

In the Matter of APPALACHIAN ELECTRIC POWER COMPANY and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION No. 906, and J. A. DAVIS, L. F. NEELY, WALTER THORNTON, J. B. EASTBURN, J. F. FACKLER, A. P. CLARK, E. B. ROBERTSON, L. W. WALL, HARRY G. THOMPSON, LUTHER HUDSON, WALTER CLARK and CLYDE HOLDREN

Case No. C-175.—Decided August 7, 1937

Electric Utility Industry—Discrimination: discriminatory refusal to reinstate following discharge prior to July 5, 1935—*Reinstatement Ordered, Non-Strikers:* employees subject to discriminatory refusal to reinstate following discharge prior to July 5, 1935—*Back Pay:* awarded.

Mr. Jacob Blum for the Board.

Hunton, Williams, Anderson, Gay & Moore, by *Mr. T. Justin Moore* and *Mr. G. D. Gibson*, of Richmond, Va., for the respondent.

Mr. Alexander B. Hawes, of counsel to the Board.

DECISION

STATEMENT OF THE CASE

On January 21, 1937, E. B. Robertson, of Lurich, Virginia, on behalf of International Brotherhood of Electrical Workers, Local Union No. 906, herein called the Union, filed with the Regional Director for the Fifth Region (Baltimore, Maryland) a charge that Appalachian Electric Power Company, of Glen Lyn, Virginia, had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8, subdivisions (1) and (3) and Section 2, subdivisions (6) and (7) of the National Labor Relations Act, 49 Stat. 449. On February 12, 1937, the Board issued its complaint, signed by the Regional Director. The complaint and accompanying notice of hearing were duly served upon the respondent and upon Robertson. The complaint alleges, in substance, that, since July 5, 1935, the respondent has refused reinstatement of J. A. Davis, L. F. Neely, Walter Thornton, J. F. Eastburn,¹ J. F. Fackler, A. P. Clark, E. B. Robertson, L. W. Wall, Harry G. Thompson, Luther Hudson, Walter Clark, and Clyde Holdren, all previously employees of the respondent, for the reason that they joined and assisted the Union and had engaged in concerted activities with other employees in the Glen Lyn plant of the respondent for the purpose of collective bargaining and other mutual aid and protection.

¹ Corrected to "J. B. Eastburn", at the hearing.

Thereafter the respondent filed a motion to dismiss the complaint on various grounds, and, without waiving such motion, also filed an answer thereto. The motion to dismiss was based on allegations that the National Labor Relations Act or its application in the present case violates the Fifth, Seventh, and Tenth Amendments to the Constitution and embodies an unlawful delegation of power to the Board, that the Act does not purport to apply to the case of persons not employees since its effective date, and finally, in substance, that the commerce powers of the Federal Government do not extend to the relationship between the respondent and the persons named in the complaint (herein called the ex-employees). The answer denied that the respondent discharged or laid the ex-employees off or refused to reinstate them for the reason that they joined and assisted the Union and engaged in concerted activities with other employees in the Glen Lyn plant of the respondent for the purpose of collective bargaining and other mutual aid and protection. It denied that any such alleged unfair labor practices were unfair labor practices affecting interstate commerce, and for a separate defense repeated the allegations of the motion to dismiss.

Pursuant to the notice, a hearing was held in Roanoke, Virginia, on February 25 and 26, 1937, before Walter Wilbur, duly designated as Trial Examiner by the Board. The motion to dismiss was renewed before the Trial Examiner at the commencement of the hearing. Ruling thereon was reserved by the Trial Examiner. Thereafter the motion, so far as it was based upon the face of the complaint, was denied. At the close of the Board's case, the respondent's counsel again pressed the motion on the ground that the Board had failed to introduce sufficient evidence bearing upon the question of jurisdiction. The motion was denied on the ground that such evidence was to be secured from officials of the respondent who had not yet testified. While correct practice would require that such evidence be presented by the Board before the close of its case, we do not consider that the error was prejudicial, and the ruling of the Trial Examiner denying the motion is hereby affirmed. On motion of counsel for the Board, the complaint was amended to strike therefrom the names of Harry G. Thompson, Walter Clark, and Clyde Holdren. During the course of the hearing counsel for the respondent excepted to one ruling of the Trial Examiner overruling his objection to the introduction of a certain exhibit in evidence. We have considered the objection and hereby affirm the ruling thereon. Full opportunity to be heard, to examine and cross-examine witnesses and to produce evidence bearing upon the issues was afforded to all parties.

Thereafter a brief was filed by counsel for the respondent and further oral argument was had before the Trial Examiner at Washington, D. C. An Intermediate Report was filed by the Trial Examiner, and exceptions thereto were filed on behalf of both the respondent and the Union. Argument on the exceptions was had before the Board on May 26, 1937.

At the time of filing their exceptions to the Intermediate Report, request was also made on behalf of the ex-employees that the case be reopened to take additional testimony. This request was subsequently denied by the Board.

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

FINDINGS OF FACT

I. THE RESPONDENT AND ITS BUSINESS

Appalachian Electric Power Company was incorporated in Virginia in 1926. It is qualified to do business and owns property in Virginia and West Virginia, and also owns a short section of line in Tennessee. It is a subsidiary of American Gas and Electric Company, New York City, and is itself a parent company owning all the outstanding securities of two utility companies, Kingsport Utilities, Inc., and Kentucky & West Virginia Power Company, operating in Tennessee and Kentucky respectively. The Ohio Power Company, another subsidiary of American Gas and Electric Company, operates in Ohio.

The respondent is engaged in the electric utility business, principally as an operating company, generating power and transmitting and distributing it directly to consumers in Virginia and West Virginia. As part of this system it operates three steam generating plants in West Virginia,² and two steam and four hydro-electric generating plants in Virginia. The total generating capacity of the system is rated at 397,255 K. V. A., of which 235,080 is in the West Virginia plants and 162,175 in the Virginia plants.

A transmission line, consisting of 530 miles of wire carrying 132,000 volts and 200 miles carrying 88,000 volts, connects all the plants of the respondent with each other and with its distributing systems. The main transmission line runs generally from Reusens, Virginia, on the east, through Glen Lyn, Virginia, at the Virginia-West Virginia border, to Kenova, West Virginia, on the west. The line connecting Kenova, West Virginia, and the remainder of the system runs for a short distance through Ohio and to the extent that it lies in that State belongs to the affiliated Ohio Power Company.

² A fourth steam generating plant, at Sprigg, West Virginia, was not in operation during the period with which this decision deals.

From the main line run six branches—one for a short distance into Tennessee—which connect with the systems of other companies operating in States other than Virginia and West Virginia. Thus the respondent connects at Danville, Virginia, near the North Carolina border, with Carolina Power & Light Company; at Holston, Tennessee, just over the border from Virginia, with Kingston Utilities, Inc., and Carolina Power & Light Company; at Sprigg, West Virginia, on the Kentucky border, with Kentucky & West Virginia Power Company; at Kenova, West Virginia, also on the Kentucky border, with the same company; and north of Logan, West Virginia, on the Ohio border, with the Ohio Power Company.

The lines of the respondent constitute a continuous wire connection across Virginia and West Virginia, between North Carolina, Tennessee, Kentucky, and Ohio.

In 1930 the population in the area served by the respondent numbered, according to the Federal Census, 832,617 in West Virginia, and 470,403 in Virginia. The respondent's customers, as of December 31, 1936, numbered 86,722 in West Virginia and 51,244 in Virginia. From 50 per cent to 70 per cent of the demand for its current is of an industrial character, and mines, in particular, are an important class of customers. The average Virginia demand slightly exceeds the Virginia generating capacity. Consequently over a period of time the tendency is for the respondent to export power from West Virginia into Virginia. But since the demand is subject to considerable and rapid fluctuations, and generating capacities vary from time to time, particularly at hydro-electric plants, such a tendency cannot be regarded as constant. It is impossible to determine where current generated at any particular point in the system is consumed. The allocation of the demand among the various plants, which must take into account not only the total load, but also the relative efficiencies of generation at each plant, is made from time to time by the respondent's chief dispatcher at Turner, West Virginia.

The plant with which we are concerned is a steam generating plant, located in the village of Glen Lyn, Virginia, at about the middle of the main transmission line and within a half mile of the West Virginia border. In the organization of the system, it is included in the Bluefield, West Virginia, Division. The plant is rated at 100,000 K. V. A., the second largest in generating capacity of all the plants of the respondent, exceeded only by that at Cabin Creek, West Virginia. Its operating force has ranged in the past two and a half years between 67 and 51 employees. The plant consumes between 300,000 and 360,000 tons of coal a year, most of it shipped from West Virginia and delivered by interstate railroads at sidings in the plant.

The function of the force at the Glen Lyn plant is the generation of electricity, as distinguished from its transmission and distribution. The division of the operations of an electric utility into these three functions is reflected in the physical equipment of the utility and is recognized by courts and regulatory authorities. The respondent contends that generation of power, as distinguished from its transmission and distribution, cannot be regarded as commerce, and therefore its relations to workers engaged in generation cannot be subjected to federal regulation.

It is clear, however, that though the employees at Glen Lyn may not have been directly engaged in interstate commerce, any interruption of operations there would instantaneously have had a substantial effect on the interstate flow of electric current. A stoppage at Glen Lyn would, at once, withdraw from this interstate system a source of a considerable portion of its transportable power.

II. THE UNION

During January 1935, there was talk among the Glen Lyn employees of formation of a union, and on January 17, 42 or 43 of them met at a beer garden in the village to organize a local. Temporary officers were elected, and an application for a charter was thereafter made to the International Brotherhood of Electric Workers, an international union affiliated with the American Federation of Labor. The charter was received, and at a second meeting held on January 25 it was signed by 29 employees, including all the men named in the complaint. Membership was open to all the Glen Lyn employees except the clerical and supervisory staff. Shortly thereafter three other employees also signed up, making a total of 32 members. At the second meeting officers were elected: J. F. Fackler was named president; A. P. Clark, vice president; and L. T. Hudson, financial secretary.

However, on the reopening of the plant in March, after the shutdown described below, those who were taken back to work generally renounced their membership. As a result dues declined, the Union was cut to 12 or 14, and some time in April, the charter was revoked by the International. The members were told, however, that they might apply for reinstatement and membership in another local. None of them thereafter paid dues, but shortly before the hearing several applied for reinstatement in a local of the Brotherhood at Princeton, about 15 miles from Glen Lyn. These applications were acted upon favorably. It is not clear what the status of such members was in the interval, but its determination is not necessary to the decision of this case.

III. BACKGROUND OF THE UNFAIR LABOR PRACTICES

A. *The shut-down of 1935*

At midnight of January 19-20, 1935, the Glen Lyn plant was shut down for an indefinite period. Although this action followed within two days of the first organization meeting of the Union, we find that it was based solely on business reasons unrelated to the union activities of the respondent's employees. The respondent wished to make certain improvements to the equipment at the plant. Contractors' proposals for these improvements had been received by the respondent in October 1934, and the new equipment had arrived at the plant between January 1 and 15, 1935. In addition, the respondent had been engaged for some time in a controversy over freight rates with the two railroads which shipped its coal. It was believed that the railroads were maintaining excessive rates because they considered the respondent dependent upon the plant. The respondent thought that a shut-down demonstrating that the system could run without Glen Lyn would help in securing a rate reduction. Finally, the moment for the shut-down appears to have been chosen because of a drop in demand on the system as a whole, combined with the fact that the generating capacity of the hydro-electric plants, which fluctuates with the flow of the streams, was usually near its high about January of each year.

The possibility of this shut-down, for the reasons stated above, had been forecast in a talk to the employees by Mr. Markle, division manager, about January 5. Notice of the shut-down was given on January 19, at which time Lugin, the plant manager, also listed the 43 or 44 men who were to be laid off. A skeleton crew was retained. All of the men named in the complaint, except L. W. Wall, were laid off at this time. A. P. Clark was rehired for construction work on January 22, but he was dropped on January 28, and his records indorsed, "Work completed." L. W. Wall was retained on the skeleton crew and continued until January 31, when he was dropped ostensibly for the same reason.

The shut-down was expected to be temporary. But, according to the respondent's officials, they intended to remove definitely from the pay roll all the men laid off, although they expected to recruit the staff from among such men on reopening. At the hearing there was considerable contention as to whether the laying off of the employees terminated their employee status. It was pointed out that the term "discharge" was not used, and it appears that upon reopening those who were put back to work resumed their seniority status. On the other hand, there was no evidence that the men were told they would be called back later, as had been customary when

individual employees were temporarily laid off in previous slack periods. Moreover, the records of the respondent for each employee laid off were indorsed, under the heading "Date dropped", with the notation "1/19/35", and, under the heading "Reason", with the notation "Services no longer needed." It appears unnecessary to determine whether the employee status of the ex-employees ended at this time. For the purposes of this decision it may be conceded that it terminated some time prior to July 5, 1935, when the National Labor Relations Act went into effect.

The shut-down continued until March 2, 1935, when the plant reopened, the improvements having been made and a further demand for power having arisen.

B. Attitude of the respondent toward organization of its employees

Apparently no attempt was made by the employees to conceal the fact some time before the shut-down that organization of a union was being contemplated. Furr, assistant division manager at Bluefield, had heard rumors of organization, at least by the middle of January, and Lugrin was then aware of organizing activities. Knowledge or suspicion of such activities probably had reached the management some time earlier, for when Markle spoke to the employees on January 5 about the possibility of a shut-down he discussed the respondent's attitude towards unions.

Hudson, one of the ex-employees, testified that Markle threatened a shut-down of the plant if the employees organized. This testimony received no corroboration from the other ex-employees and was contradicted by the respondent's witnesses. Markle claims to have told the men that they were "permitted to belong to a labor union if they so desired, but that (his) personal feeling was that it was a mistake for them to go into such an arrangement, and (the respondent) would prefer that they do not do it, as (it) would much rather, in dealing or taking up anything with (its) employees, deal with them directly rather than through some outside party." Argabrite, vice president of the respondent, had previously instructed Markle as follows: "You must make clear to your men that under the N. R. A. they have a right to belong to an organization if they want to. Now, if they want to know how we feel about it, you can tell them we are not interested in it at all and would not like to see it, but they are at perfect liberty to do that if they want to."

This position was elaborated by Argabrite at the hearing as shown in the following passages from the record:

* * * a union is a pretty difficult thing in our business. There are a lot of things which, we recognize, might be excellent in a manufacturing institution of a production type, such as making machinery or things of that kind, where great groups of

men are gathered together. They might be very fine. We do not frown on those things as being bad. We try to treat our people just as finely as we can; we like to feel that we are close enough to them that they do not need any outsiders coming between them and us, and we would be very sorry to see them go into organizations. I make no bones about that at all. It would be very difficult, with three thousand men scattered over the length of West Virginia and Virginia, to try to deal with them as an organization or a multiplicity of organizations. That would be very difficult.

Q. (By Mr. Moore.) Have you at any time, however, sanctioned any movement, either in large or small groups, so far as management is concerned, that sought to discourage the organization of unions?

A. Yes; I have sought to discourage that. During the N. R. A. days I sought to discourage it. I told Mr. Markle, when this rumbling started over in Glen Lyn, that we had better find out what was wrong with the hours and get it straightened out and get it on an operating basis that was right. I did not want any union. There is not any question about that; but I took no move to stop it.

While we do not believe that the shut-down was related to the organization of the Union, various occurrences shortly before and after indicate that the respondent's attitude toward the Union was not so disinterested as it claims.

Shortly before, Lugin tried to sound Thornton out, asking him what he thought about the Union. The night before the shut-down Jesse, a foreman, told Thornton he had better stay out of the Union or he would lose his job. Prior to the shut-down Jesse also tried to get from Robertson the names of the members of the Union.

On the night of the shut-down, before A. P. Clark had joined the Union, Turner, Lugin's assistant, came to him and said, "Pierce, keep your shirt on, and you will be all right."

In a conversation with Robertson about the Union one night in front of the hall of the Local, probably after the shut-down, Turner said that it "seemed like some of them wanted to get out of the fight pretty quick."

At the hearing there was disagreement as to the interpretation to be placed upon the action of Lugin in stopping his car opposite the entrance to the beer garden on the night when the Union was holding its first organization meeting. That he was there, accompanied by Turner and Whitt, a foreman, is not denied. According to his testimony, he was merely passing by, when, seeing a crowd of men emerging from the beer garden, he stopped some three or four minutes out of curiosity to see what was going on. According to

testimony of some of the ex-employees, he parked there, and it is suggested that he did so to observe who was taking part in the Union. Also according to their testimony, Whitt, who was sitting on the back seat of Lugrin's car, tried to crouch out of sight, presumably because he did not wish to be identified with Lugrin's action. It was also testified that Lugrin then drove the car up and down the road several times, with the headlights on, in order, it is suggested, to see better the men who were coming away from the meeting. Lugrin claimed that he only drove up to his house to change his clothes and then back to the office. Despite the conflict in the testimony, in view of other indications of the respondent's attitude, it seems likely that Lugrin was spying on the meeting at that time to determine who were Union members.

The incident of the plant union is one of such indications. Certain of the employees who were retained during the shut-down became "interested", as Lugrin testified, in the formation of a union of employees of the plant, not affiliated with outside labor organizations. Various officials of the respondent, including Argabrite, Lugrin, Turner, and Lawrence, whether or not they are to be credited with the origination of this movement, gave it their blessing. Argabrite and Lugrin secured sample organization papers for this union and drafted a proposed agreement between it and the respondent. Lawrence, who was then doing special engineering work at the plant, and who was later to replace Lugrin as plant manager, was invited to attend a meeting of the organization and read the proposed constitution and by-laws to it. Turner was elected its secretary. A foreman, Jesse, some of whose activities have been mentioned before, was president. Despite the obviously favorable attitude of the respondent, however, it should be noted that the plant union never got any where, and it and the proposed agreement with the respondent soon died a natural death.

There is some evidence of the use of coercion to force membership in this organization. A. P. Clark, who was rehired for special work shortly after the shut-down, testified that on the second day after he was rehired Fields, a chief or assistant chief electrician, asked him to join the plant union, that he refused, and that three days later he was again laid off.

All of this evidence, particularly when considered with the events of March 1935, which was discussed below, strongly indicates that the respondent was seriously opposed to unionization of its employees by any organization with outside affiliations.

C. The reopening in March 1935

On March 2, 1935, the plant reopened for operation. Fifty-one out of the 67 previously on the pay roll in January were called back

to work. Furr and Lugin had calculated, before the shut-down, that a cut of 15 or 16 could be made. The factors which made such a reduction possible were: (1) improvement of equipment; (2) rearrangement of personnel; (3) a recent increase in working hours from 32 to 40 per week; (4) the fact that the plant had been over-staffed; (5) a decrease in the average load on the system.

The selection of the men to be denied reinstatement is perhaps the strongest evidence of the respondent's antiunion bias. Of the 16 employees involved in the reduction, four were transferred to the Roanoke plant. Three of these were nonunion men; the fourth, Walter Thornton, one of the Union members involved in this complaint. Of the remaining 12, for whom no work was provided, ten were Union men, and of the other two, one was an office worker ineligible for Union membership. This proportion should be contrasted with the proportion of Union to nonunion employees before the shut-down. At that time the two groups were approximately equal. The ten Union members are the men originally named in this complaint, except Thornton and Fackler. They included A. P. Clark, vice president; and L. T. Hudson, financial secretary of the Union.

That the Union membership of these men was known to the respondent's officials, at least to Lugin, the plant manager, is not contested. Glen Lyn is a small village; every one knows his neighbor's business. As indicated above, there was no attempt on the part of the Union to conceal its activities.

The respondent denies that the Union affiliations of these men were a factor in their selection. It points to the fact that 22 of the total Union membership of 32 were given jobs, among whom was the president, Fackler. It is significant, however, that the Union members who were taken back (except Fackler and Thornton) thereupon renounced their Union membership. The respondent insists that Lugin was directed to select, and did select, the men to be reinstated solely on the basis of fitness. The respondent kept no efficiency records, however; and the facts upon which Lugin claims to have based his judgment as to fitness remain locked in his breast.

On the other hand, the service records of the men denied reinstatement are available.³ Many of them had been in the respondent's continuous employ for years and had received promotions and increases in pay. The facts may be summarized as follows:

J. A. Davis, first employed August 15, 1921, at 46¢ per hour, was raised to 55¢ on November 16, 1931; to 64¢ on September 1, 1933; and to 74¢ on May 1, 1934. He was employed throughout as a turbine oiler.

³ The service records of the men whose names were eliminated from the complaint by amendment do not appear in the record

L. F. Neely, first employed February 20, 1922, at 35¢ per hour as a crane fireman, was raised to 50¢ on July 1, 1927; and promoted to coal handler at 60¢ on May 1, 1934.

E. B. Robertson, first employed August 8, 1922, at 39¢ per hour as assistant fireman, was raised to 50¢ on August 1, 1928; to 54¢ on September 1, 1933; was promoted to water tender at 65¢ on May 1, 1934, and was raised to 74¢ on January 1, 1935, just prior to the shut-down.

J. B. Eastburn, first employed May 10, 1927, at 35¢ per hour as a laborer, was raised to 50¢ on January 1, 1932; and 58¢ on September 1, 1933; and was promoted to pump oiler at 70¢ on January 1, 1934.

A. P. Clark, first employed August 10, 1927, at 50¢ per hour as a machinist, was reduced to 35¢ on March 7, 1928; restored to 50¢ on June 16, 1930; raised to 58¢ on September 1, 1933; promoted to pump oiler at 59¢ on January 1, 1934; and raised to 71¢ on May 1, 1934.

L. W. Wall, first employed October 16, 1933, at 40¢ per hour as a laborer, was promoted to carpenter at 60¢ on March 16, 1934.

Luther Hudson, first employed by an affiliated company in 1933, was employed by the respondent February 9, 1934, at 40¢ per hour as a coal handler, and raised to 48¢ on May 1, 1934.

The seniority standing of the men reinstated does not appear in the record, without which, of course, we have no absolute check. Nevertheless it is difficult to believe that on an efficiency basis alone so large a proportion of Union men should have been eliminated and that this proportion should include so many employees of long standing with records of apparently satisfactory service. It appears clear that the connection of these employees with the Union was a definite factor in the determination that they should be among the personnel permanently eliminated.

As indicated above, Fackler and Thornton were not dropped at this time. Thornton was transferred to the Roanoke plant, but was finally laid off there on June 15, on the ground that his work was then completed. Fackler was reinstated at Glen Lyn during the first week in March. On April 15, after the excluded men started picketing the plant, he left the plant telling the manager he was "sticking by the Union".

The excluded group made several efforts during March and April to secure reinstatement. On March 8 or 9, a committee consisting of Hudson, Eastburn, A. P. Clark, and either Robertson or Thompson, called at the Bluefield office with Freeman, an organizer of the International Brotherhood of Electrical Workers. Markle was away, and Furr disclaimed any authority either to enter into negotiations with the Union or to reinstate any of the employees. On March 9, after this conference, the Union, over the signatures of Hudson and Fack-

ler, wrote Argabrite referring to the conference with Furr and charging that the reason for the non-employment of the men involved was their Union membership. When these efforts produced no results, the excluded Union members staged a "strike" and picketed the gates of the plant. They were then joined by Fackler.

IV. THE UNFAIR LABOR PRACTICES

Since the National Labor Relations Act became effective only on July 5, 1935, none of the actions of the respondent so far discussed could constitute a violation of that statute. They are important, however, in considering the significance of its actions since that date.

The plant operated with the reduced personnel of 51 during the months from March to August, 1935. Then about August 9, the force was increased by the addition of four employees, who were transferred from the Kenova, West Virginia, plant of the respondent. Operation of the Kenova plant was reduced at that time because of its relative inefficiency, and the personnel there was consequently cut. The management apparently wished, however, to keep these four men in its employ. They are referred to as "key men" by the respondent's officials, and the evidence shows that the three of them who are still working for the respondent⁴ have relatively long service records and important classifications.⁵

Three other additions have since been made to the Glen Lyn operating staff. These all involved promotions, to the staff, of men hired as laborers since July 5, 1935. R. D. Spangler, hired January 6, 1936, was promoted to the boiler room on June 1, 1936. R. D. Doss, hired September 20, 1936, and G. T. Powell, hired June 29, 1936, were promoted to the turbine room on January 1, 1937.

A. P. Clark and E. B. Robertson made active application for reinstatement in the spring of 1936. Otherwise, however, none of the men involved in this complaint have done so since the spring of 1935. This was quite natural. Their applications in March and April, 1935, had been turned down flatly. Application having once been made, little purpose would be served in repeating it. Vacancies did not occur frequently. The men were on hand and available at call. While there had been no similar group lay-offs prior to January 1935, it had been customary for the respondent, when work offered, to recall individual employees temporarily laid off. The futility of further application must have been even more apparent to the men involved here when the applications of Clark and Robertson were turned down.

⁴ The fourth has died since the transfer.

⁵ W. Jordan, first employed 1922, now classified as turbine room man at 75¢ per hour; L. C. Drain, first employed 1924, now classified as turbine room man at 75¢ per hour; C. L. Brown, first employed 1923, now classified as switchboard operator at \$165 per month.

Moreover, as indicated above, Glen Lyn is a small village. Its population numbers about 250; since the plant employs 50 to 70 men, there can have been almost no other source of work. In such a community it is not too much to assume that the plant management would be aware of the ex-employees living there. It must, therefore, have known that none of them had obtained substantially equivalent employment at the time that Spangler, Doss, and Powell were promoted.

The record shows that all of the ex-employees except Fackler have continued to live at or near Glen Lyn. Davis has been working on his farm. Eastburn has been able to secure work with another concern only recently (six months prior to the hearing), and this work is only of an irregular nature. Thornton was employed by the respondent at Logan, West Virginia, for a short period, from June to September, 1936. In October 1936, he secured employment for a very brief period at a hotel. He was unemployed at the date of the hearing. Neely's only job since 1935 has been on the state highway. This provided work every other week for 3 or 4 months. Wall has apparently earned about \$900 in the meantime. A. P. Clark worked a few days a week for six or seven months on the state highway and then with the Works Progress Administration. Hudson has worked off and on for a total of about seven months for another company. At the time of the hearing he was employed, but on a temporary basis. Robertson has worked "a little" for other concerns since the shut-down. He estimated that he had made around six or seven hundred dollars since July 5, 1935.

Fackler, however, moved to Danville, Virginia, in April of 1935, and has been living there since. With reference to him, therefore, we cannot find that the plant management should have realized that he was available for, and desirous of, reinstatement in 1936 and 1937.

It appears from a comparison of the records of the ex-employees with brief records of the laborers actually promoted that the ex-employees all had longer service records and higher classifications. The records of seven of the employees have previously been summarized and reference is made thereto. The record of Walter Thornton, one of the others involved, is among the longest. He was employed April 1, 1923, as an oil handler at 35¢ per hour; raised to 50¢ on August 1, 1928; and to 58¢ on September 1, 1933; and promoted to pump oiler at 70¢ on May 1, 1934. When reinstated on March 5, 1935, after the shut-down, it was as laborer at 60¢. Doss, Spangler, and Powell, on the other hand, had records of only 3½ months', 5 months', and 6 months' service, respectively.

On this basis, the Trial Examiner found that in promoting the three laborers instead of taking back three of the ex-employees involved in this complaint the respondent discriminated against its ex-employees except Wall, and did so on the basis of their Union affiliation. We agree in excluding Wall. We can not find discrimination against him, because, though his seniority was greater than that of the men promoted, and though he may have been as well qualified to fill the post of boiler room or turbine room man as they, his occupation was that of a carpenter, a distinct trade, and presumably it was a carpenter's job that he desired to secure. His position as a carpenter for the respondent has not been filled since the Act went into effect. We also omit Fackler because of his departure from Glen Lyn and his failure to indicate to the respondent, at any time after his departure, his desire for reinstatement, although since his testimony at the hearing the respondent is now on notice that he wishes to be restored to employment.

We do not agree that there has been discrimination against all the remaining ex-employees. Since, aside from the positions filled by the transfer of the Kenova plant employees, only three positions of the kind previously occupied by the ex-employees have been filled while the Act has been in effect, any unlawful discrimination, in our opinion, has been limited to three of them. We do not decide specifically which of the ex-employees have been the victims of the respondent's action. It is clear, however, that they are the three who merit preference in reinstatement, namely, those three with the longest seniority records, subject to the limitation that a man who has served in a position to which Doss, Spangler or Powell was promoted, is entitled to preference over one who has not.

The discrimination against these men, we find, was based upon their Union affiliations, past or present. Although Local No. 906 disintegrated and lost its charter in April 1935, and they may not have been members, even of the International Union, on June 1, 1936, or on January 1, 1937, when the discriminatory acts occurred, they remained persons who had at one time taken part in union activities and discrimination against them for such past activities would be as effective in discouraging unionization as if for similar current activities.

We find that the respondent has discriminated with respect to hire and tenure of employment against three of the persons named in the complaint, as amended, except Wall and Fackler, for the purpose of discouraging membership in a union, and that by such acts, respondent has interfered with, restrained, and coerced its employees in the exercise of the rights of self-organization guaranteed in Section 7 of the Act.

V. EFFECT OF UNFAIR LABOR PRACTICES UPON COMMERCE

We find that the aforesaid activities of the respondent, occurring in connection with the operations of the respondent described in Section I above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

VI. THE REMEDY

In addition to an order to cease and desist from its unfair labor practices, we shall affirmatively require the respondent to offer reinstatement to the three men against whom we have found discrimination. We have already indicated above the basis for their determination. The three men who are thus offered reinstatement are also entitled to back pay from the dates of the discriminatory acts, less any amounts earned by them in the meantime. Thus one should receive back pay from June 1, 1936, when Spangler was promoted, while the other two should receive back pay from January 1, 1937, when the other two promotions occurred. The determination of the employee entitled to back pay from the earlier date is to be made upon the basis of seniority, subject to the limitation that a man who has, at one time or another, occupied the position to which Spangler was promoted is to be preferred over one who has not.

As to the remaining men named in the complaint, the complaint is to be dismissed.

CONCLUSIONS OF LAW

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

1. International Brotherhood of Electrical Workers is a labor organization, within the meaning of Section 2, subdivision (5) of the National Labor Relations Act.

2. The respondent, by discriminating in regard to the hire of three of the following: J. A. Davis, L. F. Neely, Walter Thornton, J. B. Eastburn, A. P. Clark, E. B. Robertson, and Luther Hudson, and thereby discouraging membership in the labor organization known as International Brotherhood of Electrical Workers, has engaged in and is engaging in unfair labor practices, within the meaning of Section 8, subdivision (3) of the Act.

3. The respondent, by interfering with, restraining, and coercing 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.

4. 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

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 Appalachian Electric Power Company and its officers, agents, successors, and assigns, shall:

1. Cease and desist from discouraging membership in the International Brotherhood of Electrical Workers, or any other labor organization of its employees, by discharging, threatening to discharge, refusing to reinstate, or refusing to hire any of its employees or any applicants for employment by reason of their membership, past or present, in the International Brotherhood of Electrical Workers, or any other labor organization;

2. Cease and desist from in any manner discriminating against any of its employees or against any applicants for employment in regard to hire or tenure of employment by reason of their membership in the International Brotherhood of Electrical Workers, or any other labor organization of its employees; and

3. Cease and desist from in any 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 purposes of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the National Labor Relations Act.

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

a. Offer present employment to three of the men named in the complaint, except J. F. Fackler and L. T. Wall, comparable as to wages, general duties, and general conditions of employment with the positions to which Doss, Powell, and Spangler were respectively promoted, determination of the three to be made among the men named in the complaint on the basis of seniority, subject to the limitation that any man who has previously occupied any such position shall be preferred over any man who has not;

b. Make whole the three men to whom employment is offered pursuant to paragraph a. above for any loss of pay they have suffered by reason of the respondent's discrimination in regard to their hire, by payment, respectively, of a sum of money equal to that which

each would have earned as wages during the period from the date of such discrimination to the date of such offer of reinstatement, less the amount each has earned during that period, the date from which back pay is to be paid to each to be determined as outlined in Section VI above;

c. Post immediately notices to its employees in conspicuous places throughout its Glen Lyn plant, stating (1) that the respondent will cease and desist in the manner aforesaid, and (2) that such notices will remain posted for a period of at least thirty (30) consecutive days from the date of posting;

d. Notify the Regional Director for the Fifth Region within ten (10) days from the date of this order what steps the respondent has taken to comply herewith.

And it is further ordered that the complaint be, and is hereby, dismissed insofar as it alleges discrimination against persons other than the three to whom employment is ordered to be offered pursuant to Paragraph 4 a. above.