

In the Matter of UNITED STATES STAMPING COMPANY and ENAMEL
WORKERS UNION, No. 18630

Case No. C-203.—Decided February 10, 1938

Stamping and Enameling Industry—Interference, Restraint, or Coercion: use of labor spies; refusal to bargain collectively—*Discrimination:* discharges; allegations of complaint dismissed—*Collective Bargaining:* refusal to bargain collectively with representatives of labor organization subsequent to certification by the Board; presumption of continuation of majority in certified organization in absence of proof to contrary—*Strike:* caused by employer's unlawful refusal to bargain collectively; effect of injunction awarded by State court—*Reinstatement Ordered:* strikers upon application for reinstatement; commission of unlawful acts during strike as affecting reinstatement—*Back Pay:* awarded strikers, from date of denial of application for reinstatement.

Mr. Robert H. Kleeb, for the Board.

Mr. Martin Brown, of Moundsville, W. Va., for the respondent.

Mary Lemon Schleifer, of counsel to the Board.

DECISION

AND

ORDER

STATEMENT OF THE CASE

On December 9, 1936, W. H. Wilson, an organizer for the American Federation of Labor, filed a charge with the Acting Regional Director for the Sixth Region (Pittsburgh, Pennsylvania) alleging that United States Stamping Company, Moundsville, West Virginia, herein called the respondent, had engaged in and was engaging in unfair labor practices affecting commerce, within the meaning of Section 8 (1) and (5), and Section 2 (6) and (7) of the National Labor Relations Act, 49 Stat. 449, herein called the Act. On April 23, 1937, W. E. Kirk, likewise an organizer for the American Federation of Labor, filed a charge with the same Acting Regional Director, alleging that the respondent had engaged in and was engaging in unfair labor practices affecting commerce, within the meaning of Section 8 (1) and (3), and Section 2 (6) and (7) of the Act.

On April 28, 1937, the Acting Regional Director issued a complaint and notice of hearing which were duly served upon the respondent and

upon Enamel Workers Union No. 18630,¹ herein called the Union. The complaint alleged, in substance, that after February 11, 1936, the date on which the Board certified the Union as the exclusive representative of the production and maintenance employees of the respondent,² and on or about September 28, October 6 and October 9, 1936, and on various dates thereafter, the respondent refused to meet and/or negotiate with the representatives selected by the Union and that the respondent did not negotiate with such representatives in good faith, such acts constituting unfair labor practices within the meaning of Section 8 (5) of the Act; that on February 6, 1937, during a strike at the respondent's plant, which had been called by the Union on October 10, 1936, and which had not yet terminated at the time the complaint was issued, the respondent had discharged and refused to reinstate William Bane and Sylvester Riggs³ for the reason that they were too closely connected with the Union and because each of them had a son employed by the respondent who was actively engaged in the strike and appearing regularly on the picket line, such discharges and refusals to reinstate constituting unfair labor practices within the meaning of Section 8 (3) of the Act; and that the respondent had engaged in unfair labor practices within the meaning of Section 8 (1) of the Act, by virtue of the above-alleged practices and also by employing certain agencies and individuals subsequent to October 10, 1936, for the purpose of spying upon the activities and meetings of its employees and of the Union and of removing the president of the Union from the community.

On May 5, 1937, the respondent filed an answer to the complaint, denying that it had engaged in unfair labor practices affecting commerce as alleged in the complaint. At the same time the respondent filed a motion to dismiss on the grounds that the charges filed were insufficient under the Act and the rules of the Board, that the Act does not require that an employer enter into a contract with his employees, that the facts set forth in the charges and complaint showed that the respondent had not engaged in unfair labor practices, and for other reasons.

Pursuant to the notice of hearing, a hearing was held in Moundsville, West Virginia, from May 6 to May 21, 1937, before Edward Grandison Smith, the Trial Examiner duly designated by the Board. The Board and the respondent were represented by counsel and participated in the hearing. Full opportunity to be heard, to examine

¹ The charge, complaint and other pleadings in the case designate the Union as Porcelain Enamel Workers Union No. 18630. Testimony at the hearing shows that at some time in 1936, the name of the organization was officially changed by the American Federation of Labor, pursuant to request by the Union, to Enamel Workers' Union No. 18630.

² 1 N. L. R. B. 123.

³ Incorrectly designated Moody Riggs in the complaint.

and cross-examine witnesses, and to introduce evidence bearing on the issues was afforded all parties.

The respondent renewed its motion to dismiss the complaint on the grounds set forth above. The motion was denied by the Trial Examiner. The ruling is hereby affirmed. During the course of the hearing, the Mutual Labor Advancement Association of Moundsville, West Virginia, filed a petition for intervention and for other affirmative relief. The Trial Examiner reserved decision on the request of the petitioner to be allowed to intervene and denied the petition for all other purposes. In his Intermediate Report the Trial Examiner denied the petition for intervention. This ruling is hereby affirmed for the reasons hereinafter set forth.

During the course of the hearing, counsel for the Board moved to amend the complaint to allege that the strike which occurred in the respondent's plant on October 10, 1936, was caused by the respondent's refusal to bargain collectively and to allege that the respondent had employed the services of certain agencies for the purpose of spying upon the union activities of its employees in the period from November 1935 to September 6, 1936, instead of on the dates alleged in the original complaint. These amendments were allowed, objections of the respondent thereto being overruled. The most important of these objections will be discussed hereinafter. The rulings of the Trial Examiner on the motion and the objections thereto are hereby affirmed.

A certified copy of a suit in equity in the Circuit Court of Marshall County, West Virginia, was offered in evidence as Respondent's Exhibit No. 3. The Trial Examiner admitted the exhibit tentatively. Respondent's Exhibit No. 3, is hereby admitted and made part of the record in the case. Respondent's Exhibits Nos. 66 to 79 inclusive, and 81, being certified copies of true bills returned by the Grand Jury of Marshall County, West Virginia, to the Circuit Court of Marshall County, West Virginia, were refused admission by the Trial Examiner on objection of counsel for the Board. The rulings of the Trial Examiner are hereby overruled and the said exhibits are admitted into evidence.

Numerous other motions and objections to the admission of certain testimony were made by counsel for the Board and counsel for the respondent. Most of these rulings are assigned as error by counsel for the respondent. The technical objections of the respondent are in some instances well-founded. However, after careful review of the entire record, the Board is of the opinion that the respondent was not prejudiced by these rulings. With the exceptions stated above, the rulings of the Trial Examiner on motions and objections are hereby affirmed.

On June 1, 1937, the respondent filed a brief in support of its motion to dismiss the charges and complaint and amended complaint.

On July 17, 1937, pursuant to Article II, Section 32, of National Labor Relations Board Rules and Regulations—Series 1, as amended, the Trial Examiner issued an Intermediate Report which was duly served upon the respondent and the Union. The Trial Examiner found in the Intermediate Report that the respondent had engaged in unfair labor practices affecting commerce as alleged in the complaint and recommended that the respondent be required to cease and desist from such unfair labor practices, to reinstate William Bane and Sylvester Riggs with back pay, to reinstate all strikers to their former positions, discharging if necessary those who have been hired to replace them, and upon request to bargain collectively with the Union.

On August 6, 1937, the respondent filed exceptions to the findings of the Trial Examiner embodied in the Intermediate Report and further exceptions to the record, and the complaint, and amendments permitted to the complaint.

On August 7, 1937, the Mutual Labor Advancement Association filed exceptions to the record and to the ruling of the Intermediate Report which denied its petition for intervention. The petition asked for recognition of the Mutual Labor Advancement Association by the Board, for an election, and that the petitioner be allowed to intervene for all purposes relevant to the hearing. The petition for recognition is meaningless; the request for an election is not in conformity with the Board's requirements. The petition was rightly denied for these purposes. In so far as the request for intervention is concerned, the petitioner's right depended upon the relevancy of the facts alleged to the issues involved. The petition alleged that the petitioner had 551 members among the production and maintenance employees of the respondent at the time the petition was filed, but failed in any way to allege that the petitioner claimed as members a majority of the respondent's production and maintenance employees during the period within which the complaint alleges the respondent failed to bargain collectively with the Union as the exclusive representative of its employees. Without such allegation, the matters set forth in the petition were clearly irrelevant to the issues involved. It may well be, as alleged in the petition, that a majority of the production and maintenance employees now working in the respondent's plant are members of the Mutual Labor Advancement Association. However, if, as we find below, the respondent refused to bargain collectively with the Union at a time when it represented a majority of the respondent's employees, we cannot recognize a designation of other representatives since that time as indicat-

ing a free expression of choice by the employees. The exceptions of the petitioner are hereby denied.

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

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

United States Stamping Company, a West Virginia corporation, is engaged in the manufacture of enamelware, including hospital supplies, cooking utensils and other articles for household use, at a plant located at Moundsville, West Virginia. In 1936, the volume of respondent's business amounted to \$1,053,780.75; in the first four months of 1937, it amounted to \$455,758.58.

A great variety of raw materials including borax, flint, feldspar, oxides, sand, silica, and steel are used to produce the finished products manufactured by the respondent. All raw materials used by the respondent, except steel, originate outside the State of West Virginia. Seventy-five per cent of the steel used by the respondent is purchased from Wheeling Steel Company, Wheeling, West Virginia, the balance from American Rolling Mill Company, Middletown, Ohio. In addition to raw materials, many manufactured products, including cartons, pads, covers, knobs, and wooden handles, are used in the finishing and shipping of the respondent's products. Of the total amount of raw materials and manufactured products used by the respondent, 95 per cent originate outside the State of West Virginia.

Ninety to 98 per cent of the respondent's finished products are shipped to purchasers outside the State of West Virginia. These customers, numbering about 10,000 to 12,000, are located in practically all States of the United States, and in Puerto Rico, Canada, and Cuba. The respondent employs 23 salesmen who solicit orders throughout the continental United States and in Puerto Rico. Orders received by these salesmen are sent to Moundsville, West Virginia, where they are subject to acceptance. Orders accepted are shipped directly from Moundsville to the purchasers, by means of railroad or truck. The respondent maintains a sample room in New York City and in Chicago, Illinois.

II. THE UNION

Porcelain Enamel Workers Union, No. 18630, a labor organization, is a federal union chartered directly by the American Federation of Labor. It was organized in 1933, its membership being confined to production and maintenance employees of the respondent. As previously stated, the name of the organization was officially changed in 1936 by dropping the word "Porcelain" in the title.

III. THE UNFAIR LABOR PRACTICES

A. Background of the unfair labor practices

In June 1935 the Union requested the respondent to bargain collectively concerning an agreement relating to wages, hours, and conditions of employment. The respondent refused to deal with the union committee, stating that the Union did not represent a majority of the respondent's employees. In August 1935 the Union secured written authorizations to act as collective bargaining agent from 282 of the 411 persons then employed in the production and maintenance departments of the respondent. These cards were submitted by the Union to an agent of the Board, who after checking the signatures on the cards with canceled checks of employees furnished by the respondent, notified the respondent that a majority of the production and maintenance employees had selected the Union to represent them. The management of the respondent, nevertheless, refused to meet with a committee of the Union, still contending that it did not represent a majority of the employees, F. S. Earnshaw, secretary-treasurer and general manager of the respondent, stating further that under no circumstances would he deal with the representatives of a union, especially one affiliated with the American Federation of Labor.

On November 6, 1935, after failure to secure recognition as the collective bargaining representative, the Union called a strike among the employees of the respondent. The strike was terminated on November 29, 1935, by the Union's acceptance of proposals made by the respondent. These proposals included an offer to resume operations at the plant under the same rates of pay as existed prior to the strike and without discrimination against any of its employees, and the agreement of the respondent to abide by the decision of the Board designating the collective bargaining agency pursuant to a petition which had been filed on November 4, 1935, on behalf of the Union by H. G. Flaugh, an organizer of the American Federation of Labor.

On January 13, 1936, after hearings on the petition the Board directed that an election be held within a period of one week from the date of the Direction, "among the employees engaged in the production and maintenance department [of the Company] on November 5, 1935, and those employed between that date and the date of this direction of election in the production and maintenance department, excepting foremen, assistant foremen, supervisors and clerical employees, and those who quit or have been discharged for cause during such period, to determine whether or not they desire to be represented by the Porcelain Enamel Workers' Union No. 18630."⁴

⁴1 N. L. R. B. 123.

On January 17, 1936, the following printed notice was posted on the respondent's bulletin board.

We, the undersigned called on Mr. Earnshaw to obtain his view pertaining to the election Monday for the purpose of electing a collective bargaining committee.

It is rumored that this election is for the purpose of recognition of the union. Our information is that the purpose of this election is to not recognize a union but the purpose is to select a Committee to represent all the employees.

It is understood that if the union elects the collective bargaining committee, this committee will demand recognition of the union. We are informed that the company positively will not recognize any union.

It is further rumored that the committee will submit an agreement to be signed, and we are informed that the company will not sign an agreement of any nature with any union.

When the company refuses to recognize the union and will not sign an agreement, it is rumored the union will strike and we will all be out of work again.

We suggest that all employees regardless of the nature of their work who were on the payroll November 5th and those who were hired after that date up to January 13th will be permitted to vote.

Signed HARRY RICHMOND, MARY J. POWELL, M. R. HOLMES, SUE DENIS, R. C. PETERS, W. A. SCHOENIAN, J. B. MERRITT, ALBERT HOWARD, ED WEST.

Earnshaw denied that this notice was prepared by him or at his suggestion. Earl Howard, a clerical employee of the respondent, testified that, without direction of any supervisory employee of the respondent, he selected the nine persons who signed the petition from among the respondent's employees because he considered them "fair-minded" employees, and with the consent of F. W. Oberman, who was then acting in the capacity of production or plant manager, secured permission for these employees to attend a meeting in the sample room of the plant; that he requested Earnshaw to address the meeting and that after Earnshaw left he drafted the bulletin; and that the cost of printing the bulletin was paid by the Mutual Labor Advancement Association, from a fund secured by collections. What Earnshaw stated to the so-called committee is in doubt because of the conflicting testimony on this point of the various witnesses. In any event, this bulletin containing palpably untrue statements designed to influence voters in the election was posted on the respondent's bulletin board, and must have been posted with the consent or acquiescence of the management.

On January 20, 1936, at the election held by the Regional Director for the Sixth Region pursuant to the Direction, a clear majority of the eligible employees chose the Union to represent them. On February 5, 1936, the respondent filed exceptions to the Intermediate Report of the Regional Director concerning the conduct and results of the election. These exceptions, in substance, were that (1) the Act is unconstitutional; (2) the election was invalid in that certain groups of employees were not permitted to vote; (3) the ballot used in the election was "a fraud on its face and was not held (sic) in accordance with the election laws of the State of West Virginia"; (4) "the said election has all the earmarks of an election conducted under the management of Adolph Hitler rather than under the American system"; and (5) "the said election gave no opportunity to vote for anybody or any person but said Porcelain Enamel Workers' Union—and is an unconstitutional attempt to have the United States Stamping Company recognize the 'American Federation of Labor', which it will not do."

On February 10, 1936, before the Board had acted upon the Intermediate Report and exceptions thereto, a committee of the Union called on the respondent to discuss a proposed agreement which had been submitted to the respondent by the Union on February 3, 1936. Despite the agreement of the respondent to abide by the decision of the Board, on which the Union had terminated the strike of November 6, 1935, Martin Brown, attorney for the respondent, stated at various times during the course of this meeting:

I understand you gentlemen have some agreement, I don't know what that is—but whatever agreement you have, I don't intend to discuss that—but that was pending the final agreement of the National Labor Relations Act. Now, you have had an election. There has been an objection filed to that election. The Pittsburgh Office made a report as to their findings of that and asked if there was objection, and those objections have been filed and there has been no reply; so that settles that—there isn't anything to do. The statute isn't settled or determined and you can't expect or ask anyone to comply with a statute when the statute is in dispute—is in question.

The law isn't determined yet. If the National Labor Relations Act is determined to be the law of this country, it will not require any act on the part of the United States Stamping Officials to agree to it.

No, it [the Act] is not a law until some Court passes on it.

Don't you think when you hold an election that all those who are interested in the organization ought to have an opportunity to submit their views—don't you think that there were other parties . . . We are not going to be pushed into anything. We understand our rights—but when you talk about having an election and a fair election, the way I see the election it was a Hitlerized affair—planned just like Hitler. . . .

On the following day, February 11, 1936, the Board issued a Decision and Certification of Representatives.⁵ The Certification of Representatives, after stating that “no substantial and material issue with respect to the conduct of the ballot” had been raised by the objections filed by the Company, certified the Union as the exclusive representative of the production and maintenance employees of the respondent for the purposes of collective bargaining.

B. The refusal to bargain collectively

Subsequent to the Board's certification of the Union on February 11, 1936, and up to October 10, 1936, at which time another strike was called at the respondent's plant by the Union, six meetings were held between the representatives of the respondent and a committee of the Union for the purpose of negotiating a collective bargaining agreement. Notes of these meetings made by a stenographer selected by the respondent, and introduced in evidence at the hearing by the respondent, clearly show that the respondent did not bargain collectively with the Union at these meetings. The meetings were held on February 24, March 17, June 1, September 28, October 6 and October 9, 1936. The respondent was generally represented by either Earnshaw or V. W. Jared, production manager, and several foremen. The sales manager and a stockholder of the respondent were also present at some of the meetings. The union committee was accompanied at most of the meetings by an organizer from the American Federation of Labor, and on one occasion, at the meeting of February 24, by two organizers.

At the meeting of February 24, 1936, David Williams, an organizer, requested the respondent to negotiate an agreement. Earnshaw replied that the respondent and its counsel were of the opinion that the Act did not require the respondent to sign an agreement, either with the Union or with its employees. Williams stated that the Act did require the signing of an agreement and requested that Earnshaw state definitely whether or not the respondent would enter into a signed agreement. The meeting adjourned upon Earnshaw's promise that he would notify Williams within 10 days of the respondent's policy on signing an agreement.

⁵ 1 N. L. R. B. 123.

Mr. JARED. I don't believe that's included in this statement, Mr. Wilson.

Mr. WILSON. Well, then let's go ahead and negotiate the agreement, then we will talk about the signing of the contract after the terms are agreed upon.

Mr. JARED. I am sorry.

During these negotiations the respondent did not deny that a majority of its employees desired the Union to represent them. In the absence of proof to the contrary, there is the presumption that the majority secured by the Union in the election of January 20, 1936, continued. The respondent relied at the hearing rather upon the following defenses: (1) That the Union's demand at all times was that the respondent sign a contract, which the respondent is not required to do by the Act; (2) that the Union's demand was for a closed-shop contract which the respondent is not required to accede to; (3) that the signing of a contract with the Union would be a violation of the Act in that it would grant a preference to the Union over another labor organization within the plant; and (4) that it did bargain collectively with the Union.

The first defense of the respondent is shown to be invalid by the above recital of facts concerning the meetings between the respondent and the union committee. In the meeting of October 9, at least, the respondent in addition to refusing to sign an agreement, also refused to negotiate concerning an agreement. We do not consider it necessary in this case to determine whether or not an employer who refuses to enter into a signed agreement has bargained collectively. It is sufficient to state that, since the respondent's own interpretation of the refusal to sign an agreement on October 9 included a refusal to negotiate, it is apparent that throughout the negotiations the respondent had no intention of negotiating any agreement with the Union.

The proposed contract of September 28, 1936, contained a closed-shop provision. As respondent and its counsel well know, the incorporation of such a provision in a proposed contract does not indicate that the Union will not accept a contract without such a provision. No closed-shop provision was incorporated in the proposed agreement of February 3, 1936, and there was no discussion of this provision of the agreement in any of the so-called collective bargaining meetings prior to October 6, 1936. At that time Jared stated he would never sign an agreement requiring a closed shop. The minutes of this meeting do not indicate that the union committee took the position that an agreement without this provision would not be acceptable.

The third defense of the respondent requires no discussion. The Act requires negotiations by an employer, with a view to reaching

an agreement, with the organization representing the majority of his employees to the exclusion of all other representatives. By express provision, such a majority representative is the exclusive representative of all the employees.

Under the fourth ground of defense the respondent introduced in evidence records of meetings with shop committees of the Union, representing various departments. We concede that, as a result of the meetings, some adjustments in wages and working conditions were made by the respondent. These agreements, however, were not reduced to writing, nor made for any definite period of time. When the respondent acceded to the requests, it issued a bulletin which it placed on its bulletin board stating that the enumerated changes would be put into effect. Such a procedure by the respondent is clearly consistent with the respondent's policy of dealing with a committee composed of its employees, but refusing to deal with a labor organization, especially with one affiliated with the American Federation of Labor, whether the chosen representative of its employees or not. A procedure such as this does not fulfill the requirements of collective bargaining imposed by the Act.

We find that the respondent in refusing to negotiate concerning an agreement with the Union, did, after February 11, 1936, and on September 28, October 6, and October 9, 1936, refuse to bargain collectively with the Union as the exclusive representative of its production and maintenance employees.

The respondent by refusing to bargain collectively with the Union has interfered with, restrained, and coerced its employees in the exercise of their right to self-organization, to form, join, and assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining and other mutual aid and protection.

C. The strike of October 12, 1936

After the collective bargaining committee reported to the Union membership the results of the meeting with the respondent on October 9, 1936, a strike vote was taken and carried. On October 10, 1936, the Union addressed a letter to the respondent stating in part:

For the past three years a committee representing the Enamel Workers Union No. 18630 of Moundsville, W. Va., affiliated with the American Federation of Labor have repeatedly endeavored to negotiate an agreement with the United States Stamping Company covering rates of pay, wages, hours of employment, and other conditions of employment for employees of your Company, but we have been unable to arrive at a satisfactory understanding to date.

The proposal submitted by our organization was in no way an ultimatum, it was merely the basis on which we desired to open negotiations and carry through to a satisfactory conclusion; this the management has refused to do.

At a special meeting held Saturday, October 10, 1936, the entire proceedings was explained to the employees and by a substantial vote it was decided that work would cease Monday morning October 12, 1936, until at such time we could arrive at a satisfactory understanding on the issues involved.

We are willing to meet with the management at any time to discuss the matter and endeavor to arrive at a satisfactory understanding.

At the time of the hearing the Union had not voted to terminate the strike, although the respondent was then employing a greater number of persons in the plant than were employed at the time the strike was called. Of the 394 persons on the respondent's pay roll on October 10, 1936, the last working day prior to the strike, approximately 240 had not returned to work in the plant at the time of the hearing. Approximately 11 of the 240 strikers had received substantially equivalent employment elsewhere.⁶

At the hearing counsel for the Board moved that the complaint be amended to allege that the strike of October 12, 1936, was caused by the respondent's refusal to bargain collectively and that the striking employees should, accordingly, be reinstated. The motion was granted by the Trial Examiner despite objections by counsel for the respondent. These objections were, in substance, that the facts stated in the amendment were not based on a charge as required by the Act and that the cause of the strike had been determined by a decree of the Circuit Court of Marshall County, West Virginia, that such decree was entitled to full faith and credit and made the cause of the strike *res judicata*.

The record shows that on November 11, 1936, the respondent filed a bill in equity in the Circuit Court of Marshall County, West Virginia, seeking an injunction against the Union and certain individuals who were participating in the strike. In the bill, in addition to allegations of unlawful acts on the part of the defendants in the conduct of the strike, the respondent alleged that the strike was caused by the refusal of the respondent to sign the agreement submitted by the Union on September 28, 1936.

⁶ The record shows that Homer Kirby, one of the striking employees, returned to work in the plant in December 1936 but was discharged in January 1937. At the hearing counsel for the Board moved to amend the complaint to allege that the respondent by discharging Kirby in January 1937 had engaged in an unfair labor practice within the meaning of Section 8 (3) of the Act. The motion was denied by the Trial Examiner. We, accordingly, make no findings concerning the discharge of Homer Kirby.

The decree of the Circuit Court entered February 1937 prohibited the Union and the persons named in the petition from doing certain acts in connection with strike activities. A finding by this Board that the strike was caused by the failure of the respondent to bargain collectively will in no wise be a refusal to grant full faith and credit to the decree of the court. The allegation in the respondent's petition to the Circuit Court as to the cause of the strike was immaterial to the relief sought, and, in addition, the Board was not a party to the proceedings. For these reasons, the principle of *res judicata* is inapplicable.

The respondent's objection that the amendment is not based on a charge is also untenable. The original complaint, in conformity with the charge, alleged that a strike occurred at the respondent's plant on October 10, 1936, without stating the cause of the strike. Even though the complaint had not been amended, the Board could have found that the strike was caused by the respondent's refusal to bargain collectively and ordered that the respondent reinstate its striking employees.

We find that the strike at the respondent's plant on October 12, 1936, occurred because of the respondent's refusal to bargain collectively with the Union as the exclusive representative of the maintenance and production employees of the respondent.

D. *The alleged discharges*

Sylvester Riggs and *William Bane*, the two employees alleged to have been discharged pursuant to an unfair labor practice within the meaning of Section 8 (3) of the Act, had for some years previous been employed as night watchmen by the respondent. During the period when the respondent was operating under the National Industrial Recovery Act, Riggs and Bane, who belonged to the Union, were told by one of the respondent's supervisory employees that they would have to resign from the Union or seek other employment. Both withdrew from membership in the Union at that time and have never subsequently rejoined the Union. During the strike at the respondent's plant in 1935, both of these men were laid off and other watchmen put in their places, but they were reemployed as watchmen on the termination of the strike.

Riggs and Bane were not laid off or discharged at the time of the strike of October 1936 but continued to act as watchmen until February 1937. During this time windows were broken in the respondent's plant, and nails and tacks were placed on the respondent's property. The respondent does not claim that these men committed these acts, but complains that the men failed to find out who had committed the acts.

On February 6, 1937, Jared told Bane, "I am going to make a change." According to the testimony of Jared, he offered Bane the job of taking ware off a chain coming from an oven, Bane to begin work the following Wednesday. Jared likewise told Riggs on February 7, 1937, that the respondent was going to make a change and offered to find Riggs some other suitable work within the plant. Both employees arranged to return to see Jared on February 14, 1937, to consider other positions. Jared did not keep the appointment he had made to meet the two men on February 14, Jared testifying that he was ill at home on that day. On the following day, Riggs and Bane joined the picket line.

By offering other positions in the plant to Riggs and Bane at the time they were relieved of their duties as watchmen, Jared indicated that he did not intend to discharge them but merely to change their positions. The respondent offered proof of general incompetency and disability of these men for positions as watchmen. We believe the evidence clearly establishes the fact that Riggs and Bane were relieved of their duties as watchmen because the respondent feared that they were too sympathetic towards the Union's cause to be trustworthy watchmen. However, we do not believe an employer, who during a strike relieves a watchman from his duties as such for this reason, has engaged in an unfair labor practice within the meaning of Section 8 (3) of the Act.

We will accordingly dismiss the allegations of the complaint that the respondent discharged and refused to reinstate Sylvester Riggs and William Bane pursuant to an unfair labor practice within the meaning of Section 8 (3) of the Act.

E. The use of labor spies

The complaint, as amended, alleges that the respondent from November 1935 to September 1936 employed certain agencies and individuals for the purposes of espionage, intimidation, interference, spying, and keeping under surveillance the activities of its employees and the Union and for the further purpose of removing the president of the Union from the community.

Earnshaw admitted at the hearing that he engaged the services of National Corporation Service, Inc., ". . . a service that keeps you informed as to what takes place around your plant . . ." in November 1935. In February 1936 National Corporation Service, Inc., put a secret operative named Earl Trombley in the respondent's plant as a production worker. Trombley worked in the plant until April 29, 1936, when he was laid off because Earnshaw claimed he had secured all the information he wished. Trombley however was re-employed as a production employee by Jared on August 23, 1936, be-

cause the respondent had heard there was some dissension among the employees. Trombley continued working to September 5, 1936, apparently being removed by his employer because members of the Union had discovered his identity. The respondent continued the services of National Corporation Service, Inc., until October 1936. Earnshaw admitted that the respondent had used similar services in the past, but denied that it had used such services since October 1936.

Earnshaw testified that the principal reason these services were employed was to detect sabotage within the respondent's plant. In addition, respondent through its counsel took the position that the respondent has every right to use such services. Some evidence, which the respondent claims shows sabotage by union members, was introduced at the hearing. The record indicates that during the year 1936 a large quantity of finished enamelware contained black specks, which rendered it unfit for sale. The only proof or attempt to prove that this substance was put into the enamel by union members was testimony of selectors that within a short time after the strike practically all specking had disappeared. It is sufficient to state that, in our opinion, there is no proof in the record to show that this defect was caused by the putting of any foreign substance in the enamel, or if it was, that it was put there by members of the Union. In addition, there is no proof that National Corporation Service, Inc., was employed in connection with this alleged sabotage.

Throughout the period from November 1935 to October 1936, unsigned reports were mailed to Earnshaw or handed to him at various places in Moundsville or Wheeling, West Virginia. These reports, received sometimes as often as two or three times daily during the time Trombley was employed in the plant, contained detailed information concerning the respondent's employees, including information on their labor affiliations, reports of union meetings, and activities of members of the Union. Trombley, whose actual identity and purpose for being within the respondent's plant had been carefully concealed, having joined the Union in March 1936, was of course in a position to secure this information for the respondent. It is clear that the Act makes it an unfair labor practice for the respondent to use such services for the purposes of interfering with, restraining, or coercing its employees from the rights guaranteed to them by the Act.

We find that the respondent by the use of the services of National Corporation Service, Inc., has interfered with, restrained, and coerced its employees in the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purposes of collective bargaining and other mutual aid and protection.

The record does not contain any competent evidence to prove the allegation of the complaint that the respondent employed National Corporation Service, Inc., for the purpose of removing the president of the Union from the community. We, accordingly, make no finding of an unfair labor practice with respect to this allegation.

IV. THE EFFECT OF THE RESPONDENT'S UNFAIR LABOR PRACTICES ON COMMERCE

We find that 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 with foreign countries, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

THE REMEDY

The record indicates that approximately 240 of the respondent's striking employees have not yet been reemployed by the respondent. Since the strike was caused by the respondent's unfair labor practices, these striking employees must be reinstated in order to effectuate the purposes of the Act.

The respondent declares that since the strikers have been guilty of certain acts of trespass, property damage, and assault on non-striking employees, the respondent will never reemploy these persons and contends that it cannot be compelled to do so. The respondent relies on the decree of the Circuit Court of Marshall County in the injunction proceedings as establishing such guilt. In addition, it offered certain grand jury indictments returned to the February 1937 term of the Circuit Court of Marshall County as further proof. It appears that damage to the respondent's property consisted of a few broken windows and some injury to automobiles and automobile tires. No acts were committed in excess of those which often accompany a bitter strike.

The Board's power to order the reinstatement of employees is equitable in nature, to be exercised in the light of all the circumstances of the case. Here the respondent itself has engaged in unfair labor practices contrary to the express provisions of the Act. It was this violation of the law of the land which led directly to the strike. Weighing all these factors, and without condoning the acts charged to the employees in question, we feel that they should not be barred from reinstatement.

Furthermore, the record indicates that the respondent now employs certain persons who have been guilty of assaults or against

whom warrants alleging the commission of acts of violence have been issued. For this reason we cannot believe that the respondent's real objection to the reemployment of the strikers in question is based upon their responsibility for acts of violence.⁷

We will accordingly order the respondent to offer reinstatement to all of its employees who were on the pay roll on October 10, 1936, and who ceased work because of the strike, discharging if necessary those persons who have been hired by the respondent since October 10, 1936.

As previously stated, the respondent offered other positions to Riggs and Bane when they were relieved of their duties as watchmen and it was for the purpose of discussing these positions that the men returned to the respondent's plant on February 14, 1937. However, before they had seen Earnshaw they joined the other employees in the strike. We find that since the respondent contemplated using Riggs and Bane in other capacities, they had not ceased to be employees of the respondent at the time they joined in the strike. This being so, they are also entitled to reinstatement in the same manner as the other strikers.

By returning to work in the respondent's plant in December 1936, Homer Kirby lost his status as a striker. We will not, therefore, order the respondent to reinstate Homer Kirby.

Upon the basis of the foregoing findings of fact and upon the entire record in the case, the Board makes the following:

CONCLUSIONS OF LAW

1. Enamel Workers Union No. 18630 is a labor organization, within the meaning of Section 2 (5) of the National Labor Relations Act.

2. The production and maintenance employees of the respondent constitute a unit appropriate for the purposes of collective bargaining, within the meaning of Section 9 (b) of the National Labor Relations Act.

3. Enamel Workers Union No. 18630 was on February 11, 1936, and has remained the exclusive representative of employees in such unit for the purposes of collective bargaining, within the meaning of Section 9 (a) of the National Labor Relations Act.

4. The respondent by refusing to bargain collectively with the Union since February 11, 1936, and on or about September 28, October 6 and October 9, 1936, has engaged in and is engaging in unfair labor practices, within the meaning of Section 8 (5) of the National Labor Relations Act.

⁷ See *Matter of Kentucky Firebrick Company and United Brick and Clay Workers of America, Local Union No. 510*, 3 N. L. R. B. 455.

5. By interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed by Section 7 of the National Labor Relations Act, the respondent has engaged in and is engaging in unfair labor practices, within the meaning of Section 8 (1) of the National Labor Relations Act.

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

7. The respondent did not discriminate with regard to the hire and tenure of employment of Sylvester Riggs and William Bane, within the meaning of Section 8 (3) of the National Labor Relations Act.

ORDER

Upon the basis of the findings of fact and conclusions of law and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the respondent, United States Stamping Company, and its officers, agents, successors, and assigns shall:

1. Cease and desist: (a) From refusing to bargain collectively with Enamel Workers Union No. 18630 as the exclusive representative of its production and maintenance employees; (b) from, either directly or indirectly, engaging in any manner of espionage or surveillance or engaging the services of any agency or individuals for the purpose of, or in any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purposes of collective bargaining and other mutual aid and protection.

2. Take the following affirmative action which the Board finds will effectuate the purposes of the National Labor Relations Act: (a) Upon application, offer reinstatement with all rights and privileges previously enjoyed, to Sylvester Riggs and William Bane and to all of the respondent's employees who were on the pay roll on October 10, 1936, and whose work ceased because of the strike, with the exception of Homer Kirby, discharging if necessary those persons who have been hired by the respondent subsequent to October 10, 1936; (b) make whole those employees entitled to reinstatement, pursuant to Section 2 (a) herein, for any losses they may suffer by reason of any refusal of their application for reinstatement pursuant to Section 2 (a) by payment to each of them, respectively, of a sum equal to that which each of them would normally have earned as wages during the period from the date of any such refusal of their application for reinstatement to the date of reinstatement.

ment, less the amount, if any, which each, respectively, may earn during said period; (c) post notices in conspicuous places throughout the plant stating that the respondent will cease and desist as aforesaid and keep said notices posted for a period of at least thirty (30) consecutive days from the date of posting; and (d) notify the Regional Director for the Sixth 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 the allegations of the complaint which allege that the respondent discharged and refused to reinstate Sylvester Riggs and William Bane pursuant to an unfair labor practice, within the meaning of Section 8 (3) of the National Labor Relations Act be, and hereby are, dismissed.

[SAME TITLE]

AMENDMENT TO ORDER

February 17, 1938

Paragraph 2 of the Order of the National Labor Relations Board issued in the above-entitled case on February 10, 1938, is hereby amended to read:

2. Take the following affirmative action which the Board finds will effectuate the purposes of the National Labor Relations Act: (a) Upon request, bargain collectively with Enamel Workers Union, No. 18630 as the exclusive representative of its production and maintenance employees; (b) upon application, offer reinstatement with all rights and privileges previously enjoyed, to Sylvester Riggs and William Bane and to all of the respondent's employees who were on the pay roll on October 10, 1936, and whose work ceased because of the strike, with the exception of Homer Kirby, discharging if necessary those persons who have been hired by the respondent subsequent to October 10, 1936; (c) make whole those employees entitled to reinstatement, pursuant to Section 2 (b) herein, for any losses they may suffer by reason of any refusal of their application for reinstatement pursuant to Section 2 (b) by payment to each of them, respectively, of a sum equal to that which each of them would normally have earned as wages during the period from the date of any such refusal of their application for reinstatement to the date of reinstatement, less the amount, if any, which each, respectively, may earn during said period; (d) post notices in conspicuous places throughout the plant stating that the respondent will cease and desist as aforesaid and keep said notices posted for a period of at least thirty (30) consecutive days from the date of posting; and (e) notify the Regional Director for the Sixth Region in writing within sixteen (16) days from the date of this Order what steps the respondent has taken to comply herewith.