

its business of manufacturing lumber. The employment of these employees may be terminated by the termination of the Employer's agreements with the alleged independent contractors. Necessarily, Jones and Bishop, as well as their respective crews, are subject to substantial control by the Employer.

In view of the foregoing, we find that the Employer's operations at its Varnville, South Carolina, plant, including those of the green chain and planing mill crews, constitute a single, integrated enterprise in which all of the employees involved share a common interest.³ We further find that Bishop and Jones are, in effect, supervisors rather than independent contractors, and that the green chain and planing mill employees are employees of the Employer.⁴ Accordingly, a single, plant-wide unit, including these employees, is appropriate for purposes of collective bargaining.

We find that all production, maintenance, and lumberyard employees at the Employer's plant in Varnville, South Carolina, including planing mill and green chain employees, but excluding office clerical employees, guards, and all supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act.

[Text of Direction of Election omitted from publication in this volume.]

³ See *Nu-Car Carriers, Inc.*, 88 NLRB 75.

⁴ See *Alexander Brothers Lumber Company, Inc.*, 78 NLRB 1099.

U. S. RUBBER COMPANY *and* TEXTILE WORKERS UNION OF AMERICA,
CIO. *Case No. 5-CA-239. April 9, 1951*

Decision and Order

On September 27, 1950, Trial Examiner Louis Plost issued his Intermediate Report in the above-entitled proceeding finding that the Respondent had not engaged in unfair labor practices and recommending that the complaint be dismissed in its entirety, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the charging party, Textile Workers Union of America, CIO, filed exceptions to the Intermediate Report and a supporting brief. The Respondent also filed a brief in support of the recommendations of the Trial Examiner.

The Board¹ has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed.

¹ Pursuant to the provisions of Section 3 (b) of the National Labor Relations Act, the Board has delegated its powers in connection with this case to a three-member panel [Chairman Herzog and Members Reynolds and Murdock].

The 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, conclusions, and recommendations of the Trial Examiner, except as hereinafter modified.

We agree with the Trial Examiner's finding that the Respondent discharged employees Hamner and Denby for having knowingly violated the rule against gambling in the plant, and not because of these employees' union affiliations, union activities, or other concerted activities for the purpose of collective bargaining. The record is clear that the rule against gambling was reasonable, that employees Hamner and Denby had been adequately warned by the Respondent of its intent to enforce such rule, and that the rule had, in fact, been enforced with respect to employees other than Hamner and Denby before their discharge of the employees herein concerned.

In reaching the conclusion that the discharge of Hamner and Denby was for cause, we do not rely on the Trial Examiner's finding that there is no evidence in the record to show any bias on the part of the Respondent against the Union. Certain testimony offered by the General Counsel which was given no consideration or was improperly excluded by the Trial Examiner² would, if credited, tend to establish the existence of some hostility on the part of the Respondent against the Union. However, the failure of the Trial Examiner to consider this evidence was not prejudicial, because we have treated it as credible and having a relevant bearing on the Respondent's motives. We nevertheless find upon the basis of the record as a whole, including the credibility findings of the Trial Examiner, that the General Counsel has not established by a preponderance of the evidence that the Respondent discharged employees Hamner and Denby in violation of Section 8 (a) (3) of the Act. Accordingly, we shall dismiss the complaint in its entirety.

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 herein against U. S. Rubber Company, Scottsville, Virginia, be, and it hereby is, dismissed.

² The Trial Examiner excluded evidence of events, occurring more than 6 months before the filing and service of the charge, and failed to consider evidence of other conduct, which though timely, and tending to establish independent violations of Section 8 (a) (1), was nevertheless excluded from his evaluation of the facts in the case because of the absence of specific allegations in the complaint charging the Respondent with the commission of such independent 8 (a) (1) violations. The earlier testimony was specifically offered by the General Counsel for background purposes only, and as such was admissible under the broad allegations of the complaint charging Respondent with a violation of Section 8 (a) (3) of the Act. (*Axelson Manufacturing Company*, 88 NLRB 761; *Crowley's Milk, Inc.*, 88 NLRB 1049.) As all the testimony was relevant to the issue of whether or not there existed a discriminatory motive on the part of Respondent, such testimony should have been considered by the Trial Examiner and the issue resolved accordingly.

Intermediate Report

John K. Pickens, Esq., for the General Counsel.

Frank A. Constangy, Esq., and *Marion A. Prowell, Esq.*, of Atlanta, Ga., for the Respondent

STATEMENT OF THE CASE

Upon a charge duly filed September 28, 1949, by Textile Workers Union of America, CIO, herein called the Union, the General Counsel of the National Labor Relations Board, herein called the Board, on behalf of the Board, by its Regional Director for its Fifth Region (Baltimore, Maryland), issued a complaint against U. S. Rubber Company, Scottsville, Virginia, herein called the Respondent, alleging that the Respondent had engaged in and was engaging in unfair labor practices within the meaning of Section 8 (a) (1) and (3) and Section 2 (6) and (7) of the National Labor Relations Act, as amended, 61 Stat. 136, hereinafter called the Act.¹ On September 29, 1949, a copy of the charge was served upon the Respondent. On June 15, 1950, a copy of the complaint and a notice of hearing was served upon the Respondent and the Union.

With respect to the unfair labor practices the complaint alleged in substance that on or about September 14, 1949, the Respondent discharged employees Marshall Denby and Carrington Hamner² because of their membership in and activities on behalf of the Union and their concerted activities with other of the Respondent's employees for the purposes of collective bargaining, and has at all times thereafter refused them reinstatement; all in violation of the rights guaranteed in Section 7 of the Act, more particularly in violation of Section 8 (a) (1) and (3) thereof.

On June 29, 1950, the Respondent filed an answer in which it averred that Denby and Hamner were discharged for cause.

Pursuant to notice a hearing was held at Charlottesville, Virginia, on July 26, 27, and 28, 1950, before Louis Plost, the undersigned Trial Examiner. The General Counsel and the Respondent were represented by counsel, hereinafter referred to in the name of their principals and participated in the hearing, being afforded full opportunity to examine and cross-examine witnesses, to introduce evidence bearing on the issues, to argue orally on the record and to file briefs, proposed findings of fact and/or conclusions of law with the undersigned.

At the conclusion of the evidence in the General Counsel's case-in-chief the Respondent moved to dismiss the complaint. The undersigned denied the motion. The Respondent renewed its motion to dismiss at the close of the hearing. The undersigned reserved ruling. The ruling is disposed of in this Report. Likewise at the close of the hearing the General Counsel moved to conform all the pleadings to the proof with respect to dates, places, typographical errors, and the like, not substantive. The undersigned granted the motion without objection.

The parties waived their rights to argue orally and reserved their rights to file briefs with the undersigned.

A brief has been received from the Respondent.

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

¹ The complaint did not make any specific allegation as to any independent violations under Section 8 (a) (1) of the Act nor was it amended to do so. The only 8 (a) (1) would therefore be derivative under the allegation of illegal discharge specifically made in the complaint as violative of both 8 (a) (1) and (3).

² Carrington Hamner is incorrectly called Walter Hamner in the pleadings. The error is hereby amended.

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The Respondent, U. S. Rubber Company, is a New Jersey corporation which maintains its principal office in New York, New York, and operates in excess of 40 plants in various States of the Union

The Respondent operates a plant at Scottsville, Virginia, which is the only operation of the Respondent affected by this proceeding. At its Scottsville plant the Respondent is engaged in the manufacture of tire cord fabric. During the calendar year 1949, the Respondent produced manufactured goods at its Scottsville plant valued in excess of \$500,000, all of which was shipped by the Respondent to points outside the State of Virginia. During the same period 75 percent of the raw material used by the Respondent in its manufacturing process at Scottsville were shipped to Scottsville from points outside Virginia.

II. THE ORGANIZATION INVOLVED

Textile Workers Union of America, CIO, is a labor organization which admits employees of the Respondent to membership.

III. THE UNFAIR LABOR PRACTICES

A. *The alleged discriminatory discharges of Carrington Hamner and Marshall Robert Denby*

Carrington Hamner was employed by the Respondent as a "section man" in its Scottsville plant. Hamner's work consisted of servicing certain machines and keeping them in running order. His job was important to both the Respondent and the employees who operated the machines he serviced, for the production of these machines and the earnings of the operators were directly affected by Hamner's work.

There is no dispute that since some time prior to January 1948, the Union has made a steady attempt to organize the Respondent's Scottsville employees but has not achieved such majority status among the employees as to possess the right to bargain in their behalf.

Hamner testified that he joined the Union sometime in August 1948, and was a member thereof at the time of his discharge which occurred on September 14, 1949. Hamner testified that he was active in behalf of the Union, distributed application cards and talked about the Union to fellow employees.

Hamner further testified that none of the Respondent's supervisory officials ever spoke to him about his union activity or made any inquiries of him regarding his union membership.

Hamner testified that at about 2:15 a. m. of September 14, 1949, he having begun his shift at midnight:

I walked over to Marshall Denby, who was untangling a spool of yarn. Mr. Denby says "we can not talk here," and I had to speak to him by sign language, and I went over to make a motion to him about going to the cafeteria for a soft drink, and through this motion I withdrew from my pocket a coin, which slipped out of my hand onto the floor. I stooped over to pick up the coin, and Mr. Frank Kemmerly came in from the reel room. He came up the alley from over where Mr. Denby and I were standing, and I left Mr. Denby then and went to the re-spool department to pick up a sample. The sample wasn't quite ready, and I waited around there about five or ten minutes for the sample, and while I was waiting, Mr. Earle

Kemmerly come and told me he wanted to see both Denby and myself in the upstairs office. At this time Mr. Denby was coming from the wash-room. He had been in there getting ready to eat, and he was then told they wanted to see him also upstairs. So Mr. Kemmerly, Mr. Earle Kemmerly, first addressed us, saying "You all have been caught gambling." I asked him who was gambling, and he said "You and Denby." I said, "Who caught us gambling?" He said, "The old man," meaning his father.

Frank Kemmerly is supervisor of the weave room. Earle is Frank Kemmerly's son and at the time was foreman over Hamner. Earle Kemmerly told Hamner to remain at his work, but about a half hour later he came to Hamner and told him that the production superintendent, W. C. Craft, had instructed him to send Hamner home. Hamner was sent home in a car provided by the Respondent at about 3 a. m. He returned to the plant during the morning, was told by Craft that he was discharged.

Hamner testified that he was discharged for gambling and further testified that he had never been warned regarding gambling by any supervisor, either individually or as one of a group of employees so warned, nor had he ever been present when others were warned not to gamble.

Hamner denied that he was gambling together with Denby on September 14 as alleged by the Respondent and denied that he had engaged in any gambling during the night of his discharge.

Marshall Robert Denby was employed by the Respondent in 1944 and was discharged September 14, 1949. Denby was very active on behalf of the Union. During the period of his employment he received cash awards for suggestions he submitted for increasing production.

Denby testified³ that there had never been any complaints regarding his work or conduct, however the Respondent introduced as exhibits, copies of six warning slips taken from its files which show warnings and disciplinary action with respect to Denby covering a period from January 1948 to September 1949. Denby was discharged together with Hamner September 14. With respect to the incidents immediately occurring before his discharge, Denby testified as follows:

The WITNESS. That night I had a change of shift. I was walking up and down, watching my loom cable twisters. I have 17 cable twisters, and all the doffers were around the doff board. I was watching the ones in the rear, and *Napier and Hamner were throwing to a crack, throwing coins.*

When I finished watching my last frame and came back, they beckoned me to come over and join them. I threw one, but I told them I must hunt for tangles.

I went to my frame and hunted up and down and up and down. When I got there again they were still playing. They told me to pitch one more before I went through, so I pitched one more.

When I started to walk through, Mr. Kemmerly, Mr. Frank Kemmerly—

Q. (By Mr. PICKENS) Foreman or employee?

A. Foreman of the weaving room—was walking toward the cafeteria. At the end of Mr. Garrett's frame he was looking our way, and I was watching my frame. After a while Garrett asked me to watch his row of 17 twisters while he went into the cafeteria for a drink. I told him all right, so I was watching both of them, and the second frame had a bad twist, and I went over and untangled it. I had the spinners stopped while I was untangling it.

³ Denby is a deaf mute. His testimony was taken through an "interpreter" skilled in the use of sign language.

Mr. Hamner came up to the front of the frame, on the front of the second frame, and he signed to me to come and drink. I had my hands on the spool, so I shook my head while I was untangling it. When I finished, I saw some waste all over the floor. Mr. Hamner was kneeling down looking when I picked up the waste, and when I looked to see if the spool was all right, I saw someone there, Mr. Kemmerly, Mr. Frank Kemmerly of the weave room. He was standing there with his fingers crossed.

Denby further testified that Hamner left him immediately after Kemmerly observed them as above related. Within a short time Denby was called to Philpott's office, told he had been caught gambling, and sent home together with Hamner. He returned to the plant the next day and was discharged. The reason given was gambling.

W. C. Craft the Respondent's production superintendent testified that prior to March 1949, the Respondent did not interfere with employees "matching coins" for Coca-Colas in its cafeteria, the practice being indulged in by the supervision from the plant manager down as well as by rank-and-file employees. Various supervisory officials called as witnesses by the Respondent and the General Counsel freely testified that not only did they "match coins" in the cafeteria among themselves but on occasion did so with rank-and-file employees.

The record is clear, from mutually corroborative testimony of witnesses called by the General Counsel and the Respondent, that the practice of petty gambling spread from the confines of the cafeteria to the locker and wash rooms and to the working areas of the plant. Various forms of gambling were prevalent, some known and some unknown to the Respondent. Employees openly conducted base ball pools during the world series games including the 1948 series but apparently not during the 1949 series, they gambled on their pay check series numbers, and they tossed or "pitched coins" at a mark or crack in the floor or against a wall. All of these forms of gambling admittedly took place during working hours, in working areas and by employees who were supposed to be tending machines.

Craft further testified, being corroborated by Plant Manager Carroll, and others, that sometime in February 1949, gambling in the plant "had gotten out of hand" and management decided to eliminate the practice. At first it was thought that if the supervisors "set a good example" by discontinuing the matching of coins in the cafeteria the practice would cease, however it was found that this alone did not stop gambling, both in the cafeteria and in the plant proper, therefore in March 1949, all foremen were instructed to inform the employees to stop all forms of gambling. Previously, sometime in May 1948, the Respondent had posted a printed bulletin entitled "Things you should know" which listed plant rules and which prohibited gambling or pain of "immediate discharge." Foremen were now instructed to call attention to this rule and to tell the employees that henceforth it would be strictly enforced.

The record is clear that various supervisors held meetings of employees under them and issued the warning against gambling.

Hamner testified "No one ever warned me personally about gambling."

Foreman Earle Kemmerly testified that Hamner was present in three different groups called together and warned by Kemmerly that the rule forbidding gambling would be thereafter enforced.

Employee John Garrett called by the General Counsel testified that sometime in March 1949, Foreman Earle Kemmerly called together a group of employees, including Garrett, and warned them that gambling would no longer be tolerated. Garrett testified that both Hamner and Denby were in the group.

Earle Kemmerly further testified that not only was Denby present in one of the groups that were warned against gambling but that after the meeting Kemmerly wrote out the warning for Denby, because of the latter's impediment.

Employee Sadie I. Worley testified that she was employed on the same shift with Hamner and Denby and while she was at work at a point, about 10 or 12 feet from them on the morning of September 14 she observed them together "pitching coins" at a crack in the floor

John Garrett testified that at about 2 a. m. on September 14 he saw Hamner and Denby together with other employees "pitching coins" in a work area in the plant

The testimony of Hamner and Denby was contradictory in vital respects.

Hamner denied that he had gambled in the plant on the day of his discharge, but testified he had "pitched coins" in a gambling game the night before. *Hamner further admitted that shortly before Foreman Frank Kemmerly came into the room as hereinabove found, Denby and two other employees were "pitching coins"*

Denby testified that on the morning of his discharge he "pitched coins" in a gambling game with *Hamner* and another employee on two different occasions. However, Denby contends that Foreman Kemmerly did not see him pitching coins and what the foreman saw, if anything, was not a gambling game between Hamner and himself.⁴

Upon the evidence considered as a whole, including the demeanor of the witnesses, the undersigned credits the testimony of John Garrett and Sadie I. Worley to the effect that on September 14, 1949, each of them independently observed Hamner and Denby "pitching coins" in a gambling game, in a work area in the Respondent's plant and during working hours.

The undersigned credits Hamner's testimony to the effect that he observed Denby "pitching coins" on September 14, and credits Denby's testimony that he "pitched coins" together with Hamner, in the plant working area during the same morning shortly before he and Hamner were sent home.

The undersigned credits the testimony of Frank Kemmerly and finds that Kemmerly at about 2 a. m. September 14, 1949, observed Hamner and Denby engaged together in a gambling game in the plant, the game consisting of tossing or "pitching coins" at a mark

The undersigned does not credit the testimony of Carrington Hamner and Marshall Robert Denby to the effect that they did not jointly engage in a gambling game during work time and in the Respondent's plant, on September 14, 1949, or that they were not so observed by Foreman Frank Kemmerly.

It is clear that all forms of gambling in the plant were prohibited. It is equally clear that Hamner and Denby and all other employees had notice of the prohibition, and that employees including Hamner and Denby had been warned by the Respondent not to engage in any form of gambling in the Respondent's plant.

The rule against gambling was reasonable and was enforced with respect to employees other than those immediately involved in these proceedings.

The undersigned therefore finds that Carrington Hamner and Marshall Robert Denby were discharged by the Respondent because they knowingly violated a prohibition against gambling in the plant as previously established and enforced by the Respondent.

⁴ Although the General Counsel's theory is not entirely clear the undersigned will presume that the Spartan law which meted punishment only to those caught "red handed," *flagrante delicto*, is not here invoked.

B. Other acts of interference not specifically alleged in the complaint

The General Counsel through the testimony of Hamner and Denby sought to show that the real reason for their discharge was the Respondent's antiunion bias and its prejudice against them because of their membership in and activities on behalf of the Union.

The undersigned finds no merit in these contentions.

There is nothing in the record to show any bias on the part of the Respondent against the Union.

Hamner merely offered testimony of his union membership and activity on its behalf, which is uncontradicted, however there is nothing in the record to show that the Respondent had knowledge of Hamner's union membership or activity.

Denby testified to certain statements made to him by various supervisors which, absent the time when they were made, and if credited, would constitute violations under Section 8 (a) (1) of the Act.⁵ Denby's testimony was denied, however the undersigned does not deem it necessary to resolve the conflicts thus created or to make any findings with respect to such testimony inasmuch as the complaint contains no specific allegation of any independent violation of Section 8 (a) (1) of the Act, nor did the General Counsel move to amend the complaint to include any independent 8 (a) (1) violations.

It has been held by the Board that a violation of any section of the Act contains therein perforce a violation of Section 8 (a) (1).

The undersigned is of the opinion that this would mean in the instant matter that if the allegation that there had been an unlawful discharge were sustained, (8 (a) (3)) the Respondent would also have interfered with, restrained, or coerced its employees in their basic rights as guaranteed in the Act (8 (a) (1)).

The undersigned is of the opinion that to go beyond this and make independent findings of general interference in the absence of specific allegations of such violations, without having first put the party charged on notice, by pleading, and afforded an opportunity to join and meet the issue raised would not only be gratuitous, volunteered action but would be a denial of due process.⁶

Concluding Findings

Upon a review of the entire record in the case and upon all the evidence considered as a whole including his observation of the witnesses the undersigned is persuaded that the General Counsel has not adduced such clear and substantial evidence as will show the Respondent discharged Hamner and Denby because of their union affiliations, activities in its behalf or other concerted activities for the purposes of collective bargaining but the undersigned is convinced that the record discloses Hamner and Denby were discharged for cause and not in violation of the Act as alleged in the complaint.

The undersigned therefore finds that the Respondent has not violated the Act as alleged in the complaint and will recommend that the complaint be dismissed in its entirety.

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

⁵ Section 8 (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7;—Section 7 guarantees the right to engage or not to engage in activities toward self-organization

⁶ See *Electric Auto-Lite Company*, 80 NLRB 1601; *Fulton Bag & Cotton Mills*, 175 F. 2d 675 (C. A. 5).

CONCLUSIONS OF LAW

- 1 U S Rubber Company, Scottsville, Virginia, is engaged in commerce within the meaning of Section 2 (6) and (7) of the Act
2. Textile Workers Union of America, CIO, is a labor organization within the meaning of Section 2 (5) of the Act
3. The aforesaid U. S. Rubber Company has not engaged in unfair labor practices within the meaning of the Act.

[Recommended Order omitted from publication in this volume]

ROURE-DUPONT MFG., INC. *and* MICHAEL PETERS AND JAMES MARTIN.
Case No. 2-CA-800. April 9, 1951

Decision and Order

On October 27, 1950, Trial Examiner John Lewis issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged and was engaging in certain unfair labor practices, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the Respondent filed exceptions to the Intermediate Report and a supporting brief. The General Counsel filed a brief in support of the Intermediate Report. The Respondent's request for oral argument is denied, as the record and the briefs, in our opinion, adequately present the issues and the positions of the parties.

The Board¹ has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed.² The 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, conclusions, and recommendations of the Trial Examiner, with the following additions and modifications:

1. As more fully set forth in the Intermediate Report, the Trial Examiner denied the Respondent's motions to adjourn the hearing for approximately 3 months until its president, Jacques D'Aigremont, and

¹ Pursuant to the provisions of Section 3 (b) of the Act, the Board has delegated its powers in connection with this case to a three-member panel [Chairman Herzog and Members Houston and Reynolds]

² The Respondent urges that the Trial Examiner's refusal to grant its requests for adjournments and for a bill of particulars, as well as his permitting the General Counsel to amend the complaint "show a course of conduct indicating prejudice and bias on the part of the Trial Examiner towards the Employer and the Employer's counsel" The Board has carefully considered this contention and finds it without merit. The rulings were within the Trial Examiner's discretion, and the record fails to support a finding of an abuse of discretion. Under these circumstances and upon the entire record, the Board rejects the Respondent's contention and finds no bias nor prejudice upon the part of the Trial Examiner.