

In the Matter of KING VENTILATING COMPANY and UNITED CONSTRUCTION WORKERS, AFFILIATED WITH THE UNITED MINE WORKERS OF AMERICA

Cases Nos. 18-C-1038 and 18-R-920.—Decided January 15, 1945

DECISION

AND

ORDER

Pursuant to a Decision and Direction of Election of the Board,¹ an election was held on April 3, 1944, among the employees of the respondent at Owatonna, Minnesota, to determine whether or not the United Construction Workers, affiliated with the United Mine Workers of America, herein called the Union, was the majority representative of the employees for the purposes of collective bargaining. Having lost the election, the Union, on April 8, 1944, filed Objections with the Regional Director, alleging that the respondent had engaged in certain activities which had affected the outcome of the election. The Regional Director investigated the Objections, reported to the Board that they raised substantial and material issues, and recommended that a hearing be held thereon. On May 20, 1944, the Board directed that a hearing be held on the Objections. On June 7, 1944, the Union filed amended charges with the Board alleging that the respondent had engaged in unfair labor practices. On June 9, 1944, the Board issued an order consolidating the above proceedings. On September 16, 1944, the Trial Examiner issued his Intermediate Report, finding that the respondent had not engaged and was not engaging in the unfair labor practices alleged in the complaint, and recommending that the complaint be dismissed, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, counsel for the Board filed Exceptions to the Intermediate Report. None of the parties requested oral argument before the Board at Washington, D. C. 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 con-

¹ 55 N. L. R. B. 517.

60 N. L. R. B., No. 1.

sidered the Intermediate Report, the Exceptions of counsel for the Board, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner with the additions noted below:

With respect to the termination of Kenny's employment, the testimony adduced by the respondent at the hearing conflicts in certain respects with the version submitted by President Anderson in a letter to the Regional Director, dated April 24, 1944. While the matter is not entirely free from doubt and the circumstances surrounding the termination of Kenny's employment give rise to a suspicion of discrimination, we agree with the Trial Examiner that the evidence is insufficient to warrant such a finding.

We find that the record does not support the Union's contention, advanced in its Objections to the conduct of the election, that the respondent's conduct prior to the election interfered with the free choice of its employees. We shall, accordingly, overrule the Objections to the conduct of the election and order that the petition for investigation and certification of representatives be dismissed.

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 complaint issued herein against the respondent, King Ventilating Company, Owatonna, Minnesota, be, and it hereby is, dismissed.

IT IS FURTHER ORDERED that the petition for investigation and certification of representatives of employees of King Ventilating Company, Owatonna, Minnesota, filed by United Construction Workers, affiliated with the United Mine Workers of America, be, and it hereby is, dismissed.

INTERMEDIATE REPORT

For the Board: *Clarence A. Meter, Esq.*, of Minneapolis, Minn.

For the Respondent: *Samuel Lord, Esq.*, of Owatonna, Minn.

For the Union: *Mr. Milton Hodson*, of Owatonna, Minn.

STATEMENT OF THE CASE

Upon an amended charge duly filed on June 7, 1944, by United Construction Workers, affiliated with the United Mine Workers of America, herein called the Union, the National Labor Relations Board, herein called the Board, by its Regional Director for the Eighteenth Region (Minneapolis, Minnesota) issued its complaint on June 13, 1944, against King Ventilating Company (Owatonna, Minnesota), 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 amended charge, accompanied by notice of hearing, were duly served upon the Respondent and the Union.

With respect to the alleged unfair labor practices, the complaint in substance states that the Respondent: (1) discharged six named persons and thereafter refused and failed to reinstate them for the reason that they joined and assisted the Union and engaged in concerted activities for the purpose of collective bargaining and other mutual aid and protection; (2) from on or about December 1, 1943, questioned its employees about their Union activities and affiliations, advised, urged, and warned its employees to refrain from assisting, becoming members of, or remaining members of the Union, and promised and granted to its employees wage increases and vacation privileges prior to an election conducted by the Board on April 3, 1944, for the purpose of persuading its employees to vote against the Union at the election; and (3) by the discharge of the six named employees, the Respondent discriminated in regard to their hire, tenure, and terms and conditions of employment, thereby discouraging membership in the Union, and by all of the foregoing acts, interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act. The Respondent, in its answer, admitted all of the allegations of the complaint pertaining to the existence of the Respondent and the nature, character, and extent of its business and that the Union is a labor organization within the meaning of the Act. The answer denied, however, all the allegations of the complaint with reference to the commission of the alleged unfair labor practices.

Pursuant to notice, a hearing was held at Owatonna, Minnesota, on June 27, 28, and 29, 1944, before the undersigned Trial Examiner, James C. Battien, duly designated by the Chief Trial Examiner. The Board, the Respondent, and the Union were represented, and participated in the hearing. All parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues. At the close of the testimony, the undersigned, without objection, granted the motion of the Board to conform the pleadings to the proof as to minor details. At the conclusion of the hearing, the parties informally discussed the issues herein. The undersigned advised all parties that they might file briefs, provided that such briefs were submitted within 7 days from the close of the hearing. Briefs were filed by counsel for the Board and the Respondent.

Upon the entire record thus made and from the undersigned's observation of the witnesses, the undersigned makes, in addition to the above, the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The Respondent, King Ventilating Company, is a Minnesota corporation with its office and plant located in Owatonna, Minnesota, where it is engaged in the manufacture and sale of ventilators, prefabricated ducts, unit heaters, and other sheet metal products. Of the raw materials used by the Respondent in its manufacturing processes, approximately 60 percent are shipped to its plant through the channels of interstate commerce from points outside the State of Minnesota. Of its finished products, the Respondent ships approximately 58 percent through the channels of interstate commerce to points outside the State of Minnesota.

II. THE ORGANIZATION INVOLVED

United Construction Workers, affiliated with the United Mine Workers of America, is a labor organization admitting to membership employees of the Respondent.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Prefatory statement*

The effort of the Union to organize the employees at the Respondent's plant in Owatonna, Minnesota, started shortly prior to the first meeting of employees held on December 8, 1943. At the second meeting, held on December 16, Hodson, a representative of the Union, was instructed by the employees to prepare and forward a letter to the Respondent, requesting that the Union be recognized as the exclusive representative of the production and maintenance employees. The letter was received by the Respondent on December 17. Hodson, not having had a reply from the Respondent, on December 21 filed a Petition for Investigation and Certification of Representatives with the Regional Director. On March 15, 1944, the Board issued its Decision and Direction of Election¹ directing that an election be held to determine whether or not the employees desired to be represented by the Union.² On April 3 at a Board conducted election at which 17 eligible voters appeared, 10 voted against the Union, 5 for the Union, and 2 ballots were challenged. On April 8, Hodson wrote to the Regional Director protesting the election upon the grounds that prior to the election the employees had been warned by the Respondent against the Union and that certain employees were given raises immediately prior to the election for the purpose of influencing their vote. On May 3, the Regional Director (Minneapolis, Minnesota) issued his report on the Union's objections to the election and found that the Respondent through the activities of Anderson, president of the Respondent, and Foreman Mellem, prior to the election, interfered with the free choice of the employees to select a bargaining agent, and recommended to the Board that it direct a hearing on the objections. On May 20, the Board issued its order directing a hearing on the objections to the election. Subsequently, on June 7, the Union filed a charge with the Regional Director alleging that the Respondent had violated Sections 8 (1) and (3) of the Act. The Board, under date of June 9, ordered that the Hearing on Objections to Election (18-R-920) and the charge (18-C-1038) be consolidated. Upon the basis of this order, the hearing herein was convened on June 27, 1944.

B. The alleged interference, restraint, and coercion; alleged interference with the election of April 3, 1944

The complaint alleges that on or about December 1, 1943 and thereafter, the Respondent disparaged and expressed disapproval of the Union; questioned its employees about their union activities and affiliations; warned its employees to refrain from assisting, becoming members of, or remaining members of the Union; and promised and granted to its employees wage increases and promised to them vacation privileges, for the purpose of persuading its employees to vote against the Union at a Board election. The respondent in its answer denied these allegations.

In determining the issues thus presented, it is desirable to first make certain general observations, before proceeding to a consideration of the Respondent's specific conduct contended by the Board to be violative of the Act.

The King Ventilating Company was organized in 1904 and until 1943 was engaged principally in the manufacture of custom-built ventilating systems and

¹ *Matter of King Ventilating Company*, Case No. 18-R-920, 55 N. L. R. B. 517.

² The statement of a Trial Examiner made at the "R" hearing, Case No. 18-R-920, discloses that the Union submitted 17 authorization cards and that the names of 7 persons appearing thereon were listed on the Respondent's pay roll of January 21, 1944, the cards all being dated in December 1943.

sharp freezing units. In the latter part of 1943, it contracted for the construction of Army tool boxes, Liberty ship shelving and air conditioning units, which could be made upon a production basis. The Respondent's plant is small, employing approximately 20 employees. George Anderson, Respondent's president and Robert Nelson, its secretary and treasurer, jointly manage the affairs of the Respondent. They hire and discharge the employees, personally supervise the work in the shop, and the employees consult with them for advice in performing their work. Anderson, who is an engineer, devotes most of his time to the supervision of the manufacturing department, while Nelson assumes the responsibility for the business affairs of the Respondent. The manufacturing department is composed of two sections. The sheet metal shop occupies the first floor of the building where the metal is cut, shaped, riveted and assembled. The machine shop is located in the basement. Mellem is in charge of the sheet metal shop. He does not have the authority to hire or discharge employees, but he lays out the work, assigns it, and is responsible for production. Mellem testified he was the shop foreman. The machine shop at all times material herein was in charge of Sette. The evidence does not set forth clearly the limit of Sette's authority, however, according to his testimony, which is uncontradicted, his authority and relationship to Anderson and Nelson was the same as that of Mellem, except for the fact, that if Anderson and Nelson were both absent from the shop, Mellem, within certain prescribed limits, was in complete charge of the manufacturing department. The undersigned, upon the basis of the evidence herein, concludes and finds that Mellem and Sette were supervisory employees with limited authority, at least to the extent that the employees were justified in believing that they represented the management. Sette joined the Union on December 8, 1943, and Mellem was solicited to join.

Employee interest in self-organization first manifested itself sometime in November or the early part of December when some of the employees attended general meetings of the Union. However, it was not until December 8, 1943, that the first meeting was held of the Respondent's employees, followed by meetings on December 16, 22, and 29. The evidence would not warrant an inference that the Respondent had knowledge of the particular employees who had joined the Union, but certainly in a shop of this size with the personal attention given to the shop by President Anderson, it is fair to assume that the Respondent, during the month of December 1943, was aware of the Union's organizational activity. Further, when it received the Union's letter of December 17 requesting recognition, it then was aware that a substantial number of the employees had joined the Union.

The Board in support of its allegations that the Respondent interfered with its employees' rights and sought to persuade its employees to vote against the Union at the election of April 3, 1943, relies on certain statements and activities of Anderson and Mellem.

Sometime in November 1943, according to the testimony of Walter Kenney, Foreman Mellem and several of the employees customarily, during the noon hour, freely discussed labor organizations, particularly any event of significance which had that day been reported in the papers. On one occasion during this month, he testified that the group were discussing the demands of the miners to be paid for "their time going down into the mine." According to Kenney, Mellem stated that he did not think that they were entitled to this extra pay, while Kenney took the opposite position. About the middle of November 1943, at about the time that the Union herein was organizing at another plant in Owatonna, Minnesota, Kenney, Mellem, and several other employees during the noon hour entered into a general discussion of the situation in that plant. All of the employees present, including Mellem, expressed their views. Kenney

testified that Mellem and one other employee thought that the wages and conditions at that plant were satisfactory, while the other employees felt that the employees were entitled to have a union to represent them; if they so desired. During the discussion, according to Kenney, Mellem expressed the opinion that in some respects labor organizations were "racketeers and frequently bulldozed firms into doing different things" and that he, Mellem, thought unions in the United States were ineffective. Kenney further testified that during the discussion, Mellem expressed no opinion as to whether the employees should join a union or not.

At the hearing, Mellem testified that when the employees were sitting around at the noon hour or in the morning before work everyone would have something to say about what had happened around the country and that these discussions did not result in any ill feelings among the employees, each expressing their views "on who was right and who was wrong". Mellem also testified, that on no occasion did he indicate to any of the employees whether they should join or not join a union and that at the time these general discussions took place he was not familiar with the names of those employees who had joined the Union. It is plain that Mellem and Kenney and several of the other employees did engage in general conversations at the noon hour or in the mornings before work, that each freely expressed their personal views, with respect to the miners' strike and unions in general. In addition, the above conversations occurred prior to any of the Union's activities in the Plant. Although the undersigned has heretofore found that Mellem exercised limited supervisory authority, under the circumstances here set forth it is the opinion of the undersigned that his statements are not attributable to the Respondent. The undersigned concludes and finds that the statements attributed to Mellem by Kenney did not interfere with, restrain, or coerce the employees.

The Board offered the testimony of Glen W. Sette, heretofore found to have had the same status in the plant as Mellem, as further proof that the Respondent, through Mellem, interfered with the rights of the employees. Sette testified that for several years he and Mellem had had frequent discussions concerning unions, sometimes at the noon hour and at times during work. According to Sette, Mellem took the position that the Union would never succeed in Owatonna, Minnesota. Sette further testified that their discussions were in fact arguments, Mellem arguing against unions and he arguing for them, each stating their reasons for their position. Frequently the subject matter of the argument would be confined to some strike in progress or a particular situation such as the miners' demands for portal to portal pay. In the course of these arguments between Mellem and Sette, there was no discussion about the organization of or membership in the Union in the Respondent's plant. The undersigned concludes and finds that these general discussions participated in by Mellem and Sette did not in any way interfere with, restrain, or coerce the employees.

According to the testimony of Chavie, an employee, who was working under the supervision of Mellem, one morning after work had started in December 1943, Mellem came over to Chavie's bench and after requesting him to do some braking on the braker³ asked him if anyone had mentioned the Union. According to Chavie, he replied that they had, without, however, mentioning any names. Mellem then told Chavie that if the Union came into the shop the employees would be getting wages equivalent to his. He also recalled that Mellem did ask him if Sette ever discussed the Union. Chavie testified that he told Mellem that Sette had mentioned the Union to him but never during working hours. The undersigned, for reasons hereinafter stated, does not

³ The braker is a machine used in the sheet metal shop that bends and forms sheet metal.

credit this testimony of Chavie. Mellem denied this conversation. The undersigned accepts his denial.

The only incident offered by the Board of President Anderson's participation in union activities prior to the period immediately preceding the election of April 3, 1944, occurred shortly before Christmas in 1943. Chavie testified that Anderson approached him on the job, asked about his work, and then said in discussing the Union, "don't let them sandbag you into it, use your own judgment." Chavie also testified that Anderson told him that his employment with the Respondent was not conditioned upon whether he did or did not belong to the Union. Anderson when testifying was asked whether or not he had made the statement "don't let them sandbag you into it." He replied, "I might have used the word 'sandbag' to express forcing them into joining [the Union]." Assuming *arguendo* that Anderson in the conversation with Chavie did use the term "sandbag" it is undisputed that Anderson made it clear to Chavie that the continuance of his employment with the Respondent was not conditioned upon whether or not he joined the Union.

The Board contends that prior to the election of April 3, 1944, the Respondent in January and March 1944, granted to a number of its employees wage increases and promised two of its employees vacations without the approval of the War Labor Board. In connection with this contention, the Board, in its brief, refers to the fact that President Anderson admitted talking to several employees shortly before the election.

The Respondent has maintained for several years the regular practice of starting its employees at a minimum hourly rate and at regular intervals granting increases in that hourly rate, upon a meritorious basis. In October 1943, prior to any organizational activity in the plant, it granted hourly increases to eleven of the employees; in November two increases for employees who had not received increases in October; and in January increases were given to ten employees; and in March raises were given to two employees. There is no evidence in the record to indicate that any of the increases given to the employees up to and including January 1944, could possibly have been influenced or granted for the purpose of influencing the election for it was not until March 15, 1944, that the Board issued its Decision and Direction of Election providing that an election would be held to determine whom the employees desired to represent them and it was not until some time later that the Regional Director posted notices of election setting the date therefor. In addition, there is no evidence in the record to support the position, that the increases granted, prior to March, had any relation to either the organizational efforts of the Union or the election. The two increases which were granted during March 1944 were given to Schroht and Matzke on March 25 and March 31, respectively. Schroht started working for the Respondent on March 4, 1944, at 40 cents per hour and was increased to 45 cents an hour on March 25, 1944. Schroht did not testify. From the evidence there appears to be nothing unusual about this increase. Matzke started working for the Respondent on February 24, 1944, and at the time he was employed, Anderson stated to him that if his work was satisfactory he would receive an increase later. About March 25, 1944, Anderson in passing through the shop advised Matzke, that he was to receive a five-cent per hour increase. On the check which Matzke received March 31, there was an increase of two one-half cents per hour. On April 3, about 4:30 in the afternoon, preceding the election which was held between 6 and 6:30 p. m., Anderson approached Matzke in the shop stating to him that he was getting 75 cents per hour for time and a half but that later on he, Anderson, would raise Matzke a nickel. Matzke testified that during the discussion "He [Anderson] never mentioned the Union in any way." Anderson in the course of the con-

versation, also advised Matzke that the Respondent had planned on granting a week's vacation with pay to the employees who had been with it for a year. This discussion of Anderson with Matzke, followed the customary practice of Anderson in dealing with the employees upon an informal and personal basis. Chavie testified, that shortly before the election on April 3, 1944, he went into Anderson's office to inquire about a combination square which he had ordered, and at that time Anderson told him that the Board had ordered an election; that Anderson advised him of the date of the election; and that Anderson "kept on talking about unions." According to Chavie, Anderson further stated that there is very little cooperation between the employees and the office, in union shops. Anderson admitted that he made this statement. At this point in the direct examination Chavie was unable to recall any other remarks that Anderson made on this occasion. Board's counsel then asked Chavie, "to further refresh your recollection, did he say anything about starting a week's vacation with pay?" Chavie replied, "He did." Chavie through further leading questions, was then able to recall that Anderson also stated that the Respondent planned on granting vacations with pay for a week, for those employees who had been there over a year. The undersigned here, as before, does not credit this testimony of Chavie, except where fully supported by other credible witnesses.⁴

In the summer of 1943, the Board of Directors of the Respondent had discussed the advisability of granting vacations with pay during the year 1944, based upon the length of service, but the plan had not become operative because of the inability of the Respondent to secure the approval of the War Labor Board, although on at least four or five occasions application has been made to that Board for approval of vacations with pay. The undersigned, upon the basis of the foregoing facts and of the record in its entirety, determines and finds that increases in pay which were given by the Respondent were in accordance with its regular practice and not for the purpose of inducing the men to vote against the Union at the election, and that the conversations of Anderson concerning vacations with pay had no relationship to and were in no way connected with the election or the Union.

Anderson, in his testimony was frank in admitting that shortly prior to the election he talked with several of the employees, in some instances at their request, about the coming election, explaining to them the importance of the election and that they should carefully consider the matter before deciding what they wanted to do; that there probably were advantages and disadvantages on both sides; and that they should try to inform themselves of the issues so that they could vote intelligently. Anderson further stated to the employees that it was a secret ballot and nobody would know how they voted and that it is what our men are fighting for to retain that secret ballot. There, however, is no testimony by the employees to whom Anderson talked, indicating that he made any statements derogatory to the Union or in any way threatened them or made remarks which could be construed as interfering with their free choice of a bargaining representative. In the light of the foregoing facts, the undersigned finds that the Respondent by the conduct of Anderson and Mellem, heretofore set forth, has not interfered with, restrained, and coerced its employees

⁴ The undersigned is unimpressed by the testimony of Chavie and except where fully supported by other testimony of a credible nature, it is rejected. His inability to remember statements made by Anderson and Mellem, after he had testified that he had related all of the alleged conversation, except in answer to the most leading questions, makes it impossible for the undersigned to accept his testimony as worthy of belief, particularly that portion of it which was brought out by leading questions. Chavie appeared to be an intelligent individual and did not give the undersigned the impression that his memory was faulty or that he was not at ease while testifying.

in the exercise of the rights guaranteed them by Section 7 of the Act. Nor did the Respondent interfere with the employees' free choice on April 3, 1944, of a bargaining agent.

In making this finding the undersigned has given consideration to the Respondent's entire course of conduct, including the findings hereinafter referred to, that the Respondent has not discriminated in regard to the hire and tenure of six named individuals.

C. Termination of the employment of Walter Kenney

Kenney was referred to the Respondent's plant by the United States Employment Service, starting work on October 1, 1943. His employment was terminated on December 18, 1943. Kenney was employed as an unskilled worker and for the first two weeks operated the braker and thereafter worked on miscellaneous production work. Kenney's work was satisfactory although his attendance record of having been absent frequently during the time that he was employed with the Respondent established an unsatisfactory attendance record. On these occasions he had advised the Respondent that he would not report for work.⁵ Kenney attended several of the regular meetings of the Union, whose jurisdiction was city-wide, before organizational activities started in the Respondent's plant. On December 8, 16, 22 and 29, 1943, special meetings of the Union, for Respondent's employees were held at Kenney's home. Kenney joined the Union on December 16, 1943, and although he testified that he was active in solicitation of members and collection of dues, he was unable to recall how many employees he had solicited or collected dues from. The undersigned is of the opinion that during the month of December 1943, the Respondent was aware that the Union was conducting organizational activities in the plant, but there is insufficient evidence to warrant a finding that in December it knew that Kenney or any certain employees had in fact joined the organization.

The week prior to Kenney's termination of employment on December 18, he had been absent three days. On the morning of December 18, Kenney reported for work at the usual time, 7 a. m., punched in his time card, and went to the basement of the shop where he had been working the day before. According to his testimony, Kenney went to the basement of the plant where he had been working with another employee, repairing a punch press; Kenney was unable to find the part necessary to complete the repairs; he went upstairs and told Mellem that he could not find the necessary part to repair the machine. Mellem then said to Kenney "I forgot to tell you. I should have told you last night not to come back to work this morning." Kenney testified that he replied, that "this was a funny time of day to tell him about a layoff" and inquired of Mellem why he was not notified the night before, to which Mellem replied that he had forgot to tell him. According to the testimony of Kenney, when he returned from changing his clothes, Mellem took his time card out of the rack and tore it up. According to Kenney, Mellem made no reply to his inquiry that "You probably know why I was laid off."

According to the testimony of Mellem, Kenney's layoff on December 18, occurred substantially as follows: Kenney returned to work on the morning of December 18, not having been there for two or three days. Kenney's machine was not lined up for him, which resulted in some discussion between Mellem and Kenney. Kenney, during the discussion, told Mellem "that he never did care about working there and he didn't think he would be staying there very long." Mellem replied,

⁵ Kenney's attendance record was not advanced by the Respondent as a reason for the termination of his employment.

"If that is the case we will probably have to lay off a few fellows in the near future and it probably will be that you will be one of them." Kenney replied, "If that's the case I might as well quit right now." Mellem replied "No, you don't have to." Mellem testified that he didn't make any definite statement as to who was going to be laid off since he had not yet been advised as to just who the employees would be. Mellem further testified that Kenney stated, "I might as well quit right away. I haven't got anything coming on my card anyway," you might as well tear it up." Mellem testified that he then went to the clock and tore up Kenney's card. Kenney then walked out the door.

Kenney testified that he has never gone back to the Respondent's plant, but on the day he left, he went immediately to the United States Employment Service to secure another job; that while at the United States Employment Service a representative of that office called the Respondent and requested that they issue a release for Kenney; that he presumed such a release was issued; and that in January he was employed by another concern in Owatonna.

The Board contends and offered testimony of several witnesses, including Kenney, that when they started to work for the Respondent in October and November 1943, that they were told either by the United States Employment Service or the Respondent that there would be work for several months, possibly until the spring of 1944. The Respondent admits that it so advised the United States Employment Service and many of the employees hired late in 1943. The Respondent asserts, however, that certain contracts and commitments which had been made to it for the production of a large number of air conditioning units did not materialize and that when the orders on hand had been completed and it had been notified by the U. S. Air Conditioning Company that no more orders would be forthcoming, it determined to reduce its force. The undersigned credits this testimony of the Respondent and finds that Mellem's statement to Kenney on December 18 that a number of employees were soon to be laid off was, in fact, true. Furthermore, as hereinafter found, Respondent did on December 24, lay off five other employees hired on and after October 1, 1943, because of a necessity to reduce its force.

Whether the undersigned accepts the version given by Kenney or Mellem as to the statements made on the morning of December 18, there is no credible evidence direct or otherwise, that Kenney's membership in or activities on behalf of the Union, were instrumental in the termination of his employment with the Respondent.

The undersigned finds that Walter Kenney's employment was terminated for non-discriminatory reasons and that the Respondent has not discriminated against him in regard to his hire and tenure of employment.⁷

D. The termination of employment on December 24, 1943, of Herb Krause, Gus Storm, Anton Miller, John Braulik and Emil Stransky

1. Events leading up to the layoff of December 24, 1943

Prior to 1943, the Respondent's shop was engaged almost exclusively in the manufacture of custom-built ventilating systems and sharp freezing units. All of this work was built to order upon individual specifications. The average

⁶ This refers to the fact that Kenney had been paid the wages due him up to December 18.

⁷ In making this finding the undersigned is not unmindful of Chavie's testimony that about a week or 10 days prior to April 3, 1944, Anderson told him that "Mr. Kenney and Mr. Krause were union men and he thought they would be dangerous to have, being active in union affairs." For reasons heretofore stated the undersigned rejects this testimony of Chavie and for the additional reason it is inconsistent with facts existing at the time of Kenney's termination of employment.

number of employees in the shop ran from 8 to 16 employees. In 1943, the Respondent received several orders for items that could be made in quantity upon a production basis. In the early part of 1943, the Respondent received an order for 9,000 Army tool kits. The production of this item started in the fall of 1943 and was practically completed prior to December 4. In September, the Respondent had some conferences with the U. S. Air Conditioning Company, concerning the building of evaporating cooling units and about the middle of that month received verbal instructions to proceed with plans to manufacture the coolers. During the preliminary conversations, the U. S. Air Conditioning Company advised the Respondent that it could anticipate orders at the rate of approximately 100 units per month, with a probable total of 800 or 1,000 units. Upon the basis of this anticipated business the Respondent requested the United States Employment Service, in Owatonna, Minnesota, for additional employees and advertised in the local paper as well. The Respondent, on the basis of the anticipatory orders told the Employment Service and the new employees who were hired that the work would last for several months. Between October 1 and December 3, the Respondent employed 14 additional men to take care of these orders. On October 8, 1943, the Respondent received an order from the U. S. Air Conditioning Company for 100 large units and on November 16, an order for 50 large units. Towards the latter part of December 1943, the Respondent had completed the orders on hand, thus creating in the plant a surplus of employees. Upon inquiry the Respondent was advised by the U. S. Air Conditioning Company, that they did not intend to place any further orders, for the reason that it had lost the Southern market, as those buyers were able to secure the units from another manufacturer at a more attractive price. After the layoff of December 24, 1943, the Respondent received from the U. S. Air Conditioning Company additional orders for smaller units, requiring very few, if any additional workers. On January 3 Respondent received an order for 25 small units, on January 10, 50 small units, on February 17, 25 small units. The total man-hours required on these orders for small units would not require the employment of over one or two additional employees over a period of several months.

In addition to the production work upon the cooler units the Respondent had also entered into a contract about the middle of December, for the construction of Liberty ship shelving for twelve ships. This work was built according to specifications and was to run over a period of several months. In addition this shelving could only be built after definite instructions had been received from the shipbuilder. During December, there was not sufficient of this work scheduled to take up the slack in employment created by the loss of the orders for cooling units.

On December 24, 1943, the Respondent laid off Herb Krause, Gus Storm, Anton Miller, John Braulik, and Emil Stransky, all of whom were employed after October 1943, except Krause, who was employed on October 1, 1943. The quality and quantity of the work of these employees is not in issue. All were members of the Union, but not active in its organizational activities. Although the Respondent does not follow a strict seniority policy in the shop it did in the lay-off of December 24 follow substantially a plan of laying off those who had been most recently employed. Malm, Zeiner, Anhorn, and Brase, who were retained on December 4, were junior in service to only Krause of the men who were laid off. Malm had been working upon hog feeder doors and was considered by the Respondent particularly adaptable to this work. Zeiner was mechanically inclined and had been selected to work in the machine shop department. Anhorn, a part-time worker, going to high school, because of personal considerations, was not laid off and Brase was employed in the crating department. None of these

employees had been employed on production work. All were members of the Union except Brase.

2. Conclusions as to the layoff

It is clear that towards the latter part of December 1943, it was necessary for the Respondent to reduce its force because of a lack of orders and that it was not warranted in retaining its then existing force. In selecting men for lay off the Respondent laid the employees off, except for Krause, in the order in which they had been employed. The evidence is plain that there was no discrimination in the selection of the employees to be laid off, unless in the case of Krause, the retention of Malm, Zeiner, Anhorn, and Brase was discriminatory as to him. From the group of employees laid off on December 4, only Krause was senior in service to these four men and for reasons that the undersigned considers to be justifiable the Respondent determined to retain these four in preference to Krause.

The record indicates that in January 1944, and for several months thereafter, the Respondent from time to time employed some additional men. However, Nelson, secretary-treasurer of the Respondent, when additional men were needed, went to the United States Employment Service in Owatonna and sought to place an order for additional men. He was advised by that office that there were no men available. He then requested the names and addresses of the men who had been laid off in December 1943, and he was advised by that office that they were all working. In addition, Storm, Stransky, Miller, and Braulik who had originally been referred to the plant by the United States Employment Service, were only desirous of temporary work and were not seeking permanent employment.

The undersigned concludes and finds that the evidence does not support the allegation in the complaint that Krause, Storm, Miller, Braulik and Stransky were discriminatorily laid off on December 24, 1943, or since that date have been discriminatorily refused reinstatement.

The undersigned finds that the evidence does not sustain the allegations of the complaint and will accordingly recommend that the complaint be dismissed.

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

CONCLUSIONS OF LAW

1. The operations of the Respondent, King Ventilating Company (Owatonna, Minnesota), occur in commerce within the meaning of Section 2 (6) of the Act.
2. United Construction Workers, affiliated with the United Mine Workers of America, is a labor organization within the meaning of Section 2 (5) of the Act.
3. The Respondent has not engaged in unfair labor practices as alleged in the complaint within the meaning of Section 8 (1) and (3) of the Act.

RECOMMENDATIONS

Upon the basis of the foregoing findings of fact and conclusions of law, the undersigned recommends that the complaint be dismissed.

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, as amended, 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 an 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 within ten (10) days from the date of the order transferring the case to the Board.

JAMES C. BATTEN,
Trial Examiner.

Dated September 16, 1944.