

In the Matter of NATIONAL MOTOR BEARING COMPANY and INTERNATIONAL UNION, UNITED AUTOMOBILE WORKERS OF AMERICA, LOCAL No. 76

Case No. C-221.—Decided February 18, 1938

Machine Parts Industry—Interference, Restraint, or Coercion: persuading employees to refrain from forming or joining union; surveillance of union meetings—*Discrimination*: lock-out of all employees and shut-down of plant for the purpose of discouraging union activity; refusal to reinstate except on condition of membership in company-favored union—*Unit Appropriate for Collective Bargaining*: production and maintenance and shipping employees—*Representatives*: proof of choice: membership applications in union—*Collective Bargaining*: refusal to negotiate with representatives of majority of employees; recognition, as exclusive bargaining agent, of organization known not to be free choice of majority—*Reinstatement Ordered—Back Pay*: awarded.

Mr. A. Norman Somers, and Mr. David Sokol, for the Board.

Mr. J. Paul St. Sure, Mr. E. H. Moore, and Mr. J. Marcus Hardin, of Oakland, Calif., for the respondent.

Mr. Richard Gladstein, of San Francisco, Calif., for the U. A. W.

Mr. James F. Galliano, of Oakland, Calif., for the I. A. M.

Mr. Joseph B. Robison, of counsel to the Board.

DECISION

AND

ORDER

STATEMENT OF THE CASE

On March 4, 1937, International Union, United Automobile Workers of America, Local No. 76,¹ herein called the U. A. W., filed a charge with the Regional Director for the Twentieth Region (San Francisco, California) alleging that National Motor Bearing Company, Oakland, California, 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. An amended charge was filed by the U. A. W. on April 14, 1937, and a supplement thereto was filed on May 22, 1937. On May 3, 1937, the National Labor Relations Board, herein called the Board, by the Regional Director for the Twentieth Region, duly issued and

¹ The original charge did not name Local No. 76. The name of the Local appeared, however, in the amended charge.

served a complaint and notice of hearing upon the respondent, the U. A. W. and Auto Mechanics Union, No. 1546, herein called the Auto Mechanics, a local union affiliated with the International Association of Machinists, herein called the I. A. M. The complaint alleged that the respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8 (1), (3), and (5) and Section 2 (6) and (7), of the Act. On May 13, 1937, after procuring an order extending the time for filing an answer to the complaint, the respondent filed its answer denying each of the allegations of the complaint or knowledge thereof, and, as an affirmative defense, alleging that it had entered into a valid closed-shop contract with the I. A. M.

Pursuant to the notice of hearing, and a further notice postponing the date thereof, a hearing was held in Oakland, California, from May 24 to July 2, 1937, before Clifford D. O'Brien, the Trial Examiner duly designated by the Board.

Prior to the commencement of the hearing, the I. A. M., and Production Workers Local 1518, herein called the Production Workers, a labor organization chartered by the I. A. M., petitioned to intervene in this proceeding. On May 27, 1937, the Trial Examiner ruled that the petition to intervene would be allowed in so far as the interest of the petitioners appeared, and that the intervention would be treated as that of a single party. At the hearing, the Board, the respondent, the U. A. W., the I. A. M., and the Production Workers, were represented by counsel. Full opportunity to be heard, to examine and cross-examine witnesses, and to produce evidence bearing upon the issues was afforded all parties.

At the commencement of the hearing, counsel for the Board moved to amend the complaint in various particulars, some of which will be hereinafter referred to. The motion was granted with leave to the respondent to file an amended answer. The respondent's amended answer was filed on May 25, 1937. At the commencement of the hearing and again at the close of the Board's case, counsel for the respondent moved to dismiss the complaint. The motions were denied. The respondent also moved to disqualify the Trial Examiner, which motion was also denied. At the close of the Board's case, counsel for the Board moved to amend the complaint to conform to the proof. Counsel for the respondent objected on the ground that the evidence failed to support the amendments to the complaint. The motion was granted. A motion by counsel for the Board to dismiss the complaint with regard to the alleged discriminatory discharge of Benjamin S. Hoover was also granted. The respondent's answer to the complaint as amended was duly filed on June 29, 1937. Counsel for the respondent also moved that certain evidence adduced by counsel for the Board be

stricken from the record. The motion was denied. At the close of the hearing the parties were granted an opportunity for oral argument, but no such argument was made.

Thereafter a brief was submitted by counsel for the respondent.

Pursuant to notice a hearing was held before the Board on August 2, 1937, in Washington, D. C., for the purpose of oral argument. The respondent and the intervenors were represented by counsel, and the American Federation of Labor appeared as *amicus curiae*, by Charlton Ogburn, its general counsel.

Thereafter, on August 17, 1937, the Trial Examiner duly filed his Intermediate Report, in which he found that the respondent had engaged in and was engaging in unfair labor practices affecting commerce, within the meaning of Section 8 (1), (3), and (5) and Section 2 (6) and (7) of the Act. He recommended that the respondent cease and desist from its unfair labor practices, that it bargain with the U. A. W. as the representative of employees of the respondent, and that it reinstate certain employees with back pay. He also recommended that that part of the complaint which alleged that the respondent procured the arrest of two of the U. A. W. organizers be dismissed. Pursuant to an order extending the time within which to file exceptions to the Intermediate Report, the respondent, the I. A. M., and the Production Workers each filed exceptions to the Intermediate Report. On September 24, 1937, pursuant to notice, a further hearing was held before the Board in Washington, D. C., for the purpose of oral argument. The respondent, the U. A. W., and the intervenors were represented by counsel.

The Board has reviewed the rulings of the Trial Examiner on motions and on objections to the introduction of evidence and finds that, with one exception, no prejudicial errors were committed. With that exception the rulings are hereby affirmed. Several of these rulings will be hereinafter referred to. The denial of the respondent's motion to strike the testimony of Captain Thorwald Brown as to the arrest of Frank Slaby and Miles G. Humphreys is reversed and the motion is granted. The Board has considered the exceptions to the Intermediate Report and finds no merit in them.

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

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

National Motor Bearing Company was incorporated in California in 1922. It is engaged, at Oakland, California, in the manufacture and distribution of shims and oil seals or retainers. It produces on an average of 1,500,000 retainers and 15,000,000 shims per year. Its total sales from the beginning of 1936 to the end of February 1937, amounted

to \$643,569.26 in value, which sum was divided about equally between shims and retainers.

The respondent's products are used in such machines as automobiles, farm machinery, washing machines, and lathes. Retainers are made of steel and either felt or leather or both. Shims are made of brass, steel, aluminum, and babbitt. Both are produced in a wide variety of sizes and shapes, corresponding to the many uses to which they may be put. The respondent's retainers are sold for the most part for use as repair parts; whereas its shims are sold largely to manufacturers of machinery.

The respondent utilizes 11 warehouses located in 10 different States, including New York and Illinois. It has sales offices in Detroit, Michigan, and Chicago, Illinois. The salesmen attached to these offices travel throughout the country. The respondent's advertising is on a nation-wide basis, and it utilizes a trade-mark which is registered for use in interstate commerce. Its plant has a railroad siding which connects with the Western Pacific Railroad. Its competitors are all located outside of California.

The steel used by the respondent is shipped to it for the most part from stock kept in California, but some is also shipped direct from Weirton, West Virginia. Leather, felt, and babbitt are purchased in California. Aluminum is also purchased from firms located in California, but it originates in the eastern part of the country. All of the brass used by the respondent is purchased in Connecticut.

The respondent sells retainers in every State of the Union, and shims in more than half of them. It has between 600 and 800 customers, 80 per cent of whom are situated outside of California. Between 75 and 80 per cent of both the shims and the retainers produced are shipped to customers or to warehouses located outside that State.

II. THE ORGANIZATIONS INVOLVED

International Union, United Automobile Workers of America, is a labor organization affiliated with the Committee for Industrial Organization. Local No. 76 received its charter from the international organization on October 1, 1935. It admits to membership employees in the East San Francisco Bay area, including employees of the respondent.

International Association of Machinists is a labor organization affiliated with the American Federation of Labor, herein called the A. F. of L. It granted a charter to Production Workers Local 1518 on April 12, 1937, the charter to bear the date, March 9, 1937. This local admits to membership mass-production workers, including employees of the respondent.

III. THE UNFAIR LABOR PRACTICES

A. *Background of the unfair labor practices*

1. Events prior to February 1937

The employees in the respondent's tool and die department have always been members of certain I. A. M. locals which are not involved in this proceeding. There has never been any kind of agreement between the I. A. M. and the respondent, but the latter has paid the prevailing union rates and has made it a practice to hire its tool and die men through the I. A. M. In fact, since the skilled tool and die men in the vicinity have quite generally been members of the I. A. M., no other course has been open to the respondent.

Some time in August 1936 about 17 of the respondent's production employees attended a meeting of International Association of Machinists Local 284, herein called Local 284, at the I. A. M. office in Oakland. The meeting was called at the instigation of these employees, and all of them at this time signed applications to the I. A. M.

About a week after this event, L. A. Johnson, vice president and general manager of the respondent,² called a meeting in his office of all of the employees. Johnson testified that the purpose of the meeting was to explain to the employees the change which was about to be made in the system of paying wages; and he also stated that the meeting was prompted by the fact that he had heard of the movement toward unionization among the production employees. According to his own description of what he told the employees, he made it clear at the outset that the purpose of the meeting was to let the employees know the respondent's attitude toward unions, that he felt that the men must be dissatisfied, since they would only join a union for the purpose of obtaining some benefit. He stated that the respondent was not opposed to unions, but that it would be wise to be sure that they joined "a good one." He said further that it was not necessary to join a union, because his "office door was open at all times" to hear grievances. When he asked whether anyone had any complaints, "one of the wits in the audience made some smart crack about money," whereupon Johnson explained the premium system of wage payments which the respondent was about to install in the factory.

There is reliable testimony in the record that Johnson's remarks were in fact far more colored by a desire to halt the threatened organization of his employees than his own testimony indicates. At any rate, it is clear that the employees were at this time greatly

² A. S. Johnson, president of the respondent, no longer participates actively in the management of the corporation. L. A. Johnson is at present in control of its policy and activity. His brother, D. O. Johnson, is the secretary-treasurer and plant manager.

dissatisfied with their wages and that Johnson advised them that it would not be necessary for them to join a union because he was going to give them higher wages anyway.

In the meantime, however, Local 284 had been instructed by the I. A. M. that it could not admit to membership the production workers who had signed applications, since they were not skilled machinists; and that it was therefore to return the application fees. Partly because of this action of the I. A. M., and partly because of Johnson's promise of higher wages, Local 284 abandoned its attempt to organize the respondent's production workers.³

The premium system which L. A. Johnson had mentioned to the employees was in fact installed gradually during the months succeeding August 1936, but it had not yet covered the entire plant by February 1937. Despite the fact that the employees did receive on the average more wages under the premium system than they had before its installation, they were not satisfied with it. They could never discover how it operated; so there was no way for them to find out when premiums were due them. In addition they felt that the plan had all of the drawbacks of a piece-work system in that it caused increased tension and disregard of safety, as well as a spirit of enmity, rather than one of cooperation, between the men. In general, the employees came to feel that although they might have received an increase in wages, this was not the sort of increase they desired and believed they were entitled to.

2. The organization of the U. A. W. and the respondent's reaction thereto

A few days before February 21, 1937, at the request of a group of the respondent's employees, the U. A. W. distributed leaflets in front of the respondent's plant announcing a meeting which was to take place on that date. The meeting was held at the U. A. W. headquarters in the morning, and was attended by about 15 of the respondent's production employees. Those present signed applications and received buttons which were subsequently worn at the plant. In addition each applicant made a part payment toward his initiation fee. Meetings were held thereafter on February 23 and 25, in the evening. Each was attended by a greater number of employees, and again, almost all of those present, who had not done so before, signed applications, received buttons, and made a small payment. These were organizational meetings, not restricted to union members, and no minutes or formal actions were taken. At the third, discussion was begun on the terms of a contract which was to be offered to the respondent. No final decisions were made,

³ Local 284 has, since July 1937, been suspended from the I. A. M.

however, and there was no discussion, at this early stage, of the steps which were to be taken to procure the respondent's agreement to the contract. A meeting was set for the following Sunday, February 28, but before that took place, the respondent had shut down its plant.

The activities of the U. A. W. and its applicants during this period were not limited to the holding of meetings. Leaflets were distributed; the union was discussed; and applications were secured both at the plant and at the homes of the employees. In addition, buttons were worn conspicuously by the employees while at work.

Clearly, the respondent was not unaware of what was going on among its employees. A substantial and increasing number of U. A. W. buttons were worn in the plant. D. O. Johnson, the plant manager, made it a practice, during the week following the first meeting, to walk through the plant and comment on the number of buttons being worn. In fact, the respondent was informed of the U. A. W.'s organizational drive as early as its employees. Leaflets inviting employees to the first organization meeting on February 21 came into the possession of the respondent and drew an immediate response. On February 21, employees at the U. A. W. headquarters, while waiting for the meeting to begin, saw D. O. Johnson drive past in his car, then return, park his car in front of the union hall, and sit in it with pencil and paper in his hand. They informed Frank Slaby, president of Local No. 76, who went downstairs and spoke to Johnson, requesting him to give up the paper upon which it was assumed he had been taking down names, and which he had concealed upon Slaby's approach. Johnson did not deny that he had been noting the names of his employees, and refused to turn over the paper, saying that he had a right to do anything he saw fit. At the request of Slaby, and upon the latter's assurance that the invitation contained in the U. A. W. leaflets was not meant to apply to him, Johnson left. L. A. Johnson testified that upon hearing of his brother's intended visit, he requested him not to go, since such an action might be "misconstrued"; and that when he heard later that D. O. Johnson had nevertheless gone to the meeting he "criticized" him for doing so.

There can be little doubt that the plant manager's conduct, particularly since the employees were unaware of any action with regard thereto taken by the vice president, could not fail to indicate an attitude of disapproval on the part of the respondent. L. A. Johnson contended that since the act of his brother was contrary to the orders of his superior, it cannot be taken as the act of the respondent. But even if L. A. Johnson did inform his brother of the possible misconception of his conduct, he nevertheless did nothing to overcome the effect which he must have realized that such conduct

had on the employees. The fact remains that the employees knew that their meeting had been observed by the plant manager, and yet were never informed that this was only, as the respondent now claims, a regrettable error.

During the course of the following week, the attitude of the respondent toward the U. A. W. was further manifested to the employees. Numerous witnesses testified that they were advised against joining the U. A. W. by foremen, as well as by E. O. Mosher, the chief engineer. They were told that the U. A. W. was communistic, that it would do them no good to join it, and they were given to understand that it would never be recognized by L. A. Johnson. At least one employee was reminded by one of the straw-bosses that the earlier attempt to organize in 1936 had been broken up. L. A. Johnson testified that he never spoke against the U. A. W. and that whenever he was asked for advice, he outlined a "four point program," indicating that an employee had four alternatives: "join the United Automobile Workers; join this A. F. of L. union; don't join any union; or quit your job." As a matter of fact, as noted below, there was no union other than the U. A. W. attempting to secure applications from the production workers until, at the earliest, the day preceding the shut-down. This fact casts doubt on L. A. Johnson's description of his own announced position, and likewise destroys the respondent's explanation of the conduct of its lower supervisory officials that they were merely campaigning for their own organization.

3. Introduction of the I. A. M. to the plant

According to L. A. Johnson's testimony, the respondent's first contact with the I. A. M. came through Fred Metcalfe, secretary of the California Metal Trades Association, with whom Johnson had discussed generally the unionization of his plant. Metcalfe arranged a meeting between Johnson and two representatives of the I. A. M., Paul C. Huybrecht, Grand Lodge Representative, and Nash, whose status in the I. A. M. does not appear in the record. This meeting took place at Metcalfe's office in San Francisco, on February 23, 1937, after a postponement from the 19th. Johnson testified that he told Nash and Huybrecht that he would not oppose unionization of his plant, but that they would not receive any cooperation from him. During the succeeding days, Johnson had several telephone conversations with Huybrecht and E. H. Vernon, business representative of the Auto Mechanics, a local of the I. A. M., which during the week following the shut-down secured applications from some of the respondent's employees.

Although representatives of the I. A. M. were thus in contact with the management of the respondent throughout the week preceding

the shut-down, it was not until the Friday of that week, February 26, 1937, that any of them attempted to approach the employees. On that day, however, Huybrecht and Vernon came to the plant at the beginning of the 45-minute lunch period, and walked through the gates and up the ramp leading to the loading platform, which is about 200 feet inside the gates, and visible from the plant office. Word of their prospective visit was passed around the plant that morning, in part at least by the foremen. Thirty to thirty-five of the employees gathered on the platform to hear what the two men had to say. Vernon and Huybrecht spoke for the I. A. M., but did not try to sign any of the men up. In fact they did not purport to represent any particular local of the parent body. The employees indicated generally that they were satisfied with the U. A. W., and it became quite clear that the I. A. M. had made little or no impression on them.

The meeting lasted throughout the lunch period. Some time after the first or warning whistle blew for the end of the period, and at a time when most of the employees had already returned to their posts, D. O. Johnson came out on the ramp and ordered Vernon and Huybrecht to leave. He told them they had no right to enter upon the respondent's property, and that such conduct was a violation of company rules. The two men then left.

The respondent takes the position that it is in no way responsible for the opportunity that was afforded the I. A. M. representatives to speak to its employees on its own property, since this was a violation of its rules, and as soon as its management heard of what was going on, it terminated the meeting. The meeting lasted 45 minutes, however, and was not interfered with by Johnson until after it had already broken up because of the end of the lunch period. It was known generally in the plant, by the foremen and others, that the meeting was going to take place, and the meeting itself was attended by foremen, by Mosher, the respondent's chief engineer who hires the production employees, and by D. V. Daggett, the general supervisor of the second floor. If the conduct of Huybrecht and Vernon was a violation of company rules, and if the respondent actually intended to enforce those rules, Mosher and Daggett would have ordered the two men off themselves, or at least would have informed one of the Johnsons of their presence. Under the circumstances, this meeting can only be considered as having been part of the respondent's attempt to check the drive of the U. A. W.

B. The lock-out of February 27, 1937

The decision to shut down the plant was made on the afternoon of Friday, February 26, 1937. The respondent explains this decision

in various ways, but claims that it was prompted by two chief factors; first, the fact that production was dropping alarmingly during the last half of the preceding week due to dissension among its employees caused by the presence of two unions in the plant, and, second, the fact that L. A. Johnson had been informed that a sit-down strike was imminent.

It is clear that organization was discussed extensively by the employees at the plant; and it is likely that some of this discussion took place during working hours. Most of it was carried on in the dressing rooms. The evidence refutes entirely the claim that there were representatives of two unions presenting rival arguments at this time. Aside from the tool and die men, none of whom ever attempted to induce any of the production workers to join their union, no employees applied for membership in the I. A. M. prior to March 1, and none were asked to do so. The first contact with the I. A. M. did not occur until noon on February 26, and even then no attempt was made to sign employees up.

Witnesses called by the respondent and the intervenors, testified generally that there was an atmosphere of tension in the plant, and that employees were seen congregating in groups and arguing. More specifically, it was stated that girls were seen coming out of the dressing rooms, agitated and in tears; and that the reason for this was that "heat" was being put on them by representatives of the U. A. W. None of the girls upon whom this undue pressure was alleged to have been exercised were called on to testify, although they were working at the plant at the time of the hearing. The witnesses who did testify could only state that U. A. W. applicants had told them they would lose their jobs if they did not join.

In order to prove that production dropped during the three days preceding the shut-down, L. A. Johnson testified that in two departments, the retainer packing and retainer assembling, the index for the average amount of work done per hour dropped from 62 to 52, and from 61 to 45 respectively from February 24 to 26, 60 being considered normal for the purposes of the premium system. Johnson testified that these two departments were the hardest hit. These figures are not convincing. They represent only two of several departments in the plant, and admittedly the worst two. Other figures given by Johnson indicate that five-day averages are usually in the vicinity of 55 to 57, which indicates that the figures for the 24th were above normal. Moreover, a chart submitted by the respondent, to show the effect of the premium system on the wages received by its employees, shows an increase in hourly earnings in all four of the departments covered by the chart for the two-week period ending

February 28, over those for the preceding two-week period.⁴ Finally H. K. Pohlman, who measures the work done on individual operations for the purpose of determining the normal rate of productivity for those operations, made such measurements during the period in question, and has never been instructed to disregard the resulting figures as unreliable.

We come then to the other supposed reason for the decision to shut down the plant. L. A. Johnson testified that prior to the shut-down a former employee, Benjamin S. Hoover, came to see him, requesting that he be permitted to return to work. Johnson was not clear as to the date of this visit, putting it, at one point in his testimony, on February 23 or 24, and at another, on the 21st or 22nd. According to his story, Hoover, after being told that he would have to see D. O. Johnson, said that there was dissatisfaction among the employees; that it was quite likely that there would be a strike because of low wages; and that the strike would be of the sit-down variety. Hoover⁵ denied this story. He placed the date of the conversation at February 19, and stated that while he did mention the fact that the employees were dissatisfied he did not mention the possibility of any kind of a strike. Johnson stated that he believed Hoover's unsupported statement that a strike was imminent because he knew that sit-down strikes were prevalent at this time and because he had noticed the unrest in the plant. Moreover he was later told by his attorney that the U. A. W. was led by radicals. The conversation with Hoover could not have taken place later than the beginning of the week preceding the shut-down, at which time organization by the U. A. W. had just begun. There is uncontradicted evidence that the question of a strike was never mentioned at any of the U. A. W. meetings during that week and witnesses called by the respondent and the intervenors testified that no one had had any intimation of an impending strike before Johnson told them of it on February 26. Johnson's story is therefore difficult to believe.

By the early afternoon of February 26, 1937, L. A. Johnson had decided to shut down the plant. He had consulted his attorney, who agreed with him that that action should be taken. The decision may not have been adopted by the executives until later that after-

⁴ Respondent's Exhibit No 8 shows "the percentage increase in hourly earnings for departments on measured work" as follows

Period Ending	Retainer Punch Press	Retainer Assembly	Retainer Packing	Leather and Spring
2-15-37	21 0	9 0	10 0	15 7
2-28-37	23 0	11 5	10 7	19 3

⁵ Hoover's testimony is to some extent impeached by reason of his admission while on the stand that he has been convicted of a felony

noon, at a meeting called by Johnson, but Johnson himself had determined his course of action and had proceeded to make preparations. He had hired four to six guards from a private detective agency, Watkins Detective Service, and had communicated with the Chief of Police of Oakland. The latter had promised to provide protection.

The executives of the plant met at five o'clock. The testimony of the witnesses called by the respondent and the intervenors is to the effect that those present were greatly surprised at Johnson's decision and at his statement that a sit-down strike was threatened, but that they agreed that production had been falling off, and that the atmosphere of the plant had become highly charged. By six o'clock, the shut-down had been agreed upon.

All of the employees, during the afternoon on Friday, were instructed, however, to appear the following day, prepared to work eight hours. It is the practice at the respondent's plant to inform the employees on Friday whether they are to work on Saturday, and if they are, whether for four or eight hours. No warning whatever was given of the impending shut-down, despite the fact that Johnson, who was responsible for decisions of this nature, had made his decision early in the afternoon. Not even the employees who worked late that night, two of whom were still in the plant when the first policemen arrived at about ten in the evening, were notified that there was no need for them to appear the next day.⁶ However, the watchman-janitor who arrived before midnight for his night shift was met at the gate by the policemen and refused admission to the plant.

It is somewhat difficult to piece together a consistent story from the highly contradictory testimony of Captain Brown of the Oakland Police force. It appears, however, that at about seven o'clock in the evening of Friday, the 26th, he received, while at home, a telephone call from headquarters that the respondent's plant would be closed the following day, and that there might be trouble. Either at that time, or at the time he appeared at the plant the following morning, he claims he was told that the reason for the shut-down was the making of certain minor repairs, a story which is unsupported by any other evidence in the record, and is wholly incredible; but which Brown adhered to firmly throughout his testimony. He arranged for a police guard, which appeared at the plant late that night.

On Saturday, February 27, the employees started to arrive at 6:30 a. m. They were met at the gate by the plant manager, D. O. Johnson, supported by private guards and the policemen. Johnson had a list of employees who were to be admitted, and all others were

⁶ The employees were later paid for four hours on February 27.

excluded. They were told simply that there was to be no work for them that day and most were told that they would be notified when to return to work. No further explanation was given. The executives, foremen, and clerical workers were admitted to the plant as well as one or two other employees who were on Johnson's list.

When Captain Brown arrived at the plant, he found the employees in an angry mood. He was booed, and there were shouts of "We want to go to work." There was what he considered a semi-riotous disturbance; so he sent for more policemen. The crowd was forced, by the policemen, to stay a block away from the plant, except for certain of the employees who were known not to have been favorable to the U. A. W. Brown announced that if the rest did not stand back the police would use clubs on men and women alike.

It is clear that throughout the day, Brown and those under him were acting entirely under the orders of the Johnsons. Brown at no time attempted to exercise any independent judgment as to the best means to maintain peace and order. He did not attempt to induce the Johnsons to mitigate the effect on the employees of their sudden action. Instead, he and his men violently repulsed the employees at the plant gate and admitted only those whom D. O. Johnson instructed them to admit. Those instructions were already in effect before midnight when Robert Schmidt, the janitor-watchman reported for duty.⁷

Brown's subjection to the respondent's orders is further evidenced by his conduct with regard to the attempt on the part of the U. A. W. to see L. A. Johnson. Frank Slaby, president of U. A. W. Local No. 76, arrived at the plant at about 8:30 in the morning, after receiving a message from some of the employees informing him of the shut-down. He immediately selected a committee of employees and sought to gain entrance to the plant to see L. A. Johnson. The police sergeant at the gate refused to admit the committee but agreed to escort Slaby inside to find out whether Johnson would see him. The evidence is conflicting as to whether Johnson was then informed of Slaby's presence. At any rate, while Slaby and the sergeant were waiting, Captain Brown entered and immediately ordered that Slaby be taken out of the plant. Brown testified that he took this action pursuant to Johnson's order that no one be admitted to the plant. Thereafter, if not before, Johnson was informed of Slaby's visit, by his secretary and by Captain Brown. Although it may be that Johnson did not learn of Slaby's presence until after the latter had been removed, it is significant that he never made any attempt to have Slaby recalled. If Brown's conduct was not, in fact, one of the intended results of Johnson's order to keep everyone but a designated

⁷ Schmidt, after being asked whether that was his name by the waiting policeman, was told that the plant was closed and he would be told when to return to work.

group out of the plant, the error could easily have been remedied. No attempt in that direction was made. That Johnson knew that Slaby had tried to see him appears from his own testimony that Brown mentioned Slaby's name to him. It is incredible that Brown would make no connection between Slaby's presence and the disturbance outside of the plant gates, or that the sergeant would not inform him of the purpose of the visit. The same considerations must apply to Johnson's pretended ignorance of the purpose of Slaby's visit, particularly in view of his testimony that he did not try to see Slaby because the latter had already left the plant.

Slaby, upon being removed from the plant, informed the employees of his failure to see Johnson and suggested that they come to a meeting of the U. A. W. that afternoon. The crowd thereupon began to disperse. Meanwhile an event was taking place within the plant which removes all doubt as to the purpose of the shut-down.

The foremen, with one exception, were among those admitted to the plant at the time of the shut-down. The exception was Hollis Nichols, foreman of the retainer assembly line, who was one of the first group to sign applications to the U. A. W. When he got to the plant gate he was met by D. O. Johnson, who told him that there was no work for him that day. L. A. Johnson could only explain the failure to include Nichols among those admitted to the plant on the theory that "he was overlooked in the excitement." He insisted he had no intention of excluding Nichols. It is clear, however, that of all those who were admitted to the plant none preferred the U. A. W. to the I. A. M. While L. A. Johnson testified that he knew at the time that Victor Bettinardi, who was among those admitted, intended to join the U. A. W. as he in fact did, two days later, Bettinardi himself, who is now working at the respondent's plant, testified that he was not approached as to joining the U. A. W. until the following Monday.

The foremen who had been admitted to the plant were called into L. A. Johnson's office.⁸ Johnson testified that he told the assembled foremen the purpose of the shut-down, which was to prevent a sit-down strike, and generally to clarify the entire situation: and that he asked the foremen's cooperation in getting the plant reopened. He told them to visit the employees as quickly as possible, and gave them separate cards which had been prepared for each of the employees. The foremen were to divide these cards up among themselves, and to note on them the responses of the employees to the foremen's visits.

⁸ It should be noted that all of the evidence as to this meeting, and also as to the meeting of executives held on the previous afternoon, appears in testimony given by witnesses who appeared and testified for the respondent or the intervenors

Johnson's testimony alternates between two theories as to just what the foremen were to do on their visits to the employees. The theory relied on in the respondent's exceptions to the Intermediate Report is that the foremen were to find out from each employee which union he favored, so that the respondent could know which union to deal with. The reports of the foremen were to be tabulated at the plant, and the respondent was to act accordingly. That such a method of determining the union preference of a group of employees could not seriously be considered trustworthy is too obvious to require extensive demonstration. The persons who were to make the reports were all known to be favorable to the I. A. M. They were all persons in a position superior to the employees whose sympathies they were to ascertain. This theory of the respondent is further refuted by the implausibility of the evidence offered to show how this alleged polling of the employees was relied on as proof that the I. A. M. represented a majority of the employees. This aspect of the case is discussed below.⁹

Johnson also testified that the foremen were "to contact all the employees that they wanted to come back first," in order to find out whether they would return to work. The foremen were to decide which employees should be asked to commence operations, since the plant would have to reopen gradually. What the testimony of several of those who were present in fact indicates is that the foremen were to visit those of the employees whom "they believed could be talked to" and to induce them to return to work on the respondent's terms.

Johnson stated that he told the foremen that they were not to favor any union, and that his own position was the neutral one contained in his four-point program. This testimony is contradicted by at least one witness, who recalled that "Mr. Johnson stated that if any union, he preferred the American Federation of Labor." In further pursuance of his alleged policy of neutrality, Johnson gave to the foremen, to use as they saw best, photostatic copies of the affidavit of registration for the Communist Party primary election, of Miles Humphreys, one of the U. A. W. organizers. The respondent makes no attempt to deny this but maintains, instead, that "It is inconceivable that any act of the management in presenting to its employees accurate, truthful information concerning a labor organization could be held to be an unfair labor practice.¹⁰ However, the Board cannot be blind to the fact that in a critical situation such as existed at the time of the shut-down, at a time when the respondent claims to have been maintaining a rigid neutrality, the act

⁹ See Section III C 3

¹⁰ Respondent's Exceptions to Intermediate Report, p 43

of the respondent in giving to its emissaries a weapon which could be used as an argument against the union which those emissaries were known to oppose, could only be construed by its employees as a clear indication of which union the respondent favored. The effect which the visits had upon the employees can best be seen in the testimony of Ervin Felix, foreman of the shims press department, regarding his report on Elmer Scheidt.

Q. And did you call on Elmer Scheidt?

A. Yes I called on him.

Q. What report did you make as to his union preference?

A. He was willing to do anything I wanted him to do.

Q. He was willing to go along with you?

A. Willing to stick along with me. I was his boss.

The respondent shut down its plant on February 27, 1937, for the purpose of discouraging its employees from joining the U. A. W., and for the further purpose of subsequently inducing them to join the I. A. M. The facts described above leave room for no other conclusion. The respondent's contention that the shut-down was required in order to clarify a situation which was causing a decrease in efficiency and production is not supported by the facts, and is entirely incredible. No attempt was ever made to curb conversation or union activity in the plant. No notice was ever given to the employees that efficiency had dropped and must be restored. The respondent took no steps whatever until it took the extreme one of shutting down its plant altogether. While the respondent's contention derives some support from the testimony of one witness that he was warned that a sit-down strike was threatened, it cannot stand in the light of the evidence of the use to which the shut-down was immediately put. The activities of the foremen, which were arranged and started on the morning of the shut-down, were a part of the general plan of which the shut-down was the chief item. It is not true that at the time of the shut-down there were two unions contending for the allegiance of the respondent's production workers. It is not true that following the shut-down, the respondent made a bona fide attempt to discover which union its employees favored. Instead it is clear that the respondent was opposed to the organization of its employees by the U. A. W., and that the complete failure on Friday, the 26th, of the I. A. M. representatives to make any headway among the employees was the final straw in bringing about the respondent's decision to take extreme measures to force its employees into the union of its own choice. That the respondent knew that its action could not be taken by its employees as that of an impartial employer attempting to end a conflict between two unions, but rather as that of an enemy attempting to destroy the only union that did exist among

its employees, is shown by the fact that everyone connected with the respondent, as well as the police, recognized clearly that the shut-down would cause extreme resentment on the part of the employees and might even result in violence. The shut-down was a lock-out, and as such was an unfair labor practice within the meaning of the Act.

We find that the respondent, by shutting down its plant on February 27, 1937, and locking out its employees, discriminated against its employees with respect to hire and tenure of employment for the purpose of discouraging membership in the U. A. W., and that by such act the respondent interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act.

C. The refusal to bargain collectively

1. The appropriate unit

The complaint as amended alleges that the respondent's employees in the receiving, production, and shipping departments, exclusive of supervisory, clerical, and tool and die workers, constitute a unit appropriate for the purposes of collective bargaining. The respondent and the I. A. M. claim that the tool and die men should be included in the appropriate unit, and also question the exclusion of certain of the employees claimed by the Board to be supervisory.

The respondent employs ten foremen, each of whom is in charge of one of the operations of the plant, such as retainer assembly, shim packing, and shipping. All but two of them are men. They are referred to as "foremen," "straw-bosses," and also, as to some of them, "die-setters." They spend 80 to 95 per cent of their time in manual work, and they have no power to hire or discharge. The respondent contends that they are merely older employees who are given the title of "foremen" out of courtesy. The evidence indicates, however, that their work is quite different from that of the other employees. As each job is started, the foreman sets up the machine, makes the various adjustments necessary for its proper operation on the particular job being done, runs off a few pieces to see that the machine is running properly, and then turns it over to one of the men in his department. Each foreman is responsible for the proper operation of his department. His bonus under the premium system depends on the productivity of the men under him. He supervises all of the jobs, and gives orders. He has to know how to help his men in case of difficulty, and must be able to fill in on any job. Although he has no power to hire or discharge, he can and often does make recommendations as to raises. The foremen are referred to by the employees who testified both for the Board and for the respondent as "my boss" and "my

superior." Witnesses also spoke of the various divisions of the plant as "Drew's department" and the like.

If there were any doubt as to the inclusion of the straw-bosses in the appropriate unit, the use to which they were put by the respondent at time of the lock-out would set it at rest. It was these employees who were selected by the respondent to visit the employees who had been locked out, to inform them of the respondent's position. Even if the respondent's description of these visits were accepted, it would appear that the foremen were given authority to determine which of the employees were to return to work first. The actual status of these men is seen most clearly, however, in the testimony of Drew, quoted above, that Elmer Scheidt, one of the men in his department, told him that he was "willing to stick along with . . . his boss." The foremen or straw-bosses will be excluded from the unit found by the Board to be appropriate.

The tool and die men at the respondent's plant have always been organized in the I. A. M. The respondent has paid union wages and hired its men through the union, although it has never entered into a contract with it. The tool and die workers, unlike the other men in the plant, are highly skilled. They produce the dies which must be made separately for each operation, and they build certain of the machines which cannot be bought outside the plant. They are also responsible for keeping the machinery of the plant in working order. Although their work is essential to the production of the respondent's wares, they never handle the shims and retainers that are produced. Moreover, although the employees in the balance of the plant are often shifted from one department to another, there is no such shifting with regard to the tool and die department. While they are located on the second floor of the plant, they are not under the supervision of the general superintendent for that floor. It is significant that the witnesses at the hearing showed, by their use of the term "production workers" in a manner which excluded the tool and die men, that they considered the latter as a separate group.

The contract which the U. A. W. sent to the management on February 28, included the tool and die workers among those for whom rates were to be established. The extent to which this fact justified the respondent in treating the appropriate unit as including the tool and die men will be discussed below.¹¹ At the present time the U. A. W. does not desire to represent them. Moreover, the contract between the I. A. M. and the respondent, which was entered into on April 19, excluded the tool and die workers, as L. A. Johnson testified, by limiting its application to those "engaged in the actual production of parts." This exclusion was made pursuant to an oral agreement made between

¹¹ See Section III C 3

the parties on March 2. Thus the respondent and the I. A. M. have also recognized that the tool and die men should be treated separately.

The employees in the tool and die department will be excluded from the unit found by the Board to be appropriate.

The respondent's clerical workers will also be excluded from the appropriate unit for the production workers in accordance with numerous decisions of the Board. Two of the respondent's employees are listed on its pay roll as "General Factory—Clerk." The evidence indicates that they perform clerical tasks, connected with the supervision of the work, and they will therefore be excluded from the appropriate unit. One employee, Alec L. Muir, is listed as "Production Dept.—Clerk." Although his work was, in February 1937, clerical in nature, it appears that he was formerly a production worker and had been removed from this work only temporarily because of an injury to his finger, which injury had not healed at the time of the events in question. He will be included in the appropriate unit.

We find that the production, maintenance, and shipping employees of the respondent, exclusive of supervisory employees, foremen, regular clerical employees, and employees in the tool and die department, constitute a unit appropriate for the purposes of collective bargaining and that said unit will insure to the employees of the respondent the full benefit of their right to self-organization and to collective bargaining and otherwise effectuate the policies of the Act.

2. Representation by the U. A. W. of the majority in the appropriate unit

The respondent submitted its pay roll for February 25, 1937.¹² It shows that there were on that date 96 employees in the unit found appropriate by the Board. There were in addition, 16 employees in the tool and die department, as well as a supervisor of that department, and ten straw-bosses. Of the 96 employees, 56 had signed applications for membership in the U. A. W. by the morning of February 27.¹³ In addition, one employee, Joseph Paul Kreig, had taken a U. A. W. button and stated his desire to have the U. A. W. bargain for him. Since he was a member of an I. A. M. local, he did not apply for membership in the U. A. W. but told Slaby that he would arrange for his transfer to that union. Two more employees signed applications on February 27; two more on February 28; four on March 1; and four have signed since March 1.

Only one of the employees who signed U. A. W. application cards was ever formally initiated as a member of that union. It appears

¹² Board's Exhibit No 15 L. A. Johnson testified that there were no changes among the employees between February 25 and the shut-down.

¹³ Board's Exhibit No 21 (a) to (k) are the applications to membership in the U. A. W. referred to here and below.

that the U. A. W. requires payment of a \$7.50 initiation fee before an applicant can become a member, but that it will act as the collective bargaining agent of applicants who have not completed payment of this fee. Ordinarily applicants have 30 days within which to pay the full amount, but the period may be extended for sufficient reason. In this case, the occurrence of the lock-out, with the resulting cessation of wages was considered adequate reason for failure to pay the fee within the specified time, and after February 27, the U. A. W. officials did not attempt to procure further payments.

The respondent and the I. A. M. attempted in several ways to cast doubt on whether the U. A. W. was ever freely designated by the applicants as their bargaining agent. It was claimed, first, that the fact that none of the applicants were ever formally initiated as members, and the fact that the U. A. W. was never authorized by a formal resolution passed at a meeting, to bargain for its applicants, precludes any claim that it had been designated as bargaining agent. It is necessary to state only that, as the Board has held, a union may bargain for employees who are not even eligible to membership, provided that such employees have sufficiently indicated a desire that such bargaining take place; and that the signing of an application card in a union can have no important significance other than the expression of a desire that the union achieve the purposes of all labor organizations by bargaining with the employer.

Next it was contended that the respondent's employees were misled into applying for membership in the U. A. W. by the failure of the officers of that union to disclose its true relationship with the American Federation of Labor. It appears that the U. A. W. charter was displayed to those who came to meetings and that that charter contained a statement that the U. A. W. was an affiliate of the A. F. of L. However, numerous witnesses testified that at each of the organizational meetings of the U. A. W., its status was made clear by the speakers, who stated that it was suspended from the A. F. of L. and affiliated with the Committee for Industrial Organization.

Finally, the designation of the U. A. W. as the bargaining agent of the employees was attacked on the ground that it was procured by intimidation and threats of violence. The record does not sustain this contention.¹⁴ With the exception of one witness, none of those who testified could recall any actual acts of coercion. While it is claimed that some of the girls were seen in tears at the plant, the most extreme act which was charged to persons connected with the U. A. W. was that, as mentioned above, they told employees that if they did not join, they would lose their jobs. Such a threat could not have been given serious weight by the employees since it could

¹⁴ The exclusion of all evidence of intimidation by the U. A. W. subsequent to March 1 is discussed below, Section VI.

only be enforced with the cooperation of the employer. One witness called by the intervenors testified to an incident which occurred at one of the U. A. W. meetings in which a man who put his head in through the door was chased away by several of those present with shouts of "get that fellow." The witness stated that this incident, and the general attitude of the U. A. W. supporters, caused him to join the U. A. W. to "preserve his health." His testimony was highly contradictory and was denied by several other witnesses. It was substantiated by none.

We find that on February 27 and on March 1, 1937, the U. A. W. had been freely designated as the bargaining agent of a majority of the employees in a unit appropriate for the purposes of collective bargaining.

3. The refusal to bargain

The attempt on the part of Slaby to see L. A. Johnson on the day of the lock-out has already been described.¹⁵ His expulsion from the plant by Captain Brown, who was acting pursuant to the respondent's orders, and the respondent's failure to have him summoned back to the plant, although it was at the same time conferring with representatives of the I. A. M., are indicative of the respondent's attitude toward possible negotiations with the U. A. W.

At a regular meeting of the U. A. W. Local 76 on the afternoon of the lock-out, a meeting of the respondent's employees was set for the following day. At this meeting, on Sunday, February 28, the employees discussed the proposed contract, consideration of which had started on the previous Thursday, and its final terms were agreed on. Each section was voted on separately by the employees affected, and the decisions were noted by Slaby. It was agreed that the contract as finally adopted should be typed out at once and sent to the respondent. This was done.

The contract as submitted to the respondent¹⁶ contained a provision that the U. A. W. be recognized as the sole bargaining agent of the employees, and the respondent considered the contract as a demand for such recognition. L. A. Johnson testified at length that the sole reason for disregarding the U. A. W. was that he was convinced that it did not represent a majority of the employees in an appropriate bargaining unit, and that the I. A. M. did. Johnson was informed of the receipt of the contract by telephone on Monday morning, March 1, while at the office of his attorney. He did not at any time communicate with the U. A. W. or in any manner afford them an opportunity to substantiate their claims as sole bargaining agency of the employees.

¹⁵ Supra, Section III-B

¹⁶ Board's Exhibit No. 17a.

Instead, on the afternoon of March 1, he signed a contract with the I. A. M.

The circumstances surrounding the concluding of the I. A. M. contract are of great significance. The early activities of the I. A. M. and its connection with the respondent have already been described. On the afternoon of March 1, L. A. Johnson met with Vernon and Huybrecht. They presented to him a letter signed by an official of the I. A. M.¹⁷ which stated that a majority of the employees had become affiliated with the I. A. M., and requested a conference. Johnson thereupon entered into a contract with the I. A. M.¹⁸ which provided simply that the respondent was to reopen its plant, that the I. A. M. members were to return to work, and that the pending negotiations were to continue, the results thereof to be retroactive to the time of resumption of full operations. On the following day, Vernon and Huybrecht delivered to Johnson a letter in which they agreed that a separate local was to be set up for mass-production workers. This local was in fact later chartered and is one of the intervenors in this case. On April 19, a final contract was entered into between the respondent and the I. A. M.,¹⁹ which will be further discussed below. The respondent maintains that its conduct in signing a contract with the I. A. M. while refusing to do so or even to confer with the U. A. W. was justified by the fact that the former union represented a majority of the employees, whereas the latter did not. Its reasons for arriving at this conclusion do not bear close scrutiny.

The figures given above show clearly that on March 1 the U. A. W. represented a majority of the employees in the unit found appropriate by the Board. The respondent was aware of the fact that a substantial number of its employees had joined the U. A. W., since U. A. W. buttons had been worn extensively throughout the plant, and D. O. Johnson had taken careful note of this fact. The respondent contends that on the basis of the reports made by the foremen, which have already been described and which will be further discussed below, it determined that the U. A. W. could not have a majority in the unit which it appeared to consider appropriate. It maintains that the U. A. W. contract which it received on the morning of March 1 made no restrictions on the number of employees which it was to cover and in fact included a provision expressly covering tool and die workers. To sustain this contention one must believe that the respondent had reliably ascertained the number of employees who desired the U. A. W. to represent them, that the entire U. A. W. contract, consisting of three typewritten pages, was read, in

¹⁷ Respondent's Exhibit No. 3

¹⁸ Board's Exhibit No. 50-A.

¹⁹ Board's Exhibit No. 50-B.

all its details, to L. A. Johnson over the phone, and that Johnson was able to analyze the terms of the contract sufficiently to arrive at a decision as to the bargaining unit which it described. However, it is not necessary for us to decide whether the respondent could preclude all negotiations with the U. A. W. as to the appropriate bargaining unit and other matters by signing a contract with another union, or whether it could refuse to permit any efforts to establish the U. A. W.'s majority claims. Even if both of the groups in question, the tool and die workers and the straw-bosses, were included in the unit, the U. A. W. on March 1, had secured applications from 67 of the 122 employees in the unit as thus defined.²⁰

The record gives no support to the respondent's claim that the I. A. M. represented a majority of its employees on March 1. L. A. Johnson testified that he was never shown a list of I. A. M. members, but that he relied solely on the claim of the I. A. M. representatives of a majority and on the reports made by the foremen. The utter unreliability of those reports, if any were in fact made, has already been pointed out. Moreover, the evidence indicates that the reports could not have been made. In addition to the highly contradictory nature of the testimony by the foremen themselves as to whether they were supposed to ascertain the union preferences of the employees,²¹ there is the fact that Johnson was not at the plant at all on Sunday or Monday morning, and hence he could not as he claimed have been present to receive the detailed reports, and have tabulated them on little slips of paper. Finally, according to the description of the supposed reports, made by those of the foremen who testified in detail, most of the employees visited were not at home, or were doubtful as to which union they favored.

The very earliest day on which there is any evidence that the I. A. M. procured any applications from among the respondent's employees was March 1. As noted above, there was no organization at all by the I. A. M. prior to the shut-down. Those of the witnesses who did join the I. A. M. testified that they did so on March 1 at the earliest. Thus Ervin Felix, foreman of the shim press department, testified that he was one of the first ones to join, in fact that he was "practically one of the instigators of it" and that "it was March the

²⁰ Two of the foremen applied for membership in the U. A. W. In considering the larger unit, they should be added to the 65 non-supervisory employees who had made application by March 1.

²¹ The testimony of Thomas Drew, foreman of the leather department, was particularly interesting. He testified on direct examination that Johnson's only instructions were to go out and get the men they needed to start the plant operating. He denied that Johnson gave orders to discover the union sympathies of the men. When Johnson's testimony to the effect that he had given such orders was read to him, he changed his testimony and described at length how he had visited certain employees and reported on their union sympathies to Johnson at the plant on Sunday. Johnson, recalled to the stand, testified that Drew must have been mistaken, since he was not at the plant on Sunday.

3rd that I made out my application, or March 1st—I just don't recall the date."

The respondent thus signed a contract with a union which did not represent, and which it could not have thought represented, more than a handful of its employees, if any, and at the same time turned its back on a union which represented a majority of its employees in a unit appropriate for the purposes of collective bargaining, as well as a majority of the employees in any unit which the respondent could have considered appropriate. We do not find that the respondent, in the absence of more proof of the U. A. W. majority than was here given, could not have asked for that proof before entering into negotiations. But we do find that by hastily entering into a contract with the I. A. M. which it at all times treated as a closed-shop contract, it announced its firm intention to have nothing to do with the U. A. W. and precluded all further attempts on the part of that union to secure the recognition to which it was entitled. Such conduct constituted a refusal to bargain with the duly designated representative of its employees in an appropriate unit, and was an unfair labor practice within the meaning of the Act.

D. *The discriminatory refusals to reinstate*

1. The reopening of the plant

The U. A. W. at its meeting on February 28, in addition to formulating its proposed contract, elected a negotiating committee and a picket captain. No detailed arrangements for picketing were made at this time, but the employees agreed that they were to go to the plant the following day prepared to work, and if they were not permitted to do so, they were to begin picketing. Picketing was in fact commenced on March 1 and continued until the commencement of the hearing in this case. A soup kitchen was opened, and schedules for picketing were established. It was agreed by the U. A. W. members that picketing was to continue until the respondent recognized and bargained with the U. A. W.

In the meantime the foremen continued their calls upon the employees. It cannot be contended that they were still endeavoring to discover union preferences. Instead, they talked unfavorably about the U. A. W., said that it was communistic, that it was the wrong union to join, that it would never be recognized by the respondent, and that those who did not give it up would lose their jobs. They also asked the employees to join the new I. A. M. local that was to be formed and invited several of them to a meeting that was to take place, saying that the plant would reopen as soon as the I. A. M. had signed up a sufficient number of the men. As one of

the foremen put it, "We just went to see them to see if we could make them come over to our side so they could go to work."

The Auto Mechanics, an I. A. M. local for garage employees, started procuring applications from employees of the respondent early in the week following the lock-out, with the intention of eventually having them transferred to a new local for production workers. This local, the Production Workers, which intervened in this proceeding, was chartered by the I. A. M. on April 12, the charter to bear the date, March 9, 1937. A meeting was held under the auspices of the Auto Mechanics on March 3 or 4 which was attended by about 30 employees including the foremen, and also by D. O. Johnson. Some, but not all, of the U. A. W. members were invited to this meeting. Rose Fereira and Erma Jacobson were invited and came to the meeting with Garnett Rose and Ruby Elling, who had not been invited and who had been particularly enthusiastic in support of the U. A. W. prior to the lock-out. All four were met at the door by one of the foremen, who pointed out Rose and Elling to Vernon of the Auto Mechanics and told him these two were to be excluded unless they joined the I. A. M. at once. When the two girls refused to join, they were told they could not enter, although this purported to be an open meeting. Thereupon all four left. About ten days later another meeting was held of the group that was to form the Production Workers. Officers were elected, three of whom were straw-bosses.

During the latter part of the week following the lock-out, the respondent decided to reopen its plant on March 8. L. A. Johnson so informed the foremen, and certain of the employees were requested by telephone, telegraph, mail, and personal visits to return to work. Among those so requested were several of the U. A. W. applicants.²² On March 8, a large number of employees returned to work with a police escort. During the succeeding weeks, more employees returned, but the plant did not commence actual operations until March 15. Two weeks later the respondent began to hire new employees to take the place of those who had not returned.

Although the March 1 contract between the respondent and the I. A. M. was little more than a declaration of an intention to bargain, the employees who returned to work were informed that the respondent was operating under a closed-shop agreement with the I. A. M. All of the employees understood quite clearly that returning to work meant joining that organization. As late as May 18, both the respondent and the intervenors stated in sworn affidavits filed in connection with an action in the United States District Court, that the respondent was at this time operating under a closed-shop contract

²² The effect of these requests on the discriminatory discharges is discussed below.

with the I. A. M.²³ Thus both parties treated the March '1 contract as providing for a closed shop.

On April 19, the respondent entered into a contract with the Production Workers providing for a closed shop, and wages, hours, and other conditions of employment.²⁴ The contract is to run for one year and is to be renewed thereafter from year to year unless terminated by either party by notice at least 30 days prior to the annual expiration date. The contract contains a provision making it "contingent upon the employees and the union continuing their or its affiliation with the International Association of Machinists of the American Federation of Labor."

As mentioned above, the picket lines established by the U. A. W. continued up to the time of the hearing in this case. We find that the labor dispute which began with the lock-out on February 27, 1937, has continued since that date, and is a current labor dispute.

The complaint as amended alleged that the respondent procured the unwarranted arrest of the president and the organizer of the U. A. W. The Board finds that the record does not sustain the charge that the arrest of these two men, which took place on March 6, was inspired by the respondent.

2. The refusals to reinstate

The complaint in this proceeding, as amended, alleges the discriminatory discharge of 56 employees, and the discriminatory refusal to reinstate all but ten of them. As to the ten it alleges an offer to reinstate only on condition that they withdraw from the U. A. W. and join another union not of their own choosing.

The lock-out of February 27, 1937, was a mass discharge, aimed at those of the employees who were favorably inclined toward the U. A. W. Although employees who had not expressed such an inclination were also excluded from the plant, the lock-out had as its purpose the discouraging of membership in the U. A. W., and it clearly would not have occurred if that union had not appeared upon the scene and demonstrated that it was making great headway among the employees. We have held that in such a case the employer is guilty of an unfair labor practice within the meaning of Section 8 (3) of the Act.²⁵

²³ Board's Exhibits 41 and 42 are the papers in a proceeding in the District Court of the United States in and for the Northern District of California, brought by the respondent to enjoin the Board's procedure under the complaint. The Production Workers intervened in that proceeding and joined in the request for an injunction. The injunction was denied by Judge Louderback on May 24, the day the hearing on the Board's complaint began. The affidavit of L. A. Johnson for the complainant, and the petition in intervention, verified by Muir, president of the Production Workers, both alleged the existence of a closed-shop contract during the period in question.

²⁴ Board's Exhibit 50-B

²⁵ *Matter of Ford A. Smith et al. and National Furniture Workers, Local No. 3*, 1 N. L. R. B. 950.

The evidence shows that certain of the employees were requested by the respondent to return to work after the lock-out. These requests took various forms, including letters, telegrams, telephone calls, and personal visits by foremen and executives. Some of the letters and telegrams were put in evidence. They contain a simple request to return, with no conditions expressly attached. It is the position of the respondent that these communications contain its official position and cannot be considered as having any conditions attached to them. This position cannot be sustained. It has already been shown that the respondent considered after March 1 that it had a closed-shop contract with the I. A. M. which required any returning employee to join that union and abandon the U. A. W. In addition the respondent's emissaries made clear to the employees that a return to work meant a transfer of allegiance from one union to the other. The employees were forced to assume that they could only return under these unlawful conditions. It is conceded that many of the U. A. W. supporters were never recalled, and that those who were, were called a few at a time. The inference which it was natural to draw from the briefly worded telegrams and letters was that those who received them were being given an opportunity to return on conditions which were well understood. The same considerations apply to those who received their invitation by telephone or personal visit.

That the employees had been given to understand that the respondent was not taking back all employees without question is seen in the testimony of Myra Wuepper, who is now working at the plant, and who testified for the Board under subpoena. She stated that when she decided to try to go back she doubted that she would be allowed to return to work, since she had applied for membership in the U. A. W., and that she therefore went to see her superior, Lansdale, to see whether she could return. Lansdale and several other officials of the respondent received her assurance that she would join the other union before returning to work. Finally there is the fact already mentioned, which was testified to by witnesses appearing for the respondent and the intervenors, that as soon as they appeared for work, they were informed that the plant was operating under a closed-shop contract.

Willingness to reinstate employees only on the conditions above described, conditions which the respondent had no right to attach, is equivalent to absolute refusal to reinstate.²⁶ With respect to violations of the Act and the remedy therefor, all of the employees in

²⁶ *Matter of Carlisle Lumber Company and Lumber & Sawmill Workers' Union, Local 2511, Onataska, Washington, and Associated Employees of Onataska, Inc., Intervenor*, 2 N L R B 248; 94 Fed (2d) 138, (sub nom *National Labor Relations Board v. Carlisle Lumber Company*) C. C. A., Ninth Circuit, petition for enforcement of the Board's order granted.

question, whether or not they received a conditional offer of reinstatement, stand on the same footing.

Many of the employees testified that they would not return to work unless the respondent recognized and bargained with the U. A. W. This appears to have been the position adopted by the U. A. W. in maintaining its picket line, although some of the employees testified that they were willing to return if they could remain members of the U. A. W. In view of the respondent's announced position with regard to the return of its employees to work, it is not necessary to consider the effect of this attitude on the part of the men.

The following employees received requests by letter or telegram that they return to work:

William Cambra	Blanche Triplett
Willard Eugene Cox	Leonard Whaley
Tony Dias	

The following employees were asked to return by some method other than a telegram or letter:

Leon M. Bromley	George Vincent Paraspolo
Gertrude Deichler	Grace Roth
Marie Lichy	Sophie Shubin
Harold Merritt	

The following employees were never asked to return to work:

Buena Ardinger	Erma Jacobsen
Joe Camara	Eleanor Johnson
Florence Cambra	Wilfred Ernest Kettle
Marian Dickman	Joseph J. Kleiner
Roy S. Dickman	Joseph Paul Kreig
Ruby Elling	Wm. J. MacFarland
Rose Fereira	Bernice Meyers
Dorothy Fernandez	James T. Sanchez
Ray H. Givan	Robert R. Schmidt
David LaGrone	Vera Leona Tidwell

As to the following employees, there is no evidence that they were ever asked to return to work:

Geraldine Brim	Frank J. Harmon
Lucille Bronson	Mary Hughes
Hilda Cardoza	Dorothy Kirilov
Roy A. Christie	Stella Kiseloff
Marie F. Freitas	Velma Malfatti
Albert Greenhalgh	Dorothy Mitchell

Hollis Nichols
 Gilbert Paulo
 Robert James Ping
 Reginald Price
 Garnett Dorothy Rose
 Evelyn Severe

Martin J. Shubin
 Violet Stagnaro
 Irene Stephens
 Eldon M. Tennis
 Jack Townsend
 Fred G. Turner

Two of the employees above named, Joseph Paul Kreig and Fred G. Turner, have obtained regular and substantially equivalent employment elsewhere since the date of the lock-out. As to four other employees, some question was raised as to whether they had procured such employment. Leon M. Bromley, at the time of the hearing, was working part time as a relief gateman for a railroad company. He desires to return to work for the respondent and considers his present job temporary. Wilfred Ernest Kettle, at the time of the hearing was working in a stationery store at a salary lower than his wages at the respondent's plant. He wants to have his old job back. Wm. J. MacFarland has a job repairing machinery, which he considers temporary. He does not earn as much as he earned while working for the respondent, and he desires to return to his former position. James T. Sanchez, at the time of the hearing, had a temporary job in a butcher shop. He desires to return to work for the respondent. We find that Leon M. Bromley, Wilfred Ernest Kettle, Wm. J. MacFarland, and James T. Sanchez have not procured regular and substantially equivalent employment since February 27, 1937.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

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 have led, and tend to lead, to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

The respondent will be required to cease and desist from the unfair labor practices described above. The respondent will in addition be ordered to bargain collectively with the U. A. W. Since the making of both of the contracts with the I. A. M. constituted violations of the Act, the respondent will be ordered to give no effect to them. The 56 employees listed in Appendix A, who were discriminatorily discharged, are entitled to reinstatement to their former positions, without prejudice to their seniority and other rights and privileges, even

though this may require the dismissal of employees hired since February 27, 1937. The respondent will also be ordered to give to these employees back pay from the time of the discharge, February 27, 1937, to the date of the offer of reinstatement. In offering reinstatement the respondent will be ordered to notify the employees that they will not be required to relinquish their affiliation with the U. A. W. or to comply with the terms of the contracts made with the I. A. M. In all cases in which back pay is awarded, we will, in accordance with our usual practice, order the deduction of all sums earned since the discharges which would not have been earned if the employee had been working for the respondent.

VI. THE RULINGS OF THE TRIAL EXAMINER

Certain of the exceptions of the respondent and the intervenors to the conduct of the hearing by the Trial Examiner, which have been dismissed by the Board, deserve mention. The Trial Examiner excluded evidence of the use of intimidation and coercion by the U. A. W. after March 1. This evidence was offered for the purpose of showing that those who joined the U. A. W. did so under duress. Since the U. A. W. had been designated by a majority of the employees in the appropriate bargaining unit on March 1, the date on which the respondent's refusal to bargain took place, the evidence was properly excluded.

On June 30, 1937, after the hearing in this case had proceeded for more than a month, the Trial Examiner announced that beginning the following day, there would be night sessions on weekdays and afternoon sessions on Saturdays. The Board's case had been concluded on June 24, and the respondent's case was at that time being presented. The respondent concluded the presentation of its evidence on June 30, the day that the ruling was made; and the intervenors concluded two days later, on July 2. The hearing was also concluded on that day in the morning. Thus only one night session was actually held. Nevertheless this action of the Trial Examiner was assigned as prejudicial error by the respondent and the intervenors. There is nothing in the record to indicate that this action of the Trial Examiner was not a proper exercise of his discretion in the matter of holding the hearing. On the contrary it appears that the subject of night sessions had been discussed several times by counsel, and that counsel for the parties had sufficient warning to make such arrangements as were necessary to meet whatever burden the holding of night sessions laid upon them.

During the presentation of the Board's case the Trial Examiner found it necessary to defer the intervenors' right to cross-examine witnesses until the end of the Board's case, at which time opportunity

for such cross-examination was given. This action is assigned as prejudicial error by the intervenors. The record amply sustains the Trial Examiner's ruling that this action was necessary to expedite a hearing that was being unduly prolonged by the conduct and tactics of counsel for the intervenors. The cross-examination by this counsel which had taken place had covered only the ground already covered in cross-examination by counsel for the respondent. The record does not show that the intervenors were prejudiced by the ruling.

There was attached to the intervenors' exceptions to the Intermediate Report an affidavit submitted and sworn to by James F. Galliano, counsel for the intervenors, in which it was alleged that, in a conversation with the Trial Examiner during a recess in the hearing, the latter stated that the ruling discussed above was made because counsel's cross-examination "was disrupting" the U. A. W. An affidavit in reply has been filed with the Board, in which the Trial Examiner alleges that he stated to Galliano that his ruling was made because counsel's conduct was disrupting the morale of the Board's witnesses and otherwise interfering with the proper inquiry into the facts of the case. As noted above, the record in this case sustains the propriety of the Trial Examiner's ruling.

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

CONCLUSIONS OF LAW

1. International Union, United Automobile Workers of America, Local No. 76, International Association of Machinists, and Production Workers Local 1518 are labor organizations within the meaning of Section 2 (5) of the Act.

2. The production, maintenance, and shipping employees of National Motor Bearing Company, exclusive of supervisory employees, foremen, regular clerical employees, and employees in the tool and die department, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act.

3. International Union, United Automobile Workers of America, Local No. 76, was on February 27, and at all times thereafter has been, the exclusive representative of all such employees for the purposes of collective bargaining, within the meaning of Section 9 (a) of the Act.

4. By refusing and continuing to refuse to bargain collectively with International Union, United Automobile Workers of America, Local No. 76, as the exclusive representative of its employees in an appropriate unit, the respondent has engaged in and is engaging in unfair labor practices, within the meaning of Section 8 (5) of the Act.

5. By discriminating in regard to the hire and tenure of employment of the employees listed in Appendix A and thereby discouraging membership or affiliation with International Union, United Automobile Workers of America, Local No. 76, the respondent has engaged in and is engaging in unfair labor practices, within the meaning of Section 8 (3) of the Act.

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

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

ORDER

Upon the basis of the above 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, National Motor Bearing Company, and its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) In any manner interfering with, restraining, or coercing its employees in the exercise of their right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purposes of collective bargaining or other mutual aid and protection, as guaranteed in Section 7 of the National Labor Relations Act;

(b) Maintaining surveillance of the meetings and activities of International Union, United Automobile Workers of America, Local No. 76, or any other labor organization of its employees;

(c) Discouraging membership in International Union, United Automobile Workers of America, Local No. 76, or any other labor organization of its employees or encouraging membership in International Association of Machinists, or Production Workers Local 1518, or any other labor organization of its employees, by discharging or refusing to reinstate any of its employees, or in any other manner discriminating in regard to their hire or tenure of employment or any term or condition of their employment;

(d) Refusing to reinstate any of the employees listed in Appendix A or requiring as a condition to their reinstatement, membership in International Association of Machinists, or Production Workers Local 1518, or any other labor organization of its employees, or abandonment of membership in International Union, United Automobile Workers of America, Local No. 76, or any other labor organization of its employees;

(e) Giving effect to its contracts with International Association of Machinists or Production Workers Local 1518;

(f) Recognizing Production Workers Local 1518 as the exclusive representative of its employees;

(g) Refusing to bargain collectively with International Union, United Automobile Workers of America, Local No. 76, as the exclusive representative of its production, maintenance, and shipping employees, exclusive of supervisory employees, foremen, regular clerical employees, and employees in the tool and die department, in respect to rates of pay, wages, hours of employment, and other conditions of employment.

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

(a) Offer to the employees listed in Appendix A immediate and full reinstatement to their former positions, without prejudice to their seniority and other rights and privileges, dismissing, if necessary, any employees hired by the respondent since February 27, 1937, to perform the work of such employees;

(b) Make whole the employees named in Appendix A for any losses of pay they have suffered by the respondent's discriminatory acts, by payment to each of them of a sum of money equal to that which he would normally have earned as wages from February 27, 1937, to the date of the respondent's offer of reinstatement, less any amount earned during that period which he would not have earned if working for the respondent;

(c) Inform the employees listed in Appendix A in writing that they are free to join or assist International Union, United Automobile Workers of America, Local No. 76, or any other labor organization of its employees and that their status as employees of the respondent will not be affected by such action on their part;

(d) Upon request, bargain collectively with International Union, United Automobile Workers of America, Local No. 76, as the exclusive representative of its production, maintenance, and shipping employees, exclusive of supervisory employees, foremen, regular clerical employees, and employees in the tool and die department, in respect to rates of pay, wages, hours of employment, and other conditions of employment;

(e) Post notices in conspicuous places in its plant stating (1) that the respondent will cease and desist in the manner aforesaid, and (2) that the respondent's employees are free to join or assist any labor organization; and maintain such notices for a period of at least thirty (30) consecutive days from the date of posting;

(f) Notify the Regional Director for the Twentieth Region in writing within ten (10) days from the date of this Order what steps the respondent has taken to comply herewith.

APPENDIX A

Buena Ardinger
Geraldine Brim
Leon M. Bromley
Lucille Bronson
Joe Camara
Florence Cambra
William Cambra
Hilda Cardoza
Roy A. Christie
Willard Eugene Cox
Gertrude Deichler
Tony Dias
Marian Dickman
Roy S. Dickman
Ruby Elling
Rose Fereira
Dorothy Fernandez
Marie F. Freitas
Ray H. Givan
Albert Greenhalgh
David LaGrone
Frank J. Harmon
Mary Hughes
Erma Jacobsen
Eleanor Johnson
Wilfred Ernest Kettle
Dorothy Kirilov
Stella Kiseloff

Joseph J. Kleiner
Joseph Paul Kreig
Marie Lichy
Wm. J. MacFarland
Velma Malfatti
Harold Merritt
Bernice Meyers
Dorothy Mitchell
Hollis Nichols
George Vincent Paraspolo
Gilbert Paulo
Robert James Ping
Reginald Price
Garnett Dorothy Rose
Grace Roth
James T. Sanchez
Robert R. Schmidt
Evelyn Severe
Martin J. Shubin
Sophie Shubin
Violet Stagnaro
Irene Stephens
Eldon M. Tennis
Vera Leona Tidwell
Jack Townsend
Blanche Triplett
Fred G. Turner
Leonard Whaley