IV. THE REMEDY

Since it has been found that the Respondent has engaged in and is engaging in certain unfair labor practices affecting commerce, I shall recommend that it cease and desist therefrom and take certain affirmative action in order to effectuate the policies of the Act.

It has been found that the Respondent, by interrogation concerning concerted activities, interfered with, restrained, and coerced its employees in violation of Section 8 (a) (1) of the Act. I shall therefore recommend that the Respondent cease and desist therefrom.

For the reasons stated in the subsection entitled "The alleged violation of Section 8 (a) (3)," I shall recommend that the complaint be dismissed insofar as it alleges the discriminatory discharge of and refusal to reinstate Louisa Cline.

Upon the basis of the above findings of fact and upon the entire record in the case, I make the following:

CONCLUSIONS OF LAW

1. By interrogating its employees concerning concerted activities, thereby interfering with, restraining, and coercing them in the exercise of 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 (a) (1) of the Act.

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

3. The Respondent has not engaged in unfair labor practices within the meaning of the Act by discharging and refusing to reinstate Louisa Cline.

[Recommendations omitted from publication in this volume.]

WHITEACRE GREER FIREPROOFING COMPANY[1] *and* INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL, PETITIONER. *Case No. 8–RC–1716. September 10, 1952*

Decision and Direction of Election

Upon a petition duly filed under Section 9 (c) of the National Labor Relations Act, a hearing was held before Carroll L. Martin, hearing officer. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.[2]

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 [Members Houston, Murdock, and Styles].

[1] The Employer's name appears as amended at the hearing. Because its name was incorrectly designated as "Whitacre & Greer" in the petition, the Employer moved to dismiss the petition The Employer was given sufficient notice in advance of the hearing that it was the employer of the employees involved in this proceeding to adequately prepare itself for the hearing As the Employer was therefore not prejudiced by the misnomer in the petition, we shall deny its motion.

[2] The motions of the Employer and the Intervenor, Local 755, United Brick & Clay Workers of America, AFL, to dismiss the petition on the grounds of contract bar and inappropriateness of the requested unit are denied for the reasons stated, *infra*.

Upon the entire record in this case, 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.

3. The Employer contends that its contract with the Intervenor signed June 30, 1952, is a bar to this proceeding although the petition herein was filed on June 26, 1952.[3] This contention is based upon the following circumstances. On June 4, 1952, while the parties were negotiating the foregoing contract, the Petitioner sent a letter to "Fireproofing Company, Attention: Mr. Whiteacre & Mr. Greer" requesting the addressee to bargain with the Petitioner for its power plant employees. This letter was received by the Employer on about June 11. On June 12 the Employer's president was notified by a telephone call to his home from the Petitioner that the latter represented the Employer's "boiler-firemen." Thereafter, on June 26, the Petitioner filed the afore-mentioned petition designating the Employer therein as "Whiteacre & Greer." On June 27 the Regional Director mailed a notice of the filing of the petition to the Employer, but because the notice was misdirected it was not received by the Employer until July 1, after the contract with the Intervenor was already signed. The Employer argues that because of the Petitioner's inaccuracies in the foregoing claims, the erroneous designation of the Employer in the petition, the misdirection of the notice from the Regional Director, and the Petitioner's 14 days' delay in filing its petition after the July 12 claim, it was induced by the Petitioner to believe that no "impediment" existed to the conclusion of its contract with the Intervenor. In effect, the Employer asserts that the Petitioner "slept on its rights" and that the signing of the contract before the receipt of notice of the filing of the petition should estop the Petitioner from proceeding with this case. We find no merit in this contention. The alleged infirmities in the Petitioner's claims of representation to the Employer are in the context of this case immaterial to the question before us. What is here controlling is the fact that a valid petition was filed and docketed with the Board before the contract asserted as a bar was signed. Under this circumstance the contract fails to operate as a bar, despite the fact that the notice of filing was received by the Employer after the contract was signed.[4] Accordingly, we deny the motions of the Employer and the Intervenor to dismiss the petition on the ground of contract bar.[5]

[3] The Intervenor took a similar position at the hearing, but did not argue in support of this contention in its brief.

[4] Cf *Hickey Cab Company*, 88 NLRB 327.

[5] In view of this ruling, it is unnecessary for us to pass on the Petitioner's contention that the contract should not operate as a bar because it is for "members only."

4. The Petitioner requests a unit of employees, designated in the record as boiler firemen, who operate the boilers at the Employer's Magnolia, Ohio, brick manufacturing plant. The Employer and Intervenor contend that these employees do not comprise an appropriate unit because (1) they are an indistinguishable part of the plant-wide production and maintenance unit which, assertedly, has been the bargaining unit for the Employer's employees since about 1938, (2) the integration of the Employer's manufacturing processes precludes severance, particularly in the face of the asserted bargaining history, and (3) the pattern of bargaining in the industry is on the basis of plant-wide units.

The Employer produces clay bricks used for building construction by a process entailing the digging of the raw clay by the Employer from pits on its premises, and the conversion of the raw material into the finished product by successive interrelated steps. Steam generated by the boilers operated by the boiler firemen is essential to this process, first in the lubrication of dies which are blended with the clay and then in the evaporation of water from the bricks.[6] Steam from the boilers is also used to heat the plant in cold weather. Three 100 h. p. portable boilers [7] are located in a partially enclosed room in a corner of the main plant building. Although other employees occasionally enter or pass through this room to use the washroom, to go to the superintendent's office, or to reach the electric motors and control board at the rear of the room, only the boiler firemen regularly work here.[8]

The boiler firemen are required by the Employer to possess State licenses which are obtainable upon passing an examination. These licenses are posted in the boiler room. The duties of the boiler firemen consist of fueling the boilers with coal, removing ashes, maintaining pressure at the desired levels, and periodically cleaning the boilers.

These functions are performed in the boiler room. In addition they regulate and maintain weight control valves which control steam pressure to the driers. These valves are located outside the boiler room. The boilers are operated continuously on a three-shift basis each day of the week. Thus, the Employer's three boiler firemen work 56 hours weekly with no day off scheduled for them in advance. They may obtain days off on request, and in that event a licensed boiler fireman

[6] The plant's machinery is driven by electricity purchased from an outside power company.

[7] The uncontradicted testimony of one of the boiler firemen with 19 years' experience in this occupation is that these are high pressure boilers.

[8] A track for drier cars runs along the entire side of the plant building and through the boiler room. Two employees who work on these cars occasionally walk through the boiler room in performing their duties.

whose main duties consist of production work substitutes for them.[9] In these respects the boiler firemen are distinguished from the Employer's other employees, except kiln firemen, who work a single shift 6 days each week. The boiler firemen, moreover, are hourly paid, whereas a substantial proportion of the Employer's production employees receive piece rate incentive payments under a plan enabling them to quit work before the end of the regular 8-hour day. Also, unlike the other employees, the boiler firemen have no lunch periods and eat on the job. Nominally, they are under the inside plant foreman who also supervises several groups of production employees. It appears, however, that he seldom gives them orders or directions, particularly as the boiler firemen work mostly during shifts which do not coincide with his work hours. At these times they are supervised by the assistant superintendent or the superintendent. Permission for time off is requested by them of the superintendent, and their absences from duty are reported to his office.

We find from all the facts in this case that the Employer's boiler room employees comprise a homogeneous identifiable boiler room group to whom the Board customarily accords separate representation [10] despite a history of bargaining in which they may have been part of a more inclusive unit.[11] In directing an election for these employees we are satisfied that the indispensability of the steam produced by the boiler firemen does not destroy their distinctiveness and functional cohesiveness, and does not warrant a conclusion that the Employer's operations are so integrated as to preclude separate representation for them.[12] Accordingly, we find that all boiler room em-

[9] This employee also assists in cleaning the boilers During the 2 months preceding the hearing he worked in the boiler room 14 days. One other employee, who regularly drives a tractor in the plant yard, also assists in cleaning the boilers from time to time. On these occasions he sometimes fires the boiler under the guidance of the boiler fireman on duty. He appears, however, to spend only a small percentage of his time at boiler room duties, as he is frequently not available for cleaning work when it is performed. None of the parties expressed a desire as to the inclusion of these employees in the appropriate unit.

[10] *National Licorice Company,* 85 NLRB 140, *Alderwood Products Corporation,* 81 NLRB 136; *Wooster Rubber Company,* 77 NLRB 1044.

[11] Although the Employer and Intervenor contend that the bargaining history since 1938 or 1939 has been on the basis of a plant-wide production and maintenance unit, the record indicates that bargaining has been on a "members only" basis. Thus, the last contract preceding the filing of the petition, dated June 28, 1951, provided that the agreement was between the Employer and "such of its employees who are members of the [Intervenor]," and further provided that "it is clearly understood that this agreement is exclusively between the said Company and the aforementioned Employees." This circumstance serves to negate the Employer's assertion that bargaining in the industry is on the basis only of plant-wide units. Apart from this consideration, however, the record fails to support the Employer's position as to the bargaining pattern in the industry.

[12] *Charles A. Krause Milling Co*, 97 NLRB 536 We further reject the contention that the Employer's production processes are as integrated as those of "wet milling" plants, and that, as in the case of those plants, we should find only a plant-wide unit of the Employer's employees appropriate. None of the continuous flow processes typical of wet milling operations is present in the Employer's plant. Cf *Corn Products Refining Company,* 87 NLRB 187.

ployees at the Employer's Magnolia, Ohio, plant, including the boiler firemen and all other employees who perform boiler room operations,[13] but excluding 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.

5. As the substitute boiler fireman (Montgomery) regularly performs boiler room operations for substantial periods, we shall accord him voting eligibility in the election directed herein.[14] We find that the employee (Barnhouse) who occasionally assists in cleaning boilers spends only an insubstantial part of his time at boiler room duties and is, therefore, not eligible to vote.

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

[13] We shall include employees Montgomery and Barnhouse in the appropriate unit for such time as they spend in boiler room operations.

[14] *Ocala Star Banner*, 95 NLRB 569.

SIMMONS COMPANY *and* INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL, PETITIONER. *Cases Nos. 13–RC–2713, 13–RC–2714, 13–RC–2715, and 13–RC–2716. September 10, 1952*

Decision, Order, and Direction of Elections

Upon separate petitions duly filed under Section 9 (c) of the National Labor Relations Act, a consolidated hearing was held before I. M. Lieberman, hearing officer. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.[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 Styles and Peterson].

Upon the entire record in this case, the Board finds:

1. The Employer is engaged in commerce within the meaning of the Act.

2. The labor organization involved claims to represent certain employees of the Employer.

3. 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 Petitioner seeks to sever three groups of employees from the existing production and maintenance unit at the Employer's plant

[1] The Petitioner at the consolidated hearing moved to withdraw its petition in Case No. 13–RC–2713 relating to the fire protection employees. The motion is hereby granted.