In the Matter of NATIONAL DISTILLERS PRODUCTS CORPORATION [1] *and* DISTILLERY RECTIFYING & WINE WORKERS INTERNATIONAL UNION OF AMERICA, LOCAL 15, A. F. OF L.[2]

Case No. 13–C–2638.—Decided October 20, 1947

Mr. Gustaf B. Erickson, for the Board.

Mr. Morris A. Edelman, by *Mr. Samuel B. Wasserman*, of New York City, and *Mr. Fred E. Gerber*, of Peoria, Ill., for the respondent.

Mr. Robert H. Snider, of Peoria, Ill., for the Union.

DECISION

AND

ORDER

On November 15, 1946, the Trial Examiner issued his Intermediate Report 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 dismissed, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, counsel for the Board filed exceptions to the Intermediate Report, and a supporting brief.

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

ORDER

Upon the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the complaint issued herein against the respondent, National Distillers Products Corporation, Peoria, Illinois, be, and it hereby is, dismissed.

[1] The correct name of the respondent is as shown above

[2] The correct name of the Union is as shown above.

INTERMEDIATE REPORT

Mr. Gustaf B. Erickson, for the Board.

Mr. Morris A. Edelman, by *Mr. Samuel B. Wasserman*, of New York, N. Y., and *Mr Fred E Gerber*, of Peoria, Ill., for the respondent.

STATEMENT OF THE CASE

Upon a second amended charge filed on October 29, 1945, by Distillery Rectifying and Wine Workers International Union of America, Local 15, herein called the Union, the National Labor Relations Board, herein called the Board, by its Regional Director for the Thirteenth Region (Chicago, Illinois), issued a complaint dated September 4, 1946, against National Distillery Products Corporation, 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), (3) and (5) and Section 2 (6) and (7) of the National Labor Relations Act, 49 Stat 449, herein called the Act

With respect to the unfair labor practices the complaint alleged in substance that the respondent (1) on or about February 11, 1944, and at all times thereafter, failed and refused to bargain collectively with the Union although since that date it has been the exclusive representative of a majority of the employees within an appropriate unit; (2) on various dates from May through July 1945, discharged Emmett White, Frederick Leonhart, George Greenwald, and William Summers, and at all times subsequent failed and refused to reinstate any of them, because of their membership in and activity on behalf of the Union; and (3) from on or about February 11, 1944, has urged and warned its employees from becoming or remaining members of the Union, and has kept under surveillance their union activities and meeting places

Pursuant to notice, a hearing was held from September 30 to October 3, 1946, at Peoria, Illinois, before Horace A Ruckel, the undersigned Trial Examiner duly appointed by the Chief Trial Examiner. The Board and the respondent were represented by counsel and the Union by an organizer. Counsel for the Board and for the respondent 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

On October 2, 1946, the respondent filed an answer admitting some of the allegations in the complaint but denying that it had engaged in any unfair labor practices [1]

At the conclusion of the hearing the undersigned granted a motion by counsel for the Board to conform the pleadings to the proof in formal matters, and reserved ruling on a motion by counsel for the respondent to dismiss the complaint The motion is disposed of by the recommendations hereinafter made. Counsel

[1] At the opening of the hearing on September 30, the respondent was represented only by its plant manager, Fred Gerber, who stated that the respondent's counsel was not present owing to a misunderstanding as to a continuance of the hearing On this representation the Trial Examiner, without objection, continued the hearing until the following day On that day, respondent's counsel was permitted to state orally on the record the respondent's defense to the complaint, and was given until the following day to file its written answer The answer was duly filed on October 2 The Trial Examiner denied a motion by Board's counsel for a judgment by default under the provisions of Section 203 16 of the Board's Rules and Regulations Series 4, because of the failure to file the answer within 10 days from the service of the complaint.

for the parties were advised that they might argue orally before the Trial Examiner, and might file briefs and proposed findings of fact and conclusions of law with him by October 17. Subsequently, the time within which to file was extended to October 24 Counsel for the respondent has filed a brief together with proposed findings of fact and conclusions of law.[2]

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

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The respondent is now, and has been at all times material herein, a corporation operating and maintaining several plants in the United States including a plant at Peoria, Illinois, where it now is, and at all times material herein has been engaged in the manufacture and sale of whiskey and alcohol. The respondent annually has caused large quantities of raw materials consisting principally of grains and sugar to the value of more than $500,000, to be purchased and transported in interstate commerce from and through states of the United States other than the State of Illinois to its plant at Peoria. Respondent has annually caused to be produced at its Peoria plant, and sold and transported in commerce to and through States of the United States other than the State of Illinois, manufactured products having a value of more than $500,000. The respondent admits that it is engaged in interstate commerce within the meaning of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Distillery Rectifying and Wine Workers International Union of America, Local 15, is a labor organization admitting to membership employees of the respondent. It is affiliated with the American Federation of Labor.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The discharges*

During the early part of January 1945, 17 of the guards then employed signed a petition directed to the respondent, as follows:

> We the undersigned Plant Guards are asking wages equivalent to Catepillar Tractor Co., Commercial Solvents and Hiram Walkers.

This petition was laid on the desk of Fred Gerber, the respondent's plant manager, and there the matter rested.[3] The following spring the Union began organizing the guards, and on July 19, Robert Snider, the Union's business agent, demanded recognition of the Union as bargaining representative for the guards

[2] The Trial Examiner rules as follows on the respondent's proposed findings of fact and conclusions of law Proposed findings of fact Nos. 1, 2, 3, 4, 5, 6, 7, 8, 10, 11, 13, 14, 15, 16, 17, and 18 are accepted, No 9 is denied, No. 12 is accepted except the proposed finding that guards monitored employees, in which respect it is denied Proposed conclusions of law Nos. 1, 2, 4, 5, 6, 7, 8, and 9 are accepted; No. 3 is denied.

[3] Emmett White, a guard whose subsequent discharge is hereinafter discussed, requested Jay Bentley, the respondent's chief of guards, to present this petition to management Bentley refused to do so White testified, and Bentley denied, that Bentley on this occasion warned White to have nothing to do with unions. The undersigned credits Bentley's denial

Although counsel for the Board laid considerable stress on the drafting of this petition, its only apparent probative value is to show that prior to their organization by the Union the guards were dissatisfied with their wages It is not contended that any failure to grant the petition constituted a refusal to bargain collectively.

and was told that the matter would have to be referred to the respondent's New York office Gerber testified credibly, and there is no evidence to the contrary, that he first learned on this occasion that the guards were being organized by the Union The lack of any knowledge by the respondent prior to this date that the guards were being organized by the Union, and the absence in the record of any showing of interference, restraint, or coercion by the respondent,[4] directed against the Union, must be borne in mind when considering the discharges of Emmett White, Frederick Leonhart, George Greenwald, and William Summers, the employees named in the complaint.

Emmett White: White was first employed by the respondent in September 1944. He joined the Union on May 10, 1945, the first of the guards to do so. White testified that on one occasion he stated to Truman Sinor, one of the respondent s three assistant chief guards, that he had signed an application card in the Union Sinor denied this and the undersigned credits his denial. There is no other evidence in the record which would tend to show that the respondent knew of White's activity on behalf of the Union

White testified that on May 25, the night of his discharge, Jay Bentley, the respondent's chief of guards, came up to him while he was standing in front of an emergency clock, reprimanded him for not handling it in the proper manner, and discharged him. The manner of handling an emergency clock, according to Bentley's testimony, which the undersigned finds to be in accord with the facts, is not to punch it as other clocks are punched, but only to simulate punching by covering it with one hand and going through the motions of inserting a key.[5] White admitted, in substance, that as a rule he only stood in front of emergency clocks, but claimed that he had been told by Bentley's predecessor that this was sufficient. Whatever White's instructions may have been at one time, the undersigned finds that White knew that Bentley required a more realistic imitation of clock punching, and that his performance on May 25 fell short of the requirement.

Gerber testified that in November 1943, when the respondent purchased the Peoria plant from the Century Distilling Company, the respondent replaced the system of stationary watchmen employed by that company with a guard system, and required the guards to make the rounds of the plant while on duty. The further testimony of Gerber, and in this he is supported by Bentley and, in part, by witnesses for the Board, is to the effect that when Bentley was hired in November 1944, he was given instructions to, and did, improve the personnel of the force and in general tighten the discipline. Three assistant guard chiefs were appointed at this time and wages of the guards raised. White had not worked for the Century Company. Most of the respondent's guards had done so, however, and there was general agreement in their testimony that Bentley was more strict than his predecessor so far as guard discipline was concerned.

[4] The only evidence of interference, restraint and coercion in the record is the testimony of several witnesses that one or more of the assistant chief guards declared that the Union would not get anywhere in organizing the guards, and that Bentley, chief of the guards, stated to Greenwald on one occasion: "Never have anything to do with the Union; they won't do you any good" This was prior to the organization of the guards and apparently referred to the Union's representation of the production employees

[5] The emergency clocks are connected with police headquarters and actual punching of such clocks brings the police to the plant Realizing that any intruder who waylaid a guard would see to it that clocks on his round were punched so that suspicion might not be aroused, the emergency clocks are set up as traps. If a guard, under duress, punches a clock, the alarm is sounded A guard in the ordinary course of his rounds is supposed merely to go through the motions of punching these clocks. The motions must be realistic, however, or it would become apparent to an observer that the emergency clocks differ from other clocks

With respect to White, Bentley, in addition to testifying concerning his failure to simulate punching an emergency clock on the evening of his discharge, testified to a previous incident, which White in substance admitted, when White had been found asleep on duty. Bentley also testified that White had missed a number of clocks during the time he had been employed, and was generally careless in the performance of his duties. White admitted missing a number of clocks but contended that he had not been more neglectful in this respect than the average guard.

Frederick Leonhart: Leonhart came to work for the Century Company in October 1942, and continued on as a guard under the respondent He signed an application card in the Union on June 19, 1945. He admitted that he had not been active in the Union, and had not discussed it or his membership in it with any supervisory employees with the exception of one occasion when he asked Sinor, one of the assistant chief guards, if he was in favor of organizing the guards into the Union and Sinor had replied simply that he was not.

On May 25, 1945, when Bentley had watched White, he checked up on Leonhart and reported the substance of his observations in writing to Gerber. According to Bentley's testimony, he opened the door to the reconditioning plant on Leonhart's tour of duty to see what Leonhart's procedure would be Bentley's credible testimony was that Leonhart did not check the door, and it remained open. Leonhart testified that previously that evening he had inspected the door and found it locked, and gave it as his opinion that there was no use checking it again. Bentley's further testimony was to the effect that on April 5 Leonhart lost his key to the bottling house and, instead of going to the guard station for a duplicate key so that he might pull the clocks in the bottling house, he passed the bottling house up. Leonhart admitted the substance of this accusation, but testified that when he discovered that his key was missing he called the ADT office to report why the clocks in the bottling house were not pulled. He did not explain why he did not get the duplicate key from the guard house. Bentley also testified that Leonhart has missed more than the usual number of clocks during his period of employment by the respondent, and that he was in general inactive and unwilling to move about because of his weight.[6] Bentley had previously, on May 26, checked on Leonhart's performance of his duties and made a written report to Gerber that Leonhart had been negligent, and that he was slow and superficial in his work. Bentley testified that Leonhart was not discharged at this time because he had no one to take his place.

George Greenwald: Greenwald worked for the Century Company approximately 10 years before it was purchased by the respondent He joined the Union on May 23, 1945, but did not become active in its affairs. There is nothing in the record to indicate that the respondent knew of his membership.

Greenwald was called to the office of Sturgis, personnel manager, on July 17, 1945, and told that he was discharged because he had been drinking on the job in violation of a company rule, and had missed too many clocks. Greenwald admitted while testifying that he frequently drank on the job, but stated that he did not do so more than other guards.[7] Bentley testified that he recommended to Gerber on July 17 that Greenwald be discharged, largely on the basis of his observation the preceding night during Greenwald's tour of duty. Bentley testified, and his written report to Gerber stated, that on that night Greenwald was 10 minutes late starting his rounds and missed a clock. According to Bentley this was merely the culmination of a long series of complaints as to Greenwald,

[6] Leonhart testified that he weighed approximately 275 pounds

[7] There is no other substantial testimony in the record to show whether or not drinking on the job was customary.

some of which he had called to Greenwald's attention These consisted of missing clocks, taking short cuts when making the rounds, arguing and quarreling with other guards, and being inattentive in checking the badges of production employees when entering the plant. Greenwald admitted, in effect, that on one occasion when Bentley complained to him he replied that if the respondent could get better guards than those already employed, "Why the hell (don't) they trot them in?" Bentley testified that at the time of Greenwald's discharge he had a better man, and decided to let Greenwald go.

William Summers: Summers worked for the Century Company a short while before it was taken over by the respondent. He joined the Union on June 18, 1945, and solicited the membership applications of several other guards. He testified that he never talked to any supervisory employee concerning the Union or his membership in it with the exception of one occasion when, during the course of a conversation with Sinor, an assistant chief guard, the latter expressed his opinion that if the guards were organized in a unit by themselves it would be advantageous, but that he did not think that organization in the same unit with production employees was advisable. Summers' own membership in the Union was not mentioned during this conversation.

On July 26, Sturgis, the respondent's personnel manager, told Summers that he was discharged, giving as the reason that Summers had missed several clocks, and had left his post the previous night before being relieved. When Sturgis asked Summers if he cared to discuss the matter with Bentley, Summers refused the offer and left the plant.

Summers denied while testifying that he had left his post on any occasion before his relief arrived. Although he stated that he was relieved on the night in question by another guard, he could not recall who it was. Summers admitted that 3 or 4 weeks before he was discharged Bentley had warned him that he had missed several clocks, and that he had admitted that this was perhaps true, an admission which he repeated while testifying On that occasion, according to Summers, Bentley became angry and stated emphatically that the missing of clocks had to stop. A week or two before his discharge Summers, again according to his own admission, was warned by one of the assistant chief guards that he had not inspected the garage at the reconditioning plant, a requirement of long standing. Bentley testified that at the same time when he observed Leonhart's tour of duty on the night of July 5, he observed that of Summers and found it unsatisfactory. He made a written report to Gerber the following day, complaining as to Summers. Bentley testified further, that since February 1946, Summers had missed three clocks

George Hibbard, another of the assistant chief guards, testified that one night several weeks before Summers' discharge he had phoned Summers to go down to a railroad gate to let a switch engine into the plant, but that Summers delayed so long in getting there that the engine went away. Summers' testimony was to the effect that upon receiving the call he immediately went down to the gate but missed the engine because he had not been given enough notice. Hibbard also testified that on several occasions he told Summers to move around the plant more and not to stay in one place. Joseph Finley, the other assistant chief guard, testified credibly that on at least one occasion he warned Summers that he was careless in checking the badges of production employees at the main gate.

Conclusions as to the discharges

As has been found above, Gerber, the respondent's plant manager, first acquired knowledge that certain of the guards had joined the Union when, on July 19, Snider asked for recognition of the Union as representative of the guards.

There is no evidence that Sturgis, Bentley, or any other supervisory employee acquired earlier knowledge. White, Leonhart, and Greenwald had been discharged prior to July 19 Summers, alone of the four, was discharged thereafter. It does not appear from the record that the respondent, either on July 19 or at any later time, acquired knowledge as to which guards joined the Union and which did not. The absence of any substantial evidence that the respondent knew which of the guards named in the complaint were members of the Union, coupled with the absence of any substantial evidence of statements or activities hostile to the Union, aside from admitted statements to Snider on July 19, and subsequently, that the Union was not the proper representative of the guards, leads the undersigned to conclude, and he finds, that White, Leonhart, Greenwald, and Summers were discharged for the reasons assigned by the respondent, and not because of their membership in or activity on behalf of the Union.

B. *The alleged refusal to bargain*

1. The appropriate unit

The complaint alleges that all guards and watchmen, except supervisory employees, employed at the respondent's Peoria plant, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act.

The respondent employs no watchmen as distinguished from guards, and there is no substantial conflict in the evidence as to the duties of the latter. Although formerly militarized, the guards have been de-militarized. They are uniformed and armed, but, so far as the record reveals, are not deputized, perform no monitorial duties,[8] and possess no authority to make changes in the status of the production or maintenance employees, who are represented by the Union. The Union has organized a number of guards into Local 15 and they attend union meetings along with, and on the same basis, as production and maintenance employees. The Union has had for several years a contract with the respondent which specifically excludes guards.

The Board has held that guards of a status similar to the respondent's guards may constitute a unit appropriate for the purposes of collective bargaining, despite their specific exclusion from an existing contract covering production and maintenance employees, since mere exclusion from coverage of a contract is not a waiver of the contracting union's right to represent such employees.[9]

It is found that the above-described employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act.

2 Representation by the Union of a majority in the appropriate unit

At all relevant times during the year 1945 the respondent employed 18 guards, in addition to a chief guard and three assistant chief guards.

By June 17, 1945, the Union had obtained the membership applications of 10 of the 18 guards within the unit found above to be appropriate Two further applications were obtained thereafter, one on June 20 and one on June 23. However, as has been found, one of these employees, Emmett White, was discharged on May 26, 1945. Two others, Frederick Leonhart and George Greenwald, were discharged on July 7 and 16, respectively. A fourth, William Summers, was

[8] The respondent's brief refers to the monitorial duties of the guards. An examination of the record reveals, however, that while guards report infractions of rules by production and other employees, they do not themselves admonish such employees

[9] See *Florence Stove Company*, 67 N L R B. 146; *Bethlehem Supply Company*, 63 N. L. R B. 937; *Goodyear Fabric Corporation*, 63 N. L R B 495.

discharged on July 26 A fifth, William Holtzman, resigned on July 10. Other guards were hired to take the place of these guards. There is no evidence that the new guards became members of the Union.

On July 19, Snider first demanded recognition of the Union as bargaining representative for the guards. As has been related previously, the respondent on this and subsequent occasions stated that it would not recognize the Union as such representative. The undersigned is not called upon to find whether the respondent's declaration would, in other circumstances, have constituted a refusal to bargain. By reason of the lawful discharges of White, Leonhart, and Greenwald, and the resignation of Holtzman, the number of those employees who had designated the Union as their bargaining representative had been, by July 19, reduced from 12 to 8. The respondent was thus under no obligation to bargain with the Union inasmuch as it did not on July 19, or later, represent a majority of the employees within the appropriate unit

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

Conclusions of Law

1. Distillery Rectifying and Wine Workers International Union of America, Local 15, affiliated with the American Federation of Labor, is a labor organization within the meaning of Section 2 (5) of the Act.
2. The respondent is engaged in commerce within the meaning of Section 2 (6) and (7) of the Act.
3. The respondent has not engaged in unfair labor practices within the meaning of Section 8 (1), (3), and (5) of the Act.

RECOMMENDATIONS

On 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 complaint against the respondent, National Distillery Products Corporation, Peoria, Illinois, be dismissed.

As provided in Section 203 39 of the Rules and Regulations of the National Labor Relations Board, Series 4, effective September 11, 1946, any party or counsel for the Board may, within fifteen (15) days from the date of service of the order transferring the case to the Board, pursuant to Section 203 38 of said Rules and Regulations, file with the Board, Rochambeau Building, Washington 25, 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; and any party or counsel for the Board may, within the same period, file an original and four copies of a brief in support of the Intermediate Report. Immediately upon the filing of such statement of exceptions and/or briefs, 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 Proof of service on the other parties of all papers filed with the Board shall be promptly made as required by Section 203 65. As further provided in said Section 203 39, 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 service of the order transferring the case to the Board.

Horace A. Ruckel,
Trial Examiner.

Dated November 15, 1946.