

In the Matter of CONSUMERS' RESEARCH, INC. and J. ROBERT ROGERS,
REPRESENTATIVE FOR TECHNICAL, EDITORIAL AND OFFICE ASSISTANTS
UNION, LOCAL NO. 20055, AFFILIATED WITH THE AMERICAN FEDERATION
OF LABOR.

Case No. C-52.—Decided July 7, 1936

Consumers Research and Testing Service—Discrimination: discharge—*Interference, Restraint or Coercion:* espionage; attempt to secure revocation of union's charter—*Strike—Employee Status:* during strike—*Unit Appropriate for Collective Bargaining:* community of interest; eligibility for membership in only organization among employees—*Representatives:* proof of choice; membership in union—*Collective Bargaining:* refusal to meet representatives; employer's duty, as affected by strike—*Reinstatement Ordered, Non-strikers—Back Pay:* awarded—*Reinstatement Ordered, Strikers:* strike provoked by employer's violation of law; displacement of employees hired during strike.

Mr. David A. Moscovitz for the Board.

Mr. Edward Garfield, of New York City, for respondent. *Mr. Shelton Pitney*, of Newark, N. J., of counsel.

DECISION

STATEMENT OF CASE

On October 24, 1935, Local No. 20055 of the Technical, Editorial and Office Assistants Union, through its representative, J. Robert Rogers, filed with the Regional Director for the Second Region charges that Consumers' Research, Inc., Bowerstown, New Jersey (hereinafter referred to as respondent), had engaged in and was engaging in unfair labor practices contrary to the National Labor Relations Act, approved July 5, 1935. On November 20, 1935, the National Labor Relations Board issued its complaint against respondent, said complaint being signed by the Regional Director for the Second Region, alleging that respondent had committed unfair labor practices affecting commerce within the meaning of Section 8, subdivisions (1), (3) and (5), and Section 2, subdivisions (6) and (7) of the National Labor Relations Act (hereinafter termed the Act). In respect to the unfair labor practices, the complaint, as amended in substance alleged that:

1. On August 23, 1935, respondent discharged, and at all times since has refused to reinstate, John Kilpatrick, Donald H. Rogers and John

Heasty, employees of respondent, for the reason that they joined and assisted in Technical, Editorial and Office Assistants Union, a labor organization, and, in particular, Local No. 20055 of that organization (hereinafter referred to as the Union).

2. On and after August 31, 1935, respondent refused to bargain collectively in good faith with the Union, through its shop committee, as the exclusive representative of all the employees in an alleged appropriate unit constituted by the employees in respondent's entire plant, with the exception of employees in the construction, maintenance and lunchroom departments.

Respondent, in its answer, as amended upon motion of respondent, in substance, first reserves all objections to the jurisdiction of the Board by reason of the inapplicability of the Act to respondent, and the unconstitutionality of the Act as sought to be applied to it; admits its corporate organization; denies that its activities constitute commerce or interstate commerce, or business; denies that the employees named in the complaint were discharged for the reason therein stated, and avers that the employment of two of them was terminated for the sole reason that respondent had no further use for their services, and that the employment of the third was terminated solely because of his incompetence; denies that the unit alleged in the complaint is appropriate for purposes of collective bargaining, and avers that the employees of the entire plant, without exception, should be deemed the appropriate unit; denies that a majority of its employees, either in the unit alleged to be appropriate in the complaint or in the unit claimed to be appropriate by respondent, designated the Union as their representative for the purposes of collective bargaining; denies that prior to September 4, 1935, it refused to bargain collectively with the Union; and denies that the acts alleged in the complaint constitute unfair labor practices which have led or tend to lead to labor disputes affecting commerce. In conclusion, respondent's answer sets up seven separate affirmative defenses relating to the constitutional inapplicability of the Act to respondent.

Pursuant to the notice of hearing, Charles A. Wood, the Trial Examiner duly designated by the Board, conducted a hearing commencing on December 16, 1935, at Belvidere, New Jersey. Respondent appeared by its counsel, Shelton Pitney and Edward Garfield. The Board was represented by its Regional Attorney, David Moscovitz.

At the commencement of the hearing respondent, by way of common law demurrer, moved to dismiss the complaint, which motion the Trial Examiner denied. Respondent then filed a written motion to dismiss the complaint on the grounds that the Board was without jurisdiction over the parties or subject matter, and that, in so far as the Act was sought to be applied to respondent, the Act was unconstitutional. Ruling on this motion was reserved by the Trial Exam-

iner upon the understanding that an intermediate report adverse to respondent would operate to give respondent an exception. The motion to dismiss the complaint was renewed at the close of the Board's case and again at the close of the hearing, with like ruling. These rulings are affirmed by the Board, and respondent's exception to denial of its motion to dismiss, effective upon the filing of the Trial Examiner's intermediate report adverse to respondent, is expressly confirmed.

Full opportunity to be heard, to cross-examine witnesses, and to produce evidence bearing upon the issues was afforded all parties. On December 30, 1935, respondent, pursuant to permission granted by the Trial Examiner, filed a brief in support of its case.

On January 31, 1936, the Trial Examiner filed an intermediate report, finding and concluding, in substance, that respondent was engaged in commerce and had committed unfair labor practices in violation of Section 8, subdivisions (1) and (3), and Section 2, subdivisions (6) and (7) of the Act. The Trial Examiner recommended reinstatement to their former positions with back pay, of the three employees named in the complaint, and reinstatement to their former positions of all employees who went on strike on September 4, 1935. The Trial Examiner further found and concluded, in substance, that respondent had committed unfair labor practices in violation of Section 8, subdivisions (1) and (5), and Section 2, subdivisions (6) and (7), of the Act, and recommended that respondent bargain collectively with the Union, through its shop committee, as the exclusive representative of all the employees in the unit found to be appropriate for such purposes. On February 14, 1936, respondent duly filed exceptions to the intermediate report.

We find that the evidence in the record supports the Trial Examiner's rulings, findings and conclusions. We find nothing in respondent's exceptions to the intermediate report, discussed below, which requires any material alteration of such findings and conclusions. On the whole, the findings of fact and conclusions of law herein made embody those made by the Trial Examiner.

Upon the entire record in the case, including the stenographic transcript of the hearing, the documentary and other evidence received at the hearing, the Board makes the following:

FINDINGS OF FACT

I. RESPONDENT AND ITS BUSINESS

I. Respondent, Consumers' Research, Inc., is and has been since December 23, 1929, a membership corporation organized under and existing by virtue of the laws of the State of New York, licensed to do business in New Jersey, having its principal office and place of

business at Bowerstown, a "hamlet" near Washington, New Jersey (hereinafter referred to as Washington), and is there engaged in a non-commercial, non-profit enterprise.

Respondent's enterprise is national in scope. It is engaged in the collection, compiling, interpreting, editing and dissemination of information relating to consumers' goods and services. The sources of this information are the knowledge of respondent's technical staff resident at Washington, or experts in touch with respondent; limited data published by the United States Bureau of Standards; data published by the American Medical Association and other research and investigating bureaus, associations, corporations or individual experts; advice from users whose views in the opinion of the respondent's technical experts are deserving of consideration; tests or investigations made available to respondent; and tests and investigations carried out by respondent in its own "modest" laboratory, or for respondent by investigators in colleges, universities, and other properly equipped institutions. Products used for analysis are secured, directly and indirectly, from all parts of the country. In addition to respondent's utilization of the services of out-of-state government and commercial laboratories, about 200 analysts or consultants outside the State of New Jersey, and some abroad, conduct tests for respondent. Consultants who are members of university faculties donate their services in a large proportion of cases; other such consultants are reimbursed for out-of-pocket expenses; and still others are paid "customary rates".

The result of any technical or scientific research conducted by such consultants is transmitted by mail to respondent at Washington. The resident staff then compiles and digests the material, and prepares a manuscript on the basis of which a printed or mimeographed bulletin is later issued. After the resident technical director is satisfied that the material is worthy of publication, it is reduced to a finished manuscript, and sent to New York by mail or messenger for the printing of galley proof. Over 90 per cent of respondent's printing is done outside the State of New Jersey, and substantially all in New York. Having been printed for publication, the finished bulletins are sent from New York to Washington by truck, with the exception of handbooks, some of which go by express, and are finally mailed from Washington to subscribers in all States of the United States, and to a few subscribers in China, Japan, India, England, Germany and Austria.

The service of Consumers' Research, Inc., is the rendition of such information and scientific advice to 55,000 to 60,000 subscribers pursuant to a contract to pay \$3.00 per year. This sum is the subscription price of a combined service which includes monthly bulletins

for one year (except July to September), five of which are confidential and four non-confidential, and an Annual Handbook of Buying. Respondent's funds are obtained almost exclusively from this combined service; but a subscriber may contract for the four non-confidential bulletins only at the price of \$1. Reprints of articles appearing in periodicals are also distributed from time to time. Some special bulletins are sent to non-subscribers, and 1,000 to 1,500 general bulletins are sold to the public in addition to those distributed quarterly to subscribers. In addition to the above services, the organization answers subscribers' special inquiries at fees ranging from \$2 to \$20 and undertakes tests at actual cost, payable in advance, for persons, whether subscribers or not.

Persons who ask for information about the "C. R." service are given a blank contract and informed that they will receive the service if they send \$3 with the signed contract. No field agents are employed, but "promotion and other free material" is distributed without charge, and members of the "C. R." Board or staff from time to time make speeches outside the State of New Jersey, indicating, incidentally, that the "C. R." service is beneficial to consumers; blank contracts, which "half the time" are carried by the speaker, are distributed to members of the audience if asked for.

A promotion man had been employed by respondent for about five months prior to a strike which occurred on September 4, 1935, and during the course of his employment mailing lists were used to distribute "C. R." advertisements soliciting subscriptions throughout the country. On "rare occasions"; according to the president of the organization, respondent called attention to its services by advertisements in such publications as *The Nation*, *The New Republic*, *The American Mercury*, *Hound and Horn*, and one or two religious journals.

II. All the aforesaid operations of respondent constitute a continuous flow of trade, traffic, and commerce among the several States and with foreign countries.

II. THE UNFAIR LABOR PRACTICES

A. *Discriminatory discharges*

III. Technical, Editorial and Office Assistants Union, Local No. 20055, affiliated with the American Federation of Labor, is a labor organization. Local No. 20055 came into existence on August 1, 1935, having at that time apparently succeeded the Office Workers Union.

IV. On March 14, 1935, respondent employed John Kilpatrick on a six-months' trial basis to do promotion work at \$30 per week. Dur-

ing the period of his employment, and in response to his efforts, a substantial increase in subscriptions was achieved, and certain savings effected. It is not denied that Kilpatrick's pecuniary value to respondent during the period of his employment amounted approximately to \$25,000. Kilpatrick was a member of the Union, and a member of the Union's executive committee. He attended a Union meeting held on the evening of August 22, 1935, to discuss the draft of a proposed collective bargaining agreement to be submitted to respondent, and at this meeting spoke in favor of an automatic wage increase provision contained therein. The following morning at 10:30 a. m. he received notice of termination of employment, effective September 13, 1935, for the stated reason that his "ability and competence" were not satisfactory. F. J. Schlink, director, technical director and president of respondent, and, by virtue of the corporation's by-laws, final arbiter as to retention of employment, was not called as a witness in regard to Kilpatrick's discharge.

V. On June 20, 1935, Donald H. Rogers received by letter an offer of employment, which, so far as the term of employment is concerned, was couched in ambiguous language. Subsequently it was agreed between Rogers and the management that employment would be on a tentative basis. Approximately two months later Rogers received notice of termination of employment, effective September 13, 1935.

Respondent's answer states that the reason for termination of Rogers' employment was "solely and only" because respondent had no further need for his services after the end of the summer and the completion of the projects upon which he had been employed. Respondent's witnesses (Schlink, final arbiter as to retention of employment, was not called) explained that, although his work had been "entirely satisfactory", Rogers' employment was terminated because respondent was overstaffed, because respondent's finances did not permit of his retention, and because it was "necessary to let him go inasmuch as his contract expired at the end of the summer". The reasons thus stated might be deemed additional reasons for the termination of Rogers' employment, but, in light of the documentary and other evidence in the case, we are disposed to agree with the Trial Examiner that these reasons, belatedly advanced, represent a shift of ground.

Rogers admitted that he understood that the burden of his work would be proofreading of the Annual Handbook, a task expected to be completed about September 13, 1935, but declared that he nevertheless understood that his employment would continue for six months, at the end of which time respondent would decide whether or not he should be retained on its permanent staff. The evidence tends to support Rogers' understanding about the probable duration of

employment. Furthermore, respondent's written offer of employment dated June 20, 1935, does not, in the Board's opinion, sustain the contention that Rogers was employed on a specific "project"; nor does the evidence in the case sustain respondent's contention that it had no further "need" for his services.

Rogers joined the Union early in August, attended the Union meetings, and spoke at these meetings. At the Union meeting held on the evening of August 22, 1935, to discuss the proposed draft of a collective bargaining agreement to be submitted to respondent, he took a position in favor of automatic wage increases and discussed the matter with members of the minority who had just been voted down on that issue. He received notice of termination of his employment on the following day.

VI. John Heasty was "accepted" for employment by respondent in a letter dated March 29, 1935:

"Would you be willing to take a position with us on a trial basis for the summer, beginning as soon as you can come? We could pay you at the rate of \$25 a week during that period, and could, in the event that you were not retained after the summer months, pay for your transportation between here and Wichita . . ."

Five months later Heasty received the following notice dated August 23rd, effective September 13th:

"The end of the summer as meant in our letter of March 29, 1935, accepted by you in your letter of April 3rd, as a basis for temporary employment with CR is now approaching and . . . we are advising you at this time of the termination of your appointment . . ."

There is no evidence in the record that the need for Heasty had ceased, as pleaded in respondent's answer; nor, as pleaded in the answer, is there evidence of the completion of any particular project on which he had been employed. Matthews, director and vice-president of respondent, when asked on the witness stand to give the reason for termination of Heasty's employment, failed to mention either "need" or completion of project (which had been stated in respondent's answer to be "solely and only" the reasons for discharge); but referred instead to incompetence and finances. It is further significant that at a lengthy conference between the management and its staff on August 29, 1935, a stenographic report of which was received in evidence, the only reason advanced for the termination of Heasty's services was that his so-called contract period had expired. Schlink, final arbiter as to retention of employment, was not called to testify in the matter of this discharge.

Heasty had been president and chairman of the executive committee of the Office Workers Union and held the same offices in Local No. 20055 of the Technical, Editorial and Office Assistants Union. He had presided at Union meetings, and had been otherwise active. He attended the Union meeting of August 22nd and there spoke in favor of the proposed Union contract. The following day he received written notice of termination of employment, as set forth above.

VII. Apart from other evidence of respondent's knowledge of the Union activity of its employees, the Trial Examiner found that Miss White, secretary to Schlink, acted as a company spy. The evidence in the record supports this finding. Thus Miss White attended Union meetings, was present at the August 22nd Union meeting at which the proposed Union contract to be submitted to respondent was approved by the Union, spoke in opposition to the automatic wage increase provision of that proposed contract, and resigned from the Union on August 29th rather than face charges brought by the Union of betraying to Schlink the confidence of a fellow member of the Union. The Trial Examiner found evidence of a motive hostile to the Union in a patently hostile statement found in one of respondent's exhibits; in the Union's demand for automatic wage increases; and in the fact that Union membership substantially increased between August 1st and August 23rd. We further find that evidence of hostile motivation is by no means limited to that indicated by the Trial Examiner at this point but is supported, substantially and materially, by other evidence in the case, which, in part, is hereinafter set forth.

VIII. Upon all the foregoing findings of fact we find that the three employees named in the complaint were discharged and discriminated against in regard to hire and tenure of employment on account of Union activity, and that respondent thereby discouraged membership in the Union. We further find that by reason of the said discharges respondent has interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act.

B. Collective bargaining

IX. The by-laws of the Union provide:

"The members of this Union shall be composed of employees of Consumers Research, Inc., who have not the power to hire or fire and who are not engaged exclusively in construction or other work outside the ordinary functions of Consumers Research, Inc. . . ."

The by-laws make plain that the professional and intellectual homogeneity of a white collar group was sought to be preserved, and that

community of interest was to be a condition of eligibility to union membership. Thus employees *exclusively* engaged at work outside respondent's "ordinary functions", viz., maintenance, lunchroom and construction workers, were to be excluded from membership.

In practice, this grouping appears to have been preserved. Apparently, mailing employees periodically employed were excluded, and also Miss Evans, personnel director, who, despite her position, was not the final arbiter in the matter of tenure of employment.

X. A personnel director is, *ipso facto*, intimately connected with management and in a position to affect employment policy. We do not believe, therefore, that Miss Evans should be included among those who wish to bargain as a unit.

Upon all the facts contained in the record we conclude that this grouping of employees with regard to eligibility, as set forth in paragraph IX above, has a sound basis and is reasonable. We find, therefore, that respondent's employees, with the exception of Miss Evans, those exclusively engaged in work outside respondent's ordinary functions, and those periodically employed, constitute a unit appropriate for the purposes of collective bargaining.

XI. The Trial Examiner found that on or about September 3, 1935, the number of employees at respondent's plant, excluding mailing employees temporarily employed, was 87. This finding we adopt. Of these 87 employees, a total of 77 were members of, or eligible to join, the Union. It is these 77 employees who compose the appropriate unit above found. On August 31st 39 of these 77 employees were members of the Union.

XII. We find, therefore, that the Union, as of August 31, 1935, represented the majority of the employees in the said appropriate unit and, by virtue of this majority, was entitled to bargain collectively with respondent as the exclusive representative of its employees. Lending conviction to this finding that the Union represented a majority is the fact that four days later 44 employees, considerably more than 50 per cent of the total number of employees, went on strike.

XIII. On August 22, 1935, a "shop committee" of five was duly elected by the Union to conduct collective bargaining negotiations. This committee, on August 23, 1935, requested an appointment with the respondent's board of directors to discuss a proposed Union contract which had been submitted to, and approved by, the Union on the evening of August 22nd. Believing that the respondent's written reply to this request for an appointment connoted a disposition to be dilatory, the committee, over the week-end, authorized a certain Walter Trumbull, secretary of the Eastern Labor Federation, to take up the matter with Kallét, one of respondent's officers, and with Cox,

a prospective member of respondent's board of directors. Trumbull thereupon wrote to Kallet and Cox. The transmittal of this letter, and the language employed in it, was characterized by respondent as an attempt at "blackmail" on the part of the Union employees. Although scant basis for such a charge is to be found either in the language of this letter or in the record, respondent's tenacious use of this letter as a means of discrediting the Union's leaders is apparent throughout the record. The letter is here set out substantially in full:

"As an official of Consumers' Research, you will undoubtedly be interested in knowing that the majority of CR's employees have joined a Union and have received an A. F. of L. charter, the title and number being indicated above. We enclose for your information a copy of the terms for an agreement which has been sanctioned by the Union. We feel that you, as an official of Consumers' Research, are entitled to full information. The purpose of this letter is to induce you, as a well-known friend of labor, to use what influence you hold to advocate an immediate settlement of terms of Union recognition.

"Our second purpose in writing you is to inform you that so far the Union shop committee has not succeeded in making an appointment with a representative of CR for the purpose of discussion with Union representatives. The Union's application has not been rejected, but the communication from CR, signed by J. B. Matthews, dated Friday, August 23, informs the Union that 'it will be in order . . . to call a special meeting of the Board next week for the purpose of naming a negotiation committee'. Mr. Matthews on delivering the note explained that the delay was caused by a temporary vacancy on the Board, which was to be filled next week by the election of Mr. Oscar Cox. It will be as obvious to you as it is to us, we feel sure, that such a vacancy does not in any way preclude the appointment of one member of the Board to receive the initial proposals of the Union, for the purpose of discussion. Even so, it might well be that the Union would not take such a delay amiss, were it not for the fact that on Friday, August 23, after the presentation of the shop committee's request for a hearing, three Union members—one of them the president—were given dismissal notices. Under such circumstances, any delay whatever in receiving the Union representatives must be regarded by the Union with grave uneasiness . . ."

XIV. At 4 p. m., Monday afternoon, August 28th, Palmer, treasurer and a member of respondent's board of directors, who was friendly to the Union, was called to a board meeting and asked to sign a statement characterizing the above letter as blackmail and declaring that the persons instrumental in its preparation should be discharged.

Upon Palmer's refusal to sign the statement he was asked to resign from the board and upon refusal to resign he was summarily removed. The Trial Examiner found that this statement was intended to pave the way for discharge of the Union members who participated in the preparation of the "blackmail" letter, and that had the identity of these Union members been discovered, and the intent to dismiss them carried into effect, the right of the Union to demand collective bargaining as representative of the majority would have been imperiled (since the Union's majority was small), and the Union demoralized by loss of leadership. We agree with this finding and conclusion since the purpose of the statement which Palmer refused to sign is plainly confirmed in a written announcement, dated August 28, addressed to the employee staff.

XV. The following day, August 29th, in a written communication to the Union committee, respondent demanded repudiation of the "blackmail" letter, and certain assurances, as a prerequisite to further "negotiations." On the afternoon of this day, in response to a petition of protest against Palmer's removal signed by 60 members of the staff, the board met with about 59 of its employees and attempted to justify its action in this respect. Discussion was not confined, however, to Palmer's removal alone. The stenographic report of this meeting reveals that respondent also attempted to justify its dismissal of Kilpatrick, Rogers and Heasty, and that the proposed collective bargaining agreement, as it affected these discharges, was discussed. Thus the Union insisted that the proposed agreement be antedated, in order to provide for a review of the discharges. Respondent's spokesman took the position that there would be no agreement signed if the Union insisted upon a retroactive provision to cover the cases of the employees discharged.

XVI. At 10:05 a. m. the next day, August 30th, unknown to the Union, respondent sent a telegram to an officer of the American Federation of Labor which sheds light on the bona fides of respondent both prior and subsequent to this date:

"YOUR NAME HAS BEEN SENT US BY R LEE GOARD OF PRESIDENT GREENS OFFICE STOP DESIRING TO NEGOTIATE WITH RESPONSIBLE AFL OFFICIAL OF THIS DISTRICT REGARDING UNION ORGANIZATION OF CONSUMERS RESEARCH OFFICE AND EDITORIAL WORKERS WE DESIRE MEETING WITH YOU AT YOUR EARLIEST CONVENIENCE AT ANY PLACE CONVENIENT TO YOU STOP GLAD TO SEE YOU HERE IF CONVENIENT TO YOU IN WHICH EVENT SUGGEST YOUR MEETING US HERE TOMORROW MORNING BETWEEN TEN AND TWELVE BEST INTERESTS OF AFL IN LINE WITH ITS PUBLICLY EXPRESSED POLICIES SUGGESTS PROMPT ACTION ON THIS REQUEST RESPECTFULLY F J SCHLINK PRESIDENT CONSUMERS RESEARCH BOWERTOWN NEAR WASHINGTON NEW JERSEY"

Murphy, the officer to whom the above telegram was sent, testified that when the conference above requested took place, on September 3rd, Schlink and Matthews:

“ . . . made many charges that the organization was in the hands of Communistic influence. They went on to relate considerable stuff, submitting some letters to me received, or the contracts, rather, of employment from Heasty, Kilpatrick and Rogers, and had me read them . . . And during this conversation outlining the bad influences that were affecting the Local Union, they tried to influence me to revoke the charter of that Union, before I had heard the other side of the story . . . ”

We find in this effort by respondent, as the Trial Examiner found, an attempt to interfere with the self-organization of its employees. The telegram to Murphy reveals that even prior to August 30th respondent was scheming to strike down the Union, so far as removal of its charter would accomplish that purpose.

XVII. A number of communications were exchanged between respondent and the Union on August 30th and August 31st, with the result that the Union, finally, in order to have no obstacle in the way of amicable relations, offered, among other things, to withdraw the “blackmail” letter. At the same time, however, the Union demanded that Kilpatrick, Rogers and Heasty be reinstated and their continued tenure of employment be made the subject of negotiation. Obstacles to collective bargaining thus being in part removed, a conference between the board and the Union committee took place September 1st.

XVIII. The record reveals that at this conference on September 1st, the “main issue” was whether Kilpatrick, Rogers and Heasty were fired because of Union activity. Conclusive discussion of this main issue was frustrated by respondent, not only at this conference but also at the two subsequent conferences held on September 2nd and September 3rd, respectively.

XIX. Despite the fact that the record in this case carries dubious implications as to respondent’s good faith, the record nevertheless shows that on September 2nd numerous provisions of the proposed Union contract were agreed to by respondent. Thus among other things respondent agreed: to recognize the Union; to bargain collectively; to permit participation of representatives of the American Federation of Labor in future negotiations; to permit posting of notices on the bulletin board; to allow the shop committee to present to respondent matters affecting individual Union members; to holidays listed by the Union, including one not listed, and certain vacation provisions; and to a 35 hour week instead of the then 37½ hour week. No agreement was reached on the “main issue”; nor was

any agreement reached on the automatic wage increase provision. And other clauses of the proposed agreement were accepted by respondent with important qualifications.

XX. A third conference took place the following day, September 3rd, after the return of Schlink and Matthews from their efforts to induce Murphy of the American Federation of Labor to revoke the Union charter. The conference was brief. After a discussion of the three discharges and their review, the conference ended.

XXI. That evening the Union voted to strike, subject to a final personal appeal to Schlink for help to avert the necessity of such action. The appeal, however, made late that evening, proved unsuccessful.

XXII. The strike went into effect on the morning of September 4th.

Upon the basis of the record and all the foregoing findings of fact, we find that this strike was in protest against respondent's discharge of Kilpatrick, Rogers, and Heasty, and its refusal to accede to the demand of the Union that they be reinstated and that their continued tenure of employment be made the subject of negotiation.

XXIII. Thereafter the Union committee's efforts to continue negotiations were unavailing. Thus Miss Susan Jenkins, vice-president of the Union and a member of the Union's shop committee, testified:

"The shop committee in negotiations with the Union made a number of attempts during the strike to get in touch with the Board of Directors of Consumers' Research. We sent messengers to them by whoever was willing to deliver them on several occasions. We sent correspondence by mail, requesting a meeting, discussion of the agreement, in several instances this correspondence by mail was returned so we were unable to establish connections in that way. On several occasions the Shop Committee made an effort to discuss the questions at issue and to settle them amicably, by going in person to the homes of the different members of the Board. On one occasion the Shop Committee went to the home of Mr. Schlink and saw Miss Phillips there, and a communication requesting an audience was handed her. We were told that she would give it to Mr. Schlink. We failed to hear from Mr. Schlink in response to our request. On another occasion the Shop Committee went to the home of Mr. Matthews and asked that the Shop Committee be seen by the Board and tried to settle the strike and the matters at issue. Mr. Matthews said he would present our request to the Board and would let us know if there was an answer to it? But no response was received.

Murphy, of the American Federation of Labor, interviewed Schlink, Mrs. Schlink and Matthews at Washington two or three days after the strike and informed them that he was there in the interest of the American Federation of Labor to try to effect "a peaceful settlement of the strike" and offered to submit the whole case to arbitration. His offer was refused. On October 2nd, John A. Moffat, Commissioner of Conciliation, U. S. Department of Labor, went to Washington, New Jersey, and conferred with Matthews and Mrs. Schlink in an effort to settle the dispute. His good offices were likewise refused. Later in the month of October, Schlink, Mrs. Schlink, Matthews and Willever (a new member of the Board of Directors) attended a meeting of the County Board of Freeholders, called at the request of the Union and attended by three Union representatives. At this conference Schlink merely read a prepared statement explaining that respondent could not accept the good offices of the County Board of Freeholders.

XXIV. Although prior acts of respondent, and particularly its telegram to Murphy and the subsequent disclosure of the purpose of that telegram, raise grave doubts of respondent's good faith, we adopt the conclusion of the Trial Examiner that the evidence is not sufficient to warrant a finding that respondent failed to bargain collectively on September 1st, 2nd and 3rd. The allegations of the complaint as to respondent's refusal to bargain collectively during that period must therefore fall.

We do find, however, that on September 4th, and at all times thereafter, respondent refused to bargain collectively with the Union as the representative of its employees, and evaded all efforts of the Union to reach an agreement. We further find that by its conduct, as manifested by its persistent attacks on the leadership of the Union and on the Union itself through the medium of the "blackmail" letter above set forth, as manifested by its attempt, among others, to demoralize the Union by revocation of its charter, and as manifested by its refusal to bargain collectively with the representatives of its employees on and after September 4th, respondent interfered with, restrained and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act.

III. RESPONDENT'S CONDUCT IN RELATION TO INTERSTATE COMMERCE

XXV. On the day of the strike the plant was completely shut down. Because respondent's work could be carried on in Schlink's own home, however, "operations" never ceased completely, although the effectiveness of operations was reduced 75 per cent. The Annual Handbook which had been in proof state, part in New York and part in New Jersey, at the time the strike occurred, was finished mainly

by two employees; and was distributed to subscribers on the scheduled date of its release, lacking its usual detailed index. Attention of subscribers was called to the fact that errors of form, arrangement and proofreading "are an especial problem with this issue of the ANNUAL HANDBOOK because of the fact that about one-half of CR's staff, including several technicians and editorial workers and all the proof-readers, went on strike at the most critical period of the Handbook's preparation". Because trucks bringing the finished Handbooks to Washington were stopped en route, the issue was distributed by the printer in New York City instead of from Washington, New Jersey, by respondent; thus one result of the strike was to cause a transfer of mailing distribution from the Washington office to the New York printer. The October 15th bulletin was likewise distributed from New York, for the same reason.

XXVI. The aforesaid acts of respondent have led and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

RESPONDENT'S EXCEPTIONS

Respondent's exceptions to the Trial Examiner's intermediate report are so numerous as to preclude separate statement. Nor will all of them be referred to. The exceptions are based in part upon respondent's theory of the case: that respondent is not engaged in business; that it is not engaged in interstate commerce; that its conduct does not affect commerce; that the National Labor Relations Act is not applicable to it; that it had a legal right under the terms of the "contracts" of employment to terminate the services of the three employees involved; that the appropriate unit for purposes of collective bargaining should have been found to be the entire plant and that in any event the Union did not represent a majority of the employees in either the unit claimed appropriate by the Union or the unit claimed appropriate by respondent; and that the labor dispute involved in this case was a plot to seize control of respondent's enterprise. Respondent excepts also to the conduct of the hearing by the Trial Examiner as in deprivation of its rights without due process of law; to the denial by the Trial Examiner of respondent's motion by way of common law demurrer to dismiss the complaint; and to the Trial Examiner's denial of respondent's written motion to dismiss the complaint.

Exceptions which go to the conduct of the hearing by the Trial Examiner will first be discussed, then those which go to the matter of the discriminatory discharges, collective bargaining, and the claim that the dispute involved in this case was a plot to seize control.

(a) Respondent's exceptions to the conduct of the hearing by the Trial Examiner are predicated on the grounds that cross-examina-

tion of witnesses was curtailed; that evidence was excluded, including evidence excusing respondent's refusal to negotiate after September 4, 1935; that although, during the hearing, no evening sessions were held in the course of presentation of the Board's case, the Trial Examiner announced at the beginning of respondent's case that sessions would be held "day and night continuously until the trial was completed"; and that respondent was compelled to present its case into the night and until 2:00 a. m. on the morning of December 24th and to conclude its case at that time.

The record fails to sustain these exceptions.

The cross-examination of one witness only was curtailed (Heasty), and this as to a line of examination which was properly excluded by the Trial Examiner. Evidence on two matters only appears to have been excluded by the Trial Examiner: the first related to evidence concerning violence on the part of strikers, and was properly excluded; the second related to the offer in evidence of an apparently voluminous stenographic report of the negotiations on September 1st, 2nd, and 3rd, the ruling against the admissibility of which appears to have been well taken on the ground of cumulativeness and which in any event is now moot since the Board has found that the negotiations of September 1st, 2nd, and 3rd do not sustain the allegations of the complaint as to respondent's refusal to bargain collectively prior to September 4, 1935.

Again, the record fails to show that the Trial Examiner at any time announced sessions day and night continuously until the hearing was over; the record does show that an announcement of an evening session for Monday, December 23rd, was made Saturday, December 21st, before the close of the Board's case, that an evening session was held on Monday, that the hearing ended at 11:55 p. m. on that day, without objection by respondent either to the evening session itself or its duration. The record further shows that respondent was not compelled to conclude its case on Monday evening and that counsel themselves stipulated that no additional witnesses should be called.

Respondent's exceptions to rulings of the Trial Examiner, which admitted evidence tending to show that respondent refused to bargain collectively after the strike of September 4th, are apparently based upon the theory that the duty of the employer to bargain collectively is extinguished as and when a strike occurs. Such is not the law. The right to strike is expressly reserved to employees under the Act; by virtue of Section 2, subdivision (3) of the Act, employees on strike continue to be employees; consequently, the obligation on the employer to bargain collectively continues.

Likewise respondent's exceptions to the ruling of inadmissibility in respect to evidence of violence on the part of the strikers is based upon an erroneous conception of the purpose and meaning of the Act.

The National Labor Relations Act was expressly intended by Congress to be a means to an end, that end being the safeguarding of commerce by removing certain recognized sources of industrial strife, one of which was found by Congress to be the refusal of the employer to bargain collectively with the representatives of his employees. To interpret the Act to mean that upon appearance of industrial strife in a particular case the duty to bargain collectively is extinguished would be to nullify the clear intent of Congress and to disregard the very purpose of the law; to say that in the event of violence the duty to bargain is extinguished, is to interpret the Act to mean that, as and when industrial warfare appears, it shall be permitted to run its course, burdening or threatening to burden commerce, with no obligation whatever imposed by the Act to attempt to remove the burden, or threatened burden, by collective negotiations. The Act will not bear such an interpretation. We therefore find that evidence of violence was irrelevant and properly excluded from the record.

(b) We do not deem it necessary to refer to respondent's exceptions concerning Kilpatrick, which, after going to the theory that Kilpatrick was discharged for incompetency, take exception to the Trial Examiner's failure to find as the reason for termination of employment that the trial period of Kilpatrick's employment expired on September 13th. By this same token, the trial period of Heasty and Rogers should have expired, not on September 13th, but about October 3rd, and December 28th, respectively.

Respondent's concluding exceptions as to Heasty and Rogers are to the effect that there is no evidence in the record from which one may conclude that Union activity was the only reason for terminating their employment and that the Trial Examiner should have found that respondent discharged them "in the exercise of its legal and contractual right." Suffice it to say as to the first point that the Act does not provide that, antecedent to a finding of violation of the Act; it must be found that the *sole* motive for discharge was the employee's union activity. Such an interpretation is repugnant to the purpose and meaning of the Act, and, in the absence of unequivocal language that Congress so intended, such an interpretation may not be made. As to the second point, discharge by respondent "in the exercise of its legal and contractual right", it is sufficient to note that the Act is not aimed at diminution of this right of the employer, but at interference with the right of employees to have representatives of their own choosing. Because the employer, since the enactment of the National Labor Relations Act, has no "legal or contractual right", paramount to the statute, to interfere, by discharge or otherwise, with the freedom of the employees in making their selections, he cannot complain of the statute on that ground.

(c) Respondent's exceptions to the finding of the Trial Examiner that the Union represented a majority in the appropriate unit appear to be taken upon the theory that that finding was based upon an erroneous assumption of the total number of employees in respondent's plant and upon an improper exclusion and inclusion as regards eligibility of employees in the unit. We find no reason to disturb the Trial Examiner's finding that the total number of employees on or about September 3, 1935, was 87. As concerns a Union majority in the appropriate unit, respondent contends that Miss Evans, personnel director, should have been included in the list of employees eligible to become Union members in the unit found to be appropriate, if other persons in a supervisory capacity were deemed eligible, and that the inclusion of Miss Evans would bring the total number of employees in the appropriate unit as of August 31st to 78, of which the Union represented 39, or one-half, and not a majority. We have already stated, however, that, in our opinion, the exclusion of Miss Evans was proper (Finding No. X, *supra*). This conclusion, and other evidence in the record of the Union's majority, render further comment unnecessary.

(d) Respondent's theory that the labor dispute involved in this case was simply a plot to seize control of the organization renders advisable a brief statement of the position of the National Labor Relations Board in such a matter. The Board has no power under the Act to decide upon the subject matter or substantive terms of a union agreement. For this reason attempted seizure of control through the medium of collective bargaining negotiations is not within the cognizance of the Board. Again, highly improbable as it is to say that a union might be able to effect a change of management by means of the collective bargaining machinery of the Act, a union could never seize control unless such "seizure" were acquiesced in by the employer. By the Act, the terms of agreement are left to the parties themselves; the Board may decide whether collective bargaining negotiations took place, but it may not decide what should or should not have been included in the union contract. Respondent's contentions rest upon testimony regarding a certain conference at New York City on July 7, 1935; on strike demands for removal of Mrs. Schlink and Matthews from the Board of Directors and reinstatement of Palmer to the Board; and on testimony of one Wyand as to a clandestine conference on August 18th attended by members of the Union. The testimony as regards the July 7th conference lends nothing persuasive to respondent's contentions. The demand for Palmer's reinstatement to the Board, and for the removal from the Board of Mrs. Schlink and Matthews, was plainly a subject for future negotiations. Wyand's knowledge of certain facts, disregarding conflict of testimony, was not revealed to respondent until approximately Decem-

ber 1, 1935, and thus cannot serve to explain or excuse respondent's refusal to bargain collectively prior to that date. We conclude from the entire record that there was no attempt by the Union to seize control of the organization; that the record persuasively indicates that the Union was without power to seize control; and that in any event seizure of control through the mechanism of collective bargaining is outside the scope of the Board's jurisdiction.

Respondent's exceptions to the Trial Examiner's denial of its motions to dismiss the complaint, including the motion made by way of common-law demurrer, do not, at this stage of the proceedings, merit discussion. The Trial Examiner's rulings on these motions are affirmed.

CONCLUSIONS OF LAW

Upon the basis of the foregoing findings of fact, and upon the entire record in the proceeding, the Board finds and concludes as a matter of law:

1. Technical, Editorial and Office Assistants Union, Local No. 20055, is a labor organization, within the meaning of Section 2, subdivision (5) of the Act.

2. Respondent, by its discharge of John Kilpatrick, Donald H. Rogers and John Heasty, has discriminated in regard to hire and tenure of employment and conditions of employment, and by thereby discouraging membership in the labor organization known as Technical, Editorial and Office Assistants Union, Local No. 20055, has engaged and is engaging in unfair labor practices, within the meaning of Section 8, subdivision (3) of the Act.

3. Respondent's employees, with the exception of Miss Evans, personnel director, those employees exclusively engaged in work outside respondent's ordinary functions, and those employees periodically employed, constitute a unit appropriate for the purposes of collective bargaining, within the meaning of Section 9 (b) of the Act.

4. By virtue of Section 9 (a) of the Act, the Union, having been selected as their representative by a majority of the employees in an appropriate unit, has at all times since August 31, 1935, been the exclusive representative of all the employees in such unit for the purposes of collective bargaining.

5. Respondent, by its refusal to bargain collectively with Technical, Editorial and Office Assistants Union, Local No. 20055, on and after September 4, 1935, has engaged in and is engaging in unfair labor practices, within the meaning of Section 8, subdivision (5) of the Act.

6. Respondent, by interfering with, restraining and coercing its employees in the exercise of the rights guaranteed in Section 7 of

the Act, has engaged in and is engaging in unfair labor practices, within the meaning of Section 8, subdivision (1) of the Act.

7. The unfair labor practices in which respondent has engaged, and is engaging, as set forth in paragraphs 2, 5 and 6 above, constitute unfair labor practices affecting commerce, within the meaning of Section 2, subdivisions (6) and (7) of the Act.

ORDER

On the basis of the findings of fact and conclusions of law, and pursuant to Section 10, subdivision (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that respondent, Consumers' Research, Inc., and its officers and agents, shall:

1. Cease and desist from discouraging membership in Technical, Editorial and Office Assistants Union, Local No. 20055, or in any other labor organization of its employees, by discrimination in regard to hire or tenure of employment or any term or condition of employment;

2. Cease and desist from in any other manner interfering with, restraining or coercing its employees in the exercise of their 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 National Labor Relations Act;

3. Cease and desist from refusing to bargain collectively with Technical, Editorial and Office Assistants Union, Local No. 20055, as the exclusive representative of its employees, with the exception of Miss Evans, personnel director, those employees exclusively engaged in work outside respondent's ordinary functions, and those employees periodically employed.

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

(a) Upon request, bargain collectively with Technical, Editorial and Office Assistants Union, Local No. 20055, as the exclusive representative of its employees, with the exception of Miss Evans, personnel director, those employees exclusively engaged in work outside respondent's ordinary functions, and those employees periodically employed;

(b) Offer to John Kilpatrick, Donald H. Rogers and John Heasty, and each of them, immediate and full reinstatement, respectively, to their former positions, without prejudice to all rights and privileges previously enjoyed;

(c) Make whole the said John Kilpatrick, Donald H. Rogers and John Heasty, and each of them, for any loss of pay they have suffered by reason of the severance of their employment, by payment to each of them, respectively, of a sum of money equal to that which each would normally have earned as wages during the period from September 13, 1935, the effective date of severance of their employment, to the date of such offer of reinstatement, computed at the wage rate each was paid at the time of notice of such severance, less any amount, if any, earned subsequent to the effective date of such severance until the date of such offer of reinstatement;

(d) Offer to all employees, and each of them, who, on September 4, 1935, went on strike in protest against the aforesaid unfair labor practices, and who have not yet been reemployed, immediate and full reinstatement, respectively, to their former positions, without prejudice to all rights and privileges previously enjoyed, dismissing, if necessary, persons hired in their places on or after September 4, 1935;

(e) Post notices in its plant, in conspicuous places, stating that:
(1) respondent will cease and desist in the manner aforesaid; and
(2) such notices will remain posted for a period of thirty (30) consecutive days.