

In the Matter of THE OWATONNA TOOL COMPANY and UNITED CONSTRUCTION WORKERS DIVISION OF DISTRICT 50, U. M. W. A.

Case No. 18-C-949.—Decided June 16, 1944.

DECISION

AND

ORDER.

On March 7, 1944, the Trial Examiner issued his Intermediate Report in the above-entitled proceeding, finding that the respondent had engaged in and was engaging in certain unfair labor practices, and recommending that it cease and desist therefrom and take certain affirmative action as set forth in the copy of the Intermediate Report annexed hereto. Thereafter, the respondent filed exceptions to the Intermediate Report and a supporting brief. Oral argument, in which the respondent and the Union participated, was held before the Board in Washington, D. C., on May 18, 1944. The Board has considered the rulings of the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the respondent'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 exceptions, additions, and qualifications noted below:

Interference, restraint, and coercion; domination and interference with the formation and administration of the Independent

In 1937, the respondent's president told a general assembly of the employees, a number of whom had recently joined the American Federation of Labor, that he disapproved of their surreptitious meetings and that it would be better if they had an organization of their own. Later in 1937 the respondent laid off three employees who had continued their activities on behalf of the American Federation of Labor; and, in the spring of 1941, it discharged an employee who had begun to solicit memberships for the Union. On each of these occasions charges of discrimination, which had been filed with the Board, were settled without formal Board action.

When the Union began an organizational campaign among the respondent's employees in the fall of 1942, the respondent resumed and intensified its opposition to affiliated unions and to the Union in particular, coerced its employees in the exercise of the rights under the Act, and dominated and interfered with the formation and administration of a rival union, a course of action which continued to the time of the hearing before the Board. Thus, in various issues of the "Tool-O-Gram,"¹ a company bulletin which it distributed among its employees, the respondent printed pseudo-patriotic attacks upon "union leaders" and their "greedy squabbles" and upon "Mr. Lewis" as a "dangerous" and "unscrupulous" example. At a meeting of departmental foremen, the respondent's president stated that he was not opposed to unions provided the employees organized an independent union and at the same time attacked affiliated unions as a "bunch of racketeers" who would take the employees' money without giving any return and would seek to run the respondent's business. Officials of the respondent questioned one job applicant and the employee-sponsor of another job applicant as to whether the applicants were union members and, in the second case, as to whether the applicant was an "agitator." A departmental foreman was demoted to a non-supervisory position when his union membership became known. The respondent's personnel director refused an injured union employee's request for lighter work and answered his inquiry as to why he had not been given the same raises as other employees with the statement that the employee in question was a member of the Union, that the respondent did not want to have anything to do with the Union, and that under the circumstances favors could not be expected. On one occasion the respondent's president, in reprimanding a union employee, referred to the trouble his union activities were causing and charged him and certain other employees with ingratitude because they had joined the Union. On another occasion, the respondent's president made use of this charge of ingratitude in refusing raises to union members. Further illustrating the respondent's open display of antagonism toward its union employees were the separate suggestions by the respondent's superintendent and its president that a known union member ought to quit his job.

On January 30, 1943, the respondent rejected the Union's request for recognition, whereupon the Union, on February 9, filed with the Board a petition for investigation and certification of representatives. Shortly thereafter, Foremen Drum and Denny, accompanied by employee Winship, approached union member Dillon during working hours. In the presence of the foremen, Winship asked Dillon to per-

¹The first of these bulletins quoted by the Trial Examiner is dated September 8, 1942, and not September 18, 1942, as stated in the Intermediate Report.

suade the employees to "forget" the Union at the forthcoming Board election because there was no need for the Union. Foreman Drum added that if the Union's demands were granted, the employees would earn less than they were then making.² Within a week after this incident, a group of 5 foremen, including Drum and Denny, and 2 other employees, planned the formation of the Independent. The Chief Inspector and 9 of the 10 departmental foremen, whose supervisory status entitled them to attend the "foremen's meetings" held by the respondent,³ attended the formal organizational meetings on February 23, 1943, joined the Independent, and signed its Articles of Association. One of the foremen, Rasmussen, was elected as the first permanent vice president. Both before and after the organizational meetings, a number of foremen openly solicited memberships for the Independent, in several instances on company time and property.* On occasions, a foreman, in seeking to persuade a union member to abandon the Union and to join the Independent, stated that advancement would result or that the respondent intended to discharge all employees who were not members of the Independent.

The contrast between the treatment which the respondent accorded the Independent and the Union makes apparent the respondent's backing of the Independent. Goddard, a leader of the Independent, was able to leave his work on the night shift for an hour and a half without loss of pay to attend a meeting of the Independent, although guards about the plant were supposed to check ingress and egress. Solicitation of memberships and collections of dues for the Independent on company time and property were uninterrupted. Only on July 27, 1943, after the Independent had submitted an affidavit to the respondent as to the extent of its membership and was presumably well entrenched, did the respondent forbid organizational activities on company time or property. Finally, in August 1943, the respondent entered into negotiations for a contract with the Independent with knowledge of the pendency before the Board of the Union's charges that the respondent had violated the Act with respect to the Independent and despite the fact that, for this reason and because of the rival claim of the Union for recognition, the respondent had previously refused to bargain with the Independent in the spring and in June 1943. While no agreement was reached as to the terms of a contract, the respondent admitted at the hearing that, by taking part in these

² The Trial Examiner incorrectly attributed the statements of Winship on this occasion to Foreman Drum. We find, however, that Foremen Drum and Denny and employee Winship were jointly appealing to Dillon to campaign against the Union.

³ The Trial Examiner's findings as to the status of these foremen are discussed below.

⁴ In this connection, the Trial Examiner erroneously referred to employees Goddard and (George) Christenson as foremen. We therefore, affirm only his finding that Foremen Drum, Connell, Denny, Wardry, and Krahulec solicited memberships for the Independent.

negotiations, it had recognized the Independent as the bargaining agent of its employees. A neutral employer would not thus have tipped the scales in favor of one of two rival claimants for recognition.⁵ By recognizing and negotiating with the Independent, the respondent rendered it valuable assistance.

We agree with the Trial Examiner, and find, that the departmental foremen, whose activities we have hereinabove outlined, are supervisors representing management in the eyes of the employees and that the respondent is responsible for their activities. In reaching this conclusion, we adopt the Trial Examiner's subsidiary findings of fact and also rely upon the following facts, not mentioned in this connection in the Intermediate Report. The respondent contends that the only supervisors over production are the superintendent, a general foreman for the day shift, and an assistant general foreman for the night shift, in spite of the fact that 150 men are employed in at least 11 specialized departments. It accordingly appears that the respondent must depend, and does depend, upon the men whom it calls "departmental foremen" for effective supervision of each of the departments. To enable the foremen to fulfill this supervisory function, the respondent required all of them to attend a course on job methods and planning, given by its superintendent. The respondent also emphasized the supervisory status of the foremen in the bulletins it issued to the employees. Thus, on December 1, 1942, it notified the employees that 2 of the foremen had "been instructed to devote *all* their time in supervisory work . . ." [italics supplied]. And in its rules and regulations for employees, the respondent specified "insubordination to foremen or *supervisors*" [italics supplied] as ground for disciplinary action or dismissal. According to the testimony of General Foreman Soukoup, whom we credit as did the Trial Examiner, insubordination to departmental foremen was within the prohibition of this rule.

Upon the basis of the foregoing and upon the entire record, we find, as did the Trial Examiner, that the respondent has interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act and has dominated and interfered with the formation and administration of, and has contributed support to the Independent, in violation of Section 8 (1) and (2) of the Act.

Discrimination as to Clem. Smersh

Smersh worked for the respondent from February 1942 until his discharge on November 18, 1943. During this time he received raises which increased his wage rate from 35 to 60 cents per hour. Smersh

⁵ Cf. *Matter of Elastic Stop Nut Corporation*, 51 N. L. R. B., 694, 702, enforced 142 F. (2d) 371 (C. C. A. 8), decided May 1, 1944.

joined the Union in August 1943. Shortly thereafter, the respondent's president told Smersh that he was "disgusted" with him because he had joined the Union. In October 1943, Foreman Christenson tried to induce Smersh to withdraw from the Union and promised that the respondent's president would make it worth his while. Smersh, however, continued his union affiliation and testified at the original hearing in this proceeding concerning anti-union statements made by the respondent's president and one of the foremen.

On November 18, 1943, the day after the original hearing closed, Smersh was discharged ostensibly because he refused to whitewash the flamecutting room while the furnace was in operation. As he told his superiors at the time, the fumes from the furnace made the work dangerous, particularly since the dust collector had burned out. However, the superintendent refused to shut off the furnace and insisted that Smersh leave his uncompleted task of whitewashing the office and immediately whitewash the flame-cutting room. It appears that the shutting off of the furnace for the half day required to whitewash the room would not have slowed or interfered with the operations of the plant. Moreover, in view of the normal, intermittent operation of the furnace, the whitewashing of the flame-cutting room might well have been postponed for a week when the furnace became idle. Indeed, the work was performed by another employee about a week later when the furnace was in fact shut down. Under the circumstances, the order which Smersh refused to obey was clearly unreasonable, not merely because of the danger involved, but because the danger could reasonably have been avoided. The respondent's failure to explain why Smersh was ordered to whitewash the flame-cutting room before completing his work in the office and the issuance of such an order on the day following the hearing at which the respondent's anti-union attitude and unfair labor practices were exposed, indicate an intention on the respondent's part to rely upon Smersh's likely refusal to obey the order as a pretext for discriminating against him because of his persistence in adhering to the Union and because he had just given damaging testimony before the Board.

We find, therefore, as did the Trial Examiner, that the respondent discriminatorily discharged and refused to reinstate Smersh because of his membership in the Union and because he gave testimony under the Act,⁶ thereby discouraging membership in the Union in violation of Section 8 (1), (3), and (4) of the Act.

⁶ There is no testimony in the record that a representative of the Minnesota State Industrial Commission inspected the plant on or about November 18, although counsel for the respondent, in cross-examining Smersh, suggested that such an inspection had been made. Accordingly, we reverse the Trial Examiner's finding in this respect as well as his inference that the improvement of the ventilating arrangement in the flame-cutting room was the result of this inspection.

Discrimination as to Kenneth R. Sette

Sette has been employed by the respondent since March 1941 and worked regularly in the forge department from the fall of 1941⁷ until early November 1943, except for a temporary assignment of a few weeks in August and September 1943 in the steel room after having been overcome by the heat. He joined the Union in August 1943 and testified as a Board witness at the original hearing in this proceeding concerning the duties and authority of departmental foremen.

On November 6, 1943, because of "light" work in the forge room, Sette was temporarily transferred from his job in that department to general utility work, thus losing a production bonus averaging \$4 or \$5 a week. By November 20, work in the forge room had again become normal but an employee with less seniority was given Sette's job.⁸ On the following day, 4 days after the original hearing had closed, the respondent rejected Sette's request that he be returned to his old position, on the ground that he had been "loafing on the job." As the Trial Examiner found, Sette's satisfactory performance of his work was attested by his receipt of individual as well as general wage increases and departmental bonuses, by the absence of any previous criticism for loafing, and by the fact that he had been chosen by the foremen of the forge department to demonstrate, by his work, the fairness of the bonus rate fixed for the department. Moreover, the respondent introduced no testimony at the hearing on the allegations of discrimination and thus made no attempt to support the ground it gave to Sette for refusing to reinstate him to his job in the forge room.

We find, therefore, as did the Trial Examiner, that the reason for the respondent's refusal to reinstate Sette to his regular job was not that his work was unsatisfactory, but that, as in the case of Smersh; he was a member of the Union and had given testimony under the Act. We find further that by refusing to reinstate Sette to his regular job, the respondent discriminated in regard to the tenure, terms, and conditions of Sette's employment, thereby discouraging membership in the Union in violation of Section 8 (1), (3), and (4) of the Act.

⁷ Sette began working in the forge department in the fall of 1941 rather than in the fall of 1942 as found by the Trial Examiner

⁸ The identity of the employee who took Sette's job is not shown in the record. However, it is clear that he could not have been Sette's senior in the forge department. According to Sette's uncontradicted testimony, he had worked in the forge department longer than any other non-supervisory employee except Clarence Bailey. Bailey had remained at his own job in the department during the period of Sette's temporary absence.

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 respondent, The Owatonna Tool Company, Owatonna, Minnesota, and its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Dominating or interfering with the administration of, or contributing support to Tool Manufacturers Independent Union of Owatonna, and dominating or interfering with the formation or administration of, or contributing support to, any other labor organization of its employees;

(b) Discouraging membership in United Construction Workers Division of District 50, U. M. W. A., or in any other labor organization of its employees, by demoting, discharging, or refusing to reinstate any of its employees or by discriminating in any other manner in regard to their hire or tenure of employment or any term or condition of their employment;

(c) Discharging, demoting, or otherwise discriminating against any employee because he has given testimony under the Act;

(d) In any other manner interfering with, restraining, or coercing its employees in the exercise of the rights to self-organization, to form, join, or assist United Construction Workers Division of District 50, U. M. W. A. or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection as guaranteed in Section 7 of the Act.

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

(a) Refrain from recognizing Tool Manufacturers Independent Union of Owatonna as the representative of any of its employees for the purpose of dealing with the respondent concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, and completely disestablish Tool Manufacturers Independent Union of Owatonna as such representative;

(b) Offer Clem Smersh and Kenneth Sette immediate and full reinstatement to their former or substantially equivalent positions without prejudice to their seniority or other rights and privileges;

(c) Make whole the said Clem Smersh for any loss of pay he has suffered by reason of the respondent's discrimination against him,

by payment to him of a sum of money equal to the amount which he normally would have earned as wages during the period from the date of his discharge to the date of the respondent's offer of reinstatement, less his net earnings during said period;

(d) Make whole the said Kenneth Sette for any loss of pay he has suffered by reason of the respondent's discrimination against him, by payment to him of a sum of money equal to the amount which he normally would have earned at his regular job in the forge room during the period from November 21, 1943, to the date of the respondent's offer of reinstatement, less the sums received by him from the respondent for other work during said period;

(e) Post immediately in conspicuous places throughout its plant in Owatonna, Minnesota, and maintain for a period of at least sixty (60) consecutive days from the date of posting, notices to its employees stating: (1) that the respondent will not engage in the conduct from which it is ordered to cease and desist in paragraph 1 (a), (b), (c), and (d) of this Order; (2) that the respondent will take the affirmative action set forth in paragraph 2 (a), (b), (c), and (d) of this Order; and (3) that the respondent's employees are free to become and remain members of United Construction Workers Division of District 50, U. M. W. A., or any other labor organization, and that the respondent will not discriminate against any employee because of his membership or activity in that or any other labor organization or because he has given testimony under the Act;

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

INTERMEDIATE REPORT

Mr. Francis X. Helgesen and Clarence A. Meter, for the Board

Mr. Phillip J. Mackey, of St. Paul, Minn., and Mr. Samuel Lord,¹ of Owatonna, Minn., for the respondent.

Mr. John R. Walbran, of Owatonna, Minn., for the Independent.

Mr. Milton Hodson, of Owatonna, Minn., for the Union.

STATEMENT OF THE CASE

Upon an amended charge filed October 28, 1943, by United Construction Workers Division of District 50, U. M. W. A., herein called the Union, the National Labor Relations Board, herein called the Board, by its Regional Director for the Eighteenth Region (Minneapolis, Minnesota), issued its complaint dated October 28, 1943, against The Owatonna Tool Company, herein called the respondent, alleging that the respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8 (1) and (2) and Section 2 (6) and (7) of the National Labor Relations Act, 49 Stat. 449, herein called the Act. Copies of the complaint and notice of hearing were duly served

¹ Samuel Lord entered an appearance at the reopened hearing.

upon the respondent, the Union, and upon the Tool Manufacturers Independent Union of Owatonna,² herein called the Independent, alleged in the complaint to be a company dominated union.

With respect to the unfair labor practices the complaint alleged in substance: (1) that the respondent about February 19, 1943, inaugurated, created, and established the Independent and has since that time, (a) permitted and participated in solicitation and campaigning for the Independent on company time and property, (b) paid employees for time spent in activities on behalf of the Independent, and (c) fostered and promoted the growth, and dominated and interfered with the activities of the Independent and contributed support to it; (2) that the respondent since about June 1, 1937, (a) warned and discouraged its employees against affiliating with or becoming active in outside unions, (b) questioned its employees and applicants for employment about their union affiliations, (c) made disparaging and derogatory statements about labor unions, and (d) advised employees that they would not receive benefits through collective bargaining with the Union or other outside labor organizations; (3) by the foregoing acts the respondent has interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act.³

Pursuant to notice, a hearing was held from November 11 to November 17, 1943, at Owatonna, Minnesota, before J. J. Fitzpatrick, the undersigned Trial Examiner, duly designated by the Chief Trial Examiner. At the opening of the hearing the Independent filed a motion for leave to intervene. The motion was granted and the Independent was permitted to participate in the proceeding insofar as its interests were affected. The Board, the respondent, and the Independent were represented by counsel, the Union by its representative. All parties participated in the hearing and were granted full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues. At the conclusion of the hearing, counsel for the Board, the respondent, and the Independent, presented oral argument. The parties were advised of their right to file briefs with the undersigned after the close of the hearing.

After the close of the hearing Board's counsel served on all parties, and on December 10, 1943, filed, a motion for leave to issue an amended complaint and reopen the hearing. Attached to the moving papers were a second amended charge filed by the Union December 4, 1943, and the proposed amended complaint based thereon. In addition to the allegations of unfair labor practices heretofore referred to the amended complaint also alleged in substance that the respondent about November 18, 1943, discharged Clem Smersh, and about November 20, 1943, demoted Kenneth Sette, because each of them joined and assisted the Union and gave testimony under the Act. On December 10 the Chief Trial Examiner notified the parties that objections to the motion would be received up to December 13, 1943. No objections were filed and on December 15 the Chief Trial Examiner granted the motion and ordered the hearing reopened. On

¹ Incorrectly referred to in the complaint at Owatonna Tool Makers Independent Union.

² No formal answer was filed by the respondent. The respondent's counsel, at the opening of the hearing, stated on the record that he had prepared a general denial to the complaint but had decided not to file it as he was not required to do so under the Board's Rules and Regulations. All the allegations of unfair labor practices in the complaint were put in issue by the examination of witnesses, the introduction of evidence and oral argument upon the merits by the respondent. The allegations of unfair labor practices in the complaint will therefore be deemed denied by the respondent. Cf. *In the Matter of Model Blouse Co et al.*, 15 N. L. R. B. 133, 137. Furthermore, as will hereafter appear, the respondent later filed a general denial to all allegations of unfair labor practices alleged in the amended complaint.

January 8, 1944, the respondent filed its answer denying all allegations of unfair labor practices in the amended complaint.

Pursuant to notice the reopened hearing was held January 12 and 13, 1944, at Owatonna, Minnesota, before the undersigned Trial Examiner duly designated by the Chief Trial Examiner. The Board and the respondent were represented by counsel, the Union by its representative.⁴ All participated in the hearing and were granted full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues. After completing the presentation of his evidence Board's counsel moved to conform the pleadings to the proof in formal matters. There was no objection and the motion was granted. The respondent then rested its case without the introduction of any further testimony. Oral argument was presented by counsel for the Board and for the respondent. Both stated on the record that they did not desire to file briefs with the Trial Examiner. No briefs have been filed. On February 1, 1944, after the close of the reopened hearing the undersigned, pursuant to a stipulation entered into by all parties ordered certain corrections made in the transcript of the record.

Upon the record thus made, and from his observation of the witnesses, the undersigned makes the following:

FININGS OF FACT⁵

I. THE BUSINESS OF THE RESPONDENT

The Owatonna Tool Company, is a Minnesota corporation with its office and principal place of business in Owatonna, Minnesota. It is engaged in the design, manufacture, and distribution of hand tools. During the year ending October 28, 1943, it used materials and supplies in excess of \$500,000 in value, of which approximately 95 percent was purchased in States other than the State of Minnesota. During the same period the sales of finished products were in excess of \$500,000, of which 95 percent was sold and shipped in interstate commerce to points outside the State of Minnesota. The respondent does not question the jurisdiction of the Board.

II. THE ORGANIZATIONS INVOLVED

United Construction Workers Division of District 50, U M W A., and Tool Manufacturers Independent Union of Owatonna, unaffiliated, are labor organizations admitting to membership employees of the respondent.

III. THE UNFAIR LABOR PRACTICES

A. *Interference, restraint, and coercion; domination of the Independent*

1. Background

In the spring of 1937 a number of the respondent's employees, including Oscar Henson, Walter Bucholtz, Bob Davis, Vince Rischavy, Carl Hilland, and some others, became interested in establishing an American Federation of Labor union in the respondent's plant and as a result a number of organizational meetings were held at the homes of various employees. That fall, Ruben A. Kaplan,

⁴ At the opening of the hearing the attorney for the Independent entered an appearance "pursuant to the notice." He then stated on the record that as his client was not involved he would not participate and withdrew from the hearing.

⁵ Unless otherwise indicated all findings of fact herein are based upon undisputed evidence.

the respondent's president and general manager, told the employees who had been assembled in the machine shop just before working hours⁶ that he did not approve of the employees meeting surreptitiously and that it would be much better if the employees had an organization of their own.⁷

On October 15, 1937, the respondent notified all the employees that because of seasonal slack work, and to avoid lay-offs or a plant shut-down, the plant working hours would be reduced to 40 hours a week starting October 18 and so remain until business revived.

Subsequently to the above talk of Kaplan and the notice of the reduction in the hours of work, Henson, Bucholtz, Davis, Rischavy, and Hilland⁸ continued their activities on behalf of the A. F. of L. Union.

In November, Henson, Rischavy, and Hilland were laid off by the respondent.⁹ At that time a charge was filed in the Regional Office of the Board, alleging that the lay-offs were discriminatory. After an investigation by the Board's Regional Office, the matter was settled without a hearing by the reinstatement of Henson and Hilland⁹ about December 2, 1937, and the posting by the respondent of the following notice in its plant:

THE COMPANY AFFIRMS AS ITS POLICY THAT ANY EMPLOYEE MAY JOIN ANY LABOR ORGANIZATION OF HIS CHOICE AND THAT SUCH ACTION ON THE PART OF ANY EMPLOYEE WILL IN NO WAY RESULT IN ANY DISCRIMINATION AGAINST SAID EMPLOYEE AS REGARDS TENURE, WAGES OR CONDITIONS OF WORK THE SUPERVISORY STAFF HAVE BEEN INSTRUCTED THAT ANY INFRAC-TION OF THE ABOVE POLICY WILL RESULT IN DISCIPLINARY ACTION.

RECENT LAY-OFFS ARE DUE TO AND ANY FUTURE LAY-OFFS WILL BE DUE TO BUSINESS CONDITIONS, AND THE AMOUNT OF AVAILABLE WORK IN THE SHOP; AND AS SOON AS OPERATIONS PERMIT ALL EMPLOYEES LAID OFF WILL BE REINSTATED IF THEY SO DESIRE.

Signed (S) R. A. KAPLAN,
President.

DEC 2, 37.

2 Organizational activities for the Union; other events

So far as the record discloses there was no further union activity by the respondent's employees after the events above found until the spring of 1941.

⁶ Early in 1937, the respondent had about 50 production employees and presumably worked but one shift. In the fall of 1941 as the respondent got into war production work the number of employees gradually increased until it reached approximately 150 about the spring of 1943, where it has since remained, with approximately 100 employees working on the day shift and 50 employees on the night shift. At the time of hearing the respondent was engaged 100 percent in war work.

⁷ This finding is based upon the testimony of Oscar Henson. Kaplan admitted talking to the employees in 1937 and that he criticized them for holding secret organization meetings. He denied that he suggested to the employees the formation of an Independent union. However, Kaplan further testified that, since 1937, the respondent has not wanted any organization among the employees, and stated that if the employees wanted a labor organization it preferred that they have an inside union. It is therefore found, that Kaplan made the statement substantially as testified to by Henson.

⁸ Bucholtz and Davis had in the meanwhile quit their jobs with the respondent.

⁹ Hilland received back pay for the time lost because of the lay-off. Henson did not as his net earnings in the interim were more than he would have earned at the respondent's plant. Apparently Rischavy was not reinstated.

About April 2, 1941, Employee Ted Maamun became interested in and joined United Construction Workers Division of District 50, U. M. W. A., although, at the time the Union had no local organization in Owatonna. Thereafter he solicited applications for the Union among the respondent's employees. Later in April, Maamun, accompanied by a group of interested employees, took one-half a day off from work and went to Minneapolis, Minnesota, where the Union's office was located. A short time thereafter Maamun was discharged. A charge alleging that the discharge was discriminatory was filed by the Union in the Board's Regional Office. After an investigation the case was settled about the end of May without a hearing, by the reinstatement of Maamun with back pay. Subsequent to his reinstatement Maamun was elected vice chairman of local 149 of the Union which in the meanwhile had been established in Owatonna.¹⁰

Thereafter interest in the Union continued among the respondent's employees and in the fall of 1942 Milton Hodson, official representative of the Union, came to Owatonna from the Minnesota office and a drive was inaugurated to organize not only the employees of the respondent's plant, but also other manufacturing concerns in Owatonna. On September 18, 1942, the respondent issued a "Tool-O-Gram"¹¹ which stated in part:

In the September issue of Reader's Digest there appeared an article under the heading "They Were Expendable", telling of the inspiring saga of a handful of American naval heroes who waged a forlorn-hope in midget torpedo boats against the planes and cruisers and heavy guns of Japan's overwhelmingly prepared aggression against the Philippines.

* * * * *

In another magazine a cartoon depicted the effort we at home have been making. Production in general was behind schedule, due to greedy squabbles by some of our Union leaders . . . which resulted in the loss of thousands of man-hours, and how many soldiers no one will ever know. For three successive months the War Bond quota has not been met.

* * * * *

In the fall of 1942, Duane Baker applied for a job with the respondent giving Oscar Henson as a reference. Vice-President Ave Kaplan later questioned Henson¹² about Baker, among other matters inquiring if Baker was "an agitator" and whether he was affiliated with any Union.

In October, Clarence Bailey, one of the older employees in the forge shop, was appointed foreman in that department by President Kaplan. At the time of his appointment Bailey reminded Kaplan that Neils Christenson had more seniority in the forge shop than he (Bailey) had, and was therefore entitled to be foreman. Kaplan replied that Bailey was the man the respondent wanted as foreman. Bailey then assumed the duties of department foreman and attended three foreman's meetings¹³. At the last foremen's meeting Bailey attended, in November, 1942, President Kaplan asked the foremen what they thought about union activities in Owatonna. Upon receiving no specific response, Kaplan stated that he had nothing against a union provided the employees or-

¹⁰ In the spring of 1942, Maamun became chairman of the Local when the previous chairman resigned.

¹¹ Tool-O-Gram was the name given to a mimeographed or multigraphed communication issued and distributed by the respondent to its employees or posted on its bulletin board at irregular but frequent intervals.

¹² About 1939 Henson, by virtue of his seniority, had become foreman of the plating department.

¹³ These foremen's meetings were called by the respondent several times a month to discuss production problems of the plant. They were attended by most of the department foremen.

ganized an independent union; that he did not want the employees "tied up with some bunch of racketeers taking their money and doing them no good"; that he wanted to run his business his own way, but that "these fellows" would be running his business for him¹⁴

At the time of his appointment as foreman of the forge shop Bailey was a member of the Union. This fact, however, was not known to the respondent at the time. After Bailey had been foreman for several weeks, and had attended the three foremen's meetings above referred to, he accidentally left his billfold containing his union card in the washroom. He returned for the missing pocket-book about 10 p. m. the same evening¹⁵ and found that its contents had been seen by several employees. After this incident Bailey's confection with the Union was advertised by the surreptitious marking of his initials "C A B.", followed by "C I O",¹⁶ on tools and on the walls in his department. Bailey was never again invited to the foremen's meetings, although they were held thereafter at frequent intervals. Nels Christenson was later appointed foreman of the forge shop to succeed him.¹⁷ It is found that Bailey was not invited to foremen's meetings after November 1942, and was thereafter demoted from his position as foreman, because of his union membership.

In December, John W. Kenney, then a resident of Milwaukee, Wisconsin, who had relatives in Owatonna, applied to the respondent for work, giving his sister's home in Mankato, Minnesota, as his address. He was interviewed relative to his qualifications by "one of the Kaplans"¹⁸ who asked Kenney if he was a union member. Kenney answered in the affirmative.¹⁹

¹⁴ This finding is based upon the testimony of Bailey and the surrounding circumstances. Kaplan denied that he ever urged that an independent union be organized. Ed Betloch, the only other department foreman who was questioned relative to this foremen's meeting, testified that he could not recall Kaplan making the above statement. As heretofore found, Kaplan admitted a definite antipathy to any kind of union organization among his employees and testified that if an organization was necessary he preferred that the employees have an independent union. He further testified to knowledge of the efforts of the Union to organize the employees, not only of the respondent but of other local companies, and that these organizational efforts were a frequent subject of discussion in Owatonna. In the light of Kaplan's anti-union attitude, his preference for an inside union, and the creation in February 1943, as will hereafter appear, of the Independent, the denial of Kaplan is not credited.

¹⁵ At this time the respondent was maintaining two 10-hour shifts.

¹⁶ Although the Union was not at this time affiliated with the C I O., it was associated with that organization by the respondent and its employees.

¹⁷ Before the advent of Personnel Director Hertz in July 1943, who thereafter called the foremen's meetings, the department foremen were usually asked to attend these meetings by General Foreman Soukup, or one of the Kaplans. Soukup testified that he knew of no reason why Bailey was not thereafter invited to the foremen's meetings. President Kaplan more frankly testified that it was decided to drop Bailey as a foreman about November 1942 because of the poor production showing in the forge shop and that finally about August 15, 1943, Nels Christenson was installed as foreman in place of Bailey. Lacking any corroborative evidence of poor production in the forge shop during the period Bailey was in charge thereof, Kaplan's testimony that Bailey was demoted as foreman because of poor production is not credited.

¹⁸ As previously found, Ruben A. Kaplan, was president of the respondent. His brother Ave, was vice president, and another brother Don, was plant superintendent.

¹⁹ Kenney was not thereafter employed by the respondent. In his testimony he was unable to identify which Kaplan questioned him. Although there was no specific identification in this respect, the testimony is credited, lacking any denial. Ruben Kaplan was the only one of the three brothers who testified and he was not questioned relative to the above incident. There was no showing of unavailability on the part of the other brothers. Furthermore, the respondent had a record of the Kenney application which it produced at the hearing together with an answer to an inquiry made to a Mankato credit bureau to the effect that no John W. Kenney was living at the address in Mankato he had given.

On January 30, 1943, Hodson, the union representative, demanded recognition of the Union by the respondent and submitted a proposed contract. No specific proof of majority representation was produced and the respondent refused to recognize the Union as the representative of its employees. On February 9, the Union filed with the Eighteenth Regional Office a petition for investigation and certification of representatives, alleging that it represented a majority of the respondent's employees in an appropriate unit.

3. Formation of the Independent; other events

About February 17 in the washroom of the grinding department during working hours Harlan Denny, foreman of the steel room, and Harry Drum, foreman of the heat treating department, talked to employee Russell Dillon²⁰ about the Union's petition for representation. At that time Drum said to Dillon, "They are going to have an election on the union here, so I hear. Won't you please speak to the new boys and the old boys along with them and ask them to forget about it? We don't need no union here." Drum told Dillon that the Union was asking for 70 cents an hour and a 40 hour week and under such circumstances the employees would not make as much money as they were then earning.²¹

One evening about a week before February 23, a number of the employees congregated in the bar room of the Owatonna hotel. The group included Harry Drum, Stanley Connell, Harlan Denny, Frank Krahulec and Seward Abbott, department foremen; Paul Swenson, draughtsman; and Gilbert Russell, ordinary employee. During the course of the evening, the group decided to form an independent union among the respondent's employees and A. L. Goddard was selected to organize the new union.²² From then until the following June there was considerable activity on behalf of the new union. John R. Walbran was retained as attorney and prepared Articles of Association. Application forms were printed and memberships solicited by department foremen Drum, Denny, Connell and Joe Wardry as well as by some ordinary employees. The evening of February 20, Immanuel Kubalski and about 6 other employees were invited to the home of Frank Krahulec, foreman of the repair department. During the evening Kubalski signed an application to join the Independent, and paid Krahulec 1 month's dues of 50 cents. An employee from Jostens,²³ whom Kubalski was unable to identify by name,²⁴ was also present. The Josten representative told the group it was important that the Union be kept out of Owatonna and the Independent be established in the respondent's plant, because, as he stated, if the Union became established in the Owatonna Tool Company, it would also gain a foothold at Jostens. During the course of the meeting the question arose as to who would be a good leader for the Independent and Al Goddard's name was mentioned in this respect. Goddard was then sent for and spent about

²⁰ Dillon was not on duty at the time but had come to the plant to get his cap.

²¹ Neither Denny nor Drum testified, and there was no showing of their unavailability.

²² Up to the first of January 1943, Goddard had been a salesman for the respondent; however, about a month before the February meeting in the hotel, Goddard was employed on the night shift as a machine operator. There is some evidence that Goddard may have been at the hotel meeting, but the record is not clear in this respect. In any event, Goddard shortly thereafter proceeded to organize the Independent.

²³ Jostens is a manufacturing concern also located in Owatonna.

²⁴ Kubalski testified that in addition to working for Jostens the man in question operated a small fox farm near Owatonna.

an hour and a half at the party.²⁵ As heretofore found, Goddard had already been approached by Krahulec and other foremen relative to organizing the Independent. There is evidence of some solicitation on behalf of the Independent on company time by employees and by some of the department foremen. Thus, Clarence Bailey testified that employee George Christenson, during working hours solicited him and other employees to join the Independent; that Harry Drum, foreman of the heat treating department, adjoining his department, came to him during working hours and told him that he did not have "anything against" Bailey because the latter had previously joined the Union but that he wished he would join the Independent. Drum did not specifically deny this testimony of Bailey's but did deny that he solicited for the Independent. In view of Drum's interest in the Independent, heretofore found, his denial is not credited. George Christenson did not testify and there was no showing of his unavailability. It is therefore found that Bailey was solicited to join the Independent by Christenson and Foreman Drum on company time.

Due to the efforts of Foremen Drum, Connell, Denny, Wardry, Krahulec, Goddard, Christenson, and other employees, a number of the employees signed Independent application cards and paid a month's dues of fifty cents prior to February 23. On the afternoon and evening of February 23, Independent meetings were held at a downtown hall, the afternoon meeting for the night shift and the evening meeting for the day shift. The meetings were advertised by word of mouth and by handbills passed to employees entering the plant. The two meetings were attended by a majority of the respondent's employees. The day meeting was called to order by Goddard who introduced Attorney Walbran to the employees. Articles of Association of the Tool Manufacturers Independent Union of Owatonna were then read and signed by all those present, including Chief Inspector John Pichner²⁶ and practically all the department foremen. Temporary officers were then elected as follows: President, Al Goddard; Vice president, Frank Krahulec; and Secretary-Treasurer, Donald Thomas.²⁷ At the smaller meeting for the night shift the same procedure was gone through, except for the election of officers. Including the Chief Inspector and foremen, 96 of the respondent's approximately 150 employees signed the Articles of Association. Thereafter meetings of the Independent were held about once a month.

Early in the spring of 1943, Goddard and Thomas, the newly elected officers of the Independent, met with vice president Ave Kaplan and, claiming that the Independent represented a majority of the production and maintenance employees of the respondent, asked that it be recognized as bargaining representa-

²⁵ The respondent's records show that for the weeks starting February 13 and 20, Goddard worked each night and checked out only for a short lunch period of about ½ hour each evening. There was no record that Goddard checked out for any period save lunch time on February 20, or on any other evening prior to February 23. The respondent contends that it has had considerable trouble with night employees leaving their work for periods without checking out. In view of the fact that there were never more than 50 employees on the night shift, and that in February, 1943, there were guards at the plant protecting ingress and egress, the suggestion that employees on the night shift could leave for indefinite periods without the respondent's knowledge is rejected.

²⁶ Conceded by the respondent to have supervisory authority.

²⁷ Krahulec, however, resigned as vice president within twenty-four hours. March 21, Goddard and Thomas were elected as permanent president and secretary-treasurer, respectively, and Everett Rasmussen, foreman of the cutting department, was elected vice president. May 16, Goddard resigned as president and was succeeded by employee Richard Crawbuck.

tive. Kaplan did not question the majority claim of the Independent or demand proof thereof, but told the Independent officials that he could do nothing about their request because the Union also had asked for recognition.

Oscar Henson, union member, who had joined the Independent on February 23, refused thereafter to pay dues to the latter organization. Later in the spring Henson's brother-in-law, Foreman Everett Rasmussen told Henson that he had better "get into" the Independent as Rasmussen had heard that the respondent was going to discharge those employees who did not "sign up" in the Independent. That spring, Russell R. Dillon was asked by employee Dean Winship during working hours to join the Independent. Dillon replied that he wanted to think it over. Later the same day Dillon was again solicited to join the Independent by Foreman Everett Rasmussen.²⁸ On May 15, 1943, the Union filed a charge in the Regional Office alleging assistance and domination by the respondent of the Independent.

During the month of May a Tool-O-Gram was issued, prepared by William Zamboni, in charge of the production control and time study department, in the form of an open "patriotic" letter to John L. Lewis, subtly criticizing the head of the United Mine Workers for holding up the nation's coal production. On May 18, another Tool-O-Gram was issued, also patriotic in tone, which referred to the previous "letter" to John L. Lewis. The Tool-O-Gram then continued in part:

But Mr. Lewis is only one. There are many; not quite so well publicized, perhaps, not quite so much in the public eye, but just as dangerous and just as unscrupulous.

About June 1 President Crawbuck and Secretary Thomas of the Independent submitted to either Ruben A. Kaplan or Ave Kaplan, an affidavit, executed by Thomas, to the effect that the Independent represented a majority of the respondent's employees. At the same time Crawbuck and Thomas discussed with this official of the respondent terms of a proposed contract to be executed between the Independent and the respondent. On June 7, Ave Kaplan wrote Attorney Walbran that because of the union charges of unfair labor practices filed against the respondent its attorney had advised that it could not enter into an agreement with any labor organization until the charges were cleared.²⁹

About the first of June, Henson began wearing his union button in the shop. There was a coca-cola and milk machine in the plant and it was customary once every morning for the head of the plating department³⁰ to get coca-cola or milk for the employees and pass it around in the department. About two days after he started wearing his union button, Henson had secured the soft drinks when Superintendent Don Kaplan said to him, "Shorty, you've got to cut this out. You have been fooling around here a little bit too much. If you want to

²⁸ Neither Rasmussen nor Winship testified and there was no showing of the unavailability of either as a witness.

²⁹ However, about the middle of August, because of "delay" in the prosecution of the charge and to "get some action", the officials and attorneys for the respondent and the Independent met and discussed the terms of a proposed contract that Walbran had in the meanwhile drafted. As the contract drawn was incomplete in certain respects, it was agreed that Attorney Mackey redraft a form of contract. Mackey did so and mailed copies to Walbran and the respondent about August 30. Nothing further was done about it, however, and the form contract as redrafted was never accepted in all its details by the respondent. The respondent does not, however, deny that it recognized the Independent as the bargaining agency for its employees in August, 1943.

³⁰ As heretofore found (footnote 12) Henson was foreman of the plating department.

you can get your time and quit right now". Henson replied that he would try to do better.³¹

On July 27, the respondent posted the following Tool-O-Gram on its bulletin board:

Tool-O-Gram

JULY 27, 1943

RULES & REGULATIONS

The following rules and regulations relative to Company policy are effective at once.

1. PARTICIPATION IN ORGANIZATIONAL ACTIVITIES OF ANY KIND ON COMPANY TIME OR PROPERTY, ARE PROHIBITED.
2. NO PETITIONS SHALL BE PASSED ON COMPANY TIME OR PROPERTY.
3. INEFFICIENCY IS CAUSE FOR DISMISSAL.
4. FAILURE TO REPORT TO WORK WITHOUT NOTICE BEING GIVEN WITHIN TWENTY-FOUR HOURS IS CAUSE FOR DISMISSAL.
5. MERIT AND PROMOTIONAL WAGE INCREASES MUST BE HELD STRICTLY CONFIDENTIAL.
6. INSUBORDINATION TO FOREMEN OR SUPERVISORS IS CAUSE FOR DISCIPLINARY ACTION OR DISMISSAL.³²

These rules will be administered fairly, impartially and without discrimination. Violation of any one is cause for dismissal or other disciplinary action.

About the middle of August, Ted Maamun, who as heretofore found had been discharged in 1941 but later reinstated in settlement of a union charge of discrimination, went to the home of Personnel Director Hertz who was in charge of employment and the handling of employees' grievances, and requested that he be given lighter work because of his back injury.³³ Maamun also asked Hertz why he had not received a raise in pay when others around him were receiving raises. Hertz, was a resident of Owatonna but had only been with the respondent since the previous July 1st, answered, "Well, now, you are with this union³⁴ and naturally they don't want anything to do with the Union". Hertz then added that under the circumstances Maamun could not expect any favors.

³¹ About six weeks prior to this incident Henson asked Don Kaplan for a raise. Kaplan answered that because of the wage-freezing formula it would not be possible to give him the raise, but that his work was "fine" and that Henson had always done good work.

³² General Foreman Soukup testified that Rule 6 applied to insubordination to department foremen. President Kaplan, on the other hand, testified that the insubordination rule applied only to Soukup, General Night Foreman Bowman, and Chief Inspector Pichner. Under all the circumstances the undersigned credits Soukup and discredits Kaplan in this respect.

³³ At the time of his reinstatement in 1941 Maamun was put to work on a portable grinder, which was heavier work than he had been doing prior to that time. In April, 1942, while working at the portable grinder he slipped and wrenched his back. Thereafter he consulted and was treated by his own physician for a considerable period. The doctor advised Maamun, and told the latter that he had informed the respondent, that he would often be temporarily laid up because of his weak back unless he was given lighter work. At the time of the above conversation with Hertz, Maamun was not working because of his back.

³⁴ Maamun, at the time was chairman of the Union's Owatonna local.

Two weeks after this conversation, under his doctor's orders, Maamun quit his job with the respondent³⁵

About August 25, President Kaplan accused Clarence Bailey³⁶ of responsibility for a slow working start by the forge department employees that morning.³⁷ Bailey denied that he had caused the disturbance and explained that he was not in the department at the time. Whereupon Kaplan said, "Well, you have been causing plenty of trouble around anyway." Bailey asked in what respect and Kaplan replied, "By your union activities." Bailey denied that he had caused trouble around the plant and stated that he did not understand why the respondent was "against" him, adding, "I've always done my work all right, the best that I could. You give the other guys raises and neglected to give me any." Kaplan answered, "I wouldn't give you a raise if you were the last man in the shop. After pulling a trick like that on me." Kaplan then stated that he had helped Bailey secure a loan when he built his home and that Bailey "turned around and joined up with the Union to do him dirt", and that Bailey had worked himself into a good job where he could make "good money" but had thrown it all away "by joining up with this bunch of racketeers." During this talk with Bailey, Kaplan also criticized Clem Smersh and Dean Winship for belonging to the Union after he had taken them in and given them jobs. Smersh joined the Union in August, 1943. On August 25 he went to President Kaplan to inquire about a raise in pay. Kaplan told Smersh that he was earning as much as he could get elsewhere and that he was "disgusted" because Smersh had joined the Union. Kaplan also stated at this conversation with Smersh that he had helped Dean Winship³⁸ and his family out and "look what he done to me,—he joined the Union."

In October Smersh, who worked in the forge department but at that time was temporarily doing painting work for the respondent, casually met Nels Christenson, foreman of the forge shop, in a local bar. During the course of their conversation Christenson told Smersh that if he dropped out of the

³⁵ This finding is based upon the uncontroverted testimony of Maamun. Hertz was questioned about Maamun and his resignation but was not asked about and did not deny the above testimony. Maamun testified that he went to Hertz' office to resign; that while there, during Hertz's temporary absence from his office, he saw an initialed memorandum addressed to Hertz on the latter's desk instructing Hertz to check the union affiliations of new applicants for work. Maamun could not identify the initials. Hertz denied that he checked the union affiliations of applicants or that he had ever received instructions to that effect. Under the circumstances and lacking corroboration of Maamun's testimony, the denial is credited.

³⁶ As heretofore found Bailey was appointed foreman of the forge department in October 1942, but after the respondent discovered that he was a member of the union he was not thereafter invited to the foremen's meetings and Nels Christenson succeeded him as department foreman about the middle of August 1943. Bailey joined the Independent on February 23, but did not pay any dues except for one month.

³⁷ The respondent had installed a system of incentive pay above the base rate whereby if certain jobs were completed within a specified time those employees who worked on the jobs could earn a bonus. William Zamboni, who wrote some of the Tool-O-Grams from about May, 1943, also estimated the employees' bonus earnings. On the morning in question apparently some of the employees in the forge department were disappointed with their bonus earnings and did not go to work promptly. Whereupon Nels Christenson reported the dissatisfaction to Zamboni and, returning to the department, told the men to go to work and that Zamboni would explain the payments. On this assurance the employees involved went to work.

³⁸ Winship joined the Independent on February 23 at the organizational meeting and participated in Independent activities as late as May 16. The record is silent as to when he joined the Union.

Union³⁹ Christenson was sure that President Kaplan would make it worth his while. The same month Henson, foreman of the plating department⁴⁰ casually met and visited with Nels Christenson in a downtown cafe. During the course of the conversation, which was in the presence of Henson's wife, Christenson said to Henson, "Shorty, if you had a button—a union button, on I would tear it off and I would stomp on it" Christenson then said that Henson should get out of the Union and that he could better himself if he came "over with them." Henson replied that he did not think it would do him much good to come over because the respondent was feeling "pretty hard" towards him. Christenson then offered to take Henson to President Kaplan the next morning if Henson was willing to get "straightened up out of the other union" Henson made no answer to this proposal. About the same time of the year⁴¹ President Kaplan came to Henson at work and said, "Oscar, I heard you made a remark that there was no Kaplan big enough to can you" Henson replied, "Well, Rube, I never said that, but I did say the Independent Union couldn't can me" Kaplan then ejaculated "So what?" several times and Henson added that he would try to do the best he could on the job. Whereupon Kaplan used an obscene, disparaging term toward Henson and told him that if he "wanted to make a man out of himself" he would resign.

4. Employee status of department foremen

As heretofore found, practically all the department foremen joined the Independent on or about the time of its inception in February, 1943, and so far as the record shows are still members of that organization. In addition, Department Foremen Drum, Denny, Connell, Krahulec, Wardry, Nels Christenson and Rasmussen were active in organizing or securing members for it and Drum, Christenson, and Denny were active in opposition to the Union. The Board contends and the respondent denies that the department foremen are supervisors for whose activities the respondent is chargeable.

All the department foremen are required to: (a) see that work that comes to the department is efficiently and expeditiously handled and that the work is then passed on to the next department; (b) see that all the men in the department are supplied with work and, as occasion requires, shift the workers from one job or machine to another; (c) make ratings as to the efficiency of the department employees;⁴² (d) instruct new employees; (e) attend foremen's meetings; and (f) keep up production in the department. While not engaged

³⁹ Smersh joined the Independent on February 23, 1943, paying one month's dues. April 6 he was solicited by Donald Thomas for his dues on company time, and at that time paid two month's dues to the Independent. As previously found, in August Smersh joined the Union.

⁴⁰ As previously found, Henson had been active in 1937 in attempting to establish an outside labor organization in the plant. Although foreman of the plating department for about four years by virtue of his seniority, he was not asked to the foremen meetings, nor did he rate the employees in his department as described in footnote 42 *infra*.

⁴¹ Henson fixed the time as the opening of the duck season in the fall of 1943.

⁴² In August 1943, the respondent installed a rating-card system whereby the department foremen were required to rate on individual cards each employee in the department. The record thus made was to be used by the respondent as a basis for raises. Because of its recent installation, the data from these cards had not actually been used up to the time of the hearing. However, President Kaplan's testimony is credited that the cards were being prepared and would be used for the above purpose and that the system of rating thus installed was no different from that which had been employed previously but simply a more efficient application of the system.

in the above types of supervisory work the foremen work at machines or do other manual labor the same as the other employees. They receive approximately the same wages as the other employees⁴³ None of the department foremen have direct authority to hire or fire but their recommendations are given weight in wage increases, and they are also consulted, on occasion, by Superintendent Don Kaplan and General Foreman Soukup relative to discharges or demotions. By virtue of the merit rating system in their control, and by consultations with higher supervisors, they can effectively recommend changes in the status of employees in their respective departments. They are regarded by the employees as representing management.⁴⁴ The record indicates that the amount of actual supervision exercised by the respective department foremen varies with the size of their departments and to some extent with the willingness of individual foremen to accept supervisory responsibilities. It is clear, however, what functions they were supposed to perform. These functions determined their relationship both to the employees and to management, irrespective of incidental laxities in the way they were actually performed. The foremen's meetings, which had been held over a period of years, and, until July 1943, at the direct call of management, and in which the top executives of the respondent participated, were constant recognition by the respondent of the foremen's status. When this group, reflecting the known anti-union attitude of the respondent, inaugurated and sponsored the Independent, in the face of the Union's organizational campaign, their activities presumptively suggested to the employees as a whole that they were acting on the respondent's behalf.⁴⁵ It is therefore found that the employee status of the department foremen⁴⁶ is such that the respondent is responsible for their activities.⁴⁷

⁴³ Most of the employees are skilled or semi-skilled craftsmen. The respondent has no uniform wage scale but pays each man according to its estimate of his ability and tries to keep the individual wages paid secret. On the other hand, the oldest man is ordinarily selected as department foreman. As a result there are one or two instances where the department foreman's rate is slightly less than a particularly skillful mechanic in his department. For the most part the foremen receive as much as any others in the department and, in at least one instance, slightly more. The foremen do not share in incentive earnings on particular jobs or in department bonuses, but do participate in the average incentive earnings of the entire shop.

⁴⁴ These findings are based upon a reconciliation of the testimony of General Foreman Soukup, President Kaplan, Personnel Director Hertz, several of the foremen and a number of the employees.

⁴⁵ *H. J. Heinz Co v N L R B*, 311 U. S. 514, 521, *International Association of Machinists v N L R B*, 311 U. S. 72.

⁴⁶ These department foremen include all the well defined departments in the plant with the exception of the plating department, headed by Oscar Henson. As previously found, Henson was never invited to foremen's meetings nor did he rate the employees in his department. There is some reference in the record to the Production Control Department, headed by William Zamboni, the Drafting Department, headed by Paul Swanson and the Paint and Woodwork Shop, headed by Al Marek. None of these are actual departments. The first two are located in the office. Swanson does drafting and is assisted by two or three gals. Zamboni, since May, 1943, assisted by one man, has made time studies and estimates the incentive or bonus wage earned by the employees. While it is true that prior to May, 1943, Zamboni prepared some of the Tool-O-Grams which the respondent distributed, there is no evidence that the employees know he was the author of any of these documents. Marek had possibly one employee with him in the Paint and Woodwork Shop. None of the three prepared rating cards. No finding is therefore made that these three are supervisors.

⁴⁷ *N. L. R. B. v. Link-Belt Company*, 311 U. S. 584. In the *Matter of C. A. Reed Company, etc.*, 53 N. L. R. B. 279 (decided October 30, 1943). In the *Matter of Fine Art Novelty Corporation, etc.*, 54 N. L. R. B. 480 (decided Jan. 14, 1944).

B. Concluding findings as to interference and domination

At the time the employees attempted to organize an A. F. of L. Union in 1937, the respondent, by the speech of President Kaplan, made it clear to the employees, that it opposed such activities and suggested that the employees form a union of their own. In the fall of that year, when some of the employees continued their union activities, the respondent again emphasized its opposition by laying off two of these employees. Although it reinstated all but one of them later in the year and posted a notice to the effect that the employees could join any labor organization of their own choosing without discrimination, and so instructed its supervisory staff, it is clear from the record and the respondent's subsequent attitude, and the undersigned finds, that the respondent reinstated the laid off employees and posted the notice only to settle the charge of discrimination that had been filed with the Board against it. It continued in its attitude, as expressed by President Kaplan at the hearing, of lack of enthusiasm for any labor organization among its employees except an inside, unaffiliated labor union. That the respondent's fundamental opposition to outside labor unions had not changed was brought home to the employees in 1941 when Ted Maamun was discharged after he headed a movement to organize the Union. Although Maamun was later reinstated, this also was in settlement of a charge filed that his discharge was discriminatory. When interest in the Union continued in 1942 and spread, the respondent, in its Tool-O-Gram, contrasted the "greedy squabbles of union" leaders with the heroic efforts of our forces in the Philippines. It made inquiries as to the union affiliations of applicants for work in the plant. When it became known that Clarence Bailey, whom it had recently appointed foreman of the forge shop, was a member of the Union, the respondent ignored him thereafter as a supervisor and later replaced him in that position. That fall, President Kaplan notified the supervisors in effect that any organization among the employees excepting an independent union would be opposed by the respondent as it did not want the employees "tied up" with "racketeers" who would try to run its plant. On February 9, 1943, the Union filed with the Board a petition for investigation and certification of representatives, after it had demanded and had been refused recognition as such representative by the respondent. A few days later Foremen Denny and Drum urged Russell Dillon to ask the employees to "forget" the union election that might result from the petition. Within a week thereafter a movement, headed largely by department foremen, was inaugurated to start an independent union. Some of the department foremen as well as other employees thereafter solicited members for it on company time and property. During this period foremen sought to discourage the employees' interest in the Union. Al Goddard left his night shift work for an hour and a half to attend an Independent organization meeting without incurring loss in pay. At the first meeting of the Independent on February 23, Chief Inspector Pichner, concededly a supervisor, and practically all the department foremen, herein found to be supervisors, signed its Articles. During the following spring Department Foreman Everett Rasmussen told his brother-in-law Oscar Henson that he had better "get into" the Independent as the respondent was going to discharge those employees who were not members of that organization. Until about May, Donald Thomas, secretary-treasurer for the Independent, openly solicited dues from employees while they were working. There was some solicitation for Independent members on company time. In May the respondent subtly attacked the union's international president in two Tool-O-Grams. Two

days after Henson began wearing his union button at work he was unjustifiably criticized for "fooling around" In July, after the Independent had been fully organized, but the Union was still attempting to secure members, the respondent posted a notice prohibiting any kind of organizational activities on company time or property. In August, the respondent renewed its negotiations with the Independent for a contract and in the same month refused to grant Maamun an increase in pay that had been granted some of his fellow employees, or to transfer him to lighter work, because he was a union member. It accused deposed Department Foreman Bailey of "causing plenty of trouble" because of his Union activities, commented adversely to him about the union membership of two other employees, and refused to let him share in a contemporaneous raise in wages. That fall, President Kaplan abused Henson and suggested he quit his job. In October, Department Foreman Nels Christenson told Henson he would like to "stomp on" Henson's Union button and offered to take Henson to President Kaplan if he would leave the Union so that Henson could "better himself." Christenson told employee Smersh that, if he would drop out of the Union, President Kaplan would make it worth his while.

From the above facts as found, the undersigned is convinced and finds that the respondent has dominated and interfered with the formation and administration of, and has contributed support to, the Independent. It is further found that by said acts, and by the various acts of interference and coercion of Union employees by officials and supervisors above detailed, the respondent has interfered with, restrained and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act.

C. *Discrimination as to hire and tenure of employment*

1. The discharge of Smersh

Clem Smersh, as heretofore found, joined the Union in August 1943. He was criticized for so doing by President Kaplan, and Department Foreman Christenson tried to get him to resign. Smersh first came to the respondent in February 1942 in the assembly room at 35 cents an hour. Later he did trucking and then general utility work. Although none of these jobs were promotions, his pay was increased at regular intervals.⁴⁸ About July 1943, when he was earning 60 cents an hour, he was made assistant to Chief Inspector Pichner. As he was also a painter by trade, the latter part of October 1943 he was taken off the inspection work and instructed to renovate the inside of the various departments in the plant. This renovation consisted of whitewashing the side walls of the various rooms and painting any woodwork.

About November 15, Smersh had about completed this work in all the departments except the flame cutting department, the machine room and Superintendent Don Kaplan's office, which was located in the plant proper. At that time General Foreman Soukup told Smersh that he was to work next in the flame cutting department. This department is located in a large room which contains a gas furnace for heating iron and steel blocks, a large and small flame cutting machine,⁴⁹ and a number of portable grinding machines. At the time of the above conversation both Soukup and Smersh were in the flame room and Smersh called the foreman's attention to smoke being blown by the dust collector to the ceiling where he would have to start the whitewashing. Soukup replied that the smoke was bound to come to the ceiling, but that it would amount

⁴⁸ Smersh benefited by 4 pay increases, two of which were individual raises in pay.

⁴⁹ A dust collector was attached to the small flame cutter for the purpose of removing dust and fumes.

to nothing as Smersh would be working on the walls. Smersh then responded, "O. K." On the morning of the 16th Smersh, having completed all but the three rooms above mentioned, secured permission from Soukup to next whitewash Don Kaplan's office. While working in the office on the 16th, Smersh complained to Paul Swenson that he considered it dangerous for him to whitewash in the flame cutting department because of the gas therein. Swenson made no response to this comment.⁵⁰ On November 18, although his renovating work in the office was unfinished, Smersh was instructed by Don Kaplan to leave that work and proceed to whitewash the walls in the flame room. When Smersh went to the flame cutting department to carry out these instructions, he found that the two flame cutters and the gas furnace were in use but the dust collector was burned out and not in use. Smersh asked Don Kaplan, who came into the room, if he would turn off the gas furnace, as it was "dangerous up there next to the ceiling" with the furnace going. Kaplan refused the request, whereupon Smersh refused to whitewash the room. Kaplan then told Smersh, "Get your coat. You are all through. Anybody that don't take orders is certainly through working for us." Kaplan then took Smersh's badge and the latter walked over to the company office to secure his pay check. While waiting for the check in the assembly room, which adjoins the office, President Kaplan came through that department. Kaplan said to Smersh, "What is the matter, Clem?" Smersh explained that he had been ordered to whitewash in the flame cutting department and, as it was "dangerous in there," he had refused to do so. Kaplan replied, "Yes, it is dangerous in there." Nothing further was said and after Smersh had been given his pay check he left the plant. He has not since been recalled.

During the summer of 1943, Smersh had been told by employees Earl Hissen and Harvey Hogate of the flame cutting department that the gas fumes gave them headaches and otherwise affected them. There is other testimony, herein credited, of employees who worked in this department, that the gas fumes, particularly when the gas furnace was going, seriously affected them. Thus Russell Dillon, who worked off and on in this department for a year and a half, testified that he was bothered by the gas fumes and dust to such an extent that on his doctor's orders he was transferred in October, 1943, to another department. Harvey Hogate, who worked in the flame department from February to August, 1943, testified that he was transferred at his request because the fumes and dust caused him to "choke up." There is other credited testimony that the fumes were stronger in the room when the furnace was running, and were worse near the ceiling. The furnace was being used on November 18 to prepare a supply of steel blocks for use in the plant. Ordinarily a two weeks supply of blocks was made and in the meantime the furnace would not be used. On November 18 the usual two weeks supply had not been completed. If the furnace had been shut off as requested by Smersh, it would have remained idle for about half a day while he whitewashed the upper portion of the walls. The one man operating the furnace could have done other work and, as there was a supply of blocks on hand for more than that short period, it would not have interfered with the other work in the plant.

A few days after November 18, the small flame cutter was moved closer to the large one and a ventilating arrangement attached to both, which adequately removed from the room any gas or dust created by either when in operation. About a week later another employee whitewashed the room while the furnace

⁵⁰ As heretofore found, Swenson, a draughtsman, had a desk in the superintendent's office. He was not a supervisor. Smersh's comment indicates that he was not looking forward with enthusiasm to working in the flame cutting department.

was not in operation. There is evidence that about a day or two prior to November 18 a representative of the Minnesota State Industrial Commission visited the respondent for the purpose of checking the amount of fumes and smoke in the plant.⁵¹

2. Kenneth R Sette

Sette began working for the respondent in March 1941 in the steel room. He later worked in the machine shop and about the fall of 1942 was transferred to the forge department, where he worked with Arnold Mauseth on one of the four large mechanical hammers. In August of 1943, while working in the forge department Sette was overcome by the heat and was transferred to the steel room temporarily. About September he was returned to the forge department. At that time Personnel Director Hertz put Sette on a different hammer than he had previously worked and told him that as long as he was 4-F⁵² he "would have to buckle down and really get to work." In early November General Foreman Soukup again temporarily transferred Sette to the steel room because the material then being handled was light weight and did not require the services of two men per hammer. It was the usual practice to take one man off the hammers temporarily under such circumstances. Thereafter Sette did some work in the steel room, but most of his work consisted of hauling and unloading material, and general work. He was not attached to any department and, while his base pay remained the same, he did not share in the production bonus of the forge department.⁵³ As a result his weekly pay check was \$4 or \$5 less than it would have been had he remained in the forge department.

About November 20 the forge department resumed its normal operations requiring the services of two men on the mechanical hammers. Another man junior to Sette was assigned to work Sette had formerly been doing. On November 21, Sette went to Hertz and inquired why he had not been returned to his forge work. Hertz told Sette that he did not know, but that he would find out. Later the same day Hertz sent for Sette and the following took place as testified by Sette:

He [Hertz] said he had talked to Bailey [Soukup] and Don [Kaplan] and Nels [Nels Christenson, foreman of the forge department] and they told him that the reason I was removed from the forge shop was that I was loafing on the job, wasn't doing my work, and unless they watched me all the time I wouldn't get my day's work done. Nels Christenson told him. I asked him what Bailey Soukup and Don told him, and he said they confirmed Nels Christenson's opinions, and he asked me what I had to say for myself and I said, nothing, I asked him [you] a question and you gave me an answer, and I walked out, and that was all that was said.

Sette's starting wage with the respondent was 30 cents an hour. Thereafter he shared in two general wage increases and was also the beneficiary of four small individual increases. In the fall of 1943 he was receiving a base pay of 75 cents an hour and shared in the production bonus rate applicable to the forge department while working therein. On one occasion in the summer of 1943

⁵¹ The respondent developed the testimony relative to the inspection by cross-examination. It did not produce any other evidence thereon. It is a reasonable inference, herein drawn, that the later improvements were the result of this inspection.

⁵² In October Sette was classed 4-F by his local draft board. Prior to that he had been deferred twice as essential to the respondent's operations.

⁵³ As previously found, a production rate was fixed for the forge department, as well as other departments. If the rate during a given period was made, it entitled all doing straight production work in the department to benefit by a bonus for all additional production during that period in the department.

while handling hot steel in the forge department Sette accidentally burned a fellow employee. Burnings of this kind were not unusual because of the close working quarters. Sette had received burns in a similar manner. He was not criticized at the time because of this burning incident, and no mention was made of it by Hertz on November 21 when he told Sette the reason the latter was not being returned to the forge department. Prior to November 21 Sette had never been criticized for loafing⁵⁴

About the end of November, 1943, after the first hearing, Sette was working for Harlan Denny, foreman of the steel department. He was instructed to remove ice that had accumulated on some steel on the loading platform. He completed this job a few minutes before the noon lunch period and brought his shovel and pick into the department. Soukup saw Sette and the following conversation took place, as testified to by Sette.

He said if I didn't work right up to the whistle, he would get me my check. I said he must have misunderstood me. I will work up to the whistle but I didn't have any orders to do any other work and I was going to see Harlan and didn't get that far. He said I will get your check right now. I said that I didn't want the check. He said, alright, watch it. That was all that was said.

In February, 1943, Sette joined the Independent, and thereafter attended three of its meetings. He joined the Union in August, 1943. At the first hearing his testimony was largely confined to a description of the duties of Department Foreman Christenson and Denny⁵⁵

D. *Conclusions relative to discrimination*

The amended complaint alleges, and the answer denies, that the respondent discharged Smersh and demoted Sette, because of their union membership and activities, and because each gave testimony under the Act. After the Board had presented evidence at the reopened hearing in support of the above allegations the respondent offered no evidence in defense thereof but took the position that the evidence received failed to sustain these allegations in the amended complaint.

There is no contention that Smersh was not a competent, experienced employee. He was discharged ostensibly because he refused to obey instructions and whitewash the flame room. The respondent was certainly entitled to dismiss an employee for refusing to obey a legitimate order. In view of the renovating work in which Smersh was temporarily engaged, the order for him to work in the flame room was probably legitimate, but the timing and other circumstances surrounding the order were such as to cause grave suspicion as to the respondent's motives. On November 18, one day after the original hearing closed at which Smersh had given damaging testimony against the respondent, he was ordered to take the unusual course of abandoning Don Kaplan's half

⁵⁴ Due to the heat stroke Sette was not in the forge department on August 25 when the morning slow down occurred, heretofore referred to.

⁵⁵ At the first hearing Sette also testified, and the undersigned finds, that for 3 days he substituted on Lawrence Stockwell's hammer, while the latter was away; that prior to that time Stockwell had been talking and criticizing because the department production rate was so high that he could not get above it and thereby earn the department bonus; that when Sette took over the hammer temporarily Department Foreman Christenson came to him and said, "Well, you want to go fast all day today because you want to show Stockwell that a bonus can be made on that job"; that to help in the showing Christenson allowed Sette and his helper a half hour to grease the machine, although they only used ten minutes; that by being allowed the extra time for greasing he and his helper made a larger bonus that day than they otherwise would have been able to do.

finished office and to begin work in the flame cutting department at a time when the two flame cutters and the furnace, as well as the grinders, were in use. With the lack of ventilating facilities the gas fumes physically affected the department employees and had made at least one of them ill. Smersh knew that these fumes were stronger near the ceiling, and were enhanced when the furnace was going. Before complying with the instruction, Smersh requested Don Kaplan to order the gas furnace turned off for about a half day while he whitewashed the tops of the walls, stating that it would be dangerous otherwise. The request was denied. When he refused to whitewash the walls under the conditions then existing, he was summarily discharged.

It is true that General Foreman Soukup had notified Smersh about November 15 that his next whitewashing job would be in the flame cutting department, but the evidence is uncontradicted that the day following receipt of this instruction Smersh was permitted by Soukup to start work on the superintendent's office. Furthermore, he had not completed that job on November 18 when ordered into the flame cutting department by Superintendent Kaplan. It may be that the respondent could have shown a good reason for the change in Smersh's orders but it did not do so.

While the furnace was being used at the time to make the large steel blocks necessary in the plant's production, and the usual two weeks supply had apparently not been reached, there were more than enough blocks on hand to supply the needs of the plant for the short time necessary for Smersh to whitewash the tops of department walls. That the whitewashing of the flame cutting department on November 18 was not imperative seems clear from the fact that this work was not actually done until over a week later. If Superintendent Kaplan had complied with Smersh's request and closed off the furnace temporarily, it would in no way have inconvenienced the respondent or its production program. The testimony of other credible witnesses and the fact that the department walls were whitewashed later when the furnace was not being used corroborate Smersh's testimony that it would have been dangerous for him to whitewash near the ceiling while the furnace was going.

The undersigned therefore is of the opinion and finds that the refusal of Smersh to work in the flame room when the gas furnace was operating was not unreasonable and was based upon a justified fear that otherwise the whitewashing near the ceiling would be dangerous to him. It is further found in the light of the entire record that this refusal of Smersh was not the real reason for his discharge, but was merely a pretext, and that the real reason therefor was because of his union activities and because he had testified as a Board's witness under the Act in the original hearing herein.

When Sette complained because he had not been returned to his original work in the forge department, he was informed by the personnel director that he had not been so reinstated because he had previously loafed on the job in that department. From March 1941 to November 1943, Sette had worked up from 35 cents an hour to 75 cents an hour basic pay. He had been employed in the forge department almost continuously for a year prior to early November 1943, and his work had been in no way criticized. Personnel Director Hertz' statement to Sette in October in returning him to the forge department after he had been given work in the steel room for a few weeks because of a heat stroke, that, as Sette was now classed as 4-F by the draft board, he "would have to buckle down and really get to work," can not be considered a criticism of Sette's work, but rather a comment that his previous uncertain status as a permanent employee because of the draft had now been settled. Furthermore, it is noted that the previous summer the forge department foreman had used Sette to demonstrate

to another employee that the department production quota was not fixed so high that the employees could not earn a bonus. Foreman Christenson would not have selected Sette for this demonstration if the latter had been loafing on the job. When transferred out of the forge department in November, Sette was informed by the general foreman that the transfer was temporary and because two men were not needed on the mechanical hammers. This was not unusual. No criticism of his work was even hinted at that time.

The first intimation Sette had of any dissatisfaction with his work was the report by the personnel director, in response to his inquiry, that Superintendent Kaplan, General Foreman Soukup, and forge department Foreman Christenson had stated Sette had not been returned to the forge department because he had previously loafed and required constant watching in that department to get his work out. In this connection it is noted that apparently the personnel director knew of no explanation of the failure to reinstate Sette when first approached on the subject. In response to Hertz' question as to what he had to say for himself, after Hertz had reported the result of his interviews with the other supervisors, Sette answered, "nothing, I asked him [you] a question and you gave me an answer." This answer can hardly be construed under the circumstances as an admission by Sette that he had actually been loafing, or even that he had prior knowledge of the criticism.

In the light of Sette's previous good record with the respondent and the failure to prove any criticism of his work prior to November 21, it is found that the statement to him by the personnel director on November 21 that he was not being reinstated to his former work because he had loafed on the job was unfounded and a mere subterfuge; that the real reason was because Sette was a member of the Union and had testified under the Act.

It is therefore found that the respondent by discharging Smersh on November 18 and refusing to reinstate him, and by refusing on November 21 and since to reinstate Sette to his former work, discriminated in regard to the hire and tenure of employment of each of them, thereby discouraging membership in the Union, and by such action has interfered with, restrained and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the respondent set forth in Section III above, occurring in connection with the operations of the respondent 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 to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Since it has been found that the respondent has engaged in certain unfair labor practices, the undersigned will recommend that it cease and desist therefrom and take certain affirmative action in order to effectuate the policies of the Act.

It has been found that the respondent dominated and interfered with the Independent and contributed support to it. In order to effectuate the policies of the Act and free the employees of the respondent from such domination and interference, and the effects thereof, which constitute a continuing obstacle to the exercise by the employees of rights guaranteed them by the Act, it will be recommended that the respondent refrain from recognizing the Independent as the representative of any of its employees for the purpose of dealing with the respondent concerning grievances, labor disputes, wages, rates of pay, hours

of employment, and conditions of work, and to disestablish the Independent as such representative.

It has been found that the respondent discriminated in regard to the terms and conditions of employment of Clem Smersh and Kenneth Sette. It will be recommended that the respondent reinstate them to their former or substantially equivalent positions without prejudice to their former rights and privileges, and make them whole for any loss of pay they may have suffered by reason of the discharge of Smersh and the demotion of Sette, by payment to Smersh of a sum of money equal to the amount he would have earned as wages from November 18, 1943, to the date of the offer of reinstatement, less his net earnings during said period;⁶⁶ and by payment to Sette of a sum of money equal to that which he normally would have earned from November 21, 1943, the date of the refusal to reinstate him to his former work, to the date of the offer of reinstatement, less the sums received by him from the respondent for other work during said period.

Although it has been found that the respondent demoted Bailey from department foreman because of his union affiliation, no recommendation is made in this respect inasmuch as there is no allegation in the complaint to the effect that such action constituted an unfair labor practice. Furthermore, Bailey has not suffered financially by reason of the demotion, nor has he requested that he be reinstated to his former position as foreman of the forge department.

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

CONCLUSIONS OF LAW

1. United Construction Workers Division of District 50, U. M. W. A., and Tool Manufacturers Independent Union of Owatonna, are labor organizations within the meaning of Section 2 (5) of the Act.

2. By dominating and interfering with the formation and administration of the Tool Manufacturers Independent Union of Owatonna, and contributing support to it, the respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (2) of the Act.

3. By discriminating in regard to the terms and conditions of employment of Clem Smersh and Kenneth Sette, thereby discouraging membership in United Construction Workers Division of District 50, U. M. W. A., the respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (3) of the Act.

4. By discriminating against Clem Smersh and Kenneth Sette because they gave testimony under the Act, the respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (4) of the Act.

5. By interfering with, restraining and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, the respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (1) of the Act.

⁶⁶ By "net earnings" is meant earnings less expenses, such as for transportation, room and board, incurred by an employee in connection with obtaining work and working elsewhere than for the respondent, which would not have been incurred but for his unlawful discharge and the consequent necessity of his seeking employment elsewhere. See *Matter of Crossett Lumber Company and United Brotherhood of Carpenters and Joiners of America, Lumber and Sawmill Workers Union, Local 2590*, 8 N. L. R. B. 440. Monies received for work performed upon Federal, State, county, municipal, or other work-relief projects shall be considered as earnings. See *Republic Steel Corporation v. N. L. R. B.*, 311 U. S. 7.

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

RECOMMENDATIONS

Upon the basis of the foregoing findings of fact and conclusions of law, the undersigned recommends that The Owatonna Tool Company, Owatonna, Minnesota, its officers, agents, successors and assigns shall:

1. Cease and desist from:

(a) In any manner dominating or interfering with the formation or administration of or contributing financial or other support to Tool Manufacturers Independent Union of Owatonna, or any other labor organization of its employees;

(b) Recognizing the Tool Manufacturers Independent Union of Owatonna as the representative of its employees for the purpose of dealing with the respondent concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment;

(c) Discouraging membership in United Construction Workers Division of District 50, U. M. W. A., or any other labor organization of its employees, by discrimination in regard to hire or tenure of employment or any term or condition of employment;

(d) Discharging, demoting, or otherwise discriminating against any employee because he has given testimony under the Act;

(e) In any other manner interfering with, restraining or coercing its employees in the exercise of the rights to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection as guaranteed in Section 7 of the Act.

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

(a) Refrain from recognizing the Tool Manufacturers Independent Union of Owatonna as the representative of any of its employees for the purpose of dealing with the respondent concerning grievances, labor disputes, wages, rates of pay, hours of employment or other conditions of employment, and completely disestablish the Independent as such representative;

(b) Offer to Clem Smersh and Kenneth Sette immediate and full reinstatement to their former or substantially equivalent positions without prejudice to their seniority or other rights and privileges;

(c) Make whole Clem Smersh and Kenneth Sette for any loss of pay they have suffered by reason of the discrimination against them, by payment to each of them of a sum of money equal to an amount determined in the manner set forth in the section above entitled "The remedy";

(d) Post immediately in conspicuous places in its plant in Owatonna, Minnesota, and maintain for a period of at least sixty (60) consecutive days from the date of posting, notices to its employees stating: (1) that the respondent will not engage in the conduct from which it is recommended that it cease and desist in paragraph 1 (a), (b), (c), (d), and (e) hereof; (2) that the respondent will take the affirmative action set forth in paragraph 2 (a), (b), and (c) of these recommendations; and (3) that the respondent's employees are free to become and remain members of the United Construction Workers Division of District 50, U. M. W. A., or any other labor organization of its employees;

(e) Notify the Regional Director for the Eighteenth Region in writing within ten (10) days from the receipt of this Intermediate Report what steps the respondent has taken to comply herewith.

It is further recommended that unless on or before ten (10) days from the receipt of this Intermediate Report the respondent notifies said Regional Director in writing that it will comply with the foregoing recommendations, the National Labor Relations Board issue an order requiring the respondent to take the action aforesaid.

As provided in Section 33 of Article II of the Rules and Regulations of the National Labor Relations Board, Series 3, effective November 26, 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, file with the Board, Rochambeau 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 therefor must be made in writing within ten (10) days from the date of the order transferring the case to the Board.

J. J. FITZPATRICK
Trial Examiner

Dated March 7, 1944.