

In the Matter of FRED KAISER AND CHARLES KAISER, COPARTNERS,
DOING BUSINESS UNDER THE TRADE NAME AND STYLE OF NATIONAL HARD-
WARE Co. and UNITED ELECTRICAL, RADIO & MACHINE WORKERS OF
AMERICA, LOCAL 1225, CIO

Case No. 2-C-4933.—Decided February 28, 1944

DECISION

AND

ORDER

On November 8, 1943, the Trial Examiner issued his Intermediate Report in the above-entitled proceeding, finding that the respondents had not engaged in and were not engaging in the unfair labor practices alleged in the complaint, and recommending that the complaint be dismissed, as set forth in the copy of the Intermediate Report annexed hereto. Thereafter the Union filed exceptions to the Intermediate Report and a supporting brief. None of the parties requested oral argument before the Board at Washington, D. C. The Board has considered the rulings made by 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 Union's exceptions and brief, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner with the additions noted below:

The Union contends in its exceptions and brief before the Board that on February 6 and March 3, 1942, respondents violated Section 8 (5) of the Act in that they refused to reduce to writing an alleged agreement relating to the rehiring of their employees in whatever type of new business they might undertake. There is no merit in this contention. The record shows, and we find, that on February 6, 1942, there was no real meeting of the minds on any terms and conditions of employment and hence no agreement was actually reached. We find further that (1) the employment relationship terminated on February 6, 1942, when the employees were dismissed for cause; (2) that therefore the Union did not thereafter represent a majority of the employees in an appropriate unit; and (3) that consequently any refusal to bargain after February 6, 1942, did not constitute a violation of Section 8 (5) of the Act.

ORDER

Upon the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the complaint, issued herein against the respondents, Fred Kaiser and Charles Kaiser, co-partners, doing business under the trade name and style of National Hardware Co., Long Island, New York, be, and it hereby is, dismissed.

MR. GERARD D. REILLY took no part in the consideration of the above Decision and Order.

INTERMEDIATE REPORT

Mr. Sidney Reitman, for the Board.

Mr. Nathaniel Greenbaum, of Brooklyn, N. Y., for the respondent.

Mr. Julius E. Bagley, of Brooklyn, N. Y., for the Union.

STATEMENT OF THE CASE

Upon an amended charge duly filed on August 13, 1943, by United Electrical, Radio & Machine Workers of America, Local 1225, C. I. O., herein called the Union, the National Labor Relations Board, herein called the Board, by the Regional Director for the Second Region (New York City), issued its complaint dated August 16, 1943, against Fred Kaiser and Charles Kaiser, co-partners, doing business under the trade name and style of National Hardware Co., herein called the respondent, alleging that the respondent had engaged in and was engaging in unfair labor practices, within the meaning of Section 8 (1) and (5) of the National Labor Relations Act, 49 Stat. 449, herein called the Act. Copies of the complaint together with notice of hearing thereon were duly served upon the respondent and the Union.¹

With respect to the unfair labor practices, the complaint as amended at the hearing alleged in substance that the respondent: (1) on and after January 26, 1942, urged its employees to refrain from assisting, becoming members of, or remaining members of the Union; (2) on and after January 26, 1942, refused upon request to bargain collectively with the Union which was at all such times the exclusive representative of all of the respondent's production employees, exclusive of executives and foremen, and office, clerical, and sales employees who constituted an appropriate unit; and (3) by the foregoing activities, interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act.

On August 26, 1943, the respondent filed its answer, admitting certain of the allegations of the complaint but denying that it had engaged in any unfair labor practices.

Pursuant to notice, a hearing was held at New York City from September 9 through 14, 1943, before the undersigned, Earl S. Bellman, the Trial Examiner duly designated by the Chief Trial Examiner. The Board, the respondent, and the Union were represented by counsel and participated in the hearing. Full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues was afforded all parties. On the second day of the hearing, the respondent's answer was amended to aver that since the

¹ Upon two occasions, the date of the hearing was duly postponed.

establishment of its war work department there have been two separate appropriate units, rather than the single unit alleged in the complaint. At the close of the hearing, a motion by counsel for the Board to conform the pleadings to the proof was granted without objection, and the undersigned reserved ruling on a motion by counsel for the respondent that the complaint be dismissed. This motion is disposed of by the recommendations set out below. Counsel for the Board and counsel for the respondent argued orally before the undersigned. The parties were afforded, but waived, opportunity thereafter to file briefs with the undersigned.

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

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The respondent is and has been since 1929 a partnership, doing business as National Hardware Co., with its office and plant located at Ozone Park, Long Island, New York. Prior to February 6, 1942, when it shut down its plant, the respondent was engaged in the manufacture of builders' hardware. During June 1942, the respondent entered a new line of work on airplane parts. It has since been engaged in war work as a sub-contractor at various times for three other firms.² It has also engaged in some assembly, sale and distribution of hardware products.

The materials received by the respondent from its principals in its war work consist of steel rods and forgings, and aluminum die castings. During the period of one year prior to September 1943, the materials thus received had a value in excess of \$25,000 and the respondent received in excess of \$50,000 for the use of its plant, tools, and facilities and for the labor entering into the machining and finishing of such materials. As to its hardware business, about September 1942, the respondent still had on hand approximately \$100,000 worth of materials (at cost price) used in that business.³ Approximately two-thirds of such materials had been secured from places outside of the State of New York. During the 12 months preceding September 1943, from the materials on hand, the respondent assembled, packed, and shipped between \$25,000 and \$30,000 worth of hardware, about two-thirds of which was shipped to customers outside of the State of New York. For the purpose of this proceeding, the respondent concedes the jurisdiction of the Board.

The respondent presently has approximately 24 employees engaged in war work. It has only three employees in its hardware department, two foremen and a forelady.⁴ Fred Kaiser is the directing head of the business. His father, Charles Kaiser, who is the other partner, is relatively inactive.

² Liberty Aircraft Products Company, Beldix Aviation Company, and George Manufacturing Company

³ The approximate value of materials which the respondent had purchased annually in connection with hardware manufacturing during the period from 1939 to 1942 was as follows:

| | | | |
|-----------|-----------|-----------|-----------|
| 1939----- | \$200,000 | 1941----- | \$200,000 |
| 1940----- | \$300,000 | 1942----- | 1,500 |

It should be noted that during 1942 the respondent was also engaged in a brokerage business in finished hardware in connection with which it purchased about \$50,000 worth of merchandise which never entered its plant. (750)

⁴ Since February 1942, the supervisory staff of the hardware department, supplemented upon occasions by other employees, has been engaged in the liquidation of the materials on hand at the time the manufacturing of hardware was suspended for the duration of the war.

II. THE LABOR ORGANIZATION INVOLVED

United Electrical, Radio & Machine Workers of America, Local 1225, is a labor organization affiliated with the Congress of Industrial Organizations. It admits to membership employees of the respondent.

III. THE UNFAIR LABOR PRACTICES

A. *Chronological statement of the facts*

By letter dated December 15, 1938, the Second Regional Office informed the respondent of the result of a comparison of union membership cards and the respondent's pay roll which the Board had made in accordance with an agreement between the respondent and the Union. The Board's letter reported that 67 signatures on "membership cards" submitted by the Union were identical with signatures furnished by the respondent for the 80 employees then on its pay roll.

On February 10, 1939, the respondent and the Union signed an agreement in which the Union was recognized as the exclusive bargaining agent for all of the respondent's production employees, exclusive of executives and foremen, and office, clerical and sales employees. This agreement was for a term of one year, with no renewal clause, and covered such matters as hours of work, rates of pay, overtime pay, grievance procedure, arbitration, holidays, seniority, and the hiring of new employees. It was provided that in slack periods work would be divided among the employees in the particular departments affected, and that if division of work was impractical, seniority should be controlling by departments in laying off and rehiring. It was provided that the respondent was free to hire new employees from any source; that the first two weeks of employment should constitute a trial period; that during such trial period the respondent could discharge new employees for any reason whatsoever without recourse; and that upon the expiration of the trial period, new employees "must apply for membership in the Union."⁵ The minimum rate of pay for new employees was set at \$11 a week for the first three months; thereafter it increased to \$12. A schedule attached to the agreement established each employee's rate of pay. Ten employees received \$20 or more per week; 23 received \$15 or more, but less than \$20; and 42 employees received less than \$15.

On February 12, 1940, the respondent and the Union signed a second agreement for one year, covering the same unit. While many of the provisions were substantially the same as those in the previous agreement, the trial period for new employees was increased to one month. The minimum rate for new employees was increased to \$13.60 per week and the wage schedule attached granted pay increases to each of the 75 employees covered by the agreement. These increases ranged from \$1 to \$2 per week.

On February 13, 1941, the respondent and the Union signed their third agreement for one year, covering the same unit and with similar provisions. A clause was added providing for the re-employment, without loss of benefits, of employees entering the armed forces. Provisions concerning holidays were made somewhat more liberal. While the weekly minimum for new employees remained \$13.60 per week, or 34 cents per hour, all 119 employees listed in the appendix received wage increases varying from \$1 to \$3. The average was \$1.72 per week. Two increases were for \$3; 2 for \$2.50; 75 for \$2; 8 for \$1.50; and 32 for \$1.

⁵ It should be noted that this agreement and the two succeeding ones made no provision for the discharge of any employee who failed to maintain his membership in good standing.

On January 9, 1942, Charles Frank, business representative of the Union, wrote the respondent, asking for a conference not later than the week of January 19 to begin negotiations on a number of changes which the Union desired to incorporate in an agreement to succeed the one which was to expire on February 13. The letter concluded with the following paragraph:

I hope that the spirit of good will and cooperation that has prevailed will continue during our conferences.

About January 21, at a short meeting arranged pursuant to the above letter, the Union presented written demands to the respondent. Kaiser⁶ glanced at the demands; expressed surprise at the size of the wage increases sought; stated that he thought them unreasonable and impossible; and suggested that further consideration be reserved as he wanted to discuss the demands with his associate. Another meeting was arranged, and the demands were left for the respondent's consideration.⁷ Thereafter Kaiser and his father discussed the Union's proposals.

The written demands submitted by the Union about January 21 called for substantial concessions. Under these demands, the minimum rate per hour for new employees was to be increased from 34 cents to 50 cents, and per week from \$13.60 to \$20. An increase of 20 cents an hour was also demanded for all persons then employed. On the basis of the regular 40-hour week, this constituted an increase of \$8 per week for every employee, or an increase of approximately 40 percent, in contrast with the average increase of \$1.72 per week which had been granted the preceding year. The demands also required that the respondent "employ only good standing members of the Union," and give the Union 48 hours notice of intention to hire employees. It was further provided that if the Union was unable to furnish employees within 48 hours, the respondent could hire through the open market, retaining employees so hired for 2 weeks before requiring application for union membership. Provisions as to holidays were to be more liberal. A vacation of one week at straight time was proposed for all employees with one year's service or more, and also a week's separation pay for all employees entering the armed services. It was further proposed that, upon 30 days' notice, negotiations would be entered into for new wage scales in the event of any serious dislocation in the cost of living.

On January 26, Kaiser met Frank and a union shop committee in the respondent's office to discuss the Union's demands.⁸ The meeting opened with a discussion of the wage increases which were the first of the demands set out on the Union's written statement. The Union took the position that because of increased living costs, the increases demanded were imperative. Kaiser stated that such increases were impossible if the respondent was to remain in business. He explained in detail the problems confronting the respondent, pointing out that cost of materials had increased substantially;⁹ that the respondent was faced with priorities and could not obtain certain materials; that the market could not

⁶ Whenever the name, Kaiser, is used herein without a first name, the reference is to the active partner, Fred Kaiser.

⁷ The findings as to the above preliminary meeting are made upon testimony of Kaiser which the undersigned accepts. His testimony as to this meeting was convincing, and it is reasonable, in view of the length of the written demands, that Kaiser would have asked for time to consider the demands with his father before discussing them with the Union, especially in view of the business complications with which the respondent was confronted. Frank denied that any preliminary meeting had taken place.

⁸ Only Kaiser and Frank testified concerning this meeting. The findings thereon are based upon an analysis of their testimony, which differed in emphasis but was not in substantial contradiction.

⁹ Such materials as brass stampings, zinc castings, and iron castings had increased 25 percent in cost; screws had increased 50 percent; and packing materials from 100 to 200 percent.

absorb any of the increase in wages asked since ceiling prices had been fixed; that the respondent's margin of profit was only 5 percent; that labor represented approximately 50 percent of its costs; that the respondent was in a line of business that was rapidly being liquidated because of the war; that it would probably have to go out of the hardware business eventually; and that if the Union insisted upon its wage demands the respondent might as well go out of business while it was still solvent.¹⁰ Kaiser emphasized that because of these business conditions the respondent could not even consider such wage increases and asked the Union to reconsider the matter and submit something reasonable which would enable the respondent to continue in business. The Union gave no indication that it would recede from its demands for wage increases of approximately 40 percent, and did not attempt to discuss any of its other demands. On the other hand, Kaiser made no specific offer of any increases in wages, and the meeting ended with Kaiser assuming that the Union would thereafter submit revised wage proposals.

The Union did not seek a further conference with the respondent, but appealed to the New York State Board of Mediation, herein called the Mediation Board, for its assistance.¹¹ On January 29, Frank wrote the respondent that the Union was seeking the immediate intervention of the Mediation Board in order to avoid "a very serious situation developing," since the respondent had refused to consider the Union's demands unless "they were considerably changed." This letter concluded with the following paragraph:

I am awaiting the reply of the New York State Board of Mediation and as soon as can be arranged a conference will be held

About the first of February, the respondent decided to close down its hardware business for the duration of the war. On the morning of February 3, before the respondent had communicated this intention to the Union or its employees, Frank called at the respondent's office.¹² Kaiser told Frank that he was unable to talk with him, and that the Union would receive an important letter explaining the respondent's future policy. That afternoon, as the respondent's employees left the plant, each was given a copy of the following one-page notice:

NATIONAL HARDWARE CO.

MANUFACTURERS OF BUILDERS' HARDWARE

OZONE PARK, N. Y.

FEBRUARY 3, 1942.

NOTICE TO OUR EMPLOYEES

After careful consideration we have definitely decided to discontinue the hardware manufacturing business for the duration of the war. The stock of raw material and finished hardware will be liquidated and we will endeavor to obtain defense work. When suitable work and machinery is on hand we will contact the union regarding a contract.

This step is necessary because of circumstances entirely beyond our control. In addition to our old troubles such as scarcity of material, higher cost

¹⁰ About September 1941, the two partners had first discussed the possibility of having to shut down

¹¹ In previous negotiations the Mediation Board had been of assistance.

¹² Frank's explanation of the reason for his visit was that Kaiser had called him and asked him to stop by when he was in the neighborhood, as he had something important to tell him. Kaiser testified that he did not remember making such a phone call and that Frank had just dropped in that morning. Since there is no compelling reason for accepting either version, the undersigned makes no finding as to show Frank happened to go to the plant on February 3.

and a "ceiling" on our prices we also have new difficulties brought about by the governments desire to have small non-essential factories turn to war work.

The Office of Production Management has recently forbidden the use of copper and brass in builders hardware, as well as restricting the use of other metals and finishes in defense housing. The hardware used for this purpose is the ordinary cheap steel sets which we are not in a position to manufacture economically. The larger factories have automatic buffing, plating and enameling equipment which enables them to turn this material out at very low cost.

We regret having to dismiss our employees but are glad that it happens at a time when there is very little unemployment and many suitable jobs to be had. We will help all possible by supplying a list of concerns taking on help at this time and we will write to these concerns in an effort to get work for our employees.

If our employees wish to work under the old contract with a \$2 00 per week increase we will be glad to cooperate further by staying open for several weeks longer thus giving some time to obtain other employment.

NATIONAL HARDWARE COMPANY,
By: FRED KAISER.

On February 3, the respondent wrote the Mediation Board, thanking it for a letter dated January 30, in which it had offered its services, and also for its "splendid cooperation in the past." The respondent stated that the Board's services would not be necessary, since the respondent was "closing down the hardware manufacturing business for the duration of the war" for reasons set out in an enclosed copy of a letter to its employees. The respondent assured the Mediation Board that the conditions involved were beyond its control, and that it had no desire to go out of a business in which it had been "so successful for many years."

On February 4, the Union received a two-page letter from the respondent, dated February 3, enclosing a copy of the above notice to the employees. After explaining to Frank that it had been impossible to talk freely with him the morning of February 3 because of "several visitors" who had been in the office, and that for business reasons the respondent was discontinuing hardware manufacturing,¹³ this letter concluded with the following three paragraphs:

After liquidating our finished stock and raw material we are going to do everything possible to obtain war work. When we are ready to go ahead with this work we will get in touch with your organization regarding a labor contract.

Enclosed you will find a letter which has been given to each of our employees, copy of which has been sent to the State Board of Mediation. This explains the situation as thoroughly as possible. You will note that in the last paragraph we have offered to operate for several weeks longer in order to enable our employees to have some income while they are endeavoring to obtain other employment. We also agree to give a \$2 00 per week increase during this period. If this is to be accepted we must know not later than Friday morning, February 6th, as it is necessary for us to obtain some additional material in order to keep the plant operating. We should also want a letter from you extending the present contract for that length of time.

¹³ The reasons set out in this part of the letter were substantially the same as those stated in the notice to the employees

Our dealings with your union over the past few years have been entirely satisfactory and we are sure that a suitable arrangement could have been worked out for the coming year if it wasn't for these circumstances which are entirely out of our control.

On February 4, upon receipt of the respondent's letter, Frank called Kaiser, told him that he was surprised to learn that the respondent intended to close its plant in the midst of negotiations, and asked for a three months' extension of the agreement. Kaiser said that a three months' extension was unnecessary and referred to his letter. Frank, after stating that the letter was no guarantee that Kaiser would negotiate an agreement with the Union when the plant reopened, asked for a conference. One was arranged for the following day.

On February 5, Kaiser, Frank, and the Union's shop committee met at the respondent's office. Frank again asked for a three months' extension of the agreement. Kaiser would not agree to such an extension, but asked the Union to agree to a two weeks' extension, in line with his letter of February 3.¹⁴ This was not acceptable to the Union. It asked that Kaiser sign a stipulation that he would bargain with the Union if it represented a majority of the employees when the plant reopened, provided the old employees were given a chance to try the new work and the Union was given an opportunity to train the old employees for such new work. Kaiser refused to enter into any such written stipulation, pointing out that he was very doubtful that his present employees would be able to do the new type of work, and that he did not want to be under any obligation to take up with the Union the ability of each employee to perform the new work.¹⁵ No agreement was reached at this conference.¹⁶

The next morning, February 6, Kaiser telephoned Frank that he was closing the plant that day rather than keeping it open for another two weeks, as the employees might not pay attention to their work, would be taking time off, and additional materials would have to be secured. Frank asked that such a closing

¹⁴ The findings herein as to what transpired, from February 4 through February 6, are made upon the undersigned's appraisal, in the light of the entire record, of the testimony of Kaiser and Frank, the only witnesses who testified on any of these matters. The most important point of divergence in the testimony has to do with whether either Kaiser or Frank offered or refused to sign a two weeks' extension of the agreement. Frank testified on direct examination when called by the Board that he had at no time discussed with Kaiser entering into a written agreement for two weeks. On cross-examination, Frank at first testified that he had never stated to Kaiser that he would sign an extension of the agreement for a period of less than three months and that he had not been willing to consider an extension for a period of less than three months. Thereafter Frank changed his testimony, testifying that on February 5 he had requested a written extension of two weeks to test Kaiser's sincerity. The undersigned is convinced that Frank at no time offered to accept an extension for less than three months. On the other hand, the undersigned is not convinced that Kaiser specifically offered to sign an agreement for two weeks, as he testified, but believes that Kaiser intended by his letter of February 3 to extend the agreement for several weeks to assist his employees in getting relocated. That the respondent and the Union were in effect at an impasse as to whether the agreement should be extended for two weeks or three months is indicated by the record as a whole and by Kaiser's statement in a telephone conversation with a Field Examiner of the Board on February 24, discussed below. Further, the undersigned is not convinced that there was ever any clear definition of exactly what the Union wanted the respondent to include in a three months' extension.

¹⁵ Kaiser did not then know what type of war work he would be able to secure. It should also be noted that under all three of its agreements with the Union, the respondent had been free to select its new employees.

¹⁶ Frank testified that Kaiser said at the above conference that the plant would remain open for two more weeks with the workers having the privilege of taking time off to find other work. Kaiser was not asked whether he had made such a statement, but it should be noted that in the letter of February 3, such a procedure was conditioned upon its acceptance, not later than Friday morning, February 6, as it was necessary for the respondent to obtain additional materials to keep its plant in operation.

be avoided until a further conference could be held. A conference was arranged. However, the plant shut down on February 6, and the conference did not take place until the employees were leaving the plant. At this conference, Frank again asked Kaiser for a three months' extension of the agreement, stating that the respondent's letter did not constitute a sufficient guarantee to the Union, and pointing out that the Union wanted assurance that the old employees would be given an opportunity to go back to work, providing they were capable of doing the work. Kaiser said that he had no objection to rehiring his old employees, if they could do the new work, but doubted very much that they would be able to do so. Kaiser maintained that the shut down was due to priorities and to the necessity of going into war work and promised to try to get his employees positions in other plants.¹⁷

On February 16, the Union filed a charge in Case No. 2-C-4384, alleging that the respondent was violating Section 8 (1) and (5) of the Act. By letter dated February 17, the Board informed the respondent of the Union's charge. By letter dated February 18, the respondent advised the Board that it had bargained collectively during several conferences before the plant had been closed, and that the closing was due to an economic situation brought about by the war, which circumstances were fully explained in enclosed letters to its employees, the Union, and the Mediation Board.

On February 24, Kaiser telephoned Herbert J. Lahne, the Board's Field Examiner in charge of the case, and explained that the respondent intended, as soon as it was ready to start operations, to see if the old employees could be used in the new work.¹⁸ He stated that the respondent did not want to sign a stipulation to that effect with the Union because it did not know what kind of war work it would be able to secure, and did not want to be placed in the position of having to argue with the Union over the suitability of each old employee. Kaiser also stated that he did not then know when the respondent would reopen. Concerning the matter of the extension of the agreement, Kaiser stated that no formal extension had been signed "because the union wanted a 3-month extension and the company only wanted an extension for about 2 weeks because since they were winding up operations they thought a 3-month extension was too long."¹⁹

On March 3, 1942, a conference was held at the Regional Office at which Kaiser, Frank, and an attorney for the Union met with Field Examiner Lahne.²⁰ At the outset, Kaiser explained that the respondent was then finishing some of its stock and was seeking a loan in order to reopen; that it would probably be at least two months before it could reopen; and that it was uncertain in what line of manufacturing the respondent would be engaged. The Union stated that all it wanted was protection for the old employees,²¹ and asked that preference be given those qualified. Kaiser questioned whether any old employees could do the new work which would probably be skilled machine shop work on lathes, drill presses, and milling machines. Kaiser said that if there were any old employees who could do the work required, he would give preference to them and also that if he was unable to get new employees who were already skilled

¹⁷ Kaiser did thereafter secure positions in other plants for about 25 of his employees, and from the time of the shut down until the week of March 20, the only employees on the respondent's pay roll were two foremen, a forelady, and an office employee.

¹⁸ The undersigned does not interpret Kaiser's willingness to do this as evidence that the old employees were then considered laid off rather than dismissed. There is no evidence that employees were holding themselves in readiness to be recalled.

¹⁹ The above quoted matter is from a memorandum prepared by Lahne.

²⁰ The findings as to what transpired at this conference are made upon the undersigned's evaluation of the testimony thereon of Lahne, Frank, and Kaiser.

²¹ The term, old employees, as used herein, means the respondent's employees at the time the plant shut down.

In the various lines required he would train old employees. Discussion then ensued concerning the training program of the War Production Board and of the Union's ability to supply skilled employees and to train the old employees. Lahne pointed out that he believed the respondent was under a continuing obligation to the Union in the matter of employment and employment conditions.

During the course of the above meeting, the Union asked Kaiser if he would reduce to writing the respondent's willingness to recall old employees who were qualified to do the work and, in the event already skilled employees were not available, to give preference and training to old employees. Kaiser was unwilling to put anything further in writing, taking the position that his letter of February 3 was sufficient; that he was attempting to get into a line of work the character of which was uncertain; that no manufacturer so situated could afford to be in a position of having to consider in advance with a union the suitability of each old employee for the new work; and that he was under no obligation at that time to put anything in writing. Kaiser stated, however, that he would let the Union know in advance what type of employees would be needed when the plant reopened and would be glad to have any skilled employees which the Union could furnish.²² When again asked to put in writing what the respondent was willing to do, Kaiser insisted that he was under no obligation to do so and did not want to be in the position of having "to haggle with the union over the hiring of every employee."²³ After consideration of the situation with Lahne, the union representatives decided to rely upon Kaiser's oral assurances and thereafter the charge was withdrawn.

Following the above conference, the respondent's pay roll continued to consist of 3 supervisory employees and 1 office employee until the week of March 20 when the respondent took back 2 of its old employees, making 6 on the pay roll of the hardware department during that week.²⁴ There were 10 employees on the pay roll for the week of March 27. During the first half of April the pay roll averaged about 12 employees, and during the second half, about 18. During May and June employment varied from 20 to 27, averaging approximately 24. Beginning with July, employment dropped off sharply so that from the latter part of July to the latter part of November the total number of employees on the hardware department pay roll varied from 4 to 8. Thereafter during the remainder of 1942, the number of employees varied from 11 to 13. It dropped off again during 1943. For some time prior to the hearing, only 2 foremen and a forelady had been employed in the hardware department.

The variation in the number of employees in the hardware department arose from the respondent's attempt to take advantage of changing conditions and government regulations in order to liquidate to its advantage the materials and partly finished stock which it had had on hand at the time of the shut down. Such operations were on a temporary basis, their probable duration at any given time being unknown. The employees taken on during these periods were engaged largely in assembling and packing products, and included both old employees and new employees. The work involved only a part of the operations pre-

²² The undersigned does not believe that Kaiser gave his assent to the Union's suggestion that it attempt to retrain his old employees after receiving such notice, since the period of training required for skilled machine shop work is so long as to make such an understanding impractical.

²³ The quotation is from the testimony of Frank. In evaluating the above conference, it should be noted that the closed shop provision submitted as part of the Union's demands for its new agreement had never been accepted by the respondent during the negotiations prior to the shut-down, and that on March 3 the respondent had no employees and was uncertain as to when it would have.

²⁴ The employment figures which follow are for the total pay roll, including the supervisory and office employees.

viously performed in the hardware department, and former employees who were recalled received approximately \$2 per week more than they had received before the shut down. The record does not establish that the respondent failed to follow departmental seniority in recalling old employees,²⁵ nor is there any evidence that any old employee who would have been entitled to return under departmental seniority ever sought employment and was refused such employment in the hardware department. However, it is clear that the respondent did not inform the Union that it was taking on employees in the hardware department.

During the first half of June, without any prior notification to the Union, the respondent started operating its war department, which has been in operation constantly since. While the number of employees on war work has varied, it has never been large.²⁶ It was approximately 24 at the time of the hearing. At various times since it started operating the war department, a total of some 10 to 12 old employees have worked therein. However, the greatest number of old employees working at any one time was 4 or 5. For the most part, these old employees have performed relatively simple operations.

The respondent's war work has consisted of machine shop operations on airplane parts, requiring precision to within one-thousandth of an inch on certain operations. On the whole, this work has required substantially more skill than is required in hardware manufacturing.²⁷ Most of the war department employees have had considerable machine shop experience, are paid on the average more than hardware employees, and work on machines which, for the most part, have been secured for war work. In order to secure employees for its war department, the respondent has repeatedly advertised in various papers, and has used the assistance of employment agencies and other employers. The respondent at no time has attempted to secure employees through the Union, nor has the Union ever sent anyone to apply for work in the respondent's war department.²⁸

On October 26, Frank telephoned Kaiser, and reminded him of the understanding reached at the Board's office on March 3. Kaiser said that he had been very busy; that the respondent had only a small number of employees; and that he had not thought it was worthwhile calling the Union. Kaiser asked if the Union represented a majority of the employees at the plant and Frank replied that it did. The conversation thereupon terminated.²⁹

²⁵ Although the agreement providing for seniority on a departmental basis had expired, Kaiser testified repeatedly that he had followed seniority in calling back employees, as it had always been the respondent's practice to do so. While there are inconsistencies in Kaiser's testimony on this matter, the undersigned finds nothing in the evidence to warrant a finding that Kaiser was attempting to avoid hiring members of the Union. Kaiser testified, without contradiction, that Frank had always told him that all of the employees were members of the Union. Further, all three agreements had provided that employees join the Union upon the expiration of their probationary periods of employment.

²⁶ During the period from July to December, 1942, the number of employees carried on the pay roll of the war department varied from 11 to 29.

²⁷ While the testimony of an expert witness for the respondent, Fred G. Pohl, clearly discredits Kaiser's testimony as to the extremely high degree of skill allegedly required on almost all of the war work, the undersigned is convinced from all the evidence that machining airplane parts requires substantially more skill than the work in the hardware department.

²⁸ The evidence shows that there has been a scarcity of skilled help during the period involved.

²⁹ The findings as to the above conversation are made upon testimony of Frank which the undersigned credits. Kaiser characterized the conversation as an apology on Frank's part for not having called sooner because he was busy organizing larger plants. There is no evidence that Kaiser offered to bargain with the Union or that Frank requested a conference during the above conversation. It is noteworthy that Kaiser had not previously questioned the Union's majority status. At the hearing, Frank testified that he had not

Subsequent to the above telephone conversation, the Union filed its original charge in the instant matter, alleging violation of Sections 8 (1), (3), and (5) of the Act. The Board informed the respondent of this charge by letter dated October 30, 1942. By letter to the Board dated November 2, Kaiser denied the Union's charges and stated, in part:

We have never refused to engage an applicant because of union affiliations. In fact, we will be very pleased to employ all of the machinists that the above mentioned union can send to us. The fact of the matter is that we have been working under very severe difficulties because of our inability to obtain experienced workers. The work we are engaged in consists of machine work on airplane parts to very close tolerances and we must have men with three or more years machine shop experience. As mentioned above, it makes very little difference to us whether these men are organized and if Mr. Frank can show that his union has the majority of our employees enrolled, we will accept them as a bargaining agent.

We wish to advise you however, that Mr. Frank knows nothing whatsoever about the conditions in this shop and he is not acquainted with any of the men because he has never been at the plant since February of last year and the employees in this War Products Department seem to know nothing whatsoever of Mr. Frank or his union.

B *Conclusions concerning the unfair labor practices*

1. The alleged interference, restraint and coercion

The complaint alleges that from about January 26, 1942, the respondent urged its employees to refrain from assisting, becoming members of, or remaining members of the Union. There is no evidence of any such activity on the part of the respondent.³⁰ Accordingly, it is recommended below that this allegation of the complaint be dismissed.

2. The alleged refusal to bargain

(a) The appropriate unit

At the hearing, the parties stipulated that as of the date of the shut down, February 6, 1942, and prior thereto the appropriate unit consisted of all production employees of the respondent employed at its Long Island plant, exclusive of executives and foremen, and office, clerical, and sales employees. This is the unit alleged appropriate in the complaint and the unit covered by the three annual agreements.

The undersigned finds that on February 6, 1942, and at all times material herein prior thereto, all production employees of the respondent employed at its Long Island plant, exclusive of executives and foremen, and office, clerical, and sales employees constituted a unit appropriate for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, or other

based his claim of majority on October 26 on union membership secured among the new employees, but rather upon the Union's continuing status as the bargaining agent. There is no evidence that any of the respondent's new employees had joined the Union. During the pay-roll week of October 29, there were only two employees on the hardware department pay roll other than supervisory and clerical employees. Both were old employees, but there is no evidence that one has ever belonged to the Union. There were 21 employees on the war department pay roll during that week, most of them were new employees.

³⁰ The evidence shows, at most, that Kaiser learned, in February 1942 the desires of some employees concerning the respondent's offer to continue to operate a few weeks longer, and, in the fall of 1942, that employees in the war department seemed to know nothing about the Union or Mr. Frank.

conditions of employment, and that said unit insured to employees of the respondent the full benefit of their right to self-organization and to collective bargaining and otherwise effectuated the policies of the Act.

The Board takes the position that the above found unit has continued to be appropriate and that the establishment of the war department has no effect upon the appropriate unit, such employees being included appropriately therein. The respondent takes the position that since the establishment of the war department there have been two separate appropriate units, and that the unit alleged in the complaint, embracing all of the respondent's production employees, is inappropriate after the date of the shut down.³¹

The war department constitutes an operation clearly distinguishable in several ways from the hardware department. It occupies a separate part of the plant which has been partitioned off from the hardware department. The employees are carried on a separate pay roll, and are under separate supervision. While the partnership entity has not changed, in order to obtain a substantial part of the machinery required for war work a profit sharing agreement was entered into with a Mr. Hatsfield, under which he transferred 10 machines from his plant and receives one-third of the profits of the war department. Separate books are kept for the war department and a separate bank account is maintained. War department checks are on a different color paper and bear the legend "National Hardware Company, War Products Division." In addition to the machinery secured by the profit sharing agreement with Hatsfield, the respondent purchased about \$20,000 worth of new machinery, consisting of 8 machines. Only 4 or 5 of the over 50 machines in the hardware department were adaptable for war work, and these were transferred to the war department. On the whole, the machinery in the war department is substantially different from that in the hardware department, and the work performed thereon requires substantially more skill. While hardware department employees always work on an hourly basis, war department employees, at times, work on a piece rate basis. On the average, war department employees have substantially higher earnings than hardware department employees, their hourly rate averaging approximately one dollar. Many of the employees on war work have had a substantial amount of previous experience in machine shop practice. There is very little interchange of employees between the two departments, and the departments are functionally independent of one another in almost all respects. Further the activities of the war department are of a temporary nature, while the respondent's regular business is manufacturing hardware.

Clearly the unit established by three years of bargaining as evidenced by the three agreements included the production employees engaged in the respondent's hardware manufacturing business, as the war department was neither in existence nor in prospect at the time the agreements were negotiated. On the other hand, while the war department is clearly distinguishable from the hardware department, it is not so completely divorced therefrom that it could not constitute a part of an expanded appropriate unit. However, the undersigned believes that the determining factor in deciding whether or not it is appropriate to combine the war department and the hardware department into one single appropriate unit is the desire of the employees in the war department to be represented by the Union.³² There is no evidence in the record that the employees in the war department desire the Union to represent them. Further, the under-

³¹ The parties stipulated, however, that executives and foremen, and office, clerical, and sales employees are appropriately excluded from any unit or units appropriate subsequent to February 6, 1942.

³² *Amour and Company*, 40 N. L. R. B. 1333; *Northern Fisheries, Inc.*, 33 N. L. R. B. 919.

signed finds that no continuing majority following the shut down operates as a designation of the Union by the employees of the war department. Accordingly, the undersigned finds that since February 6, 1942, all of the production employees of the respondent employed at its Long Island plant, exclusive of executives and foremen, and office, clerical, and sales employees have not constituted and do not constitute an appropriate unit.

(b) Representation by the Union of the majority of the employees within the appropriate unit

The Union's majority status was never questioned by the respondent prior to the shut down of February 6, 1942. The Board maintains that prior to the shut down the Union represented a majority of the employees in the above found appropriate unit, and that its majority status since has been a continuing one because the respondent had refused to bargain with the Union by the time it had closed its plant. There is no contention that the shut down of February 6 was a lock out and there is no allegation of any violation of Section 8 (3) of the Act. However, in oral argument, counsel for the Board contended that in order to avoid bargaining with the Union the respondent took advantage of an economic problem which was confronting it and shut down its plant. The respondent takes the position that even if the Union had a majority at the time of the shut down, it lost it thereafter because the shut down was a business move involving no unfair labor practices.

A finding as to the Union's majority, on and before February 6, is not necessary to a determination of the issues herein, in view of the conclusions reached in the following section of this report. Accordingly, the undersigned does not attempt to resolve the questions involved in reaching an ultimate conclusion thereon, but will assume the Union's majority status prior to the shut down, just as the respondent did during that period.

(c) The alleged refusal to bargain.

The facts herein show that the Union and the respondent entered into three successive one year agreements, the last of which expired February 13, 1942. There is no evidence that the respondent at any time attempted to influence its employees against the Union and the agreements themselves show that the Union progressively secured more favorable conditions, including wage increases. There is no evidence that during any of the three years of contractual relationships the respondent sought to circumvent its obligations to the Union. In short, the record shows a background of labor relations free from anything suggestive of anti-union attitudes or activities on the part of the respondent. The alleged refusal to bargain must be considered against this background.¹³

Counsel for the Board contends that the respondent refused to bargain at the meeting of January 26 by refusing even to consider the Union's demands and by failing to submit counter proposals. The evidence does not substantiate this contention. In view of the size of the increases asked and the business conditions with which the respondent was then confronted, Kaiser's characterization of the demands as unreasonable and his request that they be reconsidered¹⁴ does not constitute a refusal to bargain, especially since he went to great length to explain to the Union why he considered the demands unreasonable. Nor does

¹³ Also, in reaching all of the conclusions herein, the undersigned has given due consideration to the respondent's failure to notify the Union of its operations following the shut down.

¹⁴ From this request, it is apparent that Kaiser was willing to consider giving some increases.

the undersigned believe that the respondent's failure to offer counter proposals at that juncture constituted a refusal to bargain. All of the Union's demands had not been discussed; the Union had not requested counter proposals; and Kaiser's request that the Union reconsider its demands in the light of his explanation of the respondent's financial situation was not an unreasonable one.

The Board further contends that by its notice to its employees on February 3, the respondent repudiated the Union and appealed over the Union directly to its employees. The evidence does not warrant making such a finding. Clearly the respondent was under no obligation to notify its employees through the Union of its decision to dismiss them because of economic reasons. While the respondent's procedure would have been less open to question if its offer to continue operations several weeks under the old contract with a \$2 increase had been made only through the Union rather than both to its employees and to the Union, there is no evidence that the respondent attempted to persuade its employees individually to accept its offer. On the other hand, it clearly sought the acceptance of its offer by the Union.

The conference of February 5 does not involve a refusal to bargain. Frank did not accept the respondent's offer to keep the plant open a few weeks longer with a \$2 increase, but sought rather a three months' extension of the agreement. In addition, on February 5, Frank also sought a signed stipulation which would have placed the respondent under obligations to hire its old employees, who were to be retrained by the Union for new work, the character of which the respondent did not then know. In view of its definite decision to shut down within a few weeks, at the latest, the undersigned does not believe that the respondent's unwillingness to renew the agreement for three months shows bad faith. Further, since the respondent had never specifically accepted the closed shop principle, it was under no obligation to sign a stipulation with the Union concerning the hiring of employees for work the nature and time of which was uncertain, especially since it had informed its old employees that it was dismissing them.

While some circumstances surrounding the shut down and the developments thereafter raise doubts, on the record as a whole, the undersigned cannot accept the Board's contention that in shutting down the respondent was using an economic necessity to escape bargaining with the Union. On all of the evidence, the undersigned concludes and finds that on February 6, 1942, the respondent discontinued its hardware manufacturing operations for business reasons;³⁵ that it did not know then when or under what conditions it might be able to undertake war work; that the employment status of its employees terminated on February 6, 1942;³⁶ and that the respondent had not refused to bargain with the Union through the date of the shut down. Since the shut down was not preceded by or accompanied by any unfair labor practices, and since the employment status of the employees terminated at the time of the shut down, whatever majority status the Union had prior thereto terminated on February 6, 1942. Further, the agreement expired on February 13, 1942. In view of the foregoing findings, and the above findings concerning the appropriate unit after February 6, 1942, the undersigned further finds that at no time has the respondent refused to bargain

³⁵ The fact that the high wage demands of the Union constituted a "last straw" in reaching the decision, and the further fact that the respondent would have operated a few weeks longer if the Union had accepted its proposal, have both been weighed in reaching the above conclusion.

³⁶ Not only was the term, "dismiss", used in the respondent's letter to its employees on February 3, but the Union told the employees at a meeting the evening of February 6 that it "had jobs for them." Further, Kaiser secured new employment for about 25 employees.

with the Union as the duly designated representative of a majority of its employees in an appropriate unit³⁷

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

CONCLUSIONS OF LAW

1 Fred Kaiser and Charles Kaiser, co-partners, doing business under the trade name and style of National Hardware Co, the respondent herein, is engaged in commerce within the meaning of Section 2 (6) of the Act.

2 United Electrical, Radio & Machine Workers of America, Local 1225, C. I. O., is a labor organization within the meaning of Section 2 (5) of the Act.

3. The respondent has not engaged in unfair labor practices within the meaning of Section 8 (1) or (5) of the Act.

RECOMMENDATIONS

Upon the basis of the foregoing findings of fact and conclusions of law, it is recommended that the complaint herein be dismissed.

As provided in Section 33 of Article II of the Rules and Regulations of the National Labor Relations Board, Series 2—as amended, effective October 19, 1943—any party or counsel for the Board may within fifteen (15) days from the date of the entry of the order transferring the case to the Board, pursuant to Section 32 of Article II of said Rules and Regulations, filed with the Board, Rochembeau Building, Washington, D C, an original and four copies of a statement in writing setting forth such exceptions to the Intermediate Report or to any other part of the record or proceeding (including rulings upon all motions or objections) as he relies upon, together with the original and four copies of a brief in support thereof. Immediately upon the filing of such statement of exceptions and/or brief, the party or counsel for the Board filing the same shall serve a copy thereof upon each of the other parties and shall file a copy with the Regional Director. As further provided in said Section 33, should any party desire permission to argue orally before the Board, request therefore must be made in writing within ten (10) days from the date of the order transferring the case to the Board.

EARL S. BELLMAN,
Trial Examiner.

Dated November 8, 1943.

³⁷ The facts in this case distinguish it from situations involving refusals to bargain prior to shut downs; situations in which shut downs occur in violation of the Act; situations involving temporary shut downs where the resumption of the same type of work is anticipated and employees are merely laid off; and situations in which valid contracts do not expire until after operations have been resumed.