Hefferly's letter of the same date repeated the substance of the telegram and contained this additional paragraph:

At this time I wish to call your attention to the fact that under the contract provisions you have with the United Mine Workers of America, all employees working in or around the mine must be members of our union. You have failed to carry out this portion of the agreement and we demand that you immediately see that those truckdrivers who are hauling coal from the mine to the power plant become and remain members of our union in accordance with the terms of the International Agreement which you have signed with the United Mine Workers of America.

McKinlay replied to Hefferly's telegram by letter dated December 6, stating that Edna would expect Respondent's members to report for work the following morning, and further stating:

It is the understanding of the Edna Coal Co. that if your union ever has a dispute with Edna that the dispute is to be settled in accordance with the applicable provisions of the collective bargaining contract, including if necessary the submission of the dispute to an independent umpire. And it is the further understanding of the company that pending determination of any such dispute, a work stoppage is prohibited. If this is not your understanding of the contract, I will appreciate your advising me by return mail.

By letter dated December 14, Hefferly again addressed McKinlay with respect to the latter's December 5 letter, explaining that this communication was read to him over the phone while he was away from his office. Hefferly's December 14 letter advised McKinlay that he had been misinformed as to the substance of his December 2 call to Brown; at the time that call was made he had "very meager" knowledge of what had happened among the drivers at the Navajo mine; he had requested Brown to recognize the Union as bargaining agent for Navajo drivers under Respondent's contract with Edna; when Brown said he had nothing to do with the truckdrivers in question who were employees of Gregory, he told Brown "without full knowledge of the situation" that there had been some "difficulty" reported to his office during his absence and he understood there had been a fight at the mine and that one man had been discharged; he did not want to see Edna in difficulty over trucking facilities at the mine; and reiterated Respondent's position that Navajo drivers were required under the contract with Edna to belong to the unit represented by Respondent. The letter concluded:

You are laboring under much misinformation when you insinuate in your letter that I called Mr. W. W. Brown and stated that until the Gregory Trucking Company signed a contract with the United Mine Workers a picket line would be thrown up at the Navajo Mine which our members would not cross. I simply did not make such a statement to Mr. Brown since I had never heard of the Gregory Trucking Company until Mr. Brown stated that they had contracted with a Gregory Trucking Company to deliver the coal to the

power plant. This, of course, in only a subterfuge to relieve the Company of their obligations to contract.<sup>5</sup>

Hefferly testified he had not heard much, if anything, of Gregory drivers at the Navajo mine prior to December 2, and in fact did not know too much about the truckdriving situation at Nucla prior to December 2. Concerning his December 2 conversation with Brown, he testified that he had been advised that a driver had been discharged at Nucla and that he asked Brown if he knew of the "trouble" there and told him, "I understand there has been a truckdriver fired and from the information I got he intends to picket the mine." Further according to Hefferly, he told Brown, "I would like to see this matter settled and adjudicated," and asked the latter, "Can you get hold of Mr. Gregory and see that Mr. Gregory puts the men back to work while we try to settle this thing?" Hefferly testified that Brown replied that he knew nothing of a difficulty at Nucla but would contact his people and find out, and further that Brown said, "If this man has been fired, it is a matter for you to arbitrate with us," whereupon he, Hefferly, said that the discharged employee worked for a man named Gregory and therefore the matter could not be arbitrated through Brown. Questioned whether in this conversation he told Brown that the Union would cause the mine to be picketed or shut down, Hefferly testified:

No, I did not make any such statement to Mr. Brown. My statement was that if there was a picket put up at the mine by the Teamsters down there, he was in trouble and in all probability our people would honor a picket line and I said, "I don't want that to happen."

Hefferly admitted that during this same conversation he told Brown, "We don't want any damn [non] union truckdrivers driving your trucks."

Hefferly also testified that on December 6, when he was out of his Denver office and in Delta, Colorado, he called Brown, informed the latter that McKinlay's December 5 letter had been read to him by telephone, and that the accusations in that letter that the Union was threatening to strike the Navajo mine were totally untrue, that nothing like that had been said in his December 2 conversation with Brown. Hefferly testified he told Brown in this conversation, "I want you to understand here and now that we do not intend to strike your mine, nor have we ever intended to strike your mine," and when Brown inquired if he would see that his members went to work, he replied, "So far as I know the boys are working, but I will send a telegram that in the event they are not working that they are to return to work." With respect to this conversation, Brown testified, "In most conversations, and probably in this one, Mr. Hefferly advised that we were in violation of the contract . . . by allowing those truckdrivers . . . to work in the mine without being members of their union." Respecting Edna's contention that the drivers were Gregory employees, Hefferly stated, according to Brown, that "the truckdrivers were working at the mine and therefore they had to belong to the United Mine Workers and that it was the responsibility of the Edna Coal Company to see that they did."

From these conflicting versions of conversations occurring on December 2 and 6, with no predominance of credibility to be derived from the demeanor of the witnesses, I conclude, on consideration of the entire record, that: Hefferly's information when he called Brown on December 2 was fragmentary, that he had been informed that there had been a fist fight at the Nucla operation and one of the drivers had been discharged; and he referred to a picket line being established if the situation was not rectified to the Union's satisfaction, and once more insisted that it was Edna's contractual duty to see to it that union drivers were employed at Nucla. I do not find that he told Brown, as stated in McKinlay's letter, that the Union would picket the mine "until Gregory Trucking Company signed a contract with the United Mine Workers." This was a lawyer's construction of what Brown had told him of the conversation. I find that he made no such statement.

By telegram dated December 6, addressed to the Local's financial secretary at Nucla, Neddie Cooper, Hefferly advised that he had been informed by Edna attorneys that a work stoppage existed at the Navajo mine, and if such was true "you are requested to immediately return to work." A reply telegram of the same date signed by Fred Murphy, the Local's president, and Cooper, stated: "YOU ARE MISINFORMED THERE IS NO WORK STOPPAGE HERE FIRED TRUCKDRIVER IS PICKETING THE TRUCKS AND WE DON'T WANT TO GO THRU THEIR PICKET LINES."

<sup>5</sup> Both the McKinley and Hefferly letters contain numerous self-serving statements which are not probative, but are given here in some detail to illustrate the nature and scope of the dispute between Edna and the Respondent.

As previously indicated, the work stoppage continued during such times as Hover was on hand with his picket sign and Hefferly's telegram had no effect in returning Edna employees to work behind Hover's picket line. Edna employees, and apparently the Respondent, distinguish between a strike or work stoppage instituted and authorized by the Respondent, and a refusal of union members to cross a picket line. There is some evidence other than tacit assent, though slight, that the Respondent through Hefferly approved, authorized, or ratified such work stoppages as occurred. Brown testified that Murphy, president of the Nucla Local, when requested to do certain work, told him about December 21 that he, Brown, would have to get Hefferly's permission and that Hefferly had the authority to grant it. Concerning this, Hefferly testified that he told Murphy the picketing was not authorized by the Union; that Murphy could cross the picket line if he so desired; and that the employees must work if there was not a picket line. Cooper, the Local's treasurer, testified that he asked Hefferly if Murphy could work on a welding job, that Edna had a nonunion man doing this work, and Hefferly replied that Murphy, as a member of the Union, was entitled to the work. Regarding this conversation with Cooper, Hefferly testified he told Cooper, "If they wanted Mr. Murphy to repair that machine, Mr. Murphy should go out and repair it." These conversations occurred either by telephone when Hefferly was in his Denver office, or on board his train at Grand Junction when he was en route from Salt Lake City to Denver. There is no evidence that Hefferly was an any time during the period in question in Nucla or in or about the Navajo mine.

Hefferly denied that he had any knowledge of Hover's picketing prior to December 5.

*E. Stucker's role, and the role of Edna employees, in the picketing and work stoppages*

Stucker testified that he had no knowledge of Hover's picketing until he visited the mine site on December 5 and observed him with his placard. He also saw and spoke to some of the Edna employees that day, including officers of the Local, and told them when they questioned him, to use their own judgment as to whether or not they should cross the picket line. Stucker also saw Hover in downtown Nucla on the same day, and possibly again at the mine. He was looking for Earl Widener, Gregory's foreman, to find out why Hover had been discharged. He had seen Ross, Edna's mine superintendent, at the latter's office, and had learned from him that no coal was being trucked from the mine that day due to a heavy snowstorm. According to Ross, he told the latter that he was going to see that Hover got a square deal with Gregory, and if there was a "sweetheart" contract between Edna and Gregory he was going to break it up. Stucker testified that during this conversation with Ross, he told the latter that he had no prior knowledge of the picketing and did not authorize it. Ross denied that he said this. On meeting with Earl Widener, according to Stucker, he asked Widener if he had the authority to "sign a contract and work this thing out" and Widener replied that Stucker would have to see Gregory. There is no record of any further conversations after December 5 between Stucker and Edna employees regarding Hover's picketing or their observance of his picket line. Stucker participated in the December 16 conference. About December 30 Hover stopped picketing on Stucker's advice or direction.

Cooper, the Local's treasurer, reported for work at the Navajo mine at his usual starting hour on December 5, about 7 a.m. Hover had not yet started picketing. Cooper worked until about 9 a.m., when the Local's "pit committee," Johnny Spangler, Ed Karo, and Ray Perkins, informed him, and others who were then working, that a truckdriver had been discharged and was picketing the entrance to the mine, whereupon the men left their jobs. Spangler testified that when he reported for work Hover was picketing, and he and others then saw Stucker in town and asked him if he knew Hover was picketing the mine. Stucker replied that he did not. Spangler then asked him if Edna employees "had to cross this picket line." Stucker replied, "Well, let your conscience be your guide." It was after this conversation with Stucker that the "pit committee" informed Cooper, and others at work in the mine, of the picketing. All of the mine employees who testified denied that they were instructed or advised at any time by the Respondent, or its representatives, to refuse to work behind Hover's picket line; that this was a matter that each determined for himself. Robert Moore, one of the employees, testified: "I am a union man, I don't cross anybody else's picket line."

*F. The December 16 conference*

On December 16, Cooley and Brown, representing Edna, met with union representatives at the Union's office in Denver. In addition to Hefferly and Stucker, the

Respondent's acting president, Henry Allai, participated in this meeting. Cooley testified that at this meeting Allai, as spokesman for the Union, said that: He was in Denver to get Edna out of the trouble at Nucla; the way to do this was to see that the coal miners and also the people hauling the coal become members of the Union; the Union did not like the idea of a separate labor organization engaging in the delivery of coal because in the event of a strike by such labor organization, members of the United Mine Workers would be affected; the simple solution was to cause Gregory employees to become members of the Union and the mine would resume work and everything would go on "peaceably." According to Cooley, he took the position that Edna was an innocent bystander in the dispute at Nucla. His testimony, standing alone, would give no hint or clue that there ever was a dispute between Edna and the Respondent over the application of the Oak Creek-Nucla contract to drivers at the Navajo mine.

Brown's testimony on the December 16 meeting was more inclusive, and entirely credible as far as it went. According to him Allai said Edna was in violation of the contract in allowing nonunion drivers at Navajo; demanded that Edna immediately see to it that those drivers joined the Union; denied that there was a strike at Nucla; and said that anybody had a right not to cross a picket line. Cooley then stated Edna's position that the drivers were not Edna employees, but Gregory employees; Cooley also stated it was his opinion that the Union had no jurisdiction over transportation of coal from mine to customer. Brown admitted on cross examination that Allai mentioned specific strip-mining operations where the drivers were included in the unit represented by the Respondent.

Hefferly, in general corroborating testimony of Brown and Cooley on the December 16 meeting, further testified that in response to Cooley's statement of his position that drivers were not a part of the bargaining unit and he knew of no place where union drivers transported coal from mine to customer, Allai mentioned specific parallel situations in which such drivers were members of the Union, including operations in Colorado. Thereupon, according to Hefferly, Cooley said "regardless of all that" it was still his position and that he felt that the United Mine Workers was responsible "for the situation over there." Allai replied, "I have a feeling, Mr. Cooley, that you are attempting to impose upon this Union by your objections and that what you really have in mind is that you want to sue the United Mine Workers of America, you don't care whether your mine works or not."<sup>6</sup> Hefferly testified, in corroboration of Cooley and Brown, that during this meeting Allai said, in effect, that if all Gregory drivers joined the Union there would be no dispute, no picketing, and the trouble at Nucla would cease.

The meeting was adjourned without any agreement being reached with respect to the Nucla situation.

### *G. Summarization and concluding findings*

Preliminary to findings and conclusions on the more meritorious issues herein, I find that Hover did not confine his picketing to Gregory employees. It is true that after a brief period of picketing at the entrance to the mine itself, he transferred his picketing to a place opposite the entrance to the mine office and the place where Gregory parked his trucks and stored his maintenance supplies. This latter would be a proper and logical place for picketing Gregory inasmuch as it was the situs of his operations at Nucla and the only local situs disclosed by the record. With Gregory's foreman being one of the drivers, and that foreman's brother being another, Hover would not expect much to come of his picketing of Gregory unless he could solicit the support of Edna employees. On the first morning he told the pit crew that he was fighting for his job and inferentially at least solicited them to honor his picket line, and when Gregory moved his trucks from the Navajo property Hover continued to picket in the same place. Obviously, he meant to picket Edna and did picket Edna and any support given him by the Respondent was in furtherance of his picketing of Edna as well as Gregory.

I further find that the action of Edna employees in refraining from work at such times as Hover was picketing was concerted rather than individual activity. Regardless of how they may have viewed it, they acted for a united purpose and they acted concertedly. The real issue here is whether they were encouraged or induced in their concerted activity by the Union. All who testified denied that they were in any way directed or instructed by the Union to observe Hover's picket line. The Respondent's representatives who testified entered a similar denial. I credit them.

<sup>6</sup> Apparently this reference was to the fact that except for the shift which was picketed, Edna employees regularly reported for work and were refused, with exceptions noted above.

Hefferly's telegram of December 5 directed them to work. Hefferly testified that when asked by Murphy if he could perform certain work at the mine, he replied that he could work behind the picket line if he chose to do so. The Respondent insisted throughout the period in question that it was not on strike at the Navajo mine, and indeed at such times as Hover was not actually picketing Edna employees were ready and willing to work. Encouragement and inducement must therefore be inferred from Stucker's advice to Edna employees that they were to use their own judgment whether or not to work behind Hover's picket line, or from Respondent's failure affirmatively to advise its members that they need not honor Hover's picket line, or to instruct them to disregard it. Were the matter before me *de novo* on this point, I would entertain some doubts whether encouragement and/or inducement was proved by predominating evidence. The small group of Edna employees was well acquainted with Hover and was certainly aware that he had authorized the Union, of which they were members, to represent him and had signed an application for membership card, and that from all appearances he had promptly been discharged by Gregory for engaging in this activity. When he appeared with his picket sign asking for help in getting his job back, it would be but natural and reasonable that they, the Edna employees, without inducement or encouragement by the Union, would give him their support by refraining from work behind his picket line. As one Edna employee testified, he was a union man and he knew what to do when confronted by a picket line. But in view of the many decisions on the point, decisions which hold that encouragement and inducement may be inferred from no more than a lifting of an eyebrow (possibly the famous eyebrows of the ex-chief of the UMW inspired this observation), I think nothing short of an outright disavowal of Hover's picketing would have insured the Respondent against being held liable for the work stoppages engaged in by Edna employees. If Hefferly's undisputed testimony that he specifically told Murphy that he was free to cross the picket line, is credited—and I see no reason not to credit it—there was something in the nature of a disavowal here, but in the light of the decisions I think it was not, of itself, sufficient to absolve the Respondent. If the Respondent had instructed Edna employees to work behind the picket line I think they would have complied, and no such instructions, with the possible exception of Hefferly's December 6 telegram which the Respondent did not enforce, were issued until after the work stoppage had been enjoined by a court order.

We come then to a second crucial issue: Was the Respondent under some legal obligation to instruct Edna employees not to observe Hover's picket line? But before we come to this, we must evaluate the General Counsel's position that the Respondent was responsible for Hover's picketing in the first instance. In short, that it instigated the picketing and Hover was its agent in his picketing activities from the start.

We have one bit of evidence which lends some support to the General Counsel on this point. In his conversation with Brown on December 2, Hefferly made some reference to picketing at the Navajo mine. According to Brown he threatened to picket the mine unless Edna employed union drivers. According to Edna's attorney, in his construction of what Brown told him concerning the conversation, Hefferly threatened to picket or strike the mine unless Gregory made a contract with the Respondent. Hefferly testified, "No, I did not make any such statement to Mr. Brown. My statement was that if there was a picket put up at that mine by the Teamsters down there, he was in trouble and in all probability our people would honor a picket line and I said, 'I don't want that to happen.'" Choose among these versions of the conversation as you will, we still have the testimony of Hefferly and Stucker that they knew nothing about Hover's picketing of the Navajo mine until after his picketing actually started on December 5, and Hover's testimony that the picketing was his own idea and his picket sign the work of himself and his wife. We also have the testimony of such Edna employees as testified in the matter, that they had no knowledge that the mine was to be picketed until after Hover appeared with his sign, and this testimony is substantiated by the fact that they all reported for work at their usual hours on December 5, and some had already gone to work when Hover started his picketing. I will not readily find that all of these witnesses lied. In giving their testimony they did not, within the powers of my observation, have the demeanor of liars. Is there something inherently unbelievable in Hover's testimony that the picketing stemmed from his own decision and that he and his wife together constructed the picket sign and lettered it? From my observation of him, I think Hover was just the sort of individual who would make just such a fight in protest over a wrongful discharge and to get back a job he sorely needed for the support of his family, and the tools of industrial conflict are too widely known and publicized in these days to warrant the presumption that picketing would not occur to him independently of union

suggestion, or that the crudely lettered picket sign was not of his own devising and execution.

The only other evidence linking the Union to Hover's picketing in the first instance was Stucker's reply, when Hover on December 4 asked him if he, Hover, had a right to fight for his job, that Hover was over 21 and should use his own judgment, and Stucker's presence at the mine and conversation with Hover on the day the picketing began. With respect to the former, I cannot see that Stucker was under some legal compulsion to inform Hover that he, individually, could not fight for his job. Hover had such a right and he exercised it. Stucker's presence at the mine on December 5 is adequately explained by Hover's discharge, of which admittedly Stucker had been informed, and his intention to see Earl Widener, Gregory's foreman, who had said he had the authority to hire and fire, with respect to obtaining Hover's reinstatement. Normally, Widener would have been hauling coal from the mine and that was the logical place for Stucker to look for him. The fact that he did look for him there indicated that he did not expect to find that the mine was being picketed, rather than the contrary. Being at the mine, he could hardly fail to observe Hover's picketing, and the conversations which followed between him and Hover and Edna employees on that day may well have been the natural result of an encounter which had come about in a perfectly normal lawful manner. To be sure, if at any time Stucker had told Hover that he should not picket, or should stop his picketing, it is entirely probable that he would have obeyed Stucker's edict. Looking to the Union for support in getting his job back, or equivalent employment, he could hardly have done otherwise. He did in fact stop his picketing when on December 29 Stucker advised him to do so. Is this proof that the Union induced and encouraged him to picket, and for objectives apart from his own individual interests? Not by any system of logic of which I am aware and to which I could subscribe. I find that the Respondent neither induced nor encouraged Hover in picketing, at least up to the time the work stoppages at the Navajo mine began.

I have found that under the decisions as I construe them, the Board would find the Respondent responsible for those work stoppages. We return, now, to the issue previously posed: Was the Respondent under some legal responsibility to disavow Hover's picketing and to instruct Edna employees not to observe his picket line, or at least *discourage* him in observing it.

Ostensibly at least, the sole object of Hover's picketing was to advertise his discharge and through economic pressure exerted against Gregory, require the latter to reinstate him. His picket sign unambiguously declared that Gregory was unfair to organized labor and had discharged him because of his membership in the UMW. The only reasonable construction anybody could give this sign was that Gregory was unfair because of the discriminatory discharge. I realize that under the decisions the wording of a picket sign may be conclusive of unlawful object but is never conclusive of lawful object.<sup>7</sup> Nevertheless, to give it conclusive weight in order to find a law violation, and no weight at all in finding no violation, would be to apply a crooked standard. The picket sign and everything the picket said with respect to his picketing point to a lawful object and I give this weight. I am of the opinion, and find, that Edna employees, including officers of the Union's Local, engaged in a work stoppage in support of Hover's picketing for the same reason that Hover engaged in picketing: i.e., protest of his unlawful discharge, and to get him reinstated to his job. There is not one iota of evidence to the contrary. The Respondent was under no legal duty whatever to tell Hover that he could not picket with these objectives, or to instruct its members, Edna employees, that they could not support him in these objectives by refusing to work behind his picket line. The Respondent had every lawful right to induce and/or encourage the picketing for these objectives, and the work stoppages engaged in by Edna employees in support of such picketing. This is elementary. But we are asked to engraft onto this situation the intentions and objectives of the Union, as exemplified by the statements and conduct of its agents, Stucker and Hefferly and Allai, and to find in effect that the Respondent seized on Hover's discharge and subsequent picketing as a pretext, and encouraged the observance of the picket line by Edna employees for its own unlawful objectives.

As early as June 1959, when Edna first contracted for the delivery of coal by nonunion drivers, the Respondent threatened to stop the hauling of coal from the affected mine unless the Respondent employed union drivers. The threat was repeated in February 1960. But Edna continued to contract out the hauling of coal from Navajo and there was no work stoppage of any sort or interference by the Respondent with the loading and hauling of coal from Navajo prior to December 5,

<sup>7</sup> *Calumet Contractors Association*, 130 NLRB 78.

1960, when Hover began his picketing. The General Counsel would have it found that the Respondent seized on Hover's discharge by Gregory as a pretext for doing what it had been threatening to do for 1½ years. It is a little difficult to understand why the Respondent waited so long for a pretext to arise for doing what it had all along been threatening to do without cover of pretext, but it is of course possible that the Hover incident was the straw that broke the camel's back, the spark that ignited the fire, etc. We should explore the evidence carefully, however, to see if it affords an equally plausible and lawful reason why the Respondent would lend its approval to its members' refusal to cross the picket line established by Hover and maintained solely by Hover throughout the period in question.

Having failed, either through persuasion or threat of force, to cause Edna to employ drivers subject to the Respondent's bargaining authority, and apparently unwilling to submit a fait accompli to arbitration (which may or may not have been required by its contract with Edna), the Respondent, as an alternate course of action, attempted to organize Gregory's drivers. This action cannot reasonably be construed as an abandonment of its position that the drivers were contractually required to be, or become, members of the Respondent. Respondent's position that Edna was contractually required to employ drivers subject to Respondent's bargaining authority was steadfastly maintained and reiterated.

At the time it began its organizational efforts there were four drivers employed by Gregory at the Navajo mine and one of these was a foreman, with authority to hire and fire. The Respondent was successful in signing up two of the three nonsupervisory employees. Immediately on the heels of this, Gregory sent in a fifth driver, Earl Story, and a day or so later discharged Hover, who in Foreman Widener's presence had been outspoken in his criticism of working conditions under Gregory and had signed one of the Union's authorization cards. Thus, prior to the discharge, the Respondent was well within range of achieving its organizing objectives with respect to Gregory drivers; it, as well as Hover, had every reason to believe that Hover was discharged for having authorized the Union to represent him and with an object of defeating the Union's organizational objectives. All the evidence in this case points to a flagrantly discriminatory discharge, and to ignore such evidence or minimize its importance is to prejudice the Respondent in an evaluation of its objectives in supporting Hover's picketing. If it could require Hover's reinstatement through economic pressure exerted in support of his picketing, it would then be in a commanding position with respect to Gregory drivers and its longstanding controversy with Edna would be rendered academic. In short, full and sufficient reason existed for the Respondent to support Hover's picketing, or to engage in encouragement and inducement with respect to it, for objectives that were entirely lawful. When it stood a good chance of reaching its objectives through lawful picketing, why must we infer that the picketing it actually engaged in was unlawful?

The evidence of unlawful object rests largely on background material showing threats of work stoppages if Edna did not employ union drivers; Hefferly's reference to picketing in his conversation with Brown on December 2; Stucker's organizational statements to Gregory employees to the effect that Gregory would have to contract with the Union, or else; a statement by Allai in the December 16 conference to the effect that if all Gregory drivers belonged to the Union there would be no further dispute at the Navajo mine; the fact that the Respondent on December 5 filed an RC petition with the Board seeking an election among Gregory drivers, and on January 6, 1961, several days after the picketing had ceased, wrote to Gregory demanding that he recognize the Union as representing his drivers in an appropriate unit. On the basis of such evidence the General Counsel would have it found that an object of Respondent's picketing and work stoppages was to require Gregory, through pressure on Edna, to bargain with the Union at a time when the Union had not been certified as bargaining representative of Gregory employees.

I think there can be little doubt that having failed to convince Edna that it was under a contractual duty to employ union drivers, and having, as an alternate measure, attempted to organize Gregory drivers, the Union would have accepted the unionization of Gregory drivers as an alternate to having them in an appropriate unit together with Edna employees. When Allai, at the December 16 conference, said that if all Gregory drivers became members of the Union, there would be no dispute at Nucla and the trouble would cease, he was merely expressing what was self-evident and commonplace. The Respondent's interest was that Nucla drivers be subject to its bargaining authority. The Union insisted, and had at all times insisted, that it had a contractual right to represent Navajo drivers, and every time its representatives referred to the unionization of Gregory drivers, this was coupled with a restatement of Respondent's position that its contract with Edna required union drivers. This was true in Hefferly's conversations with Brown on December 2 and 6; in Stucker's organizational remarks in the two meetings he had with Gregory drivers; and in

Allai's statements at the December 16 conference. But to engraft the Respondent's position as stated on these several occasions onto Hover's picketing and infer therefrom unlawful objects is to give it precedence and superior weight over the ostensible object of the picketing itself; Respondent's natural and reasonable concern over the discriminatory discharge of an employee whom it had induced to sign up with the Union, a discharge which if it went unremedied would in all probability wreck the Respondent's plans for representing Nucla drivers; and the reasonable assumption that Hover's reinstatement would of itself place the Respondent in a position of representing an actual majority of Gregory drivers as of the time the discriminatory discharge was planned and executed. Respondent was not estopped, on account of Hover's picketing, from filing an RC petition; the fact that it did so indicates that it was seeking a lawful, rather than an unlawful, solution to the difficulty, and the demand for bargaining rights made on Gregory a week after the picketing had ceased can hardly be construed as establishing any more than a reasonable belief that with Hover's reinstatement it had, or could command, a majority.

I think we should not be prone to read an unlawful object into a situation brought about through a flagrant flouting of an employee's rights under the Act, when an equally plausible lawful object exists, and where the rule of reason, based on evidence, is equally applicable to the two objectives, one lawful, the other unlawful, the General Counsel has not sustained his burden of proof. Analogous is the discharge of an employee where a sound and compelling reason for a lawful discharge exists, but the General Counsel would prove that this sound and compelling cause was not the actual cause of the discharge but a pretext. In such a case the burden of proof is a heavy one, as I am well aware, having on occasion been reversed by this Board in finding a pretext where the Board found no pretext but cause.<sup>8</sup> Furthermore, I am convinced that the basic dispute in this case, which gave rise to all the actions now complained of, was not between Respondent and Gregory but between Respondent and Edna, and that if unlawful objects here exist they exist with respect to Edna, not Gregory. For all of these reasons I find that the General Counsel has not established by a pre-dominance of evidence that Hover's picketing and the work stoppages that occurred as a result of it had as an object causing Gregory to recognize and bargain with the Respondent, though a successful prosecution of the same might have had just that result.

Turning now to the allegation that an object of the picketing and work stoppages was to require Edna to make a hot cargo contract for the trucking of coal from the Navajo mine, we cannot reasonably ignore the longstanding controversy between Edna and the Respondent. True, on occasion, the Respondent indicated that it would be satisfied if Navajo drivers were members of the Union whether as employees of Edna or Gregory or some other contractor. But, as previously stated, Respondent never ceased to contend that under its contract with Edna, the drivers were included in the appropriate unit and that it was Edna's contractual duty to employ drivers subject to Respondent's bargaining authority. This was insisted on as late as the December 16 conference. It is clear that this was no mere trumped-up dispute to serve as a cover for unlawful objectives, without color or authenticity under Respondent's contract with Edna. Under this same contract, drivers at Edna's older Oak Creek operation are included in the appropriate unit, and so far as appears in this record, the Nucla operation is properly regarded as an accretion to an existing unit.

Of course I do not propose to construe a contract which is not in evidence, but I do find on the evidence that there was a bona fide dispute at all times during the period in question respecting the inclusion of Navajo drivers in the unit represented by the Respondent; that Edna was well aware of Respondent's contentions before it contracted out the hauling of coal from Navajo; that, according to Hefferly's undisputed and credited testimony, Edna first agreed that Navajo drivers came within the unit represented by the Respondent and then, later, acted unilaterally in contracting for the delivery of coal, thus putting the drivers beyond the reach of the Union's representation; and that from that unilateral act stemmed the entire controversy which is now before us. In view of all this, it would be entirely unrealistic and unreasonable to find that an object of the picketing and work stoppages was to require Edna to make a hot cargo contract for the hauling of its Navajo coal. At most, it was to require Edna to live up to its contractual obligations as the Respondent, not without reason, viewed them. Any impact of its actions on Edna-Gregory relations was therefore incidental to its primary dispute with Edna.

<sup>8</sup> See, for instance, and compare the evidence of pretext existing there with that offered here, *Snellstrom Lumber Co.*, 122 NLRB 535.

The same reasoning applies to the allegation that an object of the picketing and work stoppages was to require Edna, a neutral, to cease doing business with Gregory with whom the only real controversy existed. A dispute did indeed exist between Hover and Gregory, and between the Union and Gregory insofar as the Union supported Hover in his picketing objectives, which I have found to be the advertising of his discriminatory discharge and reinstatement to the job from which he had been unlawfully discharged. Insofar as the Respondent was concerned, however, as found, its basic dispute was with Edna. Assuming that furtherance of its position in this dispute entered into its support of Hover's picketing, it may well have had a tendency to cause Edna to cease doing business with Gregory but only because, from the Respondent's viewpoint, Edna had breached its contractual obligations to employ union drivers at the Navajo mine. Giving the widest play to Respondent's objectives, we do not have here the usual unfair labor practice boycott situation of a principal contractor, a neutral or innocent bystander, on whom pressure is exerted to require him to cease doing business with a subcontractor with whom the only bona fide dispute exists. By no stretching of logic can Edna be regarded as an innocent bystander in matters affecting the employment of Navajo drivers. Clearly, on all the evidence, Respondent's first, foremost, and principal dispute is and at all times material herein has been, with Edna. If we must assume that Respondent in supporting Hover's picketing had as an object the application of pressure on Edna to require the hiring of union drivers at Navajo, this was in furtherance of a primary dispute with Edna.

The above findings are not to be construed as in any way passing on the merits or demerits of the Union's position on Edna's contractual obligations or whether, *inter alia*, it had some contractual duty itself to arbitrate the issue before applying economic pressure. The contract not being in evidence I do not pass on such matters. I only find, as I have, that the evidence before me is sufficient to establish the existence of a bona fide dispute; that if the contract in question included Navajo drivers in the appropriate unit, Edna had no lawful right unilaterally to contract out the hauling of coal from the Navajo mine and in acting unilaterally violated its duty to bargain with the Respondent;<sup>9</sup> that the Respondent could lawfully threaten economic reprisals and engage in economic reprisals, including strikes and picketing, to enforce a bona fide bargaining position vis-a-vis Edna. I make only passing reference to evidence tending to show that Edna's contracting out for the hauling of Navajo coal may have had a discriminatory motive<sup>10</sup> and make no finding on the point, though it is not to be entirely disregarded when evaluating the legal effect of Respondent's conduct.

On the other hand, to find that the Union had no lawful right to employ economic pressure to require Edna to employ union drivers is to assume too much. It is to assume that the Navajo drivers were *not* included in the appropriate unit under Respondent's contract with Edna covering both its Oak Creek and Nucla operations, and therefore that Edna could lawfully act unilaterally in contracting out for the hauling of coal from the Navajo mine. It is to assume too much because the contract was not put in issue by the General Counsel and it was not introduced in evidence. It must be borne in mind at all times that the burden is on the General Counsel to prove that the Respondent had unlawful objectives, not on the Respondent to prove that its objectives were lawful. I find that the General Counsel had not discharged his burden with respect to the alleged unlawful objectives.

It follows, of course, that if the Respondent could lawfully exert economic pressure against Edna in the matters involved herein, it could lawfully threaten to do so. Accordingly, I shall recommend the dismissal of the entire complaint.<sup>11</sup>

<sup>9</sup> *Shamrock Dairy, Inc.*, 124 NLRB 494, 496, 497, 498.

<sup>10</sup> The evidence: Hover's testimony that Edna's mine superintendent, Ross, told him, prior to his affiliation with the Union, that if the drivers joined the Union "that the work day weeks would go to three days, they would put six trucks on, or else they would shut the mine down," and on a later occasion repeated to him what was purported to be a statement by Gregory, that the easiest way for him to get fired was to join the UMW

<sup>11</sup> For ready reference, the alleged violations occurred under Section 8(b)(4)(i)(ii) (A) (B) of the Act, which provides, in pertinent part, that:

(b) It shall be an unfair labor practice for a labor organization or its agents—

(4) (i) to engage in, or induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain

## CONCLUSIONS OF LAW

1. Edna and Gregory are, each of them, Employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Respondent is a labor organization within the meaning of Section 2(5) of the Act.
3. The Respondent has not engaged in the unfair labor practices alleged in the complaint herein.

[Recommendations omitted from publication.]

any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by section 8(e);

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: . . .

Section 8(e) of the Act provides, in pertinent part that:

(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: . . .

**Miratti's, Inc., Petitioner and Retail Clerks International Association, Local 899, affiliated with the Retail Clerks International Association, AFL-CIO.<sup>1</sup> Case No. 21-RM-665. August 2, 1961**

## DECISION AND ORDER

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, a hearing was held before Louis A. Gordon, hearing officer. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

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

1. The Employer is engaged in commerce within the meaning of the Act.
2. Retail Clerks International Association, Local 899, affiliated with the Retail Clerks International Association, AFL-CIO, is a labor organization within the meaning of the Act.
3. No question affecting commerce exists concerning the representation of employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act, for the following reasons:

The Union was the contractual representative of the Employer's

<sup>1</sup> The name of the Union appears as amended at the hearing.