

entering into, renewing, or enforcing any agreement which gives a preference in hire or tenure of employment to any members of the Respondent.

Having found that the Respondent has engaged in unfair labor practices within the meaning of Section 8 (b) (1) (A) and 8 (b) (2) of the amended Act, the undersigned will recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the amended Act.

Having found that in violating Section 8 (b) (1) (A) and 8 (b) (2) the Respondent has deprived Clarence Dowdall and Johnny H. Dockery of employment by J. C. Boespflug Company on its construction project in the vicinity of Anchorage, Territory of Alaska, it will be recommended that: (1) The Respondent notify the J. C. Boespflug Company, in writing, and furnish copies of said notification to Dowdall and Dockery, that it has withdrawn its objections to the employment of Dowdall and Dockery as carpenters by the J. C. Boespflug Company on any construction project within the jurisdiction of the Respondent in the Territory of Alaska, and requests the Company to offer Dowdall and Dockery employment on any construction project now in progress or begun in the 1954 construction season; and (2) the Respondent make Dowdall and Dockery whole for any loss of earnings they may have suffered by reason of Respondent's conduct in causing the termination of their employment by the Company on October 10, 1953, in accordance with the formula of the Board set forth in *F. W. Woolworth*, 90 NLRB 289.⁹ It will also be recommended that the Respondent make available to the Board, upon request, payroll and other records to facilitate the checking of the amount of back pay due.

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

CONCLUSIONS OF LAW

1. The J. C. Boespflug Company, a Washington corporation, is an employer engaged in commerce within the meaning of Section 2 (6) and (7) of the Act.

2. The Respondent, United Brotherhood of Carpenters and Joiners of America, Local No. 1281, is a labor organization within the meaning of Section 2 (5) of the Act.

3. By restraining and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act, the Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8 (b) (1) (A) of the amended Act.

4. By causing the J. C. Boespflug Company, an employer, to discriminate against employees in violation of Section 8 (a) (3) of the Act, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (b) (2) of the amended Act.

5. The aforementioned unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

[Recommendations omitted from publication.]

⁹ The back-pay period shall begin in each case on October 10, 1953, and shall end when the Respondent gives notification to the Company that it has withdrawn its objections to the employment of Dowdall and Dockery, as recommended above. In determining the amount of back-pay due each employee for the year 1953 and ensuing years, proper allowance shall be made for the fact that the men are employed to some extent on a seasonal basis

AMERICAN SNUFF COMPANY and UNITED STEELWORKERS OF AMERICA,
CIO. Case No. 32-CA-149. August 19, 1954

Decision and Order

On June 30, 1953, Trial Examiner C. W. Whittemore 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 in its entirety, as set forth in the copy of the Intermediate

Report attached hereto. Thereafter, the General Counsel and the Union filed exceptions to the Intermediate Report and supporting briefs and the Respondent filed a brief in support of the Intermediate Report.¹

The Board has reviewed the rulings made by the Trial Examiner 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 filed by the General Counsel and the Union and the parties' briefs, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, with the exceptions, modifications, and additions noted below.

1. We agree with the Trial Examiner that the Respondent did not violate Section 8 (a) (1) of the Act, as alleged in the complaint. We base such finding upon the fact that the testimony credited by the Trial Examiner, whose credibility resolutions we accept, fails to establish that the Respondent interfered with, restrained, or coerced employees in the exercise of their rights guaranteed by the Act.³

The General Counsel has excepted to the credibility findings of the Trial Examiner. The Board, however, attaches great weight to the credibility findings of the Trial Examiner insofar as they are based on demeanor, and accordingly does not overrule a Trial Examiner's resolution of credibility except where the clear preponderance of all the relevant evidence convinces the Board that his resolution was incorrect.⁴ No such conclusion is warranted in this case.

2. We also agree with the Trial Examiner, for the reasons stated by him in the Intermediate Report, that the Respondent did not discriminate against Elsie Craig Schroer, in violation of Section 8 (a) (4) of the Act.

3. The Trial Examiner found that the Respondent did not discriminatorily deny employment to the approximately 230 persons named in the complaint, as amended. This conclusion of the Trial Examiner rests on two grounds, namely, (1) that whatever applications were

¹ The Respondent also filed exceptions to the Intermediate Report which were to be considered by the Board only if it failed to adopt the recommendation of the Trial Examiner that the complaint be dismissed in its entirety. As we are adopting this recommendation of the Trial Examiner, for reasons set forth hereinafter, we shall not concern ourselves with the issues raised by the Respondent's exceptions.

² For reasons stated in *Sailors' Union of the Pacific, AFL (Moore Dry Dock Company)*, 92 NLRB 547, apart from other considerations, we find no merit in the Union's exceptions to the Trial Examiner's denial of its motion at the hearing to amend the complaint, which motion was opposed by the General Counsel, and to the Trial Examiner's rejection of the offer of proof made in support of this motion. Contrary to the Union, we find no support for its exceptions in this connection in *Marine Engineers' Beneficial Association v. N L R. B.*, 202 F. 2d 546 (C. A. 3), and *N. L. R. B v Atlanta Metallic Casket Company*, 205 F. 2d 931 (C. A. 5)

³ We accordingly deem it unnecessary to pass upon the validity of the alternative grounds relied upon by the Trial Examiner for recommending dismissal of certain 8 (a) (1) allegations in the complaint.

⁴ *Standard Dry Wall Products, Inc*, 91 NLRB 544, enfd 188 F. 2d 362 (C. A. 3).

filed by complainants with the Respondent on July 19, 1950, or shortly thereafter, following their permanent replacement as economic strikers, were applications for immediate reinstatement, as that term is used by the Board in its remedial order, and (2) that the credible testimony failed to establish that the complainants were denied employment, following the termination of their economic strike on July 17, 1950, for discriminatory reasons. In his exceptions and briefs, the General Counsel contends that these findings are erroneous, maintaining in the former connection that the applications were for employment generally, and that they were intended to have continuing effect.

Upon careful analysis of the entire record, we are satisfied that the evidence preponderates in favor of a finding, which we make, that the applications were not for employment generally or of a continuing nature, as the General Counsel contends, but that they were for immediate reinstatement, as the Trial Examiner found. In view thereof, and as the complainants were not entitled to reinstatement as of the time their applications were filed,⁵ it follows, for the reasons set forth in *N. L. R. B. v. Pennwoven, Inc.*, 194 F. 2d 521 (C. A. 3), and *N. L. R. B. v. Childs Company*, 195 F. 2d 617 (C. A. 2), that no finding of discrimination within the meaning of Section 8 (a) (3) is warranted.⁶

But even were we to assume that all the complainants in this case filed applications for employment in any job for which they were qualified and that they intended the applications to have continuing effect for an indefinite period of time, all to the Respondent's understanding, we would still be compelled to dismiss this aspect of the case for the reason that the preponderance of the evidence fails to establish that the complainants were denied employment for discriminatory reasons. Our agreement with this ultimate conclusion of the Trial Examiner is based principally upon the following considerations: Following July 19, 1950, the date on which most of the applications by complainants were filed, there was no hiring by the Respondent until July 24, 1950. Between the latter date and January 30, 1952, the period for which data was submitted, there were 132 hirings by the Respondent. Of these hirings, 21 took place before January 9, 1951, and 18 of those 21 hirings were of strikers. No contention is made, nor does the record show, that any of these re-

⁵ The jobs vacated by the complainants in going out on strike had theretofore been filled by the Respondent, as was its right, and there were then no vacancies

⁶ We find without merit the General Counsel's contention that the *Pennwoven* and *Childs* decisions are not controlling here, because requests for reinstatement by complainants who were not entitled to reinstatement were also in issue in those cases. It is immaterial, in our opinion, that the complainants in this case lost their right to reinstatement upon being permanently replaced while on economic strike, whereas in the cited cases the complainants, because of the 6-month limitation provision of Section 10 (b), had lost the right to demand reinstatement as employees who had been discriminatorily deprived of their employment.

hired strikers was discriminatorily treated upon his or her return to work. While some special experience acquired by them in the Respondent's employ may have entered into the hiring of some of those 18 individuals, it does not appear that that was the reason for the rehire of most of them, including complainants W. Shaw and H. White, who were rehired as long after the termination of the strike as December 13, 1950, and January 8, 1951, respectively. Nor does the record show the union activity of the rehired strikers to have been less prominent than that of other strikers who are complainants herein. Indeed, 16 of those in the group under discussion are complainants in this case,⁷ alleging in effect that they were not returned to work sooner for discriminatory reasons.

Under all these circumstances, we are unable to predicate a finding of discrimination against the Respondent on this record. If the Respondent's failure to hire but one striker during the period from January 1, 1951, to January 30, 1952, has any significance when viewed in isolation, it falls far short of giving rise to such an inference of discrimination as would sustain the complaint when viewed in context, particularly when weighed against the nondiscriminatory treatment accorded strikers during the more than 5 months immediately following July 19, 1950, and in the absence of credible testimony showing restraint and coercion of employees by the Respondent during any of the period covered by the complaint. And we find no other evidence in the record which would support such an inference.⁸

On the basis of all the foregoing, we find that the preponderance of the evidence fails to establish that the complainants named in Appendix A of the complaint, as amended, were refused employment for discriminatory reasons. Accordingly, we shall dismiss the complaint as to them.

As we have found that the Respondent has not engaged in any of the unfair labor practices alleged in the complaint, we shall dismiss the complaint in its entirety.

[The Board dismissed the complaint.]

MEMBER PETERSON took no part in the consideration of the above Decision and Order.

⁷ The other two were complainants originally, but their names were deleted from the complaint at the General Counsel's request during the course of the hearing.

⁸ We are not unmindful in this connection of the testimony relating to events occurring prior to the 6-month statutory period of Section 10 (b) which was adduced by the General Counsel for "background" purposes. This testimony was disputed by witnesses for the Respondent and the credibility issues resulting therefrom were left unresolved by the Trial Examiner. However, even were we to credit the General Counsel's witnesses, and hold their testimony, some of which concerns occurrences of more than 6 months before the termination of the strike, to be material, that testimony would plainly lack controlling significance under all the facts and circumstances noted above.

Intermediate Report**STATEMENT OF THE CASE**

A charge having been duly filed and served, a complaint and notice of hearing thereon having been issued and served by the General Counsel of the National Labor Relations Board, and an answer having been filed by the Respondent Company, a hearing involving allegations of unfair labor practices in violation of Section 8 (a) (1), (3), and (4) of the National Labor Relations Act, as amended, 61 Stat. 136, herein called the Act, was held in Memphis, Tennessee, before the undersigned Trial Examiner, on various dates between March 3 and 8, 1952, and April 13 and May 2, 1953.

In substance the complaint, as amended several times during the hearing, alleges and the answer, also as amended, denies that. (1) Following the abandonment of an economic strike on July 17, 1950, and their unconditional offer to return to work, about 230 named employees were discriminatorily refused rehiring by the Respondent because of their participation in the strike; (2) in December 1952 the Respondent refused to hire Elsie Craig Schroer, an applicant for employment, because charges in this case had been filed and the proceedings were pending; and (3) by the foregoing and other specified acts the Respondent has interfered with, restrained, and coerced employees in the exercise of rights guaranteed by the Act.¹

At the hearing all parties were represented, were afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence pertinent to the issues, to argue orally upon the record, and to file briefs and proposed findings and conclusions. Oral argument was waived. Briefs have been received from General Counsel and the Respondent.

Disposition of the Respondent's motions to dismiss the complaint, urged at the close of the hearing and upon which ruling was then reserved, is made by the following findings, conclusions, and recommendations.

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

FINDINGS OF FACT**I. THE BUSINESS OF THE RESPONDENT**

American Snuff Company is a New Jersey corporation with a plant in Memphis, Tennessee, where it is engaged in the manufacture and wholesale distribution of snuff. During 1950, a period representative of all times material herein, the Respondent purchased leaf tobacco valued at more than \$1,000,000, about 50 percent of which was transported to its Memphis plant from points outside the State of Tennessee. During the same year it sold and delivered snuff valued at more than \$1,000,000, about 70 percent of which was sold and shipped to customers outside the State of Tennessee.

It is found that the Respondent is engaged in commerce within the meaning of the Act.

II. THE LABOR ORGANIZATION INVOLVED

United Steel Workers of America, CIO, is a labor organization admitting to membership employees of the Respondent.

III. THE ALLEGED UNFAIR LABOR PRACTICES**A. Background and issues**

All major issues in this case, as finally submitted by General Counsel, arose from the unsuccessful economic strike begun by a majority of the Respondent's employees

¹ On the second day of the hearing General Counsel amended the complaint to include an alternate allegation that, because of certain unfair labor practices, the strike was prolonged and became an unfair labor practice strike on or about March 6, 1950; and that on March 10, 1950, the strikers made an unconditional offer to return but were discriminatorily refused, then and thereafter by the Respondent, reinstatement to their jobs. Upon resumption of the hearing in April 1953, however, General Counsel stated that he was abandoning this alternate allegation of an unfair labor practice strike and would claim only that former employees were refused rehiring after an economic strike. Thereafter counsel for the Union made, General Counsel opposed, and the Trial Examiner denied, a motion to amend the complaint to include allegations of refusal to bargain, within the meaning of Section 8 (a) (5) of the Act, before the abandonment of the strike.

in January and ending in mid-July 1950. The strike began during contract negotiations which had started in November 1949, following a Board-conducted election and certification of the Union.

The strike was long, bitter, and liberally marked by incidents of disorder and assault, if not serious violence, on the part of both strikers and representatives of management.² The record contains a good deal of disputed testimony concerning remarks made by company officials to strikers which General Counsel claims were coercive and also indicative of an intent on the part of the Respondent, even before the end of the strike, not to rehire any of the strikers.

On July 17, 1950, the Union wired the Respondent that it was "officially calling off this strike and removing the picket line," and "requesting striking employees to report for work Wednesday morning of this week at regular work time." On that Wednesday morning, July 19, about 240 persons reported at the plant, were interviewed by representatives of management, and signed documents headed "Application for Reinstatement." Some of these applicants were thereafter rehired. The remainder had not, at the time of the hearing, been reemployed. Although not in agreement as to precise number, both General Counsel and the Respondent agree that between July 19, 1950, and January 1952, a number of job openings occurred which were not filled by individuals who had applied on July 19, 1950. It is General Counsel's claim, in substance, that all former strikers who reported for work in July 1950 and thereafter were not hired and have been discriminated against because of their participation in the strike—even if their number is greater than the number of job vacancies occurring. It is this allegation which the preponderance of evidence must sustain, if violation of Section 8 (a) (3) of the Act is to be established.

B. *The alleged discrimination in rehiring*

1. Elements pertinent to illegal discrimination

At the outset and for clarification, the Trial Examiner considers it well to paraphrase certain principles which the Board enunciated in *Textile Machine Works, Inc.*, 98 NLRB 1352. Here, the Trial Examiner believes, it is necessary that General Counsel establish that: (a) On and after July 19, 1950, the Respondent had job openings which the alleged discriminatees were qualified to fill; (b) normally, absent a discriminatory policy, the Respondent would have considered the discriminatees for employment upon the filing of their applications; and (c) the discriminatees were rejected or denied consideration for employment because of their union or concerted activities, rather than on the basis of some permissible criterion.

As to (a), it has been noted above that although the parties disagree as to the actual number of openings, there is no dispute that a substantial number of vacancies occurred after July 19, 1950. In general, such openings had previously been occupied by strikers—in many cases for many years. It may reasonably be assumed, because of the unskilled nature of most of the jobs at the plant, that strikers who had done the same or similar work were as capable of filling vacancies as wholly new employees.

As to (b), the Trial Examiner turns first to the question of applications. The point will be considered in the light of another Board principle, also set out in the above-quoted decision, to the effect that applications must be filed "in permanent form which effectively put the Respondent on continuing notice" that the applicants desire and are available for employment in any job for which they are qualified. The Respondent in this case does not concede that applications made on July 19, 1950, were either continuing or for any job available, but on the contrary claims that they were for "reinstatement" to each applicant's regular job, and that they "continued," if at all after the date made, only for a "reasonable period." Thus, the nature of the applications is placed squarely in issue.

² In his complaint, General Counsel alleged that certain members of the Memphis Police Department, as agents for the Respondent, engaged in conduct violative of the Act. Early in the hearing testimony was elicited by General Counsel tending to show that police had confiscated a camera belonging to a CIO representative while at about the same time a photographer employed by the Respondent was permitted to take pictures of the picket line. General Counsel claimed that in the disparity of treatment was an implication that the police were acting as agents of the Respondent. Upon motion the testimony regarding the incidents, as given by the witness then on the stand, was stricken, with the right granted to move for reinstatement in the event competent evidence of agency should be introduced. No persuasive evidence establishing such agency was thereafter offered. It is specifically found that the evidence is insufficient to sustain the allegations of the complaint relative to members of the Memphis Police Department.

To determine the merit of the opposing positions as to the nature of the applications, the Trial Examiner cannot rely solely upon the testimony of the scores of witnesses who appeared, briefly, and said that on July 19, 1950, they presented themselves to an identified company official and told him that they would take any job when any vacancy occurred. Such reliance would be arbitrary indeed, since many witnesses, also appearing for the General Counsel, said that they applied on July 19 for the same job they held before the strike. Several former strikers also said that after July 19 they returned to the plant and obtained written releases, in order to obtain work elsewhere, a fact which clearly leads to the presumption, in the absence of any credible evidence that they informed the Company to the contrary, that they were withdrawing application for work—either as reinstatement or for any job, at the Respondent's plant. In short, the testimony of General Counsel's witnesses may indicate a possible pattern of continuing application for any job, but does not establish it beyond doubt. The surrounding circumstances must be examined.

Counsel for General Counsel himself offered the stipulation, which was accepted by counsel for the Respondent, that "all of the striking employees were advised and instructed to report back for work by their union representatives." Credible evidence supports the Respondent's claim that the Union, in calling off the strike, at the same time demanded that strikers be reinstated to their regular jobs, with displacement if necessary of employees hired during the strike. For many weeks before July 17 the Union had insisted during negotiations with the Company that full reinstatement with previously enjoyed rights and privileges should be accorded the strikers. Its insistence was maintained in the face of the Employer's stout claim, which at the hearing General Counsel conceded was supported by facts, that after February 21, 1950, and on July 19, 1950, there were no vacancies and all jobs in the plant were filled. The language of the Union's wire of July 17, to the effect that the strikers were being requested "report for work . . . at regular work time" is consistent with the Union's previously defined position. Had it meant that the strikers would apply for employment, and for placement upon a preferential hiring list, presumably it would have said so.

Acting upon this wire, the Respondent promptly drew up forms which it had never used before, headed "Application For Re-instatement" [sic], which contained space for noting "Job last assigned here" but no printed legend: "Job applied for." These forms were used on July 19, and thereafter, only for strikers "reporting." In view of the Union's demand and its wire, the use of the "reinstatement" form by the Respondent seems consistent and in good faith—unless there be attributed to counsel Fowler, who drew up the form, extraordinary prescience, enabling him on July 17, 1950, to foresee and immediately to prepare by documentary entrapment to meet an issue which various counsel for General Counsel did not eventually define until mid-April 1953. The Trial Examiner hesitates to conclude the latter alternative.

In his brief counsel for General Counsel argues vigorously that the Trial Examiner must, upon the facts, conclude that applications were made in July 1950, and that the Respondent then and at all times thereafter considered them to have been made, for any job and with indefinite, continuing effect. Yet the Union, which General Counsel concedes *instructed* strikers to report on July 19, has never made any such claim in any charge introduced into evidence.³ The testimony of a company official is undisputed that not until September 1951, more than a year after the close of the strike, was the Respondent advised by a Board official that "there was no longer any refusal to bargain charge involved, but he was investigating discrimination in hiring." As late as March 1952, when the hearing opened, General Counsel contended, in the amended complaint, that "reinstatement" to previously held jobs was an issue. And not until April 1953, did General Counsel withdraw from that position and urge only that the issue was one of rehire, as new employees, to any jobs available. In short, it was not until more than a year after the event that any Board agent alerted the Respondent to the possibility that it might sometime have to meet allegations of discrimination in hiring. The persuasiveness of General Counsel's argument, as to what the Trial Examiner should now conclude to have the nature of the applications, is apparently lacking of precedent in General Counsel's own appraisal before the hearing, of the actual issues.

Further, as to the point of applications, the Trial Examiner has duly considered the Board's recent restatement and clarification of its original decision and order in the above-cited *Textile Machine Works, Inc.* case. (Supplemental Decision and

³ The one specific claim in the only charge placed in evidence relates to a refusal to bargain, which is not raised as an issue in the complaint. The charge is silent as to any allegation of discrimination, either as to reinstatement or rehire.

Order, 105 NLRB 717.) There the Board concluded that certain "requests," or applications, "evinced the desire of the discriminatees for employment, and not for reinstatement. . . ." It appears to the Trial Examiner that the real question in this case is not what the General Counsel, the Trial Examiner, and the Board, in turn, may now infer to have been the actual intent and "desire" of the applicants as individuals on July 19, 1950, and from such inference conclude that the Respondent should reasonably have known on that date what the applicants "desired," but what the Respondent's good-faith belief was, on that date and until issuance of the complaint, as to the nature of the applications: whether for reinstatement or for placement on a hiring list. And to determine what the Respondent believed, in this case the specific request of the Union and its steadily maintained and repeatedly expressed position must be accorded more weight, it appears to the Trial Examiner, than the inconsistent testimony of scores of individuals. As noted, General Counsel conceded that the Union *instructed* the strikers to report for work. For months the Respondent had been dealing with the Union as spokesman for the strikers. And the fact is undisputed that *before* the abandonment of the strike the Union rejected offers by the Respondent to place the strikers upon a preferential hiring list.⁴ It would be hazardous, at this late date, for the Trial Examiner to conclude that the Union really meant to ask for something which at the time it rejected.⁵

The Trial Examiner is convinced and finds, from the preponderance of credible evidence, that the applications of the strikers, made on July 19, 1950, or shortly thereafter, did not meet unequivocally the Board requirement that they be "filed in permanent form which effectively put the Respondent on continuing notice" that the applicants desire and are available for employment in any job. It appears that the failure of General Counsel to establish the necessary element of continuing applications for any jobs is sufficient ground for recommending dismissal of the 8 (a) (3) allegations of the complaint.

The Trial Examiner turns, however, to the other factor in (b): which is that General Counsel must establish that normally and absent a discriminatory policy, the Respondent would have considered the alleged discriminatees for employment when vacancies occurred after July 19, 1950.

It is undisputed that since 1947, long before the strike of 1950, the Respondent has had a policy of not hiring applicants who are more than 30 or 35 years old.⁶ (Thirty years old up to the strike, 35 years old during and after the strike.) Company records show that this hiring-age policy was generally followed from the beginning of the strike up to the time the complaint was issued. From the close of the strike in July 1950 to January 30, 1952, the Respondent hired 132 employees. Of this number only 20 were more than 35 years old. And of these 20, 17 were strikers. Clearly neither the policy nor its application were discriminatory. And where it was not adhered to, the exceptions plainly favored the strikers. Of the approximate total of 230 strikers named in the complaint, 157 were more than 35 years old on July 19, 1950.

General Counsel offered no convincing evidence to rebut the testimony of an official of the Respondent to the effect that it is and has been for about 20 years, both policy and practice to hire at the gate, and only in exceptional cases to send for a specific individual. And, so far as the record reveals, all such exceptions after July 19, 1950, were when the Respondent sent for a former striker, because of his special experience. A policy which in practice favored the strikers can hardly be termed "discrimination" against them.

The Trial Examiner therefore concludes and finds that the Respondent's major hiring policies, both as to age and as to application at the gate, were not only non-discriminatory, but as practiced after the strike actually favored the strikers. It is further concluded and found that, within its nondiscriminatory policies, the Respondent in fact did consider strikers for employment after the close of the strike.

⁴ The Trial Examiner is unable to find merit in General Counsel's contention that the Respondent, having made the rejected offers of preferential hiring, was bound by them, as by a promise, and therefore must be held to have considered the applications of July 19 as applications for placement on such a list.

⁵ In demanding reinstatement, in July 1950, the Union apparently acted in good-faith belief that its charge, later to be filed, of refusal to bargain and of an unfair labor practice strike could be sustained and a remedy of full reinstatement ordered.

⁶ While such an employing policy may seem startling and therefore unreasonable of belief, it is apparent from examination of records in evidence that a great proportion of the employees on the payroll before the strike were elderly, an important factor in obtaining group insurance.

2. Conclusions

Element (b) has not been established by General Counsel. It follows and the Trial Examiner concludes and finds that the preponderance of credible evidence fails to support the allegations of the complaint that the Respondent discriminatorily refused to hire the strikers named therein.

C. The alleged discriminatory refusal to hire Elsie Craig Schroer

On April 22, 1953, General Counsel amended his complaint to allege that the above-named individual had been refused hire because "charges were filed on her behalf" and in violation of Section 8 (a) (4) of the Act.

Schroer's testimony is to the effect that sometime in December 1952 she applied for work to a company official who told her that he couldn't take her back (she had previously been employed, worked during the strike, and so far as the record shows participated in no way as a union adherent) because they were not allowed to hire any women "due to the lawsuit and all pending."

General Counsel adduced no proof to sustain his allegation that "charges were filed on her behalf" at any time.

Section 8 (a) (4) of the Act provides that it shall be an unfair labor practice for an employer "to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act." There is no proof in the record that Schroer either filed charges or gave testimony under the Act, before applying for reemployment.

This allegation of the complaint fails for lack of proof, even if her testimony, denied by the company official, were to be accepted at face value.

D. Alleged interference, restraint, and coercion

The Trial Examiner has carefully reviewed the entire record and finds insufficient credible evidence to sustain the many allegations in the complaint of 8 (a) (1) violations or to warrant a cease and desist recommendation. It appears needless here to set out and resolve each conflict in testimony. Many, if not most, of the alleged incidents occurred, if at all, before March 6, 1950, 6 months before the charge was filed. Alleged statements by company representatives that no contract would be signed with the Union could not be held, even if made, to be coercive, since as noted heretofore there was no legal requirement that the Respondent bargain collectively with it.

Since it cannot be held, now, that the Union was the legal collective-bargaining agent of the strikers during the strike, it likewise cannot be held that any solicitation of strikers to return to work was illegal, in that it circumvented the purposes of the Act, unless such solicitation was accompanied by promises of benefit or threats of reprisal.

The Trial Examiner is unable to accept, as true, testimony of two witnesses that Personnel Manager Gill telephoned them after March 6, and promised wage benefits if they would return and bring others. General Counsel conceded, in effect, that the plant was in operation with a full quota of employees, by February 21. Evidence submitted by the Respondent is un rebutted that no one was employed during the strike at pay in excess of the minimum rates.

As to claimed incidents of company representatives engaging in or precipitating violence, the Trial Examiner considers the evidence insufficient to hold the Respondent accountable, even if they occurred. As noted above, there is little doubt that disorders, assault, and conduct a good deal short of decorous were participated in by pickets, their sympathizers, company representatives, and employees who did not strike. Passions were aroused. Undoubtedly an angry company representative did tell a truckdriver to "run over the s. o. b." when a stubborn picket refused to move away from a platform to which the vehicle was being backed. But passions are of the individual, are aroused by attendant circumstances, and are seldom except in Tarzan movies premeditated and preceded by prolonged beating of the chest. It is difficult to infer from an expression of momentary anger that such expression was designed to discourage employees from engaging in concerted activity. As for one company official—formerly an All-Southern football player—the Trial Examiner is more inclined to believe that he enjoyed the rough-and-tumble of a picket line scrimmage. His grin was cheerful enough when, as a witness, he pointed to scars he claimed were caused by a female striker's fingernails.

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

CONCLUSIONS OF LAW

1. The operations of the Respondent occur in commerce within the meaning of Section 2 (6) of the Act.
2. United Steel Workers of America, CIO, is a labor organization within the meaning of Section 2 (5) of the Act.
3. The Respondent has not engaged in unfair labor practices, as alleged in the complaint, within the meaning of Section 8 (a) (1), (3), and (4) of the Act.

[Recommendations omitted from publication.]

PIEL BROTHERS *and* POWER PLANT AND REFRIGERATION OPERATORS, MAINTENANCE MECHANICS AND HELPERS, LOCAL UNION #56, INTERNATIONAL BROTHERHOOD OF FIREMEN, OILERS AND MAINTENANCE MECHANICS, AFL, PETITIONER

PIEL BROTHERS *and* BREWERS UNION, LOCAL #8, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL, PETITIONER. *Cases Nos. 2-RC-6691 and 2-RC-6785. August 19, 1954*

Decision, Order, and Direction of Election

Upon separate petitions filed under Section 9 (c) of the National Labor Relations Act, separate hearings were held before Herman Gelband and Louis Aronin, hearing officers. The hearing officers' rulings made at the hearings are free from prejudicial error and are hereby affirmed.

As the two cases involve the same Employer and the same issues, they are hereby consolidated for purposes of decision.

Upon the entire record in these cases, the Board finds:

1. The Employer is engaged in commerce within the meaning of the Act.
2. The labor organizations involved claim to represent certain employees of the Employer.¹
3. We find that a question affecting commerce exists concerning the representation of employees of the Employer within the meaning of Section 9 (c) (1) and Section 2 (6) and (7) of the Act.
4. The Employer operates three breweries in the New York City area. Two of these breweries located in Brooklyn, one on Liberty Avenue and the other on Bushwick Avenue, operate under the name of Piel Brothers. The third brewery, located at Stapleton, Staten Island, operates under the name of Piels, Incorporated.²

¹ The Petitioner in Case No. 2-RC-6691 intervened in Case No. 2-RC-6785 on the basis of a showing of interest.

² These breweries are referred to herein as the Liberty plant, the Bushwick plant, and the Stapleton plant. All three plants produce beer and ship directly to wholesalers and retailers. The record indicates common ownership and single management of both these corporations. Although the accounting department keeps separate accounts on the Staple-