

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. Hearst Publishing Company, Inc. (Los Angeles Examiner Division), Los Angeles, California, is engaged, and at all times material herein was engaged, in commerce within the meaning of Section 2 (6) and (7) of the Act.
2. Los Angeles Newspaper Guild, affiliated with Congress of Industrial Organizations, and Association of Classified Advertising Employees of the Los Angeles Examiner, unaffiliated, are labor organizations within the meaning of Section 2 (5) of the Act.
3. The allegations of the complaint, as amended, that Respondent has engaged in and is engaging in unfair labor practices, within the meaning of Section 8 (a) (1), (2), and (3) of the Act have not been sustained by substantial evidence.

[Recommendations omitted from publication.]

T. H. Burns and R. H. Gillespie d/b/a Burns and Gillespie and Amalgamated Meat Cutters and Butcher Workmen of North America, A.F.L. *Case No. 32-CA-215. July 29, 1955*

SUPPLEMENTAL DECISION

On December 19, 1952, the National Labor Relations Board, herein called the Board, issued its Decision and Order in this case,¹ in which it found that T. H. Burns and R. H. Gillespie, d/b/a Burns and Gillespie, herein called the Respondents, had engaged in and were engaging in certain unfair labor practices affecting commerce and ordered them to cease and desist therefrom and take certain affirmative remedial action designed to effectuate the policies of the Act.

The Board thereafter petitioned the United States Court of Appeals for the Eighth Circuit to enforce its order against the Respondents. In an opinion handed down on October 29, 1953² and a decree entered on November 25, 1953, pursuant thereto, the court denied enforcement of the Board's Order upon the ground that the Trial Examiner had erroneously excluded competent and material evidence, but granted the Board authority "to open the proceedings for further evidence and a new order, if so advised."

On March 30, 1954, the Board issued its Order reopening the record for the purpose of receiving and considering the excluded evidence. On January 10, 1955, a further hearing was held before Trial Examiner George Downing, replacing Trial Examiner Stephen S. Bean, who had presided at the original hearing and who, on November 11, 1954, had disqualified himself. On February 25, 1955, Trial Examiner George Downing issued his Supplemental Intermediate Report, in

¹ 101 NLRB 1181.

² 207 F. 2d 434, 437.

113 NLRB No. 45.

which he found that the additional evidence received required no change in the Board's Decision and Order, and recommended that the Board reaffirm it without modification, as set forth in the copy of the Supplemental Intermediate Report attached hereto. Thereafter, the Respondents filed exceptions to the Supplemental Intermediate Report and a supporting brief. The General Counsel also filed a reply brief.

The Board has reviewed the rulings made by the Trial Examiner at the reopened hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Supplemental Intermediate Report, the Respondents' exceptions and brief, the General Counsel's reply brief, and the entire record in the case (including the original record), and hereby adopts the findings, conclusions, and recommendations of Trial Examiner Downing with the following additions and modifications:

1. We agree with the Trial Examiner that the new evidence, evaluated in conjunction with the relevant evidence in the previous record, failed to establish the Respondents' defense that the applicants did not make bona fide applications for work at the Respondents' plant. As stated in the Supplemental Intermediate Report, the additional evidence does not refute the testimony of the applicants as to their need and genuine desire for work, or their denials under strenuous cross-examination that they had been coached by, or had received instructions from, Union Representative Gilker as to how to present themselves for work. Clearly, the record does not support a claim of bad faith.³ At both the original and reopened hearings, the Respondents failed to elicit any evidence to prove that the applicants were aware of, or had knowingly participated in, any scheme to entrap the Respondents into a violation of the Act, or that they would not have accepted work if tendered to them. The new evidence only shows that during the course of the settlement conference Union Agent Gilker made certain representations which were false and reflected on his judgment and tactics. Even if the job applicants, who were unemployed at the time they requested employment, had reason to know or suspect that the Respondents had a discriminatory hiring policy, such knowledge would not render their request for work *mala fide* where all the evidence indicates that they would have accepted work if it had been tendered.⁴ Although Gilker's admissions at the settlement conference, and other factors emphasized by our dissenting colleagues, may suggest improbabilities in the testimony of witnesses on both sides of the decisive issues, resulting in a close fact question, there is ample evidence to support the Trial Examiner's credibility findings. We can

³ Compare *Hollywood Ranch Market*, 93 NLRB 1147.

⁴ *Swinerton & Walberg Co.*, 94 NLRB 1079, *enfd.* 202 F. 2d 511, 515 (C. A. 9).

see no justification for overturning his conclusions and recommendations.

2. The Respondents contend for the first time in their brief that Trial Examiner Bean "evidentially disqualified himself for personal prejudice" while presiding at the original hearing, and because of the resulting unreliability of the previous record it was improper for Trial Examiner Downing to adopt the previous credibility findings. They argue that it was therefore mandatory to retry the entire good-faith issue. The record reveals that on March 30, 1954, the Board issued its Order to the Regional Director reopening the proceedings for the purpose of receiving the excluded evidence. On November 1, 1954, without stating any reasons for his action, Trial Examiner Bean withdrew from the case in accordance with Section 7 (a) of the Administrative Procedure Act,⁵ herein called the A. P. A., and Section 102.37 of the Board's Rules and Regulations, Series 6, as amended. On the same date, the Chief Trial Examiner assigned Trial Examiner Downing to serve in place of Trial Examiner Bean, and on November 2, 1954, the Board notified all parties in interest of the substitution. The Respondents did not object to this Board action until after the Supplemental Intermediate Report had issued. Thus, having failed to take timely action, although afforded an opportunity to do so, the Respondents in effect waived any right they might have had to object to the substitution of Trial Examiners.⁶ Neither the A. P. A. nor the Board's Rules and Regulations require the Trial Examiner to give his reasons for disqualifying himself.⁷ As the Respondents did not file a timely "affidavit of personal bias or disqualification" against Trial Examiner Bean and as there is no evidence of bias in the record, we find, contrary to the Respondents, that his withdrawal from the proceedings is not an admission of bias.

3. Our dissenting colleagues argue that the Respondents were entitled to a trial *de novo* so that a single Trial Examiner could hear and observe the applicants testify, consider their testimony in the context of Gilker's statements made at the settlement conference, and reevaluate the total evidence before resolving the critical credibility issue of their good-faith endeavor to secure employment with the Respondents. In view of the limited scope of the remand and the nature of the evidence adduced at the reopened hearing, contrary to our dissenting colleagues, we do not believe there were any credibility issues

⁵ Section 7 (a) of the A. P. A. states in part: Trial Examiners "may at any time withdraw if they deem themselves disqualified and, upon the filing of a proper affidavit of personal bias or disqualification against them, the agency is required to determine the matter as a part of the record and decision in the case."

⁶ Cf. *Dixie Shirt Company, Inc.*, 79 NLRB 127.

⁷ The Attorney-General's Manual on the Administrative Procedure Act, 1947, p. 73, in discussing Section 7 (a) states that this provision permits any presiding officer to withdraw from a proceeding if he considers himself disqualified, for example, as being related to a party.

to resolve between the applicants and the witnesses at the resumed hearing, and therefore it was unnecessary for Trial Examiner Downing to hear the job applicants testify and observe their demeanor. Moreover, the Trial Examiner did not narrow the scope of the reopened hearing when receiving the additional evidence, and the Respondents who had the burden of rebutting the *prima facie* showing of discrimination did not recall the applicants for further examination. Under the circumstances, particularly our reading of the court's remand order, we do not believe that a trial *de novo* was obligatory. In *N. L. R. B. v. Donnelly Garment Co.*⁸ the Supreme Court of the United States held that, after a remand order issues, the Board has the *discretion* to determine whether a new hearing is required in order to reevaluate the total evidence, and whether the new evidence should be heard before the original Trial Examiner. In addition to this judicial sanction, the literal language of Section 5 (c) and 8 (a) of the A. P. A. affirmatively approves such substitutions without making a hearing *de novo* mandatory.⁹

4. The Respondents further except to the Trial Examiner's denial of their motion to dismiss the complaint because of the undue delay in reopening the hearing after the court's remand order. As there is no substantial basis for believing that the Board's powers were in any way impaired by the protracted litigation of this case, and as the doctrine of laches is generally inapplicable to Board proceedings, we find the Respondents' contention without merit.¹⁰ Accordingly, the motion, to dismiss is hereby denied.

For the foregoing reasons, and also for the further reasons set forth in the Supplemental Intermediate Report, we conclude, as did the Trial Examiner, that the additional evidence received pursuant to the order of remand neither requires nor justifies any change in the Decision and Order issued in this case. Accordingly, we hereby affirm that Decision and Order without modification.

CHAIRMAN FARMER and MEMBER RODGERS, dissenting:

We do not agree with the majority's decision.

The issue before the Board is whether the applicants who were refused employment were in good faith attempting to secure positions from the Respondents or were attempting to entrap them into com-

⁸ 330 U. S. 219 (1947).

⁹ Section 5 (c) provides: "The same officers who preside at the reception of evidence pursuant to section 7 make the recommended decision or initial decision required by section 8 *except where such officers become unavailable to the agency*" [Emphasis supplied], *National Electric Products Corporation*, 80 NLRB 995.

Section 8 (a) of the A. P. A. provides that where the presiding officer at a hearing becomes unavailable as by illness or leaving the agency, the agency may direct another hearing officer to make an initial or recommended decision, or it may issue a tentative decision, or it may order a rehearing.

¹⁰ *Eagle-Picher Mining & Smelting Co. v. N. L. R. B.*, 119 F. 2d 903 (C. A. 8), enfg. 16; NLRB 727.

mitting violations of the Act. At the original hearing, Trial Examiner Bean rejected the Respondents' offer to prove, in connection with this issue, that Union Agent Gilker had said, during a conference, that he had sent the applicants to Burns in order to make out a violation against the Respondents. In its brief to the circuit court, the Board argued that this error was harmless and should be ignored "for the credited testimony which was received, and the surrounding circumstances which corroborated it, were too cogent in character to be overborne by the rejected evidence"; and that, this being so, any error in the excluded or the rejected evidence was not prejudicial. The court rejected this argument and held that the Respondents were denied due process because the rejected evidence was "competent and material and should have been received and considered." The court therefore denied the Board's petition for enforcement, but it granted authority to the Board to open the proceedings for further evidence and a new order, if as advised.

The reopened hearing was held not before Trial Examiner Bean, who presided at the first hearing, but before Trial Examiner Downing. Trial Examiner Downing found that Gilker had said at a settlement conference held about January 18, 1952, that he was not particularly interested in the unfair labor practice charges filed, that what he wanted was a collective-bargaining contract, and that when the Respondents' attorney expressed doubt as to the soundness of the Union's unfair labor practice case, Gilker replied: "Well, we have got a violation against the Company. . . . I sent the witnesses down there and I know how to get a violation. . . ."

Gilker's statements at the settlement conference, as found by the Trial Examiner, obviously require a reappraisal of the bona fides of the applications for employment. The fact that all the applicants applied to Burns for employment, and not to Gillespie; the fact that the applicants were not unemployed, but were rather strikers who ultimately returned to work for another employer; the fact that charges against the Respondents were filed on behalf of the Union which was using these charges to exact a bargaining agreement from the Respondents; and the fact that the Trial Examiner found that Gilker, the international representative of the Union, stated he had sent the applicants down to Burns and knew how to make out an unfair labor practice violation against an employer—all create a doubt as to the applicants' good faith in seeking employment. The only person who was in a position to make a reappraisal of their good faith without retrying the case *de novo* was Trial Examiner Bean who had heard the applicants testify and was therefore in a position to redetermine their credibility in view of the Gilker statements. Trial Examiner Downing did not make the required reap-

praisal, not having seen or heard the applicants who did not testify at the reopened hearing. Actually, Trial Examiner Downing disposed of the new evidence by finding it "false" in the light of credibility resolutions previously made by Trial Examiner Bean on the basis of evidence which the court of appeals held to be incomplete. In other words, instead of reweighing the testimony of the job applicants together with Gilker's statements at the settlement conference to redetermine the bona fides of the applicants, Trial Examiner Downing used Examiner Bean's credibility findings to brand as false representations made by Gilker, the applicants' own representative and a member of the bar. Yet there is nothing so improbable in Gilker's credited statements as to justify characterizing them as false. Nor did Trial Examiner Downing from his observation of Gilker find him generally unworthy of belief. The very fact that Gilker's statements were against the interest of the people he represented would seem, on the contrary, to lend support to their acceptance as trustworthy.

What we have said is sufficient to indicate that in our opinion the procedure followed and the decision reached by the majority is not in compliance with the spirit or the requirements of the court of appeals decision. We are compelled to the conclusion that the majority has merely reiterated its former position that the evidence held to be "material and competent" by the court and which goes to the heart of the case is of no consequence. We believe that proper weight could be given to the Gilker statements only by a Trial Examiner who had heard all the witnesses, including Gilker and the applicants for employment. We would therefore reject Trial Examiner Downing's report and remand the case to a new Trial Examiner for a hearing *de novo*.

SUPPLEMENTAL INTERMEDIATE REPORT

On December 19, 1952, the Board issued a Decision and Order in the above-entitled proceeding (101 NLRB 1181) in which it found that Respondents had engaged in certain unfair labor practices proscribed by Section 8 (a) (1) and (3) of the National Labor Relations Act, as amended (61 Stat. 136), and in which it ordered Respondents to cease and desist from said practices and to take certain affirmative action designed to effectuate the policy of the Act. Thereafter in an opinion and decree entered on November 25, 1953, the United States Court of Appeals for the Eighth Circuit denied enforcement of the Board's Order but granted the Board authority to open the proceedings for certain additional evidence proffered by Respondents, and thereafter to issue a new Order if so advised (207 F. 2d 434, 437). On March 30, 1954, the Board issued its Order in accordance with the aforesaid Decision, reopening the record for that evidence and remanding the case to the Regional Director for the purpose of arranging such further hearing.

Pursuant to due notice issued by the Regional Director, a hearing was held in Rogers, Arkansas, on January 10, 1955, before the Trial Examiner duly designated by the Chief Trial Examiner. All parties were represented by counsel and were afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce relevant evidence, and to file briefs, proposed findings of fact, and conclusions of law. Oral argument was waived. Briefs have been filed by General Counsel and by Respondents.

Before summarizing the new evidence, it will be helpful to review briefly the earlier proceedings to establish the present posture of the case and to state the issue which is posed by the remand order.

The Board found originally that Respondents had discriminatorily refused employment to eight applicants because of their union membership and strike activities and had independently violated Section 8 (a) (1) by certain statements made by Copartner Burns. Respondents had defended in part on the ground that the Union had inspired the applicants to apply for work for the sole purpose of making out a case of violation of the Act. Evidence was received on that issue except that testimony was excluded from Copartner Burns (of which an offer of proof was made) that Union Representative Gilker had stated during a meeting with Respondents, their counsel, and a Board investigator that he had sent the applicants "down there to talk to Mr. Burns in order to make out a National Labor Relations Board violation against Burns and Gillespie"; 207 F. 2d 434, at p. 436 (C. A. 8); 101 NLRB 1181, at p. 1187, footnote 9.

The applicants (except Dale Bader) had testified as to their need and desire for work and as to their efforts to obtain employment with Respondents and elsewhere, and though strenuously cross-examined on the point, they had denied that the union representative had coached them on how to approach Respondents. The Board found (adopting the Trial Examiner's findings) that they were sincere in their desire to work for Respondents and that they had testified credibly that they had received no instructions concerning their manner of presenting themselves. The court, without passing on the substantive issue involved, held that the evidence proffered by Respondents was erroneously excluded and that because of lack of due process, it would not consider the sufficiency of the evidence to support the Board's determination and order.

The Board's Order reopened the proceedings for the limited purpose of receiving the excluded evidence; and the hearing on January 10 was limited to receipt of that evidence, plus other evidence offered either by way of corroboration or contradiction or to establish the background of the meeting and the setting in which Gilker's statements were allegedly made. Thus the issue under the remand order relates to Respondents' defense that the applicants had not made bona fide attempts to obtain employment with Respondents; specifically, it is whether the new testimony, considered in conjunction with relevant evidence in the previous record, establishes that the applicants did not genuinely desire work at Respondents' plant and would not have accepted jobs if offered them.

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

FINDINGS OF FACT

A. Summary of the evidence

Respondents offered the testimony of Burns and Gillespie and of Allan Andrews (the latter was counsel for Respondents at the previous hearing), and the General Counsel offered in refutation the testimony of Gilker. The evidence establishes that the meeting was held and that Gilker's statements were made in the following setting: The Union had filed charges sometime during the fall of 1951 (the complaint was not issued until March 12, 1952). An earlier attempt to hold a meeting in January 1952, had failed because Respondents wished to have their counsel present. When finally held around January 18, the meeting was attended by Burns and Gillespie, by Crouch and Andrews, their attorneys, by Gilker and a Mr. Sell (now deceased) representing the Union, and by Seymour Allsher, a field examiner of the Board.¹ Gilker's testimony is credited that Allsher called the conference for the purpose of endeavoring to effect an informal settlement of the Union's charge.

The summary of the new testimony may begin appropriately with Burns, since the offer of proof had related specifically to his testimony. Burns testified that Gilker offered to drop the charge if he could get a union contract, that Gilker stated he had sent the witnesses down to apply to Burns because Burns was not at the plant, and that he had told the witnesses what to say and how to say it. Burns could recall nothing else specifically that was said by anyone at the meeting. He conceded, however, that Gilker and the Board representative may have talked about the amount of back pay due the applicants and that the Board representative may also have referred

¹ There was also some indication that Mrs Gillespie came into the meeting at one point during discussions of the amount of back pay.

to the fact that most of the applicants would decline jobs on the Company's offer, thereby making the matter easy to settle.

Gillespie testified on direct examination that Gilker stated that he was not particularly interested in the case, that what he wanted was a union contract, and that if Respondents would give him a contract he would withdraw the case. Crouch replied that he did not think Gilker had a case; and Gilker said he generally made his cases strong enough to stick, that he had made up the case against Respondents by sending the applicants to Burns (instead of to the plant) to ask for work, though they really did not want work and were just trying to build up a case against the Respondents.

Cross-examination developed that Gillespie's recollection of Gilker's statements was at best hazy. Thus he admitted he did not remember just what Gilker had said about making out an unfair labor practice charge, but it was to the effect that if Respondents would sign a union contract he would dismiss "this unfair labor practice trial." As to sending the applicants to Respondents, Gillespie was able only to state that Gilker had said something like he had sent them down there just to make a case against Respondents. And though denying at first that the purpose of the conference was to discuss a settlement or that settlement was in fact discussed, Gillespie later admitted that there was some figuring done concerning an amount and that a proposal was made by Gilker that if Respondents would settle for so much and grant a union contract, then the matter might be settled. Gillespie could remember nothing which the Board representative had said.

Andrews evidenced a clearer recollection than Burns and Gillespie on most matters. His testimony accorded with Gillespie's that Gilker stated that he was not particularly interested in the charge, that what he wanted was a union contract, and that Crouch refused on the ground the Union did not have a case against the Company. Andrews testified that Gilker continued, "Well, we have got a violation against the Company . . . I sent the witnesses down there and I know how to get a violation"; that he referred to certain affidavits which he had in a folder and added, "I have got a violation from these witnesses that I sent down there to get the violation on." Andrews also testified that Gilker said he had sent the applicants to see Burns, but did not recall that Gilker said why he had done so.

On cross-examination Andrews summarized Gilker's statements as follows that: he knew a good case when he saw one, or knew how to make out a Labor Relations Board violation, and he had sent the witnesses down there for that purpose.

Andrews' recollection of the discussions insofar as they related to settlement was more hazy. He explained that he was not interested in the discussions of "things in the nature of a compromise" because, "I didn't think they would be admissible in testimony when you are trying to compromise a proposition." Andrews did recall, however, that there was some reference to back pay if Respondents should lose the case and that something was also said about the posting of notices and about general procedures if the case were settled.

Gilker's recollection of the setting and details of the meeting proved superior to that of Respondents' witnesses. He testified that Allsher had called the meeting and that Allsher opened it by stating he had interviewed the witnesses on both sides and felt that there was a possibility of settling the matter informally because of the small amount of money involved and because Gilker had informed him that most of the applicants had obtained other jobs and were no longer interested in working for Respondents. Allsher proposed a 50-percent back-pay settlement, plus an offer of employment, and the posting of a notice.

Gilker suggested that Respondents might as well settle the whole matter since as soon as they posted the notice they would be negotiating with the Union for a contract anyway. Allsher stated that he would have to leave the room if a contract was to be discussed, but Crouch and Burns replied that there was no need of that because they were not interested in talking contract. The discussion turned back to Allsher's proposal, and Gilker agreed to take up with the applicants the question whether they would accept the 50-percent settlement and the offer of employment. The meeting concluded with the understanding that Gilker would report to Crouch, would ascertain from him whether the settlement was also acceptable to Respondents, and would notify Allsher whether agreement was reached.

Gilker denied having stated that he was not interested in the case, but admitted saying that what he wanted was a contract, and that he commented on the small amount of back pay and the fact that the charge was therefore not important. He denied having said, however, that he would withdraw the charge as part of the settlement for a contract. Gilker also denied having stated that he sent the applicants to see Burns personally, that he sent them to Respondents to make

out an unfair labor practice charge, and that he told them how to present themselves or what to say or how to say it. He admitted, however, having said that he knew a good charge when he saw one and that he had taken affidavits from the applicants (which he delivered to the Board) which established a good charge and one which would "stick" against Respondents for violating the Act.

Questioned as to what directions he had given the applicants themselves, Gilker testified that probably around June 20 or 21 (during the course of the Pluss strike in which applicants were participants), he had begun urging the strikers in numerous meetings to seek other jobs because the strike looked like a long one, and that he suggested they go to Burns and Gillespie and to a number of other employers whom he named, but he denied that he coached the strikers on how to present themselves or what to say. He also denied that he had told them specifically who to contact when applying to Burns and Gillespie, but testified that he might have specified *Burns*, as that was the first name in the firm name, saying, for example, "Go to Burns, go to the canning factory, go to Swanson's, go to Keesin's."

B. Concluding findings

The record contains no substantial refutation of Gilker's testimony as to the background and setting of the meeting, that it was called by Allsher for the purpose of reaching a settlement of the Union's charge, and that it was devoted largely to discussions of a settlement. Indeed, the testimony of Respondents' witnesses furnished both implicit and explicit corroboration that such was the case. When the crucial matter of the previous offer of proof was reached, however, a sharp conflict developed. That conflict is to be resolved, as usual, by reconciling the conflicting versions where possible, by resolving credibility where necessary, and by then determining on which side lies the preponderant weight of the evidence.²

Of course, a resolution of credibility does not require either full acceptance or complete rejection of a witness' testimony since, "It is no reason for refusing to accept everything that a witness says, because you do not believe all of it; nothing is more common in all kinds of judicial decisions than to believe some and not all." *N. L. R. B. v. Universal Camera Corporation* (L. Hand, C. J.), 179 F. 2d 749, 754 (C. A. 2). In the present case, for example, though certain portions of the testimony of Respondents' witnesses must be rejected, their testimony on other points is mutually corroborative and outweighs the uncorroborated testimony of Gilker to the contrary. Thus Burns' testimony that Gilker stated he had told the witnesses what to say and how to say it cannot be credited in the face of Gilker's denials and the failure of either Andrews or Gillespie to corroborate Burns. In Gillespie's case; cross-examination developed a substantially weaker version of Gilker's statements. However, the latter version is in substantial accord with Andrews' testimony and is accepted.

Indeed, the testimony of Respondents' witnesses is found to be in substantial accord on the following points that: Gilker stated that he was not particularly interested in the charge; he wanted a union contract and would drop or withdraw the charge if Respondent would give him a contract; and he had sent the applicants to Respondents to make out a case or a violation against them. On those matters Gilker's uncorroborated testimony is insufficient to overcome the cumulative weight of the mutually corroborative testimony of Respondents' witnesses. In fact, Gilker admitted that he had minimized the importance of the charge and had emphasized his desire for a contract.

Some further discussion is necessary on the question whether Gilker stated he had directed the applicants to go to see Burns because Burns was not at the plant where the hiring was done. Respondents' witnesses were agreed that Gilker said he had sent the applicants to Burns, but Andrews did not recall that Gilker said why he had done so. Gilker finally admitted that he had suggested to the applicants that they apply to *Burns* (in abbreviation of the full firm name), and it is entirely probable that he used the same sort of verbal shorthand during the settlement conference. The testimony of Respondents' witnesses that he did so is credited. The further claim by Burns and Gillespie is not credited, however, that Gilker spelled out his reasons; since Andrews did not corroborate them and Gilker denied having done so. It is concluded that Burns' and Gillespie's testimony on that point included the gloss of an inference they had drawn from Gilker's statement that he had sent the applicants to Burns.

² Since one of the duties of a Trial Examiner is to determine the credibility of witnesses, he cannot properly find lack of a preponderance of evidence without first having resolved conflicts in testimony which would tip the scales to one side or the other.

There remains the matter of determining whether the new evidence, considered together with relevant evidence in the previous record, establishes Respondents' defense that the applicants made no bona fide attempts to obtain employment. Laying aside (as the court did) the point that Gilker's statements were made during the course of settlement negotiations, the statements do, of course, constitute evidence of relevance in support of that defense. But the new evidence does not *establish* the defense; it does not refute the testimony of the applicants themselves (still undenied) as to their need of work and their genuine desire for it, or their denials that they had been coached by or had received instructions from the union representative as to how to present themselves. Indeed, Gilker's testimony now corroborates them in the latter respects. The new evidence thus leaves their testimony uncontradicted and unimpeached.

What the new evidence shows is that during the course of the settlement conference Gilker made certain representations which reflected seriously on his good faith if they were true, and which, if false, reflected on his judgment and his tactics. What the entire evidence shows is that his representations were false.

In sum, the entire evidence does not establish that the applicants were aware of or that they had knowingly participated in a scheme to entrap Respondents into a violation of the Act. Cf. *Vaughn Bowen*, 93 NLRB 1147, 1179-80. It shows to the contrary that the applicants genuinely desired to work for Respondents and would have accepted the jobs they sought if offered to them. *The Babcock & Wilcox Company*, 110 NLRB 2116, distinguishing *Vaughn Bowen*, *supra*.

It being concluded and found that the evidence fails to establish Respondents' defense that the applicants made no *bona fide* attempt to obtain employment, it is accordingly recommended that the Board reaffirm its previous findings of unfair labor practices against Respondents.

Douglas Aircraft Company, Inc. and Aircraft Technical Workers Union, Local No. 1, Petitioner. Case No. 16-RC-1562. July 29, 1955

DECISION AND ORDER

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

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 employees of the Employer.¹
3. No 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 for the following reasons:

The Petitioner seeks to sever from a plantwide unit presently represented by the Intervenor, employees in the tooling subdivision in the following job classifications: master layout man, loftsmen, planners, tool designers, tool liaison men, tool project men, duplicating machine operators, production control clerks, planning clerks, planning release

¹International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, CIO, and its Local No. 1093 were permitted to intervene at the hearing in this proceeding on the basis of their certification and contract with the Employer for the production and maintenance employees at the Employer's Tulsa division.