In the Matter of JOHN W. CAMPBELL, INC. *and* LOCAL 9, UNITED CANNERY, AGRICULTURAL, PACKING AND ALLIED WORKERS OF AMERICA, C. I. O.

Case No. 10–C–1526.—Decided October 20, 1944

DECISION

AND

ORDER

On July 10, 1944, the Trial Examiner 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 copy of the Intermediate Report annexed hereto. Thereafter, the respondent filed exceptions to the Intermediate Report and a supporting brief. No request for oral argument before the Board at Washington, D. C., was made by any of the parties, and none was held. The Board has considered the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and brief filed by the respondent, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, with the addition noted below:

The Trial Examiner has found, and we agree, that the respondent discriminatorily discharged Willa Inlow, Fannie Smith, and Kate Mizell, within the meaning of Section 8 (3) of the Act. In accordance with our usual remedy for such violations, the Trial Examiner recommended that the respondent be required to offer said three employees immediate reinstatement with back pay from the date of their discharge to the date of offer of reinstatement. However, since the respondent's business is seasonal, it is possible that its plant may not be in operation at the time said offer of reinstatment is made; in that event the offer of reinstatement of these employees shall become effective at such time as the respondent's seasonal business next begins. Moreover, in making the employees whole, we shall not award back pay for the periods in which they normally would not

have worked in the respondent's plant; nor shall we deduct as earnings any monies earned elsewhere by them during such periods.

ORDER

Upon the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the respondent, John W. Campbell, Inc., and its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in Local 9, United Cannery, Agricultural, Packing and Allied Workers of America, C. I. O., or in any other labor organization of its employees, by discharging or refusing to reinstate any of its employees, or by discriminating in any other manner in regard to their hire or tenure of employment or any term or condition of their employment;

(b) In any manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist Local 9, United Cannery, Agricultural, Packing and Allied Workers of America, C. I. O., or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection as guaranteed in Section 7 of the Act.

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

(a) Offer Willa Inlow, Fannie Smith, and Kate Mizell 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 our Decision;

(b) Make whole Willa Inlow, Fannie Smith, and Kate Mizell for any loss of pay they have suffered by reason of the respondent's discrimination against them, by payment to each of them of a sum of money equal to the amount which she normally would have earned as wages from the date of the discrimination against her to the date of the respondent's offer of reinstatement, less her net earnings during such period in the manner set forth in our Decision;

(c) Post immediately or, if the plant is not in operation, immediately upon the resumption of operation, in conspicuous places at its plant in Goulds, Florida, and maintain for a period of at least sixty (60) consecutive days from the date of posting, notices to its employees stating: (1) that the respondent will not engage in the conduct from which it is ordered to cease and desist in paragraphs 1 (a) and (b) of this Order; (2) that the respondent will take the affirmative action set forth in paragraphs 2 (a) and (b) of this Order; and (3) that the re-

spondent's employees are free to become members and remain members of Local 9, United Cannery, Agricultural, Packing and Allied Workers of America, C. I. O., or any other labor organization, and that the respondent will not discriminate against any employee because of membership in or activity on behalf of that organization;

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

MR. GERARD D. REILLY took no part in the consideration of the above Decision and Order.

INTERMEDIATE REPORT

Mr. John H. Garver, for the Board.
Mr. B. E. Hendricks, of Miami, Fla., for the respondent.
Mr. George Headley, of Miami, Fla., for the Union.

STATEMENT OF THE CASE

Upon a charge duly filed by United Cannery, Agricultural, Packing and Allied Workers of America, Local 9, C. I. O., herein called the Union, the National Labor Relations Board, herein called the Board, by its Regional Director for the Tenth Region (Atlanta, Georgia), issued its complaint dated April 25, 1944, against John W. Campbell, Inc., herein called the respondent, alleging that the respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8 (1) and (3) and Section 2 (6) and (7) of the National Labor Relations Act, 49 Stat. 449, herein called the Act. Copies of the complaint and the charge, accompanied by notice of hearing, were duly served upon the respondent and the Union.

With respect to the unfair labor practices the complaint alleged in substance that: (1) the respondent discharged Willa Inlow, Fannie Smith, and Kate Mizell on or about February 16, 1944, and has since refused to reinstate them because they joined and assisted the Union, and (2) the respondent from on or about February 1, 1944, to the date of issuance of the complaint urged, persuaded, threatened and warned its employees not to become or remain members of or assist the Union, and vilified, disparaged and expressed disapproval of the Union. The respondent's answer filed May 13, 1944, denied the commission of any unfair labor practices.

Pursuant to notice, a hearing was held in Miami, Florida, on May 8, 13, 15, and 16, 1944, before William J. Isaacson, the undersigned Trial Examiner duly designated by the Chief Trial Examiner.[1]

The Board and the respondent, represented by counsel, and the Union, by a representative, participated in the hearing. Full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues, was afforded all parties. At the beginning of the hearing the respondent moved to dismiss the entire complaint on the ground that the employees herein involved were agricultural laborers within the meaning of Section 2 (3) of the

[1] On May 8, 1944, the date this proceeding was noticed for hearing and before the taking of evidence, the undersigned granted the respondent's motion requesting a continuance of the hearing to May 13, 1944, on the ground that the respondent had not received a copy of the above-described complaint and notice of hearing until May 3

Act and therefore were excluded from the application of the Act. The motion was denied. During the hearing, the Board's counsel moved to amend the complaint to name John W. Campbell, an individual doing business in Okeechobee, Florida, as an additional party defendant in the instant proceeding Upon objection by the respondent the motion was denied. At the close of the Board's case, the respondent moved to dismiss the complaint as a whole, and various parts thereof, on the merits. The Board's counsel joined the respondent in its motion to dismiss the Board's complaint insofar as it alleged that the respondent had urged, persuaded, threatened, and warned its employees not to become or remain members of or to assist the Union, and vilified, disparaged and expressed disapproval of the Union, and to that extent the respondent's motion was granted. The remainder of the motion was denied At the close of the hearing, the respondent moved to dismiss the remainder of the complaint on the merits. Ruling on that motion was reserved The motion is hereby denied for the reasons set forth in Section IV hereof. At the close of the hearing the Board's counsel moved to conform the pleadings of the respondent and the Board with respect to formal matters to the evidence adduced. The motion was granted without objection. At the close of the hearing all parties were afforded an opportunity to argue orally on the record before the undersigned and counsel for the Board and the respondent participated in such argument. None of the parties filed briefs although afforded an opportunity to do so.

Upon the entire record in the case and from his observation of the witnesses, the undersigned makes the following:

FINDINGS OF FACT[2]

I THE BUSINESS OF THE RESPONDENT[3]

The respondent, a Florida corporation, has its principal office and place of business in Goulds, Dade County, Florida, where it operates a packing plant employing an average force of about 40 employees At its packing plant, the respondent is engaged in the business of receiving, handling, washing, grading, sizing, assembling, packing and shipping tomatoes[4] During the 1944 packing season which continued from about January 15 until about the end of April 1944, the respondent packed tomatoes which the respondent grew upon 1,000 acres of land located in Dade County and under lease by the respondent. The respondent employed about 175 field laborers for the cultivation of its crops. An undisclosed portion of this acreage is cultivated by the respondent's tenants, each of whom, in pursuance of a share-cropping arrangement, receives the seed and necessary agricultural implements from the respondent, and cultivates his respective plot for a fixed percentage of the proceeds received therefrom. While the respondent primarily handles and processes its own tomato crop, at the close of the pack of the respondent's crop on March 23, the respondent processed and packed the tomatoes of other growers for about a month. About 20 percent of the tomatoes processed and packed during the 1944 season were the tomatoes of other growers Excluding the tomatoes which the respondent

[2] Unless otherwise indicated, the findings of fact hereinafter set forth were based upon admitted facts or uncontradicted evidence which the undersigned credits

[3] These findings are based upon a stipulation between the Board's counsel and the respondent, the testimony of John W. Campbell, the respondent's president, and the undisputed testimony of several other witnesses

[4] During a brief period each season the respondent processes and packs some potatoes at its packing house in Goulds which it cultivates in fields it holds under lease The record discloses that the respondent processed and packed about 5 acres of potatoes in 1944 at Goulds The remainder of the respondent's potato crop was packed at a local cooperative exchange.

thus packed for other growers, it packed about 300,000 crates of tomatoes valued at approximately $200,000, 90 percent of which it shipped by railroad and truck to points outside the State of Florida. The respondent purchases all of its machinery, equipment, and materials from points within the State of Florida.[5]

II APPLICATION OF THE ACT TO THE RESPONDENT'S PACKING-HOUSE EMPLOYEES

This proceeding concerns only the respondent's packing house and packing-house employees, the function and personnel of which are entirely separate and apart from the respondent's field work and field employees. The respondent's packing house, consisting of a large plant located within the town of Goulds, is equipped with specialized machinery for the mass production, handling, and processing of tomatoes. When the tomatoes are received at the plant they are dumped into bins and moved onto a conveyor roller. The conveyor first moves the tomatoes into a soaking tank where they pass between brushes which scrub each tomato with water. They then move automatically into a waxer where wax is applied, and then proceed parallel to grading tables. At the grading tables, one group of graders removes the inferior tomatoes (culls) and over-ripe tomatoes (pinks), another removes the first grade tomatoes, and a third group checks the work of the first two groups This sorting operation requires a high degree of proficiency and skill After being graded the tomatoes are moved onto the sizers where they are further sorted according to size, and then directly into crates (lugs).[6] The tomatoes are then trucked to the loading platforms and transferred to railroad cars and trucks for shipment to markets.

The work of the employees here involved relates exclusively to the foregoing operations.[7] Each employee has one or more specialized tasks in connection with the operation of the equipment and machines which handle and process the tomatoes. The crews which do the packing are entirely distinct from the field crews which cultivate and harvest the crop The skills required in packing are entirely different from those required in cultivating and harvesting and the wage scales differ accordingly. While the field hands are Negroes, who live in accommodations furnished by the respondent, the packing-house employees are white, who live in Goulds and the surrounding towns in their own housing accommodations.

Upon the foregoing facts, the respondent's contention that the packing-house workers are "agricultural laborers" within the meaning of Section 2 (3) of the Act and therefore excluded from the operation of the Act is without merit. Where an operation once performed on a farm has thus become specialized, removed from farm to town, and is performed under factory conditions, the workers cannot be considered "agricultural laborers" as the term is used in common parlance. There is nothing in the legislative history to indicate that Congress intended by the words "agricultural laborers" to exclude from the Act workers of the category here involved. As the facts of this case disclose, the

[5] The extremely perishable nature of tomatoes requires that the picking, packing, and shipping proceed without interruption. Thus, a labor dispute interrupting the packing operations of the respondent, would not only interrupt the flow of tomatoes from the fields to the markets while the dispute was in progress, but would, if it lasted an appreciable period, decrease the amount of tomatoes shipped that season

[6] Prior to the 1944 season tomatoes were individually wrapped and packed During the 1944 season, as a result of a shortage of labor and a dispute between the "wrappers" and the respondent over the rate of pay per crate the respondent dispensed with the wrapping operation and thereafter "bulk-packed" its tomatoes in the manner above-set out

[7] The following classifications of workers are employed at the Goulds plant: graders, "fillers" (who fill boxes), mailers, carloaders, "checkers" (who check the number of lugs in car), truckers, and "handy men."

conditions of inequality of bargaining power, with resulting industrial strife and unrest, described in Section 1 of the Act, exist in relation to the workers here involved to fully as great an extent as in any other enterprise within the scope of the Act. There is nothing in the instant case resembling the relationship of the farmer and the "hired man," the type of situation to which, as the Ninth Circuit Court of Appeals pointed out in *North Whittier Heights Citrus Ass'n* v. *N. L. R. B.*, 109 F. (2d) 76 (C. C. A. 9), cert. denied 310 U. S. 632, Section 2 (3) is most clearly applicable. The conclusion reached by the Court in the *North Whittier* case is squarely applicable here. That conclusion reads as follows:

> Industrial activity commonly means the treatment or processing of raw products in factories. When the product of the soil leaves the farmer, as such, and enters a factory for processing and marketing it has entered upon the status of "industry." In this status of this industry there would seem to be as much need for the remedial provisions of the Wagner Act, upon principle, as for any other industrial activity.[8]

The respondent's claim that whether packing-house employees are agricultural laborers within the meaning of the Act depends solely upon whether the packing-house operator and grower of the crop packed are separate and distinct legal entities is without support either in the Act and its legislative history or the judicial decisions interpretative of the Act. Although the matter of legal title is a relevant factor in determining whether employees fall within the statutory exemption, it is not, when viewed in conjunction with the foregoing facts, significant, let alone decisive. The activities in which the employees herein are engaged are not incidental to the respondent's farming operation, but form an integral part of and contribute essential services to what is clearly an industrial enterprise; the nature of the employees' function and the character of the employing enterprise are not, under the circumstances of the instant case, altered by the fact that the respondent is a grower of such proportions that it is enabled to operate its own packing house.[9]

Nor is the undersigned persuaded to the contrary by the respondent's argument that the term "agricultural labor" was given the meaning for which it contends in the regulations and the judicial decisions interpreting the meaning of that term in the original Social Security Act,[10] and in the court decisions interpreting the various state unemployment compensation statutes modelled after the Federal Social Security Act and their respective regulations.[11] See Board decisions cited in footnote 9, *supra*. The congressional reports upon the original Social Security statute taken in conjunction with the reports upon the amendment to the Social Security Act extending the term "agricultural labor" to exclude from the operation of that statute employees engaged in the packing of fruits and vegetables whether or not the packing house was owned by the grower or a

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[8] See also *N. L. R. B.* v. *Tovrea Packing Co.*, 111 F. (2d) 626, 628 (C. C. A. 9), cert. denied 311 U. S. 668

[9] *Matter of Grower-Shipper Vegetable Association of Central California, et al.*, 15 N. L. R. B. 322, 332, 333 footnote 7, modified with respect to points not herein material in 122 F. (2d) 368 (C. C. A. 9); *Matter of American Fruit Growers, Inc., et al.*, 10 N. L. R. B. 316, 319–329: *Matter of George A. Axcrill*, 13 N. L. R. B. 411, 414, 421, footnote 7

[10] 49 Stat. 625, Ch. 531, Title II, S. 210. *Code of Federal Regulations*, Title 20, Section 402.6. *Chester C. Fosgate Co.* v. *U. S.*, 125 F. (2d) 775 (C. C. A. 5); *Latimer* v. *U. S.* (*S. D. Cal. Cent. Div.*) 52 F. Supp. 228; *Stuart* v. *Kleck*, 129 F. (2d) 400 (C. C. A. 9).

[11] *State* v. *Christiansen*, 137 P. (2d) 512; *Batt* v. *Unemployment Compensation Division, Idaho*, 123 P. (2d) 1004; *California Employment Commission* v. *Butte County Rice Growers Ass'n*, 138 P. (2d) 347; *Florida Industrial Commission* v. *Growers Equipment Co.*, 12 So. (2d) 889.

separate legal entity and even though not performed as an incident to ordinary farming operations show that Congress, in excluding agricultural labor from the operation of the original Social Security Act, was concerned with problems of tax collection, tax incidence and record keeping, none of which problems is present in the field of labor relations. (House Rep't No. 728, 76th Cong., 1st Sess., p. 53, Sen. Rep't No. 734, 76th Cong., 1st Sess., pp. 63–64, House Rep't No. 615, 74th Cong., 1st Sess., p 33, Sen. Rep't No. 628, 74th Cong., 1st Sess., p. 45; *Latimer* v. *U. S.*, *supra*, at p. 241.[12] This is likewise true of the various State Unemployment statutes.

The undersigned finds that the respondent's packing-house workers herein involved are not "agricultural laborers" within the meaning of Section 2 (3) of the Act.

III THE ORGANIZATION INVOLVED

United Cannery, Agricultural, Packing and Allied Workers of America, Local 9, affiliated with the Congress of Industrial Organizations, is a labor organization admitting to membership employees of the respondent.

IV. THE UNFAIR LABOR PRACTICES

A. *The discharge of Willa Inlow, Fannie Smith and Kate Mizell*

During the 1944 packing season in Goulds which began about January 15, Inlow, Smith, and Mizell were employed by the respondent as graders. Prior to the 1944 season both Inlow and Smith, who were migratory packers, had worked for 3 seasons as wrappers at the respondent's plant in Goulds, among other places, and Inlow for 2 seasons as a wrapper at a plant operated by President Campbell, individually, in Okeechobee, Florida. The 1944 season, however, was Mizell's first season at either the respondent's plants in Goulds or his Okeechobee plant.

Mizell was engaged in the first grading operation on the conveyor, removing "culls" and "pinks" from the tomatoes as they moved upon the conveyor. Smith and Inlow, on the second operation, separated the number one tomatoes from the second and third grades and removed the "culls" and "pinks" which the first graders had overlooked. The tomatoes then passed before the "head graders" who, acting as a final check, removed all culls, pinks, and seconds and thirds which the others had failed to remove. The head graders were composed of the respondent's most experienced graders, Cora Gorday, Alma Johns, and Mabel Stevens.

Inlow and Smith joined the Union about March 1, 1943, continuing as members until the date they and Mizell were discharged, February 15, 1944.[13] Until that day, as Campbell admitted, neither Mizell, Inlow, or Smith, engaged in any union activities upon the plant premises of which the respondent had knowledge.

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[12] Significantly Congress, recognizing the distinction between the Social Security Act and the National Labor Relations Act, refused to embody in the National Labor Relations Act the extended definition of "agricultural labor" contained in the amendment to the Social Security Act (*Intermediate Report of the Special Committee to Investigate the National Labor Relations Board*, House Rep't 1902, Part I, pp. 83–84, *Report on the Investigation of the National Labor Relations Board*, House Report No. 1902, *supra*, Part II, *Minority Views on the Investigation of the National Labor Relations Board* (76th Cong 3rd Sess.) pp. 13–15

[13] Since she was unavailable as a witness, there is no evidence in the record as to when Mizell became a member of the Union She had left Florida prior to the hearing to engage in packing operations in Texas It is clear, however, from the facts hereinafter set forth that Mizell was, at the time of her discharge, one of the most active Union members in the respondent's employ

On that day, however, all three engaged in solicitation activities on behalf of the Union under the following circumstances. During the lunch period at the plant Smith, Mizell, and Inlow, according to Johns, asked Gorday and Johns to join the Union, explaining that they were attempting to get enough membership cards to enable the Union to request an election. Gorday and Johns refused, declaring that since they were not migratory workers they would gain no advantages from the Union. Mizell responded, according to Johns, "Girls, we will give you until Saturday [of the current week], we are going to take a vote If the house goes union they will want union help and you will lose your job" Johns testified that she understood this statement to mean "whatever would happen would depend upon that vote."[14] Smith added that "if [they] didn't join the Union and hold with them [they] would soon be back down to thirty-five or forty cents an hour"—the prevailing wage rate for graders was 85 cents an hour At the conclusion of the conversation, Inlow said that "it would be best to join, they wanted everybody they could get" During the same lunch period Inlow submitted an application blank to an employee who she identified only as Steve, and Mizell, according to Inlow, also presented an application blank to an employee who was unknown to Inlow. There is no evidence in the record that these activities were witnessed by any of the respondent's officers or supervisory employees.[15]

That same afternoon, while Inlow and Smith were at work, Shirley Nicholas, subforeman in charge of grading, complained that they were not grading properly. Nicholas, a witness for the respondent, testified that on this one occasion he told Inlow and Smith that they were "throwing No. 1 tomatoes over to No. 2's," as a result of which the grade was lowered from 1 to 2 thereby entailing a $2 00 loss to the respondent, the difference between the number 1 grade which sold at $6 00 a lug (crate) and the number 2 grade which sold at $4.00 a lug. Nicholas further testified that Smith and Inlow replied, "We don't care where we throw it, we don't give a damn about it." Nicholas added that Smith and Inlow satisfactorily graded the remainder of the afternoon as he directed. He expressly stated that his complaint was not directed to Mizell, who was working about 15 feet from Smith and Inlow on another part of the conveyor, and that Mizell took no part in the discussion which arose out of his complaint He further testified that he made no report of the incident either to Campbell or to his foreman, Arthur Davis. Johns and Gorday, who Nicholas testified overheard his conversation with Smith and Inlow, corroborated his account of the foregoing incident except that Gorday added that while unable to recall what Mizell said, she too was involved in the discussion.[16] Inlow's and Smith's testimony differed from Nicholas's testimony in but one particular, both declaring that neither of them had said "damn" Upon the foregoing testimony and from the undersigned's impression of Nicholas, whom the undersigned observed to be a direct and truthful witness, the undersigned finds that Nicholas's account of the incident, the persons involved, and the accompanying conversation was accurate.

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[14] At a union meeting the preceding night, Mizell had advocated that the Union request an immediate election among the respondent's employees The Union organizer, Mrs Pat Verble, thereupon gave Mizell union application cards to distribute among the employees

[15] The respondent does not contend that the employees were not permitted to engage in union solicitation on the plant premises during their own time On the contrary, the respondent freely admits that there was no prohibition of union activity in the plant if the employees utilized their own time

[16] Johns first testified, "Mrs Mizell was further down, I cannot say for sure [whether she took part in the conversation] They all got to fussing, and I cannot tell you definitely what Mrs Mizell said." Subsequently, however, when asked by the undersigned whether Mizell took part in the above conversation Johns corrected her foregoing testimony "I could not say, she was even further from me than Mrs Inlow." She expressly testified, "Smith first, and then Mrs Inlow came into the conversation."

Campbell testified that about the middle of that same afternoon W. A. Blanchard, a United States Department of Agriculture inspector stationed at the Goulds plant, who inspected and certified the respondent's grading, and Jordan, a checker at the Goulds plant, both related the details of the foregoing incident to him. When Campbell was asked whether Blanchard specifically mentioned Mizell as being involved in the foregoing incident he testified, "I think he did. I am sure that he mentioned the three." When the same question was put to him with respect to his conversation with Jordan, Campbell stated, "I am pretty sure he mentioned all three of them, they were the ones that were causing the trouble."[17] Campbell testified that upon learning of the conveyor incident he determined to discharge Mizell, Inlow, and Smith but, because of the manpower shortage, decided to wait until the end of that week. Campbell, however, admittedly took no action whatsoever at that time nor did he advise anyone that he contemplated taking any action with respect to the aforesaid employees. As a matter of fact, at the close of work that day Mizell, Smith, and Inlow were, along with the other employees, instructed by Subforeman Nicholas, in accordance with the respondent's normal practice, to report for work the next day.

After work that evening, however, Gorday and Johns intercepted Campbell as he was getting into his car to leave the plant and asked him whether it was necessary to join the Union in order to retain their jobs Campbell replied that it made no difference to him so long as they did their work properly; that they could continue to work for the respondent whether they belonged to the Union or not. Gorday and Johns thereupon recounted their lunch period conversation with Mizell, Smith and Inlow.

Johns and Gorday also informed Campbell of the incident which had occurred that afternoon on the conveyor belt. Johns testified that she "told him about Mrs. Smith and Mrs. Inlow on the belt" Campbell in vague and general terms, testified that Johns and Gorday informed him that there had been "continuous" argument on the belt and mentioned that Mizell, Inlow, and Smith had engaged in an argument on the belt that day of which he already had knowledge. Gorday did not testify as to what they had specifically told Campbell concerning the foregoing incident Since Johns' testimony as to her conversation with Campbell concerning this incident and the persons involved therein is explicit and is in accordance with what actually occurred on the conveyor that afternoon and since Campbell's testimony as to what he was told by Johns and Gorday is both vague and general, the undersigned rejects his testimony and credits Johns' account of what she told Campbell concerning the identity of the persons involved in the discussion on the conveyor. The undersigned further rejects Campbell's testimony that Blanchard and Jordan, neither of whom testified, had informed him, contrary to the facts, that Mizell, as well as Inlow and Smith, were involved in the above described incident.

Campbell "immediately" after talking with Gorday and Johns, admittedly decided to discharge Mizell, Inlow and Smith at once. He returned to the plant

[17] The undersigned, upon the application of counsel for the respondent on May 11, 1944, issued and submitted to the respondent's counsel the next day a *subpoena ad testificandum* for service upon Blanchard Although the respondent's counsel that same day airmailed the *subpoena* to Blanchard at his last known address in Palatka, Florida, it was returned unopened bearing a notation by the Palatka postal authorities tht Blanchard had moved without leaving a forwarding address Additional efforts on the part of both the respondent's counsel and the undersigned to locate Blanchard proved unavailing Jordan, however, was not called upon by the respondent to testify and there is no showing in the record that he was no longer employed by the respondent nor that he was unavailable at the time of the hearing The evidence is uncontroverted that neither Foreman Davis nor Subforeman Nicholas reported the above-described incident to Campbell, nor, as Campbell admits, did he question either of them concerning the incident.

and instructed Somers, his assistant and secretary of the respondent, to have Foreman Davis carry out his decision. Campbell explained that he "made up [his] mind to discharge them . . . that night after Mrs Johns and Mrs. Gorday told me that they had been threatened to join the union and given until Saturday night to join the Union; I just considered that as intimidation of the help I had, and the only thing I could do was get rid of them." In pursuance of Campbell's instructions, Foreman Davis drove that night from Goulds to Homestead, Florida, the residence of Smith and Inlow, a distance of about 8 or 10 miles, and informed Smith that she, Inlow, and Mizell were discharged effective as of that day. In response to Smith's inquiry as to the reason for their discharge, Davis replied that, "it [was] orders from Mr. Campbell," and that the discharges had nothing to do with the character of their work The next day Smith, Inlow and Mizell reported to the plant before work, and Inlow, acting as the spokesman for all three, inquired of Davis the reason for their discharge, Davis merely repeated according to Smith and Inlow, what he had told Smith in answer to the same inquiry the night before. He stated, according to Smith and Inlow, that no one had made any complaint about their work In conclusion he said that he would probably be discharged because he also belonged to the union.

About a week later, the aforesaid three employees, upon discussing their discharges with Mrs. Pat Verble, the union representative, and Harry Jones, a field examiner attached to the Board's Regional office in Atlanta, Georgia, were advised by Jones and Verble to return to the plant and ask Campbell the reason for their discharge They saw Campbell, and Inlow specifically asked him in what respects their work had been defective. Campbell, replying, "You aren't doing your work properly," asked whether the respondent owed them any pay. Inlow repeated her inquiry and Campbell, in turn, reiterated the foregoing question. He refused to state whether anyone had made any complaints regarding their work. All three employees thereupon left the plant.

At the hearing, the respondent's counsel urged that the discharge of the said three employees was based upon their general inefficiency as graders, particularly their insolent attitude upon the conveyor belt that afternoon when reprimanded by Nicholas and their solicitation of Gorday and Johns that same day which, the respondent asserts, was intimidatory. Upon the facts of this case this contention is unsupported and affords the respondent no defense to the Board's complaint.

In the first place, the solicitation activities of Mizell, Smith, and Inlow were clearly not intimidatory as the respondent asserts but legitimate union activity which the Act protects. Mizell, in stating that those employees who did not join the Union would not be permitted to retain their jobs at the respondent's plant, was merely pointing out the results that would inevitably follow if the Union won the proposed election and the respondent and the Union subsequently entered into a closed-shop contract. Union members are "quite free to explain the legitimate consequences of joining or remaining aloof." *N. L. R. B.* v. *Dahlstrom Metallic Door Co.*, 112 F. (2d) 756 (C. C. A. 2). Nor did Gorday or Johns, as their testimony makes plain, consider these statements addressed to them to be other than proper argument—they were merely concerned as to whether the predicted consequences would follow in the event the Union won an election. The respondent's defense this discloses that one of the two grounds upon which it relies as a justification for the discharge of the aforesaid three employees—organizational activity which they were entitled to pursue under the Act—was invalid Since, as the respondent's defense disclosed, it discharged the aforesaid three employees because they engaged in union activities protected under the Act, it is beside the point to show that, as the respondent

further asserts, an additional consideration, the conveyor belt incident, also lent weight to its decision. *Kansas City Power & Light Co.* v. *N. L. R. B.*, 111 F. (2d) 340, 348–349 (C. C. A. 8) *Cupples Co. Mf'rs.* v. *N. L. R. B.* 106 F. (2d) 100, 117 (C. C. A. 8); Cf. *N. L. R. B.* v. *Remington Rand, Inc.*, 94 F. (2d) 862, 872 (C C. A. 2). An examination of this additional ground, however, demonstrates that it was a mere subterfuge and afterthought, advanced for the first time at the hearing, the respondent thereby supplying further evidence that the legitimate union activity of the employees in question was the sole basis for their discharge. That the respondent did not decide to discharge the foregoing employees because of the incident which had occurred that day on the conveyor belt is demonstrated by the following facts. Campbell admittedly took no action upon learning of the incident, nor did he advise anyone that he intended to take such action. Moreover, Campbell could not, as he asserts, have determined to discharge all three of the aforesaid employees upon learning of this incident, since, as the undersigned found, Mizell was not even involved therein, nor was Campbell informed otherwise. Finally, the evidence is undisputed that Foreman Davis advised the employees that their discharge was wholly unrelated to the character of their work, and, Campbell, when asked for an explanation of the discharge refused to state any definite reason, let alone the reason which the respondent urged at the hearing as one of the bases for the discharge.

Nor, in the light of the foregoing facts, is a finding of discrimination precluded, as the respondent argued at the hearing, because other Union members, although known to be such, continued to work for the respondent. These three employees, as distinguished from the other Union members, were the only ones who engaged in union activities upon the respondent's premises and whose activities were brought to the respondent's attention. In any event, it is unnecessary to discharge every union member in order to discourage union activities; it suffices to make an example of a few well chosen union proponents.

Upon all the foregoing facts, with particular emphasis upon the respondent's admissions as to the reasons for its discharge of Inlow, Smith, and Mizell, the undersigned finds that the said three employees were discharged because of their activities in behalf of the Union.

V. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

It is found that the activities of the respondent set forth in Section IV above, occurring in connection with the operations described in Section I above, have a close, intimate and substantial relation to trade, traffic and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

VI. THE REMEDY

Since it has been found that the respondent has engaged in unfair labor practices, it will be recommended that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Since it has been found that the respondent discriminated in regard to the hire and tenure of employment of Willa Inlow, Fannie Smith, and Kate Mizell, it will be recommended that the respondent offer them immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of pay they may have suffered by reason of such discriminations, by payment to each of them of a sum of money equal to the amount she normally would have earned as

wages during the period from the date of the discrimination against her to the date of the respondent's offer of reinstatement to her, less her net earnings [18] during such period

Upon the foregoing findings of fact and upon the entire record in the case, the undersigned makes the following:

CONCLUSIONS OF LAW

1. Local 9, United Cannery, Agricultural, Packing and Allied Workers of America, C. I. O., is a labor organization within the meaning of Section 2 (5) of the Act.

2. By discriminating in regard to the hire and tenure of employment of Willa Inlow, Fannie Smith, and Kate Mizell, and thereby discouraging membership in United Cannery, Agricultural, Packing and Allied Workers of America, C. I. O., the respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (3) of the Act.

3. By said act of discrimination the respondent has interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act, and has thereby engaged in and is engaging in unfair labor practices within the meaning of Section 8 (1) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

5. The respondent has not engaged in unfair labor practices within the meaning of Section 8 (1) by urging, persuading, threatening and warning its employees not to become Union members or to assist the Union, and vilifying, disparaging, and expressing disapproval of the Union

RECOMMENDATIONS

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record in the case, the undersigned recommends that the respondent, John W. Campbell, Inc., its officers, agents, successors, and assigns shall.

1. Cease and desist from:

(a) Discouraging membership in United Cannery, Agricultural, Packing and Allied Workers of America, Local 9, C. I. O., or in any other labor organization of its employees, by discharging any of its employees, or in any other manner discriminating in regard to their hire or tenure of employment or any term or conditions of their employment;

(b) In any manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist Local 9, United Cannery, Agricultural, Packing and Allied Workers of America, C. I. O, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection as guaranteed in Section 7 of the Act.

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

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[18] By "net earnings" is meant earnings less expenses, such as for transportation, room, and board, incurred by an employee in connection with obtaining work and working elsewhere than for the respondent, which would not have been incurred but for his unlawful discharge and the consequent necessity of his seeking employment elsewhere. See *Matter of Crossett Lumber Company* and *United Brotherhood of Carpenters and Joiners of America, Lumber and Sawmill Workers Union, Local 2590*, 8 N. L R B 440 Monies received for work performed upon Federal, State, county, municipal, or other work-relief projects shall be considered as earnings. See *Republic Steel Corporation* v. *N. L. R. B.*, 311 U. S. 7.

(a) Offer Willa Inlow, Fannie Smith, and Kate Mizell, immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges;

(b) Make whole Willa Inlow, Fannie Smith, and Kate Mizell for any loss of pay they may have suffered by reason of the respondent's discrimination in regard to their hire and tenure of employment, by payment to each of them of a sum of money equal to that which she normally would have earned as wages from the date of the discrimination against her to the date of the respondent's offer of reinstatement, less her net earnings [19] during such period.

(c) Post immediately in conspicuous places at its plant in Goulds, Florida, and maintain for a period of at least sixty (60) consecutive days from the date of posting, notices to its employees stating: (1) that the respondent will not engage in the conduct from which it is recommended that it cease and desist in paragraphs 1 (a) and (b) of these recommendations; (2) that the respondent will take the affirmative action set forth in paragraphs 2 (a) and (b) of these recommendations; and (3) that the respondent's employees are free to become or remain members of United Cannery, Agricultural, Packing and Allied Workers of America, Local 9, C. I. O, and that the respondent will not discriminate against any employee because of membership in or activity on behalf of that organization.

(d) Notify the Regional Director for the Tenth Region in writing within ten (10) days from the date of the receipt of this Intermediate Report what steps the respondent has taken to comply therewith.

It is further recommended that the complaint be dismissed insofar as it alleges that the respondent urged, persuaded, threatened, and warned its employees not to become or remain members of or to assist the Union, and vilified, disparaged, and expressed disapproval of the Union.

It is further recommended that unless on or before ten days from receipt of this Intermediate Report the respondent notifies said Regional Director in writing that it will comply with the foregoing recommendations, the National Labor Relations Board issue an order requiring the respondent to take the action aforesaid.

As provided in Section 33 of Article II of the Rules and Regulations of the National Labor Relations Board, Series 3, effective November 26, 1943, any party or counsel for the Board may within fifteen (15) days from the date of the entry of the order transferring the case to the Board, pursuant to Section 32 of Article II of said Rules and Regulations, file with the Board, Rochambeau Building, Washington, D C, an original and four copies of a statement in writing setting forth such exceptions to the Intermediate Report or to any other part of the record or proceeding (including rulings upon all motions or objections) as he relies upon, together with the original and four copies of a brief in support thereof. Immediately upon the filing of such statement of exceptions and/or brief, the party or counsel for the Board filing the same shall serve a copy thereof upon each of the other parties and shall file a copy with the Regional Director. As further provided in said Section 33, should any party desire permission to argue orally before the Board, request therefor must be made in writing to the Board within ten (10) days from the date of the order transferring the case to the Board.

WILLIAM J ISAACSON,
Trial Examiner.

Dated July 10, 1944.

[19] See footnote 18, *supra*.