

of their strike action. *N.L.R.B. v. The Ozark Dam Constructors and Flippin Materials Co.*, 203 F. 2d 139, 145-147 (C.A. 8), enfg. 99 NLRB 1031, 1035-1036. Whatever rule of limitation the statute may require the Board to observe, calculated to prevent the issuance of complaints based upon charges reflective of stale unfair labor practices, such rules of limitation cannot be construed, legitimately, to deprive strikers of reinstatement rights upon the termination of an unfair labor practice strike.

Respondent's course of conduct, despite its limited thrust, goes to the very heart of the statute, and suggests the firm's purpose, generally, to limit the lawful rights of employees. *N.L.R.B. v. Entwistle Mfg. Co.*, 120 F. 2d 532 (C.A. 4). Upon the entire record I am persuaded that the unfair labor practices found are closely related to other labor practices statutorily proscribed, the future commission of which may reasonably be anticipated, because of the conduct found attributable to the Respondent enterprise in this report. The preventive purposes of the statute will be frustrated unless recommended remedial action and any order which may prove necessary can be coextensive with the threat. Therefore, to make the interdependent guarantees of Section 7 effective, to prevent any recurrence of the unfair labor practices found, to minimize industrial strife which burdens and obstructs commerce, and thus to effectuate statutory policies, it will be recommended that Respondent cease and desist from infringement, in any other manner, upon rights guaranteed by the aforesaid statutory provisions.

In view of the foregoing findings of fact, and upon the entire record in this case, I make the following:

CONCLUSIONS OF LAW

1. Great Western Broadcasting Corporation d/b/a KXTV, Sacramento, California, is an employer within the meaning of Section 2(2) of the Act, engaged in commerce and business activities which affect commerce within the meaning of Section 2(6) and (7) of the Act, as amended.

2. San Francisco Local of the American Federation of Television and Radio Artists, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act, as amended, which admits employees of Great Western Broadcasting Corporation to membership.

3. All of Respondent's employees at Sacramento, California, who perform before the camera or microphone, exclusive of instrumental musicians performing as such, guards, all other employees, and supervisors as defined in Section 2(11) of the Act, as amended, constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act, as amended.

4. San Francisco Local of the American Federation of Television and Radio Artists, AFL-CIO, has been, at all times material, and still is entitled to recognition as the exclusive representative of all Respondent's employees in the unit described above, for the purposes of a collective bargain with respect to rates of pay, hours of employment, and other terms and conditions of employment, within the meaning of Section 9(a) of the Act, as amended.

5. By refusal to bargain collectively in good faith with the labor organization entitled to function as the exclusive representative of its employees within an appropriate unit, and by consequent interference with, restraint, and coercion of those employees in the exercise of rights statutorily guaranteed, Respondent engaged, and continues to engage, in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act, as amended.

[Recommendations omitted from publication.]

Western Contracting Corporation and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 222. Case No. 27-CA-1170. October 17, 1962

DECISION AND ORDER

On July 12, 1962, Trial Examiner David Karasick 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 attached Intermediate Report. Thereafter, the Respondent filed exceptions to the Intermediate Report and a supporting brief.¹

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 [Chairman McCulloch and Members Fanning and Brown].

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report and the entire record in the case, including the exceptions and brief, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.

ORDER

The Board adopts as its Order the Recommended Order of the Trial Examiner.²

¹ The Respondent's request for oral argument is hereby denied, as, in our opinion, the record, exceptions, and brief adequately present the issues and the positions of the parties.

² The notice appended to the Intermediate Report is hereby amended by adding the following note which will appear immediately below the signature at the bottom of the notice

NOTE—We will notify any of the above-named employees presently serving in the Armed Forces of the United States of their right to full reinstatement upon application in accordance with the Selective Service Act after discharge from the Armed Forces.

The notice is also amended by deleting the phrase "This notice must remain posted for 60 days from the date hereof," and substituting therefor the phrase "this notice must remain posted for 60 consecutive days from the date of posting"

INTERMEDIATE REPORT AND RECOMMENDED ORDER

STATEMENT OF THE CASE

This proceeding involves allegations that the Respondent, Western Contracting Corporation, violated Section 8(a)(1) and (3) of the National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, and is based upon a complaint¹ issued by the General Counsel of the National Labor Relations Board, on behalf of the Board, on March 23, 1962, and a charge and first amended charge filed by International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 222, herein called the Union, on February 7, 1962, and March 16, 1962, respectively. A hearing, at which all parties were represented, was held before Trial Examiner David Karasick on May 10 and 11, 1962, at Salt Lake City, Utah. Following the close of the hearing, each of the parties filed a brief. In addition, the Respondent filed proposed findings of fact and conclusions of law. Each of the findings and conclusions so proposed is accepted to the extent it is consistent with the findings of fact and conclusions of law hereinafter set forth, and in all other respects is rejected.²

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

¹ The complaint was amended at the hearing to delete the names of three individuals as alleged discriminatees.

² Counsel for all parties entered into two written stipulations, filed on July 2, 1962, providing for corrections in the transcript of testimony. It is hereby ordered that the transcript be corrected accordingly and that said stipulations be made part of the record.

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The Respondent, an Iowa corporation, with its principal office and place of business located in Sioux City, Iowa, is a general contractor. The Respondent is engaged in business in various States of the United States other than the State of Iowa. Only the place of business located at Bingham Canyon, Utah, is involved in this proceeding. The Respondent annually performs services valued in excess of \$50,000 in States other than the State of Iowa. The Respondent concedes, and I find, that it has been, at all times material to this proceeding, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Respondent concedes, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The facts*

The facts giving rise to this proceeding are for the most part undisputed.

Kennecott Copper Corporation operates an open-pit mine at Bingham Canyon, located approximately 36 miles southwest of Salt Lake City, Utah. The Respondent, under contract with Kennecott Copper Corporation, is engaged in removing by truck the soil lying above the mineral-bearing strata in the mine.

Since 1958, the Union and the Respondent have been parties to successive collective-bargaining agreements, and the Union has represented the truckdrivers employed by the Respondent.

The Bingham mine at which the truckdrivers work is located in the mountains at an altitude of approximately 8,000 feet. During the winter months the weather tends to be extremely cold.

Commencing in the winter of 1959, and continuing until the events which have given rise to this proceeding, the Union has sought unsuccessfully on behalf of the truckdrivers to induce the Respondent to install heaters in the cabs of the trucks. The Respondent, upon the advice of its engineering department, has taken the position that the installation of such heaters is not feasible.

On January 15, 1962, the weather at the work project was cold and windy. During the night there had been a low reading of 15° above zero and by 9 o'clock that morning the temperature was 26° above zero and the day was windy and cloudy. At about 8:30 that morning, Gary Stephenson, one of the truckdrivers employed by the Respondent, was warming his feet beside a small fire while waiting to change trucks. He signaled Ralph Tolman, also a truckdriver employed by the Respondent, who was driving another truck and the two began to discuss the need for heaters. At this point, John Keith drove up and joined the conversation. Other trucks, driven by other employees of the Respondent, began to arrive and in a few minutes all of the drivers except one were on the scene.

Shortly thereafter, Glenn Estes, day haul foreman, drove up. He asked what the trouble was. The men told Estes that they needed heaters in their trucks and that they wanted to talk to Thomas Speight, project manager. Estes declared that he did not want to become involved in the matter. He told the employees that if they were not going to drive their trucks, to park them and go down to Speight's office and see him there.

The men thereupon parked their trucks and went to the grease shack nearby. Approximately 10 minutes later, Speight arrived. At this time, 9 of the 11 drivers on the day shift were present. Upon his arrival, Speight asked the assembled employees who their ringleader was and to whom he should talk. Tolman replied that there was no leader, the drivers were acting together and that they wanted hot water heaters for their trucks. Speight replied that there would be no hot water heaters since they were not feasible; that this matter had been discussed previously; that he would like to have everybody go to work; that the men should either drive their trucks or go home, but before they quit, they should think about what they were doing. The employees continued to discuss their desire for heaters.

One of the employees, John Keith, thereupon suggested that they call the business representative of the Union. Tolman and Keith drove down from the project site to a telephone where they placed a call to Alma May, an organizer for the Union. Both Keith and Tolman spoke to May and informed him that the truckdrivers had stopped their trucks and talked to Project Manager Speight about installing hot water

heaters, that they had been told by Speight to either drive their trucks or get off the job, and they requested May to come up to the project site and advise them. May suggested that the men return to the jobsite, choose a couple of other employees to accompany them, and thereafter they would all go to Speight's office where May would attempt to arrange for a meeting.

Tolman and Keith then returned to the jobsite and asked who would like to accompany them to Speight's office. Employees Bob Crotch³ and LaVelle Robinson joined Tolman and Keith. In the meantime, Speight had also called May, informed him of the shutdown, and requested that he come to the project.

May drove to Speight's office accompanied by John Pickett, another representative of the Union, and J. Neeley, a representative of Operating Engineers Union, Local No. 3, which represented other employees working for the Respondent.

The seven men met in Speight's office. Speight stated that the employees had refused to work and that someone was going to pay for the loss of time to the Respondent. May replied that the Union had not called the strike but that it was in full sympathy with the action taken by the employees. May stated that the Union had made a number of requests to install heaters. He pointed out that Speight had promised at least to close up the holes in the floor boards of the cabs and to tighten the windshields and doors but that this had not been done. Speight admitted that this matter had been discussed on numerous occasions, but that his position now, as in the past, was that hot water heaters were not feasible. He also stated that he had been unable to repair the holes in the floor boards of the cabs and to tighten the windshields and doors because the welders were busy repairing the bodies of the trucks.

John Keith then stated that the drivers had already improvised repairs by filling in the holes in the cabs with rags; that what was needed was hot water heaters; and that other heaters which had been placed in a few of the trucks were not the answer.⁴ At this juncture, Tolman declared that he felt the men should have some consideration; that they had done a good job and should be treated like men instead of like animals; that they were not asking for a share of the profits but merely for heaters in the cabs; and that the men were in the cabs for 18 hours in subzero weather and could not keep warm. Tolman then pointed out that the scout truck which Speight drove less than 2 hours each day had a heater and that in addition it was new, and had tight fitting windows. At this juncture, as Tolman testified; Speight told Tolman, "You are not working for Western as of this morning when you opened your mouth"⁵ The meeting ended without agreement as to the demand of the employees for heaters.

After the employees and the union representative had left his office, Speight called Foreman Estes and instructed him to shut the job down at 11 o'clock so that the employees would not be paid for more than 4 hours work. In the meantime, Tolman and the three other employees who had accompanied him to Speight's office started back to the project site for the purpose of informing the other drivers what had occurred at the meeting. Before they arrived, they met the other drivers who informed them that their foreman had shut down the job and locked up the grease rack. Since the men had no place to stay, all but one or two of the day shift drivers went down to the union hall.

The employees first met by themselves, and were later joined by May. Those present decided to get in touch with the drivers on the night shift. Tolman called Owen Woolsey, the night shift steward, and informed him that there had been a work stoppage because the employees were trying to get heaters installed in the trucks and the Respondent would not agree. Tolman told Woolsey that the day shift employees would like to get in touch with the men on the night shift and have a meeting with them. By that time it was too late to telephone the night shift em-

³ According to May's recollection, Gary Stephenson rather than Bob Crotch was present at this time. Whether the fourth employee in the group at this time was Crotch or Stephenson is not important in terms of the ultimate issues to be decided.

⁴ The Respondent had previously tried, apparently without success, to install manifold heaters in some of the trucks.

⁵ With a slight variation in wording, May corroborated Tolman's testimony in this regard. Speight's version of this conversation was that he told Tolman that since he quit driving that morning, he quit working for the Respondent. The recollections of May and Tolman seem more reliable concerning this incident. If Speight's version were correct, there would seem to be no reason why he should have made such a statement to Tolman and not to the other three striking employees who were present at the same meeting, even though Tolman's manner or remarks may have prompted a reply from Speight. Accordingly, I find that the statement was made as recounted by Tolman and May.

ployees, who had already left for their jobs. Tolman and the other employees on the day shift, therefore, drove to Leadmine, a community located some 5 or 6 miles from the project site, where they met the night shift drivers on their way to work, told them what had happened and invited them to attend a meeting at the union hall.

A meeting was held at the union hall that evening. All except one or two employees from both the day and the night shifts were present. After discussion, the employees voted not to return to work until heaters were installed in the trucks. Stephenson and Tolman, representing the day shift drivers, and Ronald Johnson and Gordon Lee, representing the night shift drivers, were chosen at this meeting as a committee to meet with the union representatives and the Respondent. A request was made of May that the Union intercede on behalf of the employees and confer further with Speight in an attempt to settle the dispute.

On January 16, the four committeemen were to meet May and thereafter proceed to a meeting with Speight. A misunderstanding occurred regarding the place they were to meet and the committeemen therefore went to the union hall to await May's arrival. When May did arrive, he called Speight and later reported to the men that he had gained nothing from the conversation.

At about this time, Woolsey, the night shift steward, arrived at the union hall and told the men that the Respondent had called him and stated that everything had been straightened out and to report for work.⁶ The committeemen decided to inform the drivers on the night shift that Woolsey's information was erroneous and that no agreement had been reached with the Respondent. Because it was too late in the day to get in touch with the night shift drivers by telephone, Gary Stephenson, John Keith, Bob Crotch, and Tolman drove to Leadmine. There they stood at the side of the road and flagged down the night shift truckdrivers as they passed.⁷ While the four men were so engaged, Speight appeared and spoke to John Keith. Speight told Keith that he thought Keith was doing the wrong thing. Keith replied that he did not believe that he was, that he was cold, that he was with the rest of the men and that he would like a heater in his truck. Speight asked Keith if he knew that he could sue him for this. Keith replied that Speight could sue him if he wished, that all Keith had was his overcoat.⁸

One of the drivers asked Speight if he would go down and meet with the employees and Speight said he definitely would not. Speight thereupon left and the drivers returned to the union hall where they held a meeting at which they further discussed the need for heaters. At this time, the discussion centered about the fact that heaters were a health factor, that the drivers could catch cold because of the unheated cabs in the trucks, that their hands and feet got numb and it was a hazard to drive in that condition, and that the men were entitled to heaters in the cabs of their trucks since all the other companies in the locality had such equipment.

On January 17, Speight met with Fullmer Latter, secretary-treasurer of the Union, and May in Latter's office at the union hall. On his way to this meeting, Latter met the four committeemen who asked if they might attend. Latter advised them to wait and he would let them know. When the meeting began, Latter told Speight that the four men were downstairs, that they were members of a committee which had been formed, and that they asked for permission to sit in at the meeting. Speight replied that he felt it would be better if just the three of them discussed the matter. The four members of the employees' committee remained downstairs in the union hall but did not attend this meeting.

⁶ This was apparently the result of a misunderstanding on the part of May and Speight that the drivers had been persuaded to return to work.

⁷ Foreman Joseph Mumm, a witness called by the Respondent, testified that on this occasion Tolman said that the employees were on their own in the strike "because the Union had sold them down the river." Tolman's denial of dissatisfaction on his part or that of the other employees with the Union, his denial that the strike occurred for such a reason, and his reliance upon and close association with the Union from the very beginning and throughout the strike convince me, and I find, that he did not make the statement so attributed to him by Mumm.

⁸ Tolman testified that on this occasion Speight stated: "You know I can sue you for stopping these men." Speight's version of his statement to Keith was that he asked Keith if he knew what he was doing and told him he could get into trouble with something like that. The coloration of mildness and restraint inherent in Speight's recounting is hardly in keeping with the strong feelings exhibited by his remarks made to the employees alone and to the employees and union representatives the day before. I am convinced, and find, that he made the statement to Keith in substance and form as related by Keith and Tolman.

Latter and May attempted to persuade Speight to return the drivers to their jobs and to install hot water heaters in the trucks. May pointed out that the Respondent had purchased four pieces of light equipment from Utah Construction Company which had hot water heaters in them and urged that such heaters be installed in the present equipment. Speight stated that the Respondent's engineers had determined that hot water heaters were not feasible for the type of equipment they were presently using and that the Respondent would therefore not install such heaters in that equipment.

After further discussion, it was agreed that the Respondent would fill the holes in the floors of the cabs and repair the doors and windshields. Speight offered to provide the drivers with flying suits instead of heaters. He also agreed that the drivers would return to work without discrimination. After some further discussion, Speight expressed concern about the attitude of the men, stating he was fearful that the drivers might be dissatisfied upon returning to their jobs. Latter assured Speight that the Union would do everything it could to achieve a proper attitude on the part of the men. Speight in return agreed that in the event any difficulty arose in this respect the individual involved would not be summarily discharged but would be given an opportunity for a hearing before Speight, rather than the immediate foreman or supervisor in charge, and that a union representative could be present at such a hearing. Although the collective-bargaining agreement to which the Respondent and the Union are parties contains no provisions with respect to seniority, Latter proposed that seniority be followed by the Respondent in the event of future layoffs and rehires. Speight declined to agree with this but did agree that all employees who had been laid off previously would be rehired before new employees were secured and that this principle would be followed with respect to a number of drivers who had been laid off by the Respondent during the previous October.

Following this meeting, Latter and May reported what had occurred to the committee of four drivers who had been waiting downstairs in the union hall. Latter told the men that he thought Speight's offer constituted a good settlement, that it was something more than the Union had in the contract and that he thought they ought to accept it and return to work. The committee members expressed dissatisfaction since their original demand for heaters had not been met. They decided, however, to call a meeting of the entire membership and submit the proposal to the entire group.

On the following day, a meeting of all the employees of the Respondent who were covered by the collective-bargaining agreement was held at the union hall. Approximately 27⁹ employees were present, in addition to Latter and May. Gary Stephenson was selected by the employees as chairman of the meeting. A report was made to the employees of the proposal agreed upon the prior day by Latter, May, and Speight. In the discussion which followed, some of the employees expressed the belief that flying suits would be too burdensome for driving, that they were not adequate to keep their bodies warm, and that even with such suits the hands and feet of the drivers would remain cold and unprotected. Following the discussion a vote was taken and the men voted approximately 15 to 12 to refuse to return to work until the Respondent installed heaters in the trucks. Those present agreed that Ronald Johnson should call Speight and invite him to lunch the next day and at that time advise Speight of the outcome of the meeting.

Following the meeting, Johnson called Speight and suggested that they have lunch together and discuss the matter. Speight refused, stating that he did not have time to have lunch with him, that he had no business to discuss with Johnson, and that Speight's dealing with the people involved in the strike would be directly with the Union.

On January 19, Latter called Speight and told him that the employees had voted to refuse to return to work unless the Respondent installed hot water heaters in the trucks. The two men agreed that they did not know how to resolve the dispute and each promised to call the other if any new ideas should occur to him.

On the next day, a Saturday, Latter again called Speight. He told Speight that May was on a connecting telephone. He then told Speight that some of the employees had approached him after the meeting which had been held the previous Thursday, and expressed the view that Latter ought to speak to Speight again in an attempt to arrive at some understanding. Speight stated that he had changed his

⁹ There are 35 employees in the collective-bargaining unit covered by the contract. Of this number 22 are truckdrivers. Both the Union and a sister local are parties to the agreement. The record does not show how many of the 35 employees are represented by the Union, as distinguished from its sister local.

mind and that the agreement they had reached previously was no longer acceptable. He asked Latter to tell the men to report to work on Monday morning and to bring their identification badges and hard hats. The Respondent, Speight informed Latter, was going to discharge the men and would rehire all except five of them. Latter asked who the five men in question were. Speight replied that he thought it would be inadvisable at this time to state who they were. After some further conversation, Speight stated that under the terms of the contract the Union was obligated to assist the Respondent in furnishing men for the job. Latter agreed. Speight thereupon stated that he was placing an order with Latter for 10 men for the day shift and 6 for the night shift, that these men were to report on the job Monday morning and that the Respondent would hire them after that.

Following this conversation with Speight, Latter and May discussed the matter and decided they would recommend to the employees that they return to work unconditionally and the Union would refer them to the jobs. It was agreed that the men would register on the out-of-work list which is made up by the Union each week on Monday morning.

That evening, another meeting of the employees was held at the union hall. Some 15 or 18 of the employees of the Respondent attended. Latter informed those present of the telephone call he and May had had with Speight earlier in the day. He advised the men to go back to work unconditionally and suggested that after work was resumed this might relieve the pressure on Speight and might create a different psychological atmosphere which would permit them to sit down and discuss the matter further with him about heaters for the trucks.

On the morning of January 22, the 12 employees who were involved in the dispute went to the union hall where they signed the out-of-work list, and were given referral slips to apply to the Respondent. The men then reported for work to Tom Lowe, project accountant. Lowe declined to accept the referral slips tendered by the men. Instead he told the men that they were discharged. Each man was given his termination papers¹⁰ upon the orders and at the direction of Project Manager Speight who admitted at the hearing that the employees were discharged because they had engaged in the strike.

Shortly after the employees had been discharged, Speight spoke to those who in his opinion wanted to go back to work. According to Speight, these were the men who "didn't have the 'no heater, no work' proposition in mind." Thereafter, he rehired 7 of the 12 employees involved.¹¹ The Respondent has refused to rehire John Keith, Gordon Lee, Gary Stephenson, Ronald Johnson, and Ralph Tolman on the ground that these employees instigated and prolonged the work stoppage which occurred on January 15.

B. Contentions of the parties

The General Counsel and the Charging Party contend that the discharge of Ralph Tolman on January 15, the discharge of the remaining truckdrivers named in the amended complaint on January 22, 1962, and the refusal on that date to rehire Tolman, Gary Stephenson, John Keith, Ronald Johnson, and Gordon Lee constitute violations of Section 8(a) (1) and (3) of the Act.¹²

The Respondent contends that Tolman was discharged on January 22 (rather than January 15) 1962, and that his discharge as well as the discharge of each of the other men and the subsequent refusal to rehire the above-named individuals was justified because: (1) the contract contains a no-strike clause; and (2) even in the absence of such a clause, the employees engaged in a wildcat strike and were therefore subject to discharge.

¹⁰ The employees were: Fred Garcia, Frank Gross, Harry M. Jeffs, Blaine Jensen, LaVelle Robinson, Gary Todd, Dee Wright, John Keith, Gordon Lee, Gary Stephenson, Ronald Johnson, and Ralph Tolman.

¹¹ These employees and the dates upon which they were rehired are as follows: Fred Garcia—January 22; Frank Gross, Harry M. Jeffs, Blaine Jensen, LaVelle Robinson, and Dee Wright—January 25; Harry Todd—January 26. Robinson was not available for work until January 25 and Todd was not available for work on January 25 but was rehired the following day.

¹² In view of the findings hereafter made, I deem it unnecessary to pass upon the contention advanced by the Charging Party that the employees were terminated unlawfully because the contract expressly provides that the employees "shall not be discharged for refusing to operate equipment they deem to be unsafe."

C. Concluding findings

1. Effect of the existing contract

It is the position of the Respondent that article I, section 5 of the current contract constitutes a non-strike clause. The provision in question reads as follows:

The UNION shall not countenance, permit or require any limit upon or curtailment of rates of production within their respective jurisdiction, or craft, and shall not object to, refuse to operate, or otherwise hamper the use of any equipment, machinery, tools or devices within their craft intended to speed or increase the efficiency of the EMPLOYER operations.

This section of the agreement, as the General Counsel contends, amounts to a guarantee by the Union that it will not permit interruptions of work by slowdown or strike arising as a result of the introduction or use of automated equipment or devices by the Respondent. It does not, however, constitute an agreement not to strike for other reasons or in relationship to other conditions of work which might lead to dispute. It is neither counterbalanced by a promise on the part of the employer not to lock out, nor is it the *quid pro quo* for a system providing for the handling of grievances and a resort to arbitration in the settlement of disputes, as is commonly found where broad no-strike clauses appear in collective-bargaining agreements. See *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448. Such a broad no-strike clause, containing those very features, does appear in the existing contract to which the Union and the Associated General Contractors of America, Intermountain Branch (herein called the AGC) are parties and which the Respondent, for the reasons noted hereafter, asserts is applicable in this case.¹³ But the contract, also contains the identical provision appearing in article I, section 5 of the agreement executed by the Respondent and the Union.

Accordingly, I find that article I, section 5 of the contract signed by the Respondent and the Union does not constitute a general no-strike clause which outlawed the work stoppage in this case.

2. The question of mutual mistake

The Respondent further contends that, even if article I, section 5 of the existing contract is not properly to be construed as a no-strike clause, the provisions of the AGC agreement apply because it was this latter agreement which the Respondent and the Union intended to sign and they failed to do so through mutual mistake.

The present agreement is the third in a successive series between the parties, the first of which was entered into in 1958. Speight testified in substance that, when the present agreement was executed, he had been assured by May that he was signing the AGC contract; that, with respect to the prior two contracts, the parties had an understanding in each instance that the wages and working conditions were those contained in the AGC agreement; that not until the day after the strike in this case began did Speight look at the agreement he had signed on behalf of the Respondent; and that he then discovered for the first time that the contract did not contain a no-strike clause. He further testified that on January 24, 1962, Latter volunteered the information that he also had believed the contract contained a no-strike clause and had only the evening before discovered that it had not. Latter was not called by the General Counsel to deny this testimony.

¹³ This clause, which is included in the article of the contract dealing with settlement of disputes through established grievance machinery and arbitration, is as follows:

It is the purpose and intent of the parties hereto that all grievances and disputes arising under this Agreement be settled in accordance with the procedure hereinabove set forth, and that during the term of this Agreement, the UNIONS signatory hereto or in whose behalf this Agreement is made, shall not during the term hereof, call or engage in, sanction or assist in a strike against or slow down or stoppage of work of the Contractor, and that there shall be no stoppage of work by any party hereto for any reason. UNIONS will require its members to perform their services for the Contractors on all work described herein when required by contractors to do so; and Contractors will not cause or permit any lockout of members of signatory Unions during the terms of this Agreement. It shall not be in violation of this Agreement for the UNION or its members to honor a picket line duly authorized by its Local Union, or other Local Unions having jurisdiction over the work, providing such picket line shall not be promoted as a subterfuge to accomplish a strike on behalf of the Unions signatory hereto.

May, however, denied that he had told Speight that the present contract between the parties was the AGC agreement. He testified that he had negotiated and signed the present contract; that it was the document he had intended to sign; that it was not the product of any mistake; and that he had never made any oral agreement with any official of the Respondent which would vary the terms of the contract as executed.

It is reasonable to conclude that, at the time the current collective-bargaining agreement was negotiated, Speight was concerned with the similarity of wage rates and perhaps other provisions in the AGC contract and the agreement then proposed to him by the Union. This much the record shows. I do not believe, however, that the affirmative defense of mutual mistake asserted by the Respondent is supported by the evidence.¹⁴ I am impelled to this conclusion by the following considerations.

If, as Speight testified, he did not learn of the absence of the no-strike clause until the day after the strike had begun, it would seem reasonable to expect that sometime during that first day he would have sought to end the walkout by telling both the employees and the Union that they were violating the contract. Ample opportunity presented itself on more than one occasion during the day in question. That morning Speight called May and asked him to come to the work project because of the strike; he thereafter spoke to the striking drivers and urged them to return to work before May arrived; he then met with May and a group of the strikers; and he later spoke to May that evening. Yet on none of these occasions did he tell either the employees or the Union that he considered either or both of them to be acting in breach of the agreement. Speight's statement during the meeting on January 15 with May and the group of strikers in his office that someone was going to pay for the loss of time to the Respondent does not necessarily carry the inference that it was motivated by a belief that the contract had been broken any more than does a similar remark he made to employee John Keith on January 16, at a time after Speight admittedly had discovered that the contract did not contain a no-strike clause.

Nor is Speight's later conduct consistent with his testimony in this regard. When the strike ended, an appreciable part of the winter remained and the contract by its terms will continue to run through the winter of 1963. The basic cause of the dispute which led to the walkout has not been removed. Nevertheless, the Respondent has not discussed with the Union the question of inserting the no-strike clause in the agreement and thus conforming it with their asserted understanding, even though, according to Speight's testimony, both the Respondent and Latter were aware of and acknowledged the omission of that clause at least as early as January 24.

Moreover, apart from Speight's conduct, other evidence concerning the contents of the agreement which the parties signed as compared with the AGC contract casts doubt upon the assertion that a mutual mistake occurred. The no-strike clause in the AGC agreement¹⁵ constitutes part of an entire article providing for grievance machinery and arbitration in the settlement of disputes which covers two pages near the center of the document. At the time Speight signed the agreement the Respondent would now repudiate, he added a sentence to qualify the provisions contained in two short paragraphs which appear in the center of the document and which deal with the payment to employees for time spent driving to and from work and for servicing and repair of equipment. One would believe that the omission of the article containing the no-strike clause would have been noted as readily as the single sentence qualification which he added both because of the relative importance of the two provisions and the amount of space which each covered. On the record as

¹⁴ When Latter was first informed of the work stoppage, he instructed May that the Union could not assume responsibility for it. This evidence fails to provide a sufficient basis for inferring that Latter took this position because he believed that the contract contained a no-strike clause rather than because union authorization by means of a strike vote, as provided for in the Union's constitution and bylaws, had not been secured. In any event, although knowledge on the part of Latter as to the contents of the contract may be imputed to the Union, the fact that he may have harbored the belief that the contract contained a no-strike clause is not relevant in determining whether or not a mutual mistake existed. May, not Latter, negotiated the contract with Speight; and it would be May's understanding of its terms, and not Latter's which would be controlling. Nor is this conclusion affected by the fact that Latter, who is secretary-treasurer of the Union, signed the contract in addition to May.

¹⁵ A significant difference between the two contracts, other than the no-strike clause, is the inclusion of a provision for the checkoff of union dues which appears in the agreement executed by the Respondent but is absent from the AGC agreement. The wage rates and other provisions of the two contracts are not identical but are substantially similar.

a whole, and on the basis of the foregoing facts, I find that the evidence does not establish the existence of a mutual mistake as to the contract which was executed or as to the fact that it did not contain a no-strike clause. In this connection, I credit the testimony of May.

3. Nature of the strike

The evidence in this case is clear that the strike which began on January 15, 1962, was not called by the Union but was the result of action taken by the employees themselves. It is equally clear that when the Union learned of the strike it supported the employees in the action they had taken and attempted to convince the Respondent that it should grant the demand of the employees for hot water heaters as a means of resolving the dispute. The Union itself had long sought to have the Respondent accede to such a request. The action taken by the employees was therefore in support, and not in derogation, of the position taken by the Union. It is this factor, I believe, which becomes the touchstone for determining whether a withholding of their services by the employees is to be regarded as sanctioned by the Union and therefore not in the nature of so-called "wildcat" action. If the position taken by the employees is contrary to that of their bargaining representative, the bargaining process itself may thereby be impaired or destroyed. *N.L.R.B. v. Draper Corporation*, 145 F. 2d 199 (C.A. 4). But a position taken by the employees in support of that of their bargaining representative creates no such threat. The demand of the employees in this case and of the Union which represented them was one and the same. Under these circumstances, I can see no basis for finding that the strike which began on January 15, 1962, was unlawful as without sanction by the Union and therefore deprived those who struck from the protections otherwise guaranteed in the Act. *Sunbeam Lighting Company, Inc.*, 136 NLRB 1248; *Philanz Oldsmobile, Inc.*, 137 NLRB 867.

4. Summary

The employees named in the complaint engaged in an economic strike on January 15, 1962, in protest against the absence of heaters in the trucks. The Union thereafter supported them in their position and represented them in an attempt to secure a settlement of the dispute with the Respondent. By withholding their services, the employees in question were engaged in concerted and union activities. The Respondent's conduct on January 22, 1962, in terminating their employment for engaging in such activities constituted an act of discrimination which discouraged union membership within the meaning of Section 8(a)(3) and in addition interfered with, restrained, and coerced the employees in the exercise of the rights guaranteed them in Section 7, thereby violating Section 8(a)(1) of the Act.¹⁶

In addition, the Respondent's refusal to reinstate five of the strikers¹⁷ on January 22, 1962, on the ground that they had instigated and prolonged the work stoppage and upon their unconditional application to return to their jobs before they had been permanently replaced violated Section 8(a)(1) and (3) of the Act. *N.L.R.B. v. Mackay Radio & Telegraph Co.*, 304 U.S. 333; *Ablon Poultry & Egg Company*, 134 NLRB 827.

Finally, Project Manager Speight's statement to employee John Keith on January 16, 1962, at the time Keith was standing beside the road flagging down the night shift drivers to inform them that an agreement respecting heaters had not been reached with the Respondent, to the effect that Speight could sue Keith for this action was certainly inhibitory in nature and constituted interference, restraint, and coercion in violation of Section 8(a)(1) of the Act.

As noted above, the General Counsel contends, and the Respondent denies, that Ralph Tolman was discharged on January 15 rather than January 22, 1962. This contention is based upon Speight's statement to Tolman during the meeting in Speight's office on January 15, 1962, that Tolman had quit working for the Respondent when he had opened his mouth during the course of the discussion. Tolman's employment release and separation notice to the Utah Department of Employment Security bear the date of January 22, 1962, as were similar documents given

¹⁶ This conclusion would follow whether the termination of the employees were regarded as effective before they had tendered their referral slips, in which case they were discharged because they had engaged in the strike (*Brookville Glove Company*, 114 NLRB 213, *enfd.* 234 F. 2d 400 (C.A. 3)); or instead were considered to have taken place after they had proffered such slips, in which event they had unconditionally offered to return to work before they had been permanently replaced and were thereupon denied reinstatement (*Marydale Products Company, Inc.*, 133 NLRB 1232.)

¹⁷ As noted above, these five employees are John Keith, Gordon Lee, Gary Stephenson, Ronald Johnson, and Ralph Tolman.

each of the other employees involved. Speight testified that these documents relating to Tolman, as well as to the other employees, were prepared on that date and at his direction. On this state of the record, I find that while Speight, in the heat of the discussion, indicated that he was terminating Tolman, he did not actually discharge him until January 22, 1962. Although Speight's statement to Tolman, therefore, did not amount to a discharge within the meaning of Section 8(a)(3), it nevertheless did constitute threatened reprisal directed toward an employee for engaging in protected concerted activities and therefore became an act of interference, restraint, and coercion in violation of Section 8(a)(1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Respondent set forth in section III, above, occurring in connection with the operations of the 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, and have led, to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that the Respondent has engaged in unfair labor practices violative of Section 8(a)(1) and 8(a)(3) of the Act, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

It has been found that the Respondent terminated the employment of 12 employees on January 22, 1962, in violation of Section 8(a)(1) and 8(a)(3) of the Act. Of the 12 employees so discharged, Fred Garcia was rehired by the Respondent on January 22, 1962; Frank Gross, Harry M. Jeffs, Blaine Jensen, LaVelle Robinson, and Dee Wright were rehired on January 25; and Gary Todd was rehired on January 26, 1962. It has also been found that the Respondent refused to rehire John Keith, Gordon Lee, Gary Stephenson, Ronald Johnson, and Ralph Tolman on January 22, 1962, and thereafter, in violation of Section 8(a)(1) and (3) of the Act. Accordingly, I shall recommend that the Respondent offer each of the employees whom it has refused to rehire immediate and full reinstatement to his former or substantially equivalent position (*Chase National Bank of the City of New York, San Juan, Puerto Rico, Branch*, 65 NLRB 827) without prejudice to all rights and privileges to which each employee is entitled. I shall also recommend that the Respondent make whole each employee for any loss he may have suffered as a result of the discrimination against him, by payment to him of a sum of money equal to that which he normally would have earned from January 22, 1962, to January 25, 1962, with respect to Frank Gross, Harry M. Jeffs; Blaine Jensen, Dee Wright, and Gary Todd;¹⁸ and from January 22, 1962, to the date of a proper offer of reinstatement with respect to John Keith, Gordon Lee, Gary Stephenson, Ronald Johnson, and Ralph Tolman, less net earnings as to each of said employees for the period applicable to each. The payments provided for hereunder are to be computed on a quarterly basis in the manner established by the Board in *F. W. Woolworth Company*, 90 NLRB 289. In addition, I shall recommend that the Respondent be ordered to pay interest on the backpay due each of the discriminatees above named at the rate of 6 percent per annum commencing at the end of each quarter of the year for which backpay is shown to be due hereunder.

Upon the basis of the foregoing findings of fact, and upon the entire record in the case, I make the following:

CONCLUSIONS OF LAW

1. The Union is, and has been at all times material to the issues in this proceeding, a labor organization within the meaning of Section 2(5) of the Act.

2. The Respondent is, and has been at all times material to the issues in this proceeding, an employer within the meaning of Section 2(2) of the Act, engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

3. By discriminating against employees with respect to hire, tenure, terms, and conditions of their employment, thereby discouraging membership in the Union, the

¹⁸ Todd was not available for work on January 25 1962, but was rehired on January 26, 1962. LaVelle Robinson was not available for work from January 22 to 25, and therefore suffered no loss of earnings, as is likewise true of Fred Garcia who was reinstated on January 22.

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, and by the conduct of Project Manager Speight in threatening to discharge employee Ralph Tolman and threatening to institute legal proceedings against John Keith because they had engaged in concerted and union activities, the Respondent has interfered with, restrained, and coerced employees in the rights guaranteed in Section 7 of the Act, and has thereby engaged 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 affecting commerce within the meaning of Section 2(6) and (7) of the Act.

RECOMMENDATIONS

Upon the basis of the foregoing findings of fact and conclusions of law, and pursuant to Section 10(c) of the Act, I hereby recommend that Western Contracting Corporation, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 222, or in any other labor organization of its employees, by discharging, laying off, or refusing to reinstate or reemploy any of its employees because of their concerted or union activities, or in any other manner discriminating in regard to their hire or tenure of employment or any term or condition of employment.

(b) Threatening employees with discharge, legal proceedings or any other reprisals because they engage in concerted or union activities.

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

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

(a) Offer John Keith, Gordon Lee, Gary Stephenson, Ronald Johnson, and Ralph Tolman immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to all rights and privileges to which they are entitled.

(b) Make whole John Keith, Gordon Lee, Gary Stephenson, Ronald Johnson, Ralph Tolman, Frank Gross, Harry M. Jeffs, Blaine Jensen, Dee Wright, and Gary Todd in the manner set forth above in the section entitled "The Remedy."

(c) Preserve until compliance with any order for reinstatement or back pay made by the National Labor Relations Board is effectuated, and make available to the said Board and its agents, upon request, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, relative to a determination of the amount of backpay due, and to the reinstatement and related rights provided under the terms of any such order.

(d) Post in conspicuous places at its place of business at Bingham Canyon, Utah, including all places where notices to employees are customarily posted, copies of the notice attached hereto as an appendix.¹⁹ Copies of said notice, to be furnished by the Regional Director for the Twenty-seventh Region, shall, after being duly signed by the Respondent's representative, be posted by it immediately upon receipt thereof, and maintained by it for 60 consecutive days thereafter. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

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

It is further recommended that, unless within said 20 days the Respondent shall have notified the said Regional Director that it will comply with the foregoing recommendations, the National Labor Relations Board issue its order requiring the Respondent to take the action aforesaid.

¹⁹ In the event these Recommendations be adopted by the Board, the words "A Decision and Order" shall be substituted for the words "The Recommendations of a Trial Examiner" in the notice. In the further event that the Board's Order be enforced by a decree of a United States Court of Appeals, the words "Pursuant to a Decree of the United States Court of Appeals, Enforcing an Order" shall be substituted for the words "Pursuant to a Decision and Order."

²⁰ In the event that these Recommendations be adopted by the Board, this provision shall be modified to read: "Notify said Regional Director, in writing, within 10 days from the receipt of this Order, what steps the Respondent has taken to comply herewith."

APPENDIX

NOTICE TO ALL EMPLOYEES

Pursuant to the Recommendations of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

WE WILL NOT discourage membership in International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 222, or any other labor organization, by discharging, laying off, or refusing to reinstate or reemploy any of our employees because of their concerted or union activities or in any other manner discriminate in regard to their hire or tenure of employment or any term or condition of employment.

WE WILL NOT threaten our employees with discharge, legal proceedings, or any other reprisals because they engage in concerted or union activities.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form, join, or assist International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 222, or any other labor organization, to bargain collectively through representatives of their own choosing, or to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities.

WE WILL offer immediate and full reinstatement to John Keith, Gordon Lee, Gary Stephenson, Ronald Johnson, and Ralph Tolman.

WE WILL make whole the following employees for any loss they may have suffered as a result of the discrimination against them: John Keith, Gordon Lee, Gary Stephenson, Ronald Johnson, Ralph Tolman, Frank Gross, Harry M. Jeffs, Blaine Jensen, Dee Wright, and Gary Todd.

All of our employees are free to become, remain, or refrain from becoming or remaining, members of any labor organization. We will not discriminate in regard to hire or tenure of employment, or any term or condition of employment, against any employee because of membership in or activity on behalf of any labor organization.

WESTERN CONTRACTING CORPORATION,
Employer.

Dated _____ By _____
(Representative) (Title)

This notice must remain posted for 60 days from its date, and must not be altered, defaced, or covered by any other material. Employees may communicate directly with the Board's Regional Office, 609 Railway Exchange Building, Denver, Colorado, Telephone Number, Keystone 4-4151, if they have any question concerning this notice or compliance with its provisions.

Harvey Aluminum (Incorporated) and General Engineering, Inc.; Wallace A. Ummel d/b/a Wallace Detective and Security Agency; ¹Harvey Aluminum (Incorporated) and United Steelworkers of America, AFL-CIO. Cases Nos. 36-CA-1067-1, 36-CA-1067-2, and 36-CA-1067-3. October 18, 1962

DECISION AND ORDER

On March 30, 1962, Trial Examiner Martin S. Bennett issued his Intermediate Report in the above-entitled consolidated proceeding, finding that the Respondents had engaged in certain unfair labor

¹Although the formal papers were amended at the hearing to reflect the correct name of this Respondent, this amendment was not reflected in the Intermediate Report or the Appendixes attached thereto. Those documents are hereby amended accordingly.