

In the Matter of THE KELLY-SPRINGFIELD TIRE COMPANY and UNITED RUBBER WORKERS OF AMERICA, LOCAL NO. 26 AND JAMES M. REED AND MINNIE RANK

Case No. C-315.—Decided March 31, 1938

Rubber Industry—Interference, Restraint, or Coercion: threatening discharge for union activity—*Discrimination as to Tenure of Employment:* furloughing and discharging employees for union activity; failure or refusal to recall to work, or offer employment to, active union members furloughed by trustees in reorganization proceedings of predecessor corporation, at time when production arose and positions became available, and employing men junior in service or without prior service to fill same; finding that successor corporation, under circumstances, assumed position of predecessor towards said furloughed employees—*Discrimination as to Hire and Condition of Employment:* union employees furloughed by trustees in reorganization proceedings, and not recalled by successor corporation when positions became available because of rise in production—*Strike Settlement Relating to Unfair Labor Practices:* no bar to order where not performed by company or made during pendency of proceedings—*Regular and Substantially Equivalent Employment:* in absence of strong evidence showing, desire of employee for reinstatement controlling—*Company-Dominated Union:* stipulation to disestablish as representative—*Reinstatement Ordered:* employees discriminatorily furloughed or discharged, to former positions; employees furloughed by predecessor, to positions formerly held with predecessor and in which successor failed or refused to employ them; employee whose work changed during proceedings before Board, to position the same or substantially equivalent to that formerly held—*Back Pay:* awarded.

Mr. Jacob Blum and *Mr. Reeves R. Hilton*, for the Board.

Mr. William C. Walsh, of Cumberland, Md., for the respondent.

Mr. Estel C. Kelley, of Cumberland, Md., and *Mr. Anthony Wayne Smith*, of Washington, D. C., for the Union.

Mr. Stanley J. Morris, of counsel to the Board.

DECISION

AND

ORDER

STATEMENT OF THE CASE

Upon charges duly filed by United Rubber Workers of America, Local No. 26, herein called the Union, the National Labor Relations Board, herein called the Board, by the Regional Director for the Fifth Region (Baltimore, Maryland) issued a complaint, dated August 11,

1936, against The Kelly-Springfield Tire Company, a Maryland corporation, herein called the respondent, alleging that the respondent had engaged in and was engaging in unfair labor practices affecting commerce, within the meaning of Section 8 (1), (2), and (3) and Section 2 (6) and (7) of the National Labor Relations Act, 49 Stat. 449, herein called the Act. Copies of the complaint, accompanied by notice of hearing, were duly served on the respondent and the Union.

The complaint charged in substance that the respondent dominated the formation of a labor organization of its employees, known as The Kelly-Springfield Employees Protective Association, Inc., herein called the Association, interfered with the administration of its affairs, and contributed financial and other support to it; that the respondent discriminated in regard to the hire and tenure of employment of 36 persons, named in the complaint, to discourage membership in the Union; and that by these and other acts and conduct, interfered with, restrained, and coerced its employees in the exercise of their right to self-organization and to engage in concerted activities for their mutual aid and protection. On August 5, 1937, the respondent filed its answer traversing the complaint and making certain allegations by way of affirmative defense.

Pursuant to an amended notice, a hearing on the complaint was held in Cumberland, Maryland, on August 12, 13, 14, and 17, 1937, before W. P. Webb, the Trial Examiner duly designated by the Board. The respondent and the Union appeared and 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, with the consent of the Regional Director for the Fifth Region, moved to dismiss the charges of the complaint with respect to 30 of the 36 persons therein alleged to have been discriminated against by the respondent, on the ground that such persons had obtained either satisfactory reemployment with the respondent or regular and substantially equivalent employment elsewhere.¹ The Trial Examiner granted the motion, and his ruling is here affirmed. Evidence was then adduced upon the issues relating to the alleged discrimination against the six remaining persons: Bernard Heishman, Edward Kyle, John Davies, Albert Starkey, Charles Eline, and James Reed. A stipulation, more particularly described hereinafter, entered into on behalf of the respondent and the Board, was taken by the

¹ The persons with respect to whom the charges thus were dismissed are: J. M. Albright, Dave Allender, Paul Amtower, H. L. Bohn, W. H. Chapman, Leonard Davies, John Dick, Andrew Eisentrout, J. R. Fatkins, Edward Fuzenbaker, O. B. Garland, Cecil Grayson, James Holsinger, Albert Jones, Elbert Jones, Elsworth Lewis, George F. Long, Jesse Merrill, Roy Mullen, Blair Pitchey, Minnie Rank, Bernard F. Reed, Elsie Shines, Charles Shriver, J. T. Stallings, Robert Starkey, George Thorpe, Robert Warnick, John Williams, Thomas Wilson.

Trial Examiner in lieu of evidence on the issues concerning the Association. During the course of the hearing the Trial Examiner made various rulings on the admission and exclusion of evidence, to some of which rulings exceptions were made. He also granted motions presented at the close of the hearing by counsel for the Board and the respondent that the pleadings be conformed to the proof. The Board has reviewed these rulings of the Trial Examiner and finds that no prejudicial errors have been committed. The rulings are hereby affirmed.

On November 24, 1937, the Trial Examiner filed an Intermediate Report, copies of which were duly served on all parties, finding that the respondent had committed unfair labor practices affecting commerce within the meaning of Section 8 (1) and (3) and Section 2 (6) and (7) of the Act, and recommending that the respondent cease and desist therefrom and offer the six above-named persons full reinstatement as employees. Exceptions to the Intermediate Report were thereafter filed with the Board by the respondent, and a brief in support thereof submitted. On January 28, 1938, oral argument on the exceptions and record was had before the Board in Washington, D. C., by the respondent and the Union. On that occasion counsel for the respondent orally moved for leave to file as part of the record an affidavit by one Albert Carlson, and copies of an amended plan of reorganization and order directing distribution, of record in the District Court of the United States for the District of Maryland in certain proceedings entitled "In the Matter of The Kelly-Springfield Tire Company, Debtor, Cause No. 8139." The motion is granted. Since the oral argument, counsel for the respondent and the Board have agreed in writing that a copy of a certain letter dated February 2, 1938, signed by the respondent's employment manager and addressed to its counsel may be filed in these proceedings. It is so ordered.

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

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The respondent is engaged in the manufacture, sale and distribution of automobile tires, tubes, rubber accessories, and specialties. It owns and operates a manufacturing plant in Cumberland, Maryland, and maintains branches or warehouses in principal cities of the country. It is a subsidiary of the Goodyear Tire and Rubber Company of Akron, Ohio, a leading producer of tires in the United States, which directly or through affiliates operates factories in several of the States, Canada, Great Britain, Australia, Argentina, and

Java. Substantially all of the raw materials which the respondent uses at the Cumberland plant are brought into Maryland either from other States or from outside the territorial limits of the United States, and, in turn, 90 to 95 per cent of the finished product there manufactured is shipped out of Maryland to branches, dealers, and distributors located throughout the country. The respondent employs approximately 1,400 production employees in Cumberland, and its monthly pay roll is around \$180,000. In April 1937, at the beginning of the annual peak season, it produced 100,000 tires.

II. THE UNION

United Rubber Workers of America, Local No. 26, is a labor organization drawing its membership from production employees at the Cumberland plant. It is affiliated with the Committee for Industrial Organization.²

III. THE UNFAIR LABOR PRACTICES

A. *Interference with, and domination and support of, The Kelly-Springfield Employees Protective Association, Inc.*

At the hearing, counsel for the respondent, without admitting the allegations of the complaint, agreed and consented in behalf of the respondent to the entry of an order by the Board directing the respondent to cease and desist from recognizing the Association as a representative or agent of its employees, or of any unit of its employees, for the purpose of collective bargaining, and to disestablish the Association as such representative or agent. It appears that the Association is defunct and has been so for some time. It was therefore within the discretion of the Trial Examiner to rule, as he did, that no evidence need be taken with respect to the allegations of the complaint concerning the Association.

B. *Discrimination in regard to hire and tenure of employment and condition of employment*

1. Background of the discrimination

Prior to July 5, 1935, the Cumberland plant was owned by The Kelly-Springfield Tire Company, a New Jersey corporation. In

² The Union was first chartered some years ago as a federal labor union by the American Federation of Labor, under the name Rubber Workers Union, No. 19007. About October 1935, an international of rubber workers was organized, known as the United Rubber Workers of America, which was admitted to membership as an affiliated international by the American Federation of Labor. Thereupon, the Union was chartered as a local under its present name by the United Rubber Workers of America and relinquished its direct affiliation with the American Federation of Labor. In 1936, the United Rubber Workers of America affiliated itself with the Committee for Industrial Organization.

March 1935, proceedings were initiated in the United States District Court for Maryland at Baltimore, Maryland, to reorganize the corporation under the provisions of Section 77B of the National Bankruptcy Act, 11 U. S. C. A. 207. Edmund S. Burke, former president of the company, and Thomas B. Finan were appointed trustees of the estate of the debtor.

On April 3, 1935, the trustees furloughed from 400 to 600 employees. The lay-off was with the understanding that the men would be recalled to work when needed. At a meeting shortly thereafter held with a committee of the employees, Finan, Soulen, the plant manager, and Harry Nelson, the employment manager, gave assurances that the furloughed employees would promptly be recalled in their order when jobs became available.

Bernard Heishman, Edward Kyle, and John Davies were among the men furloughed. Heishman worked in the calender room; Kyle and Davies in the curing department. At the hearing, Kyle and Davies claimed that they had been furloughed out of turn because of Union affiliation and activity. Kyle testified that he was furloughed despite his being the oldest employee in service at his kind of work. Davies testified that three non-union men his junior in service were retained in positions similar to his, and further testified that the foremen in his department had jested about his membership in the Union and had said that it would accomplish nothing. While this testimony is uncontroverted, it relates to acts and events occurring prior to the effective date of the Act, and, therefore, affords no basis for any charge of unfair labor practice under the statute. The evidence has materiality and bearing, however, as tending to explain later conduct of the management of the respondent with respect to the two men.³

On July 5, 1935, the District Court at Baltimore confirmed by final order a plan of reorganization for The Kelly-Springfield Tire Company, the New Jersey corporation. On July 22 the respondent was organized under the laws of Maryland. Thereupon, pursuant to the plan, the respondent transferred its entire stock to a wholly owned subsidiary of the Goodyear Tire and Rubber Company, of Akron, Ohio, and received certain cash and shares of Goodyear stock in return. The cash and stock were delivered to the trustees for distribution among the creditors and stockholders of the debtor in discharge of their claims, and title to the estate of the debtor, including the Cumberland plant, was vested in the respondent. Burke and Finan, the sole trustees, became and since have been two of the five directors of the respondent, and Burke resumed and has since held his office as

³ *Jeffery-DeWitt Insulator Co v National Labor Relations Board*, 91 F. (2d) 134 (C. C. A. 4th), cert. den. 301 U. S. 731.

president. The remaining three directors live in Akron, not Cumberland, and are concerned only with the finances of the respondent. At the hearing, counsel for the respondent stated:

I want to add that * * * the operation and management of the Kelly Company is vested entirely in the local officers of the Company here in Cumberland. The three members of the Board who live out of Cumberland are financial men and are concerned with the financing of the Company but not with the operation of it. Mr. Burke and his associates here operate the Company.

The supervisory personnel and supervision of the old company remained the same. Various supervisory employees called to testify by the respondent—Nelson, in charge of the labor department, Smith, the division superintendent, Taylor, the foreman, and Yeager, the supervisor—held their present positions prior to the reorganization.

In July and October 1935, a curtailment in production at the plant occasioned some further furloughs reducing the number of employees at work to 750. Albert Starkey, a bead builder in the bead room was furloughed by the respondent in July.

2. Furlough of Eline

On January 17, 1936, Charles Eline, a worker at the stocking assembly table in the bead room, was furloughed under the following circumstances. He was one of the older employees and had worked at the plant for 10 years. Eline had been very active in Union affairs. He joined the Union in 1934 and had held office from time to time as its vice president, treasurer, and member of the executive board. He also was financial secretary and treasurer of the Central Labor Union, an organization in Allegany County, Maryland. His principal activity arose in relation to his work as chairman of a grievance committee which had been set up by the Union in his department to represent the departmental employees in any grievances had with the management. Eline testified that his duties as chairman of this committee required that he be "very active * * * in trying to work for the betterment of conditions in that department." About one week prior to his furlough, Eline and the members of his committee were called to the office of Delagrangé, the production superintendent. In the presence of Graham, their foreman, Delagrangé said: "Eline, if you don't quit your amateur detective work and snooping around and gathering complaints you are going out the gate." Eline understood that reference was being made to his Union activity as chairman of the committee, and replied that he thought he had the right to represent employees the same as Delagrangé, the management. A few

days later, Graham called Eline, said that a man was going to be furloughed and added, "It is you." Eline protested that he considered the furlough unfair as there had been no complaints of his work, and asked for the reason. Graham gave none, saying: "That is all there is to it." Eline was asked to break in another man for his job. Shortly thereafter, during negotiations between the Union and the respondent concerning the furlough, Nelson, the employment manager, stated: "This detective business and snooping around has to stop."

Throughout the succeeding period until October 1936, the respondent failed or refused to reinstate Eline although repeated requests for reemployment were made.

The evidence of the circumstances surrounding the furlough of Eline stands uncontradicted and leaves little room for doubt that the lay-off was the result of Eline's Union activity in conscientiously representing the employees of his department in their complaints against the respondent. It is evident that the respondent intended to discourage the further handling of employee grievances through Union committees. Eline's position as chairman, as well as his importance in the Union generally, was well-known and his being furloughed for such cause would carry the desired lesson. Delagrangé, in warning Eline, made certain to do so in the presence of the other members of the committee and their foreman. That the respondent's attitude was expressed in colorful descriptive and epithet made its purpose nonetheless clear. It proposed to discourage the committee procedure by discriminating against a Union member engaged therein.⁴ The subsequent statement of Nelson affirmed this intention.

It is common knowledge that the availability of means for adjusting individual grievances through group representatives, and the work carried on by such representatives, constitute an important inducement to union affiliation. In late 1934 or early 1935, prior to the reorganization, the Union had reached an understanding with the management for the presentation of employee complaints through Union grievance committees. In furloughing Eline on January 17, because of his activity as chairman of such a committee, the respondent struck at a vital Union activity, and by such discrimination as to employment, discouraged membership in the Union within the meaning of Section 8 (3) of the Act. The respondent's conduct likewise interfered with, restrained, and coerced its employees in the exercise of rights guaranteed them by Section 7 of the Act.

⁴ As hereinafter shown, the respondent followed this policy by later discriminations as to hire and tenure of employment.

3. Respondent's failure to recall Heishman, Kyle, Davies, and Starkey from furlough

From October 1935, until spring of 1936, the number of employees at work in the plant remained the same. In late March or early April 1936, business increased, and during the course of the following few months more than 900 men were added. In time, the total number exceeded by 300 that prevailing before the furlough of April 1935. Approximately 100 to 125 of the 900 were new men who had never worked at the plant. The remainder comprised for the most part persons who had been furloughed prior to the reorganization. Nelson, the employment manager, testified that the respondent, in considering at that time the reinstatement of workers to, and their employment in, their former positions at the plant, recognized the furloughs of the trustees. The evidence shows that 75 per cent of the employees furloughed before the reorganization were returned to the same, or practically the same, positions which they had held at the time of their furlough, that approximately 15 per cent or more were given different but equivalent positions, and that the remainder, some 40 or 50 in number, accepted positions which were neither the same nor equivalent.

The respondent failed or refused to recall to work, and offer employment to, 34 of the employees on furlough, the persons named in the complaint issued by the Board. At that time, the Union had only 318 members. Upon the charge of those persons that they were being discriminated against in their hire or tenure of employment or condition of employment because of Union affiliation and activity, conversations were begun by representatives of the Union with the respondent concerning each of the cases.⁵

As already indicated, the allegations of discrimination with respect to only 5 of these persons, namely, Heishman, Kyle, Davies, Starkey, and Eline, are here presented,⁶ the charges with respect to 30 of the others having been dismissed by counsel for the Board on the ground that they had obtained satisfactory employment with the respondent or regular and substantially equivalent employment elsewhere. Eline's case requires no further discussion; those of the other four do.

⁵ John Geiss, then president of the Union, testified:

"Our major cases were employees who were bringing cases to us that claimed discrimination. There had been lots of new men being hired in the plant, and put on jobs where men had been furloughed with 8 to 10 years' seniority. They would bring cases like that to us and we would take it up with the company, or a representative of the company, and it seemed they had a blacklist, and every time we would bring a name up, that name would go down on the blacklist."

⁶ The allegations of the complaint with respect to James Reed are considered separately hereinafter

Heishman, Kyle, Davies, and Starkey had been active in the Union for several years and their affiliation and Union activities were well-known to the management. Starkey, together with Eline, and one Amtower had constituted the Union grievance committee in the bead-room; Heishman, along with Reed and one Bantz, the committee in the calender department. Amtower and Bantz are among those with respect to whom the allegations of the complaint were dismissed at the hearing because of their securing either reinstatement or equivalent employment elsewhere. All of the four men were old employees at the plant. Heishman had worked there 11 years; Kyle, 12 years; Davies, 12 years; and Starkey, 11 years. Heishman and Starkey testified that there had been no complaints about their work. Kyle had been employed in the curing department throughout his 12 years, and there is nothing to show that Davies' work had not been competent.

In June 1936, Heishman learned that the respondent was employing a second shift in the calender department. Fair, the second-shift foreman, told Heishman in a chance meeting that his name had been sent in for recall. Later in the month, when he was not recalled, Heishman went to see Nelson about the matter. Nelson said that he would speak with Taylor, the calender room foreman, and ascertain what the difficulty was. The following day, Nelson told Heishman that his job had been filled and that he "should have been there." Heishman replied that the respondent, not he, knew when the job was open, and also where to notify him. Heishman then tried to secure an interview with H. W. (Hod) Smith, the general superintendent, and upon being told that Smith was too busy, went out to Smith's home one night to discuss the matter. Heishman testified that Smith said: "Well, Irishman, I know what you have come for. You want your job, don't you. Well you fellows when you sat down in there on us that day thought you had us * * *. But things have changed. Now I have got you * * *; and I am not ready to take you back." The reference was to an occurrence in December 1934, when the calender crew of ten had stopped work because of a complaint about the spreading of work. The matter had been taken up with the management at that time through Heishman's grievance committee and had been settled in a few hours. Work was resumed the following day and nothing further about the matter had been done by the management. Heishman pointed out to Smith that he knew of one employee who had then been a member of the crew, had been furloughed in April 1935, and since had been recalled.

Smith was unable to attend the hearing but it was agreed that had he been called, he would have denied the testimony of Heishman

as to the conversation had at Smith's home, and would have stated that there had been "considerable conversation during the visit."

After the respondent failed to recall Kyle for work, Kyle made no personal request for employment but left the matter to the conversations that were being had between the Union and the respondent concerning the 34 cases. He felt that in view of his having been furloughed out of turn because of his Union affiliation, it would have been idle to have acted individually. During that period new men were hired in the curing department and furloughed employees of shorter service recalled and there employed. The precise date when Kyle's position was filled by another worker is not shown by the respondent's records although the time could not have been before March 1936, when production first rose. On October 20, 1936, Nelson told Kyle that his position had already been filled. Kyle further testified that none in the plant since employed at his kind of work had done that work longer than he had. It appears at the present time that this work has changed in operation and is now being performed along with other work by only one man on each shift.⁷

Davies had been employed in the curing department "curing air bags." At the time of his furlough, he was told by his foreman that he would be notified and recalled when his job was open. On June 30, 1936, another worker who had been painting tires was given Davies' job. Davies testified that he had made no request for employment before then because he had been waiting to be notified and recalled.

Sometime before June 1936, after learning that the respondent was putting men to work in the pit and machine shops, Starkey went to see Nelson about employment. He was told that no one was being hired for the bead room where he had worked, but that some soon would be, and that he would be notified. Thereafter, on two occasions Starkey learned that men younger in service than he had been employed and, upon making inquiry of Nelson, was merely told that none were being hired that day. The respondent then recalled to work in the bead room all remaining furloughed employees who had been employed there but failed to recall the members of the Union grievance committee of which Starkey was one. New men were also hired in the bead room. Starkey again went to see Nelson and was told that "just a few girls" were being hired. This occurred around June 1936. Starkey asked, "Well, I would like to know, Mr. Nelson, whether I have a job here or whether I am going to get one here?" Nelson replied, as testified to by Starkey, "Well, it looks like you don't want to come back here. You are running around on a committee hunting union mem-

⁷ There is such indication in the statement filed since the oral argument.

bers and interrupting our employees and intimidating and keeping them out of bed." He also told Starkey that if Starkey would keep his mouth shut, he would be reemployed. That was the last time Starkey went to see Nelson.

Nelson was a witness at the hearing. He denied that he had ever in conversation with Starkey objected to the solicitation of union memberships. However, he also testified that he may have told Starkey not to interfere with the workmen at night by soliciting memberships, although he, Nelson, did not so recall. He denied that he had ever told Starkey that he could have his job if he kept his mouth shut. However, he also testified that he had discussed with Starkey "the things Starkey had complained about when he was in the department," that at their last conversation, Starkey had said that "he felt everything in the department was all right and he had no complaint to make," that he, Nelson, then had said, "If you feel that way about it and want to go back and accept conditions as they are and have no complaint, I don't see any reason why we can't put you back." Starkey testified that he had been active on the grievance committee and had had to discuss complaints with his foreman quite often.

It will serve no purpose to discuss at length the discrimination of which the respondent was guilty in failing or refusing to return these workers to their former positions because of their Union activity and membership. The fact of discrimination is clear. At a time when production at the plant had been restored, indeed expanded, and the respondent had placed on its pay roll the hundreds of employees who had been furloughed prior to the reorganization, giving 75 per cent of such persons the same or practically the same positions which they had held at the time of furlough, more than 15 per cent equivalent positions, and the remaining, other employment, Heishman, Kyle, and Davies were denied their jobs. Although each of the three had worked at the plant many years with due competency, when the jobs which they had held and were awaiting again became open, other persons younger in service or without prior service were given the positions. Starkey was discriminated against when the respondent, who had furloughed him, offered available work in the bead room to younger men, and made his recall the subject of a condition unlawful under the Act.

The respondent urges, however, that inasmuch as there was uncertainty about seniority rules at the time of its recalling or employing, its failure to recall and employ Heishman, Kyle, Davies, and Starkey was not discriminatory. We cannot agree that certainty of seniority rules is a *sine qua non* of a finding of discriminatory failure or refusal to employ. The presence or absence of such rules consti-

tutes but one circumstance to be considered along with other facts of the case.

Heishman and Starkey were members of their respective departmental grievance committees. The respondent, in failing to recall these two men, was merely following a policy which a few months earlier it had enforced with equal vigor against Eline. What we have said above in that connection is relevant here and requires no repetition. When Heishman, after gaining no satisfaction at the plant in his quest for his job, finally went to Smith's home, he was met with marked animosity by Smith towards the Union men. That Smith, had he been called, would have denied Heishman's version and have testified instead that "considerable conversation" had been had, can be given little weight, for Smith's version is not known. Nor did Starkey fare much better when he finally was able to secure an expression from Nelson about the possibility of his employment. While Nelson denied that he had told Starkey that he, Starkey, could have his job back if he kept his mouth shut, Nelson's other testimony to the effect that he had offered Starkey a job provided he would be willing to accept conditions and would have no complaints, was in fact a confirmation of Starkey's testimony. To a worker on a grievance committee, the implication in Nelson's offer was unmistakable. Starkey's further testimony that Nelson had objected to the solicitation of members invites belief despite Nelson's lack of recollection thereof. Such objection constituted an unfair labor practice.

Kyle and Davies, for reasons heretofore mentioned, did not confer personally with their superiors about being employed in their former positions. After it became evident that they were not being recalled, their cases were included among the 34 taken up by the Union representatives in the conversations had with the respondent. Kyle and Davies were strong Union members from the early days of the Union, and testified to having engaged in soliciting memberships. The discrimination practiced against them by the respondent must be interpreted as a further expression of a perpetuated unfriendly attitude which the management entertained towards them because of their Union sympathies, an attitude which first exhibited itself in a serious way when the men were furloughed by the trustees. In this connection it should be noted that the management and supervisory personnel at the time of the recall and reemployment were the same as those which had been in charge of affairs during and prior to the reorganization, and Nelson testified affirmatively that in recalling the furloughed employees, the foremen were consulted.

We find that the respondent by failing or refusing to recall and employ Heishman, Kyle, Davies, and Starkey, under the circumstances above set forth, discriminated in regard to hire, tenure of

employment, and condition of employment, thereby discouraging membership in a labor organization.

The respondent earnestly contends that it cannot be held to have committed an unfair labor practice in not recalling and employing Heishman, Kyle, and Davies for the reason that they were never employees of the respondent. It argues that these men were furloughed not by the respondent but by the trustees; that by no act done or order entered in the reorganization proceedings was any obligation imposed upon it to reinstate employees furloughed by the trustees, in the event production arose; that the "National Labor Relations Act does not place any obligation on an employer to give employment to men who have never worked for that employer"; and, hence, its failure to employ cannot be construed as an unfair labor practice.

There can be no serious dispute that the Act is not intended to interfere with the normal exercise of the right of the employer to select its employees or to discharge them. However, if the employer discriminates either as to hire or tenure of employment or condition of employment because of organizational affiliation and activity, thereby discouraging membership in a labor organization, he has committed an unfair labor practice within the meaning of Section 8 (3) of the Act. It is not essential in all cases to a finding of unfair labor practice under this section of the statute that the status of an employee be held by the person against whom the alleged discrimination has been directed, for the provision thereof has express application to a discrimination as to hire. And where the charge of discrimination does relate to hire, the fact that an employee status has not existed is wholly without probative bearing on the issue whether an unlawful discrimination has occurred. Moreover, the record shows, and we so find, that upon the completion of the reorganization in July 1935, and thereafter, the respondent through its officers and agents did intend to, and did, assume the position theretofore occupied by its predecessor corporation, in reorganization, towards the employees who had been furloughed, and did undertake thereby to reinstate such employees to, and employ them in, their former positions when the same became available; that these employees so understood and acquiesced in the assumption of the employer relationship towards them by the respondent and in its continuation of their employee status. The fact that the respondent in taking over the plant retained the management and supervisory personnel of the predecessor, gave employment to all persons working at the plant, and failed to give any notice in the 9 months succeeding the reorganization that it was not assuming the recall, if production arose, of the hundreds of employees who had been furloughed during the reorganization proceedings and were awaiting

such recall; together with the further fact that the respondent did recall these employees and when doing so did recognize their employee status; and, further, that at the time of the strike settlement, hereinafter mentioned, the respondent drew no distinction between the employees whom it had furloughed and those furloughed by the predecessor, confirms this finding.

4. The discharge of Reed

On June 1, 1936, James Reed, an employee at the plant, was discharged by the respondent. He was called to the employment office and told that he "no longer fitted into the picture." No reason was assigned or explanation given. The Union and Reed assert that he was discharged because of his Union activity and membership. The respondent contends that it discharged him for "proper causes." A discussion of the matter was had later in June 1936 at Akron, Ohio, by Reed and officers of the United Rubber Workers of America, with Slusser, the vice president of the Goodyear Tire and Rubber Company. Although several hours were spent in reviewing the claim of the Union officers that Reed, and the other employees named in the complaint, had been discriminated against by the respondent, Slusser was obdurate. He stated that he "did not believe in the Wagner Act or any other acts passed by the United States Government; that they were going to operate those plants as they seen fit."

Reed was probably the most important man in the Union. He was its first permanent president. When the Union and management reached their understanding for the presentation of employee complaints through the Union grievance committees, Reed became chairman both of the plant grievance committee and of his departmental grievance committee in the calender room. In these positions he proved very active in securing adjustments of complaints. He sat with the management in negotiating at least one serious labor dispute. In 1934, when 16 employees were discharged at the plant allegedly for organizational activity, he was made chairman of the employee committee appointed to handle the matter. This particular controversy was settled by negotiation with the management after a charge had been filed with the Regional Labor Board in Pittsburgh.

The evidence admitted on behalf of the respondent related to Reed's alleged traits of personality, conduct, and competency in the period commencing some 2 years preceding the discharge, and before the reorganization. The respondent's principal witnesses in this branch of the case, namely Yeager, the supervisor of the calender train, Taylor, the foreman of the calender room, and Smith, the division superintendent, all were in accord that prior to that time, the respondent had no cause for complaint either about Reed or his work.

With respect to Reed's alleged behavior and conduct, Yeager testified that Reed was "insubordinate"; that he acted "very important" and "independent"; that Reed's attitude was not "very good"; that he "didn't take much interest in his work"; that he was "one of the worst men I have ever had work under me"; that when Reed would be told that his feeding was causing too much "scrap" or waste, he would say "Everything is all right and I don't care," and after correcting himself, would revert to his own manner of feeding. Taylor, the foreman, testified, that Reed was "antagonistic to his superiors" although not so much so to Taylor; that Reed said he had a hand in running the department as well as the management; that he was "boisterous and very important," "looked down on everybody else around" and was the "leader of the whole gang"; that he disregarded orders. Smith, the superintendent, testified that Reed "got very unruly"; he "assumed an attitude that he was superior to his supervisors and foremen"; he did things "which seemed to us to tantalize and belittle his superiors"; was "constantly complaining"; "was the most tantalizing, provoking individual I have ever come into contact with"; that on January 8, 1935, when Smith discussed the matter with Reed and told him not to return to work unless he changed his ways, Reed had said "I will be back"; that on March 19, 1935, when Smith told a group of employees presenting a grievance that he, Smith, thought the respondent was being fair, Reed had said, "It is a damn lie." Christner, a fabric supervisor, testified that about a year before the discharge, Reed put a piece of fabric on the witness' shoulder after the witness had told Reed not to cut out a sample, and that Reed thereafter put pieces of the fabric on the witness' shoulder about 75 times. Turner, a non-union worker under Christner, testified that he saw Reed place rubber on Christner's shoulders 10 or 12 times. Several of the respondent's witnesses testified that Reed cursed the respondent and referred to its president and plant manager as "sons of bitches."

Reed denied that he had disregarded his foreman's instructions; admitted that he cursed the respondent but testified that other rubber workers at the plant had done likewise; and denied that he had called the president and plant manager "sons of bitches." Lewis, the head calender operator, a Union member and former officer, testified that he had worked with Reed for many years on the calender train; that Reed was not boisterous; that he was agreeable and well-liked by the men; that Reed was no more argumentative than anyone else.

Yeager, the supervisor, and Smith, the superintendent, in their testimony for the respondent, gave the following instances of Reed's complaint-making. Yeager testified that Reed had complained that officials of the respondent were getting high salaries and the working-

men not enough. Smith testified that Reed had complained in late 1935 about the method followed by the respondent in paying its workmen, that is, of paying them on their last day of work by checks bearing the date of the succeeding day when the wages became due; that Reed had said, "It is a hell of a company that will give a check and then ask you to hold it until the next day to be cashed"; that Reed had complained of the procedure followed by the respondent in spreading work; that on another occasion, the calender room committee, including Reed, had presented a grievance dealing with the earnings of the operators and had requested the respondent for their wage rates. Smith added that when the information was refused Reed had said, "I will get it anyway." Both Yeager and Smith testified that at the time the N. R. A. was being enforced, Reed had complained that Yeager was "chiseling."

Reed testified that it was his duty as chairman of the plant and departmental committees to present the complaints of the respondent's employees; that the grievances over the spreading of work and Yeager's chiseling were regular employee grievances which arose during the period; that both were adjusted by the management and that Yeager's chiseling had been ordered stopped. With respect to the wage rates, he testified that the committee had requested the information because of an employee complaint involving an alleged wage disparity among the operators, and that Smith, in denying the request, had said that the rates were none of Reed's "damn business."

Reed worked at the plant as a feeder on the calender train and relief operator. He had been employed at the plant for 15 years. It was his task, as feeder, to feed the fabric into the machine and then to follow it as it passed along through the three units of the calender. After the rubber coatings were applied to the fabric, he was required to cut out any rough edges which appeared, in order to enable the fabric to pass readily through. He was furnished with shears for that purpose.

The respondent's witnesses testified at length concerning Reed's work. With few exceptions, this testimony was related to no specific dates though it referred in a general way to the two-year period preceding the discharge. Yeager testified that the work was "careless"; Taylor, that it was "careless and sloppy"; Smith, that Reed "just did enough to get by so we could not find justification to dismiss him." The three witnesses testified that Reed's work resulted in an unnecessarily large amount of "splices"; and, together with Christner and Bible, an employee, testified that Reed cut out more stock than was required, or cut stock when or where there was no occasion to do so. Yeager testified that Reed would not feed a flat feed but would roll it tight; Taylor and Smith, that he fed too quickly. Taylor testified that in the week preceding the discharge

there occurred five "wrecks", which he deemed an unusual number of such stoppages, and that in his opinion three were attributable to Reed. The witnesses testified that splices, fast feeding, unnecessary cutting, and wrecks resulted in "scrap" or wasted material. However, Taylor conceded that reduction in the amount of scrap had been a problem of the respondent for years, and would continue to be "our big job." He further admitted that wrecks sometimes were unavoidably caused by "wet splices," and Smith testified that splices were sometimes the result of defective rubber.

Reed testified that his work required him to cut stock; that the occurrence of scrap principally depended on the quality of the rubber and that defective material would produce scrap. He further testified that it was an important part of the business "to keep constant touch to hold down scrap," that since he was "the last man that handled [the material, he] * * * would have to take the brunt for that [scrap]"; that Yeager blamed him for occurrences beyond his control and that he, Reed, feeling aggrieved, had with the consent of the Union, written a letter to the respondent about it. Lewis, the head operator on the calender, testified that Reed did his operation on the machine very successfully; that he had no difficulty with the machine or his work; that the department had no unusual amount of scrap when Reed was there; that difficulties occur many times with splices regardless of who is feeding; that Reed was as good a worker as the man now doing his work, in fact was more experienced and better; and that the witness would prefer Reed on the machine to the present worker.

The respondent's witnesses testified to a miscellany of other acts of Reed. Yeager testified that Reed went to other parts of the calender room on five occasions and interrupted work; Buckle, another supervisor, and Smith, that Reed smoked in violation of a company rule; Buckle, that Reed "dominated" the employees and told them not to do too much for the respondent; Smith, Taylor and Bible, that Reed gave "Facist" salutes; and Taylor and Bible, that Reed had said that the country needed a Hitler to straighten it out.

Lewis testified that Reed did not dominate the men; was agreeable to them; that the witness never saw Reed smoke nor interrupt his duties to smoke nor to talk to other men in the department. Reed testified that he was not quite sure what was meant by his giving a "Facist" salute; that he never said the country needed a Hitler "or I would not belong to a labor union if I did."

The discharge of Reed was authorized by Soulen, the plant manager; H. W. (Hod) Smith, the general superintendent, gave the actual notice. Both Soulen and H. W. Smith have since terminated their employment with the respondent, and neither testified at the hearing. Taylor, the foreman, testified that he had no authority to

discharge; that he understood that the cause of Reed's discharge was "principally defective workmanship"; that the respondent had not discharged Reed before June 1, 1936, because it "did not want to create any labor trouble." Smith, the division superintendent, testified that Reed had not been discharged earlier because he "just did enough to get by so we could not find justification to dismiss him." He further testified, at greater length, that "the reason we put up with all that we did put up with was because we realized the precarious financial position of the company; we realized that if we had any labor trouble that it would be harder for the company to be reorganized or sold, as the case might be, and we did everything in our power to get along with this particular workman. * * * we realized that anything we did would be called discrimination"; that the "last straw" occurred when Baker, a person identified as an employee not in Reed's department but in another, told Smith some 4 or 5 days before the discharge, "You have no idea how much trouble this man is making for this company throughout your entire organization, and I don't see why the company could possibly put up with such an individual." What "trouble" was meant does not appear.

Reed, as heretofore stated, was given no reason for his discharge at the time it occurred. He testified, however, that two incidents occurring within the 6 weeks preceding thereto may have had a bearing. Both involved employee complaints taken up by the grievance committee with the management. The first was an objection to the method used by the respondent in collecting community funds from the employees. Reed testified that he, personally, had been compelled to donate one per cent of his salary in a single year. The second dealt with the matter of disparity in wages among operators, hereinabove mentioned.

If the respondent discharged Reed on June 1, 1936, because of his organizational activity and affiliation, it committed an unfair labor practice whatever "proper causes" may then have existed for terminating his employment. While proof of the presence of proper causes at the time of discharge may have relevancy and circumstantial bearing in explaining what otherwise might appear as a discriminatory discharge, such proof is not conclusive. The issue is whether such causes in fact induced the discharge or whether they are but a justification of it in retrospect. On the other hand, it is equally true that a failure to show proper causes, indeed any cause, for the discharge does not necessarily establish an unfair labor practice.

Reed's importance to the Union cannot be gainsaid. The representation of hundreds of employees in their complaints against the

management rested in the grievance committees which he headed. That he took his duties seriously and discharged them successfully are amply shown. We are not prone to give much weight to the considerable use made by the respondent's witnesses of generalized characterizations in testifying to Reed's behavior. An employee may "act important" or be "tantalizing" or appear "dominating" in the opinion of a supervisor one or two stations above the rank; yet be an agreeable, fearless leader to his fellow union workers.

Nor are we satisfied that Reed's assumption of Union responsibility thereafter reflected itself in poor workmanship. The record does not establish the contention of the respondent that Reed, after performing competently in his department for 10 years, became an inefficient worker. Reed's position on the calender train placed him in the midst of the continuing struggle waged by the respondent and its supervisors against unavoidable scrap. Reed very evidently felt the problem keenly for he was led to invent a device to reduce the waste. We believe that Lewis, the chief operator on the machine, was accurate in his observation that there was no unusual amount of scrap when Reed was there, and it is significant that Lewis expressed a preference at the hearing to having Reed now do the feeding rather than the employee presently performing the work.

There is little ground for believing that the respondent, after furloughing Eline, refusing to employ Heishman, and bargaining with Starkey about his recall, within the 6 months preceding Reed's discharge, because of their grievance committee work, was ready to accord Reed immunity. Reed's testimony that in the 6 weeks preceding his discharge the management had taken a hostile stand towards the two grievance committee complaints, has much bearing upon the issue. The failure of the respondent to tell Reed at the time of his discharge of any of the many causes here assigned and the attitude of Slusser when the matter was discussed at Akron support the conclusion reached. And there is consistency to be found in the fact that the respondent's witnesses objected to the complaints made by Reed heretofore set forth. The explanations given by Taylor and particularly by Smith for the failure of the respondent to discharge Reed sometime prior to June 1, 1936, are not very persuasive. Smith's testimony that "the reason we put up with all we did put up with was because * * * we realized that if we had any labor trouble it would be harder for the company to be reorganized or sold, as the case might be," hardly supports a discharge which occurred one year after the reorganization and sale had taken place. We observe that the amended plan for reorganization providing for a sale of the plant to the Goodyear interests was issued in June 1935, whereas Reed's discharge occurred in June 1936. Nor could the fears allegedly entertained by the respondent

of labor trouble have been very real. In the three months prior to June 1, 1936, it refused employment to 34 furloughed employees, including grievance committee members, although Union intercession was inevitable.

We sustain the finding of the Trial Examiner that the respondent in discharging Reed, committed an unfair labor practice within the meaning of Section 8 (1) and (3) of the Act.

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 business of the respondent described in Section I above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE STRIKE SETTLEMENT AND THE RESPONDENT'S OFFER OF EMPLOYMENT TO HEISHIMAN, KYLE, DAVIES, STARKEY AND ELINE

1. *The strike and settlement agreement*

On July 15, 1936, the Union filed its charge in these proceedings, and on August 11, 1936, the complaint issued. On August 18, the respondent instituted a suit in the United States District Court for the District of Columbia to enjoin the hearing on the complaint for the alleged reason that the National Labor Relations Act was unconstitutional. On the same day, as a consequence thereof, the hearing on the complaint was adjourned indefinitely. On August 22, the Union called a strike at the plant, and a few days later the plant closed. The causes for the strike were the same various grievances alleged in the complaint. Reed testified that the institution of the suit precipitated the strike.

On September 1 representatives of the respondent and the Union reached a strike settlement. A memorandum of its terms, prepared at the time of the settlement but unsigned by the parties, and thereafter confirmed by the employees at an open meeting, provided, in part:

(1) The company [respondent] has agreed to reemploy without discrimination certain employees who have heretofore been classified as "furloughed."

It is clear that in referring to "certain employees who have heretofore been classified as 'furloughed,'" no distinction was intended to be drawn between persons employed at the plant prior to the reorganization and those working subsequently. The representatives

of the respondent made no such differentiation during the negotiations. Also, whether such reference included all of the persons named in the complaint, apart from Reed and one Rank, or only a portion of them, need not be determined, for the respondent actually offered employment to all such persons, under the settlement agreement.

The representatives who negotiated the settlement testified at the hearing concerning the agreement reached. In certain respects their testimony conflicted. Burke, one of the respondent's representatives and its president, testified that no agreement was had with respect to whether the furloughed employees who were to be employed were to be reinstated to the positions which they had held at the time of their furlough, nor with respect to whether if such reinstatement proved infeasible they were to be given positions paying an equivalent wage. On the other hand, Senator Kimble, one of the Union representatives, a State senator, formerly director in Maryland for the Committee for Industrial Organization, testified that the respondent had agreed "to return all the employees back to their original positions, or to positions that would compensate them the same amount of pay"; that during the negotiations, Burke, himself, after explaining that the respondent "could not agree to reinstate every employee back in his original position, if it had been filled by another employee, because it might interfere with production, and so forth," had stated that "the company guaranteed very explicitly that they [furloughed employees] would receive the same compensation." Burke testified that the respondent understood that "if it was at all possible we [the respondent] would try to give them work and compensation as near their former rate as possible."

We find that it was the understanding and agreement that each of the furloughed employees was to be reemployed without discrimination, that is, that each was to be employed in his or her former position, or if that were impracticable, to be given substantially equivalent employment. Prior to and at the time of the settlement, it had been the complaint of the employees, and the principal cause of the strike, that they had not been offered, or had been refused, employment when hundreds of others in like position had.⁸ The language of the settlement agreement, in providing that the furloughed employees were to be reemployed *without discrimination*, must be interpreted in the light of surrounding circumstances if, indeed, these words have not already acquired so certain a meaning in the field of industrial relations as to admit of no such proof in aid

⁸ As pointed out, of a total of 800 employees furloughed before the reorganization and recalled by the respondent, "approximately 75 per cent * * * got the same or practically the same positions, * * * 15 per cent or more were given different but equivalent positions, and the remainder accepted positions" otherwise

of their interpretation. The furloughed employees were to be employed without any less favor because of their Union activity and membership than had been shown those in similar position whom the respondent already had recalled.

The respondent contends that it was agreed at the settlement negotiations that Reed was not to be reemployed by it. There is no evidence in the record supporting such contention. The Union representatives testified that they had understood that Reed's case would be the subject of further negotiations with the respondent within 90 days after the settlement was approved. The respondent's representatives denied that any such understanding had been given. We find that no agreement was entered into at the time of the settlement for the reemployment of Reed or for any other disposition of his claim to reinstatement. It is immaterial what understanding, if any, was had concerning future negotiations, and none in fact ever occurred.

2. Respondent's offer of employment in October 1936, to Heishman, Kyle, Davies, Starkey, and Eline, and the arrangement with Heishman in February 1937

In October 1936, Nelson notified Heishman, Kyle, Davies, Starkey, and Eline that they could return to work. Heishman, who at the time of his furlough had worked in the calender room as a millman and part-time operator at a wage rate of 92 cents an hour, was offered a job in the "black mill" at 40 cents an hour. The black mill was a separate building where lamp black and rubber were mixed, and the work there was very dirty. Kyle, who had been employed in the curing department curing tires at a wage rate of 62½ cents an hour, was offered a job on the sewing machine at 35 cents an hour. Davies, who had been employed in the same department curing air bags at a wage rate of about 4 dollars a day, was offered a position in the millroom at 35 cents an hour. Starkey, who had been employed as a beader in the bead room at a wage rate of 51 cents an hour, was offered a job as a tire builder at 35 cents an hour. Eline, who had worked at the stocking assembly room in the bead room at a wage rate of 45 cents an hour, was offered a job in the accessory department at 35 cents an hour. All of the men remonstrated because of the low rate of, and their unfamiliarity with, the work tendered, and requested reinstatement to their former positions. We find that the respondent clearly did not offer these men employment substantially equivalent in wage or kind to that which they had had at the time of their respective furloughs.

Heishman refused to accept the job after Nelson told him that he could not be transferred to the calender department should a vacancy there occur. Nelson denied telling Heishman that he could not be

transferred. However, Heishman was corroborated by an employee who happened to overhear Nelson's statement. Some time later he was offered employment in the millroom, which likewise was not substantially equivalent to his former position and which he refused. Kyle said he would take the new job only under protest, and refused it when Nelson would not assent. Starkey likewise said he would accept under protest, signed an employment card, but then notified the respondent the following day that he had decided not to take the position. Starkey has had employment since August 1936 as a dye carrier with the Celanese Corporation in Cumberland, where he has been earning 25 dollars a week. Eline accepted the position in the accessory department because he was told there was no vacancy in the bead room.

Davies, under economic duress, decided to accept the job offered. He submitted to a routine physical examination by the respondent's doctor, and it appeared that he had a small right hernia. Nelson indicated that in that circumstance there could be no employment. Davies, who had had no knowledge theretofore of his condition went to see his own physician, Dr. Van Omer, who told him that he had no hernia. He thereafter was examined by Drs. Hyman and Gracie who found a slight right hernia, and Dr. Van Omer upon a re-examination, concurred. Dr. Hyman, a specialist in hernia cases, reported:

In view of the fact that Mr. Davies has done quite heavy work for a long period of time, without even knowing that he had this slight change, I feel that it is likely that he may go on working for many years without further trouble.

At the time of the examination made by Dr. Hyman, Davies had been employed as a stone mason doing much heavier work than would be required in the position in which he had been employed at the time of his furlough.

We already have found that the settlement agreement required the respondent to employ the furloughed employees in their former positions or offer them employment substantially equivalent thereto. We also have found that the respondent in thereafter offering the five men employment did not offer work which was equivalent. Accordingly, in view of the respondent's failure to perform substantially its undertaking in this respect, we find that the agreement constituted no bar to an order directing the respondent not only to cease and desist but to offer employment and reinstatement as hereinafter provided. Moreover, we have held that where no member or representative of the Board has participated in an agreement involving in whole or in part the compromise and settlement of charges of unfair labor practices pending before the Board, the Board is not concluded

by such an agreement from determining, in its own discretion, whether under the circumstances of the case it is necessary in order to effectuate the purposes and policy of the Act, to refuse to withhold action on account of such agreement.⁹

With respect to Davies, the respondent, in the brief which it submitted, assumed the position that the Board was without authority to order an offer of employment and reinstatement to him for the reason that under Section 36 of the Workmen's Compensation Law of Maryland, it appeared that "while ordinarily compensation cannot be claimed for a pre-existing hernia, nevertheless, if, as the result of an accidental injury, such hernia becomes so strangulated that an immediate operation is necessary, compensation can be claimed for it, and * * * if such operation results in death, the employer would be responsible for the Five Thousand Dollars (\$5,000.00) paid in death cases, and would, in any event, be liable for the cost of the operation and the compensation payable for the time lost." (*Annotated Code of Maryland*, Article 101, sec. 36.) At the oral argument counsel for the respondent was interrogated as to whether or not it was true that the respondent had insured all of its compensation risks, including such risk as might be involved in Davies' case, in the manner required by the State compensation law. An officer of the respondent who attended the hearing, replied, at the request of the respondent's counsel, that the respondent does carry and has carried such insurance, that what risk may exist in Davies' condition was covered by such insurance, that his condition would have no effect upon the amount of premium paid by the respondent for such insurance save that in the event a compensation payment actually had to be made in the future to Davies or his beneficiaries, such compensation payment might affect the amount of premiums thereafter payable inasmuch as such premiums are ordinarily determined upon an experience basis.

We see little need for following the respondent in its contention that the beneficent provisions of the State compensation law have intervened between Davies and what redress may be accorded him under the Act. We have found that the respondent discriminated against him when on June 30, 1936, it failed to recall him from furlough and gave his job to another employee. There is no showing, if material, that at that time Davies had a hernia. The facts upon which to base an order directing an offer of employment and reinstatement had then accrued; and Davies, in the absence of any supervening and controlling event requiring otherwise, may be restored to the position to which he would be entitled. We find no occasion for staying the remedy in the existence, *per se*, of Davies' hernia, for it will afford

⁹ *Matter of Ingram Manufacturing Company and Textile Workers Organizing Committee*, Cases Nos. C-335 and R-234, decided March 11, 1938, 5 N. L. R. B. 908

no impediment to his successfully performing his work. Nor do we find any ground in Davies' assent, under economic duress, to an offer of a job not substantially equivalent and in violation of the settlement agreement. Nor can we perceive any compelling reason in the possibility that at some time in the future Davies may suffer an accident in the course of his employment which may produce a strangulation of the hernia which may result in a compensable risk under the State law which may occasion an increase in premium rate on an experience basis. An injury to any of the respondent's employees in an accident arising out of and in the course of employment may induce a similar series of events.

We further hold that the matter of reinstating Starkey and Eline has not become moot by virtue of their present employment. Each of these men stated at the hearing that despite such employment he wished to be reinstated to the position which he had held at the time of his furlough. The fact that an employee may be receiving somewhat more compensation at other employment, whether from the same or another employer, does not necessarily show that he is enjoying substantially equivalent employment. There is an infinite variety of reasons which may duly move an employee in such a case to seek his old job and past surroundings, and in the absence of strong evidence to the contrary, the employee's own wish is entitled to great weight in determining whether he has actually acquired such equivalent. We find that Starkey and Eline have not been shown to have acquired substantially equivalent employment, and, irrespective thereof, that their reinstatement is necessary in order to effectuate the policies of the Act.

Nor has the matter of hiring Heishman become moot because of an arrangement considered by him and Burke in February 1937. Heishman testified that Burke told him at that time: "We will give you the opportunity at the first opening in the plant, regardless of where it is, if you will accept with the understanding that you will be the first man to be transferred back to your department." Heishman testified that he acquiesced but has never been notified of a vacancy in the plant or his department. Burke, on the other hand, testified that he had merely said to Heishman that "if there was a future opening in the department, the work of which he was capable of doing, we would communicate with him," and that since there had been no such opening in that department, Heishman had not been called. A reading of Burke's testimony convinces us that he considered the promise, to which he testified, not a contractual undertaking but a gratuitous concession, and the fact that the respondent's answer alleges no agreement executed in February, confirms such view. The respondent's brief, filed on January 17, 1938, indicates

that Heishman had still not been called to work at that time. It is apparent that the minds of the parties never met, or if such understanding was reached in February, its performance has long since been abandoned. If either case be true, Heishman's employment cannot be held moot. In sum, we do not find sufficient evidence in the record to support an existing agreement determinative of Heishman's hire.

VI. THE REMEDY

Having found that the respondent has engaged in certain unfair labor practices, we shall order it to cease and desist from further engaging in such practices. Moreover, we shall order the respondent to take certain affirmative action which we deem necessary to effectuate the policies of the Act.

In view of the agreement and consent of the respondent entered of record we shall order the respondent to withdraw all recognition from The Kelly-Springfield Employees Protective Association, Inc., as the representative of any of its employees for the purposes of collective bargaining, and to disestablish it as such representative.

We have found that the respondent has discriminated in regard to the hire, tenure of employment, and condition of employment, of Bernard Heishman, Edward Kyle, and John Davies, and to the hire and tenure of employment of Albert Starkey, Charles Eline, and James Reed. We, therefore, shall order that the respondent offer employment and reinstatement to Bernard Heishman and John Davies in and to the positions held by them on April 3, 1935, at the time of their furlough, and offer full reinstatement to Albert Starkey to the position held by him in July 1935 at the time of his furlough; to Charles Eline, to the position held by him on January 17, 1936, at the time of his furlough; and to James Reed, to the position held by him on June 1, 1936, at the time of his discharge. If necessary, the respondent shall displace employees occupying such positions, in accordance with seniority rules or other procedures now in force. Counsel for the respondent stated at the oral argument that since the issuance of the complaint the respondent and Union have established seniority rules based upon service at the plant.

Inasmuch as it appears that the type of position held by Edward Kyle at the time of his furlough is now being performed by but one man on each shift, who also is given additional work to perform, we shall order the respondent to offer employment and reinstatement to Edward Kyle in and to a position the same as or substantially equivalent to that held by him at the plant at the time of his furlough on April 3, 1935.

We further shall order the respondent to make whole Heishman, Kyle, Davies, Starkey, Eline, and Reed for any loss of pay they

may have suffered by reason of the discrimination of the respondent against them in regard to their hire or tenure of employment or condition of employment. Inasmuch as we have found that the respondent discriminated against Charles Eline by furloughing him on January 17, 1936, we shall order that the respondent pay him a sum equal to that which he normally would have earned as wages during the period from that date until the date of the offer of reinstatement; and since the respondent discriminated against James Reed by discharging him on June 1, 1936, we shall order that the respondent pay him a sum equal to that which he normally would have earned as wages during the period from that date until the date of the offer of reinstatement.

With respect to Heishman, Kyle, Davies, and Starkey, we shall award similar sums commencing with the time that the respondent discriminated against them by failing or refusing to employ them in, or reinstate them to, the positions which they respectively had been employed at the plant at the time of their furloughs. In instances where the precise date when a position was filled does not appear, we shall fix such date from the time when it affirmatively appears that the available position already had been filled. Accordingly, we shall order that the respondent pay Charles Heishman a sum equal to that which he normally would have earned as wages during the period from July 1, 1936, until the date of the offer of employment and reinstatement; that it pay Edward Kyle a sum equal to that which he normally would have earned as wages during the period from October 20, 1936, until the date of the offer of employment and reinstatement; that it pay John Davies a sum equal to that which he normally would have earned as wages during the period from June 30, 1936, until the date of the offer of employment and reinstatement; and that it pay Albert Starkey a sum equal to that which he normally would have earned as wages during the period from July 1, 1936, until the date of the offer of reinstatement. An allowance shall be made in each case for the period from August 22, 1936 to September 1, 1936, when the plant was closed as a result of the strike; and, further, for amounts earned during the period for which compensation shall be awarded.

The respondent states that in view of its consent and agreement to the disestablishment of the Association as a collective bargaining agency of its employees, it should not be required to post notices thereof in conspicuous places at its plant. We have indicated that the Association is now defunct and the respondent has recognized the Union as the sole representative of its employees for collective bargaining and other purposes. Accordingly, the posting of such notices is unnecessary.

We shall order further affirmative action in manner hereinafter set forth.

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

CONCLUSIONS OF LAW

1. United Rubber Workers of America, Local No. 26, and The Kelly-Springfield Employees Protective Association, Inc., are labor organizations, within the meaning of Section 2 (5) of the Act.

2. The respondent, by discriminating in regard to the hire and tenure of employment and condition of employment of Bernard Heishman, Edward Kyle, and John Davies, and by discriminating in regard to the hire and tenure of employment of Albert Starkey, Charles Eline, and James Reed, and thereby discouraging membership in the Union, has engaged in and is engaging in unfair labor practices, within the meaning of Section 8 (3) of the Act.

3. The respondent, by interfering with, restraining and coercing its employees in the exercise of 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.

4. 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, The Kelly-Springfield Tire Company, and its officers, agents, successors and assigns shall:

1. Cease and desist:

(a) From discouraging membership in the Union or any other labor organization of its employees by discriminating in regard to hire or tenure of employment or any term or condition of employment, whether in regard to furloughing or discharging employees or otherwise, because of membership in or activity in behalf of the Union or any other labor organization of its employees, including participation in departmental and plant grievance committee work in behalf of the Union or such labor organization;

(b) From in any other manner interfering with, restraining, or coercing employees in the exercise of their rights to self-organization, to form, join, or assist labor organizations, or to engage in concerted activities for their mutual aid or protection, as guaranteed in Section 7 of the Act.

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

(a) Withdraw all recognition from The Kelly-Springfield Employees Protective Association, Inc., as the representative of any of

its employees for the purpose of dealing with it in respect to grievances, labor disputes, wages, rates of pay, hours of employment, and other conditions of employment, and completely disestablish said organization as such representative;

(b) Offer employment and full reinstatement to Bernard Heishman to the position in which he was employed on April 3, 1935, in the calender room, without prejudice to his seniority rights and other rights and privileges; and make said Bernard Heishman whole for any loss he may have suffered by reason of the discrimination of the respondent in failing or refusing to employ him in such position on July 1, 1936, by paying to him a sum equal to that which he normally would have earned as wages during the period from July 1, 1936, until the date of the offer of employment and reinstatement, less the amount, if any, which he may have earned during said period;

(c) Offer employment and full reinstatement to Edward Kyle to a position the same or substantially equivalent to that in which he was employed on April 3, 1935, in the curing department, without prejudice to his seniority rights and other rights and privileges; and make said Kyle whole for any loss he may have suffered by reason of the discrimination of the respondent in failing or refusing to employ him on July 15, 1936, by paying to him a sum equal to that which he normally would have earned as wages, in the position which he may accept hereunder, during the period from October 20, 1936, until the date of the offer of employment and reinstatement, less the amount, if any, which he may have earned during said period;

(d) Offer employment and full reinstatement to John Davies to the position in which he was employed on April 3, 1935, in the curing department, without prejudice to his seniority rights and other rights and privileges; and make said Davies whole for any loss he may have suffered by reason of the discrimination of the respondent in failing or refusing to employ him in such position on June 30, 1936, by paying to him a sum equal to that which he normally would have earned as wages during the period from June 30, 1936, until the date of the offer of employment and reinstatement, less the amount, if any, which he may have earned during said period;

(e) Offer full reinstatement to Albert Starkey to the position in which he was employed in July 1935 in the bead room, without prejudice to his seniority rights and other rights and privileges; and make said Starkey whole for any loss he may have suffered by reason of the discrimination of the respondent in failing or refusing to reinstate him to such position on July 1, 1936, by paying to him a sum equal to that which he normally would have earned as wages during the period from July 1, 1936, until the date of the offer of

reinstatement, less the amount, if any, which he may have earned during said period;

(f) Offer full reinstatement to Charles Eline to the position in which he was employed on January 17, 1936, in the bead room, without prejudice to his seniority rights and other rights and privileges; and make said Eline whole for any loss he may have suffered by reason of the discrimination of the respondent in furloughing him on said January 17, 1936, by paying to him a sum equal to that which he normally would have earned as wages during the period from January 17, 1936, until the date of the offer of reinstatement, less the amount, if any, which he may have earned during said period;

(g) Offer full reinstatement to James Reed to the position in which he was employed on June 1, 1936, in the calender room, without prejudice to his seniority rights and other rights and privileges; and make said Reed whole for any loss he may have suffered by reason of the discrimination of the respondent in discharging him on said June 1, 1936, by paying to him a sum equal to that which he normally would have earned as wages during the period from January 17, 1936, until the date of the offer of reinstatement, less the amount, if any, which he may have earned during said period;

(h) Post immediately notices to its employees in conspicuous places within and without its Cumberland plant stating that it will cease and desist in the manner set forth in 1 (a) and (b), and that it will take the affirmative action set forth in 2 (b), (c), (d), (e), (f), and (g), of this order;

(i) Maintain the afore-mentioned notices for a period of at least thirty (30) days from the date of posting;

(j) Notify the Regional Director for the Fifth Region in writing within ten (10) days from the date of this order what steps it has taken to comply herewith.