JORDAN VALLEY COOPERATIVE CREAMERY *and* INTERNATIONAL UNION OF UNITED BREWERY, FLOUR, CEREAL, SOFT DRINK AND DISTILLERY WORKERS OF AMERICA, CIO. *Case No. 7–CA–1090. March 10, 1955*

Decision and Order

On October 26, 1954, Trial Examiner C. W. Whittemore issued his Intermediate Report in the above-entitled proceeding finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that the Respondent cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the Respondent filed exceptions to the Intermediate Report and a supporting brief.[1]

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, and the entire record in the case and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner with the following amplification:

We agree with the Trial Examiner's conclusion that the Respondent's refusal to put Gary Farmer to work on July 12, 1954, when he reported at the plant after being hospitalized, was discriminatorily motivated. Our conclusion is predicated upon the following circumstances: (1) The treatment of Farmer on June 6 and 7, as described in the Intermediate Report, when, although there was regular work for Farmer to do, he was assigned, without assistance, to the arduous and unaccustomed tasks of loading a freight car and weighing milk. These assignments followed directly after Farmer was seen by Assistant Manager Penfold talking with Fales, the discriminatorily discharged union steward, and with McCann, a union representative. (2) The Respondent's assertion in its answer that Farmer was not physically recovered sufficiently to be returned to full duties, when in fact the Respondent's doctor had certified Farmer as "fit to return to work." (3) The inconsistency in the assertion in the Respondent's answer that Farmer was not returned to work because he was physically incapable of performing his work, and also because there was no job opening for Farmer due to a reduction in the work force.

[1] The Respondent, in its brief, takes exception to the Trial Examiner's finding that its employees are not agricultural laborers. The Respondent, a corporate entity, is engaged in processing raw milk and cream into butter and dry milk. It contends that it is engaged in "first processing only" to enable farmers to market their products. Like the Trial Examiner, we find that in the operation of its processing plant, Respondent is engaged in a separate commercial enterprise and is not engaged in activities incidental to or in conjunction with farming operations so as to constitute its employees agricultural laborers within the meaning of the Act. See *Mississippi Chemical Corporation*, 110 NLRB 826; *Shoreland Freezers, Inc.*, 108 NLRB 723; and *Wells Dairies Cooperative*, 107 NLRB 1445.

With respect to the Respondent's assertion that there was no job opening when Farmer returned to work, the Respondent sought to introduce its production records in order to show that its production was decreasing. Although, in the circumstances, such records appear to have been admissible in evidence, their exclusion, we find, was not prejudicial in view of the existence of the other factors, set forth above, which would cause us to find that the Respondent's action was discriminatorily motivated even assuming production was decreasing.

Although we conclude that the Respondent violated the Act by its failure to put Farmer to work, we disavow the implication in the Intermediate Report that the Respondent had an absolute obligation to reinstate Farmer. We hold merely that the Respondent could not, under the Act, refuse to reinstate Farmer for discriminatory reasons. With respect to the Respondent's obligation, if any, not to refuse reinstatement for other reasons, neither the Act, nor the Board, is concerned.[2]

Order

Upon the entire record in this case, and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Jordan Valley Cooperative Creamery, East Jordan, Michigan, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America, CIO, or in any other labor organization of its employees, by discharging or refusing to reinstate any of its employees, or by discriminating in any other manner in regard to their hire or tenure of employment or any term or condition of employment.

(b) Interrogating or polling its employees concerning their membership in, or activities on behalf of, International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America, CIO, or any other labor organization, in a manner constituting interference, restraint, or coercion in violation of Section 8 (a) (1) of the Act.

(c) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist the above-named or any other labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted actvities for the purpose

[2] Member Murdock does not believe the Intermediate Report is reasonably to be construed as implying that there was any obligation to reinstate Farmer other than because the refusal to reinstate was for discriminatory reasons. Accordingly, he regards this paragraph of the decision as unnecessary and does not join in it.

of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized by Section 8 (a) (3) of the Act.

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

(a) Offer to Walter L. Fales, Ray Welsh, and Gary Farmer immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges.

(b) Make whole the above-named individuals in the manner set forth in the section of the Intermediate Report entitled "The Remedy."

(c) Upon request, make available to the Board or its agents for examination and copying all payroll records, social-security payment records, timecards, personnel records and reports, and all other records necessary to determine the amounts of back pay due.

(d) Post at its plant in East Jordan, Michigan, copies of the notice attached hereto and marked "Appendix."[3] Copies of said notice, to be furnished by the Regional Director for the Seventh Region, shall, after being duly signed by the Respondent's representative, be posted by it immediately upon receipt thereof, and maintained by it for a period of sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

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

CHAIRMAN FARMER took no part in the consideration of the above Decision and Order.

[3] In the event that this Order is enforced by decree of a United States Court of Appeals, there shall be substituted for the words "Pursuant to a Decision and Order" the words "Pursuant to a Decree of the United States Court of Appeals, Enforcing an Order."

Appendix

NOTICE TO ALL EMPLOYEES

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

WE WILL NOT discourage membership in International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers

of America, CIO, or in any other labor organization, by discharging or refusing to reinstate any of our employees, or by discriminating in any other manner in regard to their hire, or tenure of employment, or any term or condition of employment.

WE WILL NOT interrogate or poll our employees concerning their membership in, or activities on behalf of, International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America, CIO, or any other labor organization, in a manner constituting interference, restraint, or coercion in violation of Section 8 (a) (1) of the Act.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form labor organizations, to join or assist the above-named or any other labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

WE WILL offer to Walter L. Fales, Ray Welsh, and Gary Farmer immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to any seniority or other rights and privileges previously enjoyed, and we will make them whole for any loss of pay they may have suffered as a result of the discrimination against them.

All our employees are free to become, remain, or refrain from becoming or remaining, members of the above-named or any other labor organization, except to the extent that this right may be affected by an agreement in conformity with Section 8 (a) (3) of the Act.

JORDAN VALLEY COOPERATIVE CREAMERY,
Employer.

Dated_____ By_____
(Representative) (Title)

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

Intermediate Report

STATEMENT OF THE CASE

Charges 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 above-named Respondent Company, a hearing involving allegations of unfair labor practices in violation of Section 8 (a) (1) and (3) of the National Labor Relations Act, as amended

(61 Stat. 136), herein called the Act, was held in Charlevoix, Michigan, on August 31 and September 1, 1954, before the duly designated Trial Examiner.

In substance the complaint alleges and the answer denies that the Respondent: (1) On April 16, 1954, discriminatorily terminated the employment of Walter L. Fales and Ray Welsh, and on July 12, 1954, likewise dismissed Gary Farmer, to discourage membership in the Charging Union; (2) since April 13, 1954, has interrogated employees concerning their union membership, has demanded surrender of their membership cards, and has threatened discharge and other reprisals against employees who became members of the Union; and (3) by such conduct has interfered with, restrained, and coerced employees in the exercise of rights guaranteed by Section 7 of the Act.

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 of fact and conclusions of law. Oral argument was waived. A brief has been received from the Respondent and, although filed after expiration of time allowed by the Chief Trial Examiner, has been considered by the Trial Examiner.

Disposition of the Respondent's motion to dismiss, renewed at the conclusion 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 COMPANY

Jordan Valley Cooperative Creamery is a Michigan corporation with its principal office and place of business at East Jordan, Michigan, where it operates a dairy products processing plant and is engaged in the production of dry milk and butter.

During the 12-month period from July 1, 1953, through June 30, 1954, and in the conduct of its business, the Respondent purchased and caused to be shipped from points outside the State of Michigan to its East Jordan plant materials valued at about $123,000. During the same period it sold and shipped to points outside the State of Michigan products valued at about $885,000.

The Respondent does not contend that the volume of its interstate business is insufficient to meet the Board's new jurisdictional standards. It does contend, however, that the Board lacks jurisdiction because its employees come within the agriculture exemption as defined in the Act. It offered no evidence to show that the nature of the work performed by its employees was substantially different from that of employees described by the Board in *Wells Dairies Cooperative* (107 NLRB 1445), in which the Board found no merit in a similar contention made by the employer there concerned. On September 21, 1954, the Board reaffirmed its determination of this issue, relating to the same employer, in 109 NLRB 1450.

The Trial Examiner believes that the above-cited cases are controlling and finds that: (1) The Respondent's employees are not agricultural laborers within the meaning either of the Act or the Board's appropriation rider; and (2) the Respondent is engaged in commerce and that it would effectuate the policies of the Act to assert jurisdiction.

II. THE LABOR ORGANIZATION INVOLVED

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

III. THE UNFAIR LABOR PRACTICES

A. *Setting and issues*

For the past 22 years Percy Penfold has been manager of the creamery which, during the material period, employed about 25 production workers. In February 1954, his son, Alston Penfold, became assistant manager. Alston Penfold soon invoked working conditions which, it is undisputed, caused dissatisfaction among the employees. At least one employee, Claude Coon, voluntarily quit on March 31, 1954.

During the first week in April Claude Coon and Ray Welsh visited Ray Lyons, a director of the Cooperative. Ray Welsh told Lyons that the employees, being dissatisfied with working conditions, were going to organize in a union.

Welsh, who at the time of visiting Lyons was away from his job recuperating from illness, was refused reinstatement when he reported ready for work a few days later. The refusal is an issue.

On April 13 a number of employees met to organize. Employee Walter Fales, elected steward, assumed leadership in distributing authorization cards. On April 14, before reporting for work and while outside the plant, Fales was seen by both Penfolds soliciting the signature of another employee. As Fales drove homeward, Percy Penfold followed him. Although there is some dispute as to its details, described in a later section, an argument occurred at Fales' home which—Penfold's own testimony makes plain—displayed the manager's bitter resentment toward organization of his employees. Immediately thereafter Alston Penfold began close watch over Fales' work. Two days later, following a minor accident, Fales was summarily discharged. This discharge is an issue.

On May 3 the original charge in this case was filed by the Union and served upon the Respondent. It alleged, among other things, the discriminatory discharge of Fales and Welsh. On May 6 all employees were called to Percy Penfold's office and asked to sign a statement to indicate whether or not they had "petitioned for the Union." The polling of the employees is likewise an issue.

Employee Gary Farmer attended a union meeting the night of June 5. After coming from the meeting and while talking with the union representative, he was seen by Alston Penfold. The next day Farmer was taken from his regular job by the same Penfold and ordered to load a box car alone—work which customarily was done by several men. Farmer complained that this heavy work affected his hernia. The following Monday, upon Alston Penfold's orders, Farmer was examined by the company doctor and sent to the hospital for an operation. Upon his return from the hospital and clearance for work by the same doctor, Farmer was refused reemployment. This refusal is also an issue.

B. *The discharge of Fales*

At the time of his dismissal on April 16, 1954, Walter Fales had been operating the milk-drying machine for about a year. It is undisputed that both Penfolds expressed their opinion to Fales and Claude Coon—who broke Fales in on the job—that Fales was the next to the best operator in the plant.

At the union meeting the night of April 13, 1954, Fales was elected steward. Many of the employees signed authorization cards that same night and a wire was sent to Percy Penfold asking for a negotiating meeting. The Respondent concedes that it received this telegram before 9 o'clock the morning of April 14.

Fales was scheduled to begin his shift at 1 o'clock the afternoon of April 14. About noon he drove to the plant with authorization cards. Just outside the plant he approached an employee leaving and—it is undisputed—while both Penfolds watched obtained the employee's signature to a card. As Fales returned to his car, Alston Penfold came out of the plant and approached him. Penfold asked him if he was coming in that day and the employee replied that he would be in at the same time—1 o'clock. Penfold then asked him when he was going into the Army. Fales said he was not sure and started home in his car. He was followed and almost crowded from the road by Percy Penfold, in his car. The manager drove into the yard immediately behind Fales, and as the employee got out of his car Penfold (according to Fales' uncontradicted testimony) came toward him "screaming, throwing his arms, . . . and swearing at the top of his voice." He demanded that Fales open up the glove compartment of his car and give him the cards, or the list of names. When the employee refused, the manager questioned his lack of "guts." According to Penfold's own testimony: "I asked him if he was like a sheep and had to follow a flock, if he didn't have two legs to stand on." Penfold further declared, according to Fales' credible testimony, "Don't you know there is no God damn union going into the Jordan Valley Creamery? It has been tried before and they will never get in there now as long as I am manager." Penfold apparently then dropped his belligerent tactics and began pleading with Fales. He urged him to "drop it, and there won't be nothing done," and told him he was a good worker, always ready to work overtime when asked. During their argument, Alston Penfold drove up, and promptly went to Fales' car and tried to reach into the glove compartment. The employee warned him that he was likely to "get real mad" if he took his "property," and Percy Penfold advised his son that "that is something you can't get away with." Finally Percy Penfold pointed to the home of one of the directors and said: "There is the guy that put you up to it, isn't it, isn't it?" Alston said he didn't think so. Percy said, "Come on, let's get the hell out of here. We ain't getting nowhere with him."

It appears to the Trial Examiner that, even under the Board's recently modified interpretation of "coercion" under the Act, the visit of the Penfolds to Fales' home the noon of April 14, and their conduct and statements there can be reasonably construed as nothing short of "coercive." In any event, both Penfolds amply demonstrated their belief that Fales was active in organizing the Union and that they were displeased by such activity.

Fales reported for work that noon at the usual hour. Later that afternoon, following a meeting of employees, according to his own testimony Alston Penfold asked Fales "what his beef was." He also told Fales that there was no union there at that time, and he could fire him or any other man in the creamery any time he wished to. In view of the events occurring but a few hours before, at Fales' home, the Trial Examiner concludes and finds that Alston Penfold's remark about being able to fire any one at any time was a plainly implied threat, coercive and violative of the Act.

The next day, when Fales reported for work, he was met by Alston Penfold who—for the first time Fales had been on that job—told him he wanted the drier in operation within 5 minutes. All during that shift—according to Fales' uncontradicted testimony—Alston followed him and watched him whenever he went for a drink or to the toilet.

On the following day, April 16, Alston again met him as he reported for work, and followed him to the drier. The employee started the machine. There was a noise. Fales promptly loosened 1 of the 2 blades which scrape dried milk from a roller. Alston accused the employee of trying to wreck the machine and sent him to the office for his pay. He was discharged, and has not been reinstated.

Although in his testimony Alston Penfold endeavored to exaggerate the incident beyond its deserving proportions, the Respondent failed to adduce any credible evidence that any damage was caused, or any production lost.[1] On the contrary, credible testimony of several employees including those who themselves ran the same machine on other shifts, establishes that the incident was not unusual, had occurred before, and no one ever had previously been fired for it.

The Trial Examiner is convinced, and finds, that Alston Penfold, intent upon finding some excuse for ridding the plant of its employee union leader, seized upon a minor accident as a pretext, without any reasonable justification accused him of sabotage, and dismissed him summarily. The real motive for the discharge, the Trial Examiner is convinced, was discriminatory and to discourage union membership.

C. *The discharge of Ray Welsh*

Welsh has been employed by the Respondent for about 5 years.

On March 26, 27, and 28, 1954, Welsh was at home, ill with the 'flu and "an attack of gallstones," and in bed under his doctor's orders. He returned to his job on March 29 and worked through the 31st. According to the credible testimony of several employees including Welsh, a part of the outer wall of the plant had been removed, at this period, to permit the installation of another machine. Welsh worked nights—and March nights in northern Michigan are cold. Working alternately in steam and cold caused a relapse, and Welsh laid off to recuperate.

The night after he laid off Alston Penfold came to his home to visit him, and asked when he would be back. Welsh said that he would not return until he felt well enough. (The finding as to this visit is based upon Welsh's credible testimony. Penfold, whom the Trial Examiner is unable to believe on this point, declared that when he called at Welsh's home on this occasion the employee said nothing about being sick, but "as I recall it, he had some problem and difficulty getting wheels for his car or tires, or something like that." He further said that Welsh told him he would be in the next night.)

Within the next day or so, as found above, Welsh and his former fellow-employee, Coon, called on Lyons, a member of the Cooperative's board of directors. Welsh informed this official that unless working conditions could be made better at the plant the employees would form a union. Lyons informed management at the creamery of Welsh's visit and, it is reasonably inferred, reported the threat of unioniza-

[1] Although Penfold, as a witness, claimed that damage was caused in that the knives were dulled, a pin was loosened—"or rather," he said, "the shaft that held the idler on the pin," and production was lost that day, his broad claims were unsupported by any records, were unsupported by the maintenance man, also a witness for the Respondent, and were flatly denied by employee Harry Sloop, who took over and ran the drier the afternoon Fales was fired.

tion. (The findings rest upon the credible testimony of Welsh and Coon. Lyons was an untrustworthy witness, as the record reveals. On direct examination he said that all he could recall of the conversation was that Welsh told him he was not going back to work unless he was given a raise and that there was "something wrong with the labor relations there . . . ." On cross-examination he finally admitted that there was considerable discussion about the men forming a union at the plant. On redirect examination he at first admitted and then denied immediately having reported Welsh's visit to management. His shifting and contradictory testimony deprives it of credibility. Furthermore, the probabilities inherent in the situation even as described by himself cast doubt that Welsh told him that he had quit. It is unlikely that an employee would visit a director seeking remedy of working conditions at a plant he had, or intended to, quit.) [2]

Within a day or two Alston Penfold again called at Welsh's home. Penfold asked him about his health and when he would be back. Welsh told him he would as soon as he felt able. Welsh spoke of a raise he had not received, and Penfold told him to take it up with his father when he came back. (The finding as to this visit rests upon Welsh's credible testimony. Testifying on this point, Penfold claimed that when he asked Welsh why he had not come in to work, the employee told him he "wasn't married to the job," and was not coming in. For many reasons the Trial Examiner discredits Penfold. His demeanor as a witness was arrogant. As the record shows, upon cross-examination he became flippant in his replies and it was necessary for the Trial Examiner to instruct him to remain in his chair. Early in his direct examination Penfold claimed that Welsh "was an employee who had an excessive absenteeism . . . He was an individual habitually late . . . an individual who did a poor job of housekeeping . . . his production was down below standard." No records were offered which supported these extreme claims which—had they been true—reasonably would have caused his discharge long before April. Certain timecards were produced at the hearing, but no citation was solicited to prove that he had been "habitually late," and the office girl testifying from them admitted that the days he was not at work before the last of March may well have been Sundays or days when he was off duty.)

There is credible testimony from the office manager, Alice Murray, to the effect that some time after March 31, she could not recall just when, Alston Penfold told her that Welsh "was through." In any event, on April 16, Welsh had his son telephone to Penfold, to tell him that he was ready to come to work the following shift. Penfold told the boy that his father's job had been filled and he was not needed any more. (The finding as to this communication is based upon the credible testimony of Joseph Welsh. Penfold admitted that the boy called, but claimed that he told him to have his father come down to the creamery "if he cares to discuss it." The Trial Examiner is unable to credit this claim. Within a period of about 2 weeks, the record shows, management was officially informed by the Regional Office that charges had been filed alleging discriminatory treatment of Welsh. No evidence was offered to indicate that the Respondent made any effort to clear up any misunderstanding as to Welsh's reporting to the plant.)

The Respondent produced records at the hearing showing that several new employees were hired after Welsh was refused reinstatement on April 16, 1954.

The Trial Examiner concludes and finds that Welsh was, in effect, discriminatorily discharged on April 16, 1954, to discourage membership in the Union. This conclusion is amply supported by the straightforward and credible testimony of one of the Respondent's directors, Claude Pearsall. Much of his testimony is uncontradicted. In substance, he said that shortly after April 14, at the first meeting of the newly elected board, Percy Penfold told him and the others that the Union had asked recognition but he had refused. Penfold also reported that Wales and Welsh had been discharged. When Pearsall raised a question of the legality of such discharges, Penfold replied that he did not understand he was "in wrong" by such discharges until the Union had been recognized. On this occasion, Pearsall testified, Penfold said that Welsh had been fired because he "wasn't doing his work properly." After this meeting, Pearsall talked with several of the employees, to get their version of the troubles at the plant. He endeavored to have other members of the board permit the employees to appear before them, but they voted him down. At the next meeting, Pearsall said, Penfold changed his story and said that Welsh had quit. Pearsall's testimony is uncontradicted that at both meetings Penfold declared that "there would never be a union in the plant as long as he was manager."

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[2] Coon, it should be noted, made no complaint to Lyons. He merely went along to show Welsh where Lyons lived.

D. *The polling of the employees*

On May 6, 1954, the day after receiving charges relating to Fales and Welsh, Percy Penfold called all employees into the office. Each employee was given a piece of paper to be filled out and signed. They were asked to indicate, on the paper: (1) That they had not signed a petition for the Union; (2) that they had signed it but were no longer interested; (3) that they had signed it but were told that it would be rough if they didn't; and (4) that they had signed it because they were promised back pay.

General Counsel conceded that no oral threats or promises of benefit were made by management on this occasion.

Counsel for the Respondent claimed, at the hearing, that these questions had been asked in "preparation for our Answer" to the charge. Such questions were plainly not pertinent to the allegations of the charge. Nor was such polling privileged, it appears to the Trial Examiner, even under recently modified rulings of the present Board majority. In the context of Percy Penfold's openly announced policy of never recognizing a union as long as he remained manager, and of the discriminatory treatment accorded Fales and Welsh, it may not be reasonably maintained that in thus polling its employees the Respondent was merely and justifiably seeking information to prepare its answer. In the atmosphere of its occurrence this written interrogation was, the Trial Examiner concludes and finds, interference, restraint, and coercion within the meaning of the Act.

E. *The discharge of Gary Farmer*

Gary Farmer was hired by the Respondent in April 1953. His regular job in June 1954 was on the butter churn.

In August 1953, Farmer was rejected by the Army because of a hernia, a fact which he duly reported to his foreman, Carl McNett.

On June 5, 1954, Farmer attended a union meeting held at a local hotel. Upon leaving the meeting he stood on the public street talking with Walter Fales, previously identified as the union steward who had been discriminatorily discharged, and the Union's official representative, Eugene McCann. Alston Penfold drove up, parked, looked at them, and went into a nearby restaurant. In a few minutes Farmer also went into the restaurant and sat beside Penfold. The latter remarked that he had seen him talking with Fales.

The next afternoon, although it is undisputed that there was work for him to do at his regular job, Farmer was removed from the churn by Penfold and ordered to load a freight car, alone. The record is replete with credible testimony of several employees that loading a frieght car is customarily a job for from 3 to 6 men, and that the only time 1 man was ordered to perform this heavy task was when Farmer was assigned to it on June 6. The job involved hauling about 1,400 pounds on a hand truck, and repeated lifting. Penfold stood by and watched the employee struggle with this work. When Farmer complained, about 3 o'clock, that his hernia bothered him, Penfold callously told him that if he didn't like it he could quit. The next day, a Sunday, Farmer was assigned to weighing milk, another job to which he was not accustomed. Ordinarily a girl is also assigned to the scales to record the weighing. Farmer was required to do it alone. According to the reluctant but uncontradicted testimony of employee Verne Bundy, he was forbidden by Alston Penfold to help Farmer on this job, and told that Farmer might make mistakes and "it might go hard with him."

The next morning Alston Penfold, according to his own testimony, instructed Farmer to report to the company doctor. The doctor ordered an operation. He was hospitalized. On July 12 he reported at the plant with a written statement from the company doctor, affirming that the employee had been "dismissed from care and fit to return to work." Penfold refused to reinstate him, telling him there was no work, and suggesting that he might recall him when winter came if help were then needed. Farmer has not been reinstated.

In its answer the Respondent claims that: (1) Farmer "was and/or is not physically recovered sufficiently to be returned to full duties"; (2) "production was decreasing and manpower was being reduced" and there was "no job opening" for him; and (3) it was "under no duty or obligation" to create a job opening for him.

The only figment of proof offered to support the claim that in July Farmer was "not physically recovered sufficiently" to be put back to work is the testimony of Alston Penfold, who said that when the employee reported he stated that "he couldn't lift over 50 pounds, couldn't do the work in the creamery." That he made this statement is flatly denied by Farmer. Not only has the Trial Examiner found Alston

Penfold to be a wholly untrustworthy witness on other matters, but here the fabricated claim flies in the face of the physician's written statement, quoted above.

As to the second claim, which is plainly inconsistent with the first, records produced by the Respondent show that several employees were hired *after* Farmer, *upon orders of Penfold himself,* had been sent to the doctor and required by him to be temporarily absent from work.

As to the third claim, which is in the nature of argument, it appears clear to the Trial Examiner that the Respondent had a most certain obligation to reinstate him, and that this obligation remains. Particularly in view of treatment previously accorded both Fales and Welsh, the Trial Examiner is convinced and finds that upon seeing Farmer in company with the union representative and Fales on the night of June 5, Alston Penfold promptly proceeded to engage in conduct designed to rid the plant of him, in order to discourage further union activity. No reasonable explanation was given for taking Farmer from his regular work of which there was plenty to do, and forcing him to load a freight car alone. It is undisputed that when Farmer complained that such arduous work, without help as others received, affected his hernia, Penfold invited him to quit. And it is equally significant that the next day Alston Penfold was seeking a pretext to dismiss Farmer by depriving the employee of Bundy's help in weighing milk, so that he would be more likely to make errors.

Of the same discriminatory design, in the opinion of the Trial Examiner, was the refusal of Alston Penfold to permit Farmer to return to his work upon release from the hospital and clearance by the company doctor.

F. *Summary conclusions*

Upon the preponderance of credible evidence the Trial Examiner concludes and finds that the Respondent: (1) Discriminatorily and to discourage membership in the Union discharged Fales and Welsh on April 16, 1954, and Farmer on July 12, 1954; and (2) by such discrimination, and by the conduct of Percy Penfold in following Fales to his home and berating him, and by its polling of employees in May 1954, interfered with, restrained, and coerced employees in the exercise of rights guaranteed by Section 7 of the Act.[3]

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Respondent set forth in section III, above, occurring in connection with the operations of the Respondent set forth in section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that the Respondent has engaged in unfair labor practices, the Trial Examiner will recommend that it cease and desist therefrom and take certain affirmative action to effectuate the policies of the Act.

It has been found that the Respondent has discriminated in regard to the hire and tenure of employment of Walter L. Fales, Ray Welsh, and Gary Farmer. It will therefore be recommended that the Respondent offer them immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority and other rights and privileges, and make them whole for any loss of pay they may have suffered as a result of the discrimination against them by payment to each of them of a sum of money equal to that which he would have normally earned from the date of such discrimination to the date of offer of reinstatement, less his net earnings during such period; the back pay to be computed on a quarterly basis in the manner established by the Board in *F. W. Woolworth Company,* 90 NLRB 289. It will also be recommended that the Respondent preserve and upon reasonable request make all pertinent records available to the Board or its agent.

In view of the nature of the unfair labor practices committed, the commission by the Respondent of similar and other unfair labor practices may be anticipated. The remedy should be coextensive with the threat. It will, therefore, be recommended that the Respondent cease and desist from infringing in any manner upon the rights guaranteed in Section 7 of the Act.

[3] The testimony of employee Bundy, undisputed, warrants an additional finding of 8 (a) (1) violation with respect to Percy Penfold's interrogation of him as to who belonged to the Union.

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

CONCLUSIONS OF LAW

1. International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America, CIO, is a labor organization within the meaning of Section 2 (5) of the Act.
2. By discriminating in regard to the hire and tenure of employment of its employees, thereby discouraging membership in the above-named labor organization, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (3) of the Act.
3. By interfering with, restraining, and coercing its employees in the exercise of rights guaranteed by 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.
4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2 (6) and (7) of the Act.

[Recommendations omitted from publication.]

STYLECRAFT FURNITURE COMPANY *and* UNITED FURNITURE WORKERS OF AMERICA, CIO. *Case No. 1–CA–1728. March 10, 1955*

Decision and Order

On October 28, 1954, Trial Examiner C. W. Whittemore issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the Respondent filed exceptions to the Intermediate Report and a supporting brief.

The Board has reviewed the rulings of the Trial Examiner 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, and the entire record in the case and hereby adopts the Trial Examiner's findings, conclusions, and recommendations, with the following additions and modifications.

THE REMEDY

Like the Trial Examiner, we find that the Respondent violated Section 8 (a) (5) of the Act by refusing to sign any agreement with the Union unless it was countersigned by at least one employee. However, since the Respondent did in fact negotiate at length with the Union and reached agreement on virtually all the terms of a contract, we believe that the broad cease-and-desist order proposed by the Trial Examiner is not warranted and that a narrower order addressed to the specific dereliction of the Respondent—its insistence upon employee countersignature of the contract—would better effectuate the policies of the Act.