

In the Matter of K. K. MEISENBACH, DOING BUSINESS AS MEISENBACH DISTRIBUTING COMPANY *and* INTERNATIONAL UNION OF UNITED BREWERY, FLOUR, CEREAL AND SOFT DRINK WORKERS OF AMERICA

Case No. 16-C-1291.—Decided July 26, 1946

Mr. Louis Mercado, for the Board.

Mr. Carl B. Callaway, of Dallas, Tex., for the respondent.

Mr. O. L. Williams, of Dallas, Tex., for the Union.

Mr. Harry W. Clayton, Jr., of counsel to the Board.

DECISION

AND

ORDER

On April 22, 1946, Trial Examiner Wells 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. Thereafter the Union and counsel for the Board filed exceptions to the Intermediate Report, and the Union filed a brief in support of its exceptions. On July 18, 1946, the Board at Washington, D. C., heard oral argument, in which counsel for the respondent and for the Union participated.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and brief, the oral argument, and the entire record, 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, the National Labor Relations Board hereby orders that the complaint herein against K. K. Meisenbach, doing business as Meisenbach Distributing Company, Dallas, Texas, be, and it hereby is dismissed.

MR. JOHN M. HOUSTON took no part in the consideration of the above Decision and Order.

INTERMEDIATE REPORT

Mr. Carl B. Callaway, of Dallas, Tex., for the respondent.

Mr. O. L. Williams, of Dallas, Tex., for the Union.

Mr. Louis R. Mercado, for the Board.

STATEMENT OF THE CASE

Upon an amended charge duly filed by International Union of United Brewery, Flour, Cereal and Soft Drink Workers of America, herein called the Union, the National Labor Relations Board, herein called the Board, by its Regional Director for the Sixteenth Region (Ft. Worth, Texas), issued its complaint dated February 19, 1946, against K. K. Meisenbach, an individual doing business as Meisenbach Distributing Company, Dallas, Texas, herein called the respondent, alleging that the respondent has engaged in, and was engaging in unfair labor practices 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. Copies of the complaint accompanied by notice of hearing and the amended charge were duly served upon the respondent and the Union.

With respect to the unfair labor practices the complaint alleged in substance: (a) that from on or about November 20, 1945, respondent interrogated his employees concerning their union affiliation, warned and discouraged his employees concerning their union activities and membership, and threatened economic reprisals if their union activities should continue; (b) that on November 21, 1945, respondent discharged James E. Hitt, and has since refused to reinstate him, because of his membership in and activities on behalf of the Union; (c) that on November 20, 1945, and at all times thereafter, respondent refused to bargain collectively with the Union as the exclusive representative of his employees in an appropriate unit, although the Union has been the selected and designated representative of such employees since on or before November 20, 1945; and (d) by these acts and conduct respondent interfered with, restrained and coerced its employees in the exercise of rights guaranteed in Section 7 of the Act.

Pursuant to notice, a hearing was held at Dallas, Texas, on March 11, 12, 13, 14, and 15, 1946, before the undersigned Trial Examiner, duly designated by the Chief Trial Examiner. All the parties were represented and participated in the hearing and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to present evidence bearing upon the issues.

At the opening of the hearing, on March 11, 1946, respondent filed an answer in which in substance he alleged (a) that he had never refused to bargain collectively with the Union as exclusive representative of all the employees in the unit described in the complaint and further that he had never been under any legal obligation to so bargain with the Union; (b) that he had discharged James E. Hitt because Hitt was an inefficient and unsatisfactory employee and not because of any union activity on the part of Hitt; and (c) that respondent had never interfered with, restrained, or coerced any of his employees in the exercise of any rights guaranteed them under the Act. At the same time, counsel for respondent orally contended, in effect, that respondent is not engaged in commerce within the meaning of the Act and stated that the filing of respondent's answer and his participation in the hearing did not constitute a waiver of this contention with respect to the Board's jurisdiction.

At the close of the hearing the undersigned granted, over the objection of respondent's counsel, a motion by counsel for the Board to amend the complaint to allege that certain acts of respondent and his agents not covered by the dates set forth in the complaint constituted unfair labor practices within the meaning of Section 8 (1) of the Act. Respondent was offered by the undersigned addi-

tional time to reopen his defense to meet the matters alleged by the amended complaint. The respondent declined the offer.¹

Counsel for the Board and for the respondent argued orally before the undersigned at the close of the hearing. All parties were afforded an opportunity to file briefs with the undersigned. No briefs have been received.

Upon the record thus made and from his observation of the witnesses, the undersigned makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

K. K. Meisenbach, an individual doing business under the trade name of Meisenbach Distributing Company, is engaged in the wholesale distribution and sale of beer and ale in and around Dallas, Texas. His annual sales of such products have a total value in excess of \$100,000 per year, and all of the products so sold are shipped to him from points outside of the State of Texas. The beer and ale purchased by Meisenbach is shipped to him in bottles packed in either wooden or paper cases. Meisenbach sells and distributes the products to his customers in these bottles packed in cases and, after the products have been consumed, gathers the empty bottles and cases for return to the breweries from which he had purchased the products. Each week Meisenbach ships at least 5,000 cases containing empty bottles to breweries located outside the State.

The respondent is engaged in commerce within the meaning of the Act.²

II. THE ORGANIZATION INVOLVED

International Union of United Brewery, Flour, Cereal and Soft Drink Workers of America is a labor organization admitting to membership employees of the respondent.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Sequence of events*

On November 19, 1945, James E. Hitt, one of the five driver-salesmen employed by respondent, advised O. L. Williams, a union officer, that he and the other driver-salesmen desired to join the Union. Williams and Hitt arranged to meet at 6:45 o'clock on the morning of November 20, 1945, at a restaurant a few blocks from respondent's place of business. The meeting occurred as planned, and Williams and Hitt walked to respondent's warehouse. Hitt approached each of the four driver-salesmen, secured the signature of each on a union authorization card and also affixed his own signature to a card. Williams and the five driver-salesmen, including Hitt, met a few minutes later at another restaurant near respondent's warehouse. After some discussion with Williams, Hitt and the other driver-salesmen returned to respondent's warehouse. Not more than 1 hour elapsed during the November 20 meeting between Williams and Hitt, Hitt's solicitation of the driver-salesmen, the meeting between Williams and all of the driver-salesmen, and the return of the driver-salesmen to the respondent's warehouse.

At about 8:30 a. m., on the same day, Williams arrived at respondent's office and asked to see Meisenbach, the respondent. One of the office clerks advised

¹ The record inadvertently omits the motion of the Board to so amend the complaint, respondent's objection thereto, and the undersigned's disposition of the motion. The undersigned hereby orders the record corrected, and such correction is hereby made to indicate the events mentioned in the paragraph above and to insert into the record the written amendment offered by the Board's counsel and which instrument is hereby designated as Board Exhibit No. 12.

² See *Matter of John S. Doane Company*, 63 N. L. R. B. 1403; *Matter of Liebmann Breweries, Inc., et al.*, 56 N. L. R. B. 1727.

Williams that Meisenbach was out of town but that Robert E. Lee, respondent's manager, would be in the office within a short time. Lee arrived at the office at about 9:30 a. m. Williams, who had waited for Lee to return, introduced himself to the latter as an officer of the Union, asserted that the Union represented all of the driver-salesmen of respondent, and requested that respondent bargain with the Union with respect to the employees' hours, wages and working conditions. Lee replied that he had not sufficient authority to deal with the matter and suggested that Williams see Meisenbach, who was then out of the city. Williams, after requesting that Lee ask Meisenbach to contact him, then left the office.

At about 8:00 a. m. on November 21, 1945, the day following the conversation described above between Williams and Lee, Hitt was discharged by Lee. Hitt immediately advised Williams of the event by telephone. Upon the advice of Williams, Hitt returned to Lee's office and requested that Lee reinstate him. Prior to Hitt's return to Lee's office, Williams telephoned Lee and similarly requested that Hitt be reinstated. Lee referred both requests to Meisenbach. The latter, during a conversation with Hitt, denied the request. During the late afternoon of the same day, Williams telephoned Meisenbach at the latter's place of business. The ensuing conversation involved both the discharge of Hitt and the Union's request for recognition, but did not produce a settlement of either matter.

At about 8:00 p. m. of November 22, 1945, respondent held a meeting with the four remaining driver-salesmen. Meisenbach addressed the meeting, stated that Hitt had been discharged, discussed the driver-salesmen's earnings during 1945 as compared with earlier years, and asked whether the employees were satisfied. He received an affirmative reply to the question. The union was not discussed, beyond respondent's comments that he had never asked any of the employees whether or not they had a union card when he hired them, and that union activities had nothing to do with Hitt's discharge.

On November 23, 1945, the Union filed with the Board's Regional Office at Ft. Worth, Texas, a Petition for Investigation and Certification of Representatives wherein it alleged that a "question" concerning representation of respondent's driver-salesmen existed. On November 26, 1945, the Union also filed with the Board a charge alleging that the discharge of Hitt had been motivated by his union activities and constituted an unfair labor practice within the meaning of the Act.

In a letter dated November 23, 1945, the Board advised respondent that the petition had been filed. Respondent's reply, dated November 27, 1945, stated merely that Williams had telephoned advising respondent that Williams wished to see him as representative of the Union, and that Meisenbach would "be glad to see Mr. Williams personally, when you [the Regional Director] think it is best for me to do so." In a subsequent letter, dated December 3, 1945, relating to the Union's charges with respect to the discharge of Hitt, respondent offered to confer with Williams and the Board's agent.

On or about December 15, 1945, Williams and Sulton J. Boyd,³ a Field Examiner attached to the Board's Sixteenth Regional Office, conferred with Meisenbach at the latter's office concerning the methods by which the "question" concerning representation of the driver-salesmen might be determined by the Board.⁴ The conference, which was restricted to the representation question, was inconclusive in result except that Meisenbach promised to contact the Field Examiner by letter within a short time.

³ Incorrectly referred to in the record as Sullivan J. Boyd.

⁴ Prior to this conference, the Union had filed with the Board a statement waiving any of the matters alleged in its above-mentioned charge against respondent as grounds for setting aside any representative election which the Board might conduct among respondent's driver-salesmen.

Sometime between December 15, 1945, and January 3, 1946, respondent's attorney, Carl B. Callaway, advised the Board that respondent would consent to an election among his driver-salesmen to determine the representation issue. On or about January 3, 1946, the Board delivered to respondent's attorney a standard Board form captioned "Agreement for Consent Election," setting forth an agreement between the parties for the election proposed by Callaway, and requested that respondent execute the document and return it to the Board. Respondent, through his attorney, signed the document and delivered it to the Board on January 16, 1946, but altered it by deleting a certain provision therein. The deletion made the agreement unacceptable to the Board and the Union.

On January 30, 1946, the Union, having withdrawn its waiver,⁵ filed an amended charge upon which the Board based its original complaint herein.

There is no real disagreement among the parties with respect to the facts stated above. The Board contends that these facts, together with certain additional comments which it imputes to the respondent, substantiate and prove the allegations set forth in the complaint as amended. Respondent, on the other hand, contends that evidence which he introduced elaborating upon the facts outlined above, together with the incredibility of certain testimony introduced by the Board, effectively rebut the allegations recited in the complaint.

The Board contends that respondent was hostile to the Union and unions in general; that he learned of the organization of his driver-salesmen by Hitt and immediately discharged him because of his dominant role in those organizational activities; and that, upon being requested by the Union to recognize it as the exclusive representative of the driver-salesmen, respondent first violently rejected the request in terms which demonstrated the futility of further requests by the Union and, after the Board had intervened, engaged in dilatory tactics and interposed specious objections designed to defeat the Union and to discourage his employees concerning their union activities. Respondent argues that he discharged Hitt for the latter's failure to perform his job in accordance with instructions, and his lack of loyalty in selling respondent's product; and that respondent did not refuse to bargain with the Union, and, in fact, had no legal obligation to do so.

Hitt on direct examination testified that about two months prior to his discharge Meisenbach, the respondent, had asked him if he had "heard anything about the Union," that he replied, "Yes, I had several men to ask me to join," that Meisenbach had made no further comment.⁶ He further testified to the effect that, prior to his discharge on November 21, 1945, he had been an efficient employee; that he had never refused to pick up empty beer cases and bottles in accordance with respondent's instructions; and that neither his customers nor respondent's supervisory staff had complained to him about his alleged refusal to pick up empty cases.

Meisenbach denied that he had ever questioned any employee with respect to union activity; and testified to the effect that he had been consulted by Manager Lee on frequent occasions prior to Hitt's discharge about the latter's inadequacy as an employee, and that he had advised Lee to handle the matter as Lee's judgment dictated. Lee testified to the effect that he had felt inclined to discharge Hitt at an earlier date for his deficiencies, particularly his refusal to pick up empty cases, but, taking into consideration the fact that Hitt had been suffering from hemorrhoids for which he intended to undergo an operation, decided to retain Hitt in order to determine whether an improvement in his

⁵ See footnote 4, *supra*.

⁶ The original complaint alleged that respondent "from on or about November 20, 1945," had interrogated his employees regarding their union activities. The complaint was amended at the close of the hearing to include such interrogation "on or about September 20, 1945," see footnote 1, *supra*.

physical condition might not also improve the character of his work. Lee further testified in substance that he discharged Hitt on November 21, 1945, after Hitt had been hospitalized for and had recuperated from the surgical treatment mentioned above and also an ensuing attack of influenza,⁷ because Hitt continued to disregard instructions and otherwise expressed his contempt for respondent's organization. With respect to the immediate reason for his discharge of Hitt on November 21, 1945, Lee testified that on or about November 16, 1945, Brady Pendleton, respondent's cashier had reported to him that Hitt had complained about being paid only \$10 or \$11 for his services while riding his route with Duncan during the week following his return to work after his operation, and that in making the complaint had contemptuously referred to the respondent's organization by the use of a vulgar term; and that during the afternoon of November 19, 1945, Mrs. R. C. Coke, Jr., respondent's "office manager,"⁸ reported to him that she had given Hitt an order that morning for 400 cases of beer to be delivered to a United States Naval station on Hitt's route, that Hitt delivered only 200 cases and then advised her that he would deliver the remaining 200 cases a week later or the next day. He pointed out that this was the "last complaint" he had received from Mrs. Coke; that he was unable to direct Hitt to deliver the remaining 200 cases that day because Hitt had left the office; and that he remembered the instance "very plainly, due to the fact it was the main reason for the final decision to discharge Hitt." Lee further testified that on November 20 he requested Hitt to take the remaining 200 cases of beer to the Naval station and, that afternoon, instructed Mrs. Coke to prepare a check covering Hitt's salary from November 16 to November 22, 1945, inclusive, and his commissions on sales from November 16 to November 20, 1945, inclusive.⁹

With respect to the delivery of full cases of beer and the pick-up of empty cases by respondent's driver-salesmen, respondent's records reveal the following for the 11-month period preceding Hitt's discharge:

1945	Felker		Henderson		Hitt		Lynch		Tripp	
	Full Beer Out	Mtys Ret'd	Full Beer Out	Mtys Ret'd	Full Beer Out	Mtys Ret'd	Full Beer Out	Mtys Ret'd	Full Beer Out	Mtys Ret'd
Jan.....	2,102	2,321	2,946	3,566	3,432	3,494	3,536	4,908	3,587	4,050
Feb.....	3,013	2,654	4,777	4,058	4,840	4,305	5,064	4,449	5,478	5,208
Mar.....	2,981	2,541	3,983	4,465	4,216	4,271	3,946	4,513	4,851	5,076
Apr.....	3,715	4,170	5,649	5,588	6,425	6,579	6,357	6,180	6,862	6,773
May.....	4,107	4,180	6,457	6,420	7,023	6,785	6,047	6,279	7,142	7,401
Jun.....	3,918	4,099	6,812	7,223	6,622	6,318	6,655	7,009	7,724	8,096
Jul.....	3,358	3,436	4,523	5,013	5,151	4,856	5,941	5,989	5,359	6,268
Aug.....	4,586	4,254	4,446	4,925	5,804	4,993	6,703	6,052	7,541	6,894
Sep.....	3,801	4,034	6,146	5,758	5,990	5,638	6,549	5,920	7,541	6,805
Oct.....	4,381	4,058	5,960	5,504	5,808	5,765	6,648	6,612	6,596	7,114
Nov.....	4,349	3,982	5,882	5,704	4,867	4,922	6,495	6,317	5,794	5,719
Total.....	40,311	39,729	57,581	58,224	60,178	57,929	63,941	64,228	67,631	69,404
	<i>582 Less empties picked up than fulls out.</i>		<i>645 More empties picked up than fulls out.</i>		<i>2,249 Less empties picked up than fulls out.</i>		<i>287 More empties picked up than fulls out.</i>		<i>1,773 More empties picked up than fulls out.</i>	

⁷ Hitt entered the hospital on or about October 2, 1945, and remained there a week. For about 2 weeks thereafter, he was unable to work. Following this period, at the request of Lee, he returned to work, although not fully recovered, merely to ride the truck around his route while Route Supervisor Thomas H. Duncan and a helper performed all work on the route. During the second week following his return, Hitt operated the route, but was accompanied each day by Duncan. Hitt became ill from influenza about 10 days prior to his discharge and was absent from work until November 16, 1945.

⁸ Respondent's clerical force apparently consists of Mrs. Coke and Pendleton.

⁹ Lee delivered the check to Hitt and discharged him when Hitt reported for work the following morning.

The obvious interpretation of these records is that Hitt, among all of respondent's driver-salesmen, was the least efficient with respect to the return of empty cases. Further, Hitt admitted that the return of empty cases and bottles was an element which determined respondent's ability to obtain beer from the breweries for sale to his customers. Mrs. Coke corroborated Lee's testimony to the effect that customers had complained with respect to Hitt's failure to pick up empty cases, and her testimony was in turn partially corroborated by Roscoe White,¹⁰ Ben Friedman, Tom Lemos, and Mrs. R. E. Walker, customers of respondent, who testified that Hitt's laxity had on occasion made it necessary for them to hire trucks at their own expense to return empty cases to respondent. Mrs. Coke further corroborated Lee's testimony with respect to Hitt's refusal to deliver the entire order of beer to the Naval station on November 19, 1945.

With respect to the disclosure made by respondent's records, Hitt explained that either he had not had room on his truck to haul back empties, or that customers had not had the empties available for him to pick up. Hitt's explanation with respect to his failure to deliver the full order of 400 cases to the Naval station on November 19, 1945, was that the person in charge of receiving beer at the Naval station had stated that he had not enough room for the second 200 cases of beer because his warehouse was "full of empties." Hitt admitted that he did not explain this circumstance to either Mrs. Coke or Lee on November 19, 1945, but stated that he explained to Lee the following morning when questioned by Lee concerning the incident.

Another dispute exists between the parties with respect to a telephone conversation on November 21, 1945, between respondent Meisenbach and Williams, the representative of the Union. Williams and Meisenbach agree that during their telephone conversation, Williams requested Meisenbach to reinstate Hitt and that Meisenbach declined to do so; that Williams claimed that all the driver-salesmen had designated the Union as their bargaining agent; and that *the conversation ended by Meisenbach inviting Williams to visit the former's farm for a turkey dinner*. Williams, however, testified in substance that, upon being advised that the Union represented the driver-salesmen, Meisenbach stated that "he had run his business a long time without a union and he was going to continue to do so," and that "before he would do business with a damned union he would go out of business." Meisenbach, on the other hand, testified that, in reply to Williams' representation claim, he said: "That is news to me; why don't you come down and talk to me about it; this is all news and it is a rather serious matter."¹¹

One further matter is claimed by the Board's counsel to be decisive as to one of the issues in the case. As stated above, the efforts of the Regional Office to arrange a consent election to determine the representation question failed because respondent insisted upon deleting from the standard form a certain provision therein. The provision deleted reads as follows:

. . . ; provided that the determination of the Regional Director shall be final and binding upon any question, including questions as to the eligibility of voters, raised by any party hereto relating in any manner to the election.

¹⁰ White testified that, although Hitt was lax in the pick up of empty cases, he had not complained to the respondent.

¹¹ Lee testified that he was in Meisenbach's office during the conversation, and corroborated Meisenbach's version of the latter's part of the conversation. Mr. O. L. Williams, wife of Williams, testified that she was sitting 2 or 3 feet from Williams during the conversation and that Meisenbach "was talking awfully loud and was using bad language. . . . I did hear him say he would close the doors before he would let the Union organize; that he had plenty of money, and then I heard them talking about the farm. . . . He invited my husband up to his farm."

Prior to returning the form, Callaway advised Field Examiner Boyd by telephone that he objected to the provision and was deleting it from the agreement. Callaway testified that Boyd offered to amend the agreement "so that the National Labor Relations Board would be substituted for the Regional Director with reference to the power to which I objected," and that he advised Boyd that his "objection was based upon the granting of any such power without any appeal to anybody or any agency." Boyd testified that in response he told Callaway that "if he were objecting to the authority as set out in that particular agreement being exercised by the Regional Director that I thought I [would] send him a stipulation for certification by the Board,"¹² and Mr. Callaway told me he had no more objection to Dr. Elliott¹³ exercising that authority than he did for the Board to exercise it; that he was simply opposed to waiving that—simply, primarily opposed to including that authority in any contract which he prepared or was a party to." Subsequently, on January 16, 1946, the Regional Director, in a telegram advised Callaway that the Board could not approve the consent election agreement as amended by Callaway's deletion; but offered to proceed with the consent election if Callaway would withdraw his objection to the deleted provision. On January 21, 1945, Callaway replied by a letter in which he renewed his objections as stated above; stated his client's willingness to determine the representation question by a consent election rather than by formal Board proceedings; and supplied certain information relating to respondent's business. The Regional Director replied on January 22, 1946, by advising Callaway that the Union had withdrawn its waiver¹⁴ and that therefore the Board would be unable to proceed with the representation matter until it had completed an investigation of the Union's charge that Hitt had been discharged because of his union activities. Again on January 30, 1946, Callaway wrote the Regional Director suggesting and urging that an election be conducted and offering to cooperate with the Board in order to accomplish a prompt decision with respect to the Union's charge. On January 31, 1946, the Regional Director advised Callaway that the Union had amended its original charge by alleging that respondent had refused "to bargain collectively." On February 2, 1946, and again on February 20, 1946, Callaway wrote the Regional Director urging that the dispute between respondent and the Union be resolved promptly by the Board and offering the Board the "fullest cooperation."

B. Conclusions

1. The alleged discriminatory discharge of James E. Hitt

Concerning the respondent's motive for discharging Hitt, there is no direct or credible evidence that the discharge was occasioned by Hitt's membership in the Union, and any finding to that effect would necessarily, in this case, be based entirely upon an inference drawn from evidence that respondent was aware of Hitt's membership in the Union;¹⁵ that the discharge occurred shortly after respondent became aware of Hitt's union activities; and that respondent failed to produce a reason for the discharge other than Hitt's union activities.

¹² A standard Board form captioned "Stipulation for Certification upon Consent Election."

¹³ Edwin A. Elliott, Regional Director for the Sixteenth Region.

¹⁴ See footnote 4, *supra*.

¹⁵ With respect to this matter, the record is not entirely clear. However, respondent on November 20, 1945, was advised by Williams that all driver-salesmen, including Hitt, had joined the Union, and admittedly believed Hitt to be a disgruntled employee dissatisfied with his wages and working conditions. These facts and the fact that respondent's business was small and closely supervised by a large supervisory staff indicate, and the undersigned so finds, that respondent believed or suspected that Hitt had joined the Union.

In the opinion of the undersigned, the reasons advanced by respondent for his termination of Hitt's employment offer a reasonable and plausible explanation for the event. Respondent's efforts to secure the return of empty beer cases from its customers through its driver-salesmen had failed substantially only in the case of Hitt. Hitt's explanation of his failure to cooperate in this matter is obviously without merit, and not credited by the undersigned. Particularly noteworthy are the facts that during October and November 1945, while his route was serviced either by Duncan or by Hitt under the direct supervision of Duncan, no difficulty was encountered in returning the empty cases; and that customers had been compelled to hire transportation to return empty cases to the respondent because of Hitt's failure to do so, as evidenced by the credible testimony of White, Friedman, Lemos and Mrs. Walker.

Any contention that respondent merely seized upon Hitt's deficiency in connection with the return of empty cases as a pretext for his discharge, rather than give Hitt the further opportunity respondent had intended to give him upon his return to work following his illness, is not supported by the evidence. On the contrary, Hitt demonstrated that he had not returned with any determination to function as a competent and efficient employee by his failure to follow instructions with respect to the delivery on November 19, 1945, of 400 cases of beer to the Naval Station. While Hitt's explanation for not delivering the complete order according to his instructions is not decisive, in view of his admitted failure to advance this explanation until Manager Lee instructed him on the following morning to complete the order, the explanation is particularly unconvincing. First, no reason is given for his failure to relate such facts to Mrs. Coke immediately upon his return to the warehouse on November 19. Second, Hitt on direct examination testified that on November 16, 1945, he had made an appointment to meet Williams, the union representative, at 3:30 p. m. on November 19, 1945. It is significant that Hitt also testified in response to interrogation by the undersigned, that he had completed his delivery of the first 200 cases to the Naval Station at about 2:00 p. m. and that he had spent about 4 or 5 hours in making this delivery. Obviously, if Hitt had delivered an additional 200 cases of beer in accordance with his instructions, he would have been unable to keep his appointment with Williams. Inasmuch as there is no evidence that he failed to meet Williams as planned, the undersigned concludes that Hitt elected to fulfill his appointment with Williams rather than his obligation as an employee of respondent.

That Hitt gave respondent further cause to perceive the futility of any expectation that Hitt intended to become a more efficient employee is further evidenced by the facts that he continued to advertise his intention to accept employment with one of respondent's competitors as soon as possible; that a few days prior to his discharge he referred to respondent's organization by the use of a vulgar and contemptuous adjective; and that he resented respondent's close supervision of his route.¹⁶

In view of the foregoing and the entire record in the case, the undersigned finds that there is not sufficient evidence to establish that the reason for respondent's termination of Hitt's employment was the latter's activity on behalf of the Union. Accordingly, the undersigned finds that the allegations of the complaint as to Hitt's discharge have not been sustained.

2. The alleged refusal to bargain

There is no dispute that all of respondent's driver-salesmen constitute a unit appropriate for the purposes of collective bargaining within the meaning of the

¹⁶ These findings are based upon the credible and, in part, uncontradicted testimony of Lee, Pendleton and Duncan.

Act, and the undersigned so finds. Further, the undersigned finds that on November 19, 1945, and at all times thereafter, the Union was and is duly designated as the representative for the purposes of collective bargaining by a majority of the employees in said bargaining unit.¹⁷

In view of the above findings, respondent's contention that he is not obligated legally to bargain with the Union until such time as the Union's majority status has been established by an election by secret ballot is obviously without merit. Respondent's contention disregards the fact that Section 9 (c) of the Act empowers the Board to ascertain the majority representative not only by means of a secret ballot of employees but through a proceeding under Section 10 of the Act or by "any other suitable method."

The sole issue, therefore, is whether respondent refused to bargain with the Union as the exclusive bargaining agent of the employees in the unit found above to be appropriate.

The Union requested recognition by the respondent on November 21, 1945, during the above-mentioned telephone conversation between Williams, the union representative, and Meisenbach. According to the testimony of Williams, Meisenbach not only refused to recognize and deal with the Union on this occasion, but made it clear that persistence on the part of the Union would result in discontinuance of respondent's business with ensuing economic loss to his employees.

Williams' testimony, however, presents a patent incongruity, and Williams himself was an evasive and reluctant witness on cross-examination by respondent's counsel. The incongruity presented by Williams' testimony lies in the fact that, while it evidences an adamant intent by respondent to ignore his employees' rights under the Act by refusing to deal with the Union, it also discloses an invitation by Meisenbach to Williams to visit the former's home. Inasmuch as Meisenbach had never met or seen Williams at the time of the conversation and no explanation is shown to account for the presence in the same conversation of two expressions of Meisenbach's attitude so diametrically opposite, the undersigned does not credit Williams' testimony that Meisenbach threatened to close his business rather than deal with the Union and credits Meisenbach's denial thereof. Accordingly, the undersigned finds that on November 21, 1945, in reply to the Union's telephonic request for recognition, respondent did not refuse to bargain with the Union but suggested a personal meeting between himself and Williams, the Union's representative, at the latter's convenience.¹⁸

The Board, however, contends that further evidence that respondent was determined not to deal with the Union is shown by respondent's conduct during the Board's attempt to resolve the representation question raised by the Union's petition. With respect to this issue the Board urges that respondent's objection to the waiver contained in the consent election agreement proposed by the Board was specious and raised merely to avoid an expeditious election to determine the issue. The undersigned finds no merit in this contention. The record does not show bad faith on the part of the respondent in insisting on the deletion. In fact, the form after deletion is substantially the same as an alternate form permissible in consent elections.

In accordance with the foregoing and the entire record in the case, the undersigned finds that there is not sufficient evidence to support that part of the com-

¹⁷ This finding is based upon cards signed on November 19, 1945, by each of respondent's 5 driver-salesmen then employed, including 4 employed at the time of the hearing herein, approving and designating Local No. 157 of the Union as his collective bargaining agency.

¹⁸ While it was possible for Mrs. Williams to have heard Meisenbach's loud and excited references to the Union on the telephone, it is unreasonable to believe that Meisenbach would have issued his dinner invitation to Williams in such tones as to have been overheard by Mrs. Williams. Accordingly, the undersigned does not credit her testimony.

plaint alleging that respondent has refused to bargain with the Union in violation of Section 8 (5) of the Act.

3. The alleged interrogation, interference, restraint, and coercion

In support of the allegation in the complaint that respondent had interrogated his employees concerning their union activities, the Board apparently relies solely upon the testimony of Hitt. Although the Board called as witnesses all of respondent's driver-salesmen except one employed after Hitt's discharge, none but Hitt could recall any instance on which respondent or any of respondent's supervisory staff had so questioned any of them. As indicated above, the undersigned does not find Hitt to be a credible witness and accordingly credits Meisenbach's denial that he had ever interrogated Hitt concerning union activities.

With respect to the meeting of driver-salesmen conducted by respondent on the evening of November 22, 1945, there is no dispute that respondent called the meeting because of the discharge of Hitt and apparent unrest among the driver-salesmen. However, Meisenbach at the meeting made it clear that he did not "care" whether or not the driver-salesmen joined the Union and that Hitt's membership in the Union had not been the cause of his discharge. Accordingly, although Meisenbach's admonition to the driver-salesmen to come to him or Lee if they were not satisfied is subject to the possible interpretation that it was an order not to seek the assistance of the Union, the undersigned finds no merit in the Board's contention that the meeting was intended to or, in fact, did interfere, restrain or coerce respondent's employees in the exercise of any rights guaranteed them under the Act.

One further matter remains to be considered. The Board contends that certain statements by respondent and his counsel, Callaway, made during the hearing to the undersigned are, *per se*, violative of Section 8 (1) of the Act. The substance of the statements were that since November 1945 respondent has held proposed changes in his business in abeyance in order to protect himself from possible charges that such changes had been made to influence employees with reference to their decision about the Union; that the respondent has urged the Board on several occasions to determine the question concerning representation; that respondent finds it impossible to delay longer; and that, therefore, "if the Regional Board does not give—some character of assurance" within the near future of what it intends to do about the representation issue, respondent will proceed to make such changes as he find necessary in the interests of the efficient operation of his business. Precisely to what changes respondent and his counsel refer is not entirely clear although there is some indication that they include salary raises for the driver-salesmen and the employment of additional employees.¹⁹

The undersigned finds no merit in the Board's contention that the above statements are violative of Section 8 (1) of the Act. Certainly such statements cannot be held to have interfered with, restrained, or coerced respondent's employees. At most the statements were made merely to emphasize respondent's often repeated contention that the Board and the Union had refused to avail themselves of respondent's willingness to cooperate in determining the representation question raised by the Union.

The undersigned concludes, in view of the entire record in the case and the foregoing, that the evidence is not sufficient to support the allegations of the

¹⁹ Most of the statements summarized above were made by respondent's counsel either as a witness for respondent or during oral argument before the undersigned. Respondent, however, apparently ratifies them.

complaint that respondent has interfered with, restrained, or coerced its employees in the exercise of the rights guaranteed them in Section 7 of the Act.

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

CONCLUSIONS OF LAW

1. The operations of the respondent, K. K. Meisenbach, doing business as Meisenbach Distributing Company, Dallas, Texas, occur in commerce, within the meaning of Section 2 (6) and (7) of the Act.

2. International Union of United Brewery, Flour, Cereal and Soft Drink Workers of America is a labor organization within the meaning of Section 2 (5) of the Act.

3. The respondent has not engaged in unfair labor practices, within the meaning of Section 8 (3) of the Act by discharging and refusing to reinstate James E. Hitt.

4. The respondent has not refused to bargain collectively with the Union in violation of Section 8 (5) of the Act.

5. The respondent has not interfered with, restrained, or coerced its employees in the exercise of the rights guaranteed by Section 7 of the Act, and has not thereby engaged in an unfair labor practice within the meaning of Section 8 (1) of the Act.

RECOMMENDATION

Upon the basis of the foregoing findings of fact and conclusions of law, it is recommended that the complaint herein be dismissed.

As provided in Section 33 of Article II of the Rules and Regulations of the National Labor Relations Board, Series 3, as amended, effective November 27, 1945, any party or counsel for the Board may within fifteen (15) days from the date of the entry of the order transferring the case to the Board, pursuant to Section 32 of Article II of said Rules and Regulations file with the Board, Rochambeau Building, Washington 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. Immediately upon the filing of such statement of exception and/or brief, the party or counsel for the Board filing the same shall serve a copy thereof upon each of the other parties and shall file a copy with the Regional Director. As further provided in said Section 33, should any party desire permission to argue orally before the Board, request therefor must be made in writing within ten (10) days from the date of the order transferring the case to the Board.

JOSEPH C. WELLS,
Trial Examiner.

Dated April 22, 1946.