

IN THE MATTER OF ART CRAYON COMPANY, INC. AND ITS AFFILIATED  
COMPANY, AMERICAN ARTISTS COLOR WORKS, INC. and UNITED  
ARTISTS SUPPLY WORKERS

*Cases Nos. C-295 and R-358.—Decided May 11, 1938*

*Art Materials Manufacturing Industry—Employer:* separate corporations, closely related in location and operations, with substantially identical stock ownership and interlocking directorates—*Conciliation:* efforts at, by New York Department of Labor—*Interference, Restraint, and Coercion:* discrediting union; expressed opposition to labor organization; persuading employees to refrain from joining union—*Company-Dominated Union:* domination of and interference with formation and administration; support; soliciting membership in; disestablished as agency for collective bargaining—*Discrimination:* discharges: charges of, not sustained as to one employee; refusal to reinstate: charges of, not sustained—*Unit Appropriate for Collective Bargaining:* functional coherence; interchangeability of employees; centralized control over labor policies; common stock ownership, interlocking directorates; production employees in employer unit—*Representatives:* proof of choice: comparison of pay roll with applications for membership in union—*Strike—Employee Status:* during strike—*Collective Bargaining:* effect of strike upon employer's duty; refusal to recognize representatives—*Reinstatement Ordered:* discharged employee; other discharged employees previously reinstated—*Back Pay:* awarded—*Investigation of Representatives:* petition for, dismissed because of order to employer to bargain.

*Mr. Lester M. Levin, for the Board.*

*Mr. David M. Neuberger and Mr. Murray M. Ratner, of New York City, for the respondents.*

*Mr. S. G. Lippman, of counsel to the Board.*

DECISION

AND

ORDER

STATEMENT OF THE CASE

Upon charges duly filed by United Artists Supply Workers, herein called the Union, the National Labor Relations Board, herein called the Board, by Elinore Morehouse Herrick, Regional Director for the Second Region (New York City), issued its complaint dated July 14, 1937, against Art Crayon Company, Inc. and American Artists Color Works, Inc., New York City, herein at times individually called Art Crayon and American Artists, respectively, and at times called the respondents, alleging that the respondents had engaged in and were engaging in unfair labor practices affecting commerce 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 notice of hearing were duly served upon the respondents and the Union. Various amendments to the complaint were made at the hearing.

In respect to the unfair labor practices the complaint, as amended, alleges in substance that the respondents discharged about May 19, 1937, various employees because they assisted the Union and engaged in other concerted activities for the purpose of collective bargaining and other mutual aid and protection; that certain of such employees have not been reinstated; that the respondents have initiated, sponsored, supported, dominated, and interfered with the administration of a labor organization or plan known as the Benevolent Association; that the respondents have urged, persuaded, warned, and threatened their employees in order that such employees should refrain from joining or give up their membership in the Union and join the Benevolent Association; that although the Union has at all times since May 19, 1937, represented a majority of the respondents' employees, exclusive of supervisory and clerical employees, the respondents have refused to bargain with the Union as the representative to such employees.

On July 21, 1937, the respondents filed answers which admitted the respondents obtained some raw material outside New York, but denied that the respondents had engaged in any of the alleged unfair labor practices or that a labor dispute existed within the meaning of the Act.

On June 3, 1937, the Union filed a petition and on July 12, 1937, it filed an amended petition with the said Regional Director, alleging that a question affecting commerce had arisen concerning the representation of employees of the respondents and requesting an investigation and certification of representatives pursuant to Section 9 (c) of the Act. The Board acting pursuant to Section 9 (c) of the Act and Article III, Section 3, of National Labor Relations Board Rules and Regulations—Series 1, as amended, ordered an investigation and authorized the Regional Director to conduct it and to provide for an appropriate hearing upon due notice. On July 21, 1937, the Board, acting pursuant to Article III, Section 10 (c) (2), of the Rules and Regulations, ordered that the two cases be consolidated for the purpose of hearing.

On July 14, 1937, the Regional Director issued a notice of hearing, copies of which were duly served upon the respondents and the Union. Pursuant to the notice, a hearing on the complaint and petition was held in New York City on July 22, 1937, through July 27, 1937, before James C. Paradise, the Trial Examiner duly desig-

nated by the Board. At the hearing, the Board and the respondents were represented by counsel and participated in the hearing. Full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues was afforded all parties.

During the course of the hearing, the Trial Examiner made several rulings on motions and on objections to the admission of evidence. The Board has reviewed the rulings of the Trial Examiner and finds that no prejudicial errors were committed. The rulings are hereby affirmed.

On November 16, 1937, the Trial Examiner filed his Intermediate Report in which he found that the respondents had engaged in the unfair labor practices alleged in the amended complaint, except in so far as the complaint alleged that the discharge of William Rothfeld and the failure to reinstate Henry Hirsch were unfair labor practices. On December 1, 1937, the respondents filed exceptions to the Intermediate Report. The respondents requested an opportunity to argue their exceptions before the Board. Pursuant to notice, a hearing was held before the Board on January 14, 1938, in Washington, District of Columbia, for the purpose of such oral argument. The respondents were represented by Mr. Nathan Agar, but the Union did not appear.

The Board has considered the exceptions to the Intermediate Report and the brief filed by the respondents. It finds the exceptions to be without merit.

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

#### FINDINGS OF FACT

##### I. THE BUSINESS OF THE RESPONDENTS

Art Crayon Company, Inc., is a New York corporation engaged in the manufacture of crayons, chalks and kindred products, having its office and place of business in Brooklyn, New York. The principal raw materials used by it are wax, steric acid, whiting, paper, wooden and tin boxes, and brushes. During the year 1936, it purchased raw materials costing approximately \$110,000, with approximately 50 per cent of the raw materials being obtained through local jobbers from sources outside of the State of New York. The total sales of Art Crayon during 1936 amounted to approximately \$260,000. About 70 per cent of its customers are located outside the State of New York. The Standard Toy Craft Company is one of the largest purchasers from Art Crayon and approximately 50 per cent of the products sold to it are shipped by Art Crayon to points outside the State of New York. Art Crayon employs about 110

production workers and has salesmen located in Canada, California, Chicago, and the South.

American Artists Color Works, Inc., is a New York corporation having its office and place of business in Brooklyn, New York, and is engaged in the manufacture of artists' materials, such as paints, water colors, oils, pastels, and kindred products. The principal raw materials used by it are colors, linseed oil, turpentine, chemicals, dyestuffs, glass containers, and miscellaneous products. Approximately 30 to 40 per cent of such materials are obtained from sources outside of the State of New York. The total sales of American Artists during the year 1936 amounted to approximately \$150,000. More than half of its customers are located outside the State of New York. American Artists employs approximately 40 production workers.

The officers and directors of Art Crayon are Mack Lester, president, and Nathan Agar, secretary. The officers and directors of American Artists are James Wilson, president, Mack Lester, vice president and treasurer, and Nathan Agar, secretary. Mack Lester and Agar each own one-half of the capital stock of Art Crayon. One-third of the capital stock of American Artists is owned by Wilson, a small amount by Mack Lester and Agar, and the balance of the stock is held by Art Crayon.

Each company has a separate pay roll for its respective employees, files separate tax returns, and pays separate workmen's compensation insurance. The evidence indicates that Mack Lester, president of Art Crayon, has charge of the management of that company and that James Wilson, president of American Artists, has charge of its management. Apparently, Nathan Agar, secretary of each respondent, normally handles labor controversies arising with respect to employees of both respondents.

The two respondents occupy space on the third floor of the same building in Brooklyn, the entire space being leased by Art Crayon, which under an informal agreement, sublets a portion to American Artists. The employees of both respondents use the same entrance and it is necessary for those working for American Artists to walk through the Art Crayon space to go to work. The respondents use the same telephone and the same timeclock. The entire inventory of American Artists is owned by Art Crayon. American Artists maintains no bank account and all funds received by it are endorsed over to Art Crayon. All disbursements of American Artists, including its pay roll, are made with checks of Art Crayon. The latter company also does all the purchasing of materials for American Artists. However, separate books are kept for each of the companies and American Artists is charged for services and disbursements made on

its behalf by Art Crayon. The respondents state that the described financial arrangements result from the fact that both the respondents are operating primarily on a loan of \$35,000 from the Federal Reserve Bank and a \$15,000 loan from the Marine Midland Bank to pay off some installments of the Federal Reserve loan, and the fact that the Federal Reserve loan was made to Art Crayon with the understanding that it could advance no part of it to American Artists.

## II. THE ORGANIZATIONS INVOLVED

United Artists Supply Workers is a labor organization affiliated with the Textile Workers Organizing Committee, admitting to its membership all employees of the respondents, excluding supervisory and clerical employees.

Four "Employee Committees", organized May 6 and 7, 1937, but defunct since May 10, 1937, were labor organizations. Separate committees were organized for the male and female employees of the respective respondents.

## III. THE UNFAIR LABOR PRACTICES

### A. *Interference, restraint, and coercion*

Prior to April 29, 1937, there appears to have been no labor organization among the respondents' employees. Shortly after that date a small group of employees, headed by Dominick Bortoluzzi, Henry Hirsch, and John Rega, wishing to form a union, went to the office of the Textile Workers Organizing Committee and spoke to one of its organizers. They obtained application cards and circulated them among the respondents' employees outside of working hours. On April 29 these three employees called their first meeting at a restaurant, not far from the plant. The number of employees of the respondents who attended the meeting was estimated at from 60 to more than 100. Coincidentally, Bob Lester, general manager of Art Crayon, Dan Small, in charge of the Art Crayon office, and Meyer Cooperman, an Art Crayon foreman, were present in the restaurant during the meeting and apparently were able to see and hear what went on. The employees present at the meeting voted to affiliate with the Committee for Industrial Organization and elected a shop committee to represent them in dealing with the respondents with respect to wages, hours, working conditions, and grievances. This committee was composed of Hirsch, Bortoluzzi, Rega, Theresa Peluso, and one or two other employees. The organization of the employees affected at this meeting was later formally designated as the United Artists Supply Workers.

The respondents lost no time in initiating a campaign aimed at persuading, intimidating, and coercing their employees into forsaking or refraining from joining the Union. This campaign included attempts by the respondents to form inside organizations, and the discharge of active union employees. These occurrences will be discussed chronologically so that they may be judged in the light of their respective surrounding circumstances.

On Saturday, May 1, 1937, during working hours, a meeting of the respondents' employees was called in the plant. The workers of the morning and afternoon shifts were asked to attend. The meeting was opened and addressed by Mack Lester, president of Art Crayon, who told the employees how the business had been built up from small beginnings, expressed his desire that the management and the employees be one happy family, stated that the C. I. O. was a racketeering organization which was out for money, and that he would not recognize the C. I. O. or any outside union but that he would recognize an inside union which he suggested might be called the Benevolent Association. He suggested that the employees organize such an organization. Hirsch, an employee, then addressed the employees and urged them not to leave the Committee for Industrial Organization.

On the evening of May 1, 1937, as soon as employees Hirsch and Bortoluzzi reported for work, they were engaged in conversation by Joseph Mascari and John Giordano, Art Crayon foremen, who urged them to try the Benevolent Association proposed by Mack Lester before committing themselves to an outside union. They stood at Hirsch's machine until about 2 a. m. despite the fact that Mascari's shift ended at midnight. No work was done during the conference.

On May 3, 1937, Bortoluzzi was assigned to the day shift and that afternoon Meyer Cooperman and John Moreno, Art Crayon foremen, invited Bortoluzzi to a neighboring restaurant and urged him "to give the boss a chance and form an inside union."

On May 4, 1937, Bortoluzzi, Hirsch, and Rega were discharged. The first two on different pretexts which are more particularly discussed, below and Rega for no reason which is definitely stated in the record. At noon of the same day a meeting of the employees of the respondents was held in the plant, at which Dan Small, an Art Crayon official, introduced to the employees a Mr. Roth, an organizer for the American Federation of Labor. The explanation given by the respondents is that Roth had asked permission to address the employees and it was granted because "The Company wished to accord the same privilege to the A. F. of L. as had been accorded to the C. I. O." The record does not disclose that the respondents granted any similar privilege to the representative of the Committee

for Industrial Organization. During the open meeting George Douval, a Union member, asked Roth to inquire of Bob Lester the reason for the discharge of Bortoluzzi and Rega. Douval was discharged the next day.

On the afternoon of May 4, 1937, Joe Mascari and John Moreno, Art Crayon foremen, were given permission by the management to hold a series of separate departmental meetings for the purpose of promoting the organization of the Benevolent Association. These meetings were held in the plant during working hours on May 4 and 5, 1937. On the evening of May 4 and May 5, 1937, Moreno and Mascari held another series of meetings of the employees of each of the departments of the respondents, during working hours, in one of the lofts. At these meetings they urged the employees to refrain from organizing an outside union but to form an inside organization as suggested by Mack Lester and to present their demands to the management. On May 5, 1937, during working hours, they called a meeting in the plant of all the employees of the respondents. They told the employees that they were "getting pretty well disgusted and fed up," and finally Mascari stated that he wanted an expression of opinion from those present. He asked all employees who were in favor of the C. I. O. to walk out, and practically all of the employees started to leave. Mascari called them back and asked for a closed ballot. He designated William Rosenzweig, an Art Crayon employee to count the ballots. The result was overwhelmingly in favor of the C. I. O.

About May 5, 1937, the respondents consulted with L. L. Balleisen, industrial advisor for the Brooklyn Chamber of Commerce, who offered them advice concerning their labor problems. This advice was crystallized in a statement read by Mack Lester to the respondents' employees on May 5 and 6, 1937. The statement opened with a recognition of the rights of employees to bargain collectively and then went on to say, "While the Company is willing to enter into a written contract with its own employees, it has come to the conclusion that it will not sign a contract with any union or have a closed shop in the plants . . ." <sup>1</sup> Following the reading of the statement by Mack Lester, which according to him was intended to make the position of the management clear, Rosenzweig, an employee, with Mack Lester's permission, called a meeting of all employees on the day shift. The meeting was held on company time and premises. At this meeting

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<sup>1</sup>The statement in its entirety follows the Balleisen formula condemned by the Board in many instances. See *Matter of Atlas Bag*, 1 N L R. B. 292; *Matter of Hopwood Retinning, Inc*, and *Monarch Retinning Company, Inc*, 4 N L R B 922, *Matter of Cating Rope Works*, 4 N. L. R. B. 1100; *Matter of American Manufacturing Company*, 5 N L R B. 443; *Matter of Jacobs Bros. Co., Inc*, 5 N L R B. 620, *Matter of Federal Carton Corporation*, 5 N. L. R. B. 879.

Rosenzweig stated "Give it a try. We have nothing to lose. If we don't like it, can't we always drop it and go back to the C. I. O.?" With this understanding the employees voted to comply with Mack Lester's suggestion. Rosenzweig apprised Mack Lester of this development and the latter immediately phoned Agar, secretary of each of the respondents, who was away from the plant. Agar thereupon dictated over the phone the forms of the petitions which the employees were to sign. These petitions provided for four separate committees, representing respectively the men and the women in each of the two companies. The petitions were taken around by Rosenzweig and other employees during working hours and were submitted to Agar and Mack Lester on May 7, 1937, with the demands which apparently had been formulated at a meeting of the employees.<sup>2</sup> Agar testified that he stated to the Employee Committee, with reference to the demand that all employees discharged of recent date be reinstated without discrimination, that none had been discharged for union activity but that everyone discharged during the preceding 2 weeks would be reinstated. As to the other demands, he told the committees that the management would consider them and advise the employees of their answer at a later date. Agar testified that he made no attempt to verify the signatures on the petitions but that he merely counted them to see if a majority of the employees of both companies had signed.

The respondents delivered their reply to the demands of the Employee Committees on May 10.<sup>3</sup> The employees held a meeting in the plant on the afternoon of that day at which they rejected the management's offer. That evening a meeting of the Union was called by Bortoluzzi and Rega to consider the matter. A majority of the employees who were present at this meeting voted to reject the respondents' offer, to drop the Employee Committees, and to remain with the C. I. O. They designated Bortoluzzi and Rega as a committee to inform the respondents of their action and to tell them that the Committee for Industrial Organization represented a majority of the employees.

On May 11, 1937, Bortoluzzi and Rega went to see Mack Lester and conveyed the employees' answer to the respondents' proposal. Mack Lester replied, according to Bortoluzzi, "Wake up, I've got the majority here and he showed me a paper with names on. He said this is the Union I recognize, I don't know you boys."

From all the foregoing it is evident that the respondents have dominated and interfered with the formation and administration of the Employee Committees and have contributed support to them, and

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<sup>2</sup> Board Exhibit 11.

<sup>3</sup> Board Exhibit 9.

have thereby interfered with, restrained, and coerced their employees in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing.

*B. The discharges and the refusal to reinstate*

1. *Dominick Bortoluzzi.* Bortoluzzi had been employed by Art Crayon since July 1933. From the evidence as summarized in Section III (A) above, it is clear that by May 4, 1937, the respondents were fully aware that Bortoluzzi was one of the principal organizers of the Union. On the morning of May 4, 1937, Bortoluzzi and Rega were summoned to Bob Lester's office where they were summarily discharged by Bob Lester without any explanation.

The reason given for Bortoluzzi's discharge at the hearing was that on the afternoon of May 1, 1937, following the meeting held by Mack Lester in the plant, Bortoluzzi was overheard by Wilson, president of American Artists, to make the following statement to a girl employee: "If she does not join, we will knock her head against the wall." Wilson's testimony regarding this incident was supported by Beatrice Braverman, his bookkeeper. According to Wilson and Miss Braverman, this statement was made by Bortoluzzi in an ordinary conversational tone just as they were passing him at a distance of about 2 feet. They testified that Bortoluzzi was facing toward them, while the girl to whom he was speaking had her back toward them. They stated that they recognized Bortoluzzi's companion as an employee, and Miss Braverman stated that the girl had been employed in the plant for about 3½ years. Nevertheless, both Wilson and Miss Braverman stated that they would not be able to identify the girl if they saw her. In fact, Miss Braverman was not sure that she would have been able to identify the girl if she had seen her the day following the alleged occurrence. Wilson stated that he was impressed by the incident, and that on the morning of May 3, 1937, he reported it to Mack Lester who received the report without any comment.

The alleged incident occurred on May 1, 1937, and despite its alleged gravity Bortoluzzi was not discharged until May 4, 1937. Bortoluzzi was never questioned about the incident and denies that it ever occurred. The Trial Examiner found the testimony of Wilson and Miss Braverman, particularly that of the latter, to be unconvincing and not to be credited. Even if the incident did occur it is clear from the manner in which Bortoluzzi was discharged and the surrounding circumstances that Bob Lester was concerned not so much with the significance of Bortoluzzi's alleged remarks as he was with getting rid of one of the spearheads of the union movement. The conclusion is inescapable that Bortoluzzi was discharged because of his activities in behalf of the Union.

On May 7, 1937, Agar promised the Employee Committees to reinstate all the employees who had been discharged within the last 2 weeks. However, it was not until May 11, 1937, that Mack Lester told Bortoluzzi to report for work on May 17, 1937.

We find that the respondent Art Crayon unfairly discharged Bortoluzzi on May 4, 1937, because of his union activities.

2. *John Rega.* Rega had been employed by Art Crayon since May 1936. He was one of the three original organizers of the Union and was active in the solicitation of employees for membership in the Union. Rega was elected to the Shop Committee at the meeting in the restaurant at which Bob Lester, Dan Small, and Meyer Cooperman, supervisory employees, were present. It is therefore a reasonable inference that the respondent Art Crayon was fully aware of Rega's union activities.

On the morning of May 4, 1937, Rega was discharged by Bob Lester without any explanation. When Rega asked Bob Lester the reason for his dismissal, Bob Lester answered that he had nothing to say. The respondent offered no explanation for Rega's discharge other than a statement unsupported by any evidence that Rega had been guilty of coercing employees into joining the Union.

Rega was reinstated on May 17, 1937, under the same circumstances that led to Bortoluzzi's reinstatement.

The Board is convinced that Rega was not discharged because of any alleged coercion of employees but that Art Crayon in discharging him was motivated by a desire to get rid of the Union leaders.

We find that the respondent Art Crayon unfairly discharged Rega on May 4, 1937, because of his union activities.

3. *Henry Hirsch.* Hirsch had been employed by Art Crayon since February 1932. He was instrumental in forming the Union and solicited employees for membership therein. As stated above, at the May 1, 1937, meeting addressed by Mack Lester, Hirsch, in answer to Mack Lester's plea that the employees form a benevolent association, spoke to the employees urging them to remain with the Union. Thus Hirsch's interest in the Union was well known to the management.

Hirsch had been working on the night shift and during the day had been employed as a janitor in an apartment house. Following the meeting of Saturday, May 1, 1937, one of his fellow employees chided him about being transferred to the day shift beginning the following Monday. It appears that when a shift was to be changed, Hirsch normally received instructions from his foreman, Cooperman, and Hirsch apparently paid no attention to the remarks of the employee. On Tuesday morning, May 4, 1937, Hirsch was summoned by Bob Lester and accused of violating instructions in failing to report for work on the day shift on Monday. Hirsch protested

that he had received no instructions to that effect. Bob Lester sent him home and told him to report back the next morning. When Hirsch reported the next morning, May 5, 1937, Bob Lester handed him his pay envelope and stated that he was "through" because of his failure to follow instructions.

Hirsch was informed by Cooperman, after a meeting on May 10, 1937, that Art Crayon had decided to reinstate him. Thereafter he received a registered letter instructing him to return to work on the day shift of May 13, 1937.

We find that the respondent Art Crayon discharged Hirsch on May 5, 1937, because of his union activities.

4. *George Douval*. Douval had been working for Art Crayon for about 15 months and was a member of the Union. During the respondents' May 4, 1937, meeting, Douval questioned the American Federation of Labor representative regarding the discharge of Bortoluzzi and Rega. Bob Lester was present at the meeting.

In the afternoon of May 5, 1937, Douval's machine jammed. The foreman sent for a wrench to fix it. While waiting, Douval went to the men's room to smoke a cigarette. Bob Lester looked into the room and asked Douval whether he had been smoking. Douval answered in the affirmative. Bob Lester reported the occurrence to Mack Lester who ordered Douval's discharge.

The respondent contends that signs were posted throughout the plant prohibiting smoking and Douval was discharged for breaking this rule. It was, however, a common practice for Douval and most of the other male employees to go to the men's room at various intervals during the day to smoke. Douval testified that foremen frequently smoked in the plant and Bob Lester admitted that it was his custom to smoke in his office and walk through the plant with a lighted cigarette. Bob Lester further testified that though he had seen employees smoking many times before this incident, he had never reported an employee to Mack Lester by name for smoking. He stated that he reported this incident because of the unrest in the plant and that he had been instructed to do so by Mack Lester.

From the above facts, it is clear that Art Crayon had resolved to discharge union members, particularly leading union members, for minor offenses in order to discourage union activities.

Douval was reinstated on May 17, 1937, together with Bortoluzzi and Rega.

We find that the respondent Art Crayon discharged Douval on May 5, 1937, because of his union activities.

5. *William Rothfeld*. Rothfeld had been employed by Art Crayon since 1935. Although a member of the Union, Rothfeld was not an active participant in the union activities as were Bortoluzzi, Rega,

Hirsch, and Douval. However, on May 15, 1937, Bob Lester visited Rothfeld at his home and stated that he wanted to give him some good advice, suggesting that Rothfeld join an inside organization because the respondents would never recognize any outside union. Rothfeld stated that he was undecided.

On May 20, 1937, at about 9 a. m., Rothfeld was working on the chalk-extruding machine. Rothfeld testifies that he set the control lever and went to the back of the machine to clean the pumps and oil the cups in accordance with his usual custom. For some reason the machine was set in motion and the ram which extruded the chalk from the cylinder was caused to advance. This ram normally moved forward through a charging cylinder which assumed a horizontal position so that the ram might pass through it. However, the charged cylinder was in a diagonal instead of a horizontal position on this occasion with the result that the ram struck it and was bent. Mack Lester was informed of the occurrence and he rushed into the department ordering that "that man be discharged." Rothfeld then went to Bob Lester's office where he was told that he was being discharged for negligence. He protested that he had never had an accident on the machine before and that the accident happened through no negligence on his part. However, Bob Lester stated "the boss is bearing down on everybody now."

As a result of the accident to Rothfeld's machine, about eight employees in the chalk assembly department who were dependent upon the machine for their materials had to cease work. The bent ram was removed and sent to a mechanic who repaired it at a cost of \$15 and returned it about 2 p. m. It appears that after the ram was returned, it was necessary to work on it for a few hours in the plant with the result that work in the department was not resumed until about 5 p. m.

There is a conflict in the testimony regarding the cause of the accident. Rothfeld testified that he left the control lever in the proper position but that the packing in the lever was worn and defective. This he said caused a partial release of water pressure which put the machine in motion. The evidence however indicates that after the ram was replaced, the machine was put into use without any repair to the lever or in the packing and that the machine had been operated ever since without any such repairs. The Lesters state that Rothfeld failed to set the lever properly and that this was an act of gross negligence. It appears that there had never been such an accident on the machine before.

We feel that under all the circumstances the discharge of Rothfeld is open to considerable suspicion. However, it appears that he was not particularly active in the union affairs, and that because of his

negligence the operations of the respondent were considerably interrupted. In view of these facts and the finding of the Trial Examiner that Rothfeld was not discharged because of his union activities, we conclude that there is insufficient evidence to uphold the allegations of the complaint with respect to Rothfeld.

6. *Second Discharge of Dominick Bortoluzzi.* As set forth above, Bortoluzzi was discharged because of his union activities on May 4, 1937, and thereafter reinstated on May 17, 1937.

On the evening of May 20, 1937, a union meeting was held at which a committee consisting of Bortoluzzi and Theresa Peluso was designated to demand the reinstatement of Rothfeld who had been discharged on May 20, 1937. On May 21, 1937, shortly after 9 a. m., Bortoluzzi received the consent of his foreman and together with Miss Peluso saw Mack Lester. They asked him to reconsider Rothfeld's dismissal because they felt he was "unfairly discharged." Mack Lester refused to do so. Bortoluzzi then asked permission to use the telephone at his own expense to call Thomas G. Evans, field representative of the C. I. O., who had been assisting the Union in its work. Mack Lester refused the request and advised Bortoluzzi to wait until noon. Bortoluzzi then stated the call had to be made even though it would necessitate his leaving the building. Mack Lester then demanded that Bortoluzzi discontinue his practice of leaving his work to carry on union activities<sup>4</sup> and warned him not to leave the building. Bortoluzzi, however, left the building and made the call, being gone 5 or 10 minutes. Upon his return he advised the workers not to strike and then resumed his work. Bortoluzzi's foreman told him to cease working. At 11:00 o'clock he was discharged by Mack Lester. A few minutes later the word had gotten around that Bortoluzzi had been discharged and all of the respondent's employees, with the exception of supervisory employees, left the building and went on strike.

The evidence is clear that Mack Lester was opposed to union organization and had unfairly discharged a number of employees because of their union affiliations and activities as noted above. Bortoluzzi himself had on May 4, 1937, been discharged but reinstated on May 17, 1937. The testimony also shows that it was not an uncommon practice for employees to use the telephone on personal business. Mack Lester conceded that employees had without objection used the telephone during emergencies. Under all the circumstances, we are constrained to view Mack Lester's refusal to allow Bortoluzzi the use of the telephone as an act designed to provoke Bortoluzzi into leav-

<sup>4</sup> Bortoluzzi admitted that on an occasion subsequent to his reinstatement after his earlier discharge he received permission to spend a few hours away from the plant on the pretext of taking care of a mortgage for his parents when in fact he went to the Union headquarters.

ing the building or into other conduct which would furnish the respondent a pretext upon which to discharge Bortoluzzi. It should also be noted that Mack Lester had agreed on May 19, 1937, to deal with the Union grievance committee. He conceded that the committee had a right to confer with the management during working hours. The matter in issue was one which was of concern to the employees generally. Under such circumstances, it would appear that Bortoluzzi, as a member of the grievance committee, was entitled to inform the Union officials of the result of the conference with Mack Lester and that, since Mack Lester refused to permit the use of the telephone, Bortoluzzi properly took a few minutes off from work to confer with Field Representative Evans.

We find that the respondent Art Crayon discharged Bortoluzzi on May 21, 1937, because of his Union activities.

7. *Refusal to Reinstate Henry Hirsch.* As set forth above, Hirsch was discharged because of his union activities on May 5, 1937, and was reinstated on May 13, 1937.

Hirsch did not report for work on the night of May 19, 1937, or the following night. He testified at the hearing that he was "too tired" to work on these nights. Thereafter, he remained out on strike with the other employees. The strike ended on July 9, 1937, and practically all the striking employees returned to work about July 11, 1937. Hirsch did not, however, apply for reinstatement until July 20, 1937, at which time he was informed that he would be put on the preferred list and given a job as soon as a vacancy occurred. He stated that he did not apply for reinstatement earlier because he did not believe he would get his job back. However, there was apparently no foundation for this belief, the respondents having reinstated all striking employees who applied for reinstatement.

In view of these facts, we find that there is not sufficient evidence to support the allegation of the complaint that the respondent refused to reinstate Hirsch because of his union activities.

We find that the respondent Art Crayon, by discharging Dominick Bortoluzzi and John Rega on May 4, 1937, Henry Hirsch on May 5, 1937, George Douval on May 5, 1937, and by discharging Bortoluzzi a second time on May 21, 1937, has discriminated against its employees with respect to hire and tenure of employment for the purpose of discouraging membership in the Union and that by such acts the respondent has interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act. We also find that Art Crayon, by discharging William Rothfeld on May 20, 1937, and by the refusal to reinstate Henry Hirsch, on July 20, 1937, did not thereby discriminate against its employees with

respect to hire and tenure of employment for the purpose of discouraging membership in the Union, and the complaint in these last respects will be dismissed.

*C. The refusal to bargain collectively*

1. The appropriate unit

The Union claims that all factory and production employees of the respondents, excluding supervisory and clerical employees, constitute a single unit appropriate for the purposes of collective bargaining. The respondents contend that two bargaining units are appropriate, one composed of the factory and production employees of Art Crayon, and the other composed of such employees of American Artists. We have carefully considered in Section I above, the facts pertaining to the relationship between Art Crayon and American Artists. As we have noted, the two respondents are separately incorporated, have different general managers, maintain separate pay rolls, file separate tax returns, and pay separate workmen's compensation insurance. These considerations support the contention for two separate bargaining units.

However, we have also noted that the two respondents are closely connected physically and closely related in their operations and through substantially identical stock ownership and interlocking directorates. There is also some interchange of employees. One individual, Agar, has handled labor controversies arising with respect to employees of both respondents. Indeed, the relationship of the two respondents is such that ultimate control over the labor policies of both respondents unquestionably rests in the same hands. Under all the facts, we are of the opinion that employees of both respondents should be included within a single bargaining unit.<sup>5</sup>

We find that the factory and production employees of Art Crayon and American Artists, excluding supervisory and clerical employees, constitute one unit appropriate for the purposes of collective bargaining and that said unit will insure to the employees of the respondents the full benefit of their right to collective bargaining, and otherwise effectuate the policies of the Act.

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

There were introduced in evidence lists of persons on the pay roll of each respondent for the period ending May 20, 1937, the last pay-roll date prior to the strike. The list pertaining to Art Crayon contained

<sup>5</sup> See *Matter of Todd Ship Yards*, 5 N. L. R. B. 20; *Matter of C A Lund Co*, 6 N. L. R. B. 423.

the names of 110 employees within the appropriate unit and the list pertaining to American Artists contained the names of 48 employees within the appropriate unit. Thus, the respondents, on May 20, 1937, employed 158 persons within the appropriate unit.

There were also introduced in evidence authorizations signed by employees of Art Crayon and American Artists designating the Union as their bargaining representative. The respondent objected to the introduction of the authorizations into evidence on the ground that they were not properly proven. However, the three employees who participated in procuring the signatures of the applicants testified that the applications were either signed in their presence or handed to them by individuals whose signatures the applications bore. The respondents did not attempt to offer any proof attacking the validity of the applications. They were content with merely alleging the insufficiency of the proof. We find, therefore, that the objection of the respondents is without merit.

A comparison of the pay-roll lists and authorizations shows that 86 of the 158 employees on the pay-roll lists signed authorizations.

The respondents introduced at the hearing petitions signed by various employees designating Employee Committees as their bargaining representative. Many of the persons signing union authorizations also signed such petitions. We have found, however, that the petitions do not reflect the free choice of the employees and have ordered that the Employee Committees be disestablished. Under all the circumstances, we find that the appearance of an employee's name on a petition is not, of itself, an indication of such employee's desire respecting such representation. Accordingly, we conclude that a majority of the employees of the respondents in the appropriate unit on May 20, 1937, desired representation by the Union. No evidence was introduced that subsequent to May 20, 1937, the employees changed their desires with respect to representation by the Union.

We find that on May 20, 1937, and at all times thereafter, the Union was the duly designated representative of a majority of the employees of the respondents in the appropriate unit. By virtue of Section 9 (a) of the Act, the Union is, therefore, the exclusive representative of all the factory and production employees of the respondents, exclusive of clerical and supervisory employees for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment, and other conditions of employment.

### 3. The refusal to bargain

On May 19, 1937, representatives of the Union met with representatives of the respondents. At that time the Union's representatives

stated that the Union represented a majority of the workers of the respondents and asked to bargain collectively. Mack Lester on behalf of the respondents replied that a majority of the employees had signed petitions designating the Employee Committees. Finally, the parties agreed to confer further on May 24, 1937. The respondents agreed to maintain the status quo in the meantime, and to recognize a union grievance committee. On its part, the Union agreed not to call a strike.

After the discharge of Bortoluzzi on May 21, 1937, practically all the employees went on strike. On May 24, 1937, a representative of the respondents informed Union officials that inasmuch as the employees had gone on strike, the conference set for that day would be canceled. Nevertheless, representatives of the Union went to the respondent's office at the appointed time. The respondent's officials, however, refused to enter into any discussion.

On May 26, 1937, Ernest W. Lanoue, a mediator for the New York Department of Labor, attempted to arrange a conference between representatives of the Union and the respondents. The respondents refused to confer on the ground that "The Union did not represent the employees and the strikers were no longer considered as employees; that there were new employees taken on."

We find that on May 24, the respondents refused to bargain collectively with the Union, basing its refusal to bargain on the ground that the employees had gone on strike. The strike which resulted from the discharge of Rothfeld and Bortoluzzi and the previous course of conduct of the respondent in intimidating and coercing its employees, was clearly caused by a labor dispute. The respondents clearly were not, on the basis of the strike, justified in refusing to bargain.<sup>6</sup> As we have found above, the Union was on May 20, 1937, and at all times thereafter, the designated representative of the majority of the employees of the respondents within the appropriate unit. It was such representative on May 24, 1937, at which time the respondents refused to bargain with the Union.

We find that the respondents Art Crayon and American Artists have refused to bargain collectively with the Union as the exclusive repre-

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<sup>6</sup> See *Matter of Columbian Enameling and Stamping Company*, 1 N L R B 181. In that case (page 197) the Board stated "That the respondent was under a duty to meet with the Committee, if settlement were possible, seems clear. The Act requires the employer to bargain collectively with its employees. Employees do not cease to be such because they have struck. Collective bargaining is an instrument of industrial peace. The need for its use is as imperative during the strike as before a strike. By means of it a settlement of a strike may be secured. It is our opinion that the respondent's refusal to meet with the Committee after it promised to do so, resulted from its realization that it could in any case open its plant and that to do so without dealing at all with the union would discourage active support of the union and render it useless."

sentative of its employees in the appropriate unit in respect to rates of pay, wages, hours of employment, and other conditions of employment, within the meaning of Section 9 (a) of the Act.

#### IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the respondents, set forth in Section III above, occurring in connection with the operations of the respondents, 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.

#### REMEDY

In addition to an order to each respondent to cease and desist from its unfair labor practices, we shall affirmatively require each respondent to withdraw all recognition from its Employee Committees as the representative of any of their employees for the purpose of dealing with the respondents concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment and completely disestablish the Employee Committees as such representative. We shall require the respondents, upon request, to bargain collectively with United Artists Supply Workers as the exclusive representative of its factory and production employees, excluding supervisory and clerical employees.

We have found that the respondent Art Crayon discriminatorily discharged Dominick Bortoluzzi on May 4, 1937; reinstated him on May 17, 1937; and again discriminatorily discharged him on May 21, 1937. We shall, therefore, order the respondent Art Crayon to offer Bortoluzzi reinstatement and to make him whole for any loss of pay he may have suffered by reason of his two discriminatory discharges, by payment to him of a sum equal to the amount he would have normally earned as wages from the date of his first discharge to the date on which he was reinstated and from the date of his second discharge to the date of the respondent's offer of reinstatement, less any amount which he has earned during the said periods.

Since Art Crayon has offered reinstatement to John Rega, Henry Hirsch, and George Douval, other employees found to be discriminatorily discharged, as indicated above, no affirmative order therefor need be made in this connection. However, we shall require Art Crayon to make whole those employees and each of them for any loss of pay they may have suffered by reason of their respective discriminatory discharges, by payment to each of them of a sum equal to the amount each would have normally earned as wages from the date of

their respective discharges to the date on which they were, respectively, reinstated, less any amount which they have, respectively, earned during said period.

### THE PETITION

In view of the findings in Section III above as to the appropriate bargaining unit and the designation of the Union by a majority of the respondents' employees in the appropriate bargaining unit as their representative for the purpose of collective bargaining, it is not necessary to consider the petition of the Union for certification of representatives. Consequently the petition will be dismissed.

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

### CONCLUSIONS OF LAW

1. United Artists Supply Workers and the Employee Committees are labor organizations within the meaning of Section 2 (5) of the Act.

2. The respondents by dominating and interfering with the formation and administration of the Employee Committees and by otherwise contributing support thereto, have engaged in and are engaging in unfair labor practices within the meaning of Section 8 (2) of the Act.

3. The respondent, Art Crayon Company, Inc. by discriminating in regard to the hire and tenure of employment of its employees and discouraging membership in the United Artists Supply Workers has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (3) of the Act.

4. The respondents by interfering with, restraining, and coercing their employees in the exercise of the rights guaranteed in Section 7 of the Act, have engaged in and are engaging in unfair labor practices within the meaning of Section 8 (1) of the Act.

5. The production and factory employees of the respondents, excluding supervisory and clerical workers, constitute a single unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the National Labor Relations Act.

6. The United Artists Supply Workers, having been designated as their representative by a majority of the employees in the appropriate unit, was on May 20, 1937, and at all times thereafter has been 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.

7. The respondents, by refusing to bargain collectively with United Artists Supply Workers as the exclusive representative of its em-

ployees in the appropriate unit has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (5) of the Act.

8. 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 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 respondents, Art Crayon Company, Inc. and American Artists Color Works, Inc., their officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) In any manner dominating and interfering with the formation or administration of the Employee Committees, and from contributing support thereto, or to any other labor organization of their employees;

(b) In any manner interfering with, restraining, or coercing its employees in the exercise of their rights to self-organization, to form, join, and assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purposes of collective bargaining or other mutual aid and protection;

(c) Refusing to bargain collectively with United Artists Supply Workers as the exclusive representative of their factory and production employees, exclusive of supervisory and clerical employees.

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

(a) Withdraw all recognition from the Employee Committees groups as the representative of any of their employees for the purpose of dealing with the respondents concerning grievances, labor disputes, wages, rates of pay, hours of employment or other conditions of work, and completely disestablish the Employee Committees as such representative;

(b) Upon request, bargain collectively with United Artists Supply Workers as the exclusive representative of their factory and production employees, excluding clerical and supervisory employees;

(c) Post immediately notices in conspicuous places throughout its plant and maintain such notices for a period of thirty (30) consecutive days, stating (1) that the respondent will cease and desist as aforesaid; (2) that the Employee Committees are disestablished as the representative of any of their employees for the purposes of deal-

ing with them with respect to grievances, labor disputes, wages, rates of pay, hours of employment or conditions of work and that the respondent will refrain from recognition thereof; (3) that the respondent will bargain collectively with United Artists Supply Workers as the exclusive representative of the employees in the appropriate unit;

(d) Notify the Regional Director for the Second Region in writing, within ten (10) days from the date of this order, what steps the respondent has taken to comply herewith.

FURTHER ORDERS that the respondent Art Crayon Company, Inc., its officers, agents, successors and assigns shall:

1. Cease and desist from discouraging membership in United Artists Supply Workers or any other labor organization of its employees, by discharging or refusing to reinstate any of its employees or in any other manner discriminating in regard to their hire or tenure of employment or any term or condition of their employment because of their membership in, activity on behalf of, or sympathy toward any such labor organization;

2. Make whole John Rega, Henry Hirsch, and George Douval and each of them for any loss of pay they have suffered by reason of the respondent's discrimination in regard to hire and tenure of employment by payment to each of them of a sum equal to that which each would normally have earned as wages during the period from the date of their respective discharges to the date on which they were respectively reinstated, less any amount each has earned during that period;

3. Offer reinstatement to Dominick Bortoluzzi and make him whole for any loss of pay he may have suffered by reason of the respondent's discrimination in regard to hire and tenure of employment, by payment to him of a sum of money equal to that which he normally would have earned as wages from the date of his first discharge to the date of his reinstatement and from the date of his second discharge to the date of the respondent's offer of reinstatement, less any amount earned by him during the said periods;

4. Notify the Regional Director for the Second Region in writing, within ten (10) days from the date of this order, what steps the respondent has taken to comply herewith.

FURTHER ORDERS that the complaint be, and it hereby is, dismissed in so far as it alleges that the respondents discriminatorily discharged William Rothfeld on May 20, 1937, and discriminatorily refused to reinstate Henry Hirsch on July 20, 1937.

FURTHER ORDERS that the petition for certification of representatives filed by the United Artists Supply Workers be, and it hereby is, dismissed.