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If employees have any question concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 528 Peachtree-Seventh Building, 50 Seventh Street, N.E., Atlanta, Georgia 30323, Telephone 526-5741.

Hoffman Beverage Company and Hoffman Beverage Company, Debtor in Possession and Joseph Terry, Thomas Teaton, Arthur Anderson, Arthur Termotto, Albert Valentine, Michael Cardielo, William C. Hutchinson, John J. Bryan, John J. Dohrman, Pat Torre, Stephan Halop, Andrew Pastor, Harry A. Unser, Anthony Delasandro, Anthony Angelicola, Pasquale J. Bellino, Anthony Crispo, Michael Buonagura, Michael Chiamonte, Henry Numssen, Joseph Mottola, Anthony J. Capone, Jr., Patrick S. Sheridan, Christopher Kelly, Ragner Nelson, Frank Sadlo, Anthony Mannino, Bernard P. Reyman, Chester J. Kolinowski, Andrew Newman, Anthony Radziavich, Leo J. Brzynski, Edwin Janecki, James Merolla, Joseph Dunican, Philip Trope, Luke P. Mullally, Joseph Gambarini, John J. Rembiszewski, Otto Amari, John T. Moloney, Thomas Leonick, Edward V. O'Connor, James V. Posa, Eugene J. Scheibing, Edward Philip Clifford, Augustin De Bellis, Walter Hopkins, Charles Longboat, Jr., Anthony J. Kapela, Louis Zangrillo, Michael J. Kruk, John Giordano, Charles S. Logerfo, Charles Priola, Earle C. Barling, and Onofino Castiglie. Cases 29-CA-88-1 through 29-CA-88-46, 29-CA-88-48 through 29-CA-88-58.

April 11, 1967

DECISION AND ORDER

BY CHAIRMAN McCULLOCH AND MEMBERS
FANNING, JENKINS, AND ZAGORIA

On February 21, 1966, Trial Examiner Sidney Sherman issued his Decision 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 Trial Examiner's Decision. He also found that the Respondent had not engaged in certain other unfair labor practices and recommended the dismissal of such allegations.

Thereafter, the Respondent and the General Counsel filed exceptions to the Decision and supporting briefs. The General Counsel also filed a reply brief and Respondent a supplemental brief.

The National Labor Relations 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 Trial Examiner's Decision, the exceptions and the briefs, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner with the modifications stated hereinafter.

1. From September 8 to 15, employees of Respondent's Pelham Manor plant represented by Teamsters Local 46 picketed Respondent's Long Island City plant. The employees of the latter plant were represented by Teamsters Local 282. The picketing was in protest of Respondent's conduct in closing the Pelham Manor plant after the employees had rejected a proposal to modify the current collective-bargaining agreement between Respondent and Local 46 by substituting an incentive pay plan for the existing hourly plan of compensation. Many of the Long Island City plant drivers refused to cross the picket line established by the Pelham Manor employees and to report to work. On September 16, Respondent discharged those Long Island City employees who refused, or who, it believed, had refused, to cross the picket line.

Ordinarily it is a violation of Section 8(a)(1) for an employer to discharge employees who join in a strike, as for example, by refusing to cross a picket line.¹ Respondent contends, however, that in this instance the strikers' conduct was not protected because it was in breach of the collective-bargaining contract between Respondent and Local 282.² The Trial Examiner rejected this defense on three grounds: (1) the no-strike commitment implicit in the contract grievance-arbitration procedure is not applicable to the present situation because the grievance-arbitration provision is expressly limited to disputes over the application or interpretation of Local 282's contract and there was no such dispute here; (2) even if there was a dispute cognizable under Local 282's contract, the contract-grievance procedure expressly prohibits strikes only "during the period of arbitration," and there was no arbitration proceeding pending here; and (3) the contract provision giving drivers the right to refuse to cross picket lines in making deliveries protects the refusal of the drivers to cross picket lines at their own employer's premises.

We agree with the Trial Examiner's conclusion that the Long Island City plant employees, who refused to cross the picket line of the Pelham Manor

¹ *Redwing Carriers, Inc. and Rockana Carriers, Inc.*, 137 NLRB 1545, *enfd. sub nom. Teamsters, Local Union No. 79 v. N.L.R.B.*, 325 F.2d 1011 (C.A.C.), cert. denied 377 U.S. 905; *Cooper Thermometer Company*, 154 NLRB 502.

² Respondent also contends that the strikers' conduct was minority action proscribed by *N.L.R.B. v. Draper Corp.*, 145 F.2d 199 (C.A. 4). For the reasons stated by the Trial Examiner, we find this defense to be without merit.

plant employees, did not engage in unprotected activity. But we base this conclusion only on the first ground stated by the Trial Examiner.

The collective-bargaining contract between Respondent and Local 282 does not contain a prohibition against striking except during the pendency of arbitration proceedings. Nevertheless in the *Lucas Flour* case,³ the Supreme Court said that "a strike to settle a dispute which a collective-bargaining agreement provides shall be settled exclusively and finally by compulsory arbitration constitutes a violation of the agreement." But the Court also indicated that such a no-strike agreement is not to be implied "beyond the area which it has been agreed will be exclusively covered by compulsory arbitration."⁴ The contract between Respondent and Local 282 provides a grievance procedure with compulsory terminal arbitration in relation to disputes "concerning the application or interpretation of any provision of this Agreement, or concerning any term or condition of employment under this Agreement. . . ." When the Long Island City employees refused to cross the Pelham Manor employees' picket line, they did so, the Trial Examiner found, because of fear of physical reprisals or out of sympathy for the Pelham Manor strikers, and not because they had a dispute of their own cognizable under the grievance-arbitration provision in their agreement. Hence, the strikers' conduct was not in conflict with the implied no-strike provision, and did not lose its protected character.

2. On September 25, the discharged Long Island City drivers began to picket the Long Island City plant with signs saying that they had been "locked out" and had received no pay. The few drivers who had continued to work during the prior picketing by the Pelham Manor employees honored this picket line. Thereupon Respondent discharged them. Although the discharge of an employee is ordinarily subject to a grievance-arbitration provision like that in this case,⁵ the employees discharged on September 16 were, we have found, unlawfully discharged. The picketing which began on September 25 was directed against Respondent's unfair labor practices in discharging these employees. The Supreme Court has held that an express no-strike clause does not waive employees' right to strike against an employer's unfair labor practices.⁶ *Pari passu*, an implied no-strike clause does not deprive employees of such right. The employees who honored the picket line set up by the unlawfully discharged employees thereby became in their turn unfair labor practice strikers. Accordingly, we find that by discharging employees who refused to cross the picket line established by Long Island City employees on September 25, Respondent violated Section 8(a)(1) of the National Labor Relations Act, as amended.

3. The Trial Examiner found that Respondent

violated Section 8(a)(5) by Attorney Sale's statement to some employees at a State court injunction hearing that he thought the employees could return to work if they accepted an incentive plan. According to the Trial Examiner, this statement represented at the least "an invitation to or encouragement of, the men to offer individually to return to work under an incentive plan . . . and to that extent constituted an effort to bypass Local 282." However, the Trial Examiner also made a general finding that Respondent was not trying to bargain individually with employees about substituting an incentive pay plan for the existing pay system, but was seeking to enlist the aid of the employees in bringing Local 282 to the bargaining table so that the Union might consider and accept Respondent's proposal. We find that Attorney Sale's isolated statement to some employees was not inconsistent with this general intent and therefore did not violate Section 8(a)(5).⁷

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order of the Trial Examiner and hereby orders that Respondent, Hoffman Beverage Company and Hoffman Beverage Company, Debtor In Possession, Long Island City, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order, as herein modified:

1. Delete paragraph 1(b) and reletter paragraphs 1(c) and 1(d) consecutively.

2. Delete the third indented paragraph of Appendix B attached to the Trial Examiner's Decision.

³ *Local 174, Teamsters v Lucas Flour Co*, 369 U S 95, 105 *New York Mailers Union v NLRB*, 327 F.2d 292 (C A 2)

⁴ *Local 174, Teamsters v Lucas Flour Co*, *supra* at 106, *San Juan Lumber Company*, 154 NLRB 1153.

⁵ *Retail Clerks, Local 1401 v Woodman's Food Market*, 371 F 2d 199 (C A. 7)

⁶ *Mastro Plastics Corp v NLRB*, 350 U S 270

⁷ The Trial Examiner's second conclusion of law is hereby deleted, and conclusion number 3 renumbered 2

TRIAL EXAMINER'S DECISION

SIDNEY SHERMAN, Trial Examiner. The charges herein were served upon Respondent on various dates between October 23, 1964, and March 18, 1965,¹ the complaint issued on June 30, 1965, and the proceeding was heard on various dates between September 7 and October 13, 1965. After the hearing briefs were filed by Respondent and the General Counsel. The issues litigated were alleged violations of Section 8(a)(1), (3), and (5) of the Act.

¹ All events hereinafter related occurred in 1964, unless otherwise stated

Upon the entire record² and my observation of the witnesses, I adopt the following findings and conclusions:

I. RESPONDENT'S BUSINESS

Hoffman Beverage Company is a New Jersey corporation engaged in the manufacture, sale, and distribution of soft drinks. It has several plants in the New York City area, including one at Long Island City. On September 18, 1964, it filed a petition in bankruptcy and the bankruptcy court issued an order authorizing the petitioner to continue in possession of, and to operate, its business, as debtor in possession, and the petitioner has continued so to operate. The events hereinafter related occurred both prior to, and after, the entry of such order, and Hoffman Beverage Company, whether acting in its capacity as a debtor in possession or in its prior capacity, is hereinafter referred to as Respondent.

During the past fiscal year Respondent received at its Long Island City plant from out-of-State points goods valued in excess of \$50,000, and shipped from the plant to out-of-State points goods valued in excess of that sum.

Respondent is engaged in commerce within the meaning of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Local 282, International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, hereinafter variously referred to as Local 282 or the Union, is a labor organization within the meaning of the Act.

III. THE UNFAIR LABOR PRACTICES

The complaint, as amended, alleges that Respondent violated Section 8(a)(3) and (1) of the Act in the following respects:

1. By denying reemployment to or discharging certain employees³ because they engaged in concerted activities, or because Respondent believed that they engaged in such activities.

2. By refusing, for discriminatory reasons, to pay to certain employees earned wages and vacation and sick pay, to provide accident and sickness benefits, and to make pension fund contributions.

The complaint further alleges that Respondent independently violated Section 8(a)(1) of the Act as follows:

1. By bargaining directly and individually with its Long Island drivers, notwithstanding that they were at the time represented by a labor organization.

2. By threatening employees with reprisals for engaging in concerted activities and for refusing to bargain individually with Respondent.

The complaint finally alleges that by all the foregoing acts Respondent violated Section 8(a)(5) and (1) of the Act.

Respondent's answer, as amended at the hearing, admits the withholding of earned wages, vacation pay, and pension fund contributions. The answer denies, however,

that any of the foregoing actions were for discriminatory reasons, and ascribes the withholding of wages to the pendency of a suit by Respondent against the claimants. The answer further denies the allegations of discriminatory discharge, individual bargaining, and threats of reprisal.

A. Sequence of Events

Respondent is engaged in the manufacture, sale, and distribution of soft drinks. It has several plants in the New York City area, including one at Long Island City, New York, where all the claimants were employed, and another at Pelham Manor, New York. At all times here relevant, the Pelham Manor employees were represented by Teamsters Local 46, and the Long Island employees by Teamsters Local 282. Both locals had contracts running from June 1, 1962, to May 31, 1965, and, in the case of Local 282, there were two such contracts, one for a unit of production workers and the other for a unit of drivers, helpers,⁴ and warehousemen.

The events here in issue were set in motion on September 4, when Respondent closed its Pelham Manor plant after the drivers there rejected Respondent's proposal that their current contract be modified by substituting an incentive plan for the existing system of compensation, which was based solely on time worked. To protest this "lockout," the Pelham drivers picketed at Long Island from September 8 to 15. Most of the Long Island drivers did not report for work during the picketing. On September 11, which was Respondent's regular payday, the drivers who had not worked during the picketing were told that Respondent's payroll records had been lost and they received no pay.⁵ On September 15, the Pelham drivers, in compliance with a court injunction, ceased picketing. There is conflicting testimony, which will be considered below, as to whether between September 16 and 25, the idle Long Island drivers offered to return to work. It is clear, in any event, (1) that none of them was actually put back to work during that period, and (2) that there was no picketing during that period, either by the Pelham or by the Long Island drivers. On September 18, Respondent filed a voluntary petition in bankruptcy, and its business was thereafter administered, pursuant to an order of the bankruptcy court, by Respondent as a debtor in possession. Also, on September 18, the next payday, no paychecks were distributed, ostensibly because the payroll had again been lost. On September 23, Respondent executed a new agreement with Local 46, providing for an incentive plan for the Pelham Manor drivers and on September 24 operations were resumed at Pelham Manor.

On September 25, the idle Long Island drivers began to picket the Long Island plant, and those few drivers who had been working up to that time honored this picket line. Most of the production workers and warehousemen, all of whom had worked up to that time, also honored the picket line initially, but after several days returned to work. Also, on September 25, Respondent filed suit against about 70 of

well, unless otherwise indicated. Most of the drivers were "route drivers," who made deliveries to customers. The balance were tractor-trailer drivers, who made interplant deliveries.

⁵ The pay due on September 11 applied to services performed during the week ending September 4. It was Respondent's practice to hold back 1 week's pay.

The reason given the drivers for not distributing their paychecks was admittedly false.

² There was attached to the General Counsel's brief a motion to correct certain typographical errors in the transcript. No objection thereto having been received, said motion is hereby granted. For other corrections of the record and the disposition of certain objections to evidence, as to which ruling was reserved at the hearing, see my order of February 7, 1966.

³ Hereinafter referred to as the "claimants."

⁴ All references hereinafter to "drivers" denote helpers, as

the Long Island drivers, seeking to recover \$1 million for damages allegedly suffered by Respondent as a result of their failure to work on and after September 10. On October 1 Respondent obtained an injunction against the picketing, and there was none thereafter. Within the next few days, Respondent hired replacements for the claimants, and they have not been rehired. On various dates in October, Respondent mailed to all the claimants notice that their employment had terminated on September 25. On November 17, Local 282 wrote Respondent, requesting, *inter alia*, arbitration of the foregoing discharges, which request was rejected by Respondent. In January 1965, as a result of a State court order, Respondent finally paid to the drivers the wages previously withheld for services rendered during September. However, Respondent has not yet paid the drivers for any unused sick or vacation pay allegedly earned by them prior to the termination of their employment.

B. Discussion

1. The discharge of the Schedule B claimants

The complaint, as amended, alleges that a number of Respondent's drivers and helpers were discharged, *inter alia*, because of their actual or assumed refusal to cross the Pelham drivers' picket line (between September 10 and 15), and the names of such alleged discriminatees, 84 in number, are listed on "Schedule B" attached to the complaint. These individuals will be referred to hereinafter as the "Schedule B claimants."

There is no dispute that the employment of these claimants terminated at least by September 25, and that such termination was related to the failure of at least a majority of them to report for work between September 10 and 15, during the picketing by the Pelham drivers. Moreover, while at some points in his testimony, Respondent's industrial relations director, Armstrong, characterized such failure to report as an "assumed" resignation from work, he elsewhere acknowledged that the Schedule B claimants were in fact discharged by Respondent, and it is so found.⁶

As to the date of their discharge, while Respondent's written notice to the Schedule B claimants of their separation, mailed in October, refers to the fact that their employment terminated on September 25, Armstrong admitted that the decision to discharge them was reached before that date, and that the September 25 date was selected for reasons related to the claimants' group insurance coverage, and there is persuasive evidence in the record that such decision was, in fact, reached at least by September 16.⁷ Thus, Priola related that on

September 16, the day after the Pelham picketing ceased, he was in the forefront of a group of about 30 to 40 drivers, who attempted to report for work, but that Supervisor Jacknain barred their way, and, when Priola announced that the men were seeking to return to work, Jacknain retorted, "you didn't work Thursday and Friday, the 10th and the 11th. Now the company don't want you."⁸ Torre corroborated Priola, as did Trope and Sheridan. While Jacknain disputed their testimony, in view of demeanor considerations as well as other circumstances reflecting on Jacknain's credibility,⁹ I credit such testimony.

De Bellis testified that on September 17 or 18, when he asked about some wages that were due him, Jacknain retorted that the wages would not be paid him because he was discharged, and that Jacknain had "orders from the front office . . . a blanket ruling" that all drivers and helpers were "no longer connected with Hoffman Beverage." Jacknain disputed this testimony. De Bellis added that when, on the same day, he reported the foregoing incident to Respondent's vice president, Horne, he remarked only that the matter was "in the hands of the attorneys" and that De Bellis was a victim of circumstances. Horne did not testify. In view of this, and as I was favorably impressed by De Bellis' demeanor as well as by the circumstantiality of his testimony, I credit his version of the foregoing incidents.

I find therefore that the decision to discharge the Schedule B claimants was made not later than September 16, and that such decision was effectively communicated to all such claimants by Jacknain's barring of ingress to the group of 30 to 40 men who sought to enter the plant on the 16th.

There remain to be considered the reason for, and legality of, the foregoing discharges. The record amply supports a finding that the reason was the actual or assumed refusal of the overwhelming majority, if not all, of the Schedule B claimants to cross the Pelham drivers' picket line,¹⁰ and in its brief Respondent avers that this was in fact the sole reason for the discharges, contending only that such claimants forfeited their right to employment, because, by honoring the Pelham drivers' picket line, they violated the terms of Local 282's agreement with Respondent, as well as the instructions of Local 282.

While Respondent's brief fails to specify what provisions of Local 282's contract was violated, Respondent presumably has reference to section 11 thereof, which reads in pertinent part as follows:

Should any dispute arise between the Employer and employee, or the Employer and the Union concerning the application or interpretation of any provision of this Agreement, or concerning any term or condition

⁶ It is well settled, in any event, that a respondent cannot avoid the onus of a discharge for a concerted refusal to work by treating such refusal as a resignation or permanent quit.

⁷ Jacknain, one of Respondent's supervisors at Long Island, insisted that none of the claimants was discharged until September 28, and that between September 10 and 28 the witness and Armstrong were unsuccessfully soliciting them to return to work. However, I do not credit such testimony, since it conflicts with Armstrong's own testimony regarding the date of the discharge decision and his admission that before September 25 many of the claimants approached him about returning to work, as well as with the mutually corroborative testimony of the General Counsel's witnesses as to the rejection by both Jacknain and Armstrong, before September 25, of their offers to return to work.

⁸ Priola and Torre also testified to a similar remark addressed to each of them individually by Jacknain on September 14, when they sought to work. I credit them, despite Jacknain's denial.

⁹ As already noted, while Jacknain insisted that from September 10 to 28, he and Armstrong were unsuccessfully soliciting the claimants to return to work, Armstrong admitted that during that period various of the claimants broached to him the matter of reemployment and that his only response to them was to refer them to Local 282.

¹⁰ See, e.g., Armstrong's admissions to that effect and the findings above as to Jacknain's statements to like effect to various of the claimants.

of employment under this agreement, the representatives of the Employer and representatives of the Union shall attempt to adjust the controversy themselves. In the event they are unable to adjust the same, the dispute shall within two (2) days after the request of either party be submitted to arbitration to (sic) a mutually acceptable arbitrator, whose decision shall be final and binding upon the parties hereto. *During the period of arbitration there shall be no strikes or lockouts by either party to this agreement.* [Emphasis supplied.]

The General Counsel contends that the foregoing no-strike commitment is not applicable to the present situation because its scope is expressly limited to disputes over the application or interpretation of *Local 282's* contract, and there was no such dispute here. I agree. So far as appears from the record, those employees who refused to cross the Pelham drivers' picket line did so either because of their fear of physical reprisals by the pickets or their sympathy for the pickets' cause, or both. In any event, it is clear that the foregoing absenteeism among the Long Island drivers during the Pelham picketing stemmed from the pickets' dispute with Respondent over the closing of the Pelham plant and not from any dispute over the interpretation or application of *Local 282's* contract. There was therefore no occasion for invoking the provisions of section 11, quoted above, including the no-strike clause, which provisions were designed only to limit the right to strike over grievances concerning the application and interpretation of that contract.

Moreover, even if it be assumed that there was some issue underlying the events of September 10 that might have been arbitrated under *Local 282's* contract, the fact remains that the foregoing clause by its terms bars strikes only during "the period of arbitration," and is silent as to the right to strike, as here, before any resort to arbitration. Under the familiar rule of *expressio unius exclusio alterius*, it is proper to infer that the parties did not intend to foreclose prearbitration strikes.¹¹

Finally, there is a provision of the contract which has even more specific application to the instant situation than the foregoing language of section 11 relating to "strikes." Section 8(L) of the contract deals expressly with the right of the members of *Local 282* to refuse to cross a picket line, as follows:

The Employer agrees that drivers and helpers in making deliveries shall not be required to cross picket lines.

While normally that provision would be invoked in situations where the picket line is at a customer's premises, there is nothing therein to preclude it from applying to a case where, as here, the drivers and helpers could not reach the customer's premises to make their deliveries without first crossing a picket line at their employer's premises.

For all these reasons, I find that Respondent's reliance

on the no-strike pledge in *Local 282's* contract is misplaced.

There remains to be considered Respondent's contention, in effect, that the Schedule B claimants' abstention from work on September 10, was unprotected because it was in defiance of the instruction of *Local 282* that they continue working. As to the nature of such instruction, the record shows the following:

Claimant Priola testified that on September 9, Union Agent McFarland came to the Long Island plant and told the drivers that Respondent was a "dying duck," and that the men should continue to work despite the picketing by the Pelham men. However, according to Priola, McFarland added that as union men the Long Island employees did not have to cross a picket line. Respondent's industrial relations director, Armstrong, testified that on a date, which he tentatively identified as September 8, he overheard part of a conversation between McFarland and members of *Local 282*, which part consisted of a direction by McFarland to the others to go to work. However, he did not controvert Priola's testimony as to the remainder of this conversation. Accordingly, I credit Priola, and construe the sense of McFarland's remarks to be that, while *Local 282* recognized the right of its members to refuse to cross the picket line (whether because of their obligations as union members or because of the provisions of section 8(L) of *Local 282's* contract, noted above), it did not deem it expedient for the men to exercise this right in view of Respondent's financial plight.

That the Union, itself, did not unqualifiedly condemn, nor disassociate itself entirely from, the claimants' action is apparent also from the fact that on November 17, it requested Respondent to arbitrate their discharges. Moreover, while shop steward Posa, himself, continued to work until September 25, and urged others to do so, he acted as spokesman of a committee of claimants, who on September 24, approached Armstrong and solicited him to rehire those who had honored the Pelham line.

In any event, those cases on which Respondent apparently relies here,¹² do not hold that all walkouts without the sanction of the incumbent union are unprotected, but only such walkouts as are in derogation of the union's bargaining position or objectives. That this is so is apparent not only from the holdings of those cases, but also from the language of subsequent Board and court decisions, in which those cases were distinguished. Thus, in *R. C. Can Co.*,¹³ the Board held the doctrine of the *Draper* case, *supra*, inapplicable to a case where the facts were strikingly similar to those in the case at bar. There, ignoring the admonition of their bargaining representative, a minority of the employees struck in protest of their employer's dilatory bargaining tactics; and, upon learning of the strike, an agent of the union expressed disapproval thereof and advised the strikers to return to work, which advice they refused to obey until several hours later. They were thereafter denied reemployment. The Board there held that, since it was in support of, rather than in

¹¹ There are, accordingly, at least two reasons for deeming the rule of *Local 74 (Teamsters) v. Lucas Flour Co.*, 369 U.S. 95, not to be controlling here. In that case the Court held that an agreement to submit a particular dispute to binding arbitration implied a commitment not to attempt to resolve that dispute by any other means, such as a strike. However, the Court made it clear that its ruling did not extend to disputes relating, as here, to matters outside the scope of the arbitration machinery. Moreover, here, by expressly making the suspension of the right to strike

coterminous with the arbitration proceeding, itself, the parties have negated any intent to suspend that right at some earlier point in time. *San Juan Lumber Co.*, 154 NLRB 1153 (agreement not to strike pending exhaustion of grievance procedure did not bar a strike after such procedure had been exhausted), *Deaton Truck Line, Inc.*, 152 NLRB 1531

¹² *N.L.R.B. v. Draper Corp.*, 145 F.2d 199 (C.A. 4), *Plastu-Line, Inc. v. N.L.R.B.*, 278 F.2d 482 (C.A. 6)

¹³ 140 NLRB 588, enfd. 328 F.2d 974 (C.A. 5).

derogation of, the union's bargaining efforts, the strike was protected and the denial of reemployment was unlawful.¹⁴

Thus it is clear that concerted activities may be protected whether or not sanctioned by the incumbent union, and, indeed, even if expressly disapproved by such union, the critical test being whether the ultimate objectives of the employees involved in such activities diverge from, or coincide with, those of the union. Here, the claimants' abstention from work between September 10 and 15 was calculated to aid the cause of the Pelham pickets, who had been locked out because they rejected Respondent's proposal that their existing contractual system of compensation be abrogated in favor of an incentive plan. There is no basis for assuming that Local 282 favored such an abrogation of its sister local's contract. On the contrary, Armstrong himself admitted that all his efforts to draw Local 282 into negotiations concerning a similar change in its contract were futile, and no such change was ever accepted by Local 282. Accordingly, insofar as the action of the claimants in honoring the Pelham drivers' picket line was calculated to exert pressure upon Respondent to recede from its program of foisting an incentive plan upon all its drivers, in derogation of existing union contracts, such action necessarily coincided with the interest of Local 282 in preserving the integrity of its contract. Insofar as the claimants' action may be construed simply as supporting the protest of the Pelham drivers against the closing of their plant, there is no reason to believe that Local 282 approved such closing or the wholesale discharge of members of a sister local. Needless to say, such closing was not sought by Local 282.

Finally, it having been found that section 8(L) of Local 282's contract guaranteed to the claimants the right

to honor the Pelham picket line, it can hardly be said that, by exercising such right, which had been won for them by Local 282 through the bargaining process, the claimants' action conflicted with Local 282's bargaining objectives. At the most, it can be said only that their action conflicted with Local 282's advice that they waive their contractual right for tactical reasons.

Accordingly, all things considered, I find no merit in Respondent's position insofar as it is based on the rule of the *Draper* case.¹⁵

In conclusion on this issue, it is found that by September 16, Respondent had decided to discharge all of the Schedule B claimants because of their actual or assumed support of the picketing by the Pelham drivers,¹⁶ and that Respondent effectively communicated such decision as early as September 16 to such claimants. I find further that by such discharges Respondent violated Section 8(a)(1) of the Act.¹⁷ As the remedy would be the same, there is no need to determine whether by such discharges Respondent also violated Section 8(a)(3).

2. The discharge of the Schedule C claimants

As already related, between September 16 and 25 there was no picketing at Long Island City. Of Respondent's approximately 120 drivers and helpers there, only 6 continued to work until September 25.¹⁸ On that date the idle drivers began to picket with signs referring to the fact that they had been "locked out" and had received no pay, and the foregoing six employees refused to cross the picket line, until the picketing was enjoined by a State court (on October 1). They, like the others, subsequently received formal notice of their termination effective

¹⁴ Accord *San Juan Lumber Co.*, 154 NLRB 1153

¹⁵ Respondent appears to contend, also, that the picketing by the Pelham drivers was unprotected because not sanctioned by Local 46, and that the sympathetic action of the Long Island drivers between September 10 and 15, was, therefore, also unprotected. However, the only evidence that Local 46 had not sanctioned the picketing at Long Island City by its members consisted in certain hearsay testimony by Armstrong and Andersen, which was objected to by the General Counsel, and Priola's characterization of the Pelham drivers picketing as "illegal," which was clearly merely a conclusion of the witness. Accordingly, I find no competent evidence in the record that the picketing was not sanctioned by Local 46. In any event, it is not clear how such picketing, which was precipitated by the closing of the Pelham Manor plant, could be deemed to contravene any bargaining objectives of Local 46. Certainly, it cannot be assumed that Local 46 desired such closing or the wholesale discharge of its members. (While Respondent's counsel asserted at the hearing that Local 46 had recommended to its members acceptance of Respondent's proposal for an incentive plan, there is no competent evidence to that effect, and Armstrong's testimony was, on the contrary, that the Pelham Manor plant was closed because Respondent could obtain no relief from "the union" (i.e., Local 46). In any event, the immediate cause of the picketing was not the dispute over the incentive plan but the closing of the Pelham Manor plant.)

¹⁶ It is not necessary to determine whether, as the General

Counsel contends, some of the claimants failed to report on or after September 10, because they were sick or on vacation or because they were intimidated by the pickets. It is sufficient that Respondent attributes their discharge to their refusal to cross the Pelham drivers' picket line, as it is well settled that a discharge of an employee because of a belief that he engaged in protected, concerted activity is unlawful even though such belief is erroneous.

The record warrants the additional finding that, as a measure of reprisal for the action of those claimants who honored the picket line, Respondent decided to discharge even some who were known to have so reported or to have been on vacation throughout that period. Thus, according to the credible testimony of Dunican, a helper, although he continued to report for work between September 10 and 25, he was not given any assignment because of the alleged unavailability of work, and, like the others, he was notified of his termination as of September 25. Another example was the case of De Bellis, who, as noted above, credibly testified that he was on vacation throughout the period of the picketing by the Pelham men, but, when he returned a few days after the picketing ceased, he was, as found above, told by Jacknam of the "blanket" order to discharge all the drivers and helpers, including De Bellis. (Only Posa, the union steward, his helper Hutchinson, and four trailer-truck drivers appear to have been exempted from this blanket order, as they worked continuously from September 10 to 25.)

September 25. These six are alleged in the complaint to have been discriminatorily discharged and are listed on Schedule C of the complaint. They will be referred to herein as the "Schedule C claimants."

Respondent's brief makes no specific reference to these claimants or to the reason for their termination. However Armstrong admitted that, when they applied for rehire,¹⁹ he told them that Respondent could not "use them any longer" because "they had placed themselves in the same category" as the men who had honored the Pelham drivers' picket line between September 10 and 15. Since Armstrong thereby, in effect, acknowledged that he was discharging these claimants for the same reasons as the others, the legality of their discharge stands on the same footing as that of the Schedule B claimants.²⁰

It is accordingly found that, by discharging the Schedule C claimants on September 25, for honoring the picket line established on that date, Respondent violated Section 8(a)(1) of the Act.

3. The failure to recall Mrs. Kruk

Edward Kruk was one of the four tractor-trailer drivers who ceased work on September 25, because of the picket

line established on that date, and who was discharged under the circumstances just described. His wife was employed in Respondent's office at Long Island City as a comptometer operator on a regular, part-time basis, from February to September 14, when she was laid off, allegedly for lack of work. Although her supervisor, in effect, promised to recall her when normal operations were resumed, and, although early in October Respondent did resume its normal operations,²¹ Mrs. Kruk was never recalled.

The General Counsel's present position appears to be that, while her layoff was for valid, economic reasons, the failure to recall her was unlawful, because it was in reprisal for her husband's refusal to cross the picket line established on September 25.

Armstrong explained that Mrs. Kruk was not rehired because of a change in Respondent's office procedures, which eliminated the need for her services. However, Kruk testified that in October he asked Respondent's vice president, Horne, why Respondent had hired two new girls but had not recalled Mrs. Kruk, and that Horne answered "How would it look if you are on the street with all your time, and she would be working? It wouldn't look nice." When, according to Kruk, he remonstrated that he needed his wife's income because he had "five mouths to feed,"

¹⁷ The record shows that on and after September 24, some, at least, of the claimants, were offered reinstatement by Armstrong upon condition that they induce Local 282 to accept an incentive plan, and that such offer was uniformly rejected. Respondent does not contend that such rejection adversely affected the claimants' right to reinstatement, and, in effect, denies in its brief that there was any such offer. In any event, even if the matter be deemed to be properly in issue, I would not regard such an offer as in any way mitigating Respondent's liability. While it might be contended that such an offer warrants a finding that at some date after September 16, the discharges were converted into a "bargaining lockout," and that under *American Shipbuilding Company v NLRB*, 380 U.S. 300, such a lockout was privileged, such contention must fall for the following reasons:

1 *American Shipbuilding* dealt only with a lockout after a good-faith impasse in bargaining. See *Weyerhaeuser Company*, 155 NLRB 921. Here, not only was there no impasse, but bargaining had not even begun. It is inconceivable that the Supreme Court intended to license mass lockouts as a prelude to any bargaining. It is difficult to imagine anything better calculated to discourage union activity among employees than the foreknowledge that their employer, if required to deal with a union, may lock them out in advance of any bargaining, and not merely in the limited situations where an impasse is reached despite good-faith bargaining.

2 *American Shipbuilding* did not involve a lockout, which, as here, was designed to secure midterm modification of a contract. Such a lockout would seem to conflict with the Act's paramount policy of promoting stability in labor relations through the negotiation of binding contracts. See *H. J. Heinz Co. v NLRB*, 311 U.S. 514, *NLRB v Insurance Agents*, 361 U.S. 477, 485. Compare, *NLRB v Sands Mfg. Co.*, 306 U.S. 332, where the Court denied the protection of the Act to economic action by employees to secure midterm modification of a contract.

3 Moreover, it is manifest from the record, including Armstrong's own testimony, that the offers of reemployment were conditioned upon the claimants' exerting concerted pressure upon

Local 282 to accede to an incentive plan, such pressure to take the form of mass petitions and mass demonstrations. Clearly, the guarantee in Section 8(a)(1) of the Act of the right of employees to refrain from concerted activities extends to the right of union members to refrain from taking concerted action such as Armstrong proposed, in order to influence their union's bargaining position. Accordingly, any lockout of the claimants for the purpose of coercing them to take such action would violate Section 8(a)(1), if not Section 8(a)(3), of the Act.

¹⁸ These included one route driver (Posa, the union steward) and his helper, and the four tractor-trailer drivers. They had all worked throughout the period of the picketing by the Pelham drivers.

¹⁹ This was apparently after the picketing was abandoned, in compliance with the injunction.

²⁰ If anything, there would appear to be a stronger case for finding these six discharges illegal. While Armstrong testified that he was told by some unidentified individual in the office of Local 282 that the picketing on and after September 25 was not "sanctioned" by Local 282, there was uncontradicted testimony by Priola, which I credit, that on September 24, at a meeting in the union office, where the decision to picket on the 25th was reached, Local 282's vice president, Jennings, suggested that the Long Island drivers emulate the action of the Pelham drivers. Accordingly, even if it be assumed that the ensuing picketing was not formally authorized by Local 282, there is no evidence that it was specifically disapproved by that Local, but, on the contrary, unchallenged evidence that it was encouraged by the vice president of that Local. Moreover, it is undisputed that Posa, Local 282's steward among the drivers, honored the picket line established on September 25.

In any event, there is no evidence that the objectives of the pickets—restoration to their jobs and payment of the wages due them—conflicted with any policy or bargaining program of Local 282.

²¹ By replacing the claimants.

Horne promised to call her back "after this is all straightened out."

Horne was not called to dispute the foregoing testimony, and I credit it, and find that Kruk taxed Horne with having hired two new girls, while refusing to recall Mrs. Kruk, and that he did not deny the charge, or offer an economic justification for Respondent's action, but instead admitted, in effect, that her continued layoff was causally related to Kruk's discharge.²²

In view of the foregoing, I do not credit Armstrong's explanation for Respondent's failure to recall Mrs. Kruk, but find, absent any other explanation, and, in view of Horne's foregoing admission to Kruk, that such failure was causally related to Respondent's decision to discharge Kruk in reprisal for his concerted activities, and that, by failing to recall Mrs. Kruk, Respondent violated Section 8(a)(1) of the Act.

4. The discharge of Teaton and Valentine

Teaton and Valentine, unlike the other claimants, were not drivers but production employees. The complaint, as amended at the hearing,²³ alleges that they were discharged because of their refusal to cross the picket line established on September 25.

Armstrong testified that on September 25, he found Valentine in the "shape room," which the employees used as a sort of lounging room before reporting for work, and that, when Armstrong asked him why he was not working, Valentine's only answer was that he could not work. Thereupon, according to Armstrong, he ordered Valentine to "go out in the street with the rest of the people," informing him that he had just "quit" his job.

In a pretrial affidavit, Armstrong admitted that his foregoing action constituted a discharge of Valentine, and it is conceded that Valentine was not taken back, although other production workers who failed to report to work during the picketing on and after September 25 were rehired.

As to Teaton, Armstrong testified that, after absenting himself from work during the first few days of the picketing, he came into Armstrong's office and demanded his pay, and that Armstrong disclaimed any responsibility for payroll matters. Armstrong added that, when he asked Teaton why he did not try to report for work, Teaton answered only that he would not work, and left the premises. Armstrong admitted that Teaton was never recalled, attributing this, at least in part, to his refusal to make any attempt to cross the picket line. When asked why he treated Teaton differently from other production employees who failed to come to work during the picketing, Armstrong intimated that the others at least claimed to have made unsuccessful efforts to cross the line and, in their case, he had no information to the contrary; and he elsewhere admitted that Teaton and Valentine were not taken back because they rejected his request to "cross the picket line."

²² Such admission is implicit not only in Horne's aforementioned explanation of the failure to recall Mrs. Kruk, after such explanation is stripped of its patently feigned concern for Kruk's sensibilities, but also in Horne's promise to recall her after matters were "straightened out," which, in the context, presumably meant after Kruk had been rehired.

²³ At the hearing, the General Counsel orally amended the complaint to substitute the names of Teaton and Valentine for those of Anderson and Termotto wherever they appeared in the body of the complaint.

It is clear from the foregoing that both Teaton and Valentine were discharged because they, unlike the other production workers, flatly refused, in Armstrong's presence, to work during the picketing, and it is found that Respondent thereby violated Section 8(a)(1) of the Act.

5. The withholding of wages due

It is undisputed that Respondent withheld, for a period of at least 4 months, wages due the claimants for services rendered in September, and paid such wages only after ordered to do so by a State court. The General Counsel contends, *inter alia*, that such withholding was in reprisal for the actual or supposed concerted activities of the claimants during the month of September. As already related, on their regular paydays, September 11 and 18, the Schedule B claimants were told that no paychecks would be issued because the payroll records had been lost.²⁴ However, at the hearing, Respondent's counsel asserted that the men had not been paid solely because of Respondent's decision to file a suit for damages against those who failed to cross the Pelham drivers' picket line, and that their pay was withheld as security for the satisfaction of any judgment that might be entered in favor of Respondent in such suit. As already related, a complaint for damages caused by the Schedule B claimants' abstention from work on and after September 10, was in fact filed on September 25. However, Respondent's counsel, Sale, admitted²⁵ that the decision to file the damage suit was not made until a few days before September 25. Yet, the wages were first withheld on September 11. In view of this, I cannot credit the foregoing explanation of counsel, and, absent any other justification therefor, conclude that the withholding of the wages was, as the General Counsel contends, a further measure of reprisal against the claimants for their actual or supposed concerted activities. As it has been found that such activities were protected, it follows that by such reprisal Respondent additionally violated Section 8(a)(1) of the Act.

6. The denial of vacation pay

It is undisputed that Respondent has refused, and still refuses,²⁶ to pay certain of the claimants' vacation pay which they had earned before their discharge, and Respondent's counsel asserted at the hearing that such pay was withheld for the same reason as the wages—namely, the suit for damages. However, as it has already been found that the decision to withhold wages was unrelated to the damage suit but was in reprisal for the claimants' concerted activities, it is appropriate to infer that the companion decision to deny vacation pay was similarly motivated. Accordingly, I find that by such denial Respondent violated Section 8(a)(1) of the Act.

7. Denial of sick pay

Section 12(D) of Local 282's contract provides that

²⁴ The Schedule C claimants also failed to receive any pay on October 2 for services rendered during the week ending September 25.

All the pay withheld was eventually distributed between January and April 1965, pursuant to a State court order, entered in a suit filed by the claimants.

²⁵ This admission was made when he took the stand as a witness for Respondent.

²⁶ According to Sale the State court order for payment of the arrears in wages did not apply to vacation pay or other fringe benefits.

employees who had worked 100 days during the preceding contract²⁷ year “and who are still in the employ of the employer shall qualify for 12 days sick leave in the event of proven illness. A day’s pay shall be paid to each employee for each of his unused sick days at the end of each contract year.” The contract provides further for the payment of unused sick pay in case of death or retirement. Notwithstanding the foregoing reference to “proven illness,” Armstrong acknowledged that in actual practice Respondent granted “sick pay” regardless of illness, and that it was in effect a supplemental form of vacation pay. Respondent admitted further, in effect, that no unused sick pay was granted to the claimants on and after September 10, although the record shows that some, at least, of the claimants had not prior to that date used up their entire annual allotment of 12 days “sick” pay.

The General Counsel contends that, in reprisal for the claimants’ concerted activities, Respondent revised its sick pay policy in two respects, as follows:

(1) By refusing to honor claims for sick pay with respect to September 10 and 11.

(2) By refusing, after the discharge of the claimants, to compensate them for unused sick leave.

As to (1), above, Priola credibly testified that he failed to report for work on September 10 and 11, and that on the latter date, he applied for sick pay for these 2 days, but was told by Jacknain that Respondent would not honor his claim for the 11th.²⁸

Hutchinson, who worked up to September 25, credibly testified that he claimed sick pay for September 11, but was later told by Jacknain that Respondent was not honoring any claims for sick pay for the 11th because “the men went out in the street.”

It is clear, therefore, that Respondent departed from its usual sick pay policy by refusing to honor claims for sick pay with respect to September 10 and 11, and that such departure was attributable solely to the claimants’ concerted activities.²⁹ Moreover, since sick pay had heretofore been treated as a form of vacation pay, unrelated to actual illness, and was based on past services, the withholding thereof because of the employees’ concerted activities was equatable to the withholding of earned vacation pay, considered above. Accordingly, it is found that Respondent violated Section 8(a)(1) by its refusal to honor the claims for sick pay with respect at least to September 10 and 11, by persons who were still in its employ at the time such claims were made.

There remains to be considered whether it was unlawful for Respondent to refuse to pay the claimants, after their discharge, for accumulated, unused sick leave, based on services rendered prior to their discharge.

If one accepts the General Counsel’s contention, it is necessary to find that such refusal was contrary to Respondent’s general practice of paying such unused sick

leave to employees after their termination for whatever reason,³⁰ and was solely in reprisal for the claimants’ concerted activities, thereby violating Section 8(a)(1). The same result follows even if one accepts Respondent’s contention—namely, that neither under the contract nor under Respondent’s practice was unused sick leave available to employees who had been discharged; for, the necessary corollary of this position is that Respondent concedes that it would have paid such benefits to the claimants had they not been discharged. However, it having been found that they were discharged in reprisal for concerted activities, and that such discharges were therefore unlawful, it follows that the imposition on the claimants of any additional detriment because of their discharge would be equally unlawful.

Accordingly, it is found that, whichever view is taken of the matter, the failure to compensate the claimants³¹ for unused sick leave violated Section 8(a)(1) of the Act.

8. Pension fund contributions

Section 16 of Local 282’s contract provided for the payment by Respondent of certain contributions to a pension fund, the amount of such contributions to be based on total man-hours worked, and to be paid by the 10th of each month with respect to the preceding calendar month. It is undisputed that no such contributions have been paid by Respondent for the account of the claimants with respect to the period beginning July 1 and ending September 18, when Respondent’s petition in bankruptcy was filed.³² However, the record shows that no such payments were made by Respondent for the account of any of its employees, including those covered by contracts with unions other than Local 282, and such delinquency having commenced before the events here involved, there is no reason to assume that it was attributable to such events rather than to Respondent’s financial stringency.

As to the pension fund contributions applicable to the period after September 18, it appears from Armstrong’s testimony and various admissions in Respondent’s pleadings, as amended at the hearing, that, while, as a debtor in possession, Respondent has paid all such contributions for its other employees, it has not made any payments for the Schedule B claimants, and, as to the Schedule C claimants, had made payments only with respect to the period from September 18 to 25.

Since it has been found that all the Schedule B claimants were unlawfully discharged prior to September 18, any pension payments due and unpaid with respect to the period since September 18 will be covered by the backpay remedy recommended herein, and there is no more need to consider whether the failure to make such payments was in itself illegal than there is to consider whether the failure to pay wages with respect to the

²⁷ The contract year ran from June 1 to May 31.

²⁸ He was, in fact, never paid for either the 10th or the 11th.

²⁹ Certain testimony by Armstrong indicates that such departure was not limited to the claimants, but applied also to certain warehousemen who failed to report for work during the picketing by the claimants, claiming illness. That such denial of sick leave extended to employees other than the claimants does not, however, suffice to negate the fact that such denial was due to the concerted activities of the claimants, but is persuasive rather that Respondent decided to reject all claims for “sick pay” during this period to preclude the possibility of awarding such pay to employees who had abstained from work solely out of deference to the picket line.

³⁰ The General Counsel offered in evidence various records of Respondent bearing on its practice in this regard. Ruling was reserved as to the admission of such exhibits, but by an order issued after the hearing they were received in evidence.

³¹ The identity of all the claimants whose rights to sick pay and vacation pay were abridged by Respondent was not fully litigated at the hearing, and may appropriately be determined in compliance proceedings.

³² There was no evidence as to whether any part of such delinquent contributions has since been paid.

postdischarge period was illegal. The same considerations obviate any need to consider the legality of the discontinuance of pension contributions for the Schedule C claimants with respect to the period after their discharge (on September 25).

It will accordingly be recommended that the complaint be dismissed, insofar as it alleges that the nonpayment of contributions to the pension fund violated the Act.

9. Sickness and accident benefits

The complaint, as orally amended at the hearing, alleges that Respondent failed to provide accident and sickness benefits for any of the claimants, based on services rendered prior to their discharge. This allegation apparently refers to matters covered by section 17 of Local 282's contract, which requires Respondent to provide medical and hospital care in case of sickness or accident. However, no evidence was presented on this issue, and at the hearing the General Counsel stated that claim was being made only for such benefits of this type as related to the period after the separation of the claimants.³³ For reasons just stated with regard to postseparation pension fund contributions, there is no need to consider whether the failure to pay the instant benefits was, in itself, unlawful.

10. Threats

The complaint alleges that Respondent unlawfully threatened its employees with discharge or other reprisals, if they continued to engage in concerted activities or refused to bargain individually.

Armstrong admitted that on September 10, he warned employees that, if they did not come to work despite the picket line, Respondent would assume that they had resigned. As this was tantamount to a threat to discharge them if they did not abandon their concerted activities, which have been found to be protected, Respondent by such threat violated Section 8(a)(1) of the Act.

Moreover, it has been found that on September 16, Jacknam told 30 to 40 of the claimants in effect that they had been discharged because of their absence from work during the picketing by the Pelham drivers. By such assertion, Respondent violated Section 8(a)(1) of the Act.

And, as related in more detail below, Respondent's counsel on September 29, in effect, told the claimants that they would not be rehired, unless they abandoned the protection of their union contract and individually agreed

to an incentive plan. Respondent thereby further violated Section 8(a)(1).³⁴

11. The 8(a)(5) issue

The complaint alleges that Respondent violated Section 8(a)(5) and (1) of the Act by bargaining directly and individually with its Long Island employees concerning their terms of employment. In support of this allegation, there was adduced virtually undisputed testimony that Armstrong, on various occasions during the latter part of September, promised to rehire the claimants, if they would prevail upon Local 282, through mass petitions or demonstrations, to abrogate the existing wage provisions of the contract and accept an incentive plan like that which had been adopted by Local 46 for the Pelham Manor employees on September 23.

However, the main thrust of this testimony is that Armstrong was not seeking to make any separate bargains with individual employees to give up their existing mode of compensation in favor of an incentive plan, but was seeking to enlist the aid of the employees in bringing Local 282 to the bargaining table, so that it might there accept Respondent's proposal for an incentive plan.³⁵ Whatever one may think about the coerciveness of the means thus used by Respondent to bring Local 282 to the bargaining table,³⁶ it is difficult to see how the employment of such means can be said to constitute a refusal to bargain with, or an attempt to bypass, Local 282.³⁷

But certain testimony relating to statements by Respondent's counsel, Sale, to the claimants cannot be dismissed so lightly. Claimant Andersen testified that on September 29, when 35 to 40 of the claimants appeared at a State court hearing on Respondent's petition to enjoin their picketing activity, Sale told some of them that he thought they could return to work if they accepted an incentive plan. Priola substantially corroborated this testimony, and, although he testified about other matters, Sale did not refer to this incident. Accordingly, I credit Andersen, and find that Sale expressed the view that the men would be rehired if they accepted an incentive plan. Such statement would seem, at the very least, an invitation to, or encouragement of, the men to offer individually to return to work under an incentive plan, which represented a change in their terms of employment, and to that extent constituted an effort to bypass Local 282 and to undercut its authority as the exclusive representative of the employees.

I find therefore that, by the foregoing overtures of

³³ See page 681 of the transcript

³⁴ Jacknam asserted that on September 28, he offered those involved in the picketing a last chance to return to work, warning them, in effect, that they would otherwise be discharged. However, insofar as such testimony purports to relate to the instant claimants, I do not credit it, as it conflicts with Respondent's own admission that all the claimants had already been discharged before that date. As it does not appear to what other employees, if any, Jacknam addressed the foregoing warning, I make no violation finding on the basis of such incident.

I do not deem it necessary to determine whether there were any other unlawful threats by Respondent. Any such findings would be cumulative and would not affect the remedy.

³⁵ Armstrong tried about this time to contact Local 282 representatives in order to discuss an incentive plan, but was unable to reach them. (In determining the sequence of these events I have not relied on the dates given by Armstrong in his pretrial affidavit, which are patently erroneous.)

³⁶ See fn 17, above

³⁷ Cf. *NLRB v Insurance Agents' International Union (Prudential Insurance Co)*, 361 U.S. 477, where the Court held that the fact that union-sponsored economic action by employees in support of the union's bargaining position was unprotected did not in itself warrant a finding that the union had violated its bargaining obligation. The Court there stressed that resort to economic action by either party at the bargaining table in order to force concessions was not *per se* violative of the statutory duty to bargain.

counsel to the employees, Respondent violated Section 8(a)(5) and (1) of the Act.³⁸

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 relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

It having been found that Respondent violated Section 8(a)(1) and (5) of the Act, it will be recommended that Respondent cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

It has also been found that Respondent discriminatorily discharged the Schedule B claimants by September 16, and the Schedule C claimants on September 25, and that Valentine and Teaton were discriminatorily discharged on or about September 25, and that Respondent discriminated against Mrs. Kruk by refusing to recall her to work after her layoff on September 14.³⁹

The record shows that Respondent has discontinued its Long Island City operation, but is still doing business at other locations. Under the circumstances, it will be recommended that Respondent be required to offer all the foregoing discriminatees immediate reinstatement to their former or substantially equivalent positions, without prejudice to their seniority and other rights and privileges, dismissing, if necessary, any employees hired since the initial discrimination against them; and that if there is not then sufficient work available for those discriminatees who accept reinstatement and those persons already in Respondent's employ, the following procedure shall be adopted:

All available positions shall be distributed among the discriminatees and the other employees in accordance with such contractual or other practice as Respondent had followed before September 10, in effecting reductions in force for economic reasons, and those employees, if any, for whom no jobs are available after such distribution shall be placed on a preferential hiring list, priority on such list being determined in accordance with such preexisting practice.

³⁸ The complaint alleges also that Respondent violated Section 8(a)(5) by the mass discharges and all the other acts which have been found above to constitute violations of Section 8(a)(1). While the General Counsel's brief makes no specific reference to this allegation, it may be conjectured that the sense thereof is that the entire course of Respondent's illegal conduct was in furtherance of a scheme to force the claimants to bargain individually for an incentive plan. However, as it has already been found, on the basis of Sale's overtures to the claimants, that Respondent violated Section 8(a)(5) by seeking to bargain individually for an incentive plan, it is not clear what useful purpose would be served by making an additional finding that all Respondent's illegal activities were directed to that end. Accordingly, I do not pass on this allegation.

³⁹ The record does not permit a determination of the precise date when she would have been recalled, absent discrimination. Such date may be ascertained in compliance proceedings.

Respondent should also be directed to reimburse the discriminatees for any loss of pay they may have suffered by reason of Respondent's discrimination against them, by paying to them a sum of money equal to the amount they would normally have earned as wages from the date of their discharge⁴⁰ to the date of Respondent's offer of reinstatement (or placement on a preferential hiring list), less their net earnings during that period. Backpay shall be computed on the basis of calendar quarters, in accordance with the method prescribed in *F. W. Woolworth Company*, 90 NLRB 289, and interest at the rate of 6 percent per annum shall be added to net backpay, in accordance with *Isis Plumbing & Heating Co.*, 138 NLRB 716.

It will be further recommended that Respondent be required to reimburse the claimants for all vacation and sick pay which has been found herein to have been discriminatorily withheld, together with interest at the rate of 6 percent per annum, that it compensate them for any loss of sickness and accident benefits resulting from their discharge, and that it make pension fund contributions for them with respect to the period after September 18, 1964.⁴¹

It has been found that Respondent violated Section 8(a)(5) by Sale's abortive effort to bargain individually with some of the claimants about an incentive plan. However, since Armstrong was about the same time seeking to draw Local 282 into negotiations about the same matter, and since the record does not show that Respondent was in any other respect derelict in its bargaining obligation, but shows rather that it continued to recognize and bargain with Local 282, and there is no reason to anticipate any future refusal so to bargain, I shall not recommend that Respondent be required to bargain with Local 282.

CONCLUSIONS OF LAW

1. Respondent violated Section 8(a)(1) of the Act by discriminating against employees with regard to their tenure of employment for engaging in concerted activities, by threatening employees with reprisals for engaging in such activities, and by withholding from employees earned wages, vacation pay, and sick pay because they engaged in such activities.

2. Respondent violated Section 8(a)(5) and (1) of the Act by attempting to negotiate directly with employees concerning their tenure of employment, notwithstanding that such employees were duly represented for purposes

⁴⁰ Or, in the case of Mrs. Kruk, the date that Respondent discriminated against her by failing to recall her.

Backpay for the Schedule C claimants and Valentine and Teaton shall not include any wages lost because of their concerted abstention from work during the picketing from September 25 to October 1. However, such loss of wages shall not be excluded from backpay for the Schedule B claimants, as their discharge antedated, and led to, such picketing.

⁴¹ The following individuals, whose names appear on Schedule B of the complaint, shall be excluded from the scope of the foregoing reinstatement and backpay remedy: E. J. McCabe, Gering, Briong, and Monckton. The General Counsel consented to the deletion of McCabe and there was insufficient proof as to the employment status of the others.

At the hearing the General Counsel amended Schedules B and C of the complaint by substituting O'Connor for Sonnenberg in Schedule B and Sonnenberg for O'Connor in Schedule C. Schedule B was further amended by adding the names of Arthur Andersen and Arthur Termotto.

of collective bargaining by a labor organization.

3. The foregoing are unfair labor practices affecting commerce within the meaning of the Act.

RECOMMENDED ORDER

Upon the entire record in this proceeding, and the foregoing findings of fact and conclusions of law, it is recommended that Respondents, Hoffman Beverage Company and Hoffman Beverage Company, Debtor in Possession, be required to:

1. Cease and desist from:

(a) Discouraging employees from engaging in concerted activities, by discharging them, refusing to recall them, refusing to pay them earned wages or vacation or sick pay, or otherwise discriminating against them with respect to their hire or tenure of employment, or any term or condition of employment.

(b) Seeking to bargain directly with employees concerning their terms or conditions of employment, in derogation of the exclusive right to their statutory representative to negotiate concerning such matters.

(c) Threatening employees with discharge or other reprisals for engaging in concerted activities or for refusing to renounce their rights under a union contract.

(d) In any other manner interfering with, restraining, or coercing its employees in the exercise of their right to self-organization, to form, join, or assist any labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities, except to the extent that such right is affected by the provisos in Section 8(a)(3) of the Act, as amended.

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

(a) Offer to the employees listed in the attached Appendix A immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, in the manner set forth in the above section entitled "The Remedy."

[Notify the employees listed in the schedule attached to Appendix B if 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 and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.]

(b) Make whole the said employees, in the manner set forth in the above section entitled "The Remedy," for any loss of wages, sick pay, vacation pay, sickness and accident benefits, and pension fund contributions that they may have suffered by reason of the Respondent's discrimination against them.

(c) 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 amounts of backpay due under the terms of this Order.

(d) Post at all its plants in the New York City area copies of the attached notice marked "Appendix B."⁴² Copies of said notice, to be furnished by the Regional Director for Region 29, after being duly signed by the Respondent's representative, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in

conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 29, in writing, within 20 days from the date of receipt of this Trial Examiner's Decision, what steps the Respondent has taken to comply herewith.⁴³

⁴² In the event that this Recommended Order is adopted by the Board, the words "a Decision and Order" shall be substituted for the words "the Recommended Order of a Trial Examiner" in the notice. In the further event that the Board's Order is enforced by a decree of a United States Court of Appeals, the words "a Decree of the United States Court of Appeals Enforcing an Order" shall be substituted for the words "a Decision and Order."

⁴³ In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read "Notify said Regional Director, in writing, within 10 days from the date of this Order, what steps Respondent has taken to comply herewith."

APPENDIX A

I. SCHEDULE B CLAIMANTS

- | | |
|-------------------------|------------------------|
| 1. Numssen, P. H. | 42. Kelly, C. C. |
| 2. Halop, S. | 43. Rizzo, J. |
| 3. O'Connor, E. V. | 44. Christophersen, W. |
| 4. Schmidt, G. | 45. Sadlo, F. |
| 5. Bryan, J. J. | 46. Maniscalco, A. |
| 6. Inselman | 47. Winnizla, J. |
| 7. Biondo, S. C. | 48. Terry, J. |
| 8. Radziavick | 49. Jablonski, C. |
| 9. Kruk, M. J. | 50. Unser, H. A. |
| 10. Manghisi, S. | 51. Mottola, J. |
| 11. Priola, C. | 52. Caraccio, C. |
| 12. Garbarini, J. | 53. Brzynski, L. J. |
| 13. De Bellis, A. | 54. Reffelt |
| 14. Amari, C. | 55. Sadrakula, S. M. |
| 15. Zangrillo, L. | 56. Scheihing, E. S. |
| 16. Behrens, J. | 57. Sheridan, P. J. |
| 17. Torres, P. | 58. Stravinski, L. S. |
| 18. Castiglie, O. | 59. Kapella, A. J. |
| 19. Leonick, T. P. | 60. Doring, S. M. |
| 20. Crispo, A. | 61. Reyman, B. P. |
| 21. Castiglie, P. J. | 62. Schau, L. W. |
| 22. Longboat, C., Jr., | 63. Picard, E. J. |
| 23. Nelson, R. W. | 64. Nocilla, J. |
| 24. Rembiszewski, J. A. | 65. Kolinowski |
| 25. Weber, E. C. | 66. Bellino, P. S. |
| 26. Dohrman, J. J. | 67. Giordano, J. B. |
| 27. Michael Cardiello | 68. Capone, A. J. |
| 28. Pastor, J. A. | 69. Delasandro, A. |
| 29. Barling, E. C. | 70. Angelicola, A. M. |
| 30. Nordstrom | 71. Saviano, R. S. |
| 31. Trope, P. | 72. Fettinger, J. |
| 32. Cestaro, M. | 73. Eden, W. M. |
| 33. Lo Gerfo, C. S. | 74. Genzone, C. |
| 34. Moloney, J. T. | 75. Sigillo, J. R. |
| 35. Janecki, E. | 76. Clifford, E. P. |
| 36. Mullally, L. P. | 77. Mirande, L. J. |
| 37. Dunican, J. | 78. Tascinone, A. F. |
| 38. Bell, W. R. | 79. Sherrock, R. |
| 39. Merolla, S. A. | 80. Davidson, N. |
| 40. Chiamonte, M. | 81. Andersen, A. |
| 41. Mannino, A. | 82. Termotto, A. |

II. SCHEDULE C CLAIMANTS

- | | |
|--------------------|---------------------------|
| 1. Newman, A. | 4. Hutchinson, William C. |
| 2. Kruk, Edward V. | 5. Hopkins, Walter |
| 3. Posa, J. V. | 6. Sonnenberg, E. |

III. OTHERS

- | | |
|------------------|---------------|
| 1. Mrs. E. Kruk | 3. Teaton, T. |
| 2. Valentine, A. | |

APPENDIX B

NOTICE TO ALL EMPLOYEES

Pursuant to the Recommended Order of a Trial Examiner 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 discourage our employees from engaging in concerted activities, by discharging them, failing to recall them, or by withholding earned wages or vacation or sick pay.

WE WILL NOT threaten employees with reprisals for engaging in concerted activities or for refusing to renounce their rights under a union contract.

WE WILL NOT attempt to bargain directly with our employees, in derogation of the authority of their statutory bargaining agent.

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 any labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective-bargaining or other mutual aid or protection, or to refrain from any or all such activities, except to the extent that such right may be affected by the provisos in Section 8(a)(3) of the Act, as amended.

WE WILL offer the employees listed in the attached schedule immediate and full reinstatement to their former or substantially equivalent positions, and make them whole for any loss of wages, sick pay, vacation pay, sickness and accident benefits, and pension fund contributions that they may have suffered by reason of the Respondent's discrimination against them.

HOFFMAN BEVERAGE
COMPANY
(Employer)

Dated _____ By _____ (Representative) _____ (Title)

Note: We will notify the employees listed in the attached schedule if 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 and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

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

If employees have any question concerning this notice or compliance with its provisions, they may communicate

directly with the Board's Regional Office, 16 Court Street, 4th Floor, Brooklyn, New York 11201, Telephone 596-5386.

SCHEDULE

- | | |
|-------------------------|----------------------------|
| 1. Numssen, P. H. | 46. Maniscalco, A. |
| 2. Halop, S. | 47. Winnizla, J. |
| 3. O'Connor, E. V. | 48. Terry, J. |
| 4. Schmidt, G. | 49. Jablonski, C. |
| 5. Bryan, J. J. | 50. Unser, H. A. |
| 6. Inselman | 51. Mottola, J. |
| 7. Biondo, S. C. | 52. Caraccio, C. |
| 8. Radziavick | 53. Brzynski, L. J. |
| 9. Kruk, M. J. | 54. Reffelt |
| 10. Manghisi, S. | 55. Sadrakula, S. M. |
| 11. Priola, C. | 56. Scheihing, E. S. |
| 12. Garbarini, J. | 57. Sheridan, P. J. |
| 13. De Bellis, A. | 58. Stravinski, L. S. |
| 14. Amari, C. | 59. Kapella, A. J. |
| 15. Zangrillo, L. | 60. Doring, S. M. |
| 16. Behrens, J. | 61. Reyman, B. P. |
| 17. Torres, P. | 62. Schau, L. W. |
| 18. Castiglie, O. | 63. Picard, E. J. |
| 19. Leonick, T. P. | 64. Nocilla, J. |
| 20. Crispo, A. | 65. Kolinowski |
| 21. Castiglie, P. J. | 66. Bellino, P. S. |
| 22. Longboat, C., Jr. | 67. Giordano, J. B. |
| 23. Nelson, R. W. | 68. Capone, A. J. |
| 24. Rembiszewski, J. A. | 69. Delasandro, A. |
| 25. Weber, E. C. | 70. Angelicola, A. M. |
| 26. Dohrman, J. J. | 71. Saviano, R. S. |
| 27. Michael Cardello | 72. Fettinger, J. |
| 28. Pastor, J. A. | 73. Eden, W. M. |
| 29. Barling, E. C. | 74. Genzone, C. |
| 30. Nordstrom | 75. Sigillo, J. R. |
| 31. Trope, P. | 76. Clifford, E. P. |
| 32. Cestaro, M. | 77. Mirande, L. J. |
| 33. Lo Gerfo, C. S. | 78. Tascione, A. F. |
| 34. Moloney, | 79. Sherrock, R. |
| 35. Janecki, E. | 80. Davidson, N. |
| 36. Mullally, L. P. | 81. Newman, A. |
| 37. Dunican, J. | 82. Kruk, Edward V. |
| 38. Bell, W. R. | 83. Posa, J. V. |
| 39. Merolla, S. A. | 84. Hutchinson, William C. |
| 40. Chiaramonte, M. | 85. Hopkins, Walter |
| 41. Mannino, A. | 86. Sonnenberg, E. |
| 42. Kelly, C. C. | 87. Mrs. E. Kruk |
| 43. Rizzo, J. | 88. Valentine, A. |
| 44. Christophersen, W. | 89. Teaton, T. |
| 45. Sadlo, F. | 90. Andersen, A. |
| | 91. Termotto, A. |

**Alabama Precast Products Co., Inc. and
International Union of Mine, Mill and
Smelter Workers, Birmingham Industrial
Workers Local Union #830. Case
10-CA-6165.**

April 12, 1967

DECISION AND ORDER

On August 30, 1966, Trial Examiner Jerry B. Stone issued his Decision in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be