

In the Matter of MARYLAND DISTILLERY, INC., CALVERT DISTILLING COMPANY, INC., CALVERT MARYLAND DISTILLING COMPANY, INC., now known as CALVERT DISTILLERS CORPORATION, CALVERT-MARYLAND CORPORATION, INC., and DISTILLERY WORKERS UNION 20270, and H. S. MULLINEAUX, B. FOSTER, C. W. GREGER, E. GOSSMAN, A. HANSHAUD, GEORGE HODGSON, R. W. ALDOM, FORD EDWARDS, JULIAN BOSWELL, FRANK W. CLIBOURNE and A. KARWOSKI

*Case No. C-157.—Decided August 2, 1937*

*Liquor Distilling Industry—Interference, Restraint or Coercion:* attempt to persuade employees not to join union but to join company-dominated union—*Company-Dominated Union:* domination and interference with formation and administration; financial and other support; disestablished as agency for collective bargaining—*Employee Representation Plan:* form and operation—*Strike:* provoked by employer's unfair labor practices—*Agreement Between Union and Employer Which Is Inconsistent With the Provisions of the Act:* does not affect Board's power to prevent any person from engaging in any unfair labor practice affecting commerce—*Discrimination:* discharge of active union members and officials; nonreinstatement following strike called as result of unfair labor practices—*Reinstatement Ordered—Back Pay:* awarded.

*Mr. Jacob Blum* for the Board.

*Weinberg and Sweeten*, by *Mr. Leonard Weinberg*, *Mr. Harry J. Green*, and *Mr. Zanvil Krieger*, of Baltimore, Md., for the respondents.

*Mr. Joseph Rosenfarb*, of counsel to the Board.

## DECISION

### STATEMENT OF THE CASE

Upon charges duly filed by Distillery Workers Union 20270, herein called the Union, the National Labor Relations Board, herein called the Board, by Bennet F. Schaffler, Regional Director for the Fifth Region (Baltimore, Maryland), issued its complaint, dated January 8, 1937, against Calvert Maryland Distilling Company, Inc., Baltimore, Maryland. The complaint and notice of hearing thereon were duly served upon the Calvert Maryland Distilling Company, Inc. and the Union. Thereafter, an amended charge was duly filed, and an amended complaint dated January 14, 1937, was issued against Distillers Corporation, Seagram of Canada, Calvert Distilling Company of Maryland, Calvert Maryland Distilling Company, and Calvert Maryland Corporation, a Massachusetts corporation. The

amended complaint and notice of hearing thereon were duly served upon the respondents and the Union. Thereafter, a second amended charge was duly filed, and a second amended complaint, dated January 16, 1937, was duly issued against Maryland Distillery, Inc., a Maryland corporation; Calvert Distilling Company, Inc., of Maryland; Calvert Maryland Distilling Company, Inc., now known as Calvert Distillers Corporation; and Calvert-Maryland Corporation, Inc., a Massachusetts corporation, the respondents as finally appearing herein. The second amended complaint and notice of hearing thereon were duly served upon the respondents and the Union.

The second amended complaint alleged that all of the respondents were under the same management, direction, and control and were engaged in the distilling, bottling, barreling, and sale of whiskies. It also alleged that the respondents had engaged in unfair labor practices affecting commerce, within the meaning of Section 8, subdivisions (1), (2), and (3) and Section 2, subdivisions (6) and (7) of the National Labor Relations Act, 49 Stat. 449, herein called the Act.

Prior to the hearing the respondents, Calvert-Maryland Corporation, Calvert Distillers Corporation, and Maryland Distillery, Inc., each filed a special appearance to object to the jurisdiction of the Board. Thereafter each of said respondents filed its answer specifically and expressly reserving all of its rights to question the constitutionality and validity of the Act. The answer of Calvert-Maryland Corporation admitted that it was engaged in the sale of spirituous liquors but asserted that all of its operations were carried on wholly within the State of Massachusetts, that it had no knowledge of any of the other allegations contained in the complaint, and moved that the complaint against it be dismissed. Likewise, the answer of Maryland Distillery, Inc. admitted that it is a corporation engaged in the distilling of spirituous liquors, is the corporate owner of the distilling plant at Relay, Maryland, and is the employer of the men named in the complaint, but denied that it had engaged in the alleged unfair labor practices and moved that the complaint against it be dismissed. The answer of Calvert Distillers Corporation denied knowledge of any corporation named Calvert Distilling Company, Inc., of Maryland, and asserted that the Calvert Distillers Corporation denied the allegations of the complaint pertaining to the unfair labor practices.

Pursuant to the notice, a hearing was held in Baltimore, Maryland, on January 28 and 29, 1937, before A. Howard Myers, the Trial Examiner duly designated by the Board. The respondents appeared specially by counsel and made an oral motion to dismiss the complaint. The motion was denied. At the opening of the hearing

counsel for the Board moved to dismiss the complaint as to E. Gossman, George Hodgson, R. W. Aldom, and A. Karwoski, and during the hearing he moved to strike the name of Julian Boswell from the complaint. The motions were granted. Full opportunity to be heard, to examine and cross-examine witnesses, and to produce evidence bearing upon the issues was afforded to all parties. Counsel for the respondents however did not call any witnesses in behalf of the respondents and limited his participation in the hearing only to making motions of dismissals and cross-examining witnesses. The parties were granted a reasonable period for oral argument at the close of the hearing and were afforded an opportunity to file briefs but did not avail themselves of these offers. At the close of the hearing the respondents, through their counsel, renewed their motion to dismiss the complaint, which motion was again denied.

On February 23, 1937, the Trial Examiner filed an Intermediate Report in accordance with Article II, Section 32, of National Labor Relations Board Rules and Regulations,—Series 1, as amended, in which he found in substance that the respondents, with the exception of Calvert-Maryland Corporation, a Massachusetts corporation, have committed unfair labor practices as charged in the complaint and recommended that the respondents cease and desist from committing the unfair labor practices, reinstate the employees named in the complaint with back pay, and that the respondents withdraw recognition from the Employees Representation Plan as representatives of their employees for the purpose of collective bargaining. The Trial Examiner recommended that the complaint as to Calvert-Maryland Corporation, a Massachusetts corporation, be dismissed. The Intermediate Report was duly served upon the parties.

On March 13, 1937, counsel for the respondents filed exceptions to the Intermediate Report of the Trial Examiner. The exceptions to the Intermediate Report are hereby overruled and all rulings and motions made by the Trial Examiner are affirmed.

Upon the entire record in the case the Board makes the following:

### FINDINGS OF FACT

#### I. THE RESPONDENTS AND THEIR BUSINESS

The respondent corporations are owned and controlled by the same parent corporation, Distillers Corporation-Seagram's Limited of Montreal, Canada. According to a copy of the Registration Statement (form A-2) filed with the Securities and Exchange Commission by the latter corporation on October 1, 1936,<sup>1</sup> the respondents Calvert Distillers Corporation and Calvert-Maryland Corporation, a Massa-

<sup>1</sup> Board Exhibit No. 3.

chusetts corporation,<sup>2</sup> are listed as wholly-owned subsidiaries of the respondent, the Calvert Distilling Company of Maryland;<sup>3</sup> while the latter company and the respondent, Maryland Distillery, Inc., a Maryland corporation, are in turn wholly controlled by the parent corporation. Other subsidiaries of the Canadian company are: Distillers Corporation Limited (Canada), Joseph E. Seagram & Sons, Limited (Canada), Joseph E. Seagram & Sons, Inc. (Indiana), Julius Kessler Distilling Co., Inc. (Indiana), Joseph E. Seagram & Sons, Inc. (Maryland), Joseph E. Seagram & Sons, Inc. (Delaware), Julius Kessler Distilling Co., Inc. (Kentucky), Lincoln Inn Distilling Co., Inc. (Delaware), Reserve Corporation (Kentucky), Robert Brown, Limited (Great Britain), Distillers Corporation-Seagrams, Ltd. (Delaware), Seagram, Inc. (Kentucky), Seagram, Inc. (Nebraska), Alexander Maclaren & Company Limited (Great Britain), Stewart Cameron & Son (Great Britain), and Joseph E. Seagram & Sons Limited (Great Britain).

The parent corporation was organized in March 1928, acquiring at that time all of the stock of several predecessor companies incorporated in the British Empire. Prior to the repeal of the Eighteenth Amendment, activities of the parent corporation and its subsidiaries were confined to production, warehousing, and sales in Canada and exports from Canada. Since repeal, Canadian operations have been continued on a more limited scale, and activities have been primarily directed to building up productive capacity in the United States, to the blending, bottling, and selling in the United States of aged American type whiskey imported from Canadian subsidiaries, to the establishment of brands in the United States through advertising and sales promotion, and to the establishment of a sales organization throughout the United States. During the fiscal year ending July 31, 1936, substantial advertising and sales promotion expenses were incurred in establishing the brands of the respondent, accounting in the main for an increase in such expenditures from \$3,775,000 for the previous year to \$5,541,000 in the latter year.

The parent company distills, blends, and bottles Canadian whiskeys, Scotch type whiskeys, and gins, through subsidiaries in Canada. It ships in bulk from inventory previously produced to its American subsidiaries for blending, bottling, and marketing in the United States. Through its American subsidiaries it distills, blends, and markets in the United States various spirituous liquors, as well as marketing Canadian and American type whiskeys produced, aged,

<sup>2</sup> In the complaint called Calvert-Maryland Corporation, Inc., a Massachusetts Corporation.

<sup>3</sup> In the complaint called the Calvert Distilling Company, Inc., of Maryland. In December 1936, the name as registered with the Federal Alcohol Commission was changed by striking "Company, Inc." and adding "Co."

and bottled in Canada by its subsidiaries. The sales activities of the subsidiaries are confined almost entirely to the sale of goods bottled under their own brands.

Sales in Canada are made to Provincial Liquor Commissions and Control Boards, and export sales are subject to the supervision of the Canadian Government. Sales in the United States are made primarily to wholesale distributors and to State Boards, and are carried on under license from the Federal government in compliance with Federal regulations and state laws. All the distilling, rectifying, and bottling operations are carried on under the supervision of the Canadian government or the United States government, in each case under license from the respective government. The business is also subject to substantial excise taxes both in the United States and Canada, and is subject to import and other taxes on exports from or imports to either of the two countries.

The following tabulation of net sales, exclusive of inter-company sales, for each of the five fiscal years ending July 31, 1936, indicates the growth of the business subsequent to the organization of the parent company's subsidiaries in the United States after repeal of the Eighteenth Amendment on December 5, 1933:

<i>Fiscal Period Ending July 31:</i>	<i>Net Sales</i>
1932 -----	\$6, 481, 356. 36
1933 -----	4, 884, 837. 04
1934 -----	8, 991, 766. 20
1935 -----	55, 204, 438. 92
1936 -----	60, 585, 916. 71

For the two complete fiscal years subsequent to repeal, the percentage of the above sales made in the United States was 95.4% for the fiscal year ending July 31, 1935, and 95.5% for the fiscal year ending July 31, 1936.

On May 1, 1934, the company acquired all of the issued and outstanding capital stock of the Maryland Distillery, Inc., which owned the distillery involved in this case at Relay, Maryland, and all of the outstanding capital stock of the Calvert Distilling Company. These two respondent companies have been operating the distillery at Relay since repeal. In August 1934, Calvert-Maryland Distilling Co., Inc., now known as Calvert Distillers Corporation, was organized to handle and is now handling sales in the United States of products of the Relay plant and such products of the Canadian plants as are bottled under the Calvert name for sale in the United States.

The Maryland Distillery, Inc., one of the respondents, is the owner of a trade mark known as *Calvert Amber Bottle*, registered with the United States Patent Office for use in commerce among the

several States of the United States.<sup>4</sup> The Calvert Distilling Company, another of the respondents, is the owner of a trade mark, *The Flavor of By-Gone Days*, which is similarly registered.<sup>5</sup> Each of the respondents holds a distillers basic permit issued by the Federal Alcohol Administration Division of the United States Treasury Department authorizing it to distill whiskies at Relay, Maryland, and to sell, offer, and deliver for sale, contract to sell and ship, in interstate and foreign commerce, the distilled spirits so produced.<sup>6</sup>

The distilling plant operated by the respondents, Maryland Distillery, Inc. and Calvert Distilling Company, is located on a 12-acre tract of land owned by the former at Relay, Maryland. The plant is served by a railroad siding leased from the Baltimore and Ohio Railroad. It is operating under permits from the United States Government at a mashing capacity of 4,085 bushels per 24 hour day, the equivalent of approximately 18,000 United States proof gallons. All the buildings, equipment, and machinery are practically new, having been erected in and since the summer of 1933. The plant is equipped to manufacture rye whiskey and to produce dried grain for cattle feed. Storage warehouses have a total capacity of approximately 256,000 barrels of 50 United States proof gallons each. The two bottling houses are capable of bottling 12,000 cases per 8 hour day. The plant is equipped with a laboratory for checking all materials and manufactured products in the various stages of fermentation and distillation.

In 1934 the number of employees at the Relay plant was 215; in 1935, 411; in 1936, 600. At the time of the hearing the number of employees was 462.

The Maryland Distillery, Inc. and Calvert Distilling Company, two of the respondents, distill and rectify in the Relay plant whiskies in the preparation of which various products are utilized, almost all of which come from destinations outside of the State of Maryland,<sup>7</sup> namely, barley malt, rye malt, hops, rye, bottles, cartons, labels, spirits, caps and seals, filters, barrels, fuel oil, coal, and bags. Minor supplies such as labels, barrels, fuel oil, and bags are acquired principally in Maryland. The Commissioner of Customs reported that during the month of December 1936, Maryland Distillery, Inc. imported 129,838.7 gallons of whiskey from Canada.

The raw materials come to the distillery at Relay from destinations outside of the State of Maryland by rail and truck. The whiskey produced from these raw materials at Relay leaves in inter-

<sup>4</sup> Board Exhibit No. 4.

<sup>5</sup> Board Exhibit No. 5.

<sup>6</sup> Board Exhibit No. 6.

<sup>7</sup> Board Exhibit No. 8.

state commerce by rail. The products of the Relay plant are sold by Calvert Distillers Corporation, a third respondent, "in all States excluding dry States," and are advertised by it in various periodicals and newspapers.

It is the position of the respondents that the Maryland Distillery, Inc. is a manufacturing corporation owning the plant at Relay and is engaged in the manufacturing business solely in the State of Maryland; that the Calvert Distillers Corporation does not manufacture but is solely engaged in selling; that the Calvert Distilling Company has at all times distilled and rectified at its plant at Relay; that Calvert-Maryland Corporation, a Massachusetts corporation, does no manufacturing nor does it make any sales but is a Massachusetts corporation acting solely as an agent whose activities are confined to the State of Massachusetts.

Whatever division of functions exist among the respondents, it is undeniable that they are owned and controlled by the same parent corporation and are subject to the same management and control. With the exception of Calvert-Maryland Corporation, all of the respondents constitute one business enterprise engaged in interstate commerce, the enterprise consisting in the importation in Maryland of raw materials and supplies, the processing of these materials and supplies, the selling and the shipping of the finished products to destinations outside of the State of Maryland. The operations of the respondents are interrelated and interdependent. They are wholly subject to the same ownership, control, and actual management. Indeed, the labor policies of all of the respondents are directed by the parent company, Distillers Corporation-Seagram's Limited. The resort to the corporate fiction of the holding company device does not hide the real picture presented by the respondents and their business, namely, that of a single enterprise with unitary control doing business of national, indeed of international, scope and ramifications.

## II. THE UNFAIR LABOR PRACTICES

### A. *The employers*

Maryland Distillery, Inc., one of the respondents, admits in its answer that it is the employer of the men working at the Relay plant. The evidence is uncontradicted that the employees at the Relay plant were paid by checks of the Calvert Distilling Company, another of the respondents. From this and other evidence in the record, it is clear that Maryland Distillery, Inc. and Calvert Distilling Company are the employers of the men working at the Relay plant.

### B. *The Union*

In July 1936, there appeared among the employees of the respondents at the Relay distillery a movement for organization. On July 16, 1936, one of the employees at the Relay plant wrote to the Baltimore Federation of Labor asking for assistance in becoming organized. In response to this letter Joseph Gillis, organizer of the American Federation of Labor, saw a number of interested employees, and on or about July 20, 1936, the American Federation of Labor issued a charter to them as Distillery Workers Union 20270. Shortly thereafter organizational meetings of the Union were held resulting in a continuous increase in membership. Employees of the respondents employed at the Relay distillery are eligible to membership in the Union. However, at no time during the events involved in this case has the membership of the Union been more than about 80. The Union is a labor organization.

### C. *The labor dispute*

The campaign for the unionization of the employees of the respondents at the Relay distillery galvanized the respondents into activity. On August 10, 1936, 11 employees of the distillery were discharged, or "furloughed" as they were told. All of these were members of the Union, and some of them were officers. On August 11, 1936, Gillis attempted to confer with the respondents concerning the discharges, but without success.

On August 12, 1936, an "Employee Representation Plan" was organized under circumstances related below, and the employees were urged by the officers of the respondents not to join the Union. On the next day Ford W. Edwards, an active member of the Union, was discharged.

On August 14, 1936, the president of the respondents, Calvert Distilling Company and Maryland Distillery, Inc., Edwin F. Fleischmann, in a conference requested by Gillis, could not be persuaded by Gillis to reinstate the discharged employees. When, on the same day, Gillis reported to a meeting of the Union the results of the conference with Fleischmann, the members of the Union who were still working at the distillery voted to strike in protest against the discharges which they believed were due to the union activities of the employees. The strike became effective the following day.

After numerous conferences the strike was called off on October 22, 1936, when an agreement was reached between the representatives of the Union and the respondents whereby the strikers and the discharged employees were to be reinstated. However, the employees named in the complaint have never been reinstated.

Such, in brief, is the outline of the labor dispute in this case.

*D. The Employee Representation Plan*

On August 12, 1936, a notice signed by President Fleischmann was posted on the bulletin board announcing a meeting of all of the employees to be held that afternoon at 3 o'clock in the distillery. The employees were notified by their foreman to attend the meeting and no deduction from the wages of the employees was made for attending.

President Fleischmann and Vice President Hermann presided over the meeting and addressed the employees. Fleischmann's remarks were in part as follows:<sup>8</sup>

Now, we have had a happy family up to now, but we have had a little bit of trouble. We don't want no outside union to come in and run our business for us . . . We realize in the last few months the cost of living has gone up, so we have decided to give all laborers and all helpers and all of the girls a raise.

Fleischmann then asked the employees to indicate by raising their hands whether they favored an "outside" labor "organization" or a company "organization". At the conclusion of the meeting the employees were handed a two-page memorandum containing an outline of an Employee Representation Plan at the bottom of which memorandum the employees were asked to vote on whether they were in favor of or against the plan.<sup>9</sup>

As its purpose the Employee Representation Plan declared:

This Plan provides a means whereby elected representatives of the employees and appointed representatives of the management shall meet in joint conference to discuss and settle all matters of mutual concern including wages, hours and working conditions subject to review when necessary as provided in paragraph 6 below.

The Employee Representation Plan was of the standard pattern. Adjustment of wages, hours, and conditions of work were to be made in conference between an equal number of employee representatives and representatives of the management, subject to the subsequent approval of the management. However, when adjustments were to be made the representatives of the employees were to be limited to the voting group or operating unit affected without any such limitation on those representing the management.

The joint meetings of the representatives were called by notices mailed to them, signed by H. C. Price, personnel manager at the Relay distillery, who also acted as one of the management's repre-

<sup>8</sup> Page 89 (stenographic transcript).

<sup>9</sup> Board Exhibit No. 10.

sentatives.<sup>10</sup> Meetings were held in President Fleischmann's office. Eventually nine employee representatives were elected and they met from time to time with nine management representatives. In addition to the nine management representatives, President Fleischmann presided as chairman of the joint conference while Emile E. Grignard, industrial relations manager of the respondents, attended some of these meetings as the "guest" of the management.<sup>11</sup> Thus, actually there were at times 11 management representatives and only nine representatives of employees, two of the former without formal vote but necessarily with some influence on the decisions. There were no provisions for dues and the meetings were held on the respondents' time and property.

It is too clear to require discussion that the Employee Representation Plan was the creature of the respondents. It was initiated, sponsored, and established by the management of the respondents. There is no pretense to the contrary. By actual participation in the administration of the Plan and by financing it the management of the respondents had complete control of it.

We find that the Employee Representation Plan is a labor organization.<sup>12</sup>

Brought into being and administered by the respondents as one of the means of thwarting its employees in their right to self-organization and to bargain collectively, it obviously cannot serve as an instrument of collective bargaining contemplated by the Act.

#### *E. The discriminatory discharges and failure to reinstate*

In order to frustrate the campaign to unionize the employees the respondents also resorted to the heavy bludgeon of economic compulsion, the discriminatory discharge.

Herbert Samuel Mullineaux was discharged on August 10, 1936. He entered the employ of the respondents in August 1935. Before then he had been working for eight months on the premises of the respondents on a construction job for an independent contractor and had been selected by one of the executives of the respondents for employment in the shipping department. He had joined the Union in July 1936, solicited membership in the Union among the other employees, and discussed unionization with them.

Mullineaux's work for the respondents consisted in loading and unloading trucks and freight cars. He had never been singled out for any reprimand or criticism by his superiors although on a few

<sup>10</sup> Board Exhibits 11 and 12.

<sup>11</sup> Board Exhibits 12 and 13.

<sup>12</sup> This, however, is not to be taken as placing the stamp of legitimacy upon the Plan as a bona fide labor organization. *Matter of Atlanta Woolen Mills and Local No. 2307, United Textile Workers of America*, Supplemental Decision, 1 N. L. R. B. 328.

occasions he had been taken to task with others for "just playing around like kids; that is all." He enjoyed seniority in his job over many of the men in the shipping room who were not discharged. Subsequent to his discharge he applied for reinstatement but without success although he had seen new men working in the shipping room.

Mullineaux's wage while working for the respondents averaged between \$17 and \$18 a week and he had earned since his discharge approximately \$380 as a laborer, first with the Doughnut Machine Corporation in Ellicott City, Maryland, and then with the Gibson and Kirk Brothers Foundry in West Baltimore, Maryland.

Andrew Handschuh<sup>13</sup> was also discharged or furloughed on August 10, 1936. He had worked for the respondents since 1934 as a rectifier helper. Prior to the completion of the Relay plant he had worked for the respondents in Baltimore. He was among the first to join the Union in July and was active in union affairs.

Handschuh's work for the respondents had been satisfactory. He had never been warned or criticized and he had never been laid off before, even during slack periods. He testified that in fact there was no falling off of work in his line at the time he was discharged. He had earned approximately \$350 since his discharge working intermittently in a boiler shop.

Ford W. Edwards was discharged on August 13, 1936. He had been employed by the respondents since October 1935. His work had never been criticized and in fact he had been promoted to an assistant foremanship in charge of the repacking department about eight months before his discharge. He joined the Union three days before he was discharged. At the time of his discharge he was told by his foreman Jack Schlosser that his union activities were the reason for his discharge. When, two weeks after his discharge, he inquired of one Hopkins, superintendent of bottling at the Relay distillery, about his chances of getting his job back he was told that his discharge was due to his union activities and that as far as he, Hopkins, was concerned, he would discharge and never rehire members of the Union. Subsequently he asked Superintendent Garlock and Vice President Hermann for reinstatement but without success. He received, while working for the respondents, a 50-cent hourly wage for a 40-hour week. After his release he had earned approximately \$450, working for the Baltimore and Ohio Railroad, but at the time of the hearing he was not employed.

Bernard Foster was an employee of the respondents in the rectifying plant for a year before the strike. His work had never been criticised by his superiors. He joined the Union in August 1936,

<sup>13</sup> Spelled Hanshaud in the complaint.

had gone out on strike, and picketed for over a month in front of the distillery at Relay in full view of the respondents' executives. When the strike ended he asked for reinstatement and also authorized Gillis to apply for reinstatement in his behalf. He has never been reinstated by the respondents. While working for the respondents he received 50 cents per hour for a 48-hour week. Since he ceased working for the respondents he had earned \$75 working in a boiler shop. At the time of the hearing he was not employed.

Charles William Greger was in the employ of the respondents from September 1934 to November of that year as a laborer and then had been transferred to the rectifying department with a wage increase from 40 cents to 45 cents per hour. This was afterwards increased to 50 cents per hour. He had joined the Union on July 31, 1936, and gone out on strike August 15, picketing for over a month in front of the Relay distillery in full view of the executives of the respondents. After the end of the strike he asked Garlock, the superintendent, several times for reinstatement but without success. Since he ceased working for the respondents he had earned approximately \$215 at occasional jobs, the last one being with the Maryland Dry Dock Company.

Frank W. Clibourne was employed by the respondents as a copper-smith on January 20, 1936. Four months later, when the respondents discharged one of its two copper-smiths, they retained Clibourne in preference to the employee who had greater seniority. He had been selected as the employee representative for the Power and Maintenance Department. He joined the Union on November 20, 1936, and on the same day he was asked by Garlock if he had been given a Union application card to sign by Boswell, another employee in the department. Later in the day Clibourne was approached by his foreman and was asked whether Boswell had solicited him for membership in the Union. He was discharged on December 2, 1936, when he was given a furlough notice and a week's pay in advance. After his discharge his work was divided among other men in the department in so far as they could do it, while the rest of the work was given to an outside contractor. The respondents offered no explanation for his discharge. Clibourne, while in the employ of the respondents, received \$36 per week for a 40-hour week. Clibourne, since his discharge, had not earned any money.

After Gillis' unsuccessful attempt to confer with the respondents on August 11 he was granted a conference with Fleischmann on August 14, 1936, to discuss the discharges. Fleischmann stated at this conference that the men were laid off because a falling off of business necessitated a reduction of the force and that he could not give any definite date when they would be taken back.

During the strike several conferences were held between the representatives of the Union and the respondents. These conferences culminated in the settlement of the strike on October 22, 1936. At the conference of October 22, the Union representatives were informed that 15 of the 45 strikers were already back at work. At the same conference the following memorandum<sup>14</sup> was drafted by Grignard and signed by representatives of the Union and of the respondents:

CALVERT-MARYLAND DISTILLING Co., INC.  
GENERAL SALES OFFICES, CHRYSLER BUILDING, NEW YORK  
DISTILLERY, RELAY, MD.

October 22, 1936.

OFFICE OF THE PRESIDENT

Relay, Md.

Recognizing that a misunderstanding existed between the management of the Calvert-Maryland Distillery, a Seagram interest, located at Relay, Maryland, and the American Federation of Labor, which it is now mutually desired shall be corrected, it is agreed:—

- 1—That members of Local Union No. 20270, as per attached list will be reemployed and will be brought back in one group, if possible, otherwise in two groups within ten days.
- 2—The company agrees to meet with a representative or representatives of the American Federation of Labor to discuss problems affecting members of Local Union No. 20270, who may be employed at the distillery.
- 3—Where possible, employees will be given positions in the same department in which they were employed, prior to August 14, 1936, and will be given the prevailing scale of wages now in effect.
- 4—Where any employees return to work and find their former job has been combined with some other job or abolished, he will be given work at some other position, at not less than the established hourly rate now in effect.
- 5—The company reiterates its policy of non-discrimination among its employees and recognizes the rights of employees to become members of the union known as Distillery Workers Union No. 20270, affiliated with American Federation of Labor. And further states this right is extended to all other CALVERT and SEAGRAM plants.
- 6—Returning employees will enjoy all rights of other employees as to time of employment, dating back to original date of employment, including vacation policies.

<sup>14</sup> Respondents' Exhibit No. 1.

The American Federation of Labor agrees:—

To immediately notify all organizations and individuals, who had previously been advised that CALVERT and SEAGRAM organizations were unfair to organized labor, that CALVERT and SEAGRAM organizations are fair to the American Federation of Labor and that they be instructed to cease discriminating against the products of the CALVERT, SEAGRAM and WILSON organizations.

*For the Company*

EDWIN M. FLEISCHMANN (sgd)  
*Pres.*

EMILE C. GRIGNARD (sgd)

*For the American Federation of Labor*

JOSEPH GILLIS (sgd)

JOSEPH P. McCURDY (sgd)

Attached to this memorandum was a list of 18 names. Those named in the complaint were not included among them.

Despite the contents of this memorandum it is clear from the testimony that the terms of the settlement were that the respondents were to reinstate 20 strikers and "furloughed" employees immediately and that the remaining ten employees would be reinstated by the respondents ten days later.

Of the first group of 18 strikers only five were reinstated by the respondents. The others refused to return to work. Subsequently, on or about November 7, 1936, Gillis presented to President Fleischmann a second list of ten employees, in which list were included all those named in the complaint in the present case, and asked that they be reinstated in accordance with the agreement of October 22, 1936. Fleischmann replied that due to a lack of business no more employees would be reinstated. In fact, no more were.

The position of the respondents, in so far as it can be learned from the testimony in behalf of the Board, and from cross-examination by counsel for the respondents, is untenable. The respondents' alleged need to reduce the personnel at the distillery cannot serve as a sufficient reason for the discharge of the Union members and officers on or about August 10, 1936. It is true that the figures submitted by the respondents at the request of the Trial Examiner show a steady decrease of employment from March 1936 to September of the same year.<sup>15</sup> However, this does not explain why those discharged or

<sup>15</sup> Jan. 1936.....	404	Aug. 1936.....	346
Feb. 1936.....	410	Sept. 1936.....	339
Mar. 1936.....	430	Oct. 1936.....	378
Apr. 1936.....	395	Nov. 1936.....	402
May 1936.....	373	Dec. 1936.....	379
June 1936.....	367	Jan. 1937.....	250
July 1936.....	362		

furloughed on or about August 10, 1936, were active Union men and officers and why no others were discharged. Their records of employment, as we have seen, would not justify their selection for discharge. Moreover, the evidence indicates that when there was a falling off of business before the Union organization campaign began the employees had been staggered or rotated rather than discharged. Furthermore, as the figures submitted by the respondents show, there was a constant increase of employment from September on, but those discharged in August were not reinstated.

Fleischmann's position that the second group of strikers and "furloughed" employees could not be reinstated after October 22, 1936, because of a falling off in business is not borne out by the figures submitted by the respondents themselves. They show that the number of those employed by the respondents increased from 378 in October to 402 in November.

Likewise, although the respondents were ready to give immediate reinstatement to 20 strikers on October 22, 1936, only five were reinstated due to the fact that the rest did not wish to return to work for the respondents, thus leaving 15 vacancies for the second group of ten employees which the respondents obligated themselves to reinstate within ten days.

The objection by counsel for the respondents to the oral testimony of Gillis that the respondents agreed to reinstate the second group of employees within ten days was correctly overruled by the Trial Examiner. First, Gillis' testimony did not violate the parol evidence rule since it tended to show that the written memorandum was not the whole contract entered into between the respondents and the representatives of the Union; second, the parol evidence rule is not controlling in a proceeding under this Act<sup>16</sup>; third, whatever the agreement may have been between the Union and the respondents, it cannot relieve the respondents from their obligation under the Act to reinstate the strikers and those discharged in August, for Section 10 (a) of the Act provides that the Board's power to prevent any person from engaging in any unfair labor practice affecting commerce "shall be exclusive and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law or otherwise."

The discharge of the active Union members and officers of the Union, organization by the respondents of the company-dominated Employee Representation Plan, the failure to reinstate the discharged and striking employees and the open opposition by the respondents to the "outside" union, form the component parts of a course of action undertaken by the respondents to frustrate the unionization of their employees.

<sup>16</sup> Section 10 (b).

*F. Conclusions respecting the unfair labor practices*

We conclude that:

Andrew Handschuh, Herbert Samuel Mullineaux, Ford E. Edwards, and Frank W. Clibourne ceased work as the result of an unfair labor practice by the respondents. The strike involved in this case is a labor dispute. Bernard Foster and Charles William Gregor ceased work as a consequence of and in connection with a current labor dispute. Handschuh, Mullineaux, Edwards, Clibourne, Foster, and Greger had not obtained any other regular and substantially equivalent employment. They are now, and have been all through the occurrences of this case, employees of the respondents. The respondents have dominated and interfered with the formation and administration of the Employee Representation Plan and have contributed financial and other support to it. The respondents, by discharging Handschuh, Mullineaux, Edwards, and Clibourne and by failing to reinstate Foster and Greger, thus discharging them, had discriminated against its employees in regard to hire and tenure of employment, thereby discouraging membership in a labor organization. The respondents, by all of the acts above set forth, have interfered with, restrained, and coerced their employees in the exercise of their right 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.

**III. EFFECT OF THE UNFAIR LABOR PRACTICES ON COMMERCE**

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

**CONCLUSIONS OF LAW**

Upon the basis of the foregoing findings of fact the Board makes the following conclusions of law:

1. Distillery Workers Union 20270 is a labor organization, within the meaning of Section 2, subdivision (5) of the Act.
2. The Employees Representation Plan is a labor organization, within the meaning of Section 2, subdivision (5) of the Act.
3. The strike of the employees of the respondents is a labor dispute, within the meaning of Section 2, subdivision (9) of the Act.

4. H. S. Mullineaux, B. Foster, C. W. Greger, A. Handschuh, Ford Edwards, and Frank W. Clibourne are now, and have been all through the occurrences of this case, employees of these respondents, within the meaning of Section 2, subdivision (3) of the Act.

5. The respondents, by discriminating in regard to the hire and tenure of employment of H. S. Mullineaux, B. Foster, C. W. Greger, A. Handschuh, Ford Edwards, and Frank W. Clibourne, and each of them, have engaged in and are engaging in unfair labor practices, within the meaning of Section 8, subdivision (3) of the Act.

6. By the domination and interference with the formation and administration of the Employees Representation Plan and by contributing financial and other support thereto, the respondents have engaged in and are engaging in unfair labor practices, within the meaning of Section 8, subdivision (2) of the Act.

7. By all of the acts set forth in these conclusions of law the respondents have interfered with, restrained, and coerced their employees in the exercise of the rights guaranteed in Section 7 of the Act and have engaged and are engaging in unfair labor practices, within the meaning of Section 8, subdivision (1) of the Act.

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

### ORDER

Upon 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 the respondents Maryland Distillery, Inc., a Maryland corporation, Calvert Distilling Company, and Calvert Distillers Corporation, and their officers, agents, successors, and assigns shall:

1. Cease and desist from:

a. Discouraging membership in Distillery Workers Union 20270 or any other organization of its employees by discharging, refusing to reinstate, or otherwise discriminating against their employees in regard to hire and tenure of employment or any term or condition of employment;

b. Dominating or interfering with the administration of the Employees Representation Plan or with the formation or administration of any other labor organization of their employees and from contributing financial or other support to the Employees Representation Plan or any other labor organization of their employees;

c. In any other manner interfering with, restraining, or coercing their employees in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively by

representatives of their own choosing, and to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection.

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

a. Offer to H. S. Mullineaux, B. Foster, C. W. Greger, A. Handschuh, Ford Edwards, and Frank W. Clibourne, and each of them, immediate and full reinstatement in their former positions without prejudice to their seniority and other rights or privileges;

b. Make whole said H. S. Mullineaux, B. Foster, C. W. Greger, A. Handschuh, Ford Edwards, and Frank Clibourne, and each of them, for any loss of pay they have suffered by reason of their discharge by payment to each of them, respectively, a sum equal to that which each would normally have earned as wages during the period from the date of their discharge, in the case of H. S. Mullineaux and Handschuh being August 10, 1936, in the case of Ford Edwards being August 13, 1936, in the case of B. Foster and C. W. Greger being November 7, 1936, and in the case of Frank W. Clibourne being December 2, 1936, to the date of such offer of reinstatement, less the amount earned by each of them, respectively, during such period;

c. Withdraw all recognition from the Employees Representation Plan (under which representatives have been selected) as representative of any of their employees for the purpose of dealing with respondents concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work, and disestablish the Employees Representation Plan as such representative;

d. Post notices in conspicuous places in all of the departments of the Relay plant stating that: (1) the respondents will cease and desist in the manner aforesaid; (2) that the Employees Representation Plan is so disestablished and that the respondents will refrain from any recognition thereof; and (3) that such notices will remain posted for a period of at least thirty (30) consecutive days from the date of posting;

e. Notify the Regional Director for the Fifth Region in writing within ten (10) days from the date of this order of the steps respondents have taken to comply herewith.

3. The complaint as to Calvert-Maryland Corporation (Massachusetts) is hereby dismissed.

4. The complaint as to E. Gossman, George Hodgson, R. W. Aldom, A. Karwoski, and Julian Boswell is hereby dismissed without prejudice.