

In the Matter of FREDERICK R. BARRETT and INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL NO. 978

Case No. C-173.—Decided August 31, 1937

Stevedoring Industry—Labor Organization: Board will not interfere in internal affairs of; local union entitled to invoke remedies of Act regardless of its standing with parent organization—*Discrimination:* discharges for purpose of discouraging membership in one union and encouraging membership in another—*Reinstatement Ordered:* of employees who would not have been discharged if selections for discharge had been made on basis of seniority and not for purpose of discouraging membership in union; displacement of employees who would have been discharged if such discharges had been made on basis of seniority; displacement of employees hired since date of such discharges; preferential list ordered for reemployment of balance of employees discriminatorily discharged—*Back Pay:* awarded, based upon average earnings of employees retained and working subsequent to date of discriminatory discharges.

Mr. Jacob Blum for the Board.

Mr. Tazewell Taylor and *Mr. Tazewell Taylor, Jr.*, of Norfolk, Va., for the respondent.

Mr. Ernest S. Merrill, of Norfolk, Va., for Local 978.

Mr. Arthur E. Reyman, of Washington, D. C., for I. L. A.

Mary Lemon Schleifer, of counsel to the Board.

DECISION

STATEMENT OF THE CASE

On March 24, 1937, Local No. 978, International Longshoremen's Association, herein called Local 978, filed a charge with the Regional Director for the Fifth Region (Baltimore, Maryland) alleging that Frederick R. Barrett, Norfolk, Virginia, herein called the respondent, had engaged in and was engaging in unfair labor practices affecting commerce, within the meaning of the National Labor Relations Act, 49 Stat. 449, herein called the Act. On April 9, 1937, the Regional Director duly issued and served upon the parties a complaint and notice of hearing. The complaint alleged in substance that during the month of April 1935, and continuously to date the respondent had conspired with certain corrupt and discredited officials of Local 978 for the purpose of intimidating and coercing the members of Local 978 into dissociating themselves from that organization and into joining another labor organization, and that in furtherance of said conspiracy the respondent discharged 19 named per-

sons on April 1, 1935 and 32 named persons on February 21, 1936, and that such acts constituted 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.

On April 14, 1937, the respondent filed an answer to the complaint in which he denied that he had engaged in such a conspiracy and alleged that the men named had been discharged because of a decreasing volume of business and that discharges had been made on the basis of relative efficiency. The answer also stated that the respondent believes he is subject to the provisions of the Railway Labor Act¹ and consequently not subject to the jurisdiction of the National Labor Relations Act.

On April 26, 1937, International Longshoremen's Association, herein called I. L. A., filed a petition for intervention on the grounds that Local 978, as a local of I. L. A., is and has been since October 6, 1935, a non-existent organization; that since October 12, 1935, Local No. 1379, herein called Local 1379, has been the only local union of the I. L. A. in Norfolk, Virginia; and that since October 12, 1935, the respondent and Local 1379 have observed a working agreement by which members of Local 1379 are employed from time to time as needed by the respondent. The motion was not acted upon prior to the hearing.

Pursuant to an amended notice, a hearing was begun at Norfolk, Virginia, on April 29 and continued through May 8, 1937, before Charles A. Wood, the Trial Examiner duly designated by the Board. Full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues, was afforded all parties.

The petition to intervene was renewed at the hearing by counsel for I. L. A., who stated that he abandoned all points raised by the petition filed prior to the hearing, except that Local 978 is not a local in good standing of the I. L. A. and does not have a charter from the I. L. A. The Trial Examiner allowed I. L. A. to intervene for the purpose stated. Counsel for the respondent moved that the complaint be dismissed on the grounds that the respondent was subject to the jurisdiction of the Railway Labor Act and therefore, by virtue of Section 2, subdivision (2) of the Act, not subject to the jurisdiction of the National Labor Relations Act. The motion was denied. At the close of the hearing, counsel for the respondent moved that the complaint be dismissed on the grounds that the proof offered did not sustain the allegations of the complaint. This motion was likewise denied.

¹ Act of June 21, 1934; 45 U. S. C. A. 151 et seq.

Many objections were made by counsel for the various parties to the introduction of evidence. The Board has reviewed the rulings of the Trial Examiner on motions and objections and finds that no prejudicial errors were committed. The rulings are hereby affirmed.

On May 11, 1937, the Board, acting pursuant to Article II, Section 37 of its Rules and Regulations—Series 1, as amended, ordered the proceeding transferred to and continued before the Board.

On June 2, 1937, I. L. A. filed a brief and on June 16, 1937, the Board heard oral argument by the parties at Washington, D. C.

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

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The answer of the respondent admits the allegations of the complaint issued by the Board, which state

1. The respondent is and has been for a long period of time engaged as an independent contractor in supplying longshoremen for the purpose of unloading coal from interstate freight trains and reloading such coal into interstate vessels, at the Port of Norfolk, Virginia.

2. The respondent in the course and conduct of his business, and principally for the Norfolk and Western Railroad, an interstate common carrier, causes and has for a long period of time caused interstate shipments of coal to be unloaded from interstate trains of the Norfolk and Western Railroad, and causes and has for a long period of time caused the said coal to be reloaded into various vessels at the Port of Norfolk, Virginia, where it is used for the fuel necessary to propel the said vessels in interstate commerce.

The aforesaid business of the respondent occurs in the course of commerce among the various states of the United States, and foreign countries, and is an integral part of that commerce, all of the aforesaid constitutes a continuous flow of commerce among the several states of the United States and foreign countries.

We find that the respondent is engaged in trade, traffic, transportation, and commerce among the several States, and between the United States and foreign countries, and that the longshoremen employed by the respondent are directly engaged in such trade, traffic, transportation, and commerce.

II. THE UNIONS

The predecessor of Local 978 was formed in October 1916, and was directly affiliated with the American Federation of Labor. In

1918 it joined I. L. A., becoming Local 978, I. L. A. Jurisdiction of Local 978 was limited to colored longshoremen employed by the respondent.

The intervenor, I. L. A., contends that the charter of Local 978 has been revoked, and that if the Board issues a decision in a case arising on a charge filed by Local 978, the decision would constitute a determination by the Board that Local 978 is still a local in good standing of I. L. A.

As we have said many times before, the Board will not interfere in the internal affairs of labor organizations.² It follows that we will make no attempt in this decision to determine whether or not the charter of Local 978 has been revoked, or if revoked, whether such revocation was proper. However, the present contention of I. L. A. has no relevance to the Board's doctrines. Whether Local 978 is or is not a local of I. L. A., it is still a labor organization within the meaning of the Act, and is accordingly entitled to invoke the remedies of the Act against an employer, whatever its standing with the International. That is all we believe we need decide for purposes of the present case.

Local 1379, I. L. A. was chartered in January 1935. It likewise has jurisdiction over colored longshoremen employed by the respondent, and is a labor organization within the meaning of the Act.

III. THE UNFAIR LABOR PRACTICES

For the purpose of answering certain contentions of the intervenor and the respondent, and in order that the alleged unfair labor practices of the respondent may be presented in an understandable way, it is necessary that we relate briefly the salient steps in the history of Local 978 and Local 1379.

In 1918, the respondent entered into a closed shop agreement with Local 978. The closed shop remained in force until March 1935. During this period, the custom of operation, though not specifically set forth in the contract, was that the respondent selected eight gang leaders,³ who in turn selected 40 longshoremen to work in each of their gangs; and the gangs were given numbers, from one to eight. The respondent's only contact with his employees was maintained through the business agent and the working rules committee of Local 978, whose salaries were paid by the members of Local 978. These agents received instructions from the respondent concerning

² See: *Matter of Aluminum Company of America and Aluminum Workers Union No. 1910*, Case No. R-4, 1 N. L. R. B. 530; and *Matter of The Axton-Fisher Tobacco Company and International Association of Machinists, Local No. 681 and Tobacco Workers International Union, Local No. 16*, Case No. R-5, 1 N. L. R. B. 604

³ During the British coal strike in 1926, three additional gangs were temporarily employed.

the work to be done, carried such instructions to the gang leaders, and allocated the work among the gangs. Discipline, by means of temporary lay-off or discharge, was maintained by Local 978. Payment for services rendered by the entire group was made by the respondent to timekeepers, members of Local 978, who distributed the money so received among the men in proportion to the work performed by each. At no time prior to 1933 did the respondent personally hire or fire any of his employees; in fact, before 1931 he did not even know the names of most of his employees.⁴

The officers of Local 978, who had been re-elected yearly since 1928, included David Alston, president; George W. Millner, business agent;⁵ Edward Green, secretary-treasurer; N. D. Lawrence and Henry Copeland, working rules committee; and George W. Millner, James M. Gallup and Harry Smith, trustees. In the latter part of 1932 or the early part of 1933, dissension arose in the ranks of Local 978. This dissension is alleged to have been caused by a combination of factors, including the objection of members to large assessments, the failure of the officers to account for disbursements, the refusal of the officers to make account books accessible for examination by members, and the refusal of the officers to sue the respondent to recover sums which the complaining members felt had been improperly deducted from their wages.

In January 1933, one month prior to the expiration of the contract,⁶ the respondent notified Local 978 that in the execution of a contract for the following year he wanted the following provision inserted:

It is agreed that the party of the first part (i. e., the respondent) has the right to specify the number of gangs to be employed and also the right to designate the number of men in each gang, and as to what men shall constitute the personnel of each gang.

The respondent admitted at the hearing that Millner had suggested this provision be inserted in the contract. Although the membership of Local 978 protested against the inclusion of such a provision in the contract, they voted to accept the contract on Millner's statement: "You had just as well sign it, because I am going to sign it."

⁴ In 1931, most of the employees of the respondent joined a group insurance plan and the names of participators were given to the respondent. The first complete list was secured by the respondent in March 1935, for the purposes of the Railroad Retirement Act.

⁵ George W. Millner is also third vice-president of the I. L. A. He is not an employee of the respondent, although a list of present employees submitted by the respondent at the hearing includes his name. The respondent stated Millner's name was carried as an employee for the purpose of allowing him to participate in the group insurance of the respondent's employees.

⁶ Contracts were drawn for a period of one year, and to continue thereafter until notice of termination was given by the parties in the manner provided by the contract.

In June 1933, the respondent discharged gangs five and six. He testified that due to a decreasing volume of business, the men were obtaining less work; as a consequence, they were not earning a living wage, and accidents were increasing because the men were becoming soft. The respondent also testified that although often requested to do so, the working rules committee and the business agent of Local 978 failed to choose the men who should be discharged, and that, finally, the respondent made the selection on the basis of the report of the working rules committee that gangs five and six were the least efficient.

Subsequent to the discharge of these gangs, the officers of Local 978 attempted to exclude these men from the union meetings and failing to do so, held meetings only on the pier, to which the discharged employees had no access. The dissatisfaction of many of the members of Local 978 with the actions of its officers resulted, in November 1933, in the filing of a bill of complaint in the Court of Law and Chancery of the City of Norfolk, against David Alston, George W. Millner and Edward Green to compel them to hold a meeting for the election of officers.⁷ On January 16, 1934, the court decreed that a general meeting be held on January 26, 1934, for the purpose of electing officers for the ensuing year and directed that such election be conducted by certain named officers of the court. On February 2, 1934, following the election, the court decreed that the officers elected were Junius Batts, president; Henry Knotts, vice-president; John Bailey, secretary-treasurer; Watson Goodman, business agent; N. D. Lawrence and Henry Copeland, working rules committee; and Charles Williams, Thomas Cook, and M. Tyler, trustees. The order of the court also directed that the old officials turn over the money, books, papers, etc. of Local 978 to the newly elected officers.

In April 1934, the newly elected officers employed a certified public accountant to audit the books of the old officers. The report of the accountant, filed July 17, 1934, stated that the accounts were in very unsatisfactory condition and that many of the vouchers and books had been removed from the office or destroyed, but that on the basis of the material available, there was an apparent shortage of \$5,754.28. A second bill of complaint was thereupon filed in the same court, against George W. Millner, James M. Gallup, Harry Smith, Edward Green and David Alston for an accounting of these funds.

The court found, on June 1, 1935, that Green had misappropriated and embezzled \$4,868.57 of the monies of Local 978, and that \$4,535.67 had been lost by reason of the failure of Millner and Gallup to properly audit the accounts of the secretary-treasurer, and directed

⁷ Counsel for the respondent in the case before the Board acted as counsel for the defendants in this suit.

that the complainants recover the sum of \$4,868.57.⁸ No portion of this sum has ever been recovered. Green was imprisoned for embezzlement, and Millner filed a petition in bankruptcy. The International failed to prosecute on the bond of the secretary-treasurer.

In October 1934, Millner, Green, Gallup, Smith and Alston were expelled from Local 978 by vote of the members.⁹ The ousted members thereupon appealed to the Hampton Roads District Council,¹⁰ herein called The Water Front Council, which notified Local 978 to be present at a meeting of November 7, 1934, at which time the appeals would be taken up. Representatives of Local 978 attended this meeting. No action was taken on the appeals but by a majority vote of the delegates present, it was moved to revoke the charter of Local 978. Although the Water Front Council had no authority to take such action, the motion was used for the purpose of preferring charges against Local 978 to the International. The charges filed, which were sent by President Ryan of the International to Local 978 on December 7, 1934, were in substance:

1. That Local 978 allowed members who were delinquent in dues to attend meetings in violation of its Constitution;
2. That members of Local 978 were taking part in dual organizations and going to communistic meetings;
3. That Local 978 was refusing to pay taxes to The Water Front Council on the pretext it had no money.

Apparently no action was ever taken by I. L. A. against Local 978 on the basis of these charges.

In December 1934, Alston, and others who were termed "loyal followers" by Millner, set up a club among the employees of the respondent. On January 10, 1935, despite protests by Local 978, I. L. A. issued a charter to the club, which then became Local 1379, I. L. A.¹¹ Forty-four of the 240 employees of the respondent were members of the club when the charter was issued. These 44 persons continued to be employed by the respondent, despite his closed shop contract with Local 978.¹²

⁸ The respondent appeared as a character witness for the defendants in this case.

⁹ The record shows that the respondent was notified of the expulsion of these members

¹⁰ This is an association of various locals in the district affiliated with the American Federation of Labor.

¹¹ Ryan notified Local 978 on the same day that a charter had been issued to Local 1379 and stated that it had been issued on the recommendation of The Water Front Council.

¹² Minutes of meeting of Local 1379 on February 11, 1935, include the following:

"... next were the Special Committee report the Special Committee recommended that we begin paying dues to 978 to safeguard ourselves M-S (moved and seconded) that the report be received and that the recommendation complied with M-S next we heard an excellent report coming from our Vice President in being in conference with our employer and how that he had looked after our cares and he also presented a Gold membership button to the 10 Chartered members of Local #1379 as a token for the part that they played. . ."

One month later, on February 14, 1935, the respondent gave notice to Local 978 that in accordance with a provision of the contract allowing either party to cancel upon 30 days written notice, he was cancelling the contract, the cancellation to become effective on March 31, 1935, after which date he would operate on an open-shop basis.

When the men reported for work on April 1, 1935, the day after the cancellation became effective, Lawrence and Copeland stood at the entrance to the pier and issued passes to certain employees whose names were on lists which they held. Only the persons receiving passes were permitted to work. Twenty-three men who did not receive passes, were told they were discharged and ordered to secure their property on the pier and to leave immediately.

The evidence as to how the men were selected for discharge is sharply contradictory. In view of the conclusion hereafter reached concerning these discharges, it is unnecessary to determine whether they were selected for discharge by the working rules committee or by the respondent. Suffice it to say that all 23 were members of Local 978, none members of Local 1379, whose membership at this time numbered 109 and included Lawrence and Copeland, the members of the working rules committee. Junius Batts, Henry Knotts, and Watson Goodman, president, vice president and business agent, respectively, of Local 978 were among those discharged. At the same time the gangs were reorganized, the new gang five being composed entirely of members of Local 978, with the exception of a newly appointed gang leader and a second man or assistant who were members of Local 1379.

Shortly thereafter Millner, as business agent of Local 1379 and as vice president of the International, requested the respondent to enter into a contract with Local 1379. The petition of the intervenor states that a "working agreement" was entered into by the respondent and Local 1379 on October 12, 1935. However, the respondent denies that he has ever entered into any contract with Local 1379, though often solicited by Millner to do so. It seems apparent from the record that no such contract was entered into, at least during the period with which we are concerned.¹³

In July 1935, the delegates of Local 978 were ordered to leave the convention of the Atlantic Coast District of I. L. A. and the national

¹³ The minutes of the meeting of Local 1379 about one year later, on March 17, 1936, include the following:

" . . . a recommendation from the executive board stating that the I. L. A. Vice-President and the wage committee be ordered to go into the matter of a wage agreement with Mr. F. R. Barrett and find out why he is not carrying out the promise made Mr. Ryan when he was here as to an agreement we felt that the time is long past for an agreement. . ."

The minutes of the meeting of Local 1379 on May 5, 1936, state:

" . . . The Secy Tres with a Committee were in conference with Mr. Barrett to discuss an agreement and were told that at the proper time such agreement would be had. . ."

convention of the I. L. A. They were excluded from the Atlantic Coast District convention for being delinquent in dues, but only after a statement by Alston, a representative from Local 1379, that Local 978 was not in good standing with The Water Front Council. They were denied admittance to the national convention on the grounds they were delinquent in their dues to the Atlantic Coast District.¹⁴ The minutes of the national convention show that a letter from the respondent was read at the convention. The letter stated in part:

. . . I want you to know that I deeply appreciate the invitation to visit your association while in their annual meeting.

It was indeed kind of you to think of me and if it were possible, I would be very glad to accept. However, I have so many things on hand that require my attention here that I doubt the possibility of getting away.

As you well know I have always been extremely interested in the welfare of your organization. During the many years that I have contracted with you, there has never been a difficulty that was not easily adjusted and there has never been a moment's loss of time on account of strikes or other differences. I know of no other organization that can claim the same results, and naturally all employers would far prefer dealing with such a liberal organization as yours than trying to conduct the work in any other manner.

This letter was written three months after the respondent had cancelled his contract with Local 978, and at a time when he denies having a contract with Local 1379.

On October 7, and again on November 4, 1935, Batts, president of Local 978, tendered \$113.29 to The Water Front Council, the amount of the alleged delinquency, with a request that Local 978 be reinstated in The Water Front Council. On November 5, 1935, The Water Front Council wrote Ryan that

After due deliberation, the Council voted unanimously to refuse to allow Local 978 to reaffiliate with the Hampton Roads District Council because of their continued hostile attitude towards the Council and because of their activities with the Communist movement. . . The membership of Local 978 have and are continuing to villify our International organization and its officers from the International President down. Therefore we the Council, feel and believe we are justified in refusing . . . until Local 978 shall have made amends for all the wrongs,

¹⁴The audit made in 1934 had revealed that Local 978 had been in arrears in dues to the Atlantic Coast District since July 1933. But this delinquency has taken place during the stewardship of the old officials, the same men who were now leading Local 1379

humiliations and injustices which Local 978 have imposed upon our International organization and its affiliated bodies . . . we recommend that no further taxes be accepted by our International organization or District until the local shall have settled their differences with the District Council of Hampton Roads. . .

At approximately the same time Local 978 sent \$60 to the I. L. A., being dues to date in full, and \$10 on account of delinquent dues to the Atlantic Coast District. Both sums were returned with the statement that no dues would be accepted until Local 978 had reaffiliated with the Water Front Council.

The intervenor offered in evidence a copy of a letter sent by I. L. A. on January 21, 1936, to Roger Doles, secretary-treasurer of Local 978, stating that in accordance with Section 2, Article 7 of the I. L. A. Constitution, Local 978 having become six months in arrears in taxes, was automatically dropped from I. L. A. Doles, Batts and other members of Local 978 testified that no such notice had ever been received.

On February 21, 1936, gang five, with the exception of the gang leader and second man, was discharged. As above set forth, all of the discharged employees were members of Local 978; the gang leader and second men who were retained were members of Local 1379. The respondent testified that due to a further decrease in the volume of business, it was necessary to discharge some of the men and that gang five was discharged because the working rules committee, and other persons on the pier, agreed that gang five was the least efficient gang. No credible testimony was introduced to show the inefficiency of this gang as compared with other gangs. Indeed, the respondent subsequently admitted that there were many very efficient men in the gang and further that "it was a very good gang." In addition, the failure of the respondent to discharge the gang leader and second man of gang five is a complete refutation of the claim that inefficiency was the basis of selection since the respondent admitted he held the gang leaders responsible for the work of the gangs.

It is apparent from the foregoing statement of the long and bitter dispute between the two factions, that Barrett could not have been unaware of the conflict. The insertion of the clause allowing Barrett to control the selection and grouping of men in the contract of 1933, the cancellation of his contract with Local 978 on March 31, 1935, and the discharges in 1933, 1935, and 1936, were timed in such a way that the only possible conclusion to be drawn is that the respondent was fully acquainted with all the facts and that he was interested in aiding the cause of the old officials.

Other facts in the record substantiate this conclusion. Barrett knew of the court actions pertaining to the dispute. In the action to compel election of officers in 1934, he filed an affidavit to the answer of the defendants, and attended the hearings. The record also shows he attempted to have the complainants withdraw the bill of complaint. Despite the defeat of Millner as business agent in the election ordered by the court, the respondent continued to deal with him as such, and did not deal with Goodman, the newly elected business agent. In the suit of the newly elected officials to collect the money lost by the embezzlement of Green and the negligence of the other officers, Barrett appeared as a character witness for the defendants. The respondent admits, and the minutes of meetings of Local 1379 show, that Millner met constantly with Barrett and that Millner was attempting at all times to secure a contract for Local 1379. The record also shows that Barrett secured and read the minutes of the I. L. A. convention at which delegates from Local 978 were not seated; that Barrett demanded both before and after the cancellation of the contract on April 1, 1935, that Millner have the status of Local 978 determined by the I. L. A. He also demanded that Millner and Alston have withdrawn a resolution passed by the Central Labor Union of Norfolk, condemning Barrett and his activities.¹⁵ Many additional facts, established at the hearing, might also be cited. In the face of this evidence, it is worse than futile for the respondent to insist that he did not even know the numbers of the locals, let alone which men belonged to which local.

The record also leaves no doubt that the selection of the men to be discharged on April 1, 1935, and on February 21, 1936, was made on the basis of membership in Local 978. There is no other possible explanation of why only members of Local 978 were discharged at both times, when on April 1, 1935, approximately 110 of the 240 men employed were members of Local 1379, and on February 21, 1936, approximately 100 of the 200 men employed were members of Local 1379. The respondent, however, contends that even though the men were so selected the respondent is not guilty of any discrimination, since the selections were made by the working rules committee, the agent of the employees. There are many answers to this contention. The respondent insists he was not operating under a contract with any labor organization on either of the two dates when the discharges were effected. The record shows that Lawrence and Copeland, with

¹⁵ Millner notified Ryan of the adoption of this resolution on February 27, 1936, and stated "I have had conference with Mr. Barrett today . . . and he is very much peeved . . . On Friday last the remaining members of former Local 978 were dismissed from the service of the piers and that is why the resolution was presented by those men". However, Millner's statement is incorrect, since it was shown at the hearing that of approximately 160 persons now employed by the respondent, 30 are members of Local 978.

whom the respondent dealt as a working rules committee, were defeated in the election of Local 978 in December 1934. Although they were elected as the working rules committee of Local 1379 in the spring of 1935, they were not the representatives of members of Local 978 thereafter. The respondent admits that after the cancellation of the contract, he made no effort to determine whether or not the men wished to continue to work under the same committee and with the same arrangement. It is true that a certain percentage of the sum turned over by the respondent to the timekeepers, was used to pay the salaries of Lawrence and Copeland during the period following the cancellation of the contract. Even if this be considered acquiescence by the men that Lawrence and Copeland be paid by them, which we doubt, the payment of wages is only one of the factors to be considered in determining whether Lawrence and Copeland were the agents of the respondent or of his employees. A more effective criterion is the determination of those who chose them to act. If the respondent was not operating under a contract with Local 1379, Local 1379 had no right to choose persons for this purpose. Clearly they were not the choice of employees belonging to Local 978. If the respondent, subsequent to the cancellation of the contract, found it to his advantage to continue under the same arrangement and to use these men for the purpose of dealing with his employees he cannot now deny his liability for the mode of operation he chose to adopt. We find that subsequent to the cancellation of the contract, Lawrence and Copeland were agents of the respondent, and that if the selection of persons to be discharged was made by Lawrence and Copeland, the respondent must, as principal, assume responsibility for their acts of discrimination. In addition, we are not convinced on the record, that Lawrence and Copeland made the actual selection of persons to be discharged, but are convinced that at least the final selection, in both the discharges of April 1, 1935 and February 21, 1936, was made by the respondent himself.

The discharges of April 1, 1935, having occurred prior to the effective date of the Act, did not constitute unfair labor practices.

We find that the respondent, by discharging the 32 members of Local 978 whose names are listed in Appendix A, attached hereto and made a part hereof, on February 21, 1936, has discriminated in regard to hire and tenure of employment to discourage membership in Local 978 and to encourage membership in Local 1379. The respondent, by discharging 32 members of Local 978 on February 21, 1936, has interfered with, restrained, and coerced his employees in the exercise of the rights to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities,

for the purposes of collective bargaining and other mutual aid and protection.

We find that the 32 persons discharged on February 21, 1936, were employees of the respondent at the time of their discharge and ceased work because of the unfair labor practices of the respondent.

We find that the respondent's conduct burdens and obstructs commerce and tends to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

IV. THE REMEDY

We accept as true the respondent's contention that a decreased volume of business necessitates the employment of fewer men than were employed prior to February 21, 1936. It is impossible to order the reinstatement of the 32 discharged employees when such positions are not now available. However, since the manner of selection of employees for discharge was in direct violation of the provisions of the Act, as many of the discharged employees are entitled to reinstatement as would not have been discharged had the selection been made in some manner not constituting discrimination because of union affiliation. The respondent does not keep efficiency records so selection on this basis is impossible. The only remaining objective test available which will prevent discrimination and will not be unfair to the respondent, is selection on the basis of seniority. We will, therefore, order the respondent to select for discharge the same number of persons as were discharged on February 21, 1936,¹⁶ from among the persons employed on that date (including those discharged), who had the least seniority on February 21, 1936, and to reinstate all those employees listed in Appendix A, who would not have been discharged if the selection had been made solely on the basis of seniority. We will also order the respondent to pay to each of the employees listed in Appendix A who are reinstated in accordance with this order, a sum equivalent to what each would have earned, based on the average amount earned by the employees who have worked for the respondent during this period, in the period from February 21, 1936, to the date of the offer of reinstatement, less whatever sum each of the reinstated employees may have earned elsewhere in the same period.

The record shows that four new persons have been hired by the respondent since February 21, 1936. We will also order that if any of the employees listed in Appendix A are not returned to work

¹⁶ Ordinarily 38 men, a gang leader and a second man constitute a gang. The evidence is that one complete gang was discharged on February 21, 1936, but only 32 persons are alleged in the complaint to have been discharged. This discrepancy is not explained in the record.

as a result of a selection based on seniority as of February 21, 1936, as many of such employees as possible shall replace any persons who have been employed by the respondent since February 21, 1936. Choice of persons for these positions shall also be based upon seniority as of February 21, 1936, and each of the men so reinstated shall also be entitled to back pay, based on the average earnings of employees during this period, from the date on which the person he replaces was hired, to the date of the offer of reinstatement, less whatever sums each of the reinstated employees may have earned elsewhere in the same period.

If any of the employees listed in Appendix A are still not reinstated under either of such provisions, then the respondent should offer them reinstatement on the basis of seniority, at the first opportunity when there are places to be filled, either as replacements or as the result of an increased volume of work, and we so order.

CONCLUSIONS OF LAW

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

1. Locals 978 and 1379 are labor organizations, within the meaning of Section 2, subdivision (5) of the Act.

2. The persons listed in Appendix A, were employees of the respondent at the time of their discharge, within the meaning of Section 2, subdivision (3) of the Act.

3. The respondent, by discriminating in regard to the hire and tenure of employment of the persons listed in Appendix A, and thereby discouraging membership in Local 978 and encouraging membership in Local 1379, has engaged in and is engaging in unfair labor practices, within the meaning of Section 8, subdivision (3) of the Act.

4. The respondent, by interfering with, restraining, and coercing his 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.

5. 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 respondent Frederick R. Barrett, and his officers, agents, successors, and assigns, shall:

1. Cease and desist from

a. In any manner interfering with, restraining, or coercing his 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 and other mutual aid or protection, as guaranteed in Section 7 of the National Labor Relations Act;

b. In any manner discouraging membership in Local 978 or any other labor organization of his employees, or encouraging membership in Local 1379 or any other labor organization of his employees, by discharging or threatening to discharge and refusing to reinstate any of his employees, or otherwise discriminating in regard to hire and tenure of employment or any term or condition of employment, or by threat of such discrimination.

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

a. Offer reinstatement to

(1) Those employees listed in Appendix A who would not have been discharged on February 21, 1936, had the men to be discharged on that date been selected on the basis of seniority as of February 21, 1936;

(2) Those employees in Appendix A who are not reinstated pursuant to Section 2a (1) of this order, to replace any new employees who have been hired since February 21, 1936, selection for these positions to be based on seniority as of February 21, 1936;

b. Make whole the employees reinstated under 2a of this order, by payment

(1) To each of those reinstated pursuant to Section 2a (1), of a sum equivalent to the amount each would have earned, based on the average earnings of the persons who worked for the respondent during this period, had he been employed during the period from February 21, 1936, to the date of the offer of reinstatement, less any amount each may have earned elsewhere during the same period;

(2) To each of those reinstated pursuant to Section 2a (2), of a sum equivalent to the amount each would have earned, based on the average earnings of the persons who worked for the respondent during this period, had he been reemployed on the date when the person he replaces was employed, to the date of the offer of reinstatement, less any amount each may have earned elsewhere during the same period;

c. Place those employees listed in Appendix A who are not reinstated pursuant to Section 2a of this order, on a preferential list to be offered reinstatement at the first opportunity, on the basis of seniority as of February 21, 1936;

d. Place notices in conspicuous places on the pier stating (1) that the respondent will cease and desist as aforesaid, and (2) 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 what steps the respondent has taken to comply herewith.

Mr. EDWIN S. SMITH took no part in the consideration of the above Decision and Order.

APPENDIX A

Thomas Shorter	W. J. Fuller
Charles Jones	Samuel Bly
Floyd Whitmore	Walter Gray
Fred William Compton	Henry Christian
J. A. Patterson	B. F. Baxter
John Gaines	Jacob Davis
Arthur Whitmore	Benny Davis
George Drake	Duke Dunston
T. L. Womack	Joe Parson
Thomas Moss	Peter Yancy
Isaac Watts	Lemuel Knotts
Jonah Pailen	Lee Patterson
Thomas Valentine	Henry Gallup
Ben. Griffin	Jerry Mosby
Richard Griffin	John Harrison
Ephram Weaver	Joe Turner