

Samuel Ablon admitted having a conversation at the time and place with Twedell. He denied that he (Ablon) made the statement attributed to him by the witness, Schatzki. Further, he testified that he did not know that Middlebrook was an organizer for the Union at the time he fired her. From this scanty and conflicting evidence I find that the General Counsel has not proven, by a preponderance of the testimony, that Respondent had knowledge of Middlebrooks' union activities. Consequently, because of failure to prove the indispensable element of knowledge it will be recommended that the complaint be dismissed.³

IV. THE OBJECTIONS IN CASE NO. 16-RC-2783

The Regional Director in his report on objections to the election found only one objection merited hearing.⁴ The Board ordered the hearing and that it be consolidated with Case No. 16-CA-1444.

Concerning the objection, here at issue, the Regional Director concluded and recommended:

In view of the coercive effect of the discharge of a *known* Union leader (Middlebrook) just prior to the election . . . it is recommended that a hearing on objections be held with respect to this allegation. . . . [Emphasis supplied.]

Inasmuch as it was not proven that Middlebrook was "known" to Respondent as a "Union leader" at the time of her discharge, it will be recommended, that this objection be overruled.

CONCLUSIONS OF LAW

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

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

3. Middlebrook was not discharged by Respondent in violation of Section 8(a)(3) and (1) of the Act.

4. Respondent did not interfere with the election in Case No. 16-RC-2783 by its discharge of Middlebrook 2 days before the election.

[Recommendations omitted from publication.]

³ If the element of knowledge had been proven I would find that Middlebrook was discharged because of her attitude toward her job and superiors and her propensities; and not in violation of Section 8(a)(3) and (1) of the Act. It is to be noted that at the opening of the hearing the General Counsel stated that he was not seeking reinstatement and backpay for Middlebrook "since it's our position she has forfeited these particular rights through subsequent activity on her part."

⁴ All other objections were overruled. No exceptions were filed.

National Furniture Manufacturing Company, Inc. and Local Union No. 215, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case No. 25-CA-1336. November 29, 1961

DECISION AND ORDER

On June 9, 1961, Trial Examiner Ramey Donovan issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the Intermediate Report attached hereto. Thereafter, the Respondent and the General Counsel filed exceptions to the Intermediate Report and supporting briefs.

Pursuant to the provisions of 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].

The Board has reviewed the rulings of the Trial Examiner and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the 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 modifications.

THE REMEDY

The Trial Examiner found that the Respondent violated Section 8(a)(3) and (1) of the Act by discriminatorily discharging employees Calvin Belt, James Crane, Howard Dunn, Daniel Hughes, Clarence Sims, and Carvel Dillback, and he recommended that the Respondent be ordered to offer Belt, Crane, Dunn, Hughes, and Sims reinstatement to their former or substantially equivalent positions and make them whole for losses in pay by reason of the discrimination. As to Dillback, the Trial Examiner recommended that this employee be granted backpay but did not order his reinstatement.

As reasons for withholding the reinstatement remedy from Dillback, the Trial Examiner noted (1) that on January 8, 1961, when Respondent's general manager, Mosier, attempted to hand a letter to Dillback, Dillback made a vulgar remark showing "an unnecessarily disrespectful attitude toward the general manager," and (2) that in December 1960, Dillback had adversely affected Respondent's sales by telling a customer of the Respondent that there had been changes in personnel at Respondent's plant, that keymen had been laid off, that the whole organization was turned upside down, and that if the Respondent did not do well at the January furniture show it was going to discontinue the making of furniture.

We disagree with the Trial Examiner's conclusions with respect to the foregoing conduct. The issue here is not whether Respondent could have discharged Dillback for using offensive language to his superiors or for his statement to Posey relative to his employer's business prospects. Rather, it is whether such conduct has made Dillback unemployable by the Respondent, so as to excuse Respondent from the duty of remedying its unlawful discharge of Dillback by reinstating him to his former position. While we do not approve of Dillback's mode of expression to his superior officers, we note that such mode of expression is not at all unusual in work-a-day associations among industrial workers. It is also a fact that tempers are aggravated and attitudes hardened in the stress and strain of hotly contested labor disputes. In these circumstances we do not view Dill-

back's statements to his superiors¹ as so unpardonable to warrant denying him reinstatement on that basis. Nor do we find that the Posey incident is a sufficient basis for such action. That incident occurred some time before Dillback's unlawful discharge and, while Respondent may not have discovered it until after the discharge, it remains an isolated instance. No similar instances were established on the record. Not only was it isolated, it was from all appearances an unpremeditated remark made by a truckdriver in response to a complaining customer's general query as to what was going on at the Respondent's plant. In these circumstances, Dillback's remarks hardly warrant characterization as those of an insider with special knowledge of the Respondent's business prospects, nor do they come within the area of these statements involved in the *Jefferson Standard Broadcasting* case² which the Supreme Court found, in agreement with the Board, warranted treatment as an attack "made by the Company's technical experts upon the Company's products."

Accordingly, in view of all the circumstances, we find that it will not effectuate the policies of the Act to deny reinstatement to Dillback, and we shall accordingly order Respondent to offer him immediate and full reinstatement.³

ORDER

Upon the entire record in the case, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, National Furniture Manufacturing Company, Inc., Evansville, Indiana, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging employees because they have exercised their rights under Section 7 of the Act and have engaged in protected union and concerted activities.

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

¹ For the purposes of this decision we assume that Dillback did make the statement to Holt discussed in footnote 58 of the Intermediate Report.

² *Local Union No. 1229, IBEW, AFL (Jefferson Standard Broadcasting Company) v. N.L.R.B.*, 346 U.S. 464.

³ For the reasons advanced by the Trial Examiner, Member Rodgers agrees that Dillback should not be granted reinstatement. As the conduct engaged in by Dillback, which the Trial Examiner found to be of such a nature that reinstatement should be denied, occurred prior to and on the day following his discharge while in a layoff status, Member Rodgers would deny backpay to Dillback. Moreover, because the Board has reversed the Trial Examiner and rejected the proven incidents of Dillback's misconduct as grounds for denying him reinstatement, Member Rodgers is of the opinion that the exclusion by the Trial Examiner of other evidence of additional misconduct by Dillback has materially prejudiced Respondent. See the Trial Examiner's discussion of this ruling, at footnote 58 of the Intermediate Report.

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

(a) Offer to Calvin Belt, James Crane, Howard Dunn, Daniel Hughes, Clarence Sims, and Carvel Dillback immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of pay they may have suffered by reason of the discrimination against them.

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its office in Evansville, Indiana, copies of the notice attached hereto marked "Appendix."⁴ Copies of said notice, to be furnished by the Regional Director for the Twenty-fifth Region, shall, after being duly signed by the Company's representative, be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including places where notices to employees are customarily posted. Reasonable steps shall be taken by the Company to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for the Twenty-fifth Region in writing, within 10 days from the date of this Order, what steps it has taken to comply herewith.

⁴In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "Pursuant to a Decision and Order" the words "Pursuant to a Decree of the United States Court of Appeals, Enforcing an Order."

APPENDIX

NOTICE TO ALL EMPLOYEES

Pursuant to a Decision and Order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

WE WILL NOT discharge employees because they have exercised the rights guaranteed to them under the National Labor Relations Act and have engaged in protected union and concerted activities.

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

WE WILL offer to the employees named below immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and

privileges, and make them whole for any loss of pay they may have suffered as a result of the discrimination against them.

Calvin Belt
James Crane
Howard Dunn

Daniel Hughes
Clarence Sims
Carvel Dillback

NATIONAL FURNITURE MANUFACTURING COMPANY, INC.,
Employer.

Dated----- By-----
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

INTERMEDIATE REPORT

STATEMENT OF THE CASE

The complaint issued by the General Counsel alleged that Respondent had terminated the employment of six-named employees because the said employees joined or assisted Local Union No. 215, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called the Union, or because the employees engaged in other union or concerted activity, all in violation of Section 8(a)(1) and (3) of the Act. In its answer Respondent denied the commission of unfair labor practices.

With all parties represented a hearing was held before the duly designated Trial Examiner in Evansville, Indiana, on April 25 and 26, 1961.

Upon the entire record in the case, and from my observation of the witnesses, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

Respondent maintains its principal office and place of business in Evansville, Indiana, and various other plants and places of business in Kansas and Illinois, and is engaged in the manufacture, sale, and distribution of upholstered furniture and related products. The Evansville plant and Respondent's display facility at Chicago, Illinois, are involved in this proceeding. On an annual basis Respondent manufactured, sold, and shipped from its Evansville, Indiana, plant finished products valued in excess of \$50,000 to points outside Indiana. Respondent is engaged in commerce within the meaning of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Local Union No. 215, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

Background

The record in the instant case discloses the following pertinent background information: In a proceeding involving the Respondent and the instant Charging Party, Case No. 25-CA-1198 (130 NLRB 712), Trial Examiner John von Rohr on August 16, 1960, following a hearing, issued an Intermediate Report in which he found that Respondent had violated Section 8(a)(1) and (5) of the Act. Respondent filed exceptions and a brief to the Intermediate Report. On February 24, 1961, the Board after consideration of "the Intermediate Report, the exceptions and brief, and the entire record of the case . . . [adopted] the Trial Examiner's findings, conclusions, and recommendations" and issued an order directing Respondent to bargain with the Union as the collective-bargaining representative of its over-the-road truckdrivers at its Evansville plant, to offer reinstatement upon request to the

employees who went on strike on October 31, 1959, and to cease threatening or coercively interrogating its employees concerning their organizational activities or offering inducements to employees to withdraw their support of or affiliation with the Union.

Although the issues in the instant case are not the issues of the preceding case and the instant proceeding must be adjudicated on the evidence in the record thereof, the events in the case at hand, and the conduct of the employees, the Union, and the Respondent, is to be viewed in context. This is particularly so since the events in the instant case are related to the aftermath of the October 31, 1959, strike and the conduct and the posture of the parties toward each other.¹

On August 26, 1960, Arden, business representative of the Union, addressed a letter to President Caldemeyer of Respondent, requesting reinstatement of the strikers.² Also, on the same date, each of the striking employees wrote individual letters to Caldemeyer requesting reinstatement.³

In the first part of September 1960, apparently at varying dates, the strikers, or at least the six drivers involved in the instant case, Dillback, Hughes, Crane, Dunn, Belt, and Sims, were reemployed by Respondent. When the foregoing individuals were reemployed, Mosier, Respondent's general manager, and Holt, Respondent's personnel manager, spoke to them individually, discussed provisions of the truck-driver's manual, and asked them not to involve company customers in "internal problems" between the Company and the Union. The men, with respect to the latter, acquiesced or did not indicate disagreement.⁴

About November 5, 1960, Dillback, one of the reemployed strikers, was suspended for a week for violating a rule pertaining to logbook entries. The Union filed a charge (Case No. 25-CA-1316) against Respondent on November 8, 1960, alleging that the layoff of Dillback was discriminatory. Respondent was advised on December 23, 1960, by the Board's Regional Director that the charge had been withdrawn by the Union.

¹ Among the findings and conclusions in the Intermediate Report adopted by the Board were: ". . . 10 of the Respondent's 13 over-the-road truckdrivers signed union authorization cards on October 24 [1959] and . . . the remaining 3 employees in the unit signed cards on October 27, October 28, and November 8. Accordingly, it is found that on October 28, the date on which the Union made its request for recognition, the Union represented a majority of the employees in the appropriate unit. . . . Finally, we turn to the strike which the evidence clearly indicates, and I find, was called for the purpose of achieving recognition [and was] . . . an unfair labor practice strike." Among the conclusions found in the same decision was the following: "The record is abundantly clear that immediately upon receiving the Union's request for recognition, the Respondent embarked upon a campaign designed to thwart the statutory rights guaranteed its employees in Section 7 of the Act. As has been found and detailed in preceding sections, Respondent's top management, including its president [Caldemeyer], its personnel manager [Holt] and its traffic manager, interrogated, threatened, and warned each and every one of its over-the-road truckdrivers to refrain from assisting, or becoming or remaining members of, the Union by threatening to shut down its business, to move the plant, or to eliminate their truckdriving positions entirely by the adoption of some other delivery system. As has also been seen, several of the drivers were flatly told that Respondent would not have a union. As if this were not enough, Respondent further demonstrated its determination not to recognize the Union by placing advertisements for truckdrivers in Tennessee and Mississippi newspapers on the morning before the strike began."

² The letter stated: "I am authorized by striking employees of your company to request immediate reinstatement to their former jobs. This request for reinstatement is unconditional and the employees will be available for work immediately upon receipt of this letter or not later than August 29, 1960, midnight. We also renew our request to bargain for the employees within the truckdrivers unit for which we had originally advised that we sought recognition. We ask that you advise us upon receipt of this letter when we can meet for the purpose of initiating collective bargaining negotiations."

³ The letters read: "I went on strike because of unfair labor practices committed by the Company. I now offer unconditionally to report to work and hereby request reinstatement to my former employment with the company. I will be available for work immediately."

⁴ Dillback, in his testimony, acknowledged that Mosier and Holt had so spoken to him. He also stated credibly that Holt told him that the Company "wanted nothing to do with me, no part of me, and that this was not their doing, that they were taking me back on the advice of counsel only."

The Terminations in January 1961

Truckdrivers Dillback, Hughes, Crane, Dunn, Belt, and Sims were laid off by Respondent at approximately the same time, December 23, 1960.⁵ They were told by their foreman, Ottman, that they would be recalled about the second week in January 1961.⁶ The layoff was unexceptional since the entire plant, including the production employees as well as the drivers, ceased operations in order that inventory might be taken. The shutdown followed the general practice of prior years.

During the period of their layoff the six drivers aforementioned went to Chicago on January 5. They had with them a supply of leaflets that Dillback had secured from the Union in Evansville. The trip was financed and sponsored by the Union.

Annually there is held in Chicago at 666 Lake Shore Drive a furniture exposition referred to in the hearing as the Furniture Mart. Manufacturers, dealers, and buyers of furniture at the wholesale as distinguished from the retail level attend this Mart. A "Marketing Bluebook of Buyer Registration, 1961 Winter Mart in Chicago" shows that 15,575 buyers from 7,531 stores registered for the 9-day period of the Mart starting Friday, January 6, through Saturday, January 14.

On Friday morning, January 6, at the three pedestrian entrances to the Mart, between 9 a.m. and 12:30 p.m., the six drivers from Evansville handed out leaflets to any individual walking by who would take them. There were two drivers at each entrance. No oral appeals were made and the only conversation was confined to such matters as "Thank you" or "Good morning." The distribution apparently occurred on public property since on one occasion when the men went on the Mart property a guard told them to get off, which they did without incident.⁷ Leaflets were not given out at truck entrances to the Mart and there is no evidence that leaflets were given to people physically carrying furniture items into the Mart.⁸

Dillback, one of the leaflet distributors, testified that he was wearing his truck-driver's uniform consisting of jacket, shirt, pants, and cap.⁹ His shirt had no insignia but his jacket bore a patch saying "National." Due to the cold on Lake Shore Drive in Chicago in January, Dillback stated that most of the time he was wearing a topcoat over his jacket. His cap had a badge on it that read, "National Furniture Manufacturing Company, Evansville, Indiana." This equipment was also secured and paid for by Dillback.

The leaflets which were distributed in Chicago read:

A MESSAGE TO THE PUBLIC

Truck driving employees of the NATIONAL FURNITURE MFG. CO. at Evansville have, for over a year, waged a hard and costly battle with their

⁵ Apparently there was some variance as to the exact date of layoff since the drivers were laid off when they returned from their respective last return trips before Christmas.

⁶ There is no dispute that at the time of the layoff the laid-off employees were to be recalled. The witnesses, who testified as to what they were told by Ottman, who did not testify, stated credibly as follows: Dillback was told that it would be about January 15 before he was recalled; Hughes was told that he would be called back around the 10th or 15th of January; Crane was told it would be around the 15th or possibly later; and Dunn was told it would be about January 15 when the drivers would be recalled but that he was not sure about the date for Dunn because of damage to a truck motor.

⁷ Dillback testified that on the occasion in question the wind was blowing pretty cold and they stood under a canopy on Mart property. They were told to get off the steps and they immediately complied.

⁸ The record in fact does not show that there was any movement of furniture and related items in and out of the Mart on any of the days when leaflets were distributed.

⁹ Holt, Respondent's personnel manager, testified that the driver can purchase any type of acceptable truckdriver's uniform that he wishes. According to Holt, the Respondent reimburses the employee for one-half the cost of the uniform after the employee has been with the Company for a year. The Company furnishes a shirt and jacket insignia in the form of a sew-on patch in blue and white bearing the word "National." Dillback, who commenced working for the Company in the fall of 1957, went on strike, as we have seen, on October 31, 1959. He was reemployed in September 1960. He testified that he had bought and paid for his own uniform and that the Company had never reimbursed him therefor. Dillback was the first witness called by the General Counsel and his testimony regarding uniform reimbursement was not controverted by any company records or evidence to show that Dillback had been reimbursed for one-half the cost of his uniform other than by Holt's testimony as to general company practice. I credit Dillback regard-

employer. This is not a fight that they wanted. It was a fight forced on them by the Company. All that the men wanted was for the Company to recognize and bargain with the Union which they had freely and practically unanimously selected as their bargaining agent.

The Company's refusal to deal with the Union, and other unfair labor practices, caused the strike which went on for many months.

These unfair labor practices by the Company were investigated by the National Labor Relations Board. After a lengthy hearing a Trial Examiner of the Labor Board has upheld the Union's charges. Its recommended order requires that the Company shall cease and desist from:

(a) Refusing to bargain collectively with (Teamsters) Local Union No. 215 , as the exclusive representative of all over-the-road truck drivers at its Evansville plant

(b) Threatening or interrogating its employees concerning their organizational activities, or in any manner offering inducements with respect to withdrawing their support or affiliation with any labor organization.

The Company has still not fulfilled the remedy which the Trial Examiner recommended. Instead, it continues its hard-nosed attitude and refuses to bargain with the Union. Additional charges have been filed against the Company.

All that the Union has ever sought is that this Company sign a Union contract which will give these drivers a living wage and decent working standards. We don't think that National Furniture is entitled to under-mine the rates of fair-minded employers who are now under Union contract.

We ask you to help these men. Only public opinion can force National Furniture to do what the government's Trial Examiner recommended. If YOU let the National Furniture representative know that you believe in fair play for these men, this Company might be induced to do the right thing. YOUR help can force this Company into FAIR—rather than chiseling—competition among employers.

Your support of these badly treated truck drivers in their hard fight for justice and their rights under the law will be deeply appreciated by

TEAMSTERS LOCAL UNION No. 215.

The January 6 distribution of the leaflets was without incident. The six drivers did not see any representatives of Respondent on that day. Mosier, Respondent's general manager, testified that he did not see the drivers on January 6.

The morning of the following day, Saturday, January 7, President Caldemeyer, Mosier, and Respondent's plant engineer, Quackenbush, were observed by the drivers as the company officials were taking still and motion pictures of the drivers' Chicago leaflet distribution activity aforescribed.

About 1 p.m., on January 7, Holt, Respondent's personnel manager who was in Evansville, received a telephone call from Chicago and was informed by Caldemeyer and Mosier about the leaflet distribution. Either Caldemeyer or Mosier or both advised Holt on the telephone that a letter warning the men to cease their leaflet activity was prepared or was being prepared and that this letter would be delivered to the six men. Mosier gave Holt the names of the six men. Holt was told on the same occasion that a decision had been made to replace the six men and he was instructed to make the replacements. Accordingly, at about 3 or 3:30 p.m., January 7, Holt sent telegrams to six men in Evansville assigning them as replacements for the six drivers who were distributing leaflets in Chicago.¹⁰ The wording of the telegrams, signed by "Joe E. Holt, Nat. Furn. Mfg. Co." was: "We are assigning you as a truck driver as a replacement effective immediately."

Although the foregoing facts are not in dispute it is clear that the warning letter, to which reference was made, was not delivered until the following day, Sunday, January 8. Mosier testified that he prepared the letter in Chicago on January 7

ing his testimony on the matter of his own uniform. The record is otherwise barren on the matter of uniform cost, or the attire of the other five men, which, in any event, I do not regard as a pivotal matter in this case.

¹⁰ The six recipients of the telegrams were: Mathney, Buzzingham, Williamson, Nickes, Harth, Jr., and Fallowfield. These men, according to Mosier, were employees of the Company in nontruckdriving jobs. During the 1959 strike they had driven company trucks. As far as appears, on January 7, 1961, they had been on a laid-off status like all the other employees, including drivers and production employees, owing to the annual shutdown of the plant.

and took it down to the Furniture Mart late in the day. By the time Mosier had arrived at the Mart the six leaflet distributors had left the vicinity.¹¹

On January 8 the six men were again distributing leaflets as previously described. Dillback testified that on that day Mosier came up to him where he was distributing leaflets and said, "Take this." Dillback states that Mosier had a paper in his hand which, although he did not know what it was, Dillback assumed it was a letter. According to Dillback, he made no move to accept the proffered letter, and Mosier spoke loudly and belligerently telling him again to take the letter. Dillback said to Mosier, "Piss on that thing. If you want me to have it, mail it to me." Dillback stated that his own voice was not loud enough for Hughes, who was about 5 feet away, to hear. Hughes was a driver who was also distributing leaflets and he apparently was Dillback's partner at one of the three entrances to the Mart. There were two distributors at each entrance. Mosier testified that after giving a copy of the warning letter, previously described, to two of the distributors, whom he believed were Simms and Dunn, he went to where Dillback was stationed. Mosier states that Hughes was within 10 feet of Dillback at the time. Mosier testified that he asked Dillback to take the letter, saying "Take this" in a normal tone. According to Mosier, ". . . Dillback looked at me belligerently and backed off and said he wouldn't take it. And I repeated my words . . . without raising my voice" and it was then that Dillback made the remark previously described.¹² Hughes testified

¹¹ The letter referred to and which I shall hereinafter describe as the warning letter was typewritten on a letterhead of Respondent and is dated January 7, 1961. It is reproduced as written. The letter lists the names of Dillback, Belt, Dunn, Crane, Sims, and Hughes immediately above the salutation, "Gentlemen".

In our opinion what you are doing is picketing and/or striking while employees of this company.

This is to notify you that your action as enumerated above has subjected you all and has caused this company to take the appropriate action as allowed under the National Labor Relations Act

This incorporated with the other acts such as sending letters to the dealers that are libelous, in our opinion is an unfair labor practice and furthermore certainly is an attempt on your part to undermine this company and can not be permitted by management of this concern.

This is to notify you that while you are in the process of striking and picketing you have no right to wear the uniform of National Furniture Manufacturing Company because while on strike you have voluntarily withdrawn your services from this company. I hereby request and in fact order you to refrain from wearing the uniform of this company while you are conducting yourselves in such a fashion

This is to further notify you that the mere presence of each of you on this picket line does have the effect of inducing employees of our customers to stop handling the products of the National Furniture Company and thus does constitute the coercion of the neutral employers. For this and other reasons you are being given this formal notification of our opinion so that there can be no misunderstanding of our interpretation of your conduct

NATIONAL FURNITURE MFG. COMPANY,
(S) J S Mosier,
J. S. MOSIER, *Prod Mgr.*

¹² Mosier testified that Dillback made some further remarks. On the witness stand at this point Mosier initially conveyed the impression that he simply did not wish to reiterate publicly what Dillback had said. When advised by the Trial Examiner that he should state whatever else Dillback told him on the occasion in question, Mosier said it was "something like sex." When pressed by Respondent's counsel to be more specific Mosier said, ". . . I couldn't really understand the language he was mumbling and backing off; and I don't know exactly what the words were but it was along that line." The following colloquy then occurred:

Q. (By Respondent's counsel, Mr. DONOVAN) Well, I am still not satisfied with the word "sex," you are either going to have to testify or not testify as to what these sex words were. If you want to, you can spell them.

A. (By MOSIER.) Well, I can't exactly say because I couldn't understand them, so—

TRIAL EXAMINER: As I understand the witness now, Mr. Donovan, it's not the reluctance to say it, it's just that the man was mumbling something and he doesn't know exactly what he did say, which is different from being . . .

MR. DONOVAN: Yes, that's right.

TRIAL EXAMINER: . . . refusing to say the expression. Is that true, Mr. Mosier?

THE WITNESS: I think that's true.

that although he was 5 or 10 feet away from Dillback and Mosier he did not overhear their conversation.

In appraising the foregoing testimony of Dillback and Mosier I note that each chose the adverb "belligerently" in describing the conduct of the other. Dillback states that Mosier spoke "belligerently" to him and Mosier says that Dillback looked at him "belligerently." As I view the testimony, the personalities, and the demeanor of the witnesses, I find that when Mosier approached Dillback with the letter he told the latter, "Take this." The decibel level of Mosier's words was probably normal but the terse phrase under the circumstances, including management's reaction to the leaflet activity in Chicago, was in all likelihood more peremptory than casual. Dillback moved back to avoid the out-thrust letter and said he did not want it or would not take it. Although Dillback did not know the contents of the paper, he probably had the instinctive reaction that, whatever it was, it was not something beneficial to him. Dillback was an active union adherent and his employer in the past had evinced pronounced opposition to the union movement among the drivers. It was also self-evident and apparent that the contents of the leaflets and the distribution thereof at the Furniture Mart would be and was less than palatable to Respondent. The picture taking on the previous day was certainly not a manifestation of management approval. Here then was Mosier, the general manager, telling Dillback in Chicago, to take a proffered piece of paper without explanation of contents or subject matter. Dillback backs away, refusing to take it. Mosier repeats the words, "Take it." I believe it is quite likely that Mosier, irritated not only by the whole Chicago episode but also by Dillback's initial refusal, repeated his words with some emphasis and with a peremptory note. In Dillback's view Mosier was acting belligerently and, subconsciously at least, to Dillback it was in a framework of management hostility to past union activity and to his union activity in distributing union leaflets at the Mart. The unknown and therefore suspect paper that Mosier was insisting that Dillback take was to the latter, a symbol of management hostility, based on the conviction that the paper, whatever it was, was not something helpful to Dillback, and the instinctive reaction was to avoid doing what Mosier wanted him to do. Mosier then evoked from Dillback words calculated to make it unmistakably clear that he was not going to take the paper and he said the words quoted previously in this report. From Mosier's standpoint the entire leaflet distribution at Chicago was indefensible and this was compounded by the refusal of Dillback, an employee, to take a paper that the general manager told him to take, and then using vulgar language in telling Mosier what to do with the letter. From the standpoint of each, the other was acting belligerently.¹³

Mosier, on January 8, gave copies of the warning letter to all but one of the other drivers who were distributing leaflets at the Mart. Crane accepted the letter. Dunn testified that Mosier came up to him and asked him to take an envelope and Mosier then placed the envelope with the letter on Dunn's arm between the leaflets that the latter was holding and his jacket. Mosier approached Belt and told him he was giving out handbills of his own. Belt said he did not want one and Mosier placed the letter in Belt's pocket. Mosier gave Sims one of the letters and Sims took it. After the Mosier-Dillback episode, Mosier approached Hughes but the latter walked off as Mosier came over and Mosier made no further attempt to give him the letter. Shortly after the initial distribution of the letter all the drivers, including Dillback and Hughes, had read a copy of the warning letter. They continued to distribute leaflets on January 8 after being aware of the contents of the letter. January 8 was the last day of the leaflet distribution.

Holt wrote to Arden, business representative of the Union, on January 9. After referring by name to the six employees who had distributed leaflets in Chicago the letter stated:

On January 7 and January 8, 1961, these individuals did, in our opinion, commit acts of misconduct against our company at a time when they were employees of this company. They have attempted to degrade, humiliate, hurt, injure, and otherwise damage the reputation, ability to sell and/or the productive capacity of this company, by the issuance of circulars and oral statements to employees, agents, and customers that were guilty of violating the laws of the United States of America; that we were a chiseling corporation and by telling these people that they had filed charges with the National Labor Relations Board since the issuance of the Intermediate Report.

These individuals wore the uniform of National Furniture Manufacturing Company at the time they committed these acts enumerated above. In our

¹³ Other than as found above, I do not find that Mosier or Dillback did or said anything further on the occasion when Mosier sought to give Dillback the warning letter

opinion, these individuals committed acts of misconduct. . . . We believe that they have subjected themselves to disciplinary action up to and including discharge; or, on the other hand, if they think they are striking, they have caused themselves to be replaced . . . if your members should interpret this as a strike against the company they are committing secondary boycott acts. This, of course, is in direct contradiction to your notification to this company that you called off the strike unconditionally and without any restrictions.

Should you care to comment or explain the position of your union, either your agents or these individuals, as to whether or not you are again striking, or whether they are committing individual acts of misconduct without any authority of your union, or what your position may be in this matter, we, of course, will accept and review such statement.

On January 10, Respondent mailed memorandums to Belt and Crane that stated:

You are suspended indefinitely due to your current misconduct in connection with your current activities on January 7 and 8, 1961 while you were in the employ of the company.

That same date, January 10, the following memorandums were mailed to Dunn, Hughes, and Sims:

You are suspended indefinitely due to your past record and furthermore your current misconduct in connection with your current activities on January 7 and 8, 1961, while you were in the employ of the company.

The reference in both sets of memorandums to "current activities on January 7 and 8, 1961" is, I find, to the leaflet distribution activity at the Chicago Furniture Mart on those dates. Regarding the phrase "suspended indefinitely," Respondent's counsel and Holt stated at the hearing that after the January 10 memorandums, above, and the filing of unfair labor practices by the Union, ". . . as far as we are concerned, they are discharged employees. . . ." ¹⁴

With respect to Dillback, on January 10 an eligibility report form of the Indiana Employment Security Division was mailed to said division stating:

Discharged—misconduct in connection with your past work as an unsatisfactory employee for which you have been disciplined. And furthermore for your current misconduct in connection with your current activities on January 7, 1961, and January 8, 1961, while you were in the employ of the company.¹⁵

By letter dated January 12, 1961, Arden replied to the January 9 letter, previously described herein, that he had received from the Company. Arden stated that the

¹⁴ The reference to past record in the January 10 memorandums to Sims, Dunn, and Hughes apparently refers to the following: *Sims*: Respondent's file contains a memorandum dated September 6, 1960, which states that Sims reported for reemployment (after the strike) on September 2, 1960; the memorandum states that the Drivers' Manual was discussed with Sims and that Mosier pointed out that the drivers should have a good night's sleep; Mosier pointed out to Sims the accidents he had had in 1956-59. Another company memorandum, dated September 13, 1960, states that the Company found out that on September 7 Sims worked elsewhere during the day and then drove a company truck at 4:30 p. m. Sims was warned that ICC regulations forbade driving in a fatigued state and Sims was warned that further violations of regulations would result in discharge. *Dunn*: A file memorandum, dated October 12, 1959, to the effect that on that date Holt called to Dunn's attention certain violations such as not leaving promptly on trips, failing to keep his log properly, failing to follow instructions as to where to purchase gasoline, etc. and Dunn was warned of dismissal if he continued to violate regulations. A memorandum of October 24, 1960, is to the effect that Dunn was told about and warned about his failure to make a proper log entry on October 18, 1960. *Hughes*: Memorandum of December 28, 1960, reprimanding Hughes for failure to make proper log entries on specific days and warning him of possible suspension for further violations.

¹⁵ Reference has previously been made to the fact that on November 5, 1960, Dillback was suspended for a week for violating a regulation regarding logbook entries. Respondent also introduced a memorandum dated November 14, 1960, from Holt to Dillback in which Dillback was reprimanded for calling some employees "scabs" and for saying, "You can't get any lower than these men." Dillback was also accused, in the memorandum, of saying about an employee that "he didn't have to take a truck out" and that Dillback and his men were "through with him." The memorandum went on, "In the same instance you referred to this firm in a derogatory manner saying that 'the company had the guts to ask' you and your men 'to sit down and eat with a bunch of scabs.'"

employees whom the Company had dismissed were not on strike nor were they picketing on January 7 and 8. The letter continued:

At that time they were on temporary layoff and were merely trying to advise the public, as the leaflet said, that you are not bargaining with Teamsters Local 215 as required by law.

In our opinion you have continued to violate the law by refusing to bargain even after the Trial Examiner recommended that you do so. You reinstated these employees in order to reduce possible financial penalties, but you have utterly failed to abide by the law in other respects by continuing your refusal to bargain with the Union.

Your letter of January 9 is your first communication with this union despite our repeated efforts to meet with you and to bargain collectively with you. We would like to meet with a representative of your company and bargain a labor agreement. . . .¹⁶

Respondent, by a charge dated January 11, 1961, and filed with the Regional Director of the Board, alleged that the Union, through its agents, Dillback, Belt, Dunn, Crane, Sims, and Hughes, had on January 7 and 8 engaged in a secondary boycott in Chicago in violation of Section 8(b)(4)(ii)(B) of the Act. On January 28, 1961, Respondent requested permission from the Regional Director to withdraw the aforementioned charge. Pursuant thereto the charge was withdrawn.

On March 20, 1961, a decision of appeals referee, Indiana Employment Security Division, issued. The issue before the referee was whether the suspensions of the men involved, on January 7, 1961, were for "misconduct in connection with work." Reference is made to the decision of the appeals referee at this time solely for the reason that it tends to show that the employer's position was based entirely on the leaflet distribution in Chicago on the date aforementioned and was not based on any prior alleged misconduct. The decision states, *inter alia*: "This handbill [the leaflet] is marked as the employer's Exhibit #1. The employer alleges that the circular was false and misleading, at least in part, and did not clearly state the facts. The employer alleges that the conduct of the claimants . . . was tantamount to acts of misconduct against the company at the time when they were employees of the company. The employer further alleges that such conduct attempted to degrade, and damage the reputation of the company. In view of the employer's allegations each of the claimants herein were suspended for what the employer considers misconduct in connection with work. The facts are not disputed. . . ."

Conclusionary Findings

The evidence detailed in the preceding section of this report convincingly establishes that the crux of the instant case is the distribution of the leaflets in Chicago on January 7 and 8, 1961, by the six laid-off employees of Respondent. I find that Respondent intended to and did terminate the six drivers on January 7 when it assigned six other persons as "replacement(s) effective immediately." When an employer secures and assigns replacements to the jobs of 6 of its employees the intent to sever the employment relationship with the latter group is clear. Respondent did not intend that 12 employees occupy 6 jobs.

Respondent's prompt and immediate reaction to the Chicago leaflet distribution was manifested as soon as it became aware of such activities on January 7. The terminations on that date, preceding the delivery of any warning, oral or written, were attributable to the leaflet distribution. The six employees who, together with the rest of the plant employees, had been temporarily laid off in December 1960, because of an annual inventory, would not have terminated, I am convinced, if they had not engaged in the leaflet distribution on January 7. The evidence is clear that but for the Chicago events the six men would have been recalled around the middle of January 1961. At the time of their layoff in December 1960, their foreman had so informed them and there is no evidence that in the interim between their layoff and January 6 anything had occurred or any company action had been taken which would affect their expected recall to work. Any misconduct or inefficiency on the part of the six men prior to their December 1960 layoff, was not the cause of the January 7 terminations.

¹⁶ On January 17 Respondent replied to Arden's letter of January 12 in which it was stated that the leaflet did not tell the whole truth about the additional charges filed by the Union, namely, that the charges had been withdrawn by the Union on December 23, 1960. Respondent also stated that it would not recognize the Union as the bargaining agent.

The foregoing conclusion, based on the inherent nature of the facts and circumstances, finds additional confirmation in the January 9 letter from Respondent to Arden, the union representative. This letter referred solely to the leaflet distribution in Chicago and it was stated therein that "these individuals did, in our opinion, commit acts of misconduct against our company at a time when they were employees of this company"; it was further stated that "they have subjected themselves to disciplinary action up to and including discharge; or, on the other hand, if they think they are striking, they have caused themselves to be replaced." The memorandums of January 10 sent to each of the six men terminated all of them. Three of the men had no "past record" but they as well as the others were terminated because of "current misconduct in connection with your current activities on January 7 and 8, 1961." The January 7 and 8 events were the assigned reasons for the terminations in all instances although "past record" was added with respect to three of the men.¹⁷ That "past record" was no more than a makeweight is further confirmed by the following statement of Respondent's counsel in reply to questions by the Trial Examiner at the hearing regarding Respondent's position:

I think in my opinion the actions of these parties, six individuals, doing what they did in Chicago was sufficient cause in itself for discharge. However, I think the Board in its 20 some years has always been interested in background. I hear it at every hearing, so I thought possibly you might like to have some of the background of these individuals into the record; but I would like to state that I believe the actions of the six individuals, what they did in Chicago, in itself was sufficient grounds for discharge. Someone else may not think so, but we are giving you the whole background. . . . We think we could have and properly discharged them for that reason alone [the Chicago leaflet incident], that's our opinion; but we think that the determination of this case is not going to be judged on what we thought, so we thought we would not only put in evidence of handing out these circulars and what they did in Chicago, but the additional data just in case someone might think they needed additional information other than the actions up in Chicago.

I am not making any admission on that, I don't want to put in just one incident and then find out if other evidence had been introduced in the record, that would have been cause for discharge. I am trying to make as complete a record as I can.

Having concluded that the leaflet distribution was the cause of the termination of the six employees, we must now consider some matters raised by Respondent in justification of its action. Respondent takes the position that the six men were terminated. They were terminated because in Respondent's eyes their activities in Chicago constituted a strike and made the participants strikers; as strikers, Respondent contends, they were replaced on January 7, 1961. Respondent asserts that if the men were not strikers they were terminated because they were disloyal, insubordinate employees whose leaflet distribution did not constitute activity protected by the Act.

First of all is the question whether the six men were strikers. It is my opinion that they were not. The commonly accepted meaning of the term "strike" is the act of employees in quitting work or withholding their services.¹⁸ This essential

¹⁷ As noted in the prior section of this report, the term "indefinitely suspended" was used in the January 10 memorandums to five of the men. Indefinite suspension in the context of this case was in effect a termination, an indefinite termination, and, in any event, Respondent at the hearing stated that it was its position that these men had been discharged. The notation with respect to Dillback, as we have seen, was "Discharged." The same citation of "current misconduct in connection with your current activities on January 7 and January 8" is made regarding Dillback. Instead of "past record" as in the case of three of the other men, the additional citation as to Dillback is "misconduct in connection with your past work as an unsatisfactory employee for which you have been disciplined." It is apparent that Respondent had disciplined Dillback previously by suspending him for a week on November 5, 1960. There is no evidence that but for the Chicago events in January 1961, Dillback would have been discharged; the evidence in fact is to the contrary since at the time of the plant layoff on December 23, 1960, Dillback was told, as were the others, that he would be recalled and there was no indication that he would be discharged for any past derelictions.

¹⁸ The Court of Appeals for the Seventh Circuit, quoted with approval the following definition of a strike: "A 'strike' in such common acceptance, is the act of quitting work by a body of workmen for the purpose of coercing their employer to accede to some demand they have made upon him, and which he has refused." *Jeffery-De Witt Insulator*

cessation of work or refusal to work is absent in the instant case. On January 6, 7, and 8, 1961, and from approximately December 23, 1960, these men were laid off employees. There was no work for them to perform during this period. They had not been asked to perform work during the period of layoff or at any time prior to their January terminations. Nor had they been told during their layoff period that they should report back to work on any specific date or to report back to work on any date prior to or including the period when they were distributing leaflets in Chicago.¹⁹ Although the six men were replaced on January 7 there was no work performed or to be performed on that date for any of the drivers, including the replacements. The first truckdriving performed by any replacement employee was on January 18 and the first work performance of the second replacement was January 25.²⁰ Of the regular drivers, one started on January 9, five started on January 15, and two commenced on January 16. There is no evidence that the Company had intimidated or intended that any of the six men in Chicago should report back to work during the period when they were in Chicago.²¹ Further, the Respondent never asked or sought to ascertain from any of the six men whether or not they would be available for work if called to return. The men had applied for their jobs unconditionally after the issuance of the Intermediate Report in the prior case. They worked from September 1960 until the December layoff. Nothing was said or done to indicate that they did not intend to return to work when the plant resumed operations. Respondent simply took the position that the activity of leaflet distribution in Chicago, calling the attention of the readers to the Company's refusal to recognize and bargain with the Union as recommended by a Trial Examiner of the Board and asking assistance of the readers of the leaflet, constituted a strike.²²

Respondent has pointed to certain testimony of Dillback wherein the witness at one point said he was not calling off the strike when he returned to work. Later, Dillback said that when they returned to work in September 1960, the strike was called off and they were ready to go to work. I find that the strike was terminated when the strikers and the Union applied for reinstatement and when the strikers continued to work without interruption after their reemployment. The efforts that the union members and the Union made thereafter to endeavor to force the Respondent to bargain with the Union did not include a quitting of work or a strike. The Union and the employees did not abandon their legitimate claims against the Employer pursuant to the provisions of the Act and the decision of a Board Trial Examiner but

Co. v NLRB, 91 F 2d 134, 138. Again in *C G Conn, Limited v NLRB*, 108 F 2d 390, 396-397, the same court stated that "We are supplied with numerous definitions of the word 'strike' They are all substantially alike" and went on to quote a definition which embodied among the essential ingredients of a strike the "*stopping work in a body . . . and refusing to resume work until the demanded concession shall have been granted*" [Emphasis supplied]

¹⁹ At the time of the December layoff, no specific date of recall had been given to the men. It was made clear that the Company would call them when they were needed.

²⁰ Mosier testified that the Company used only two of the replacements as drivers.

²¹ Before work would be available for the drivers it was necessary that the production facilities of the Company, which had also been closed for inventory, be resumed so that finished furniture would be available for shipment. Mosier testified that the factory resumed production gradually and that some production employees came back the second week of January and more came back the third week. Later, Mosier said, ". . . instead of the second and third weeks, I think our production started the first and second week."

²² If it be assumed, *arguendo*, and contrary to my view of the facts and the law, that there can be a strike by employees who are not working because they are laid off and at a time when they have not been told to report back to work, there is a further question whether such "strikers" can be replaced at such a time. The basic concept of the law in sanctioning replacement of strikers is to enable the employer to carry on his business during the strike and in the course of his economic contest with the strikers. *NLRB v Mackay Radio & Telegraph Co*, 304 US 333, 345. The instant Respondent was shut down at the time of the alleged strike and there was no business to be carried on. There is also a question whether six alleged strikers can be replaced by six replacements when only two of the latter actually go to work when the employer resumes operations. A further consideration is, if there was a strike, was it an economic strike or an unfair labor practice strike. The evidence establishes that if there was a strike it was because of Respondent's refusal to bargain with the Union. This, it was found, Respondent was legally obligated to do and its refusal was a violation of Section 8(a)(5) of the Act. Unfair labor practice strikers would be entitled to reinstatement regardless of replacements and in the instant case, subsequent to the termination of the six alleged strikers in January 1961, application had been made for reinstatement.

this did not constitute a strike nor had the Union and the employees in applying for reinstatement waived their right to seek to compel Respondent to bargain.

Having rejected the concept that the Chicago activity of the six men in January 1961 was a strike, we now consider the contention that such activity constituted misconduct and was not activity protected by the Act. Although Respondent has referred to the Chicago leaflet distribution as picketing, the descriptive term itself is not determinative. Perhaps the most accurate description is in this case the most obvious. The six men in Chicago were handing out leaflets that described how the Company was refusing to bargain with the Union that the employees had freely chosen; how this caused a long strike; and that a Board Trial Examiner had upheld the Union's position and had recommended that the Company bargain with the Union; that the Company was still refusing to bargain; that additional charges have been filed against the Company; that all the Union wanted from the Company was a contract with provisions for fair wages and decent working conditions; that the Union did not think that the Company is entitled to undermine the rates of unionized employers; that the Union was asking the readers of the leaflets to help the employee; and that if the reader let the Company know that he believed in fair play, including compliance with the recommendations of a Government Trial Examiner, the Company might be induced to do the right thing and this would make for fair competition between employers and would not give the nonunion company an advantage over the employer with a union contract and would result in fair rather than "chiseling" competition.

Aside from the plea for assistance in the leaflet and the exhortation and argumentation as to why the reader should render such help, the bulk of the leaflet purports to be a factual statement. The sentence, "Additional charges have been filed against the Company" is pointed out by Respondent as an untrue statement. As I view this aspect, the statement is true as far as it goes but it does not tell the full story. Additional charges have been filed against the Company. They were filed on November 8, 1960, Case No. 25-CA-1316, as mentioned in the preceding section of this report. The charges, however, were withdrawn on December 23, 1960.

In reading the leaflet, the crux of the factual message is that the Company has refused to bargain and has persisted in such refusal notwithstanding recommendations by a Government agent that it has a legal obligation to do so. The reference to additional charges actually means that the Charging Party, presumably, and in fact, the Union, believes that the Company has committed other or additional unfair labor practices. Since anyone may file a charge, the filing itself establishes nothing with respect to whether or not there has been a violation.²³ If it had been desired to state in the leaflet that "additional charges are presently pending against the Company," a charge could have been filed with the Board's Regional Office on the day of the initial leaflet distribution or the day before and such a charge could have contained the same allegations, or different allegations, that had been in the charge in withdrawn Case No. 25-CA-2316. Without condoning the leaflet's failure to give the complete picture with respect to the "additional charges," I do not regard this factor, when the leaflet is viewed as a whole, and when in fact additional charges had been filed and when the inconclusive nature of the mere filing of any charge is borne in mind, as a misrepresentation of a material fact or one that grievously maligned the Company.²⁴

Although at the hearing and in its brief Respondent, in attacking the Chicago leaflet distribution, has among other things asserted that the leaflets were untrue, the initial and I believe the principal cause of the replacement and termination of the men on January 7 was Respondent's belief that it was an act of disloyalty and misconduct for employees to publicize Respondent's labor troubles in Chicago at a situs where Respondent's customers and potential customers were present. It was Respondent's view that the Chicago activity was hurting or was an attempt to hurt its business by cataloging Respondent's conduct toward its drivers and by citing the adverse finding of a Trial Examiner of the Board and by categorizing the Company as an unfair competitor and by the appeal to the readers for help. This basic position of outrage at the effort of the Union to exert economic pressure upon the Employer in order to force compliance with the Intermediate Report's finding and recommenda-

²³ The Rules and Regulations of the Board, Series 8, Section 102.9, provide "A charge that any person has engaged in or is engaging in any unfair labor practice affecting commerce may be made by any person."

²⁴ If, for instance, in the prior case there had been a court decision enforcing the Board's order and the leaflet had stated that the court had found against the Company, it might be said that the statement was inaccurate if it failed to mention that one judge had dissented and the decision was by a 2 to 1 margin and that the Supreme Court had granted certiorari.

tions that Respondent was legally obligated to bargain with the Union is reflected in the first page of Respondent's brief:

Under our free enterprise system it is unreasonable to expect a reputable and reliable company to stand helplessly by and do or say nothing in its own defense while six men . . . try to destroy their own company's sales efforts at the Chicago Furniture Market.

(p. 2) . . . it seems double ill-advised and unjust to compel this company to retain in its employ six men who were so disloyal that they tried to stop our customers from buying our products. . . . Company management cannot be expected to condone or tolerate such disloyalty. . . .

The foregoing view that it was not the incomplete and therefore allegedly "untrue" reference to the filing of additional charges in the leaflet that was the motivating cause for the terminations is further confirmed by a reading of the January 7 "warning" letters to the six men. This letter was prepared on the same day that the men were replaced and terminated and it reflects the motivation therefor. The letter accuses the men of striking or picketing "while employees of this company." This is the gravamen of the employees' activities in the view of the Company and such activities were regarded as basic disloyalty. The view of disloyalty is elaborated in the reference to the activity as "an attempt on your part to undermine this Company and cannot be permitted by management of this concern." The letter admonishes the men about wearing the company uniform while engaged in their activities at Chicago and orders them to refrain from doing so. Then appears a reference that the activities constituted inducement of employees and customers "to stop handling the products" of the Company, which is again the basic theme of disloyalty in trying to thus adversely affect the Company's business. There is not a word, not a reference, to any allegedly false or incomplete statement in the leaflet. There is no warning that any false or incomplete statement should be corrected. The letter makes it clear that it is a "formal notification" of the Company's position regarding the employees' conduct. And, as already stated, this letter reflects the operative factors that motivated the Company's January 7 terminations.²⁵

We come now to what, in my opinion, is the crux of the case. I have rejected Respondent's contention that the employees were striking in Chicago and I have also concluded that the gravamen that led to the terminations was neither past conduct nor the fact that the leaflets failed to state that although additional charges had been filed after the issuance of the prior Intermediate Report they had subsequently been withdrawn.²⁶ The issue that remains is the question whether the Chicago leaflet distribution for which the six men were terminated was protected activity within the meaning of the Act or whether it constituted disloyalty and misconduct that furnished justifiable cause for termination.

In order to reach a conclusion upon the foregoing issue it is necessary to decide what it was that the six men were doing in Chicago. That they were distributing leaflets is clear enough. The leaflet was addressed to "The Public" and was given to any individual in the vicinity of the Furniture Mart who would accept it. How-

²⁵ The reference in the letter to "other acts such as sending letters to the dealers that are libelous" clearly refers to activity during the original strike in 1959-60. The employees were reemployed after the strike; they were not disciplined or terminated for such prior activity; and they continued to work until the general layoff in December 1960. It is clear that but for the Chicago activity in January 1961, the employees would not have been terminated, as was discussed in the preceding section of this report.

²⁶ In oral argument at the hearing Respondent's counsel suggested that the November 1960 charge against the Company had been withdrawn because "apparently" the Regional Director had advised the Union that he would not issue a complaint. There is no evidence in the record why the charge was withdrawn and Respondent made no attempt to adduce evidence on the point. While it is perhaps not unreasonable to infer that counsel's suggestion may be accurate there are various other possible explanations for the withdrawal of a charge, including tactical considerations or the inability to obtain adequate legal proof notwithstanding a conviction on the Charging Party's part that the allegations of the charge are true. In the absence of evidence, this entire area involves us in speculation and I am not prepared to make any conclusion thereon. In any event I do not consider this aspect material to the analysis and conclusion heretofore made regarding the reference in the leaflet to additional charges. My position regarding the charge of a secondary boycott filed by the Employer on January 11 with respect to the January 1961 Chicago activity and withdrawn by the Employer on January 25 is the same and I do not speculate that the charge was withdrawn because it was found to lack merit or for other reasons

ever, I am not persuaded the six men came from Evansville, Indiana, primarily to distribute leaflets to members of the general public in Chicago. If it was desired simply to circularize the general retail consuming public, the man on the street, the downtown center-city part of Chicago would have provided the maximum number of recipients. The general public was not admitted to the Furniture Mart exposition. Other than taxi drivers and others whose work dictated their presence, it is doubtful that many members of the general public were walking in the vicinity of the Mart on Lake Shore Drive during the forepart of the month of January. In the same connection, if the principal objective was to reach the general public, the cities of St. Louis and Indianapolis were nearer to Evansville than Chicago. If size of audience was the criterion, New York City was available. The selection of the Lake Shore Drive area for leaflet distribution, at the precise location where and at the precise time when the Winter Furniture Mart was being held, was, quite clearly, more than coincidence. It was a deliberate choice. In my view the selection of the particular time and place is attributable to the fact that the Furniture Mart was attended by furniture manufacturers, owners of retail furniture stores and department stores, and wholesale buyers of furniture. I believe that it was the foregoing public that it was intended that the leaflets should reach. It is also my opinion that the primary purpose of the leaflet distribution to this public was to exert economic pressure upon the Respondent Company in order to compel the latter to recognize and to bargain with the Union as it was legally obligated to do as found by a Board Trial Examiner and as subsequently found by the Board itself.

In reaching the foregoing conclusion I have rejected as unconvincing parts of the testimony of some of the men who distributed the leaflets, at least if the public to which they refer is other than, except in a very minor degree, the rather specialized public attending the Furniture Mart. Dillback stated that he wanted the public to know that the Company was thumbing its nose at the NLRB. He said the leaflets would help the Company because if it was organized and manufacturing under a union label it would help the sale of products. At another point the witness said he did not think the circulars would hurt the Company and then stated that he did not know whether they would help the Company. Hughes stated that by giving out the leaflets "we were just showing the people what the company hadn't done for us." Hughes said that there was but one way the people could help and that was by not buying the Company's furniture. Crane said that by giving out the leaflets he was appealing to the people to force the Company to bargain with the Union. Dunn said that his purpose was to let the public know that the Company was not bargaining with the Union. Belt testified that the purpose was to get the message on the leaflets across to the public. Sims said the same.

As a matter of realism it cannot be said that the help that the leaflets requested from those attending the Furniture Mart was solely sympathetic sentiment. The reference in the leaflets to "Your help can force this Company into Fair—rather than chiseling—competition among employers" envisaged or hoped for practical assistance in the form of a cessation or threatened cessation of purchases from Respondent manufacturer by the owners and buyers of the retail furniture and department stores who were attending the Mart. As one of the men who distributed the leaflets candidly testified, ". . . there wasn't but one way they could help us was not buy the furniture." Since the Furniture Mart "Public" was composed of employers and persons such as buyers who were closely identified with management, their sympathies might well be on the side of their fellow employer, the Respondent, rather than on the side of the Union. To deal with this factor the leaflets attempted to couch their appeal in terms of competition among employers, an aspect that might strike a responsive chord among at least some of those attending the Mart, to wit, "We don't think that National Furniture is entitled to undermine the rates of fairminded employers who are now under union contract. . . . Your help can force this Company into Fair—rather than chiseling—competition among employers." Again, the statement, "If you let the National Furniture representative know that you believe in fair play for those men, this Company might be induced to do the right thing" indicates that the plea for help was addressed to the storeowners and buyers at the Mart who would have access to and contact with the National Furniture representative in attendance at the Mart.²⁷ The general public would have no such access to or contact with the company representative. A further implicit but potent factor in the appeal to the wholesale buyers at

²⁷ Respondent had rented space at the Mart during the period of the furniture show and was represented by its president and general manager and at least one other management representative.

the Mart was the fact that the leaflet distribution as well as the contents thereof manifested a clearly unsettled and inharmionous state of labor relations among Respondent's employees. This in itself might be an inducement to curtail or omit future purchases for fear of uncertain delivery of products.

In the light of the foregoing conclusions that the Chicago leaflets were primarily an appeal that those in attendance at the Furniture Mart should exert economic pressure on Respondent by not purchasing its products, it is necessary to analyze the Chicago events as a possible violation of the secondary boycott provisions of the Act, more particularly Section 8(b)(4)(ii)(B) thereof.

The consideration of this aspect entails the assumption that if the Chicago conduct constituted a secondary boycott it would be illegal and unprotected activity.²⁸

Proceeding on the last-mentioned assumption we now consider the applicability of Section 8(b)(4) of the Act.²⁹ I have previously rejected the contention that the men in Chicago were engaged in a strike. I have also concluded that their conduct was intended to induce the retail store owners and buyers at the Furniture Mart not to purchase Respondent's products. The question is, did the leaflet distribution induce "any individual employed" as that term has been construed by the Board. The Board has drawn a distinction between individuals employed at the managerial level and individuals, who although possessing supervisory functions, were not, under the facts of the particular case, managerial employees.³⁰ In arriving at a determination of this matter of the authority and position of supervisors the Board examines in each case "such factors as the organizational setup of the Company, the authority, responsibility and background of the supervisors, and their working conditions, duties and functions on the job involved . . . salary, earnings, perquisites and benefits. No single factor will be determinative."³¹ Where there was no evidence in the record regarding the foregoing factors or other factors which the Board "might use to make the determination we deem basic to the disposition" of the issue whether the supervisors are individuals employed by any person, the Board has dismissed the case.³²

In the instant case, although Respondent has raised the issue of a secondary boycott as a part of its defense, the record does not show the essential factors referred to by the Board in the above cases. There is the testimony of Mosier that the general public did not have access to the Furniture Mart and that admission was by pass. The Mart, according to Mosier, was for the manufacturers and dealers, the customers of the manufacturers. This testimony was not controverted and I have credited it without specific reference previously in this report. The other evidence that bears upon the identity of those at the Mart is the "Bluebook of Buyer Registration" for the "1961 Winter Market in Chicago." The bluebook lists by States 15,575 buyers from 7,531 stores. Although there is no testimony on this point a perusal confirms the fact that those listed were wholesale furniture customers of the manufacturers and were either retail store owners themselves or buyers for such stores.³³

²⁸ *Mackay Radio and Telegraph Company, Inc*, 96 NLRB 740, 741-743; cf. *NLRB v. Rockaway News Supply Company, Inc*, 197 F 2d 111, 114 (CA 2), aff'd 345 US 71

²⁹ Section 8(b)(4)(i)—"to engage in, or to 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 any person engaged in commerce . . . where in either case an object thereof is . . . (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 . . ."

³⁰ *Local Union No. 505, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, et al. (Carolina Lumber Company)*, 130 NLRB 1438.

³¹ *Idem*.

³² *Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO (Peyton Packing Company, Inc)*, 131 NLRB 406.

³³ For instance, the first listing under "Alabama" is the town or city of Anniston and under the latter is listed "Geo. Cater Furn. Co, Howard W. Cater, Howard C. Cater, Jr"; under the same State is listed the town of Haleyville and "Dobbs Furn. Co., Ronald D. Dobbs, Mrs. Ronald D Dobbs." Many listings under the various States are similar in that they indicate by the name of the Company and the name of the persons listed thereunder that the latter were probably the owners of and the buyers for their respective stores. There are, of course, other companies listed where there is no such similarity or identity of store name with that of the persons listed. Thus, it is reasonable to conclude that in some instances the buyers listed under a store name are buyers employed by the

Although evidence of such a limited nature does not enable us to weigh the factors enumerated by the Board in the *Carolina Lumber* case, above, the evidence indicates, if anything, in my opinion, that those in attendance at the Mart were not "individuals employed" as the Board has construed that term in the Act. The owners were clearly not such individuals, and "buyers" for such stores are of managerial stature. If the buyer for a small store is not also the owner or a part owner it is not unlikely that he is the store manager or is high in the presumably small hierarchy of the store. The buyers for the large stores, such as department stores, are also of high managerial status and have never been included in collective-bargaining units determined by the Board as appropriate for rank-and-file employees. A buyer is a keyman in a retail store since he determines the very matters that are the heartblood of a retail business, namely, what items to purchase, at what price, in what quantity, what style trend to adopt, all having in mind the ultimate salability of the items at a particular markup in the particular local retail market served by the store. As a policy maker at a high and vital managerial level he is not an "individual employed" as the Board has interpreted the words in Section 8(b)(4) of the Act. In any event, since the secondary boycott assertion was an affirmative defense advanced by the Respondent it was incumbent upon it to establish by evidence that the persons at the Furniture Mart were "individuals employed."³⁴ I do not believe that Respondent has done so and such evidence as is available shows the contrary.

Nonsupervisory employees are of course "individuals employed." There is no evidence that any of the manufacturers or retail storeowners or buyers had their employees present at the Furniture Mart. While a few such employees may have been present prior to the opening of the furniture show on January 6 in order to help with arrangements this is a matter of surmise in the absence of evidence. On January 6, at 9:30 a.m., when the leaflet distribution commenced, and on January 7 and 8, there is no evidence that any employees of manufacturers or employees of their customers were present. As previously stated, the people who were present were manufacturers, owners of stores, and buyers. Respondent, who had rented space at the Mart, had, what is perhaps, in the absence of other evidence, a complement more or less typical of those in attendance, namely, its president, its general manager, and its chief plant products engineer.³⁵ None of these people were rank-and-file employees and it is doubtful that there was any need for any of the storeowners and buyers to have their employees present at the furniture exposition. It perhaps can be assumed that the American Furniture Mart Corporation which apparently sponsored or ran the exposition had some employees. There is evidence that there was at least one guard at an entrance to the Mart and there were probably other guards or attendants present at the other doors. There could have been some building maintenance employees. Apparently taxi drivers and municipal policemen were in the vicinity and some miscellaneous pedestrians probably passed by. Since leaflets were given to anyone who would take one we can conclude that the foregoing categories received them. However, as I have stated above, the leaflets were directed to the manufacturers, store owners, and buyers at the Mart. Any incidental appeal to taxi drivers, guards, and pedestrians, was, if anything, directed to each one as a consumer and was not an inducement that he should not use Respondent's products "in the course of his employment."³⁶ Nor do I find evidence to warrant the conclusion that

store and are not owners. This would appear to be particularly true with such large department stores as "The May Company" under Ohio, Cleveland, and "R. H. Macy & Co., Inc.," and "Gimbel Brothers, Inc.," under New York, New York City

³⁴ *Peyton Packing Company, Inc., supra*

³⁵ In the instant case, Quackenbush was referred to in the record as chief engineer. The Intermediate Report and Board Decision in the prior case identified Quackenbush as plant products engineer. I incline to the belief that the latter is probably the more accurate title although the individual may have been chief plant products engineer.

³⁶ The categories to which I have been referring were actually not present at the Mart as consumers. They were present as drivers of taxis, etc. Even to these people as consumers the theme is a tenuous one since it entails projecting that at such time as they were in the market for a chair or sofa, they would scrutinize products in a retail store, lifting up the furniture, perhaps, to ascertain, if possible, whether the particular piece was manufactured by Respondent. Without any reflection upon National Furniture Manufacturing Company, its brand name does not have the common marketplace diffusion that General Motors may have. Leaflets directed against the latter company and distributed among Tom, Dick, and Harry, might register since the particular automobile product would be widely known and readily identified. Here again though, any general consumer boycott would probably not be in the course of employment.

the leaflets constituted inducement to any unidentified employees of American Furniture Mart Corporation, assuming that there were such, not to perform their work with an object proscribed by the Act. The appeal and the inducement of the leaflets and the distribution thereof was, realistically viewed, not in that direction. If the leaflet activity had been intended to reach employees and to dissuade them from working in the course of their employment, the obvious approach for any union and particularly a Teamsters Union, as was here involved, was to patrol the truck entrances to the Mart and to circularize the truckdrivers. This, the evidence shows, was not done and it apparently was a deliberate choice.³⁷ The facts in the instant case are distinguishable from those cases involving picketing of and/or leaflet distribution at a factory or retail store having employees working on or handling products of or products destined for the primary employer and where the evidence indicates an appeal to employees as such.³⁸

Regarding Section 8(b)(4)(ii) of the Act, it is my opinion that the leaflet distribution in Chicago did not constitute threatening, restraining, or coercing the persons in attendance at the Mart. There were no leaflets being distributed at their respective stores or factories and no threat, express or implied, that such would be done. Moreover, as previously found, employees or persons employed by the owners and buyers were not being induced to stop work. The wholesale customers or potential customers at the Mart were simply asked to help the Union. They themselves were not threatened. In fact, insofar as Respondent's competitors, other manufacturers, were concerned, the leaflet distribution's effect was the direct opposite to a threat or restraint of themselves.

Although the Chicago leaflet distribution has been found not to be a secondary boycott within the Act's terms, there still remains the question whether it was activity protected by the Act or whether as Respondent contends, it constituted misconduct by employees and was unprotected.

Since the conduct here involved constituted union and concerted activity, the initial observation is that not all such activity is protected activity.³⁹ While affirming the principle that the Act does not excuse union or concerted activities that are "themselves independently unlawful," the Court of Appeals for the Second Circuit has made it clear that peaceful union propagandizing, being a lawful means, does not render the activity unlawful by reason of its consequences.⁴⁰ Not inconsistent with this approach was the action by the Court of Appeals for the District of Columbia in the *Jefferson Standard Broadcasting* case in remanding to the Board for the purpose of having the Board determine whether the means used by the Union in that case, to obtain a lawful objective, were unlawful.⁴¹

³⁷ Cf. *Journeyman Barbers, Hairdressers, Cosmetologists, and Proprietors International Union of America, AFL-CIO (Chicago and Illinois Hairdressers Association)*, 120 NLRB 936, 939, where, among other factors, "picketing began before the shows were officially opened and was conducted at times and at entrances when the exhibitor's material was being delivered"

³⁸ See also, the general proviso to Section 8(b)(4) of the Act which appears after subsection (D) thereof

³⁹ *NLRB v. Fansteel Metallurgical Corporation*, 306 U.S. 240, *Automobile Workers v Wisconsin Board*, 336 U.S. 245; *The American News Company, Inc.*, 55 NLRB 1302, *Thompson Products, Inc.*, 70 NLRB 13.

⁴⁰ "But so long as the 'activity' is not unlawful, we can see no justification for making it the occasion for a discharge; a union may subsidize propaganda, distribute broadsides, support political movements, and in any other way further its cause or that of others whom it wishes to win to its side. Such activities may be highly prejudicial to its employer; his customers may refuse to deal with him; he may incur the enmity of many in the community where disfavor may bear hard on him; but the statute forbids him by a discharge to rid himself of those who lay such burdens upon him. Congress has weighed the conflict of his interest with theirs and has *pro tanto* shorn him of his powers." *NLRB v. Peter Cailler Kohler Swiss Chocolates Company, Inc.*, 130 F.2d 503, 506. The breath of the foregoing holding is apparent since the protected activity in the case did not occur in the course of a labor dispute between the employer and his employees. Farmers in the area were on a milk strike. During the strike the employer bought and processed milk not for its own use but for delivery to the metropolitan market affected by the strike. The employer's employees injected themselves into the matter by passing and publicizing a union resolution that attacked the employer for aiding the forces that were using "every vile and vicious means" to defeat the farmers in their strike. The court upheld the Board in holding the activity protected.

⁴¹ *Local Union No 1229, IBEW, AFL v. N.L.R.B.*, 202 F.2d 186.

The *Jefferson Standard Broadcasting Company* case was one where picketing was commenced without calling a strike. The handbill distributed attacked the technical quality of the employer's product and the employees through the handbill undertook to speak as experts thereon to consumers and the public at large. The Board in its decision referred to these factors and noted that the employees "did not indicate that they sought to secure any benefit for themselves as employees by casting discredit upon their employer . . . the subject matter of the employees verbal attack upon the employer was not related to their interest as employees. And the gist of their appeal to the public was that the employer ought to be boycotted because he offered a shoddy product to the consuming public—not because he was 'unfair' to the employees who worked on that product." The Board found such activity to be unprotected.⁴² The Supreme Court affirmed the decision of the Board noting that the "attack related itself to no labor practice of the company. . . . The policies attacked were those of finance and public relations for which management, not technicians, must be responsible. The attack asked for no public sympathy or support." The Court stated that the Board correctly treated the attack in the handbills "solely as one made by the Company's technical experts upon the quality of the Company's product."⁴³

The facts and the legal principles in the foregoing cases do not lead to the conclusion in the instant case that the Chicago leaflets and their distribution constituted unprotected activity. It is my opinion and finding that the activity was protected. The leaflets clearly disclosed the existence of a labor dispute between the Company and the Union, including its driver members. There was a description of the nature of the dispute and of an adjudication thereon by a Trial Examiner. The assistance of the audience in compelling the Company to bargain with the Union as legally required was sought. No attack was made on the quality of the Company's products. I have previously discussed the incomplete or inaccurate statement in the leaflets regarding the fact that subsequent charges have been filed against the Company. This statement regarding charges did not allege a material fact that constituted the essence of the leaflets' message. For reasons set forth elsewhere in the report, I do not find that the men were terminated because of the reference to the additional charges nor do I believe that but for such reference they would not have been terminated. The evidence is clear that the termination by replacement on January 7 was due to the Respondent's position that it was misconduct and disloyalty for employees to seek to induce customers of the Company not to purchase from the Company in connection with their labor dispute. I am of the opinion that the generally protected nature of the leaflets' message and its dissemination do not become unprotected by reason of the incomplete reference to the charges.

In this connection it is appropriate to consider not only the cases above cited but also some additional decisions including *The Hoover Company*, 90 NLRB 1614, 1617-1618, 1621. The Board, in that case, rejecting the contention that the consumer boycott had an unlawful objective, went on to discuss cases in which it had been held that certain activity was not protected where the object was to cause the employer to violate an obligation imposed by law. Such a factor was found to be absent in the case before it. The Board went on to state that "the Respondent's argument rests wholly upon the proposition that the conduct of a consumer boycott by employees while they continue to work and receive wages from the boycotted employer is unjust and disloyal. This may well be true, as it is true, to be sure, in certain other individual instances where employees strike, picket, or engage in other forms of concerted activity. But absent showing that the means employed were other than peaceful or that the objectives sought were as have been held for reasons of clear public policy to be improper, we find no authority to regard the concerted activity herein as unprotected."

The Court of Appeals for the Sixth Circuit, in reviewing the *Hoover* case, found that the boycott had an unlawful purpose.⁴⁴ This conclusion was based on an application of the Board's *Midwest Piping* doctrine⁴⁵ and the court held that the company

⁴² 94 NLRB 1507, 1511. The *Peter Cailler Kohler* case, *supra*, was distinguished on the ground that in that case the employees did not suggest that consumers should avoid the employer's products because they were of inferior quality.

⁴³ *NLRB v Local 1229, IBEW, AFL*, 346 U.S. 464. To the same effect, the following cases held attacks upon the employer's products to be unprotected. *Kitty Clover, Inc.*, 103 NLRB 1665, 1657-1688, *enfd.* 208 F.2d 212 (C.A. 8), where the strikers told customers that the employer, who manufactured potato chips, employed "diseased girls" from "Skid Row"; *The Patterson-Sargent Company*, 115 NLRB 1627.

⁴⁴ *The Hoover Company v. N.L.R.B.*, 191 F.2d 380, 385-386.

⁴⁵ *Midwest Piping & Supply Co., Inc.*, 63 NLRB 1060.

had the right to discharge or refuse to reinstate employees "who were engaging in and maintaining a boycott to force it to recognize the United Electrical Workers Union while representation proceedings were pending on the petition of a competing union to select a bargaining representative."⁴⁶ The court went on to consider the contention that the purpose of the original boycott had subsequently changed. After discussing the evidence on this aspect the court concluded: "It is clear in this case that the purpose of the boycott did not change" (p. 387). In a dictum the court then asserted that even if the purpose of the boycott did change the employees' activity was not protected. The dictum went on to state that the right to strike requires that the strikers "must thereby cease to work and draw their pay. . . . An employee cannot work and strike at the same time. He cannot continue in his employment and openly or secretly refuse to do his work. He cannot collect wages for his employment, and, at the same time, engage in activities to injure or destroy his employer's business." The instant Respondent in its brief cites the foregoing dictum.

An examination of the cases cited by the court in support of its dictum reveals the context in which the various propositions appeared.⁴⁷ The *Montgomery Ward* case was quoted at some length by the court in *Hoover Company*. *Montgomery Ward* was a case in which it was found that employees while working and drawing pay were refusing to do certain of their normal work such as handling a particular class of work orders. In *United Biscuit*, employees while working and drawing pay refused to perform certain assigned duties. *Metal Mouldings* involved a working employee who was recruiting trained technicians from his employer for a competing firm in which his father was foreman. *Northwestern* was the case of an employee who was discharged because he continued to visit his former employer, a competitor of the then employer, notwithstanding the objections of the latter. There was no showing that the visits were in connection with any union activity. As I read these cases and such cases as *Jefferson Standard Broadcasting*, *supra*, it is only in this context that the dicta that an employee "can not collect wages . . . and, at the same time, engage in activities to injure or destroy his employer's business" finds support in the precedents cited.

The instant case does not involve the same situation as that passed upon in *Montgomery Ward* and the other cases above referred to. Those cases involved partial strikes, where employees were setting their own terms and conditions of employment, i.e., working and drawing pay but refusing to perform certain normal work tasks, or they were cases involving conduct that apparently was neither union nor concerted activity and which consequently was unprotected. Nor, factually, do we have here the case of employees who in the course of their regular employment and while receiving pay, devoted their after-work hours to disseminating the leaflets in Chicago. The legal principles in the last-mentioned situation may or may not be the same as those applicable to the facts before us in the instant case. However, it is the particular facts in the case before us which we consider.

Although the drivers who distributed leaflets in Chicago on January 6, 7, and 8, 1961, were employees of Respondent, they had been on layoff status since December 23, 1960. At the time of layoff they had been informed that they would be recalled around January 15 but no specific date was fixed. The men were not paid during the layoff. Respondent's general manager, Mosier, testified that during the layoff the men were accumulating seniority and it appears that they received holiday pay for December 25 and January 1. The status of the laid-off employees was simply that of persons who had a reasonable expectancy of reemployment. In the absence of any contract Respondent had no legal obligation to reemploy the men. While, in a sense, duration of employment and seniority are synonymous terms, seniority has no legal significance as an enforceable right except pursuant to contract. Thus, an employer has no legal obligation to prefer a senior employee to a junior employee except insofar as he may be obligated to do so by contract. The holiday pay that the laid-off employees received was undoubtedly attributable to their past services during the year and prior to the layoff.⁴⁸ Thus, we see that although there was an employer-employee relationship in existence during the layoff period it was a dormant type of relationship embodying no active performance of mutual

⁴⁶ See also *N.L.R.B. v. Electronics Equipment Co., Inc.*, 194 F. 2d 650, 205 F. 2d 296 (C.A. 2), involving the same type of unlawful purpose

⁴⁷ *N.L.R.B. v. Montgomery Ward & Co.*, 157 F. 2d 436 (C.A. 8); *United Biscuit Company of America v. N.L.R.B.*, 128 F. 2d 771 (C.A. 7); *N.L.R.B. v. Metal Mouldings Corporation*, 12 LRRM 723 (C.A. 6); *Northwestern Photo Engraving Co.*, 38 NLRB 813.

⁴⁸ Personnel Manager Holt testified that it is company policy that to be eligible for a paid holiday, an employee must have completed 90 days of service prior to the holiday.

rights and duties during the layoff. The relationship of the laid-off employees to the employer would appear to be less viable than that of a working employee to his employer after working hours.⁴⁹ The extent of the latter relationship is itself rather tenuous since the employer-employee relationship is not that of master and servant, or master and slave or lord and vassal. What an employee does on his own time, particularly when away from his place of employment, is generally not of legitimate concern to his employer.

Whatever may be the ordinary ramifications of the employer-employee relationship when the employer is on his own time, the Act interposes certain guarantees that affect important aspects of the relationship. Thus, the employee in the exercise of statutory rights under certain conditions is freed from interference or penalty not only on his own time but also when he engages in union activity on the property of the employer on his own time.⁵⁰

The cases heretofore discussed are illustrative of the metes and bounds of the activities in which employees may engage without incurring discharge or penalty.

Disloyalty, which was the ground for Respondent's action in terminating its employees and which it stresses in its brief, is, of course, the opposite of loyalty. The latter may be defined as "fidelity to a superior, or to love, duty, etc.—faithfulness, constant devotion."⁵¹ The term is easy of definition but its application is more difficult.⁵² In a more contemporaneous application it may be said and has been said in other situations that employees who join a union are disloyal to their employer. All strikes seek to injure the employer's business and perhaps are referred to as acts of disloyalty. The important thing, however, is that union activity by employees is protected by statute and it is no less so when by publicizing a labor dispute the employees seek to exert economic pressure upon their employer by injuring his business.

Respondent has also referred to the fact that when the employees returned to work after the strike they were asked by Respondent not to involve company customers in internal matters between the Company and the Union and the employees agreed. It is not entirely clear what was the import of the foregoing verbal exchange. In any event, a waiver of statutory rights must be in clear and unmistakable terms.⁵³ This is true with respect to alleged waiver by a union and it is doubly true with respect to individual employees, even assuming that an individual employee may waive his statutory rights.⁵⁴ I am unable to conclude that there was a waiver in the instant case or that the conversations aforedescribed affect the conclusions to be drawn regarding the Chicago leaflet distribution. Substantially the same observation is applicable to the effect of Respondent's rule 15 which was adopted after the inception of the 1959-60 strike.⁵⁵ If the employee conduct is protected activity under the Act a company rule forbidding such activity, assuming that it does, does not render the activity unprotected.⁵⁶ Respondent's assertion that the employees at Chicago were insubordinate and disobedient because they did not heed Respond-

⁴⁹ If an employer had a rule against "moonlighting," i.e., an employee holding two jobs, one for the employer and another job on a night shift in another plant, it is extremely doubtful that the rule, intended to promote efficiency by preventing physical debilitation by overwork and lack of adequate rest, would be deemed applicable or would be enforced against an employee who was on a 3-week layoff at the employer's plant.

⁵⁰ *Republic Aviation Corporation v. N.L.R.B.*, 324 U.S. 793

⁵¹ Webster's New International Dictionary

⁵² Historical examples provide an exercise in definition and application of the terms of loyalty and disloyalty: Moses and his people v their Egyptian "owners"; the American revolutionists v the Mother Country; Luther v the Papacy or the Roman Catholic Church, the Bolsheviks v the Czar; Cuba v Spain; Bolivar v. Spain, the Boers v. Great Britain; the Bantu, *et al v.* the South African Republic; American Indian rebellions v the United States; the Confederacy v the United States; the Hungarians v. U.S.S.R.

⁵³ "We are reluctant to deprive employees of any of the rights guaranteed them by the Act in the absence of a clear and unmistakable showing of a waiver of such rights." *Tide Water Associated Oil Company*, 85 NLRB 1096, 1098; *Hekman Furniture Company*, 101 NLRB 631.

⁵⁴ Waivers by contracting parties such as an employer and a union are based on contractual consideration, e.g., a union waives its statutory right to strike in return for certain contract provisions. It is certainly open to doubt that an individual employee may waive his right to engage in union activities by promising not to join a union or to strike. Consideration for agreement not to join a union in the form of an offer of employment and employment has been commonly referred to as a "Yellow Dog" contract.

⁵⁵ "15. The making of false, vicious, or malicious statements concerning any employee, the Company, or its products constitutes infraction of company policy."

⁵⁶ *Republic Aviation Corporation v. N.L.R.B.*, *supra*

ent's letter, dated January 7, described above, is unconvincing since all six employees were terminated on January 7 and they did not receive the letters from Respondent until January 8. Further, if the employees were engaged in protected activity the letter could not alter the fact.

Considerable testimony has been elicited by Respondent with respect to Dillback, one of the six men. Dillback, like the others, was terminated on January 7 before he received Respondent's letter and before he had the conversation with Mosier, previously described, in which he told the latter what to do with the letter. Respondent called two of its foremen, Chamberlain and Barnet, who testified that on December 16, 1960, while in a tavern restaurant, Dillback told them that he and others were going to pass out nasty handbills at Chicago and that the handbills "will not hurt the Company but they will help salesmen from others companies to show against the National Company." A plant guard at Respondent's plant, Stickman, testified that "in the summer, I would say, of '60" Dillback said to him, "Well, we are ready to buy them out and can buy them out." Respondent's counsel then asked the witnesses, "Buy what out" and the witness said, "The furniture factory." Although questioned about the foregoing, the witness did not say that Dillback had said who would do the buying. Foreman Chamberlain testified that on December 16, 1960, in the conversation where Dillback referred to the handbills, that "I believe the last part of it was brought up that the Teamsters Union would buy and run National if it would be sold." Barnet also testified that Dillback referred to buying the plant.

Although I credit the testimony with respect to the foregoing, I fail to see that the testimony regarding the handbills adds anything material to the case. The reference to buying the Company I regard as a form of braggadocio on the part of Dillback with no basis in fact. Other than this isolated statement between a union adherent and a nonunion guard and supervisors there is nothing in the record to warrant the conclusion or even a valid suspicion that the Union was attempting to injure the Company's business in order to buy out the Company, as Respondent's counsel has intimated. All the evidence, in my opinion, indicates that the Union was interested in recognition only and the 1959 strike and the leaflet distribution were efforts in that direction. There is no basis for concluding that if the Company had complied with the prior Intermediate Report, including recognition of the Union, that the Chicago leaflets would have been initiated and distributed.

Respondent called Lloyd Posey as a witness. Posey owns a furniture store in Green Bay, Wisconsin, and he has purchased furniture from Respondent for 10 years. About the middle of December 1960, Dillback delivered some of Respondent's furniture to Posey. Posey testified that he was looking at one of the chairs and apparently because of some defect he was wondering whether he should return it. He spoke to Dillback at this point and asked him what was going on down at National Furniture. Posey testified that he had received a letter in August, apparently from the Union, that referred to the Company's products and asked him not to handle its furniture. Apparently the letter together with his own observation of the particular chair's defect, and the fact that Posey had noticed, as he testified, that his orders from National were coming through slower than formerly, prompted Posey's inquiry to Dillback. In reply to Posey's inquiry, Dillback said that there had been changes in personnel at the factory and some or a lot of keymen had been laid off and there was trouble with the drivers and that the whole organization was turned upside down. Dillback also said that if the Company did not do well at the January furniture show it was going to discontinue the making of furniture. Posey testified he was concerned about continuing to do business with Respondent in view of these various factors and he did thereafter order only a few chairs on special order. At the January 1961 furniture show in Chicago, Posey did not visit Respondent's space or exhibit.

Dillback testified that he did not tell Posey not to buy the Company's furniture or anything to that effect and that he simply told him of the decision against the Company and that the Company still refused to bargain.

On the whole, I found Posey to be a witness who was endeavoring to tell the truth and I credit his above testimony. However, the evidence does not establish that the Green Bay incident was a factor in Dillback's termination since there is no evidence that any supervisor of Respondent was aware of the incident prior to the terminations. No company witness testified on this aspect except Posey and I am unable to find from his testimony that Respondent's supervisors were aware of the Green Bay affair prior to the terminations.⁵⁷ I therefore conclude that Dillback's termination was not attributable to his conversation with Posey.

⁵⁷ Posey testified that he told Becht, a company salesman, about the Dillback conversation when Becht visited his store right after Christmas and before the Chicago furniture

On all the evidence it is found that the leaflet and the distribution thereof in Chicago on January 6, 7, and 8, 1961, was activity protected by Section 7 of the Act. It is further found that the six employees were terminated because of the aforesaid activity and but for such activity they would not have been terminated and that the terminations were violative of Section 8(a)(1) and (3) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above occurring in connection with the operations of Respondent described in section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

V. THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I will recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

The appropriate and customary affirmative action to remedy an illegal discharge is an offer of reinstatement and compensating the dischargee for any loss of pay he may have incurred by reason of the discrimination against him. I recommend such action, with one qualification, in the instant case since I have found that all six men were illegally terminated. However, with respect to Dillback I do not recommend that Respondent be required to offer him reinstatement.

While Dillback like the others was illegally discharged, I find that, in addition to the protected activities in which he engaged and which were the cause of his termination, other conduct of Dillback affords a legitimate basis for Respondent's opposition to his reinstatement. It is my opinion that the legitimate rights of the employees, including Dillback, to engage in protected activities have been vindicated herein and I do not believe that it will effectuate the policies of the Act to recommend Dillback's reinstatement.

An employee has equal status as an individual and as a citizen with his employer. Subservience is not to be required nor need an employee stand mute before his employer. The employee, as we have seen in this case, has certain statutory rights with which the employer may not interfere. But, by the same token, an employee if he wishes to be an employee of a particular employer owes a duty of reasonable respect toward that employer. I am well aware of all the circumstances of the incident in Chicago, previously detailed, when Mosier, Respondent's general manager, twice asked Dillback to take the paper that the former was proffering. Under the circumstances, including the fact that Dillback was on his own time and was on a laid-off status, I do not believe that he was required to accept the unidentified paper, at least without having some explanation of its contents. The risk that Dillback ran in refusing acceptance was perhaps that the paper contained a legitimate employer-to-employee message, such as a request or order that the employee report for work the next day. However, in declining acceptance of the paper in the language he used, Dillback, while he had a right to so express himself as an individual, showed an unnecessarily disrespectful attitude toward the general manager of Respondent. There is no evidence that such language was customary between the employees and Mosier or that it was elsewhere tolerated. Mosier's testimony to the effect that no employee had ever spoken to him like that is uncontroverted and is credited. Dillback was not required to forego any statutory rights or his rights or dignity as an individual or as a union member. But, in my opinion, if he wished to continue to work for Respondent, to return as an employee, he was obliged to eschew the use of the type of language he expressed toward the general manager. While Dillback's reaction in context may perhaps be understood the provocation was not such that it justified the outburst. This was no imprecation uttered in the course of a heated argument or in the course of bargaining or in response to an attack in kind by Mosier. The Trial Examiner seeks to establish no

show. Posey said at one point that Becht came to his store every 2 weeks. He said he saw Becht right after the Chicago furniture show which ended January 14. On cross-examination Posey said Becht drops by his store every 4 months because they have known each other for a period of years. Posey then was asked, "You don't know what month he was there, whether it was February or March of '61." Posey replied that Becht was there in January and in February. In any event, whenever Becht, a salesman, learned of the incident there is no evidence that Respondent's supervisors were informed of it by Becht prior to Dillback's termination. All that can be said is that Respondent evidently became aware of the incident prior to the hearing.

Pollyanna standards for the conduct of workmen but merely those that are not incompatible with the normal employee-employer relationship.

The Posey incident, of which the Respondent was aware at least sometime prior to the instant hearing, likewise militates against recommending Dillback's reinstatement. The employee was at liberty to inform Posey about the Intermediate Report in response to the latter's inquiry, and about what was involved and about the union activity and of the factual situation then existing. Without attempting to prescribe precisely the ambit of legitimate expression in such circumstances, I believe that the statement that the Company was going out of the furniture business if it did not do well at the January furniture show exceeded the bounds of legitimate comment by an employee on active duty for his employer and drawing wages therefrom. There is nothing in the record to show that such a statement had any basis in fact. As far as appears, Respondent's labor problems were confined to its drivers and not to its production and maintenance operations. Even if true, the propriety of such a statement by an employee to a customer is not apparent. The significance of such a remark to a customer, interested in having a reliable and continued service of supply, is clear. The statement, purportedly by an insider, is in the area of those statements in such cases as *Jefferson Standard Broadcasting, supra*, where the employer's product is depicted as shoddy and inferior. Here, the productive capacity of the employer or its continuance was cast in substantial doubt and the parlous state of the business was not ascribed solely to any difficulties between the Company and the employee and his Union. There was a general aspersion to the effect that the entire plant was turned upside down and that its continuance was dependent upon the upcoming furniture show.⁶⁸

CONCLUSIONS OF LAW

1. Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By discriminating in regard to the hire and tenure of employment of Calvin Belt, James Crane, Carvel Dillback, Howard Dunn, Daniel Hughes, and Clarence Sims, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(3) of the Act.
4. By the above conduct, thereby interfering with, restraining, and coercing employees in the exercise of rights guaranteed by Section 7 of the Act, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.
5. The aforesaid unfair labor practices are unfair labor practices that affect commerce within the meaning of Section 2(6) and (7) of the Act.

[Recommendations omitted from publication.]

⁶⁸ Respondent's personnel manager, Holt, testified on the first day of the hearing. He resumed the stand on the second day and testified, *inter alia*, that after he had left the witness stand on the preceding day, Dillback said to him, "That's a bunch of lies. You are the lyngest son-of-a-bitch I have ever seen." The Trial Examiner sustained the General Counsel's objection to the testimony. The General Counsel's objection was based on the assertion that the testimony was not relevant to the issues in the case. In retrospect, I am of the opinion that my ruling was in error. While the evidence was not relevant to the issue in the case which was the allegedly illegal terminations, it was relevant on the question of remedy with respect to Dillback. However, since in view of my ruling at the hearing the General Counsel made no effort to meet the particular evidence by recalling Dillback in possible rebuttal or otherwise, I have not relied on this evidence in my recommendation excluding Dillback from reinstatement.

T. E. Mercer Trucking Co. and Oil, Chemical and Atomic Workers International Union, AFL-CIO. Case No. 23-CA-1231.
November 30, 1961

DECISION AND ORDER

On September 15, 1961, Trial Examiner John H. Dorsey issued his Intermediate Report herein, finding that the Respondent had engaged