

Elmira Machine & Specialty Works, Inc.; Youngstown Steel Door Company; Elmira Machine & Specialty Works, Inc., subsidiary of Youngstown Steel Door Company and District No. 58, International Association of Machinists, AFL-CIO.
Case No. 3-CA-1793. October 4, 1962

DECISION AND ORDER

On June 8, 1962, Trial Examiner Horace A. Ruckel 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 attached Intermediate Report. Thereafter, the Respondent and the General Counsel filed exceptions to the Intermediate Report and supporting briefs.

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 McCulloch and Members Rodgers and Fanning].

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 and the entire record in the case, including the exceptions and briefs, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner as modified herein.¹

In accord with our recent decision in *Isis Plumbing & Heating Co.*, 138 NLRB 716, interest shall be awarded on the backpay due the discriminatees named in Appendix A of the Board's attached notice.²

¹ The record shows that on and after November 13, 1961, a number of employees who had punched in and were working engaged in an unfair labor practice strike, in protest against the Respondent's discriminatory layoff of other employees, that the Respondent thereafter sent letters to the laid-off employees, *inter alia*, validly offering to reinstate them on various dates between November 21 and 28; and that each employee who refused the offer of reinstatement also became an unfair labor practice striker. Our order of reinstatement upon application will be construed as applying to the unfair labor practice strikers, including Chifton Rought and Harry Casteline (inadvertently omitted by the Trial Examiner) and Gerald Brown (incorrectly listed by the Trial Examiner as Gerald Bowman), but excluding Lynn Manchester (a supervisor). If, by reason of a reduction in force and upon dismissing persons hired on or after November 13, 1961, there are still not sufficient positions available for such applicants, all available positions (including those held by laid-off employees who have accepted reinstatement) shall be redistributed on a nondiscriminatory basis, and those for whom no position is then available shall be placed in nondiscriminatory sequence on a preferential list, as set forth by the Trial Examiner. The backpay period ends for a laid-off employee on the date when work was actually offered, and begins for a striker 5 days after his application for reinstatement.

² Member Rodgers, for the reasons stated in his dissenting opinion in *Isis Plumbing & Heating Co.*, would not award interest on backpay.

ORDER

The Board adopts as its Order the Recommended Order of the Trial Examiner, except that Appendix C has been redrafted as attached hereto.

APPENDIX A

Stanley Bennett	Bertha Hollenbeck	Marjorie Monteleone
James E. Baily	Rose Patterson	Marguerite Forsyth
Harry Coxhead	Ida Frisbie	Arlan Briggs*
Donald Schrom	Pauline Connolly*	Mahlon Baldwin, Jr.
Chester Wilk	Mary Ross	John Caggia
David Terwilliger	Loraine Edwards	Frank Camp, Jr.
Vance Tiffany	Virginia Hoover	Wallace Connis
Robert Norton	Myrtle Caslin	Harold Amey
Richard Bostwick*	Agnes Bullock	Atlon Briggs
Robert M. Dates	Gladys Ma Camber	Carl Whipple
Kenneth Leister	Nellie Smith	Joseph Long
Gerald Brown	Bertha Sykora	Sevellin Hoyles, Jr.
John Smith	Della Brewer	Louise Passeri*
Lyle Dykins*	Louise Baker	Mary Touchie
Edgar Garland	Emma J. Kelly	Onalee Stahle
Douglas Washburn	Mable Carroll	Frances Krumloff
Johann Micheler	Vera Landon	Mary A. Carl
Edmund Murray	Adelaide Carlson	Angeline Lewis
Carol E. Bailey	Helen Kline	Margaret Whittemore
Kenneth Forsuth	Cora Kudzinski	Evelyn Huntington
Edith Rockwell*	Lois Meany	Dolorty Amey
Marion Buchanan	Evelyn Seymour	Gladys Gulich
Mildred Green	Donna Wheeler	Hazel Bush
Anne Daughtery*	Mary Martin	Ada Weston
Mary Spencer*	Flora Wheeler	Elaine Ferris
Kay Orcutt	Sally Burnside	Jean Urbaniak
Barbara Leister	Dora B. Smith	Bessie Miller
Robert C. Bailey	Shirley Johnson	Joanne Beebe
Charles Griffiths	Ida Mays	Julia Tice
James Kelsey	Florence Oliver	Clifton Rought
Ester Andrus	Elsie Benjamin*	Harold Casteline*
Winifred Little	Eleanor Erwin	

* Indicates reinstatement before hearing

APPENDIX B

Mary Bartlett	Barbara Sawyer	Margaret Tyson
Elva Burns Little	Kenneth Ripley	Arlene Jennings
Sharon Bourdette	Carl Slingerland	Shirley Miller
Rose Williamson	Sylvia Slingerland	Dorothy Norton
Carrie Baker	Donald Moore	Elizabeth Lyons
Ella Deery	Nellie Miller	Betty Garland
Edith Edwards	Dulcie Hill	Gertrude Hilfiger

APPENDIX C

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, we hereby notify our employees that:

WE WILL NOT discourage membership in District No. 58, International Association of Machinists, AFL-CIO, or in any other labor organization, by laying them off or in any other manner discriminating against our employees in regard to their hire or tenure of employment or any term or condition of employment because of their union affiliation or activities.

WE WILL NOT close down or threaten to close down our plant or part of our production to discourage membership in any labor organization of our employees.

WE WILL NOT in any manner interfere with, restrain, or coerce employees in the exercise of their right to self-organization, to form, join, or assist the above-named Union, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in strikes and other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

WE WILL, upon application, offer the employees named in Appendix A and Appendix B attached immediate employment at our plant, and make them whole in the manner provided in The Remedy section of the Intermediate Report, as amended herein.

WE WILL make whole the employees on Appendix A attached for any loss of pay they may have suffered by reason of their layoff on November 13, 1961, and until the date sometime after November 18, 1961, on which work was actually offered them.

WE WILL, upon request, bargain collectively, with District No. 58, International Association of Machinists, AFL-CIO, as the exclusive bargaining representative of all our employees in the appropriate bargaining unit consisting of all employees at our Elmira, New York, plant, excluding office clerical employees, professional employees, and supervisors.

All our employees are free to become and remain members of the above or any other labor organization, 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, as amended.

ELMIRA MACHINE & SPECIALTY WORKS, INC.;
YOUNGSTOWN STEEL DOOR COMPANY,
Employer.

Dated----- By-----
(Representative) (Title)

NOTE.—We will notify any of the above-named employees presently serving in the Armed Forces of the United States of their right to full reinstatement upon application in accordance with the Selective Service Act after discharge from the Armed Forces.

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

Employees may communicate directly with the Board's Regional Office, 120 Delaware Avenue, Buffalo, New York, Telephone Number, TL 6-1782, if they have any question concerning this notice or compliance with its provisions.

INTERMEDIATE REPORT AND RECOMMENDED ORDER

STATEMENT OF THE CASE

Upon charges and amended charges filed on November 24, 1961, and January 18 and February 27, 1962, respectively, by District No. 58, International Association of Machinists, AFL-CIO, herein called the Union, the Regional Director for the Third Region of the National Labor Relations Board, Buffalo, New York, herein called the Board, on January 24, 1962, issued a complaint and notice of hearing and on March 1, 1962, an amended complaint and notice of hearing against Elmira Machine & Specialty Works, Inc.; Elmira Machine & Specialty Works, Inc., Subsidiary of Youngstown Steel Door Company; and Youngstown Steel Door Company, herein jointly called Respondent. The complaint was further amended at the hearing. The complaint, as amended, alleges in substance that Respondent since May 1961, has, by its agents, (1) threatened to discharge its employees and to close its plant if they supported the Union, and threatened them with physical violence; (2) on or about November 13, 1961, laid off and/or discharged and locked out 95 employees because they engaged in union activity, as the result of which other employees engaged in an unfair labor practice strike; and (3) since about November 16, 1961, refused to bargain collectively with the Union as representative of its employees in an appropriate unit. These acts of Respondent are said to constitute unfair labor practices within the meaning of Section 8(a)(1), (3), and (5) of the National Labor Relations Act, as amended (29 U.S.C. sec. 151, *et seq.*), herein called the Act. Respondent's answer denies the commission of unfair labor practices.

Pursuant to due notice, Trial Examiner Horace A. Ruckel conducted a hearing at Elmira, New York, on March 21, 22, and 23 and May 1, 1962, at which all parties were represented.

At the conclusion of the hearing the parties waived oral argument. The General Counsel and Respondent have filed briefs which I have considered. Upon the entire record, and from my observation of the witnesses, I make the following:

FINDINGS OF FACT

I. RESPONDENT'S BUSINESS

Elmira Machine & Specialty Works, Inc., herein sometimes called Elmira Machine, is a New York corporation having its principal office and place of business at

Elmira, New York, where it is engaged in the manufacture, sale, and distribution of steel punch press stampings.

Youngstown Steel Door Company, herein sometimes called Youngstown Door, is an Ohio corporation. On or about October 30, 1961, Youngstown Door purchased from Elmira Machine a substantial part of its physical assets, and its name, goodwill, accounts receivable, and other assets, including the Elmira Machine plant at Elmira, New York, and assumed the liabilities theretofore incurred by Elmira Machine. Since about October 30, 1961, Elmira Machine ceased to operate as a separate entity and Youngstown Door has since then operated Elmira Machine as its subsidiary and has engaged in the same business operations at the same location as formerly engaged in by Elmira Machine, and has employed substantially the same employees and supervisors as had been employed by Elmira Machine.

During the 12 months prior to the issuance of the amended complaint, a representative period, Respondent purchased and caused to be transferred and delivered to its plant in Elmira, steel and other goods and materials valued in excess of \$50,000 from States of the United States other than the State of New York. During the same period Respondent manufactured, sold, and distributed at said plant, products valued at more than \$50,000 of which products valued at more than \$50,000 were shipped from said plant directly to States of the United States other than the State of New York. The complaint alleges, the answer admits, and I find that Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

District No. 58, International Association of Machinists, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act and admits employees of Respondent to membership.

III. THE UNFAIR LABOR PRACTICES

A. *The discriminatory layoffs on November 13, 1961; interference, restraint, and coercion; the strike*

Organization of Respondent's employees into the Union began on November 9, 1961, when James Kelsey, an employee, got in touch with Justin Donahue, business representative of the Union, in Elmira. A meeting was held at the union hall on the following evening, attended by Donahue and Kelsey as well as by two other employees, Donald Schrom and Harold Coxhead. These employees signed union authorization cards and took other cards to which they obtained signatures.

On Monday morning, shortly after 6 o'clock, Donahue and Otto Halliday, another union representative, shortly joined by employees Kelsey, Schrom, and Coxhead, arrived at the plant and began passing out union application cards and literature as employees reported for work at 7 o'clock. About 6:15, Anthony Serio, president and general manager of Elmira Machine, arrived. Donahue offered him a union circular and an altercation followed during which Serio, according to Donahue, said: "God damn you, Donahue, I told you years ago I would close this plant down before I would have your union in here. Now, you take these people and you feed them. I have my mind made up, I am all through. When I close this place, I will ruin your reputation in this area. How do you like that?" Donahue's testimony as to these statements was substantiated by that of Halliday. Serio, while testifying, admitted that he was "furious" and told Donahue that he had "taken care" of the employees in the past, that now Donahue could take care of them, and that he was going to "shut down a line and possibly a line and a half." I find that Serio made substantially the remarks attributed to him by Donahue and Halliday.

1. Layoff of dayworkers; the strike

When the day shift entered the plant at 7 o'clock, Serio ordered work on baskets and handles for nine-cup percolators then being produced for the Greencastle, Pennsylvania, plant of Corning Glass Works, one of Respondent's principal customers, suspended. Accordingly, the employees were divided into two groups. Those in one group were told to punch in and those in the other, consisting of 59 employees, were told that they were being laid off. The latter group left the plant and attended a hastily called meeting of the Union. Further membership applications were filled out and the workers voted to strike. Picket signs were improvised and about 9 o'clock a picket line was established in front of the plant. At noontime a number of other

employees, who had punched in and who had been working, left the plant and joined the strike. Others worked the remainder of Monday and joined the strike on Tuesday. The picket line was still in effect at the time of the hearing.

2. Layoff of the night shift

Lynn Manchester, night foreman, arrived at the plant shortly before 1 p.m. and Serio told him that there "wouldn't be a night shift." When the night shift reported to work at 3:30 p.m., having crossed the picket line without interference, Manchester met them in front of the plant and told them that the entire shift, consisting of 34 employees, was temporarily laid off. Asked by various of the employees what had happened, Manchester replied, according to his own testimony, that he "didn't know too much about what was going on." He further testified that he had no knowledge of an impending layoff prior to reporting to the plant. It does not appear from the testimony of either Manchester, Thayer, or Serio, that Serio gave either the day-shift or night-shift foreman any notice of an impending layoff or any reason for it.

Various witnesses called by the General Counsel testified that Manchester, when laying off the night shift, told them that the "doors were locked," or that they were "locked out." Manchester and other witnesses denied that Manchester said either of these things. I do not find it necessary to resolve this contradiction. It is not controverted that the members of the night shift were in fact laid off.

Conclusions

The "line and a half," closed down by the Respondent on November 13, consisted of employees working on the production of baskets and handles for a nine-cup percolator manufactured by Corning. The basket is that part in which the ground coffee is placed. Baskets are produced on the day shift and handles on the night shift. Respondent's defense is that the layoff was necessitated by a telephone call from Robert Ryerson, purchasing agent for Corning, asking him to hold up delivery of baskets for Corning's nine-cup percolator. Serio, called as the General Counsel's first witness, testified that he received this call late in the afternoon of Friday, November 10, and that he knew then that Respondent would have to lay off employees. Serio did not state during this part of his testimony that the holdup request included handles.

Ryerson, also called as a witness by the General Counsel, testified on the basis of his telephone records that he called Serio on Tuesday, November 7, and again on Wednesday, November 8, and that in one of these calls he asked Serio to hold up shipments of nine-cup baskets, but without specifying how long. He denied calling Serio on Friday afternoon, November 10, as related by Serio. Asked on cross-examination if Serio called him on Friday, Ryerson stated that he had no recollection of his doing so.

Serio, when later called as a witness by Respondent, changed his testimony that Ryerson called him late Friday afternoon, November 10, and stated instead that he called Ryerson at that time. According to Serio, in this conversation Ryerson agreed to take the baskets which Respondent had produced that week. Although Serio had originally testified that the alleged Friday call from Ryerson pertained only to the delivery of percolator baskets, he testified when called by Respondent that the conversation included handles, which Respondent was to continue to deliver on a limited basis. Serio further admitted on cross-examination that on December 5 he told an investigator for the Regional Office of the Board that Ryerson had called him on Sunday, November 12. He did not state while testifying that any such call was made, nor did Ryerson, and I find that it was not.

I found Serio to be an unreliable witness, self-contradictory with respect to the circumstances of his telephone conversations with Ryerson, and in other aspects of his testimony, eager, evasive, and unresponsive by turn. I credit the testimony of Ryerson, an unbiased and straightforward witness, and find that Ryerson called Serio on November 7 and 8, and not later, to hold up delivery of percolator baskets only.

Construing the evidence most favorably to Respondent and assuming, without finding, that Ryerson's request was made on Wednesday, November 8, Respondent nevertheless continued its production of these articles that day, and on Thursday, Friday, and Saturday, November 9, 10, and 11, without laying off any employees. While Respondent, prior to Monday, November 13, may have considered reducing production, Serio admitted that no decision to do so was made until Monday morning, February 13, when Serio saw union literature being passed out in front of the plant. Hence, the foreman of the day shift had not been advised or consulted as to any such decision, or the employees themselves alerted over the weekend.

As has been seen, upon arriving at the plant on Monday morning Serio found representatives of the Union passing out union literature and, in admitted anger, reminded Donahue that he had told him previously that he would close the plant down before having the Union, that his mind was "made up," that he was "all through," and that the Union would now have to feed the employees. The layoff which immediately followed, I find, was because of the appearance of the Union and not for any legitimate reason relating to production.

Respondent's alleged reason for laying off the night shift was equally unconvincing. As has been found. Manchester, night foreman, was not informed that the night shift was to be laid off until shortly before 1 p.m. on Monday when he arrived at the plant and Serio told him that "there wouldn't be a night shift." Serio testified that when he decided to close the basket line on the day shift he also decided to shut down half the handle line on the night shift and to lay off employees "in the same proportion." Asked why, instead of laying off employees in the same proportion, he laid off the entire shift, he stated that it was because of "the turmoil out front." Serio's testimony on that point was as follows:

TRIAL EXAMINER: I am not quite clear. As I understand it, the layoff of some of your people was due, you say, to your conversations with Mr. Ryerson?
The WITNESS: Yes.

* * * * *
TRIAL EXAMINER: Did that affect some of the people on the night shift, did that decision affect, necessarily, the people on the night shift?

The WITNESS: Yes, we would cut down proportionately too.

TRIAL EXAMINER: Then you said later that your decision not to call the night people was due to violence on the picket line.

The WITNESS: That is right.

TRIAL EXAMINER: Well, now, which is correct?

The WITNESS: Well, we had received material, I believe, around the first of December on the six cup basket. [sic]

* * * * *
Q. (By Mr. BURKE.) Why did you lay off the entire night crew if your material called only for a proportionate lay off?

A. Because of the violence.

* * * * *
Q. Up to the time the picket line was formed and the trucks were denied entrance had you decided to lay off the entire night crew or part of the night crew?

A. No, part of the night crew.

The record fails to reveal that trucks from other firms were unable to get into the plant before 1 o'clock when Serio instructed Manchester to lay off the entire night shift. Moreover, neither on this day nor any other day did the pickets interfere with the entrance and exit of employees on the day shift who were not laid off. Employees on the night shift who reported for work on November 13 passed through the picket line without incident, and were at the door to the plant when they were told that they were laid off.

The only specific instance of an outside truck being stopped occurred around 2 o'clock on the afternoon of November 13, after Serio's instructions to Mansfield to lay off the night shift when it arrived. On this occasion a truck from Rochester was stopped by a group of pickets, though it later crossed the picket line. There is no evidence of violence by pickets.¹ Serio came out of the plant when the Rochester truck arrived, and engaged in an altercation with Schrom, during when he pushed him and threatened to strike him. Serio, though recalling the incident involving this truck, testified that he was not sure that it took place on Monday and that it might have been on the following day or even later in the week. I have found that it did take place on Monday afternoon. Serio's uncertainty, however, is significant since it seems to reveal that he made no connection in his mind between this incident and his decision on Monday afternoon to lay off the entire night shift, allegedly because deliveries could not be made.

I find that Serio, at 7 a.m. on November 13, decided to and did lay off 59 employees on the day shift, and that this decision was discriminatorily made because of their union activity. It follows that the layoff of a "corresponding" number of employees

¹ Respondent has not advanced and does not now advance acts of violence or other unprotected activity as a reason for not rehiring or recalling employees.

on the night shift was also discriminatory, since there would have been no such necessity but for the original discriminations.

By laying off employees on November 13, 1961, Respondent discriminated against them in regard to their hire and tenure of employment, in violation of Section 8(a)(3) and (1) of the Act.

By threatening to close down its plant and to lay off employees, and by threatening a picket with physical violence, Respondent interfered with, restrained, and coerced its employees in violation of Section 8(a)(1) of the Act.

The strike which took place on November 13, 1961, engaged in by the laid-off employees and others not laid off but who joined the strike, was caused by Respondent's unfair labor practices.

On November 18, 1961, Respondent sent letters to all employees on both the day and night shifts who had been laid off on November 13, as well as to those who joined the strike, requesting them to return to their jobs at staggered dates between November 21 and 28. I find that this was a valid offer of reinstatement. It was accepted by 12 employees.

B. Other acts of interference, restraint, and coercion

James Kelsey testified that about the middle of October 1961, when he and others were in the washroom discussing the need of a union, Robert Thayer, day-shift foreman, said to him that he "could get fired for talking that way." Thayer, called as a witness, though admitting that Kelsey stated that a union was needed in the plant, denied saying anything. I do not credit the denial and find that Thayer made in substance the statements attributed to him by Kelsey. Donald Schrom testified that during the week before the layoff and strike on November 13, he asked Thayer if he thought that, since Youngstown Door had bought Elmira Machine, there would be a union in the plant, stating that it would be a good thing, and that Thayer replied that Serio would close down first. Schrom's testimony was supported in part by that of Clifton Rought who heard part of the conversation, and testified that he heard Thayer say that Serio would not let the Union in.

Thayer admitted having a conversation with Schrom during the week prior to the strike, and admitted the substance of the conversation as described by Schrom and Rought, except that he denied that he said that Serio would close down the plant. I do not credit the denial. I find that Serio made in substance the statement attributed to him by Schrom.

Donald Moore testified that in early October 1961, when he and Thayer were repairing a spring shaft in the toolroom, he asked Thayer if he thought the Union would ever get into the plant and Thayer replied that Anthony Serio would close down the plant first. Thayer admitted the substance of the conversation, except that portion of it relating to Serio's closing down the plant. He stated first that he did not recall making such a statement, and later that he did not. I do not credit his denial.

Carl Slingerland testified that during the early afternoon of November 13, near the timeclock, while he and Thayer were talking about the employees on the picket line, Thayer said to him that Serio would close the plant before letting the Union in. Thayer, while testifying, did not specifically deny making the statement attributed to him by Slingerland, and I find that he did.

Elva Little, a worker on the assembly line, testified that on November 13 when Serio came back into the plant after the incident of the Rochester truck, previously related, he exclaimed in such a way that employees then working could hear: "I will close the shop before a union gets in." Serio testified first that he could not remember making this statement, then that he could not have made it, and then that he did not. He admitted being "very mad" at the time. I have found that Serio that morning, when he was "furious," told Donahue that the Union could "take care" of the employees, and threatened to close the entire plant. The threat attributed to him by Little was in character. I find that he made it.

By further threatening to close the plant and discharge employees if they assisted the Union, Respondent interfered with, restrained, and coerced its employees, thereby violating Section 8(a)(1) of the Act.

C. The refusal to bargain

1. The appropriate unit

The complaint alleges, Respondent admits, and I find that all production and maintenance employees at Respondent's Elmira plant, exclusive of office clerical employees, professional employees, guards, and supervisors as defined in Section 2(11) of the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

2. The Union's majority in the appropriate unit

Respondent's payroll records show that there were 156 employees in the appropriate unit during the week ending November 11, 1961. Of this number, 105 on or prior to November 14 signed cards authorizing the Union to represent them for purposes of collective bargaining. Respondent does not contest the Union's majority. I find, accordingly, that on November 14, 1961, and thereafter, the Union represented a majority of Respondent's employees in the appropriate unit.

3. The refusal to bargain

On November 16, 1961, Donahue wrote Serio by certified mail advising him that a majority of Respondent's employees had designated the Union as its collective-bargaining representative, requesting recognition of the Union, and asking that Respondent designate a time and place to begin negotiations for a collective-bargaining agreement. Serio admitted that the envelope containing this letter, and which bore the Union's return address in Elmira, was delivered at Respondent's plant on November 17. Serio, however, refused to receive it and the letter was returned unopened to the Union's office with the post office notation: "Refused." A copy of the letter was on the same day sent James Burke, attorney for the Union in this proceeding, who accepted it. Burke had on one or more previous occasions represented Respondent, but there is no showing in the record that he did so on November 17. The Union, after Respondent's refusal to accept its letter of November 16, made no further written or oral request.

Respondent's defense to the allegation of a failure to bargain, as stated in its brief, is (1) that Respondent was justified in believing, in view of a statement made to Serio by Donahue on the morning of November 13,² that "any demand for recognition by the Union, if it obtained majority representation, would come to him (Serio) through the processes of the N.L.R.B.," that Respondent "was not charged with knowledge that any envelope which he received from the Union would contain a letter abandoning the announced intention to seek recognition through processes of the Board, and a demand for recognition," and (2) that there is no evidence that Burke was on November 17, or subsequently, retained by Respondent to represent it in collective bargaining.

I find both of these contentions to be without merit. As to (1), the Act does not require that a union seek to establish its representative status by filing a petition with the Board, and Donahue's statement that the Board would decide the question by secret ballot did not commit the Union to this course. Serio could not reasonably understand that it did. Here there was an express request to bargain which failed of actual communication to Respondent only because Respondent, knowing that the latter came from the Union, refused to accept it.³ With respect to (2), while Burke

² When Serio, as has been found, told Donahue that he would close the plant down before having the Union, and that the Union could thereafter feed Respondent's employees, Donahue prophesied that the Union would obtain a majority and said: "There is nothing to lose your head about—neither you nor the Union will decide this question. The National Labor Relations Board will decide it by a secret ballot of your employees." Serio then told Donahue to get off his property.

³ See *N.L.R.B. v. Burton-Dixie Corporation*, 210 F. 2d 199 (C.A. 10), enfg 103 NLRB 880, where a union's request to bargain, conveyed in person by the union's representative, failed of actual communication to the employer because the employer refused to talk with him and ordered him off his property. The court cited *N.L.R.B. v. Columbian Enameling & Stamping Co., Inc.*, 306 U.S. 292, 297, where the court said: "Since there must be at least two parties to a bargain and any negotiation for a bargain, it follows that there can be no breach of the statutory duty by the employer—when he has not refused to receive communications from his employees—without some indication given to him by them—of their desire or willingness to bargain." [Emphasis supplied.]

at the time of his receipt of a copy of the Union's request for recognition and for a bargaining conference may not have been Respondent's agent for this purpose, he shortly thereafter was retained in the preparation of this case. It is a reasonable inference, which I draw, that at that time, if not earlier, Respondent was advised of the contents of the letter, the original of which Respondent had refused to accept. Thereafter, Respondent did not reply to the Union's demand. That demand was a continuing one. Under the circumstances existing here, it is evident that any further specific demand upon Respondent would have been a futile gesture.

Respondent does not contend that it had on November 17, or has now, a good-faith doubt of the Union's majority status. It is clear from the facts outlined in section III, A and B, above, that Respondent had categorically determined not to deal with the Union. I find that Respondent has refused to bargain with the Union or to recognize it as the exclusive representative of its employees in the appropriate unit on and after November 17, 1961. In so doing, Respondent has violated Section 8(a)(5) and (1) of the Act. I further find that Respondent's refusal to bargain with the Union prolonged the strike.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

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

V. THE REMEDY

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

It has been found that on November 13, 1961, Respondent unlawfully discriminated in regard to the hire and tenure of employment of employees by laying them off. The names of these employees appear in Appendix A. I have found that the strike which followed on November 13 was caused and prolonged by Respondent's unfair labor practices and hence was an unfair labor practice strike; that other employees whose names appear in Appendix B joined the strike and became unfair labor practice strikers; that on November 18 Respondent made a valid offer of reinstatement to its laid-off and striking employees, both those included in Appendix A and those in Appendix B. I will recommend that Respondent be ordered to reinstate these employees, upon application, to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges (See *The Chase National Bank of the City of New York, San Juan, Puerto Rico, Branch*, 65 NLRB 829) dismissing, if necessary, any person hired on or after November 13, 1961, to provide places for the returning employees. If, thereafter, by reason of a reduction in force, there are not sufficient positions available for the remaining strikers, then such strikers for whom there are no available positions shall be placed upon a preferential list, and shall thereafter, in accordance with such list, be offered employment in their former or substantially equivalent positions as such employment becomes available and before other persons are hired for such work.

As to the discriminatorily laid-off employees whose names appear in Appendix A, it will further be recommended that Respondent be ordered to make them whole for any loss of pay they may have suffered by reason of their discriminatory layoff, by payment to each of them of a sum of money equal to that which he would normally have earned as wages during the period from November 13, 1961, the date of the layoff, to November 18, 1961, the date of Respondent's offer of reinstatement, less their net earnings, if any, during such period, in accordance with the formula prescribed in *F. W. Woolworth Company*, 90 NLRB, 289, 291-294; *N.L.R.B. v. Seven-Up Company of Miami, Inc.*, 344 U.S. 344. It will also be recommended that Respondent preserve and, upon request, make available to the Board, payroll and other records to facilitate the computation of backpay due.

It will be further recommended that Respondent make whole all the employees whose names appear in Appendixes A and B for any loss they may suffer by refusal of reinstatement or placement upon the preferential list, by payment to each of them of a sum of money equal to that which each of them would normally have earned as wages during the period from 3 days after the date of application to the date of offer of reinstatement or placement upon the preferential list, less the amount, if any, which each respectively earned during said period.

Having found that Respondent has refused to bargain with the Union in violation of Section 8(a)(5) and (1) of the Act, I will recommend that Respondent be ordered to bargain with the Union upon request as the exclusive representative of all its employees in the appropriate unit concerning rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

As the unfair labor practices committed by Respondent involve discrimination and are thereby of a character striking at the root of employee rights safeguarded by the Act, it will be recommended that Respondent cease and desist from infringing in any manner upon the rights guaranteed in Section 7 of the Act.

CONCLUSIONS OF LAW

1. Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. District No. 58, International Association of Machinists, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All production and maintenance employees of Respondent, at its Elmira, New York, plant, excluding office clerical employees, professional employees, and supervisors as defined in the Act, constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

4. By virtue of Section 9(a) of the Act the said Union has been since November 14, 1961, and now is, the exclusive representative of all employees in said appropriate unit for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

5. By refusing, since November 17, 1961, to bargain collectively in good faith with the said labor organization as the exclusive representative of all employees in the said appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

6. By laying off the employees whose names appear in Appendix A, thereby discriminating as to their tenure of employment and thereby discouraging membership in and activity on behalf of the above-named labor organization, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

7. By threatening to close its plant and to lay off employees, and by threatening an employee with physical violence, Respondent has engaged in and is engaging in unfair labor practices in violation of Section 8(a)(1) of the Act.

8. The strike which commenced on November 15, 1961, was caused and prolonged by Respondent's unfair labor practices, and hence was an unfair labor practice strike.

9. The remaining allegations of the complaint setting forth facts and conduct in violation of Section 8(a)(1) have not been established by a preponderance of the evidence.

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

RECOMMENDED ORDER

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record in the case, it is recommended that Respondent, Elmira Machine & Specialty Works, Inc.; Youngstown Steel Door Company; Elmira Machine & Specialty

Works, Inc., Subsidiary of Youngstown Steel Door Company, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in District No. 58, International Association of Machinists, AFL-CIO, or any other labor organization of its employees, by discriminatorily laying off employees or refusing to reinstate any of its employees or by discriminating in any other manner in regard to their hire and tenure of employment or any term or condition of employment.

(b) Refusing to bargain collectively with respect to rates of pay, wages, or hours of employment with the above-named labor organization as the exclusive representative of its employees in the appropriate unit.

(c) Threatening to close down its plant and to lay off its employees if they do not refrain from becoming members of or supporting the above-named labor organization.

(d) Threatening its employees with physical violence because of their legitimate strike activity.

(e) In any other manner interfering with, restraining, or coercing its employees in the exercise of their right to self-organization, to form, join, or assist any labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purposes of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities.

2. Take the following affirmative action which I find will effectuate the policies of the Act:

(a) Upon request, bargain collectively with the above-named labor organization as the exclusive representative of the employees in the above-described appropriate unit with respect to rates of pay, wages, hours of work, and other terms or conditions of employment, and embody in a signed agreement any understanding reached.

(b) Offer to each employee named in Appendixes A and B immediate and full reinstatement, upon application, to his former or substantially equivalent position, without prejudice to his seniority or other rights and privileges, dismissing, if necessary, any persons hired on or after November 13, 1961, and make them whole for any loss of pay they may have suffered in the manner set forth in the section entitled "The Remedy."

(c) Preserve and, upon request, make available to the National Labor Relations 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 for the determination of the amount of backpay and the right of reinstatement under this Recommended Order.

(d) Post at its plant in Elmira, New York, copies of the notice marked "Appendix C."⁴ Copies of said notice, to be furnished by the Regional Director for the Third Region, shall, after being duly signed by Respondent's authorized representative, be posted by it immediately upon receipt thereof, and be maintained for a period of 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director, in writing, within 20 days from the date of the receipt of this Intermediate Report and Recommended Order, what steps it has taken to comply therewith.⁵

(f) It is recommended that the complaint be dismissed insofar as it alleges acts and conduct in violation of Section 8(a)(1) not specifically found to be violative of that section.

⁴ In the event that the Board's Order be enforced by a decree of a United States Court of Appeals, the words "Pursuant to a Decree of the United States Court of Appeals, Enforcing an Order" shall be substituted for the words "Pursuant to a Decision and Order."

⁵ In the event that this Recommended Order be adopted by the Board, this provision shall be modified to read: "Notify said Regional Director, in writing, within 10 days from the date of this Order, what steps the Respondent has taken to comply herewith."