

In the Matter of KENTUCKY FIREBRICK COMPANY and UNITED BRICK
AND CLAY WORKERS OF AMERICA, LOCAL UNION No. 510

Case No. C-179.—Decided August 30, 1937

Firebrick Industry: mining and manufacturing—*Strike—Employee Status:* during strike—*Discrimination:* non-reinstatement of union members following strike; violence during strike cannot be used by employer as excuse for discrimination against union members for union membership and activity—*Reinstatement Ordered, Strikers:* discrimination in reinstatement following strike—*Back Pay:* awarded from date of denial of reinstatement, excluding period between intermediate report and decision.

Mr. Philip G. Phillips for the Board.

Knapp, Beye, Allen and Cushing, by *Mr. William Beye* and *Mr. B. L. Rawlins, Jr.*, of Chicago, Ill., for the respondent.

Mr. Julius Schlezinger, of counsel to the Board.

DECISION

STATEMENT OF THE CASE

In December 1935, the United Brick and Clay Workers of America, Local Union No. 510, herein called the Union, filed a charge with the Regional Director for the Ninth Region (Cincinnati, Ohio) against the Kentucky Firebrick Company, Haldeman, Kentucky, the respondent herein, charging the respondent with violation of Section 8, subdivisions (1) and (3) of the National Labor Relations Act, 49 Stat. 449, herein called the Act. On March 10, 1936, the National Labor Relations Board, herein called the Board, by the Regional Director for the Ninth Region, issued its complaint against the respondent, alleging that the respondent had engaged 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 Act, in that the respondent had refused to reinstate, following a strike, 73 of its employees for the reason that they had joined and assisted the Union and had engaged in concerted activities with other employees of the respondent for the purpose of collective bargaining and other mutual aid and protection.¹ The complaint and accompanying notice of hearing were duly served upon the parties.

¹ The complaint subsequently was amended at the hearing so as to charge a refusal to reinstate 49 employees and a delay in reinstating 24 other employees.

The respondent filed a "Special Appearance and Motion to Dismiss", in which it claimed that the Act is unconstitutional and that the Board has no jurisdiction over the respondent. Reserving all its rights under the special appearance, the respondent also filed an answer to the complaint in which it admitted some of the specific acts alleged therein but denied that it had engaged in unfair labor practices.

Pursuant to the notice of hearing, a hearing was conducted by Robert M. Gates, the Trial Examiner duly designated by the Board, on April 6, 7, and 8, 1936. Full opportunity to be heard, to examine and to cross-examine witnesses, and to introduce evidence bearing upon the issues was afforded to the parties. At the commencement of the hearing the respondent moved to dismiss the proceeding for the reasons stated in its special appearance. The Trial Examiner denied the motion without prejudice to the right of renewal after the introduction of evidence with respect to the jurisdiction of the Board. At the conclusion of the presentation of evidence by the Board's counsel and again at the conclusion of the hearing the respondent renewed its motion to dismiss. The motions were denied in so far as they pertained to the constitutionality of the Act but the Trial Examiner reserved decision with respect to the applicability of the Act to the business of the respondent. The respondent took exception to this ruling and to various other rulings made by the Trial Examiner during the course of the hearing. The Board finds no prejudicial error in any of the rulings of the Trial Examiner, and they are hereby affirmed. After the hearing the respondent filed briefs with the Trial Examiner.

Thereafter, on July 29, 1936, the Trial Examiner duly filed his Intermediate Report. He found that the respondent, following a strike, had refused to reinstate 30 of its employees and had delayed the reinstatement of 34 others because such employees had joined and assisted the Union. He found further that, by virtue of such acts the respondent had engaged in and was engaging in unfair labor practices within the meaning of Section 8, subdivisions (1) and (3) of the Act. The Trial Examiner concluded, however, that such unfair labor practices were not unfair labor practices affecting commerce within the meaning of Section 2, subdivisions (6) and (7) of the Act. No exceptions to the Intermediate Report were filed within ten days of its issuance and the case was considered closed.

On April 29, 1937, following the decisions of the Supreme Court of the United States on April 12, 1937, sustaining the constitutionality of the Act, a motion to reopen the case was filed in behalf of the Union. Objections to the motion were filed by the respondent. On May 17, 1937, the Board, acting pursuant to Article II, Section 36

of National Labor Relations Board Rules and Regulations—Series 1, as amended, granted the motion to reopen the case. Subsequently, exceptions to the Intermediate Report were filed by both the Union and the respondent.

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

FINDINGS OF FACT

I. RESPONDENT AND ITS BUSINESS

The Kentucky Firebrick Company is a Kentucky corporation which operates at Haldeman, Kentucky, two clay mines and two firebrick refractories. The clay is mined both from the property of the Pennsylvania and Kentucky Firebrick Company and from the respondent's own property. The respondent sells none of the clay which it mines but uses such clay in the manufacture of firebrick.

Both machine pressed brick and hand pressed brick are manufactured by the respondent. In the manufacture of either type of brick, labor is the most important factor. About 25 per cent of the bricks manufactured by the respondent are specially shaped directly upon the orders of its customers. Special shapes are always hand pressed.

The bricks manufactured by the respondent are either loaded into freight cars for shipment or placed in a warehouse for storage. The cars are loaded on a siding owned by the respondent and located on the respondent's property. However, they are switched by locomotives of the Chesapeake and Ohio Railway, an interstate carrier, which enter directly upon the respondent's tracks. All shipments to and from the plants are handled by the Chesapeake and Ohio. The respondent supplies most of the business at the Haldeman station of this railroad.

Firebrick is a very important element in the manufacture of steel. Because of its heat resisting qualities it is used in the lining of open hearth and other furnaces in steel mills. The respondent's market is wholly dependent upon the condition of the steel industry.

The Kentucky Firebrick Company is a wholly owned subsidiary of the United States Steel Corporation and all of its products are sold to other subsidiaries of that corporation.² A registration statement³ filed by the Illinois Steel Corporation with the Securities and Exchange Commission in 1935 reveals that the respondent and the Pennsylvania and Kentucky Firebrick Company are the only firebrick subsidiaries of that concern and that the refractories at Haldeman, Kentucky, are the only refractory brick plants owned by any

² The Pennsylvania and Kentucky Firebrick Company is also a subsidiary of U. S. Steel.

³ Board's Exhibit No. 5.

subsidiary of Illinois Steel. This same registration statement shows that the Illinois Steel Corporation, 100 per cent of whose stock is owned by the United States Steel Corporation, is an enterprise with assets of over \$243,000,000 which owns and operates at South Chicago, Illinois; Milwaukee, Wisconsin; Joliet, Illinois; and Gary, Indiana, plants for the production of pig iron, semi-finished and finished steel products and coke and coke by-products. The Illinois Steel Corporation owns all of the stock of the Chicago, Lake Shore and Eastern Railway Company and of the Joliet and Blue Island Railway Company, railroads owning rights of way between and around South Chicago, Illinois, and Gary, Indiana, and in Joliet, Illinois. These railroads are leased to the Elgin, Joliet and Eastern Railway Company, a common carrier.

The respondent's operations at Haldeman, Kentucky, are very largely controlled by its parent corporation. To such an extent is this true that D. B. Leadbetter, vice president and general superintendent of the respondent in charge of the Haldeman plants, does not even know the value of a carload of firebricks. It was frankly admitted at the hearing that the labor policy of the respondent is determined in Chicago.

The respondent's products are shipped entirely to points outside of the State of Kentucky, the vast majority going to the great steel producing States of Illinois, Indiana, Ohio and Pennsylvania.⁴ Out of 1766 carloads of bricks shipped by the respondent in 1934, 1935, and the first two months of 1936, 1675 were delivered into these four states. During this same period, none of the respondent's products were shipped to any point within the state of Kentucky.

All of the raw materials used by the respondent in the manufacture of firebrick are obtained from within the State of Kentucky. The only purchases made by the respondent in states other than Kentucky are of machinery and of parts for the repair of machinery. These purchases amounted to \$7,870.86 in the period from July 1, 1935 to March 1, 1936.⁵

The respondent's works at Haldeman, Kentucky, a town of only 387 persons, are the sole industry of that community. The respondent owns in and around Haldeman, in addition to its refractories and mines, 23 of about 70 houses located in that vicinity. It also owns and operates a company store. Haldeman may be accurately called a company town and the Kentucky Firebrick Company, the life blood of the community.

⁴A statement read by Mr. Leadbetter at the hearing revealed that shipments during this period were also made to Alabama, Connecticut, Massachusetts, Minnesota, New Jersey, and West Virginia.

⁵This total consisted of 148 separate purchases. They were shipped to the respondent from New York, Ohio, West Virginia, Pennsylvania, Illinois, Michigan, and Indiana.

II. THE UNION

Local Union No. 510 of the United Brick and Clay Workers of America is a labor organization, affiliated with the American Federation of Labor.

III. THE UNFAIR LABOR PRACTICES

A. Background of relations between the respondent and the Union

1. Events preceding the strike of June 1935

About May 1, 1934, the Haldeman Employees Representation Plan, herein referred to as the Plan, was organized by the respondent among the employees in its Haldeman plants. The Plan appears to have been dominated by the respondent to a large extent and officials of the respondent attended some of its meetings.

The domination of the Plan by the respondent and its failure to secure any benefits for its members resulted in considerable dissatisfaction among them. In July 1934, many members withdrew from the Plan and formed the Union. The Union grew rapidly and on September 27, 1934, it received a charter from the United Brick and Clay Workers of America.

Early in December 1934, the Union, believing an agreement with the respondent to be necessary for the safeguarding of the interests of its members, determined to seek a contract covering hours, wages, and other working conditions. On December 5 and 7, a committee of the Union conferred with the respondent's president, L. P. Haldeman. Mr. Haldeman, however, refused to discuss the matter of a contract and stated to the committee that it was against the policy of the respondent to enter into contracts with labor unions. The Union thereupon called a strike and the respondent's plants were forced to close. National guardsmen were called to Haldeman at the commencement of the strike but no violence occurred and they left within a few days.

Shortly after the beginning of the strike, the Union filed a complaint with the old National Labor Relations Board. A hearing was held on January 16, 1935, by the Cincinnati Regional Labor Board and the respondent was found to have violated Section 7 (a) of the National Industrial Recovery Act.⁶ Subsequently, on February 13, 1935, there was a meeting between Mr. Haldeman and the union committee at which the respondent, although still refusing to enter into a contract with the Union, offered to post a bulletin of labor policy covering the matters over which bargaining with the

⁶ Board's Exhibit No. 10.

Union had been carried on. The Union accepted this offer and the strike was called off.

The respondent refused to reinstate Allie Messer, one of the union members, following the strike. Also, despite the fact that the respondent's labor policy included an offer to bargain collectively at all times, the Union soon found it difficult to negotiate with the respondent concerning various problems which had arisen. As a result, in April 1935, the Union filed another complaint with the old National Labor Relations Board. No hearing on this complaint was ever held, however, because of the invalidation of the National Industrial Recovery Act.⁷

2. The strike of June 1935

The Union, believing its position to be less secure as a result of the voiding of the National Industrial Recovery Act, determined again in June 1935, to seek a contract with the respondent. A union committee conferred with Mr. Haldeman in regard to this matter on June 17. Upon his refusal to enter into a contract, the Union called a strike for the following morning. The strike occurred at a time when the respondent's operations were at a low ebb and the respondent made no attempt to operate its plants for several months.

During the course of the strike the Union tried on several different occasions to negotiate with the respondent. Mr. Haldeman left the community at the beginning of the strike, however, and the other officials of the respondent stated that they lacked authority to settle the question in dispute. For this reason a trip to Haldeman, early in July 1935, by P. A. Carmichael of the Conciliation Service of the United States Department of Labor was of no avail. An attempt in August or September by Stanley Mathewson of the National Labor Relations Board to arrange a conference between the respondent and the Union proved unsuccessful when the respondent's vice president stated that a conference was unnecessary.

In September, a rumor spread through Haldeman that the respondent intended to reopen its plants under the protection of the National Guard. C. S. Stinson, the secretary of the Union, then wired the United States Secretary of Labor that a serious situation would be created in Haldeman if some branch of the government did not intervene. As a result, Newcomb Barco of the Conciliation Service was sent to Haldeman late in September. He remained for several days and held conferences both with the Union and with various officials of the respondent. The respondent informed him

⁷ *Schechter Corporation v. United States*, 295 U. S. 495.

that it intended reopening its plants and offered to reinstate without discrimination all of its employees who had not been guilty of violence or of interfering with the respondent's "necessary operations, business, or affairs in any illegal manner."⁸ This offer was rejected by the Union with a request that the respondent reveal the names of the persons who had been guilty of violence. Upon the respondent's refusal to reveal such names the Union again rejected the offer. Seeing no prospect of a settlement Barco then left Haldeman.

During the week of October 7, 1935, the respondent began distributing cards to those of its employees whom it intended to rehire, telling them to report back to work. On October 17, the plants reopened under the protection of the National Guard. However, the union members, including those who had received cards, did not return to work. Committees of the Union held conferences with officials of the respondent on October 19 and 26 in which an attempt was made by them to persuade the respondent to reinstate all of its former employees and to leave to the civil authorities the task of determining the persons who had been guilty of illegal acts. The respondent rejected this proposal.

By this time, after more than four months of idleness, most of the union members were in destitute circumstances. As a result, on October 30, the Union adopted a suggestion by Miss Lockett, an examiner in the Regional Office for the Ninth Region of the National Labor Relations Board, that all persons who had received cards return to work and that the cases of the other union members be left to the Board to decide. The following day, the members of the Union who had received cards reported back to work.

3. The violence

The strike was marked by considerable violence. During the period in which the plants remained closed and for a short time thereafter, Haldeman and the region around it were the scenes of constant shooting and dynamiting. The violence apparently reached its peak in a battle fought on the night of August 17, 1935, between union members on the one side and members of the Plan and company guards on the other.

No real understanding of the strike of June 1935, and of the violence which occurred while it ran its course can be obtained unless it is borne in mind that the respondent's employees were divided into two organizations. The Haldeman Employees Representation Plan had lost only a portion of its members with the formation of the Union and at the time of the strike, although no exact figures are

⁸ Board's Exhibit No. 13.

available, the membership of the Plan seems to have been about equal to that of the Union. The Union had approximately 135 members.

The community appears to have been divided into two hostile camps during this period and feeling between the two groups ran high. The members of the Plan undoubtedly blamed the Union for the loss of their jobs. The union members, on the other hand, were no doubt embittered by the fact that each member of the Plan received \$2.50 per week during the period of the strike.⁹ Also, the fact that membership in the two organizations cut across family lines probably increased rather than decreased the bitterness which had arisen.

Haldeman is located in the Kentucky hill country. Most of the men in the section customarily carry guns and in the region surrounding Haldeman there is at all times a considerable amount of shooting. It was natural, therefore, that the occurrence in this community of a labor dispute of this character which effectively shut down its sole industry should be the signal for a violent flare-up between the opposing groups. The prolonging of the strike and the tenacity with which it was fought only intensified the bitter feeling which already existed.

The truly amazing fact which stands out from the mass of testimony concerning the violence is the very slight damage which actually resulted. No lives were lost on either side and the respondent admitted that the damage to its property resulting from alleged illegal conduct amounted to very little. The county judge testified that, with one exception, the only warrants issued in connection with the strike were for drunkenness and breach of the peace.

The respondent at no time contended that the illegal and violent acts which occurred during the strike were solely the fault of union members. The record clearly indicates that members of both the Union and the Plan were to blame. In fact, the only persons injured in the battle of August 17, the most serious outbreak, were union members.

B. Discrimination

The complaint, as amended, alleges that the respondent refused to reinstate 49 employees and delayed the reinstatement of 24 others because such employees joined and assisted the Union. The respondent admitted that 31 union members had been refused reinstatement but denied that it had either refused to reinstate or delayed the reinstatement of any employee because of such employee's union activi-

⁹ These weekly payments were received from the Haldeman Employees Representation Plan. The Plan did not have any dues but Mr. Leadbetter testified that a loan from the respondent enabled it to make the payments.

ties. It submitted a statement ¹⁰ showing its position with respect to each of the 73 individuals named in the complaint. In this statement it divided such individuals into the following six classifications:

1. Not to be Returned to Employment for Cause

Roscoe Adkins	Ersal Parker
J. R. Bailey	D. W. Rakes
Hazel Christian	C. C. Sparks
Cordie Davis	Andy Sturgell
Ralph Evans	Roy Sturgell
Roland Eldridge	James Sturgell
Dave Glover	Marvin Sturgell
Squire Hall	C. S. Stinson
W. C. Hogge	George Sparkman
Ivan Hogge	C. H. Stamper
William Lewis	William Sammon
Boone Lands	Cleo Stewart
J. E. Messer	W. F. Thomas
Estill Oney	Carl White
Everett Oney	Silas Wilson
Frank Pettit	

2. Returned to Employment Since October 31, 1935

Zode Adkins	Lorty Hamm
Hollie Adkins	Marvin Johnson
Bannie Adkins	Virgil Oney
Marion Black	Homer Rice
Noah Barker	Allen Roberts
Noah Caudill	J. H. Stewart
Charles Carter	Miles Sturgell
Lake Estep	Amos Thompson
Athol Eldridge	Earl Withrow
Powell Ferguson	Herb Withrow
Roscoe Ferguson	Clyde Wilson
M. F. Fraley	Jake Viars

3. Employees Not Called to Work Because of Their Absence from Community

Milza Black	A. B. Haynes
Richard Bradley	W. E. Powers
Frank Christian	Willie Stamper

¹⁰ Board's Exhibit No. 7.

4. Employees Who are Eligible to Return to Work But Whose Employment Numbers Have Not Yet Been Reached

G. W. Fraley	Thomas Oney
E. W. Gayheart	C. A. Sparks
J. R. Johnson	James Stinson
Everett Messer	Mose Stamper
James Mabry	Rube Thomas

5. Employees Unable to Return to Work Because of Injury or Illness

J. W. Glover

6. Employees Who Refused to Return to Work When Called

J. H. Reynolds

1. Employees not to be returned to employment for cause

Shortly before reopening its plants in October 1935, the respondent requested James Clay, a Kentucky attorney who had represented it at various times over a period of 15 years, to conduct an investigation into the violence which had taken place during the strike with a view to ascertaining for the respondent the persons who had been guilty of breaking the criminal laws of Kentucky. Clay testified that during the course of his inquiry he made five or six trips into Haldeman and took between 30 and 35 affidavits. On October 14 he wrote a letter ¹¹ to the respondent in which he listed 33 persons who, in his opinion, had committed felonies during the strike. On October 25 Clay wrote another letter ¹² to the respondent in which he named three additional persons who had "made most damaging threats against the company and its property". Thirty of the 36 persons named by Clay were members of the Union while the other six were not even employees of the respondent. No member of the Plan was included in the list.

Subsequent to the conclusion of Clay's investigation the respondent obtained an affidavit with respect to another union member and submitted it to William Beye, its Chicago attorney. Upon Beye's statement that in his opinion the respondent would be justified in not reemploying such person, that union member also was refused reinstatement.

Included among the 31 employees designated by the respondent's attorneys were the vice president, secretary and treasurer of the Union, as well as most of the members who had served on the various

¹¹ Respondent's Exhibit No. 1.

¹² Respondent's Exhibit No. 2.

union committees.¹³ Of the three persons named in Clay's second letter as having "made most damaging threats against the company and its property", two were union members who had already received cards but had refused to return to work until the Union called off the strike.

It was freely admitted by the respondent at the hearing that the violence which had occurred during the strike had not been limited to union members but had been committed by members of both the Union and the Plan. The respondent's vice president and general manager, who had requested an opinion from Mr. Beye as to whether he would be justified in not reemploying a particular union member, testified that he had heard rumors of certain members of the Plan, now back at work at the respondent's plants, who had been guilty of shooting. Yet he made no attempt to ascertain the guilt or innocence of these persons. This fact is significant in determining whether the real purpose of Clay's investigation was to find out the names of the persons who had committed illegal acts or whether such purpose was to furnish the respondent with an excuse not to reinstate the most active members of the Union.

This Board cannot condone violence by any party to a labor dispute. An employer cannot, however, use the fact that violence has been committed during a strike as a pretext for not reinstating some of his employees where the real motive behind his refusal is the union activities of such employees and not an honest belief that they have engaged in illegal acts. In the present case, despite the fact that the respondent knew that violence had been committed by both its union and nonunion employees, not a single nonunion employee was denied reinstatement. The respondent based its belief that the 31 union members had committed unlawful acts upon opinions of counsel received from the respondent's own agents, opinions based upon affidavits obtained from persons selected by such agents in an investigation conducted by them. None of the accused employees were interviewed by Clay and none of them were given an opportunity by the respondent to contradict the charges against them. The affidavits upon which the opinions of counsel were based were not introduced into evidence at the hearing. Thirty of the 31 persons named in the opinions of counsel were not linked at the hearing to any specific acts of violence. Sixteen of them testified and denied that they had engaged in any illegal conduct. The designation of the respondent's own attorney to investigate the violence, the pursuit of the investiga-

¹³ The "big shot" of the Union and its most active member was its secretary, C. S. Stinson. C. A. Sparks, the president of the Union, was one of the ten persons whose employment numbers had not yet been reached by the respondent but whom it alleged that it intended rehiring.

tion in such a way that the testimony of union members would not be heard, and the selection of the Union's most active members as the persons who had committed the violence lead inevitably to the conclusion that the purpose of the inquiry and the opinions of counsel based thereon was to furnish the respondent with an excuse not to reinstate the most active members of the Union rather than to ascertain the names of the individuals on both sides who had been guilty of unlawful conduct during the strike.

The case of Boone Lands, one of the union members denied reinstatement, differs from that of the other 30. Lands was named in Clay's letter of October 14 as one of the persons who had committed illegal acts during the strike, and the determination of the respondent not to rehire Lands was undoubtedly grounded, in so far as that letter was concerned, on Lands' union activities. It is clear that the respondent discriminated against Lands because of his membership in the Union.

However, Lands subsequently was arrested and indicted for the shooting of Herb Christian, a nonunion workman, on the night of October 30. Christian was injured so severely that one of his legs had to be amputated. Lands was the only person indicted for a serious crime during the strike despite all of the shooting which occurred. Under all of the circumstances of this case, therefore, and without in any way passing on the guilt or innocence of Lands, we will not order the respondent to reinstate him.

2. Returned to employment since October 31, 1935

The complaint, in addition to charging the respondent with refusing to reinstate 49 of its employees because of their union activities, alleged that the respondent had postponed the reinstatement of 24 others for the same reason. These 24 employees were back at work at the time of the hearing. Two of them had been reinstated in December 1935, seven in January 1936, 12 in February 1936, and the other three, in March 1936. Since 21 of these men had reported back for work on October 31, 1935, and the other three shortly thereafter, it is quite apparent that a considerable period of time elapsed before they were returned to their jobs.

The respondent explained that prior to the strike it had carried more men on its pay roll than it actually needed and had followed the policy of spreading the work among them. Before reopening its plants, however, it determined not to reemploy more men than the actual operations of the plants required. Since operations were only gradually resumed over a period of several months there was no work available for a number of employees for some time following the strike.

During the second week in October, the respondent issued cards to its employees, calling them back to work on the basis of their seniority. If a workman did not report when called, however, his position was not kept open for him but was given to the person next on the list. By the time the union members reported for work on October 31, therefore, all of the members of the Plan had been given jobs. As a result, many members of the Union, though senior in service to some members of the Plan, were not reinstated for several months. The evidence clearly indicates that the delay in reinstating these 24 union members was occasioned by their failure to return to work when called and not by their union activities.

3. Employees not called to work because of their absence from community

Six union members were absent from the community when operations were resumed. There was evidence that some of these six individuals were absent only because the respondent's plants were closed and that they would return to Haldeman if they could secure employment. Since the respondent stated at the hearing that the reason they had not been notified to report back to work was their absence from Haldeman and that it was willing to reinstate them if they returned, the charge of discrimination by the respondent in refusing to reinstate them is not borne out by the evidence. If the six are refused reinstatement upon their return to Haldeman, the question of whether such refusal is predicated upon their union membership can be considered at that time.

4. Employees who are eligible to return to work but whose employment numbers have not yet been reached

The respondent testified that ten of the 49 union members who the complaint charges were denied reinstatement because of union activities were not back at work because their names had not yet been reached on the employment list and that the reason for the delay in placing them was their tardiness in reporting after the strike. The discussion in paragraph 2, *supra*, applies equally well to these ten men and we cannot find that at the time of the hearing discrimination because of union activities had been practiced against them. If subsequent events show that the respondent is discriminating against them by reinstating employees with less seniority or by hiring new employees instead of reinstating these ten union members, the question of whether such discrimination is a result of their union activities can be considered at that time.

5. Employees unable to return to work because of injury or illness

The respondent's uncontradicted testimony indicated that the reason J. W. Glover, one of the union members named in the complaint, had not been reinstated was because he was injured or sick and unable to work. The charge of discrimination in his case is, therefore, not borne out by the evidence. If, upon Glover's reporting for work he is denied reinstatement, the question of whether such denial is based upon his union activities can then be considered.

6. Employees who refused to return to work when called

The statement introduced by the respondent¹⁴ shows that J. H. Reynolds, a member of the Union, reported for work on November 1, 1935, but subsequently refused to return to work when called. This evidence was not contradicted at the hearing. It is clear, therefore, that the failure to reinstate J. H. Reynolds, following the strike, was not because of his union activities.

C. Conclusion

The strike of June 1935, being a controversy concerning terms of conditions of employment, was obviously a "labor dispute" within the meaning of Section 2, subdivision (9) of the Act. The work of the 73 union members named in the complaint having ceased as a result of a current labor dispute, they at all times thereafter retained their status as employees of the respondent within the meaning of Section 2, subdivision (3) of the Act.

The action of the respondent in denying reinstatement to the following 31 employees, namely, Roscoe Adkins, J. R. Bailey, Hazel Christian, Cordie Davis, Ralph Evans, Roland Eldridge, Dave Glover, Squire Hall, W. C. Hogge, Ivan Hogge, William Lewis, J. E. Messer, Estill Oney, Everett Oney, Frank Pettit, Ersell Parker, D. W. Rakes, C. C. Sparks, Andy Sturgell, Roy Sturgell, James Sturgell, Marvin Sturgell, C. S. Stinson, George Sparkman, C. H. Stamper, William Sammon, Cleo Stewart, W. F. Thomas, Carl White, Silas Wilson, and Boone Lands was for the reason that they had joined and assisted the Union. The respondent's conduct in so denying reinstatement to these employees was calculated to and did have the necessary effect of discouraging membership in the Union. We find that the respondent has discriminated against its employees in regard to hire and tenure of employment, thereby discouraging membership in a labor organization, and has interfered with, re-

¹⁴ Board's Exhibit No. 7.

strained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act.

The delay by the respondent in reinstating 24 of its union employees, namely, Zode Adkins, Hollie Adkins, Bannie Adkins, Marion Black, Noah Barker, Charles Carter, Noah Caudill, Lake Estep, Athol Eldridge, Powell Ferguson, Roscoe Ferguson, M. F. Fraley, Lorty Hamm, Marvin Johnson, Virgil Oney, Homer Rice, Allen Roberts, Miles Sturgell, J. H. Stewart, Amos Thompson, Earl Withrow, Herb Withrow, Clyde Wilson, and Jake Viars was occasioned by their tardiness in reporting back to work after the reopening of the plants and not by their action in joining and assisting the Union. We find that the respondent in delaying the reinstatement of these employees did not discriminate in regard to hire and tenure of employment for the purpose of discouraging membership in a labor organization.

The respondent, at the hearing, stated its willingness to reinstate six of its union employees, namely, Milza Black, Richard Bradley, Frank Christian, A. B. Haynes, W. E. Powers, and Willie Stamper, if they returned to the community. No question is presented at this time, therefore, as to whether the failure to reinstate these men is because they have joined and assisted the Union. Such question may arise, however, if upon their return to Haldeman they are denied reinstatement. We will dismiss without prejudice the allegations of the complaint with respect to these employees.

The failure of the respondent to reinstate ten of its union employees, namely, G. W. Fraley, E. W. Gayheart, J. R. Johnson, Everett Messer, James Mabry, Thomas Oney, C. A. Sparks, James Stinson, Mose Stamper, and Rube Thomas, appears at this time to have been due to their tardiness in reporting back to work after the reopening of the plants rather than to their action in joining and assisting the Union. Subsequent events may show the contrary to have been true, however. The allegations of the complaint with respect to these men will be dismissed without prejudice.

The respondent's testimony indicates that the reason for its refusal to reinstate J. W. Glover, a member of the Union, was because he was injured or sick and unable to return to work. If, upon his recovery, Glover is denied reinstatement, the question of whether the respondent has discriminated against him because he has joined and assisted the Union may arise. The allegations of the complaint with respect to J. W. Glover, therefore, will be dismissed without prejudice.

The failure of the respondent to reinstate J. H. Reynolds, also a member of the Union, was caused by the refusal of Reynolds to return to work when called. We find that the respondent, in the case of

J. H. Reynolds, did not discriminate in regard to hire and tenure of employment for the purpose of discouraging membership in a labor organization.

IV. THE EFFECT OF UNFAIR LABOR PRACTICES UPON COMMERCE

In 1934, the respondent delivered 1047 carloads of firebrick into the stream of interstate commerce. In 1935, it shipped only 499 carloads. Yet during this same period business conditions generally were improving. It is quite evident that the explanation for this sharp curtailment in the respondent's business is the two strikes that took place in 1935 at its plants.

The Kentucky Firebrick Company cannot be considered as a complete unit in itself, operating only at Haldeman, Kentucky. Owned and dominated by the Illinois Steel Corporation, its Haldeman plants the only firebrick refractories controlled by that corporation, the respondent must be pictured as an integral part of Illinois Steel. The only logical assumption that can be drawn from the relationship between these two corporations is that a labor dispute at Haldeman, Kentucky, would directly affect activities at other points in the organization of Illinois Steel throughout the Midwest.

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

THE REMEDY

The refusal of the respondent to reinstate 31 of its employees on October 31, 1935, the day following the termination of the strike by the Union, constituted a discharge of such employees. In the case of employees who have been discharged because of unfair labor practices, we normally order reinstatement with back pay from the date of the discharge to the time of the respondent's offer of reinstatement.¹⁵ In view of the Trial Examiner's recommendations in the present case, however, the respondent could not have been expected to reinstate the other employees after it received the Intermediate Report, and therefore it should not be required to pay them back pay from that time to the date of this decision.¹⁶

¹⁵ For the reasons stated above, we are not requiring the respondent to reinstate Boone Lands.

¹⁶ *Matter of E. R. Haffelfinger Company, Inc. and United Wall Paper Crafts of North America, Local No. 6*, 1 N. L. R. B. 760.

CONCLUSIONS OF LAW

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

1. Local Union No. 510 of the United Brick and Clay Workers of America is a labor organization, within the meaning of Section 2, subdivision (5) of the Act.

2. The strike of June 18, 1935, was a labor dispute, within the meaning of Section 2, subdivision (9) of the Act.

3. Roscoe Adkins, J. R. Bailey, Hazel Christian, Cordie Davis, Ralph Evans, Roland Eldridge, Dave Glover, Squire Hall, W. C. Hogge, Ivan Hogge, William Lewis, J. E. Messer, Estill Oney, Everett Oney, Frank Pettit, Ersell Parker, D. W. Rakes, C. C. Sparks, Andy Sturgell, Roy Sturgell, James Sturgell, Marvin Sturgell, C. S. Stinson, George Sparkman, C. H. Stamper, William Sammon, Cleo Stewart, W. F. Thomas, Carl White, Silas Wilson, and Boone Lands were at the time of their discharge, and at all times thereafter, employees of the respondent, within the meaning of Section 2, subdivision (3) of the Act.

4. The respondent, by discriminating in regard to the hire and tenure of employment of Roscoe Adkins, J. R. Bailey, Hazel Christian, Cordie Davis, Ralph Evans, Roland Eldridge, Dave Glover, Squire Hall, W. C. Hogge, Ivan Hogge, William Lewis, J. E. Messer, Estill Oney, Everett Oney, Frank Pettit, Ersell Parker, D. W. Rakes, C. C. Sparks, Andy Sturgell, Roy Sturgell, James Sturgell, Marvin Sturgell, C. S. Stinson, George Sparkman, C. H. Stamper, William Sammon, Cleo Stewart, W. F. Thomas, Carl White, Silas Wilson, and Boone Lands, and each of them, has engaged in and is engaging in unfair labor practices, within the meaning of Section 8, subdivision (3) of the Act.

5. The 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.

6. The unfair labor practices referred to in paragraphs 3 and 4 above are unfair labor practices affecting commerce, within the meaning of Section 2, subdivisions (6) and (7) of the Act.

7. The respondent, by discharging J. H. Reynolds, has not discriminated in regard to hire and tenure of employment, within the meaning of Section 8, subdivision (3) of the Act.

8. The respondent, by delaying the reinstatement of Zode Adkins, Hollie Adkins, Bannie Adkins, Marion Black, Noah Barker, Charles Carter, Noah Caudill, Lake Estep, Athol Eldridge, Powell Ferguson, Roscoe Ferguson, M. F. Fraley, Lorty Hamm, Marvin Johnson,

Virgil Oney, Homer Rice, Allen Roberts, Miles Sturgell, J. H. Stewart, Amos Thompson, Earl Withrow, Herb Withrow, Clyde Wilson, and Jake Viars, has not discriminated in regard to hire and tenure of employment, within the meaning of Section 8, subdivision (3) of the Act.

9. The respondent, by failing to reinstate Milza Black, Richard Bradley, Frank Christian, A. B. Haynes, W. E. Powers, Willie Stamper and J. W. Glover, has not discriminated in regard to hire and tenure of employment, within the meaning of Section 8, subdivision (3) of the Act.

10. The respondent, by delaying the reinstatement of G. W. Fraley, E. W. Gayheart, J. R. Johnson, Everett Messer, James Mabry, Thomas Oney, C. A. Sparks, James Stinson, Mose Stamper, and Rube Thomas, has not discriminated in regard to hire and tenure of employment, within the meaning of Section 8, subdivision (3) of the Act.

11. The respondent, by discharging J. H. Reynolds, by failing to reinstate Milza Black, Richard Bradley, Frank Christian, A. B. Haynes, W. E. Powers, Willie Stamper, and J. W. Glover, and by delaying the reinstatement of Zode Adkins, Hollie Adkins, Bannie Adkins, Marion Black, Noah Barker, Charles Carter, Noah Caudill, Lake Estep, Athol Eldridge, Powell Ferguson, Roscoe Ferguson, M. F. Fraley, Lorty Hamm, Marvin Johnson, Virgil Oney, Homer Rice, Allen Roberts, Miles Sturgell, J. H. Stewart, Amos Thompson, Earl Withrow, Herb Withrow, Clyde Wilson, Jake Viars, G. W. Fraley, E. W. Gayheart, J. R. Johnson, Everett Messer, James Mabry, Thomas Oney, C. A. Sparks, James Stinson, Mose Stamper, and Rube Thomas, has not interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act, within the meaning of Section 8, subdivision (1) 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 the respondent, Kentucky Firebrick Company, and its officers, agents, successors, and assigns, shall:

1. Cease and desist from discouraging membership in Local Union No. 510 of the United Brick and Clay Workers of America, or any other labor organization of its employees, by discharging, threatening to discharge, or refusing to reinstate any of its employees for joining or assisting Local Union No. 510 of the United Brick and Clay Workers of America, or any other labor organization of its employees;

2. Cease and desist from in any manner discriminating against any of its employees in regard to hire or tenure of employment for joining or assisting Local Union No. 510 of the United Brick and Clay Workers of America, 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 purpose 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 to Roscoe Adkins, J. R. Bailey, Hazel Christian, Cordie Davis, Ralph Evans, Roland Eldridge, Dave Glover, Squire Hall, W. C. Hogge, Ivan Hogge, William Lewis, J. E. Messer, Estill Oney, Everett Oney, Frank Pettit, Ersell Parker, D. W. Rakes, C. C. Sparks, Andy Sturgell, Roy Sturgell, James Sturgell, Marvin Sturgell, C. S. Stinson, George Sparkman, C. H. Stamper, William Sammon, Cleo Stewart, W. F. Thomas, Carl White, and Silas Wilson, and each of them, immediate and full reinstatement, respectively, to their former positions, without prejudice to their seniority or other rights and privileges;

(b) Make whole the persons named in paragraph 4 (a) above, and each of them, for any losses of pay they have suffered by reason of their discharge, by payment to them, respectively, of a sum of money equal to that which each would normally have earned as wages during the periods from October 31, 1935, to the receipt of the Intermediate Report by the respondent, and from the date of this decision to the time of such offer of reinstatement, less the amounts, if any, which each earned during such periods;

(c) Post immediately notices to its employees in conspicuous places throughout its place of business, 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 Ninth Region in writing 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,

5. The allegations of the complaint be, and they hereby are, dismissed without prejudice with respect to the discharge of Milza Black, Richard Bradley, Frank Christian, A. B. Haynes, W. E. Powers, Willie Stamper, G. W. Fraley, E. W. Gayheart, J. R.

Johnson, Everett Messer, James Mabry, Thomas Oney, C. A. Sparks, James Stinson, Mose Stamper, Rube Thomas, and J. W. Glover; and

6. The allegations of the complaint be, and they hereby are, dismissed with respect to the discharge of J. H. Reynolds, and with respect to the delay in reinstating Zode Adkins, Hollie Adkins, Bannie Adkins, Marion Black, Noah Barker, Charles Carter, Noah Caudill, Lake Estep, Athol Eldridge, Powell Ferguson, Roscoe Ferguson, M. F. Fraley, Lorty Hamin, Marvin Johnson, Virgil Oney, Homer Rice, Allen Roberts, Miles Sturgell, J. H. Stewart, Amos Thompson, Earl Withrow, Herb Withrow, Clyde Wilson, and Jake Viars.