

In the Matter of FANSTEEL METALLURGICAL CORPORATION and AMALGAMATED ASSOCIATION OF IRON, STEEL AND TIN WORKERS OF NORTH AMERICA, LOCAL 66

Case No. C-235.—Decided March 14, 1938

Rare Metal Products Manufacturing Company—Interference, Restraint, or Coercion: antiunion statements; use of labor spy; isolation of Union president; attempt to induce employees to renounce Union and institute employee representation plan—*Collective Bargaining:* flat refusal to deal with “outside” union as representative of employees—*Strike:* brought on by employer’s unfair labor practices—*Discrimination:* alleged refusal to reinstate strikers; charges of, dismissed, due to failure of strikers’ committee to make request for reinstatement—*Company-Dominated Union:* result of employer’s prior efforts to institute “inside” union in plant; sponsorship, domination, and interference with formation and administration of; support of; mimeographing and typing services furnished by employer; use of company building for meetings and balloting; contrast between hostility to Union and open favoritism toward company-dominated organization; disestablished as agency for collective bargaining—*Reinstatement Ordered:* strikers, upon application; employer’s contention that participation in sit-down strike should preclude reinstatement, found without merit under circumstances—*Discharge Ordered:* employees hired during and after strike if necessary to make room for employees reinstated—*Back Pay:* awarded to strikers whose applications for reinstatement are refused by employer.

Mr. William R. Walsh, for the Board.

Levinson, Becker, Peebles & Swiren, by *Mr. Max Swiren* and *Mr. Harold M. Keele,* of Chicago, Ill., and *Mr. Sidney H. Block,* of Waukegan, Ill., for the respondent.

Mr. Lester Collins, of Waukegan, Ill., for the Union.

Mr. Lewis M. Gill, of counsel to the Board.

DECISION

AND

ORDER

STATEMENT OF THE CASE

Upon charges and amended charges duly filed by Meyer Adelman, organizer for Amalgamated Association of Iron, Steel, and Tin Workers of North America, Local 66, herein called the Union, the National Labor Relations Board, herein called the Board, by Leonard C. Bajork, Regional Director for the Thirteenth Region (Chicago,

Illinois), issued its complaint dated May 25, 1937, against Fansteel Metallurgical Corporation, North Chicago, Illinois, herein called the respondent, alleging that the respondent had engaged in and was engaging in unfair labor practices within the meaning of Section 8 (1), (2), (3), and (5) and Section 2 (6) and (7) of the National Labor Relations Act, 49 Stat. 449, herein called the Act.

The complaint and accompanying notice of hearing were duly served upon the respondent and the Union. On June 2, 1937, the respondent filed an answer to the complaint denying the unfair labor practices charged, alleging that all of its manufacturing operations are intrastate in character, and praying that the complaint be dismissed.

Pursuant to the notice, a hearing was held at Waukegan, Illinois, from June 7 to June 25, 1937, before Tilford E. Dudley, the Trial Examiner duly designated by the Board. The Board, the respondent, and the Union were represented by counsel and participated in the hearing. Full opportunity to be heard, to examine and cross-examine witnesses, and to produce evidence bearing upon the issues was afforded all parties.

During the hearing, the respondent moved for dismissal of the complaint in so far as it was inconsistent with an order and decree of the Circuit Court of Lake County, Illinois, relating to a sit-down strike in the respondent's plant in which certain individuals named in the complaint participated. The Trial Examiner denied the motion on the ground that the issues and parties were not the same and the court's findings not binding upon the Board. This ruling is hereby affirmed. At the conclusion of the Board's case, the respondent moved to dismiss the complaint as a whole and also made numerous motions to dismiss particular parts thereof and to strike certain testimony. Some of these motions, including the motion to dismiss the entire complaint, were denied at the hearing; the Trial Examiner reserved rulings on others until the issuance of his Intermediate Report. A large number of other motions and of objections to the admission of evidence were made during the course of the hearing, both by counsel for the respondent and by counsel for the Board. The Trial Examiner reserved rulings on some of such motions and objections for disposition in his Intermediate Report.

On September 2, 1937, the Trial Examiner filed his Intermediate Report, in which he found that the respondent had engaged in and was engaging in unfair labor practices within the meaning of Section 8 (1), (2), (3), and (5) of the Act, and recommended that the respondent cease and desist its unfair labor practices, reinstate, with back pay, all but ten of the individuals named in the complaint as having been discriminated against, bargain collectively with the Union, withdraw recognition from a company-dominated labor

organization, and take certain other appropriate action to remedy the situation brought about by the unfair labor practices. Thereafter, the respondent filed voluminous exceptions to findings and recommendations of the Intermediate Report. The Union also filed exceptions to certain parts of the Intermediate Report. The Board has fully considered the exceptions to the Intermediate Report, and, in so far as they are inconsistent with the findings, conclusions, and order set forth below, finds no merit in them. The Board has also reviewed the rulings of the Trial Examiner on motions and on objections to the admission of evidence and finds that no prejudicial errors were committed. The rulings are hereby affirmed.

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

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The respondent is a New York corporation with offices at New York City and at North Chicago, Illinois, where its only plant is located. It is engaged in the manufacture and sale of various products from tantalum, columbium, tungsten, molybdenum, and other rare metals. Its finished products include contact points for ignition systems, tantalum parts for chemical and rayon industries, battery chargers and rectifiers, and special alloy wires for vacuum tubes and radio tubes. Approximately 70 per cent of the raw materials used in the manufacturing processes of the respondent originate in States other than the State of Illinois and in foreign countries. Approximately 70 per cent of its finished products are sold and shipped into States other than the State of Illinois and into foreign countries. The value of its manufactured products during the calendar year of 1936 was about \$1,050,000. The respondent has few competitors in its field, and is in fact the only manufacturer of some of the products it makes.

II. THE UNION

Amalgamated Association of Iron, Steel and Tin Workers of North America, Lodge 66, is a labor organization affiliated with the Committee for Industrial Organization, and admits to its membership hourly paid employees of the respondent. It excludes from membership clerical employees, laboratory men, engineers, and supervisory employees.

III. THE UNFAIR LABOR PRACTICES

A. Background of the unfair labor practices

Until early in July 1936 there was no labor organization in the respondent's plant. Dissatisfaction arose at that time over the intro-

duction into the plant of certain "efficiency experts" who proposed a system of wages based upon certain minima of production. Envisioning a serious danger to their scale of earnings, the employees began seriously discussing organization. A group of employees undertook to establish an industrial union in the plant, and an organization drive was conducted under the guidance of Meyer Adelman, an organizer for the Steel Workers Organizing Committee of the Amalgamated Association of Iron, Steel and Tin Workers of North America. A charter, designating the Union as Lodge 66 of the Amalgamated and dated July 24, 1936, was presented to the Union on August 14, 1936. A skeleton organization had been set up prior to the receipt of the charter; temporary officers had been elected, and a substantial beginning toward organizing the employees of the respondent had been made.

B. Interference, restraint, and coercion

On the morning of September 10, 1936, John Kondrath, an employee of the respondent and president of the Union, requested A. J. Anselm, the respondent's plant superintendent, to meet with a committee of the Union. Anselm specified that only employees of five years' standing should be on the committee. This condition, it happened, was satisfied at the time. While much grosser examples of antiunion conduct followed, we may point out here that the imposition of such a condition on the personnel of the Union committee was totally unwarranted. The right of employees, guaranteed by the Act, to representatives of their own choosing necessarily negatives any privilege on the part of the employer to place limitations upon the representatives whom the employees are permitted to designate.

At any rate, a committee of six employees, including Kondrath, met with Anselm that afternoon. A contract¹ was presented for his consideration. It embodied certain provisions for improvements in working conditions, for a closed shop and check-off, for recognition of and bargaining with the Union. Anselm read it over, and objected to the closed-shop and check-off provisions. However, he by no means limited his remarks to such legitimate subjects of objection and negotiation. He announced that it was the policy of the respondent to refuse recognition to any union with "outside influences." Producing several copies of a booklet² setting forth details of an employee representation plan, he handed them out to the committee and asked them to consider such a plan in lieu of the form of organization they had chosen. He did not raise the question of whether the Union represented a majority of the employees in an appropriate

¹ Board Exhibit No. 12.

² Board Exhibit No. 13.

unit; he made it clear that the respondent's policy was to refuse recognition to "outside" unions.

Several employees who were present at this conference testified to the above facts, and no controverting testimony was presented by the respondent, although Anselm was present at the hearing and in fact testified at some length on other phases of the case. In its exceptions to the Intermediate Report of the Trial Examiner, however, the respondent urges a finding that by "union recognition" Anselm was referring merely to the closed shop. This peculiar construction of his remarks was not suggested at the hearing, and we would be disregarding the evidence if we adopted it. As a matter of fact, another proposed contract,³ with the closed-shop provision eliminated, was presented by the committee subsequently, to no avail. However, the evidence clearly shows that regardless of terms, Anselm announced an unqualified opposition to outside unions.

If any doubt remained in the minds of the employees as to Anselm's views on the point, it was removed on the occasion of the committee's next visit to his office on September 21, 1936. This time the Union had duly voted to include Adelman, the "outside" organizer, on the committee. Pursuant to an appointment which they understood to have been made for them by a representative of the Board, the committee proceeded to Anselm's office and were shown inside. Anselm was out for the moment but soon returned. Adelman was introduced to him by Ed Ruck, one of the employees on the committee. The conference was short-lived. The testimony of several of the committee members who were present is practically identical as to Anselm's remarks when Adelman was introduced. The testimony of John Kondrath in that regard is as follows:

Mr. Anselm said, "I have nothing to do with this gentleman here. He is not on my pay roll." And he says, "Therefore, I don't want to have any discussion with him. He better go out and present his card and wait out in the lobby, and then maybe I will leave him in."

Well, Meyer Adelman told Mr. Anselm he had no calling cards, but that he thought that the committee that had brought him in there was better than any calling cards he could have.

Mr. Anselm got kind of upset and told him to leave, and get out. He says, "Get out of here. We don't want you", or words to that effect.

So then Mr. Meyer Adelman went out, and Mr. Anselm was very excited and angry, and wanted to know who brought him in.

³ Board Exhibit No. 17.

After Adelman's departure, Anselm denied that any appointment had been made, and the committee withdrew.

The antiunion conduct of the respondent by no means was limited to the occurrences described above. The expressions of hostility to the Union were supplemented by a prompt and aggressive attempt on the part of the respondent to foist upon its employees a company-dominated union.

We have already noted that at the September 10 conference Anselm sought to interest the committee in an employee representation plan. The afternoon of the same day Anselm had conversations with Thomas Fagan, Ted Daluga, and Clarence Dreyer, three employees in the cutting department, relative to the contract proposed by the Union. Fagan and Dreyer testified that Anselm tried to induce them to drop the Union and to sign a petition for a company union. Anselm denied this and testified that he merely was trying to ascertain whether they understood the full import of the provisions of the contract. As to the petition referred to by Fagan and Dreyer, he testified that it was not circulated that day, but admitted that he caused such a petition, relating to an employee representation plan, to be circulated three or four days later. According to his own testimony, this petition "called for an expression from the employees, if they favored that plan." He testified further that his object in circulating the petition was to "find out what the boys down in the shop were thinking about."

The circulation of the petition was vigorously conducted, during working hours. Anselm himself and a number of foremen participated. Uncontradicted evidence shows that Hall, a "straw boss," told Zelenick, an employee, that "we are trying to form a company union . . . you might as well sign up . . . The company will never recognize the outside union anyway," and that Schardt, a foreman, remarked to Steve Luczo, another employee whose signature Hall was soliciting, "Steve, you are better off if you sign for the company union." Other employees were also solicited while they were at work.

Shortly after the second conference on September 21 each employee received an interoffice envelope containing two documents. One was entitled "A Plan of Employee Representation Which Has Been Pronounced Successful in a Large Number of Plants," and contained details of a typical company union set-up, with provision for committees containing an equal number of employee and management representatives and for arbitration of grievances if adjustment proved impossible.⁴ No dues were involved. The other

⁴ Board Exhibit No 15.

document was a statement of the respondent's labor policies, containing various assurances of the respondent's willingness to treat its employees well.⁵ Included in it were the following illuminating passages:

To-day, there is no question of its (respondent's) ability to provide employment and opportunity unless its progress is broken by internal troubles.

The management will not sign the closed shop agreement nor any agreement which has for its objective the virtual control of the relations of the company and its various employees.

In the best interests of everyone concerned, management reserves its right to reward individual merit and efficient work, and to protect and preserve the rights of its individual workers. Likewise, management reserves the right to discontinue the services of any whose work, abilities or general conduct is not in keeping with the best interests of the business and its employees as a whole.

In view of Anselm's preceding clarification of the respondent's attitude toward "outside" unions, and together with the drive to set up a company union, the meaning of the documents was obvious. The carefully guarded statements in the announcement of the respondent's policy were clear enough so that employees could readily comprehend the policy of the respondent toward the Union. The accompanying company-union plan served to drive the message home to any who failed to "catch on" from a reading of the statement of policy.

This attempt to set up a company union proved abortive. Despite the presence of a large number of signatures on the petition, enthusiasm for a company union appeared to be centered principally in the respondent, and the campaign was dropped. Anselm testified that Aitchison, the president, told him to allow the matter to rest with the employees. This was after the signatures had been obtained.

The attack shifted to other fronts. On November 11, 1936, Kondrath, the president of the Union, was called into Anselm's office, which is set apart from the rest of the plant. Kondrath had been working in the tool room. Anselm told him that he had a new job for him. A room near Anselm's office had been fitted up with a lathe and a drill press, and Kondrath was to work there. Kondrath testified that Anselm told him "you are to work over here from eight o'clock until four o'clock, and during the noon hour you can go and eat your dinner any place you want to, except visiting inside of the plant." Upon obtaining Kondrath's promise to stay away from the other workers, Anselm took him to his new quarters and told him

⁵ Board Exhibit No 14.

that if there was no work to be done at a given time, he was to sit down. Magazines were brought to him to enable him to while away the time. One Schultz, Anselm's secretary, served as a flunkey to go to the shops and get Kondrath tools when needed. Kondrath was paid for the lunch period. It is not clear from the evidence what Kondrath's duties were in his isolated location; the respondent's answer alleges that the purpose of the transfer was to have Kondrath "assist in the development and improvement of machines and machine parts." On the evidence, however, it is abundantly clear that the real purpose was to keep him away from the other workers. This ingenious insulation of the employees from the presence of the Union president was abandoned in January, when Kondrath was returned to his old post in the tool room.

One further matter deserves scrutiny before we discuss the events of February 17, 1937. On August 17, 1936, the respondent applied for membership in the National Metal Trades Association, herein called the N. M. T. A. Its application was accepted in the latter part of March 1937. The N. M. T. A. is an association of employers dedicated to the principle of the open shop, and in its Declaration of Principles, which was introduced into evidence, it proclaims that its members will not "deal with striking employees as a body." Aitchison testified that he was ignorant of N. M. T. A. principles relating to labor organizations, except that he agreed with its views on the closed shop. He testified that the respondent joined the N. M. T. A. for the sole purpose of furthering business efficiency by means of its facilities for exchange of views between its members on common problems of manufacturing technique.

One phase of the N. M. T. A.'s activities was not unknown to the respondent, and that was its function of supplying espionage agents. The respondent employed one Alfred Johnstone through the N. M. T. A. the day after applying for membership therein. The complaint alleges that he was hired as a labor spy and used as such; the respondent's answer denies this and alleges that he was hired "for the purpose of working in the respondent's plant and observing and reporting upon all matters coming to his attention respecting plant production, efficiency of plant supervision, efficiency of tool and machine equipment, the morale of employees, shop working conditions, and all other factors reflected in the prevailing rate of production." The testimony relating to this phase of the case warrants particularly close attention, for it is common knowledge that the use of the labor spy is a device peculiarly calculated to lead to strife. The Supreme Court of the United States, in the case of *National Labor Relations Board v. Fruehauf Trailer Company*, 301 U. S. 49 (1937), recognized the propriety of condemning such activity as an unfair labor practice, and upheld an order of the Board

requiring the employer in that case to cease and desist from, among other things, employing persons for the purpose of espionage within the union there involved.

Aitchison testified that Johnstone was represented to be an expert in plant production problems, in efficient plant supervision, and in tool and machine work, and that he was hired as such. He admitted that Johnstone was instructed to make confidential reports to him, and that Johnstone's true function was not disclosed to his fellow employees. Aitchison alleged, however, that the object of this secret arrangement was not in any way to spy upon the union activities of the men, but rather was to get the ideas of an experienced and capable machinist on possible improvements in efficiency of the plant, including changes in personnel and equipment. Johnstone's reports were delivered weekly to Aitchison at the latter's home, and were burned as soon as read. Aitchison said that they dealt primarily with suggested transfers of supervisory personnel and with sundry minor improvements in working conditions. He admitted that four of the reports contained information on the activities of the Union, but said that only the names of the officers and speakers at Union meetings were revealed, and that he knew the names of the officers anyway. As a matter of fact, Johnstone's reports were made to the N. M. T. A., and then transmitted to Aitchison, during the month of October. Thereafter, due to the fact that the N. M. T. A. was subpoenaed to appear before the Senate Subcommittee investigating violations of civil liberties, the reports were made directly to Aitchison. This appears from the testimony of one Abbott, an official of the N. M. T. A. We may reasonably wonder why the N. M. T. A. took pains to avoid having Johnstone's reports get into the hands of a committee investigating violations of civil liberties, if the reports were as innocuous as Aitchison would have us believe. Johnstone was discharged about December 1, 1936, allegedly because of certain domestic difficulties.

Aitchison was immediately followed on the witness stand by Abbott, office manager of the N. M. T. A. in Chicago. Abbott's testimony conflicted directly with Aitchison's on one point. Aitchison had testified that Johnstone was paid, in addition to the regular wages for machinist work, enough to make his total compensation \$200 per month, and that all this was paid directly by the respondent to Johnstone, and not through the N. M. T. A. Abbott testified that the N. M. T. A. billed the respondent for \$225 monthly, less the amount Johnstone earned as regular wages, and that the N. M. T. A. then paid Johnstone the difference between his wages and \$200 a month. The N. M. T. A. kept \$25 a month. The respondent offered thereafter no explanation of this discrepancy.

It is interesting to note that employees who worked at machines in Johnstone's vicinity in the plant testified that he was a poor workman. In fact, even his foreman testified that Johnstone was "very poor," that he "could not do the work," and that he "was not mechanic enough." However, Johnstone did show aptitude at one function. He lost no time in joining the Union, attending meetings, inquiring as to the numerical strength of the Union, and suggesting to his fellow members that they strike. Kondrath testified that Johnstone was eager to attend all Union functions, that "he wouldn't miss a meeting on a bet." Here we find the plausible explanation of his presence. The familiar pattern of the labor spy emerges. His previous experience adds to the picture in this respect. According to Abbott's testimony, Johnstone had been haunting the N. M. T. A. offices in Chicago for about a year and a half previous to August 1936, seeking employment. The assignment to the respondent's plant was his first job for the N. M. T. A. His only known experience, aside from his claim to be a machinist and tool maker, was prior employment at Corporations Auxiliary Company and at the Sherman Service, both organizations having a history of labor espionage activities.

Upon all the evidence, we can reach only one conclusion. We cannot believe that Aitchison was so poor at selecting personnel that he unwittingly employed Johnstone as an expert in the various lines indicated in the respondent's answer to the complaint. We conclude that he was hired as a labor spy and that one of his principal functions, to say the least, was to engage in espionage within the Union.

C. Conclusions as to unfair labor practices prior to February 17, 1937

From the various events set forth above it appears that the respondent engaged in a consistent program, developed along varied lines, of both open and underhanded attack upon the efforts of its employees to exercise their right to self-organization. We find that by the antiunion statements and actions of Anselm on September 10 and September 21, by the campaign to introduce into the plant a company union, by the isolation of the Union president from contact with his fellow employees, and by the employment and use of Alfred Johnstone as a labor spy, the respondent has interfered with, restrained, and coerced its employees in the exercise of their right to self-organization guaranteed in Section 7 of the Act.

D. The refusal to bargain collectively on February 17, 1937

The complaint alleges that the respondent engaged in unfair labor practices within the meaning of Section 8 (5) of the Act in refusing

to bargain collectively with the Union on September 10 and September 21, 1936, on February 17, 1937, and at all times thereafter.

1. The appropriate unit

The complaint alleged that the production and maintenance workers, exclusive of supervisory, clerical, and laboratory employees, constitute an appropriate bargaining unit. The Union admits to membership all hourly paid employees of the respondent, excluding laboratory and engineering employees, supervisory employees and clerical employees. The respondent claimed that employees in the maintenance department, consisting of electricians, carpenters, and steam fitters, should not be included in the bargaining unit with the remainder of the hourly paid employees. However, we find no reason for this proposed exclusion under the circumstances. Most of these employees were members of the Union, and some were extremely active members. No craft organization at any time purported to represent them in dealing with the respondent. We will include them in the unit.

We find that the hourly paid employees of the respondent, excluding laboratory and engineering employees, supervisory employees, and clerical employees, constitute a unit appropriate for the purposes of collective bargaining, and that such unit insures to the employees of the respondent the full benefit of their rights to self-organization and to collective bargaining and otherwise effectuates the policies of the Act.

2. Representation by the Union of the majority in the appropriate unit

A count of the respondent's time cards made at the hearing, with deductions for those not properly belonging in the unit, revealed that on September 10 and September 21 there were at least 185 or 186 employees in the appropriate unit. Witnesses for the Union did not claim, and the evidence does not reveal that it had more than 91 members on either of those dates. While this lack of a majority precludes a finding of unfair labor practices under Section 8 (5) of the Act on those dates, it does not, of course, preclude findings of interference and coercion by the respondent on those occasions directed against "outside" unionization.

On February 17, 1937, the result is different. It was stipulated that there were on that date 229 employees in the unit we have found to be appropriate. This figure was based on the respondent's records. On behalf of the Union, there were introduced into evidence membership cards which were made available to the respondent's

counsel for examination. The respondent checked the cards against its pay roll. The cards were withdrawn later in the hearing and lists of the signatories were admitted into evidence in substitution therefor. After deducting from the list several employees shown to have left the respondent's employ prior to February 17, 1937, it appears that on February 17, 155 employees in the appropriate unit had, by signing membership cards, designated and selected the Union as their representative for purposes of collective bargaining. No evidence was introduced to show that any of these individuals had withdrawn from the Union on or before that date.

We accordingly find that on February 17, 1937, the Union had been designated as their bargaining representative by a clear majority of the respondent's employees in the unit above-described as appropriate. Pursuant to Section 9 (a) of the Act, the Union was, therefore, the exclusive representative of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, and other conditions of employment.

3. The refusal to bargain

On the morning of February 17, a duly authorized bargaining committee from the Union once more met Anselm in his office. The committee informed him that as representatives of the employees in the plant, they desired recognition of the Union and collective bargaining. Anselm reaffirmed the respondent's policy of non-recognition of "outside" unions. At the request of the committee, he conferred with Aitchison and reported back, saying "Nothing doing. It stands as it is, everything." He suggested, however, that the committee return at 2 p. m. the same day. The committee returned at the appointed hour, and Anselm told them: "It is still the same. We can't recognize an outside union. If you fellows want to call it as a shop committee, why, we will give you collective bargaining, but under the leadership of outsiders, and the Amalgamated Association of Iron, Steel and Tin Workers, we will not." The committee withdrew after further discussion proved futile.

The respondent did not controvert the testimony relating to this refusal to bargain. It is significant that Anselm, far from attempting to question the committee as to whether they represented a majority of the employees, indicated a complete willingness to bargain with them if they would renounce their chosen union and assume the status of a shop committee. Coming after the series of blows at the Union described above, this refusal to bargain constituted an unequivocal and final defiance of the Act, and indicated clearly to the employees that the respondent had no intention of complying with the law.

We find that on February 17, 1937, the respondent refused to bargain collectively with the Union as the representative of its employees in respect to rates of pay, wages, hours of employment, and other conditions of employment. We also find that by such refusal the respondent interfered with, restrained, and coerced its employees in the exercise of their right to self-organization and to collective bargaining through representatives of their own choosing, as guaranteed in Section 7 of the Act.

E. *The strike*

Retiring from Anselm's office after the collapse of the attempt to bargain on February 17, the Union committee immediately reconvened in one of the plant buildings. It had been voted full authority by the Union to take such action as seemed appropriate if the respondent could not be induced to recognize the Union and engage in collective bargaining. It was testified that the members of the Union were becoming restive and demanding that the committee take vigorous action. The committee decided to take over and hold two of the respondent's "key" buildings. These buildings were thereupon occupied by about 95 employees. Work stopped, the foremen and women employees left at the request of the Union leaders, and those employees who did not desire to participate were permitted to leave. There was no violence. The remainder of the plant also ceased operations. This happened at about 2:30 in the afternoon. A number of the members of the Union who worked on the night shift and did not arrive for work until about 3 o'clock did not join their fellow members inside the buildings.

At about 6 o'clock that same evening, Anselm, accompanied by two police officials and Max Swiren, counsel for the respondent, went to each of the buildings and demanded that the men leave. They refused, and Swiren thereupon announced in loud tones that all the men in the plant were discharged for the seizure and retention of the buildings.

The men occupied the buildings until February 26, 1937. Their fellow members brought them food, blankets, stoves, cigarettes, and other supplies, the materials being passed into the plant through windows after deputies stationed at the plant had inspected the bundles. The men in the plant kept the machines oiled as best they could. The only injuries to the plant and the equipment occurred on the occasions of two attempts to oust the employees. The respondent had, the day after the occupation began, secured an injunctive order against the men from the Circuit Court of Lake County, Illinois. This was read and posted at the plant. The men refused to leave the buildings, and a writ of attachment was obtained and served upon the men by the sheriff on February 19, 1937. Upon the

men's refusal to submit to arrest, the sheriff and his deputies attacked the buildings with tear gas bombs, a battering ram, and baseball bats. The employees threw back nuts, bolts, spools, and other articles. Many windows were broken, some by the tear gas bombs thrown by the deputies, some by the men in the plant in an attempt to secure fresh air and to combat the gas fumes. Some of the missiles thrown by the men were intended for the purpose of breaking the windows; others were undeniably aimed at the attacking deputies. While the equipment was damaged by this barrage, as well as by the deputies' bombs, there is no evidence that any malicious sabotage of the equipment took place.

The attack on the 19th was unsuccessful. Efforts at mediation on the part of the United States Department of Labor and the Governor of Illinois proved unavailing. On February 26 the sheriff and an increased force of deputies conducted another drive on the buildings. After a pitched battle similar to the one on the 19th, the men were ousted and placed under arrest. Most of them were eventually fined and given substantial jail sentences by the Circuit Court of Lake County for violating the injunction.

F. *The resumption of operations*

As soon as the strikers were ejected from the buildings, the respondent began preparing to resume operations. The buildings were cleaned up, broken windows were replaced, some rusted machines were rehabilitated, and production gradually began. Aitchison gave Anselm *carte blanche* to restaff the plant with new employees in addition to such of the old employees as he desired to retain. Anselm told his various foremen to seek out those of the employees they wanted back, and to have both old employees and new applicants report to Anselm for interviews. Foremen approached a large number of old employees with individual offers of reemployment, including many Union members who had participated in the occupation of the buildings or helped to furnish supplies to those inside. Back pay for the period of the shut-down was offered and given to most if not all of those returning to work. A large number of new workers were hired.

Meanwhile the Union was not inactive. On March 3 a duly authorized Union committee presented to the respondent a written request⁶ for a meeting to consider recognition of the Union and collective bargaining. On the same day, Aitchison sent to the Union committee a written reply,⁷ refusing to meet for the purposes specified. A number of reasons were given, including allegations that the Union was not a proper bargaining agency since the respondent

⁶ Board Exhibit No. 25A.

⁷ Board Exhibit No. 26.

was not in the iron, steel, or tin business, that many of the members of the Union had become such through duress, and that those who had participated in the sit-down strike were ex-employees. On March 5 the Union committee returned and presented another written request,⁸ pointing out that the Union was "desirous of bringing about peace and a settlement of the strike now in progress," requesting recognition of the Union, and asking "that a conference be held between the company and the Union for the purpose of adjudicating the dispute." Aitchison replied in writing⁹ once more on March 8, again refusing the Union's request for a meeting.

The respondent continued its individual offers of reinstatement to such of the employees as it wanted to take back. Some of the strikers capitulated and returned to work, receiving back pay for the period during which the plant had been closed. They did not resign from the Union, although a few testified that they considered that by going back to work they were abandoning it. Others refused to return without Union recognition and mass reinstatement of the strikers. A skeleton crew of about 30 or 40 began operations in some sections of the plant on March 1. By March 12 the restaffing of the plant was substantially complete and operations were approximately normal. The strikers were still out at the time of the hearing, when the plant was operating with a larger force than at the time the strike began.

G. Conclusions as to the respondent's campaign to break the strike

The complaint alleged that by the announcement of discharge on February 17, and by the failure to reinstate the strikers upon the reopening of the plant, the respondent discriminated in regard to the hire and tenure of employment of the strikers, thereby discouraging membership in the Union and engaging in unfair labor practices within the meaning of Section 8 (3) of the Act. In his Intermediate Report the Trial Examiner found that by failing to reinstate the strikers the respondent had, with a few exceptions, so discriminated against them.

We do not construe Swiren's announcement, coming as it did after the strike had begun, as a discriminatory discharge of the men in the plant. We are convinced by the record before us that this announcement was not so regarded by the strikers. The evidence does not show that they were deterred from applying for their jobs by reason of these assertions of Swiren. On the contrary, it was well known throughout the strikers' ranks that the respondent was taking back many of those who had occupied the plant. As a matter of

⁸ Board Exhibit No. 26A.

⁹ Board Exhibit No. 28.

fact the respondent did reinstate 35 of the sit-down strikers, or over one-third of the total. Emissaries of the respondent were actively seeking out individual strikers and imploring them to return to work. At the same time, the evidence clearly shows that the position of practically all of those strikers who did not go back, and who are named in the complaint, was that they were determined to stay out until the Union reached a settlement with the respondent. And we are unable to reach the conclusion that the Union committee, on March 3 or March 5, made a collective request for reinstatement of all the strikers. Rather, the committee on those dates requested collective bargaining and negotiations looking toward the settlement of the strike. The strikers were still holding out for the objectives for which they had originally struck.

It might be argued that since the Union was demanding as a condition to reinstatement only something to which they were entitled under the Act—recognition and collective bargaining—the respondent in illegally refusing this demand should be considered as discriminatorily refusing to reinstate the strikers. We do not take this view. So long as the employees were unwilling to return to work under the conditions existing at the time the strike was called,¹⁰ however just the grounds on which their position was based, it cannot be said that the respondent was refusing to reinstate them.

While the record gives rise to a reasonable speculation that the respondent would have refused to take back the strikers in a body, such a speculation, in the absence of a clear-cut request for reinstatement, cannot support a finding that the respondent refused to restore them to their jobs. We will dismiss the complaint in so far as it alleges that the respondent committed unfair labor practices within the meaning of Section 8 (3) of the Act by discharging and refusing to reinstate the strikers.

What we have said above does not in any sense involve approval of the conduct of the respondent in connection with its strikebreaking campaign. By refusing to negotiate with the Union committee during the strike, it repeated its unlawful refusal to bargain collectively, and underscored its policy of hostility to the Union. The respondent cannot be heard to assert that the Union on March 3 and 5 no longer was the representative of the majority of the employees. The evidence does not show that any of the Union members had resigned by that time, and any defections from the Union's representative authority implied in the return to work of some of the members is clearly ascribable to the unlawful conduct of the respondent in con-

¹⁰ Cf. *Matter of American Manufacturing Company; Company Union of The American Manufacturing Company; The Collective Bargaining Committee of The Brooklyn Plant of The American Manufacturing Company and Textile Workers Organizing Committee, C. I. O.*, 5 N. L. R. B. 443.

rinuing to rebuff all efforts of the Union to meet and settle the strike through negotiation. Any such defections may accordingly be disregarded.¹¹ By the foregoing actions, as well as by going over the heads of the Union leaders and appealing to individual strikers to return to work, the respondent engaged in unfair labor practices within the meaning of Section 8 (1) and (5) of the Act.

We may note in this connection that the respondent contends that it was under no duty to deal with the strikers due to the unlawful character of the sit-down strike. Under all the circumstances, we find no merit in this contention. We will discuss it more fully under the section headed "The Remedy," in considering the question of whether the strikers' conduct was sufficiently indefensible to warrant us in not ordering them reinstated.

H. Domination and interference with the Rare Metal Workers of America, Local #1

We have noted above that the respondent had resumed almost complete operations by about March 12. Early in April a small group of employees went to Anselm's office and informed him that they contemplated the formation of an inside union in the plant. He told them that "under the labor act" they were entitled to organize. This temporary committee included Henry Berquist, who had been employed before the strike but who had not joined the Union, and Ted Sylvin and A. R. Johnson, both new men who were taken on after the sit-down. Sylvin was informally designated by the group as temporary leader of the movement.

A meeting was planned for April 15, at which a vote was to be taken on whether the employees desired an "independent" union in the plant. The respondent granted the use of one of its buildings for the meeting and readily permitted the use of its bulletin boards for announcements relating thereto. It may be noted in this connection that in August 1936, when the Union requested permission to use the respondent's bulletin boards for notices of meetings, the request was denied. But, for the meeting to consider an "independent" union, the respondent even supplied the typed announcements and mimeographed about 300 ballots, free of charge.

The meeting was held as scheduled, about 200 employees attended, and the balloting resulted in a vote of about 185 to 15 in favor of the formation of an "independent" organization. The ballots were placed in a box which was sealed and put in one of the respondent's vaults.

¹¹ *Matter of Bradford Dyeing Association (U. S. A.) (a Corporation) and Textile Workers' Organizing Committee of the C. I. O.*, 4 N. L. R. B. 604.

The temporary committee decided to incorporate the new organization. Application for a certificate of incorporation from the State of Illinois was made on April 17 and the certificate¹² was granted on the 19th. The name chosen for the organization was "Rare Metal Workers of America, Local #1." A petition was circulated among the employees, the signatories becoming charter members. Over 220 signatures were obtained within two or three days.

Another meeting was held, also in one of the respondent's buildings. Typed notices and use of the bulletin boards were again supplied by the respondent. Officers were nominated at this meeting, and an election scheduled. The slate of nominees and notices of the elections were posted on the respondent's bulletin boards. Ballots were mimeographed by the respondent. The election was held in the plant, ballot boxes being placed under the time clocks in two of the buildings. After the balloting was completed, the ballots were placed in the respondent's safe. The new officers were installed, and some dues collected.

At the time of the hearing, the R. M. W. A. had had two meetings outside the respondent's property. Bylaws¹³ had been adopted, the provisions of which are most illuminating. Section 21 provides that "any member of this organization may bargain as an individual with the employer as to rates of pay and wages or working conditions or any other matter pertaining to his or her employment," and further provides for submission of any grievances on these matters to the Executive Board of the organization, whose action shall be final. The organization is, by the same article, forbidden to affiliate except upon a 75-per cent vote of its membership, and a like percentage of assent is required before a strike may be called.

On May 26 or 27 a committee from the R. M. W. A. met with Anselm, seeking recognition. Swiren, the respondent's counsel, was furnished the membership cards of the organization, and had photostatic copies made. He reported to Anselm at that meeting that "undoubtedly they had a majority, and under the law they deserved recognition, and we would recognize them." Recognition was granted. At the time of the hearing, which began shortly thereafter, the new organization had not engaged in any further negotiations with the respondent.

In considering the question of the legitimacy of the R. M. W. A., we must direct our attention first to the company-union campaign conducted by the respondent before the strike. We have already described the scope of that campaign. Through the statements made by Anselm to the Union committee, through the copies of a model company-union plan sent to each employee in an interoffice envelope,

¹² Board Exhibit No. 31.

¹³ Board Exhibit No. 42.

and through the circulation of a petition with which to obtain support for an "employee representation plan," the respondent's desire for an inside union in the plant was emphatically brought home to the employees. Despite this diligent attempt to undermine the Union, the company-union drive collapsed.

After the reopening of the plant, with the bulk of the Union membership still out on strike, the respondent's prior efforts finally bore fruit. There appeared an inside organization obviously of a pattern calculated to meet with the respondent's full approval. The respondent, not resting on its previous announcements and actions in favor of an inside organization, made certain that its warm feeling toward this new movement was made evident. Favors were readily granted to the R. M. W. A., in significant contrast to the hostility with which it had previously responded to the appearance of the Union. The Union's committee had met with unyielding resistance on the part of Anselm, who had abruptly ordered from his office the "outside" representative selected by the Union to serve on its committee; the R. M. W. A. was welcomed and readily granted recognition. The Union had been denied the use of the respondent's bulletin boards for announcements of meetings; this favor was at once bestowed upon the R. M. W. A. An attempt had been made to poison the Union ranks by the injection therein of a labor spy; far from using espionage against the R. M. W. A., the respondent granted it the use of a company building and furnished it free typing and mimeographing services. The prior drive to induce the employees to abandon the Union in favor of an employee representation plan quite naturally had no counterpart when the R. M. W. A., an organization modelled to comply with the respondent's desires, appeared on the scene. In general, the contrast between the respondent's well-publicized animosity toward the Union and its open affection for the R. M. W. A. was so clear and striking that it must necessarily have prevented freedom of choice by the employees.

Upon all the evidence, we find it impossible to conclude that the R. M. W. A. has been freely selected by the employees, unfettered by company interference. We must conclude that the R. M. W. A. is the result of the respondent's antiunion campaign, and that it has received support from the respondent.

We find that the respondent has dominated and interfered with the formation and administration of the R. M. W. A., and has contributed support to it, and has thereby engaged in unfair labor practices within the meaning of Section 8 (2) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

We find that the activities of the respondent set forth in Section III above, occurring in connection with the operations of the re-

spondent 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

THE REMEDY

Having found that the respondent engaged in various unfair labor practices we must, in order to effectuate the policies of the Act, restore as fully as possible the situation that existed prior to the respondent's unlawful conduct.

One obvious requisite is that the strikers be restored to their jobs upon application by them, unless the surrounding circumstances are such that we should not exercise our power, equitable in nature, to order such restoration. It is contended that the conduct of the strikers in engaging in the sit-down strike and in refusing to vacate the buildings in response to the injunction, relieves the respondent of any obligation toward the participants, including those who brought supplies to the men in the plant. In making this contention, however, the respondent does not come before the Board with clean hands. On the contrary, as we have found above, the respondent is guilty of gross violations of law, violations which in fact were the moving cause for the conduct of the employees.

There can be no doubt that the direct and immediate cause of the strike was the illegal activity of the respondent. Nor can there be any question as to the gravity of the respondent's unlawful course of action. While the Act imposes no criminal penalties for unfair labor practices, it expresses an important national policy. If judicial authority be needed for condemning the refusal to bargain, the highest is available. In the case of *National Labor Relations Board v. Jones & Laughlin Steel Corporation*, 301 U. S. 1, 42 (1937), the Supreme Court of the United States, speaking through Chief Justice Hughes, stated:

Refusal to confer and negotiate has been one of the most prolific causes of strife. This is such an outstanding fact in the history of labor disturbances that it is a proper subject of judicial notice and requires no citation of instances.

Even assuming that the striker's conduct was violative of certain State laws carrying criminal penalties, we cannot say that the respondent is therefore guilty in any lesser degree. One who engages in persistent and open defiance of a national law cannot be heard to assert that the retaliatory conduct of his employees in seeking to secure their rights is necessarily a bar to their reinstatement. We have, in some cases, declined to order reinstatement of striking employees despite the fact that the strike was caused by the employer's unfair labor practices. In one such case, the striker in question had

been indicted for shooting and wounding a fellow employee during the course of the strike.¹⁴ In another, six strikers had pleaded guilty to a felony involving conspiracy to destroy property, and two had pleaded guilty to the felony of stealing dynamite and converting it to their own use; all eight had been sentenced to a maximum of ten years in jail.¹⁵ It cannot be said that the conduct of the strikers in the present case is analogous to the conduct in these instances. They were not engaged in sabotage. Under the circumstances, we do not feel that the respondent's contention should prevail. Furthermore, in view of the fact that the respondent did take back a large number of the sit-down strikers, we find it difficult to believe that the respondent's objection on that score is put forward in good faith.

The outstanding fact revealed by this record is that, had it not been for the respondent's illegal conduct, the orderly processes of collective bargaining, which the Act is designed to encourage, would have taken place. After giving the fullest consideration to the question, our conclusion is that the strikers should be reinstated upon application, and we will so order.

In this connection we may note the respondent's further contention that certain of the strikers were not called back because of inefficiency, and others because the departments in which they worked had been reorganized upon the resumption of operations and their jobs thereby abolished. We need not concern ourselves with these allegations, in view of the fact that we are not finding that such workers were discriminatorily discharged or denied reinstatement. In fulfilling its duty to restore the status quo, the respondent will be ordered to reinstate upon application all the strikers; after this has been done, it may reorganize or reduce its staff in any non-discriminatory fashion it deems necessary, subject to any modification introduced by agreement with the Union. In reinstating the strikers upon application, the respondent must dismiss, if necessary, employees hired for the first time during the strike. This is in accordance with our usual practice in cases where strikes are caused by unfair labor practices.

We shall also order the respondent to bargain collectively with the Union upon request. It is true that at the hearing it was testified that a majority of the workers in the plant had become members of the R. M. W. A., and that there was some evidence that certain of the employees had tacitly abandoned their Union membership by deserting the strikers' ranks and returning to work. However, we have found that the R. M. W. A. is not the free choice of the employees, that it is company-dominated, and that the strikebreaking

¹⁴ *Matter of Kentucky Firebrick Company and United Brick and Clay Workers of America, Local Union No. 510*, 3 N. L. R. B. 455

¹⁵ *Matter of Standard Lime & Stone Company and Branch No. 175, Quarry Workers International Union of North America*, 5 N. L. R. B. 106.

campaign of the respondent, through which a number of strikers were induced to return to work individually, was in violation of law. We have also found that by February 17, 1937, the Union was the representative of a clear majority of the employees in the appropriate unit. To refrain from ordering the respondent to bargain collectively with the Union under these circumstances would be to permit the respondent to profit by its own wrongdoing. Such a frustration of the purposes of the Act cannot be tolerated, as we have said in previous cases involving analogous circumstances.¹⁶ When an employer illegally denies to the representatives of his employees the right of collective bargaining, effectuating the purposes of the Act requires that he be commanded to deal with them upon request. We shall, of course, order the respondent to withdraw all recognition from the R. M. W. A. as the bargaining agency for its employees.

The Trial Examiner recommended that back pay starting on March 12, 1937, be awarded the workers against whom he found the respondent had unlawfully discriminated. Since we have not found this discrimination to be shown by the evidence before us, we shall not follow this recommendation. However, the strikers will be entitled to back pay beginning with any refusal on the part of the respondent to reinstate them upon application in accordance with our order.

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. Amalgamated Association of Iron, Steel, and Tin Workers of North America, Lodge 66, and Rare Metal Workers of America, Local #1, are labor organizations, within the meaning of Section 2 (5) of the Act.

2. The respondent, by dominating and interfering with the formation and administration of, and contributing support to, the R. M. W. A., has engaged in and is engaging in unfair labor practices, within the meaning of Section 8 (2) of the Act.

3. The hourly paid employees of the respondent, excluding laboratory and engineering employees, supervisory employees, and clerical employees, constitute a unit appropriate for the purposes of collective bargaining, within the meaning of Section 9 (b) of the Act.

4. The Union was on February 17 and March 3 and 5, 1937, the exclusive representative of all employees in such unit for the purposes of collective bargaining, within the meaning of Section 9 (a) of the Act.

¹⁶ *Matter of Atlas Mills, Inc and Textile House Workers Union No. 2269, United Textile Workers of America*, 3 N. L. R. B. 10; *Matter of Bradford Dyeing Association (U. S. A.) (a Corporation)* and *Textile Workers' Organizing Committee of the C. I. O.*, 4 N. L. R. B. 604.

5. By refusing and continuing to refuse to bargain collectively with the Union as the exclusive representative of the employees in the above-stated unit, on February 17 and March 3 and 5, 1937, the respondent has engaged in unfair labor practices, within the meaning of Section 8 (5) of the Act.

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

8. The respondent has not engaged in unfair labor practices within the meaning of Section 8 (3) 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, Fansteel Metallurgical Corporation, 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 rights to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, or to engage in concerted activities for the purpose of collective bargaining or other mutual-aid or protection, as guaranteed in Section 7 of the Act;

(b) Dominating or interfering with the formation or administration of Rare Metal Workers of America, Local #1, or any other labor organization of its employees, or contributing support to any such labor organizations;

(c) Refusing to bargain collectively with Amalgamated Association of Iron, Steel and Tin Workers of North America, Lodge 66, as the exclusive representative of its hourly paid employees, excluding laboratory and engineering employees, supervisory employees, and clerical employees.

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

(a) Upon request bargain collectively with Amalgamated Association of Iron, Steel and Tin Workers of North America, Lodge 66, as the exclusive representative of its hourly paid employees, excluding laboratory and engineering employees, supervisory employees, and clerical employees;

(b) Upon application, offer to those employees who went on strike on February 17, 1937, and thereafter, immediate and full reinstatement to their former positions, without prejudice to their seniority or other rights or privileges, dismissing, if necessary, all persons hired since February 17, 1937;

(c) Make whole all employees who went on strike on February 17, 1937, and thereafter, for any losses they may suffer by reason of any refusal of their application for reinstatement in accordance with the preceding paragraph, by payment to each of them of a sum of money 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 to the date of the offer of reinstatement, less the amount, if any, which each, respectively, earned during said period;

(d) Withdraw all recognition from Rare Metal Workers of America, Local #1, as a representative of its employees for the purpose of dealing with the respondent concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work, and completely disestablish Rare Metal Workers of America, Local #1, as such representative;

(e) Post immediately in conspicuous places in its plant at North Chicago, Illinois, and maintain for a period of at least thirty (30) consecutive days, notices to its employees stating that the respondent will cease and desist in the manner aforesaid, and that recognition is withdrawn from the R. M. W. A. as ordered above;

(f) Notify the Regional Director for the Thirteenth 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 complaint be, and it hereby is, dismissed in so far as it alleges that the respondent has engaged in unfair labor practices within the meaning of Section 8 (3) of the Act.