In the Matter of E. L. BRUCE COMPANY *and* INTERNATIONAL BROTHERHOOD OF FIREMEN & OILERS, LOCAL 954, A. F. OF L.

Case No. 15–C–1034.—Decided December 12, 1947

Mr. Jerome A. Reiner, for the Board.

Canale, Glankler, Loch & Little, by *Messrs. Hamilton E. Little* and *F. H. O'Connor*, of Memphis, Tenn., for the respondent.

Mr. Harold L. Colvin, of Louisville, Ky., for the Firemen & Oilers Union.

Taylor, Higgins, Koenig & Windham, by *Messrs. Fred G. Koenig* and *J. C. Barrett*, of Birmingham, Ala., *Mr. W. T. Yount*, of Memphis, Tenn., and *Mr. Charles E. Kay*, of Frazier, Tenn., for the Carpenters Union.

DECISION

AND

ORDER [1]

On October 21, 1946, Trial Examiner Horace A. Ruckel issued his Intermediate Report in the above-entitled proceeding, finding that the respondent had not engaged in the unfair labor practices affecting commerce alleged in the complaint, and recommending that the complaint be dismissed in its entirety, 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, and the Carpenters Union filed a brief and the respondent a reply brief in support of the Intermediate Report. On January 21, 1947, the Board at Washington, D. C., heard oral argument, in which the respondent and the Carpenters Union participated.

On September 19, 1947, the Board, acting pursuant to Section 3 (b) of the Act, as amended, delegated to Chairman Herzog and Members Houston and Reynolds, who had heard the oral argument herein, all the powers which the Board itself might exercise in this case.

The Board has considered the rulings of the Trial Examiner at the hearing, and finds that no prejudicial error was committed. The

[1] The Board has power to issue a decision and order in a case such as the instant one, where the charging union may not have complied with the filing requirements specified in Section 9 (f), (g), and (h) of the National Labor Relations Act, as amended. See *Matter of Marshall and Bruce Company*, 75 N. L. R. B. 90.

rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and briefs, and the entire record in the case, and hereby adopts the findings and conclusions of the Trial Examiner insofar as they are consistent with this Decision and Order. [2]

The Trial Examiner found that the respondent did not violate the Act in discharging the complainants. We do not agree. By April 9, 1945, the Carpenters Union had accepted all the complainants as *de facto* members.[3] Likewise by that date, the complainants, while continuing their *de facto* membership in the Carpenters Union, had also become affiliated with the rival Firemen & Oilers Union. On that date, which was near the automatic renewal date of the then existing agreement between the Carpenters Union and the respondent, Kay, the Carpenters Union representative who later demanded the discharges, had a conversation with O'Connor, the assistant to the respondent's president in charge of labor relations. In this conversation, Kay stated that the firemen and helpers, who are the complainants in this case, had joined the Firemen & Oilers Union, and that a demand would be made for their discharge unless they took the obligation in the Carpenters Union—a long-standing membership requirement. The obligation, as O'Connor must have inferred from Kay's conversation, would have bound the complainants to abandon their membership in the Firemen & Oilers Union.[4] Yet O'Connor called Sisco, one of the firemen and helpers, into his office and advised him that the entire group should take the obligation or risk discharge. When Sisco replied that the "one reason" for the group's refusal to take the obligation was "because . . . they were going along with the Firemen & Oilers [Union]," as O'Connor admitted at the hearing, O'Connor nevertheless promptly complied with the demand of the Carpenters Union that the respondent discharge the complainants under the terms of the union-shop agreement, on the alleged ground of "bad standing" in the Carpenters Union.[5] Under similar circum-

[2] Those provisions of Section 8 (1) and (3) of the National Labor Relations Act, which the complaint herein alleged were violated, are continued in Section 8 (a) (1) and (3) of the Act as amended by the Labor Management Relations Act, 1947.

[3] In addition to the fact that the Carpenters Union had been accepting the complainants' dues, as the respondent knew because of the check-off, we find, contrary to the Trial Examiner, that at least one of the complainants had attended approximately six meetings of the Carpenters Union and had participated in the voting at those meetings, and that each of the complainants was permitted by the Carpenters Union to enjoy another and most important membership privilege, working at the all-union plant here involved.

[4] Moreover, uncontradicted and credible testimony in the record shows that, after the firemen and helpers had joined the Firemen & Oilers Union, a Carpenters Union representative had threatened them with discharge if they "don't get out of the Firemen & Oilers"; and another representative admitted at the hearing that members were required to "drop membership in any other organization they belonged to."

[5] We find that the respondent discharged complainants Lott and Odum on or about May 14, 1945, and not on or about April 11, 1945, as found in the Intermediate Report.

stances, we held in the *Rutland Court* case [6] that an agreement requiring membership in a certain labor organization as a condition of employment, although lawfully made, could not serve as a device for depriving employees of their freedom to designate another labor organization as their collective bargaining representative for the period following the termination of the agreement.

On the foregoing facts, the Trial Examiner concluded that the principle of the *Rutland Court* case was inapplicable on two alternative grounds: (1) The complainants intended to supplant the Carpenters Union with the Firemen & Oilers Union *before* the termination of the existing agreement and thus, as the Board held in the *Southwestern Portland Cement* case,[7] were not entitled to protection against the requirement of membership in the Carpenters Union. (2) The discriminatory motive of the Carpenters Union in securing the discharges was "irrelevant," because the four complainants who had failed and refused to take the obligation had never completed the steps necessary to bring themselves into compliance with the Carpenters Union's membership requirements, and the respondent justifiably although erroneously thought that the other two complainants had similarly failed to comply with the membership requirements.

We do not agree with the Trial Examiner. As to his first ground of distinction, we are of the opinion that the *Southwestern Portland Cement* case is not applicable to the facts here present, for the employee there was expelled from union membership for rival union activity early in the term of a union-security agreement which still had more than 8 months to run at the time of his discharge; it was the *early* timing of the rival activity which was a major factor in persuading us that it was calculated to replace the contracting union during, rather than after, the term of the contract. In the present case, the complainants were not penalized for allegedly seeking to replace the Carpenters Union before the end of its contract term. On the contrary, the discharges occurred *near the expiration of the term*, and were demanded by the Carpenters Union because of the complainants' refusal to abandon the Firemen & Oilers Union *at that time.*

As to the Trial Examiner's second ground of distinction, we believe that it overlooks the purpose of the *Rutland Court* principle, to protect the employees' freedom of choice. The record shows, and the Trial Examiner found without objection, that Lott and Odum, who had previously taken the oath of obligation in the Carpenters Union, were nevertheless expelled from union membership and discharged by the respondent because, shortly before the termination of the contract be-

[6] *Matter of Rutland Court Owners, Inc.*, 44 N. L R. B. 587, 46 N. L. R. B. 1040.
[7] *Matter of Southwestern Portland Cement Co.*, 65 N. L R. B. 1.

tween the respondent and the Carpenters Union, they refused to abandon the Firemen & Oilers Union. This is, as we find, a *Rutland Court* case. The other four complainants were discharged because, shortly before the termination of the same contract, they refused to take an oath which would have required them to abandon the Firemen & Oilers Union—the same oath which Lott and Odum had previously taken. Had they taken the oath, they would undoubtedly have been expelled and discharged, just as Lott and Odum were, and for the same reason. A labor organization cannot, by means of its membership rules, restrict the freedom of employees to designate a new collective bargaining representative—a freedom which, as we held in the *Rutland Court* case, the Act confers on them. It follows that the respondent's erroneous belief that Lott and Odum had, like the four other complainants, refused to take the obligation, did not justify their discharge.

The respondent argues, in part, that the complainants, a small group at a single plant, were improperly seeking to split themselves off from the established multi-plant collective bargaining unit which had theretofore included them, and that their activity, like that involved in the *Southwestern Portland Cement* case, is therefore not entitled to protection under the Act. This assumes the inappropriateness of the collective bargaining unit they sought to establish. In any event, the argument proves too much, for it would remove from the protection of the Act the self-organizational activities of employees who have once been included in a unit found appropriate for collective bargaining purposes, but who seek to persuade the Board to modify that unit. Such activities customarily precede presentation to the Board of questions as to appropriateness of units or as to whether previously established bargaining units should be modified—questions best decided in proceedings under the Act after the organizational activities out of which they arise have taken place. We find no warrant in the statute for holding that such activities are not protected.

It is also argued that discrimination is disproved by the fact that the Carpenters Union demanded and secured the discharge of shipping department employee Thompson along with that of the complainants, and that Thompson was not shown to have been involved in any rival union activity. We find no merit in this argument. No charge was filed alleging discrimination in Thompson's discharge, no such allegation was included in the complaint, and the issue was not litigated. But even if Thompson's expulsion and discharge was found to be non-discriminatory, the finding would not disprove discrimination as to the complainants. Nor is discrimination disproved by the fact that the Carpenters Union subsequently readmitted three of the

plainants (Sisco, Wells, and Stroggins) to membership upon their taking the obligation, and that the respondent thereupon reinstated them. The record shows that these complainants were readmitted and reinstated only *after* they had abandoned their membership in the Firemen & Oilers Union.

We have considered the provision in Section 10 (c) of the Act, as amended, which authorizes the Board to require back pay of the labor organization responsible for the discrimination suffered by an employee.

We are of the opinion that it cannot be given retroactive effect so as to govern the result in the present case. The discharges were effected in 1945, and did not at that time constitute unfair labor practices on the part of the Carpenters Union. Moreover, no charge was filed and no complaint issued against the Carpenters Union, and we would therefore be without power to issue an order directed against that organization even if we considered it appropriate to do so.[8]

Upon the entire record, we find, contrary to the Trial Examiner, that the respondent discharged Sisco, Johnson, Wells, Stroggins, Lott, and Odum in violation of Section 8 (1) and (3) of the Act.

THE REMEDY

Having found that the respondent discharged Sisco, Johnson, Wells, Stroggins, Lott, and Odum in violation of the Act, we shall order the respondent to reinstate such of them as have not yet been reinstated and to make them all whole, except that in computing back pay and net earnings the period between the Intermediate Report and the Decision and Order herein shall be excluded.[9]

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 respondent, E. L. Bruce Company, Memphis, Tennessee, and its officers, agents, successors, and assigns shall:

1. Cease and desist from discouraging membership in International Brotherhood of Firemen & Oilers, Local 954, A. F. of L., or in any other labor organization of its employees, or encouraging membership in United Brotherhood of Carpenters and Joiners of America, A. F.

[8] Cf. *Consolidated Edison Company* v *N L R B*, 305 U S 197 Our reasons for believing that no such power was vested in the Board under the National Labor Relations Act prior to the 1947 amendments are stated in the majority opinion in the *Lewis Meier* case, 73 N L R B 520

[9] See, e. g, *Matter of Colgate-Palmolive-Peet Company*, 70 N L R B 1202

of L., 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, for engaging in activities directed toward the designation of a new collective bargaining representative at an appropriate time.

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

(a) Offer Oza Johnson, Roosevelt Lott, and Charles Odum immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges;[10]

(b) Make whole Oza Johnson, Roosevelt Lott, and Charles Odum 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 he normally would have earned as wages during the period from the date of his discharge to the date of the Intermediate Report herein, and during the period from the date of the Decision and Order herein to the date of the respondent's offer of reinstatement, less his net earnings during such periods;[11]

(c) Make whole Lonnie Sisco, Henry Wells, and Willie Stroggins 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 he normally would have earned as wages during the period from the date of his discharge to the date of his reinstatement, less his net earnings during such period;

(d) Post at all its plants covered by the union-shop agreement with United Brotherhood of Carpenters and Joiners of America, A. F. of L., copies of the notice attached hereto, marked "Appendix A."[12] Copies of said notice, to be furnished by the Regional Director for the Fifteenth Region, shall, after being duly signed by the respondent's representative, be posted immediately upon receipt thereof, and maintained by it for sixty (60) consecutive days thereafter, in conspicuous

[10] In accordance with our consistent interpretation of the term, the expression "former or substantially equivalent position" is intended to mean "former position wherever possible, but if such position is no longer in existence, then to a substantially equivalent position." See *Matter of The Chase National Bank of the City of New York, San Juan, Puerto Rico, Branch*, 65 N L R. B 827

[11] 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*, 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

[12] In the event that this Order is enforced by decree of a Circuit Court of Appeals, there shall be inserted in the notice, before the words "A Decision and Order," the words "A Decree of the United States Circuit Court of Appeals enforcing"

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

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

AND IT IS FURTHER ORDERED that the complaint, insofar as it alleges that the respondent violated Section 8 (1) of the Act other than by the discharges herein, be, and it hereby is, dismissed.

APPENDIX A

NOTICE TO ALL EMPLOYEES

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

WE WILL OFFER to the employees named below immediate and full reinstatement to their former or substantially equivalent positions without prejudice to any seniority or other rights and privileges previously enjoyed:

Oza Johnson Roosevelt Lott Charles Odum

WE WILL MAKE WHOLE the employees named below for any loss of pay suffered as a result of the discrimination, as set forth in the Board's Decision and Order:

Lonnie Sisco	Henry Wells	Roosevelt Lott
Oza Johnson	Willie Stroggins	Charles Odum

WE WILL NOT discourage membership in International Brotherhood of Firemen & Oilers, Local 954, A. F. of L., or any other labor organization, or encourage membership in United Brotherhood of Carpenters and Joiners of America, A. F. of L., or any other labor organization, by discharging or refusing to reinstate any of our 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, for engaging in activities directed toward the designation of a new collective bargaining representative at an appropriate time.

E. L. BRUCE COMPANY,

Dated_____ By _____
(Representative) (Title)

NOTE.—Any of the above-named employees presently serving in the armed forces of the United States will be offered full reinstatement

upon application in accordance with the Selective Service Act after discharge from the armed forces.

This notice must remain posted for sixty (60) days from the date hereof, and must not be altered, defaced, or covered by any other material.

MEMBER REYNOLDS dissenting in part:

I concur with the findings of fact made by my colleagues. However, those findings lead me to the conclusion that the Carpenters Union rather than the respondent is the party chiefly responsible for the violations found herein. It was the union, through its threat of economic pressure, which urged the respondent to its illegal conduct, and it is that union which should therefore bear the burden at least in part of making whole the insured employees.

I am in agreement that the provision of Section 10 (c) of the Act, as amended, which authorizes the Board to require back pay of labor organizations responsible for discrimination such as is found in this case, does not apply where the discrimination took place, as here, prior to August 22, 1947. Nevertheless, for the reasons stated in my dissenting opinion in *Matter of Lewis Meier & Company*, 73 N. L. R. B. 520, I would dismiss the complaint herein.

INTERMEDIATE REPORT

Mr. Jerome A. Reiner, for the Board.

Messrs. Hamilton E. Little and *F. H. O'Connor*, of Memphis, Tenn., for the respondent.

Mr. Harold L. Colvin, of Louisville, Ky., for the Firemen and Oilers.

Messrs. Fred G. Koenig and *J. C. Barrett*, of Birmingham, Ala., *Mr. W. T. Yount*, of Memphis, Tenn., and *Mr. Charles E. Kay*, of Frazier, Tenn., for the Carpenters.

STATEMENT OF THE CASE

Upon an amended charge filed on May 28, 1945, by International Brotherhood of Firemen & Oilers, Local 954, affiliated with the American Federation of Labor, herein called the Firemen and Oilers, the National Labor Relations Board, herein called the Board, by its Regional Director for the Fifteenth Region (New Orleans, Louisiana), issued its complaint dated August 22, 1946, against E. L. Bruce Company, 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.

With regard to the unfair labor practices, the complaint alleged in substance that respondent: (1) from about March 1945, to the date of the complaint, questioned and warned employees concerning their membership in the Firemen and Oilers, and (2) during the months of April and May 1945, discharged Lonnie

Sisco, Oza Johnson, Henry Wells, Willie Stroggins, Roosevelt Lott, and Charlie Odum, and has since failed and refused to reinstate them, because they joined and assisted the Firemen and Oilers, and engaged in other concerted activity for the purposes of collective bargaining and other mutual aid and protection.

On September 9, 1946, respondent filed an answer admitting some of the allegations of the complaint but denying that it had engaged in any unfair labor practices As an affirmative defense to the discharges, respondent's answer stated that the above-named employees were discharged because of the demand of Lumber and Sawmill Branch of the United Brotherhood of Carpenters and Joiners of America, herein called the Carpenters, with whom the respondent has a union-shop agreement.

Pursuant to notice, a hearing was held on September 23 and 24, 1946, at Memphis, Tennessee, before Horace A. Ruckel, the undersigned Trial Examiner duly appointed by the Chief Trial Examiner. Upon the opening of the hearing the undersigned granted without objection a request by Local Unions Nos 2523, 2846, 3124, 2825, 2964, 2639, and 2598 of the Carpenters to intervene The Board and respondent were represented by counsel and participated in the hearing The Firemen and Oilers and the Carpenters were represented by officers and organizers. Full opportunity to be heard and to examine and cross-examine witnesses and to introduce evidence bearing upon the issues was afforded all parties.

At the conclusion of the hearing the undersigned granted, without objection, a motion by counsel for the Board to conform the pleadings to the proof in formal matters and reserved ruling on a motion by respondent's counsel, in which he was joined by representatives of the Carpenters, to dismiss the complaint This motion is disposed of by the recommendations hereinafter made. The parties were advised that they might argue orally and might request the privilege of filing briefs and/or proposed findings of fact and conclusions of law with the Trial Examiner Counsel for the parties engaged in oral argument. No request was made to file briefs or proposed findings of fact and conclusions of law.

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

Respondent is a Delaware corporation having its principal office and place of business in Memphis, Tennessee, where it is engaged in the manufacture of hardwood flooring, finished furniture, prefabricated houses, and related products. During the period from July 1 to December 31, 1944, which is representative of its operations at all times material herein, respondent purchased raw materials consisting principally of lumber, in the amount of $873,000, approximately 30 percent of which was shipped to its Memphis plant from points outside the State of Tennessee During the same period respondent manufactured and sold finished products from its Memphis plant in the amount of over three million dollars, approximately 90 percent of which was sold and transported to and through States of the United States other than the State of Tennessee. Respondent admits that it is engaged in commerce within the meaning of the Act.

II. THE ORGANIZATIONS INVOLVED

International Brotherhood of Firemen and Oilers, Local 954, and Lumber and Sawmill Branch of the United Brotherhood of Carpenters and Joiners of America, and Local Unions Nos. 2523, 2846, 3124, 2825, 2964, 2639, and 2598, thereof, are labor organizations admitting to membership employees of the respondent. Both the Firemen and Oilers and the Carpenters are affiliated with the American Federation of Labor

III. THE ALLEGED UNFAIR LABOR PRACTICES

A *The discharges*

There is no substantial dispute as to the facts in this case. The question presented is whether respondent engaged in an unfair labor practice in discharging certain employees upon the demand of the Carpenters with whom respondent had a valid union-shop contract which required that all employees be members of the Carpenters "in good standing" The contract was entered into on May 27, 1944, and covers all respondent's plants, there being a separate Carpenters local in each plant. Local Union 2523 of the Carpenters represents the employees in the Memphis plant which has approximately 600 employees. The contract is the latest of a succession of contracts, the more recent ones having covered all respondent's plants and the earlier ones having been for individual plants A check-off of union dues was first written into the 1944 contract and became effective on July 1 of that year. The expiration date of the contract was May 31, 1945, but there is a provision for automatic annual renewal in the absence of notice from either party 30 days prior to the expiration date of a desire to amend, change, or terminate it.

With the obtaining of the check-off in the summer of 1944, Local 2523 had from 100 to 150 members who, although they had made formal application for membership in the Carpenters, and although they were paying their monthly dues of $1, had not taken the formal obligation required of members by the Carpenters' constitution.[1] Accordingly, at a meeting on October 23, 1944, prior to any organizing activity on the part of the Firemen and Oilers, and upon the insistence of J. C. Barrett, an international representative with supervision over the local, Local 2523 instituted a campaign to have those applicants for membership who had not taken their formal obligation, do so, thus fulfilling the constitutional requirement for membership in good standing

[1] The obligation consists of a ritual of some length participated in by the applicant and the president of the local union in which the applicant undertakes to abide by the constitution and bylaws of the Carpenters, to observe local trade union rules, to attempt to procure employment for unemployed members, to demand the union label when purchasing goods, to employ only union labor when it can be obtained, to submit to the discipline of the union and its officers, and to refrain from joining any revolutionary organization or any organization "attempting to disrupt or cause dissension in the Carpenters" Upon completion of the obligation the applicant, now a full-fledged member, is furnished the quarterly password to union meetings and is permitted to attend meetings and vote

The application for membership includes a series of questions as to the candidate's national origin and citizenship, the number of years he has worked as a carpenter and in what community, his domestic status, his health, and his previous membership in the Carpenters Union, if any After the execution of an application for membership, the candidate is normally investigated by an investigating committee of the local union before he is administered the obligation of membership

The Firemen and Oilers first undertook to organize respondent's firemen and helpers in January 1945, when Lonnie Sisco, a fireman, obtained the membership applications of Henry Wells, Oza Johnson, Willie Stroggins, Roosevelt Lott, and Charles Odum, the other firemen and helpers in respondent's boiler room. The Firemen and Oilers filed a petition with the Regional Office of the Board on January 12, 1945. It was later withdrawn, and the Regional Office advised respondent to that effect on February 12. The credible testimony of Charles Kay, president of Local 2523, is that he had no knowledge of the activities of the Firemen and Oilers prior to the filing of the petition.

The appearance of the Firemen and Oilers in the boiler room accelerated the efforts of the Carpenters in obligating those employees, now reduced to about 20 in number, who had not taken their obligation, and a committee was appointed to interview each of them. Although the boiler room employees must have known of the campaign to have all employees complete their membership in the Carpenters, Sisco testified credibly,[2] and the undersigned finds, that it was not until after the filing of the petition that he was personally requested to take his obligation. Thereafter, he was asked by Kay and one or two other stewards or officers of Local 2523 to do so, and each time he refused. Kay testified credibly that he personally solicited Stroggins to take his obligation, but was uncertain as to when he did so

By April 9, all respondent's employees excepting Sisco, Wells, Johnson, Stroggins and one or two other employees in other departments who were not eligible for membership in the Firemen and Oilers, and as to whom the question of dual unionism was not pertinent, had taken their obligation On that date, Kay called at the office of Frank O'Connor, assistant to the president of the respondent and in charge of labor relations, and informed him that the firemen and helpers were interested in the Firemen and Oilers union and that they had refused to take their obligation in the Carpenters Kay stated that unless they did so their discharge would be requested under the provisions of the Carpenter's contract, and suggested that O'Connor speak to one of the firemen. Accordingly, on the same or the following day, O'Connor called Sisco to his office and repeated, in substance, Kay's warning Sisco admitted that the firemen and helpers had joined the Firemen and Oilers and that they had not taken their obligation in the Carpenters[3] O'Connor read to Sisco the union-shop provision of the Carpenters' contract, told him that it was likely that his discharge would be requested by the Carpenters if he refused to take his obligation, and suggested that he do so.

On April 10 the Carpenters wrote respondent requesting the discharge of Sisco, Johnson, Wells, and Stroggins, and, in addition, Booker Thompson, an employee in the shipping department, because they were in "bad standing" in the Carpenters. Respondent immediately complied with the request.

On November 12, 1945, Sisco, Wells, and Stroggins took their obligation in the Carpenters and respondent, upon being so advised, immediately reemployed them.

Roosevelt Lott and Charles Odum were members in good standing in the Carpenters when they joined the Firemen and Oilers in January. At the same time

[2] Sisco was the only one of the discharged employees who was called as a witness.

[3] It is of some importance that in O'Connor's conversation with Kay, the names of individual firemen and helpers were not mentioned, and that in his talk with Sisco the latter referred to himself and his fellow employees in the boiler room simply as "we," when discussing the failure of himself and others to take the obligation. Actually, as is hereinafter related, two of those employees, Lott and Odum, had taken their obligation and become full-fledged members of the Carpenters, subsequently joining the Firemen and Oilers.

Local 2523 demanded the discharge of the other firemen and helpers, it commenced expulsion proceedings against Lott and Odum They were tried before the local on April 26 on the charge of "becoming affiliated with [the Firemen] thereby giving comfort, aid and support to another organization trying to disrupt and cause dissension." They were found guilty of dual unionism and their discharge was requested on April 11. It was promptly granted The Carpenters' letter to the respondent stated merely that Lott and Odum were in "bad standing" in that organization.

Conclusions

The Board relies on the theory set forth in the *Rutland Court* case[4] in which it was held to be violative of the Act to discharge employees who were seeking to change their union affiliation and collective-bargaining representative near the expiration date of a closed-shop contract, the discharge having been demanded by the union holding the contract and the employer having knowledge that the reason for the demand was the activity of the employees in seeking to change their union affiliation. The Board adhered to this theory in the *Portland Lumber Mills*[5] and *Cliffs Dow Chemical Co.*[6] cases, but reached a contrary result in the *Diamond T Motor Co.*[7] case, which it distinguished on the ground that the employer had no knowledge of the reason for the demand for discharge, and in the *Southwestern Portland Cement Co.*[8] case, which it distinguished on the ground that the employees sought to change the bargaining agent at a time which was not reasonably close to the expiration date of the contract, with the intention that the change become effective during the term of the contract.

Under all these cases, involving membership in a union as a condition of employment, before activity on behalf of a labor organization other than the contracting union is protected, three requisites must be met: (1) the employee must, under normal circumstances, become a member in good standing of the contracting union; (2) the attempt to change the bargaining representative must be at an appropriate time; and (3) the intention must be that the change is not to become effective during the current contract term.

In the instant case, it is admitted that the four employees whose employment was terminated on April 10, 1945, never took their obligation in the Carpenters as required by the constitution of that organization in order to become a member in good standing. The record does not reveal the reasons for their failure to do so, but whatever they were they antedated, in origin, the advent of the Firemen and Oilers in the boiler room. It is clear that Sisco, Wells, Johnson, and Stroggins only went so far in affiliating themselves with the Carpenters as they were compelled to do by the operation of the check-off. They contributed their dues by force of circumstance, but studiously withheld their allegiance. Because of their refusal to take their obligation they were not able to attend meetings, to vote, to participate in sick benefits, or to enjoy any of the other privileges accorded members in good standing under the union constitution Inasmuch as these four employees refused to become members in good standing in the Carpenters, it is irrelevant to speculate to what extent the Carpenters, in demanding their discharge, were motivated by such refusal, and to what extent they

[4] 44 N. L. R. B 587.
[5] 64 N. L. R. B. 159.
[6] 64 N. L R B 1419
[7] 64 N. L. R B. 1225.
[8] 65 N L R B 1.

were motivated by the acitivities of these employees in joining a rival organization.

Moreover, all six firemen and helpers joined the Firemen and Oilers in the middle of the contract term, without any indication that any change in bargaining representative, if obtained, was to become effective only after the expiration of the contract term On the contrary, the long continued refusal of four of these employees to take their obligation in the Carpenters, and the filing of the Firemen and Oilers' petition in January, four months before the expiration date of the Carpenters' contract, strongly indicate, and the undersigned finds, that the intention was to supplant, forthwith, the Carpenters with the Firemen and Oilers, as bargaining representative for the firemen and helpers. This being the case, the instant matter falls within the principle enunciated by the Board in the *Southwestern Portland Cement* case.

The cases of Lott and Odum differ from those of the other four firemen and helpers in that they took their obligation in the Carpenters and became full-fledged members of that organization. They were expelled for dual unionism. Their activity in behalf of the Firemen and Oilers, however, was no more protected than that of their four fellow firemen and helpers. All six employees joined the Firemen and Oilers 4 months before the expiration of the contract, and Lott and Odum were associated with the others in attempting to effect an immediate change in their bargaining representative. Furthermore, in the case of Lott and Odum, the respondent lacked knowledge of the fact that they had become full-fledged members of the Carpenters. O'Connor testified credibly that he presumed that the reason which prompted the demand that these two employees be discharged was the same which prompted the demand as to the other four employees, i. e., failure to take their obligation. Under the circumstances, O'Connor's conclusion was a reasonable, if not an inevitable one. When O'Connor talked with Kay and Sisco, each spoke of the firemen and helpers as a group which, acting together, had refused to take their obligation in the Carpenters, Sisco, during his conference with O'Connor, referring to himself and his fellow employees, simply as "we," without distinguishing between the status of Lott and Odum and their fellow employees. The undersigned concludes that the respondent discharged Lott and Odum in the belief that they had not become members in good standing of the Carpenters

It is found that the respondent, by discharging the employees named in the complaint, did not interfere with, restrain, or coerce its employees in the exercise of the rights guaranteed in Section 7 of the Act

The complaint alleged that the respondent engaged in acts designed to restrain employees from membership in the Firemen and Oilers and to maintain membership in the Carpenters in violation of Section 8 (1) of the Act. Other than the discharges considered above, there was no evidence presented that the respondent has engaged in such conduct.

The undersigned finds that the respondent did not violate the Act by discharging the employees named in the complaint because of their non-membership in or expulsion from the Carpenters in view of the lawfully agreed requirement of membership in that organization as a condition of employment, and did not otherwise interfere with, restrain, or coerce its employees. Accordingly, the undersigned will recommend that the complaint herein be dismissed.[9]

[9] In making his findings and conclusions the undersigned has not taken into consideration the fact that both unions here involved are affiliated with the same international organization.

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. International Brotherhood of Firemen and Oilers, Local 954, and Lumber and Sawmill Branch of the United Brotherhood of Carpenters and Joiners of America, both affiliated with the American Federation of Labor, are labor organizations 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 any unfair labor practices 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, and upon the entire record in the case, the undersigned recommends that the complaint against the respondent, E. L Bruce Company, Memphis, Tennessee, be dismissed in its entirety.

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 October 21, 1946.